TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-13-00327-CV

Appellants, The Texas Alcoholic Beverage Commission and Sherry Cook, Administrator// Cross-Appellant, D. Houston, Inc. d/b/a Treasures

v.

Appellee, D. Houston, Inc. d/b/a Treasures// Cross-Appellees, The Texas Alcoholic Beverage Commission and Sherry Cook, Administrator

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 126TH JUDICIAL DISTRICT NO. D-1-GN-12-001750, HONORABLE GISELA D. TRIANA, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

This cause, which was abated previously, presents cross-appeals concerning the district court's jurisdiction over claims brought against the Texas Alcoholic Beverage Commission (TABC) and its administrator, in her official capacity. The claimant was D. Houston, Inc., which holds TABC-issued permits utilized in its operation of what it terms a "gentleman's club," "Treasures," located in Houston. Treasures brought its claims after TABC initiated an enforcement proceeding seeking to impose civil penalties (including potential revocation of Treasures's permits) predicated on alleged violations of the Alcoholic Beverage Code and TABC rules through the purported conduct of five of Treasures's "dancers" or "entertainers."[1] Treasures's claims—and, in

[1] The alleged underlying conduct by the entertainers included sexual solicitation, sexual contact, exposure of genitalia, and being intoxicated.

turn, the jurisdictional issues presented—fall into two categories. Both categories of claims must be dismissed, for the reasons we will explain below.[2]

TABC Rule 35.31(b)

Under color of Section 2001.038 of the Administrative Procedures Act (APA),[3] Treasures asserted a claim against TABC for a declaration regarding the "applicability" of TABC Rule 35.31(b), which states in relevant part:

> A licensee or permittee violates the provisions of the Alcoholic Beverage Code . . . if any of the offenses . . . are committed:
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> (1) by the licensee or permittee in the course of conducting his/her alcoholic beverage business; or
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> (2) by any person on the licensee or permittee's licensed premises; and

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[2] We review questions of subject-matter jurisdiction de novo. *See, e.g.*, *University of Hous. v. Barth*, 403 S.W.3d 851, 854 (Tex. 2013) (per curiam) (citing *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004)). This inquiry is not necessarily confined to the precise jurisdictional challenges or arguments presented by the parties, because jurisdictional requirements may not be waived and "can be—and if in doubt, must be—raised by a court on its own at any time," including on appeal. *Finance Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 580 (Tex. 2013) (citing *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445–46 (Tex. 1993)); *see also Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012) ("[R]egardless of whether immunity [from suit] equates to a lack of subject-matter jurisdiction for all purposes, it implicates a court's subject-matter jurisdiction over pending claims."). We have not belabored arguments advanced by the parties that are ultimately not material or controlling in our jurisdictional inquiry. *See* Tex. R. App. P. 47.1.

[3] *See* Tex. Gov't Code § 2001.038(a), (c) ("The validity or applicability of a rule . . . may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs . . . a legal right or privilege of the plaintiff. . . . The state agency must be made a party to the action."); *see also Texas Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 700 (Tex. App.—Austin 2011, no pet.) (explaining that Section 2001.038 waives sovereign immunity to extent of relief it authorizes) (citing *Texas Logos, L.P. v. Texas Dep't of Transp.*, 241 S.W.3d 105, 123 (Tex. App.—Austin 2007, no pet.)).

(3) the licensee or permittee knew or, in the exercise of reasonable care, should have known of the offense or the likelihood of its occurrence and failed to take reasonable steps to prevent the offense.[4]

Treasures pleaded that its "dancers operate as separate, independent businesses," or "[a]t most . . . may be deemed independent contractors." Based on that factual premise, Treasures sought "a declaration regarding the inapplicability of TABC Rule 35.31(b)(1), or alternatively, the applicability of Rule 35.31(b)(2) & (3) to the acts of employees acting outside the scope of their employment, to independent contractors, and to independent businesses."

TABC interposed a plea to the jurisdiction, which the district court granted. The court rendered judgment dismissing the claim for want of jurisdiction, specifically citing failure to exhaust administrative remedies that the court viewed as necessary to develop the factual predicate for the rule's application. Treasures challenges this ruling in its appeal. It emphasizes the concept that Section 2001.038 allows pre-enforcement adjudication of rule "applicability" issues, and thus does not (at least categorically) require exhaustion of remedies. Nor, Treasures insists, would the presence of some factual questions preclude its claim, as "Section 2001.038 is not limited to questions of law." In any event, Treasures maintains, its claim does not require resolution of factual disputes, such as "whether Treasures'[s] dancers were in fact independent contractors (versus employees)," whether "the dancers' alleged criminal conduct was in the course and scope of their employment," or the ultimate question of whether Treasures can be held liable based on the dancers' conduct, which Treasures acknowledges "would be resolved in the contested case below." Instead,

[4] 16 Tex. Admin. Code § 35.31(b) (Texas Alcoholic Beverage Comm'n, Offenses Against the General Welfare).

as Treasures explains the distinction, it is seeking a declaration regarding "a question of law"—specifically, whether TABC, in order to hold Treasures liable for the conduct of its independent contractors or employees acting outside the course and scope, must prove Treasures's "negligence" under (b)(2) and (3) or has the benefit of (b)(1)'s "essentially strict liability" standard.

