Opinion issued May 10, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00321-CV

TEXAS DEPARTMENT OF INSURANCE,
DIVISION OF WORKERS' COMPENSATION, Appellant

V.

LINDA GREEN, Appellee

On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Case No. 2010-25688

MEMORANDUM OPINION ON REHEARING[1]

The Texas Department of Insurance, Division of Workers' Compensation appeals the trial court's denial of its plea to the jurisdiction in Linda Green's

[1] We grant rehearing, withdraw our opinion and judgment dated December 22, 2015, and issue this opinion in its place.

workers' compensation lawsuit. Green's lawsuit sought (1) a judicial review of the Division's administrative decision in favor of Zurich American Insurance Company, the worker's compensation insurer, denying Green worker's compensation benefits for certain injuries under the "injurious practices" defense and (2) a declaratory judgment that the "injurious practices" defense is not available under current Texas law to deprive her of workers' compensation benefits. The Division argues that the trial court lacks jurisdiction over the declaratory-judgment action against it. We agree and reverse the trial court's denial of the plea to the jurisdiction and dismiss the declaratory judgment action against the Division.

Background

Green received workers' compensation benefits for a workplace injury to her spine and ankle. Several years later, after a contested case hearing, the Division issued a decision and order finding that part of Green's injury would no longer be compensable, based at least partially on the "injurious practices" defense. That defense allowed the Division, at Zurich's request, to order the reduction or suspension of benefits to of an employee if the injured worker "persist[s] in insanitary or injurious practices which tend to either imperil or retard his recovery, or shall refuse to submit to such medical or surgical treatment, chiropractor service or other remedial treatment recognized by the State, as is reasonably essential to

promote his recovery." TEX. REV. CIV. STAT. ANN. art. 8307 § 4 (West Supp. 1987).

Green sued Zurich, the workers' compensation insurer, seeking (1) a judicial review of the Division's administrative decision and (2) a declaratory judgment that the "'injurious practices' [defense] is not a proper defense" under the current version of the workers' compensation statute.[2]

Green argues that, by applying the injurious practices defense, the Division disregarded her statutory rights to (1) lifetime medical benefits for compensable injuries and (2) impairment income benefits for permanent damage from injuries. Her lawsuit attempts to prevent Zurich and the Division from applying the injurious practices defense not only against Green but also against any future injured worker. Declaratory judgment is necessary, she argues, because district court reversals are binding only in the lawsuit before the trial court—not in future lawsuits.

The Division intervened in the lawsuit for the "sole purpose" of objecting to Green's declaratory judgment claim against Zurich. *See* TEX. LAB. CODE ANN.

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[2] The old version of the Texas Workers' Compensation statute recognized the "injurious practices" defense. *See* TEX. REV. CIV. STAT. ANN. art. 8307 § 4. In 1989, Texas revamped its Workers' Compensation system. TEXAS DEP'T INSURANCE, ABOUT WORKERS' COMPENSATION, https://www.tdi.state.tx.us/wc/dwc/ (last visited May 4, 2016). The Division agrees that the new version of the Workers' Compensation statute does not have an explicit "injurious practices" defense but argues that it contains a similar defense. *See* TEX. LAB. CODE ANN. § 406.032 ("insurance carrier is not liable for compensation if the injury . . . was caused by the employee's wilful attempt to injure himself . . . .").

§ 410.254 (West 2015) (authorizing Division's intervention into proceedings seeking judicial review). In its first plea to the jurisdiction, the Division argued that Green's request for declaratory relief was an improper attempt to bypass relief available under Section 410 of the Texas Labor Code, which governs proceedings before the Division to determine the liability of an insurance carrier for compensation for an injury or death, and thus "is an impermissible attempt to control state action." The trial court denied that first plea to the jurisdiction.

Green then amended her pleading to seek declaratory relief against the Division, as well as attorney's fees and costs. The Division, in response, asserted the "affirmative defense of sovereign immunity to the extent that any portion of Plaintiff's claim is barred thereby." The Division filed a second plea to the jurisdiction, arguing that sovereign immunity barred Green's declaratory-judgment action against the Division, that declaratory judgment is redundant to judicial review of the administrative decision, and that declaratory judgment is an impermissible attempt to control state action.

