

Affirmed and Opinion Filed May 31, 2016



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-01001-CV

NATALIE L. HOLMES, Appellant

V.

SOUTHERN METHODIST UNIVERSITY, Appellee

**On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-10-11311**

MEMORANDUM OPINION

Before Justices Francis, Evans, and Schenck
Opinion by Justice Francis

This is the second appeal in Natalie L. Holmes's suit against Southern Methodist University for Texas Deceptive Trade Practices Act violations, breach of contract, and fraud after she twice failed a required master's program comprehensive exam. In three issues, Holmes asserts the trial court erred in dismissing her suit for lack of subject matter jurisdiction, overruling her objections to SMU's evidence, and denying her motion to compel discovery. For the reasons set out below, we conclude all issues are without merit and affirm the trial court's order of dismissal.

The facts underlying this suit are fully set out in the first appeal. *See Holmes v. Southern Methodist University*, No. 05-11-01178-CV, 2013 WL 1857932 (Tex. App.—Dallas May 1, 2013, no pet.). Briefly, the evidence shows that in May 2013, Holmes began graduate studies at

SMU to obtain a master's degree in music education. To obtain her degree, she had to complete required coursework and pass the Graduate Comprehensive Exam. Holmes successfully completed the coursework in July 2004 and took the GCE in February 2005. The following month, she learned she had failed three of the four parts of the GCE. Holmes pursued academic appeals of the exam results, claiming the grading was arbitrary and capricious and objecting that she was not allowed to review her music history exam answers.

SMU policy allows graduate students three attempts to pass all portions of the GCE. Consistent with that policy, SMU encouraged Holmes to retake the exam, which she did in 2008, passing all parts except the music history component. Again, she appealed the results, this time complaining of the "overbreadth of material tested." As before, SMU offered Holmes the opportunity to retake the portion of the exam she failed. In addition, SMU offered to disregard one previously failed iteration, which meant Holmes had used only one of her three opportunities to take the music history portion. SMU also offered Holmes the opportunity to take the exam on terms "convenient to her," including by telephone. Holmes declined. Instead, maintaining that she passed the 2005 GCE, she informed the university in August 2009 that she had "consulted with legal counsel" and expected a "satisfactory and timely resolution to this matter." At that point, SMU referred the matter to its legal office.

Holmes filed this lawsuit thirteen months later, alleging claims for DTPA violations, breach of contract, and fraud. In essence, she claims SMU improperly withheld her degree and seeks to recover costs of her tuition, fees, and material fees; living expenses incurred while pursuing her master's degree; travel expenses to Dallas; costs incurred in obtaining alternative career training; lost employment opportunities; and lost wages for working without a graduate degree.

In the first appeal, we explained that the trial court granted SMU's motion to dismiss the lawsuit for want of jurisdiction. SMU argued the claim was not ripe because Holmes failed to exhaust all administrative appeals. However, SMU failed to produce any evidence to establish what administrative remedies Holmes had failed to exhaust; rather, it attached only a short conclusory affidavit of Samuel S. Holland, who at the time was its director of the music division. *Holmes*, 2013 WL 1857932, at *4. Consequently, we concluded the trial court erred by granting SMU's plea to the jurisdiction and dismissing the case. We reversed the trial court's order and remanded for further proceedings. *Id.* at *5.

On remand, SMU filed an amended motion to dismiss for lack of subject matter jurisdiction, arguing Holmes's claims are not ripe because she has not used her existing opportunity to retake the final portion of the exam which she has not passed. As evidence, SMU attached the four-page declaration of Holland, who is now dean of the SMU Meadows School of the Arts, and copies of a portion of SMU's policy manual and Graduate Supplements to the Music Division Student Handbooks for academic years 2001–2002 through 2013–2014.

In his declaration, Holland stated he has personally dealt with Holmes regarding the GCE and her related disputes with the university. He explained that Holmes, like similarly situated graduate students, is automatically allowed three attempts to pass all portions of the GCE. He said SMU has offered, and continues to offer, to disregard one previously failed iteration of the exam, so Holmes actually has used only one opportunity to pass the music history component. Holland personally offered Holmes the opportunity to retake that portion of the exam on terms convenient to her, including by telephone, but Holmes "expressly refused."