Very recently, in *LMV-AL Ventures, LLC v. Texas Department of Aging and Disability Services*, this Court revisited, in light of contemporary immunity jurisprudence, the sometimes-unclear parameters of rule "applicability" challenges under APA Section 2001.038.[5] We clarified that a rule "applicability" challenge authorized by Section 2001.038 is limited to determining whether a rule is capable of being applied to or is relevant to a factual situation, as distinguished from a challenge to the rule's *application* (i.e., "how the rule should be applied" to particular facts or "the specific outcome after a rule's application.").[6]

Like the facility in *LMV*, Treasures seeks a declaration not as to the "applicability" of Rule 35.31(b)(1), (2) and (3)—the rule would plainly be applicable or relevant to Treasures's situation in some way—but as to the rule's *application* to the particular facts Treasures assumes (the conduct made the basis for the enforcement action was committed by independent contractors, independent businesses, or employees acting outside the course and scope).[7] Consequently (and without need to belabor any other potential jurisdictional barriers), Treasures's claim is not

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[5] *See* ___ S.W.3d ___, No. 03-16-00222-CV, 2017 Tex. App. LEXIS 2973, at *9–20 (Tex. App.—Austin Apr. 6, 2017, no pet. h.).

[6] *See id*. at *17–20.

[7] *See id*. at *19–20.

authorized by Section 2001.038 and is barred by sovereign immunity.[8] We affirm the district court's judgment dismissing that claim for want of subject-matter jurisdiction.

Alcoholic Beverage Code Section 11.641(c)

Treasures's remaining claims sought declaratory and injunctive relief with respect to Section 11.641(c) of the Alcoholic Beverage Code, which states:

> A civil penalty, including cancellation of a permit, may not be imposed on the basis of a criminal prosecution in which the defendant was found not guilty, the criminal charges were dismissed, or there has not been final adjudication.[9]

Treasures's claims were predicated on the view that Section 11.641(c)'s prohibition against penalties being "imposed *on the basis of a criminal prosecution*" encompasses penalties that are founded *on the same factual bases* that have given rise to criminal charges. Section 11.641(c), as Treasures sees it, functions as both a timing restriction on the imposition of penalties having a common factual basis with criminal charges (as there can be no penalties unless and until a "final adjudication" of the criminal charges) and a prohibition against "double-jeopardy" (as penalties "may not be imposed on the basis of a criminal prosecution" if the permit-holder was found not guilty or the charges were dismissed).

Based on this view of Section 11.641(c), Treasures alleged that TABC has acted inconsistently with that statute by pursuing penalties in the underlying enforcement proceeding (and other proceedings brought against other parties) based on factual allegations that also gave rise to

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[8] *See id*.

[9] Tex. Alco. Bev. Code § 11.641(c).

criminal charges against Treasures's dancers without regard to whether those charges had been finally adjudicated or the outcome. Characterizing this perceived departure from Section 11.641(c)'s limitations as an "ad hoc" or de-facto "rule" adopted without compliance with APA notice-and-comment rulemaking, Treasures asserted claims under color of Section 2001.038 seeking to invalidate the "rule" on grounds of both procedural and substantive invalidity. In the alternative, Treasures asserted claims for declaratory and injunctive relief through the Uniform Declaratory Judgments Act (UDJA) against TABC and its administrator, in her official capacity, to restrain TABC's unconstitutional "suspension" of Section 11.641(c).[10]

The district court ruled that it had jurisdiction to entertain Treasures's procedural-validity challenge under Section 2001.038 and granted summary judgment for Treasures on the merits of that claim. The court dismissed Treasures's remaining claims relating to Section 11.641(c) for want of jurisdiction, holding specifically that Treasures's UDJA claim was "redundant" of its Section 2001.038 procedural-invalidity challenge. Each side appealed the portions of these rulings that were adverse to it.

