

Opinion issued March 8, 2012



**In The
Court of Appeals
For The
First District of Texas**

NO. 01-11-00428-CV

JOSEPH R. WILLIE, II, Appellant

V.

COMMISSION FOR LAWYER DISCIPLINE, Appellee

**On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Case No. 2007-69255**

MEMORANDUM OPINION

Appellant, Joseph R. Willie, II, has filed a motion for en banc reconsideration of our November 10, 2011 opinion. In light of the motion, we withdraw our opinion and judgment of November 10, 2011, and we issue this

opinion in its stead. We overrule the motion for reconsideration en banc as moot. *See Brookshire Bros., Inc. v. Smith*, 176 S.W.3d 30, 33 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (op. on reh’g) (noting that motion for en banc reconsideration becomes moot when panel issues new opinion and judgment).

In this interlocutory appeal,¹ Willie challenges the trial court’s order granting the motion of appellee, the Texas Commission for Lawyer Discipline, to dismiss Willie’s claims for “lack of subject-matter jurisdiction.” In four issues, Willie contends that the Commission’s motion to dismiss is “prohibited” under Texas law, the trial court erred in considering the Commission’s motion to dismiss as a plea to the jurisdiction, the trial court erred in not permitting his counterclaims to be filed in the disciplinary proceeding, and the Commission waived its sovereign immunity.

We affirm.

Background

In its third amended petition, the Commission alleged that the complainant, Neal Armstrong, retained Willie to represent him in a federal criminal matter and, on February 20, 2007, Armstrong filed a grievance against Willie. The Commission further alleged that Willie, in the course of his representation of Armstrong, failed to abide by Armstrong’s decisions, keep Armstrong reasonably

¹ *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (Vernon Supp. 2011).

informed about the status of the case, promptly comply with reasonable requests from Armstrong for information, and surrender papers and property to Armstrong to which he was entitled.² The Commission asked the trial court to discipline Willie by reprimand, suspension, or disbarment and order Willie to pay restitution to Armstrong, if applicable. The Commission also generally prayed for all other relief to which it was entitled, including expenses, court costs, and attorney's fees.

Willie generally denied the Commission's allegations, asserted that the proceedings were time barred, and filed special exceptions. Willie subsequently filed counterclaims against the Commission for intentional infliction of emotional distress, civil conspiracy, and violations of his equal protection and due process rights.³ In support of his claim for intentional infliction of emotional distress, Willie alleged that the Commission "intentionally misstated the facts" in its petition and the Commission's acts caused him severe emotional distress, and he sought damages for his "extreme mental anguish" as well as exemplary damages on the basis that the Commission acted with malice. In support of his conspiracy claims, Willie alleged that the Commission, with its attorneys, "agreed to file an

² See TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(a)(1), 1.03(a), and 1.15(d).

³ See U.S. CONST. amend. XIV.

illegal grievance,” and he sought damages and exemplary damages for the Commission’s malice. Willie also sought to recover his attorney’s fees.⁴

The Commission then filed its “Motion to Dismiss [Willie’s] Counterclaims for Lack of Jurisdiction or, in the Alternative, Motion for Severance,” in which the Commission asserted that its motion was the “functional equivalent” of a plea to the jurisdiction. The Commission argued that Willie’s counterclaims could not be tried in a disciplinary proceeding because the proceeding is “limited in scope to the issue of professional misconduct” and the trial judge appointed to preside over the proceeding lacked authority to consider Willie’s causes of action. The Commission also asserted that Willie’s claims were barred by sovereign immunity, Willie could not cure this defect by amending his pleadings, and “immediate dismissal” of Willie’s counterclaims was proper.