After the Division filed this second plea to the jurisdiction, and one day before the hearing on the plea, Green amended her pleading and joined the head of the Division, Commissioner Ryan Brannan, in his official capacity, as a defendant to the lawsuit. Green asserted that a declaratory judgment action was proper because the Division's application of the injurious practices defense was an "ultra

vires act[] in direct dereliction" of its responsibility to "properly apply, interpret and enforce the Texas Workers' Compensation Act."

Following the hearing, the trial court denied the Division's plea. The Division appeals the trial court's denial of its plea to the jurisdiction. The Commissioner is not a party to the appeal.

Jurisdiction over Declaratory Judgment Claim against the Division

The Division argues that the trial court lacks jurisdiction over the declaratory judgment action against it for four reasons: (1) "the doctrine of sovereign immunity protects [the Division] from suit"; (2) "the relief sought by [Green] is available under the Texas Labor Code . . . making [Green's declaratory judgment] claim redundant of the relief available under the Labor Code"; (3) "Green is impermissibly trying to control state action through her [declaratory judgment claim]"; and (4) Green's "claims are not ripe for adjudication and seek an impermissible advisory opinion."

A. Standard of review

A plea to the jurisdiction challenges the trial court's subject-matter jurisdiction over a case. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000); *Pineda v. City of Houston*, 175 S.W.3d 276, 279 (Tex. App.—Houston [1st Dist.] 2004, no pet.). Subject-matter jurisdiction is required for a court to have authority to decide a case and is never presumed. *Tex. Ass'n of Bus. v. Tex. Air*

Control Bd., 852 S.W.2d 440, 443–44 (Tex. 1993). The plaintiff has the burden to allege facts affirmatively demonstrating that the trial court has subject-matter jurisdiction. *Id.* at 446; *Richardson v. First Nat'l Life Ins. Co.*, 419 S.W.2d 836, 839 (Tex. 1967).

The existence of subject-matter jurisdiction is a question of law. *State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). Therefore, we review de novo the trial court's ruling on a plea to the jurisdiction. *Mayhew*, 964 S.W.2d at 928.

B. Sovereign immunity

The Division argues that "Green's lawsuit is inappropriate and must be dismissed because a state agency is immune from [declaratory judgment] claims when a party seeks a declaration of its rights under a statute or law."

The doctrine of governmental immunity bars suit against the state and its governmental units unless the state waives immunity. *Tex. Adjutant Gen.'s Office v. Ngakoue*, 408 S.W.3d 350, 353 (Tex. 2013). It protects the state and its subdivisions from lawsuits that would "hamper governmental functions by requiring tax resources to be used for defending lawsuits and paying judgments rather than using those resources for their intended purposes." *Id.* (quoting *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655–56 (Tex. 2008)).

The Uniform Declaratory Judgment Act is not a general waiver of sovereign immunity. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370 (Tex. 2009). "[S]tate agencies . . . are immune from suits under the UDJA unless the Legislature has waived immunity for the particular claims at issue." *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 620 (Tex. 2011); *see Satterfield & Pontikes Constr., Inc. v. Tex. S. Univ.*, 472 S.W.3d 426, 432 (Tex. App.—Houston [1st Dist.] 2015, pet. filed) ("[A]bsent a legislative waiver, governmental immunity bars suits seeking declaratory and injunctive relief against governmental entities.").

Section 37.006(b) of the UDJA provides a limited waiver of immunity for claims challenging the validity or constitutionality of ordinances or statutes. TEX. CIV. PRAC. & REM. CODE ANN. § 37.006(b) (West 2015); *see Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 76 (Tex. 2015); *Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011); *Heinrich*, 284 S.W.3d at 373 n.6. Thus, the UDJA waiver of sovereign immunity is "narrow." *Harvel v. Texas Dep't of Ins.-Div. of Workers' Comp.*, No. 13-14-00095-CV, 2015 WL 3637823, at *3 (Tex. App.—Corpus Christi June 11, 2015, pet. denied) (describing UDJA waiver of sovereign immunity as "narrow"); *see Texas Dep't of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 746 (Tex. App.—Austin 2014, pet. dism'd) (describing UDJA waiver of sovereign immunity as "limited"). The UDJA does "not waive the state's sovereign immunity when the plaintiff seeks a

declaration of his or her rights under a statute or other law." *Sefzik*, 355 S.W.3d at 621 (citing *Heinrich*, 284 S.W.3d at 372–73).