The parties' competing contentions hinge initially on the meaning of Section 11.641(c) and whether that provision's prohibition against imposition of a "civil penalty . . . *on the basis of a criminal prosecution*" is as broad as Treasures insists. Here, *LMV* is again instructive. As this Court recognized there, an asserted "rule" that merely restates the unambiguous meaning of

[10] *See* Tex. Const. art. I, § 28 ("No power of suspending laws in this State shall be exercised except by the Legislature.").

a preexisting rule or statute cannot in itself be a "rule" under the APA's definition.[11] Thus, if the "rule" of which Treasures complains (construing Section 11.641(c) to allow TABC to bring enforcement actions predicated on facts also giving rise to criminal prosecutions) merely reflects the provision's unambiguous meaning, then that application is not in fact a "rule," and it would follow that Treasures's claims under Section 2001.038 are barred by sovereign immunity.[12] Nor would Treasures have pleaded a viable constitutional claim in that event.

To understand the meaning of Section 11.641(c), we look to the well-established principles of statutory construction. "'Our objective . . . is to give effect to the Legislature's intent, which requires us to first look to the statute's plain language.'"[13] If this "language is unambiguous, 'we interpret the statute according to its plain meaning,'"[14] and "'[w]e presume the Legislature

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[11] *See LMV*, 2017 Tex. App. LEXIS 2973, at *10–14; *accord Sunset Transp., Inc.*, 357 S.W.3d at 703–04.

[12] *See LMV*, 2017 Tex. App. LEXIS at *12–14; *Sunset Transp., Inc.*, 357 S.W.3d at 704.

[13] *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2017) (per curiam) (quoting *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam)); *accord Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 46 (Tex. 2015) ("[W]e initially limit our statutory review to the plain meaning of the text as the sole expression of legislative intent, *see State ex rel. State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002), unless the Legislature has supplied a different meaning by definition, a different meaning is apparent from the context, or applying the plain meaning would lead to absurd results, *see Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010).")*; Nathan v. Whittington*, 408 S.W.3d 870, 872 (Tex. 2013) (per curiam) ("Our objective is to give effect to the Legislature's intent, and we do that by applying the statutes' words according to their plain and common meaning unless a contrary intention is apparent from the statutes' context." (citing *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011))); *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) ("To discern [legislative] intent, we begin with the statute's words.").

[14] *Coleman*, 512 S.W.3d at 899, (quoting *Lippincott*, 462 S.W.3d at 509); *accord Abutahoun*, 463 S.W.3d at 46 ("'If the statute is clear and unambiguous, we must read the language according to its common meaning without resort to rules of construction or extrinsic aids.'" (quoting *Crosstex*

included each word in the statute for a purpose and that words not included were purposefully omitted.'"[15]

Applying these principles, we look to the ordinary meaning of "basis" (and the related word "base") in the context of Section 11.641(c). The word "basis" refers to "a foundation upon which something rests,"[16] and the related word "based" (when used as a verb) commonly means "[t]o form or provide a basis for."[17] The unambiguous import of Section 11.641(c), then, is that *"a criminal prosecution*" cannot serve as the "basis" (i.e., the "foundation") of a civil penalty if the defendant in such prosecution "was found not guilty, the criminal charges were dismissed, or there

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Energy Servs., L.P. v. Pro Plus, Inc., 430 S.W.3d 384, 389 (Tex. 2014) (quoting *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) (internal quotation marks omitted)))); *TGS–NOPEC Geophysical Co.*, 340 S.W.3d at 439 ("[I]f a statute is unambiguous, we adopt the interpretation supported by its plain language unless such an interpretation would lead to absurd results." (citing *Texas Dep't of Protective & Regulatory Servs. v. Mega Child Care*, 145 S.W.3d 170, 177 (Tex. 2004))).

[15] *Coleman*, 512 S.W.3d at 899 (quoting *Lippincott*, 462 S.W.3d at 509); *accord TGS–NOPEC Geophysical Co.*, 340 S.W.3d at 439 ("We presume that the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen." (citing *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008))); *DeQueen*, 325 S.W.3d at 635 ("We presume the Legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind." (citing *In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008); *Chastain v. Koonce*, 700 S.W.2d 579, 582 (Tex. 1985)).

[16] *See The American Heritage Dictionary of the English Language* 150 (5th ed. 2011) ("[B]asis . . . . 1. A foundation upon which something rests. 2. The chief constituent; the fundamental ingredient[.] . . . 3. The fundamental principle. 4a. An underlying circumstance or condition[.]"); *Webster's Third New Int'l Dictionary of the English Language* 182 (unabridged ed. 2002) (defining "basis" as, inter alia, "the bottom of anything considered as a foundation for the parts above" and "something on which anything is constructed or established").