According to Holland, the faculty has authority to grant exceptions to stated degree requirements. He stated the normal time limit set by the faculty for a student to pass the GCE is seven years, but the faculty, in its academic judgment and discretion, has extended the time in

Holmes's case. Holmes stated the opportunity to retake the final portion of the GCE has been available to Holmes since before suit was filed and "remains open and available to her."

A copy of SMU Policy Number 6.21, attached to Holland's declaration, provides: "Conditions of graduation' (i.e., degree requirements) is one of the 'powers and duties' delegated in the Bylaws of Southern Methodist University (4.08) to the 'particular faculties' of the Schools."

The student handbooks provide that, if a student appeals a failing grade that the Dean or Provost sustains, then the Committee for either oral or written examinations may recommend one of the following courses of actions:

1. A retake after not less than four weeks of additional preparation (this may only be applicable if the student came close to a passing performance).
2. A retake during the next term (not including summer).
3. Formal dismissal from the degree program.

After three failures a student will be dismissed from the degree program with no possibility of reentering the program.

Holmes responded to the amended motion to dismiss and objected to portions of Holland's declaration. Following a hearing, the trial court granted SMU's motion to dismiss and also denied Holmes's motion to compel discovery. This appeal ensued.

In her first issue, Holmes contends the trial court erred by dismissing her lawsuit based on the doctrine of ripeness. She argues that SMU's offer to allow her to retake the exam is nothing more than a "settlement offer" and not a bar to the suit. She contends that if she retook the test and passed, "the result would not compensate her for the ten years of lost economic opportunity or the ten years of mental anguish she has suffered by being deprived of the degree she earned in 2005." And, she contends, if she failed the exam, it would not answer the question

whether she was entitled to her degree in 2005 nor otherwise compensate her for damages she allegedly suffered.

In response, SMU counters that Holmes has failed to complete the university's academic process by refusing to retake the exam required to obtain a degree. It argues that Holmes seeks damages for injuries allegedly caused by failing to obtain a degree, without completing the degree's requirements. Thus, it contends, her claims are not ripe and the court is without subject matter jurisdiction.

The law governing pleas to the jurisdiction is thoroughly set out in the first appeal of this case. *See Holmes*, 2013 WL 1857932, at *2. The plaintiff has the burden to plead facts affirmatively showing the trial court has subject matter jurisdiction, and the defense then has the burden to assert and support its contentions, with evidence, that the trial court lacks jurisdiction. *Id.* We review the trial court's decision de novo. *Id.*

Ripeness "is a threshold issue that implicates subject matter jurisdiction . . . [and] emphasizes the need for a concrete injury for a justiciable claim to be presented." *Robinson v. Parker*, 353 S.W.3d 753, 755 (Tex. 2011) (quoting *Patterson v. Planned Parenthood of Houston & Se. Tex.*, 971 S.W.2d 439, 442 (Tex. 1998)). In evaluating ripeness, we consider whether the facts are sufficiently developed "so that an injury has occurred or is likely to occur, rather than being contingent or remote." *Patterson*, 971 S.W.2d at 442; *see also Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851–52 (Tex. 2000). Thus the ripeness analysis focuses on whether the case involves "uncertain or contingent future events that may or may not occur as anticipated or may not occur at all." *Gibson*, 22 S.W.3d at 852 (quoting *Patterson*, 971 S.W. at 442).

In *Gibson*, plaintiffs sued to enjoin a school district from implementing a policy that required students in grades one through eight to pass a standardized test to advance to the next grade. 22 S.W.3d at 850. Under the policy, students who failed the first time were to attend a

summer remediation program and then retake the test. *Id.* Students who then failed a second time would be allowed to take a different test in reading and math. *Id.* Students who failed this third test would be retained (held back). *Id.*

At the time the lawsuit was filed, however, no student had been retained because the test results were not available; the district had only sent out notices of possible retention if the students did not meet promotion requirements. *Id.* Consequently, the Texas Supreme Court concluded the claim was not ripe for review. The court reasoned that the “alleged harm” caused by retention “was still contingent on uncertain future events, *i.e.*, the students’ performance on the standardized tests and, if necessary, in WISD’s remediation program.” *Id.*