1. Immunity for UDJA claim seeking interpretation of statute

Green argues that sovereign immunity is waived for her claim because "when the State is a necessary party to a statutory cause of action, such [as in a declaratory judgment] action for interpretation of a statute, sovereign immunity is expressly waived because, were the State not joined, the right to a declaration would have no practical effect." She contends that the Texas Supreme Court's decision in *Texas Lottery Commission v. First State Bank of DeQueen* "require[s]" her to name the Division as a party because lawsuits against a government agency "to construe statutes are expressly allowed." 325 S.W.3d 628 (Tex. 2010).

DeQueen, however, does not authorize all lawsuits against governmental agencies that seek an *interpretation* of a statute; it holds, instead, that jurisdiction exists over a declaratory judgment action that challenges the *validity* of a statute. *Id.* at 633–34. The case does "not support the proposition that governmental immunity is waived whenever a party seeks an interpretation of a statute or ordinance." *City of McKinney v. Hank's Rest. Grp., L.P.*, 412 S.W.3d 102, 112 (Tex. App.—Dallas 2013, no pet.). *City of McKinney* also reads *DeQueen* as waiving immunity "against claims that a statute or ordinance is invalid" but not "against claims seeking a declaration of the claimant's statutory rights or an

interpretation of an ordinance . . . [or] a claim that government actors have violated the law." *Id.*

DeQueen was interpreted by the Corpus Christi court in 2015 to only allow UDJA actions when the plaintiff challenges the validity of the statute. *Harvel*, 2015 WL 3637823, at *3. As in this case, the injured worker in *Harvel* sought judicial review of the denial of workers' compensation benefits and sought declaratory relief against both the Division and its Commissioner under the UDJA. *Id.* The trial court granted the Division and Commissioner's plea to the jurisdiction asserting that sovereign immunity barred the UDJA claims. *Id.* But *Harvel* held that the UDJA waiver of sovereign immunity is "narrow." *Id.* By seeking a determination of what actions were within his scope of employment, the worker sought "a declaration of [his] rights under a statute," relief which sovereign immunity bars. *Id.* The court distinguished *DeQueen* because there the plaintiffs challenged the validity of statutes. *Id*.

Green's petition does not challenge the validity of any statute. It requests declaratory relief "that the injurious practice defense no longer applies." Closely related to this assertion, Green contends that in the absence of that defense, (1) the worker's compensation statute "does not permit the reduction or termination of medical benefits" or the termination of impairment income benefits and (2) the decision and order made in the Division's contested case hearing are "final and

binding." All of these claims concern the proper interpretation of the statute to be applied to her claims, not its validity. Thus, *DeQueen* does not establish jurisdiction over Green's claims against the Division for declaratory relief seeking a statutory interpretation.

Green maintains that the Supreme Court rejected the distinction between declaratory relief seeking an interpretation of a statute from that challenging a statute's validity in *Patel v. Texas Department of Licensing & Regulation*. *See* 469 S.W.3d at 76–77. The Supreme Court, however, did not hold, like Green contends, that "state agency immunity is waived when statutes are challenged as not being properly applied and enforced." Instead, the Court held that, because the plaintiffs there challenged "the validity" and constitutionality of the statutes and regulations at issue, "rather than complaining that officials illegally acted or failed to act," sovereign immunity did not apply. *Id.* Green does not challenge the constitutionality or validity of any regulations and, thus, *Patel* does not support her contention.

Next, Green relies on four court of appeals cases to assert that the trial court has jurisdiction over her declaratory–judgment claim against the Division. But these four cases either (1) do not involve a situation, like here, in which a plaintiff challenges the interpretation of a statute by a governmental agency and not the

validity of the statute[3] or (2) have effectively been overruled by subsequent Texas Supreme Court opinions.[4]

To support its argument that her claim against the Division is not barred by sovereign immunity because she seeks an interpretation of a statute, Green also cites *National American Insurance Company v. Texas Property and Casualty Insurance Guaranty Association for Paula Insurance Company*, which dealt with a controversy over which workers' compensation insurer had to pay for a worker's injury. No. 03–09–00680–CV, 2013 WL 4817637 (Tex. App.—Austin Aug. 28,