[17] *See The American Heritage Dictionary* at 148 ("[B]ased . . . 1. To form or provide a base for[.] . . . 2. To find a basis for; establish[.]"); *Webster's Third New Int'l Dictionary* at 180 ("[B]ase: . . . 2 : to use as a base or basis for: ESTABLISH, FOUND — used with *on or upon* . . . ~ vi 1 : to become based — used with *on or upon*[.]").

has not been final adjudication."[18] Contrary to Treasures's argument, Section 11.641(c) does not prohibit TABC from imposing penalties on the "basis" or foundation of *common facts that underlie* "a criminal prosecution," but are not "a criminal prosecution" itself.[19] To conclude otherwise would amount to judicially amending Section 11.641(c), and we must instead apply the plain meaning of the statute as written.[20]

Treasures suggests that this plain-meaning construction of Section 11.641(c) is not viable because it would render the provision a nullity, reasoning that a criminal prosecution, per se, is not made a basis for TABC civil penalties. While apparently not disputing that proposition, TABC counters that Section 11.641(c) relates to another provision of the Alcoholic Beverage Code—Section 11.61(b)(2)—which permits a civil penalty upon findings of a code or rule violation "after notice and hearing."[21] In TABC's view, "Section 11.641(c) ensures that the Commission cannot impose civil penalties on a permittee without proving that a violation of the code or a rule has [actually] been committed." Treasures replies that Section 11.61(b) was enacted before Section

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[18] Tex. Alco. Bev. Code § 11.641(c).

[19] *See id.*

[20] *See, e.g.*, *DeQueen*, 325 S.W.3d at 637 ("[W]e must take statutes as we find them and first and primarily seek the Legislature's intent in its language. . . . Courts are not responsible for omissions in legislation, but we are responsible for a true and fair interpretation of the law as it is written." (citing *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997))).

[21] *See* Tex. Alco. Bev. Code § 11.61(b)(2) ("The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true: . . . (2) the permittee violated a provision of this code or a rule of the commission[.]").

11.641(c)[22] and insists that it "makes no sense . . . that the . . . Legislature added [S]ection 11.641(c) to require that . . . TABC prove its case" because Section 11.61(b)(2) already required such proof.

Whatever the practical effect of Section 11.641(c) may be, "we must take statutes as we find them."[23] We are not "are not empowered to . . . disregard[] direct and clear statutory language that does not create an absurdity,"[24] and the outcome here does not rise to that "exceptional" level.[25] We are bound by the plain meaning of Section 11.641(c) which unambiguously prohibits "a criminal prosecution" (as opposed to the common underlying facts) from serving as the "basis" of a civil penalty.

Accordingly, we reverse the district court's judgment awarding Treasures relief on the merits of its procedural-validity challenge under APA Section 2001.038 and render judgment

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[22] *See* Act of May 12, 1977, 65th Leg., R.S., ch. 194, § 11.61, 1977 Tex. Gen. Laws 391, 410–11 (codified at Tex. Alco. Bev. Code § 11.61(b)); Act of May 30, 2003, 78th Leg., R.S., ch. 1223, § 3, sec. 11.641(c), 2003 Tex. Gen. Laws 3467, 3469, *amended by* Act of Oct. 12, 2003, 78th Leg., 3d C.S., ch. 3, § 21.03, sec. 11.641(c), 2003 Tex. Gen. Laws 78, 104 (codified at Tex. Alco. Bev. Code § 11.641(c)).

[23] *See DeQueen*, 325 S.W.3d at 635–39 (holding that amendments to Texas Lottery Act were rendered ineffective by plain and unambiguous amendments to Texas Uniform Commercial Code made during same legislative session); *id.* at 637 (stating that "[c]ourts do not lightly presume that the Legislature may have done a useless act" but "we must take statutes as we find them and first and primarily seek the Legislature's intent in its language" (citations and quotation marks omitted)).

[24] *See id.* at 639 ("Even when it appears the Legislature may have made a mistake, courts are not empowered to 'fix' the mistake by disregarding direct and clear statutory language that does not create an absurdity." (citing *Brown v. De La Cruz*, 156 S.W.3d 560, 566 (Tex. 2004))).

[25] *See Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 630 (Tex. 2013) ("If an as-written statute leads to patently nonsensical results, the 'absurdity doctrine' comes into play, but the bar for reworking the words our Legislature passed into law is high, and should be. The absurdity safety valve is reserved for truly exceptional cases, and mere oddity does not equal absurdity.").

dismissing that claim for want of subject-matter jurisdiction. We affirm the district court's dismissal of Treasures's remaining claims concerning Section 11.641(c).

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Bob Pemberton, Justice

Before Chief Justice Rose, Justices Pemberton and Field

Affirmed in part; Reversed and Rendered in part

Filed: May 25, 2017