In his response to the Commission’s motion, Willie asserted that the Commission’s “motion to dismiss” is not “recognized” under Texas law, nothing in Texas law precludes his filing of counterclaims, the Commission waived its

⁴ See TEX. CIV. PRAC. & REM. CODE ANN. § 105.002 (Vernon 2011) (providing that party to civil suit “brought by or against a state agency in which the agency asserts a cause of action against the party, either originally or as a counterclaim or cross claim, is entitled to recover, in addition to all other costs allowed by law or rule, fees, expenses, and reasonable attorney’s fees incurred by the party in defending the agency’s action if: (1) the court finds that the action is frivolous, unreasonable, or without foundation; and (2) the action is dismissed or judgment is awarded to the party); *see also* 42 U.S.C. § 1988 (“Proceedings in vindication of civil rights”).

sovereign immunity by filing suit against him, and his counterclaims are compulsory counterclaims to the claims brought by the Commission.

The trial court first signed an Order Granting [the Commission's] Motion to Dismiss [Willie's] Counterclaims for Lack of Jurisdiction or, in the Alternative, Motion for Severance, stating only that the motion was "granted." The trial court subsequently signed an order entitled "Order Granting [the Commission's] Motion for Severance," in which the trial court ordered that Willie's counterclaims "are hereby severed for lack of subject-matter jurisdiction."⁵

Standard of Review

We review de novo a trial court's ruling on a jurisdictional plea. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). When reviewing a trial court's ruling on a challenge to its jurisdiction, we consider the plaintiff's pleadings and factual assertions, as well as any evidence in the record that is relevant to the jurisdictional issue. *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 625 (Tex. 2010); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). We construe pleadings liberally in favor of the plaintiffs, look to the pleader's intent, and determine if the pleader has alleged facts affirmatively demonstrating the court's jurisdiction. *City of Elsa*, 325 S.W.3d at 625; *Miranda*,

⁵ Neither party addresses why the trial court entered two separate orders.

133 S.W.3d at 226. Allegations found in pleadings may affirmatively demonstrate or negate the court’s jurisdiction. *City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009). “If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend.” *Miranda*, 133 S.W.3d at 227.

Sovereign Immunity

In his first and second issues, Willie argues that the trial court erred in granting the Commission’s motion to dismiss because Texas law prohibits the Commission’s filing of a motion to dismiss rather than a plea to the jurisdiction and the trial court should not have considered the Commission’s motion to dismiss as a plea to the jurisdiction. In his third and fourth issues, Willie argues that the trial court erred in granting the Commission’s motion to dismiss because nothing in the Texas Rules of Disciplinary Procedure purports to prohibit the filing of counterclaims, his counterclaims were compulsory counterclaims that should not have been severed, and the Commission waived its sovereign immunity by bringing suit against Willie.

We initially note that, in its second order granting the Commission’s motion, which the parties identify as the order being appealed, the trial court stated that it was “sever[ing]” Willie’s claims “for lack of subject-matter jurisdiction.” Although the trial court did not specifically refer to the dismissal of the claims, it is

clear from the language of both orders that the trial court in fact dismissed Willie's claims from the underlying proceedings for lack of jurisdiction. *See It's The Berrys, LLC v. Edom Corner, LLC*, 271 S.W.3d 765, 772 (Tex. App.—Amarillo 2008, no pet.) (“When a trial court lacks subject matter jurisdiction to render a judgment, the proper procedure on appeal is for the appellate court to set the judgment aside and dismiss the cause.”). Thus, we will treat this appeal as one from an order dismissing Willie's claims for lack of subject-matter jurisdiction.

In regard to Willie's procedural complaints about the Commission's motion, it is well-settled that a challenge to subject-matter jurisdiction may be raised by a plea to the jurisdiction, as well as by other procedural vehicles, such as a motion for summary judgment. *Bland Indep. Sch. Dist.*, 34 S.W.3d at 554. A motion to dismiss for lack of jurisdiction is the “functional equivalent” of a plea to the jurisdiction. *Lacy v. Bassett*, 132 S.W.3d 119, 122 (Tex. App.—Houston [14th Dist.] 2004, no pet.). Here, in its motion to dismiss and alternative motion to sever, the Commission sought dismissal of Willie's counterclaims for lack of subject-matter jurisdiction. The Commission argued that it was immune from Willie's counterclaims and the trial judge appointed to preside over the disciplinary proceedings did not have authority to entertain Willie's counterclaims. There is no merit to Willie's argument that we must reverse the trial court's order because the Commission sought dismissal with the wrong procedural vehicle. *See State v.*