Similarly here, SMU has not dismissed Holmes from the program; rather, consistent with its policy, it has offered, and continues to offer, Holmes the opportunity to retake the exam.¹ The university has also extended the time for her to complete her degree requirements and has agreed to disregard one iteration of the exam, leaving Holmes with two more opportunities to pass. Holmes, however, has refused and, in so refusing, has failed to complete the academic process at SMU. Because Holmes still has the opportunity to pass the GCE and obtain her degree, and because SMU has not dismissed her from the program, nor made any final decision on the award of a degree, she cannot show that her claim is ripe. In reaching this conclusion, we have considered Holmes’s argument that she no longer wants the degree. Nevertheless, all of Holmes’s alleged damages arise from her claim that SMU has wrongfully failed to award her degree. We overrule the first issue.

In her second issue, Holmes contends the trial court erred in overruling objections to Holland’s declaration. Holmes does not direct us to any explicit ruling by the trial court. Assuming an implicit ruling, however, her issue is without merit.

¹ At oral argument, Holmes’s counsel said that Holmes agrees there is an “open offer” for her to retake the exam.

Holmes challenges three paragraphs of Holland’s declaration, generally on grounds that certain statements are conclusory, contradict other statements he made to Holmes, illogical, inherently flawed, or factually incorrect. First, she challenges Holland’s statement that “[t]he normal time limit set by the faculty for a student to pass the Graduate Comprehensive Exam is seven years.” She asserts the statement is “a legal or factual conclusion that is contrary to the catalog on which it is based.” She then cites a portion of the catalog stating that credit will not be allowed toward the master’s degree “for courses taken more than seven years before the date at which the degree is to be conferred.”

Holmes cites two cases that set out the general proposition that conclusory statements by expert witnesses are insufficient to support summary judgment. *See McIntyre v. Ramirez*, 109 S.W.3d 741, 749–50 (Tex. 2003); *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991). Holmes has not shown that Holland was an expert witness nor has she explained why his statement is a “conclusion.” More importantly, she has not explained how any purported difference between the policy and Holland’s statement has any meaningful impact in light of the fact that SMU continues to offer Holmes the opportunity to retake the exam.

Holmes also complains about paragraphs six and seven, arguing that certain statements are illogical, flawed, contradictory, unacceptably vague, or factually incorrect. She does not support her argument with any legal authority; consequently, it is therefore inadequately briefed. *See* TEX. R. APP. P. 38.1(i). Regardless, these particular complaints do not render the statements inadmissible but go to credibility and weight. We overrule the second issue.

In her third issue, Holmes contends the trial court erred in denying her motion to compel discovery. She complains our previous opinion did not limit discovery on remand to jurisdictional discovery and, even though the trial court acknowledged as much, it nevertheless denied her motion to compel, effectively limiting her to jurisdictional discovery.

Courts may limit discovery pending resolution of threshold issues, such as jurisdiction. *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999) (orig. proceeding). Holmes does not identify any discovery she sought, but was denied, that was material to the determination of subject matter jurisdiction. In fact, SMU's response to the motion asserted it had produced more than 1,100 pages of documents in response to Holmes's jurisdictional discovery requests. Given the trial court's ruling to grant the plea to the jurisdiction and dismiss the case, merits discovery was not necessary. Accordingly, we conclude the trial court did not abuse its discretion in denying the motion to compel discovery. We overrule the third issue.

We affirm the trial court's order of dismissal.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

151001F.P05



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

NATALIE L. HOLMES, Appellant

No. 05-15-01001-CV V.

SOUTHERN METHODIST UNIVERSITY,
Appellee

On Appeal from the 298th Judicial District
Court, Dallas County, Texas

Trial Court Cause No. DC-10-11311.

Opinion delivered by Justice Francis;
Justices Evans and Schenck participating.

In accordance with this Court's opinion of this date, the trial court's order of dismissal is **AFFIRMED**.

It is **ORDERED** that appellee Southern Methodist University recover its costs of this appeal from appellant Natalie L. Holmes.

Judgment entered May 31, 2016.