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[3] *See, e.g.*, *Lone Star Coll. Sys. v. Immigration Reform Coalition of Texas*, 418 S.W.3d 263 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (holding immunity was waived when plaintiff challenged validity of provision of Texas Education Code on grounds that federal law preempted it and declaratory judgment action necessarily involved interpretation of federal statute); *Town of Flower Mound v. Rembert Enters.*, 369 S.W.3d 465, 474 (Tex. App.—Fort Worth 2012, pet. denied) (holding immunity is waived when party "joins a governmental entity and seeks a declaration that an ordinance or statute is invalid, based on either constitutional or nonconstitutional grounds."). In such cases, the court must necessarily interpret the second statute to determine whether the first statute is valid. *See DeQueen*, 325 S.W.3d at 634–35. But the thrust of the claim is a validity challenge, which is proper under the UDJA.

Green also cites *Hamilton v. Washington*, which dealt with a challenge to the validity of a statute on constitutional grounds. No. 03-11-00594-CV, 2014 WL 7458988, at *7 (Tex. App.—Austin Dec. 23, 2014, no pet.) (dealing with constitutional challenge to provision of Local Government Code and holding that agency's immunity was waived only for challenge to validity of statute "to the extent [the plaintiff] sought declaratory relief on constitutional grounds . . . .").

[4] *See, e.g.*, *Texas Workers' Comp. Ins. Fund v. Texas Workers' Comp. Comm'n*, 124 S.W.3d 813 (Tex. App.—Austin 2003, pet. denied) (decided before *Heinrich*, *Sefzik*, and *DeQueen* and thus, insofar as it contradicts those cases, has been overruled).

2013, no pet.) (mem. op.). The Texas Guaranty Association,[5] which had taken over payments for an insurer when it became insolvent, sought a declaratory judgment against a second workers' compensation insurer "that it is not liable to reimburse [the second insurer] for any amounts that [it] paid in workers' compensation benefits . . . ." *Id.* at *2. The Guaranty Association named the Division as a party "having or claiming an interest in the action." *Id.*

National American Insurance Company is distinguishable for two reasons. First, unlike Green, the Guaranty Association in that case did not allege an ultra vires claim, thus *Heinrich* and its discussion of sovereign immunity were not implicated.[6] Second, the Guaranty Association did not seek a declaratory judgment against the Division—it only named the Division as an entity having an interest in the lawsuit, not as a party to the lawsuit. In this case, Green seeks a declaratory judgment against the Division and specifically named the Division as a party. Thus, *National American Insurance Company* is not controlling.

Alternatively, Green argues that the Division "actually intervened as a party in this lawsuit" and, as we construe Green's argument, thereby waived its immunity. When a government agency intervenes in a lawsuit to assert

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[5] The Texas Guaranty Association continues insurance policy coverage if an insurance company becomes insolvent. TEXAS LIFE & HEALTH INSURANCE GUARANTY ASSOCIATION, http://www.txlifega.org/ (last visited May 4, 2016).

[6] We discuss *Heinrich* and its holding on sovereign immunity for ultra vires claims in the next section entitled "Ultra Vires Acts by Commissioner."

"affirmative claims for relief," it waives immunity for claims "germane to, connected with and properly defensive to claims" the agency asserted when it intervened. *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006). When a government agency joins the lawsuit but does not seek "its own affirmative claims for monetary relief," it does not waive immunity. *See City of Dallas v. Jill Herz, P.C.*, 363 S.W.3d 896, 900–01 (Tex. App.—Dallas 2012, no pet.) (holding that City's intervention did not waive immunity because City did not assert affirmative claims for monetary relief); *In re K.G.S.*, No. 14-12-00673-CV, 2014 WL 801127, at *6 (Tex. App.—Houston [14th Dist.] Feb. 27, 2014, no pet.) (mem. op.) (holding that agency's intervention in suit did not waive sovereign immunity because agency did not request monetary relief).