Lueck, 290 S.W.3d 876, 884 (Tex. 2009) (stating that “ absence of subject-matter jurisdiction may be raised by a plea to the jurisdiction, as well as by other procedural vehicles, such as a motion for summary judgment”); *Doctor v. Pardue*, 186 S.W.3d 4, 16 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (“[W]e look to an instrument’s substance rather than its form.”).

Accordingly, we address the merits of the jurisdictional arguments. Sovereign immunity protects the State from lawsuits for money damages, unless such immunity has been waived.⁶ *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). Sovereign immunity “extends to various divisions of state government, including agencies, boards, hospitals, and universities,” and, as such, extends to the Commission as a standing committee of the State Bar of Texas. *See Ben Bolt–Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Property/Casualty Joint Self–Insurance Fund*, 212 S.W.3d 320, 324 (Tex. 2006); *see also Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003); TEX. GOV’T CODE ANN. § 81.011(a) (Vernon 2005) (“The state bar is a public corporation and an administrative agency of the judicial department of government.”), § 81.071 (Vernon 2005) (“Each attorney admitted to practice in this state and each attorney specially admitted by a court of this state for a

⁶ Willie refers both to sovereign immunity and governmental immunity. Governmental immunity protects political subdivisions of the state, including cities, from lawsuits for money damages, unless such immunity has been waived. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006).

particular proceeding is subject to the disciplinary and disability jurisdiction of the supreme court and the Commission for Lawyer Discipline, a committee of the state bar.”), § 81.076(b) (Vernon 2005) (“The commission is a standing committee of the state bar.”) (Vernon 2005); *see also Willie v. Comm’n for Lawyer Discipline*, No. 14–10–00900–CV, 2011 WL 3064158, at *4 (Tex. App.—Houston [14th Dist.] Jul. 26, 2011, pet. filed). Sovereign immunity involves immunity from suit and immunity from liability. *Harris County Hosp. Dist. v. Tomball Reg’l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009). Immunity from suit is jurisdictional and bars suit, whereas immunity from liability is not jurisdictional and protects from judgments. *Id.* Sovereign immunity from suit deprives a trial court of subject-matter jurisdiction. *Miranda*, 133 S.W.3d at 224.

Willie agrees that the Commission generally enjoys sovereign immunity. But, citing *Reata Construction Corporation*, Willie argues that, by bringing suit against him, the Commission has waived immunity for his counterclaims, which he asserts are incident to or connected with the Commission’s claims. Willie notes that, in its petition, the Commission seeks “appropriate sanctions,” which he asserts could include monetary damages, restitution, expenses, costs of court, and attorney’s fees. In his reply brief, he further asserts that it would be fundamentally unfair to allow the Commission to assert affirmative claims, such as attorney’s fees, . . . while claiming it had immunity” as to his counterclaims.

In *Reata Construction Corporation*, the Texas Supreme Court held that a governmental entity that otherwise enjoys immunity, but files suit for monetary damages, waives immunity from suit for “claims against it which are germane to, connected with and properly defensive” to the claims asserted by the entity. 197 S.W.3d at 377. The court noted that once a governmental entity “asserts affirmative claims for monetary recovery,” then it must “participate in the litigation process as an ordinary litigant, save for the limitation that the [entity] continues to have immunity from affirmative damage claims against it for monetary relief exceeding amounts necessary to offset the [the entity’s] claims.” *Id.*

