DISSENT; Opinion Filed August 24, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00492-CV

IVERY T. WILLIAMS, Appellant
V.
DAVID GUTIERREZ, Appellee

On Appeal from the County Court at Law No. 1
Dallas County, Texas
Trial Court Cause No. CC-18-04233-A

DISSENTING OPINION

Before Justices Schenck, Molberg, and Nowell
Opinion by Justice Schenck

While I agree with my colleagues' decision to broadly construe appellant's brief and claim to include the issues raised in the opinion, I disagree with the conclusion that he has asserted a claim over which the trial court had subject matter jurisdiction.

Appellant's claim is brought against the head of a state agency arising from his denial of parole eligibility. While he has revised his claim below to one alleging that he seeks relief against David Gutierrez in his individual capacity, there is no factual allegation in the petition or any other filing below, however liberally

construed, that Gutierrez was ever acting other than in his titular role as head of TDCJ or, more to the point, that he had any personal involvement in the decision to deny appellant's parole application. We might debate whether the general presumption of subject matter jurisdiction obtains in cases involving claims brought against state officers, given the sovereign and official immunity concepts that animate those questions. *See Dubai Petroleum v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000); *see also Beeman v. Livingston*, 468 S.W.3d 534, 537–38 (Tex. 2015) (TDCJ Executive Director immunity from suit precludes jurisdiction over decisions made in official capacity). I do not believe such debate is necessary here. The Legislature has clearly spoken to the issue, as a general matter, in the Texas Tort Claims Act, section 101.106(f) of the civil practice and remedies code:

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f).

I, of course, accept that both the statute and the ancient immunity doctrines it reflects leave the courts open to claims arising from a state employee's actions beyond "the general scope of that employee's employment" and that a plaintiff's good faith pleading alleging that fact would be sufficient to invoke the court's

jurisdiction to pursue an *ultra vires* action for non-monetary relief or a money damages claim based on actions taken in an individual capacity, *until they are contested*. Once challenged, however, the plaintiff's unilateral and bare allegation that the governmental official was acting in an individual, rather than official, capacity cannot be controlling of the question any more than the unsubstantiated, but challenged assertion that a suit involves an amount in controversy within the court's proper jurisdiction.[1] *E.g.*, *Bybee v. Firemans' Fund Ins. Co.*, 331 S.W.2d 910, 913–14 (Tex. 1960). Were it otherwise, every state official and employee could be added to this and every other like suit and left to pursue their defense on the merits. While

[1] Admittedly, the plea to the jurisdiction does not reference section 101.106(f). However, in his plea and in his response to Williams's motion for summary judgment, Gutierrez denies any personal involvement in any complained-of act or omission and further points out Williams's failure to allege any particularized facts specifying Guterriez's personal involvement. When reviewing a decision made without findings of fact or conclusions of law, we assume the trial court is aware of the law relevant to the issue and may look for "any legal theory that finds support in the evidence." *See In re W.E.R.*, 669 S.W .2d 716, 717 (Tex. 1984). We are not obliged in conducting this de novo review to ignore relevant controlling authorities, whether cited or not. *See State Office of Risk Mgmt. v. Martinez*, 539 S.W.3d 266, 273 (Tex. 2017); *see also Elder v. Holloway*, 510 U.S. 510, 516 (2004) (in answering legal arguments court is free to discover and apply the governing law). This is especially true where the issue presented is subject matter jurisdiction and where, as here, we and the appellee alike are construing *pro se* submissions. As no one doubts that the trial court's subject matter jurisdiction was timely and properly raised below, I believe that we are entitled to apply the correct law, *sua sponte* if necessary. *See Freedom Commc'ns, Inc. v. Coronado*, 372 S.W.3d 621, 624 (Tex. 2012) (per curiam); *Moses v. Dallas Indep. Sch. Dist.*, 12 S.W.3d 168, 170 (Tex. App.—Dallas 2000, no pet.). And, as I read section 101.106(f) as directing itself to and constraining the power of the district court to adjudicate a matter not within its historical constitutional ambit, I believe its application to the subject matter jurisdiction question in this case is appropriate.

To the extent the majority relies on *Tatum v. Hersh*, 559 S.W.3d 581, 585 (Tex. App.—Dallas 2018, no pet.), and *Victoria Gardens of Frisco v. Walrath*, 257 S.W.3d 284, 290 (Tex. App.—Dallas 2008, pet. denied) for the proposition that neither this Court nor Gutierrez could raise a new "issue," I would agree and find both our prior panel authorities in keeping with higher controlling authority that distinguish between "arguments" and "issues" in this regard. *See Chi. Title Ins. Co. v. Cochran Invs., Inc.*, 602 S.W.3d 895, 907 n.13 (Tex. 2020). In this case, however, Gutierrez raises only one legal theory: the trial court lacked subject matter jurisdiction. Whether that legal theory is properly viewed as an argument or issue or both, the role of section 101.106(f) is simply that of an authority applicable to his arguments before us.

appellant here has uttered the words "individual capacity," he has not made any effort in response to the challenge to the court's jurisdiction to substantiate what act or role Gutierrez had in causing his claimed injuries or how those acts amount to an individual, rather than official, capacity.

To be sure, appellant also seeks relief under federal law in 42 U.S.C. § 1983. Putting aside the question of whether that law purports to or could create (or compel the states to create) subject matter jurisdiction in their courts in the face of sovereign immunity doctrines that would otherwise exist, *see Alden v. Maine*, 527 U.S. 706 (1999), the claim at issue recognizes an immunity to suit that parallels our jurisdictional analysis. *Jackson v. City of Beaumont Police Dep't*, 958 F.2d 616, 618 & n.3 (5th Cir. 1992). As the majority notes, the Supreme Court has stated officials sued in their individual capacities are "persons" within the meaning of section 1983 and are not absolutely immune from personal liability solely by virtue of the "official" nature of their acts. *Hafer v. Melo*, 502 U.S. 21, 31 (1991).

The majority recognizes the Supreme Court's decision in *Heck v. Humphry*, 512 U.S. 477, 486–87 (1994). There, the Supreme Court made clear that section 1983 is not available "to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," unless "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state

tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id*.

In *Wilkinson v. Dotson*, 544 U.S. 74 (2005), the Supreme Court made clear that "a state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if success in that action would necessarily demonstrate the invalidity of confinement or its duration*." *Id*. at 81–82. Where I disagree with the majority is in its conclusion that success in this action would not necessarily "demonstrate the invalidity of . . . [the] duration" of appellant's confinement. As I understand his claim, the money damages appellant seeks are anchored solely to his argument that the duration of his confinement was improper. Because neither his conviction nor his sentence have been invalidated, I do not believe that federal law purports to create a claim within the district court's jurisdiction. As a result, I see no reason to develop the question further.

Accordingly, I dissent from the majority's decision to reverse and remand and would instead affirm the trial court's order dismissing appellant's claims.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

190492DF.P05