The Division's "sole purpose" in intervening in this lawsuit was to "assert that the [trial court] does not have jurisdiction to sign Green's proposed final judgment because Green improperly sought to resolve her suit for judicial review of a Division decision by seeking declaratory relief . . . ." Green sought more than to set aside the Division's order in her case; she sought declaratory relief regarding the defense in future cases. The record does not show, nor does Green argue, that the Division is pursuing affirmative claims for monetary relief. Thus, the Division's intervention in this lawsuit does not waive its sovereign immunity to Green's claims against it.

Because we hold that the Division is protected by sovereign immunity, we do not reach its other arguments regarding the propriety of a declaratory judgment in this case.[7]

2. Ultra Vires Acts by Commissioner

Green further argues that her case is "an ultra vires suit against the government" for which sovereign immunity is waived. The Division argues that "Green's claims for declaratory relief against [the Division] are barred because . . . ultra vires suits for declaratory relief may only be brought against state officials in their official capacities and not against the state itself or its agencies."

Under the "ultra vires exception," sovereign immunity does not apply to a suit against a state official in his official capacity to require the official to comply with a statutory or constitutional provision because the suit is not "against the

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[7] Although we do not reach the issue because we hold that Green's claim against the Division is barred by sovereign immunity, Green's UDJA claim may be duplicative of her appeal of the Division's administrative ruling and therefore may also be barred by the "redundant remedies" doctrine. Under that doctrine, "a litigant's couching its requested relief in terms of declaratory relief does not alter the underlying nature of the suit . . . ." *Balquinta*, 429 S.W.3d at 746. When a plaintiff "has invoked a statutory means of attacking an agency order, a trial court lacks jurisdiction over an additional claim under the UDJA that would merely determine the same issues and provide what is substantively the same relief that would be provided by the other statutory remedy." *Id.* Both Green's appeal of the Division's administrative order and of the UDJA action would determine the same issue (whether the injurious practices defense was correctly applied to Green's case) and would provide the same relief, if Green were to be successful (i.e., Green receiving an increased amount of worker's compensation benefits). Thus, the Division argues that Green's UDJA claim is barred because it is duplicative of her administrative appeal.

State." *Patel*, 469 S.W.3d at 76; *Sefzik*, 355 S.W.3d at 621; *Heinrich*, 284 S.W.3d at 372–73. An official acts ultra vires when the officer acts "without legal authority." *Heinrich*, 284 S.W.3d at 372. Such a claim "must allege that a state official acted without legal authority or failed to perform a purely ministerial act, rather than attack the officer's exercise of discretion." *Patel*, 469 S.W.3d at 76. "[T]he premise underlying the ultra vires exception is that the State is not responsible for unlawful acts of officials." *Patel*, 469 S.W.3d at 76.

If an ultra vires claim is filed against both the government entity and the "appropriate officials in their official capacity," the court must dismiss the claims against the government entity for lack of jurisdiction but allow the claims against the official in his official capacity to go forward. *Heinrich*, 284 S.W.3d at 377; *see Patel*, 469 S.W.3d at 76 ("suits complaining of ultra vires actions may not be brought against a governmental unit, but must be brought against the allegedly responsible government actor in his official capacity").[8] Because the Division's Commissioner is not a party to this appeal and the parties do not ask us to determine whether the Commissioner acted without any legal authority, we do not address whether immunity applies to Green's claims against the Commissioner.

[8] Green relies on *Texas Department of Insurance, Division of Workers' Compensation v. Lumbermens* to support her argument that she can bring an ultra vires claim against the Division. 212 S.W.3d 870 (Tex. App.—Austin 2006, pet. denied). But *Lumbermens* was decided three years before *Heinrich*. The reasoning of *Heinrich* controls, and insofar as it is in conflict with this section of *Lumbermens*, overrules it.

Heinrich, 284 S.W.3d at 372 (holding that plaintiff must bring ultra vires claim against state actor in official capacity when actor acts "without legal authority" and not, when he merely "exercise[d] [his] discretion" and is thus, protected by immunity); *see Sefzik*, 355 S.W.3d at 620 (same).

Conclusion

We have sustained the Division's sole issue that the trial court lacked jurisdiction over Green's claim against it for declaratory relief. We, therefore, reverse the trial court's denial of the Division's plea to the jurisdiction and dismiss Green's declaratory judgment action against the Division for lack of subject-matter jurisdiction.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Massengale and Brown.