Here, Willie seeks to recover actual and exemplary damages from the Commission based upon his claims for intentional infliction of emotional distress, conspiracy, and equal protection and due process violations. The Commission, however, has not sought the recovery of monetary damages from Willie. Instead, the Commission’s petition seeks only an order disciplining Willie for his alleged violations of the Texas Disciplinary Rules of Professional Conduct. Although an order of restitution to the complainant is included among the requested remedies, we conclude that such an order, if one is ultimately made, does not transform the Commission’s suit to one for the recovery of monetary damages because any restitution would be payable to the complainant, not the State. The Commission is

not seeking the recovery of monetary damages from Willie, so Willie may not seek, as an offset, monetary damages for his alleged mental anguish or any of the other injuries he allegedly sustained as a result of the Commission's petition. Accordingly, we hold that the trial court did not err in granting the Commission's motion and dismissing for lack of jurisdiction Willie's counterclaims for intentional infliction of emotional distress, conspiracy, and equal protection and due process violations. *See Willie*, 2011 WL 3064158, at *4 (concluding, on similar facts and involving same parties, that trial court did not err in granting Commission's plea to jurisdiction).

In his original briefing, Willie primarily argued that the Commission waived its immunity from his counterclaims as a result of its request for sanctions. Specifically, Willie argued that the Commission waived its immunity because it filed "a petition in the district court" and sought "appropriate sanctions or sanctions to impose," which he noted could include "monetary damages, such as restitution, expenses, costs of court, and attorney's fees." In our original opinion, we held that Willie could not seek, as an offset, monetary damages for his alleged mental anguish or any other injuries sustained as a result of the Commission's suit. Our holding in our original opinion was generally consistent with the disposition reached by our sister court in another similar appeal brought by Willie in which he, like here, challenged a trial court order granting the Commission's plea to the

jurisdiction and dismissing his tort claims brought in the context of a disciplinary proceeding. *See Willie v. Comm'n for Lawyer Discipline*, No. 14–10–00900–CV, 2011 WL 3064158, at *4 (Tex. App.—Houston [14th Dist.] Jul. 26, 2011, pet. denied) (stating that Commission, by bringing disciplinary action against Willie, had not brought affirmative claim seeking monetary recovery).

On rehearing, Willie now focuses his immunity arguments on the Commission's general prayer for relief. In its petition, the Commission seeks an order disciplining Willie "by reprimand, suspension, or disbarment" and an order providing restitution. It also seeks "all other relief, general or specific, at law or in equity, to which [it] may show itself to be justly entitled, including, without limitation, expenses, court costs, and attorney's fees." Willie complains that the Commission, in this general prayer, sought "monetary damages" against him "in the form of expenses, costs of court, and attorney's fees."

Our sister court, in its opinion in *Willie*, did not address whether the Commission, in that case, had also included a prayer that generally requested attorney's fees. However, under the specific facts presented here, we conclude that the Commission has not waived its immunity from Willie's tort claims. Although the Commission initiated the disciplinary proceeding in response to a grievance filed with the Commission by the complainant, and although the Commission generally sought "fees and costs," it "asserted no claims for relief." *See Tex. Dep't*

of Criminal Justice v. McBride, 317 S.W.3d 731, 732 (Tex. 2010). As noted above, the only possible monetary relief, other than fees and costs, sought by the Commission was an order of restitution that would be payable to the complainant, not the State or the Commission. In sum, we hold that the Commission’s request for attorney’s fees does not waive its immunity.

We overrule Willie’s four issues.⁷

Conclusion

We affirm the order of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Sharp, and Brown.

⁷ In its motion to dismiss, the Commission sought dismissal of Willie’s counterclaims for “monetary damages for intentional infliction of emotional distress, civil conspiracy, and civil rights violations.” The Commission did not present, and the trial court did not rule upon, Willie’s request for attorney’s fees if the trial court ultimately makes a finding that the Commission’s suit “is frivolous, unreasonable, or without foundation.” *See* TEX. CIV. PRAC. & REM. CODE ANN. § 105.002. Neither party addresses this specific provision on appeal.