

Opinion issued December 14, 2021.



In The
Court of Appeals
For The
First District of Texas

NO. 01-20-00076-CV

ST. JUDE HEALTHCARE, LTD., Appellant

V.

**TEXAS HEALTH AND HUMAN SERVICES COMMISSION,
DEPARTMENT OF AGING AND DISABILITY SERVICES; AND PHIL
WILSON, ACTING EXECUTIVE COMMISSIONER OF HHSC, Appellees¹**

**On Appeal from the 419th District Court
Travis County, Texas²**

¹ St. Jude Healthcare, Ltd. sued the Texas Health and Human Services Commission (“HHSC”), as well as Charles Smith, former HHSC Executive Commissioner, and Sylvia Rodriguez, former Home and Community Support Services Agency manager for the Department of Aging and Disability Services (“DADS”). On appeal, HHSC substituted Phil Wilson, Acting Executive Commissioner of HHSC, in his official capacity for both Smith and Rodriguez.

² Pursuant to its docket equalization authority, the Supreme Court of Texas transferred this appeal from the Court of Appeals for the Third District of Texas to

MEMORANDUM OPINION

Appellant St. Jude Healthcare, Ltd. (“St. Jude”) held a Home and Community Support Services Agency (“HCSSA”) license issued by the Health and Human Services Commission (“HHSC”). After HHSC declined to provide notice and hearing on St. Jude’s alleged failure to mail a timely renewal application for its license, St. Jude sought declaratory and mandamus relief against Appellees HHSC, Charles Smith, former HHSC Executive Commissioner, and Sylvia Rodriguez, former Home and Community Support Services Agency manager for the Department of Aging and Disability Services (“DADS”). St. Jude appeals the district court’s final judgment granting Appellees’ plea to the jurisdiction and cross-motion for summary judgment and denying St. Jude’s motion for summary judgment and petition for writ of mandamus.

In two points of error, St. Jude asserts the trial court erred in holding it lacked jurisdiction to determine (1) whether the HHSC/DADS “has a ministerial duty to provide St. Jude a [contested] hearing on the timeliness of St. Jude’s renewal

this Court. *See* TEX. GOV’T CODE § 73.001 (authorizing transfer of cases). We are unaware of any conflict between precedent of that court and that of this court on any relevant issue. *See* TEX. R. APP. P. 41.3.

application,” and (2) “whether due process prohibits the retroactive application of the State’s [license] termination decision.”

We affirm.

Factual Background

Prior to September 2017, DADS was the state agency responsible for the licensing of Home and Community Support Services agencies.³ In 2014, DADS renewed St. Jude’s HCSSA license (No. 009466), under which St. Jude provided Medicare and Medicaid reimbursed services to elderly and disabled persons. St. Jude was licensed to provide Licensed and Certified Home Health Services, as well as Licensed Home Health Services and Personal Assistance Services. St. Jude’s license was due to expire on December 31, 2016.

On August 10, 2016, DADs notified St. Jude in writing that its HCSSA license would expire on December 31, 2016, unless it submitted its complete license renewal application, any applicable documents, and the required license fee to DADS before the expiration date. The notice stated: “Your application, documents, and required fee for renewal of the HCSSA license must be postmarked 45 days prior to the expiration date of the license or you will be charged a late fee. If an agency fails to

³ In 2015, the Texas Legislature directed that all DADS’ duties be transferred to HHSC. 84th Tex. Leg., S.B. 200, R.S. (2015). Pursuant to that change, the Legislature abolished DADS effective September 1, 2017. We refer to both agencies as HHSC, unless otherwise noted.

apply for license renewal prior to the expiration date of the license, the agency must cease operation upon expiration of the license.” *See* TEX. HEALTH & SAFETY CODE § 142.0105(c) (stating that “[n]ot later than the 120th day before the date a person’s license is scheduled to expire,” HHSC must notify license holder in writing about impending expiration date and provide license holder with application for license renewal and instructions for completing application).

St. Jude contends it mailed its complete license renewal application together with a check for the filing fee to DADS at the proper address on December 16, 2016. DADS claims it never received St. Jude’s renewal application and St. Jude does not appear to challenge DADS’ assertion. Because DADS did not receive a renewal application from St. Jude, it took no action on St. Jude’s alleged mailed renewal application.

On February 23, 2017, Hazel Flores (“Flores”), a Licensing and Permit Specialist IV (LP IV) with HHSC’s HCSSA Licensing and Certification unit, and Sylvia Rodriguez (“Rodriguez”), former Home and Community Support Services Agency manager for DADS, spoke on the telephone with St. Jude’s administrator, Glenda Sanchez (“Sanchez”). They informed Sanchez that because St. Jude’s license had expired on December 31, 2016, St. Jude had been operating without a state license and could be subject to administrative penalties. They informed Sanchez that if St. Jude wanted to continue to operate, it needed to submit an initial

application for a new HCSSA license “as soon as possible,” along with the appropriate filing fee. That same day, DADS sent St. Jude a “NOTIFICATION OF CHANGE” stating the type of action as “Agency closed effective 12/31/2016, due to Expired license.” Subsequently, on March 13, 2017, DADS informed Palmetto GBA (“Palmetto”), the federal Centers for Medicare & Medicaid Services’ (“CMS”) Medicare Administrative Contractor for St. Jude, that St. Jude “ha[d] failed to renew [its] HCSSA license and CMS has requested that DADS contact the agency’s MAC [Medicare Administrative Contractor]”

On March 28, 2017, St. Jude’s legal counsel, Brooks & Acevedo, submitted an affidavit from Sanchez to DADS attesting to the timely mailing of St. Jude’s license renewal application and the calls placed by St. Jude to ensure delivery and ask about the status of the application. In her affidavit, Sanchez asserted that on “December 16, 2016, I placed the [renewal] application and a check for the applicable fee in United States First Class Mail addressed to” the proper address and “made repeated calls to the staff at the Texas Department of Aging and Disability services to inquire as to the status of the application” before December 31, 2016.

On March 28, 2017, DADS responded to St. Jude’s email and informed St. Jude’s counsel that St. Jude’s license had expired because St. Jude had failed to submit a renewal application. DADS specified it had no record of receiving the

referenced license renewal application.⁴ DADS further advised St. Jude that it should not continue to operate without a license and if it wanted to continue to operate, St. Jude needed to submit an initial application to obtain a new HCSSA license. St. Jude's counsel responded that he was aware DADS did not have a record of receipt for St. Jude's renewal application. He nonetheless asserted that Sanchez's affidavit and St. Jude's other supporting documents were sufficient to prove St. Jude mailed its renewal application before December 31, 2016, and he asked DADS to consider the renewal application as timely filed.⁵

On September 19, 2017, nine months after the expiration date of its license, St. Jude mailed an HCSSA renewal license application to HHSC together with a check in the amount of \$1,750. Rodriguez called and advised Sanchez that she was returning St. Jude's renewal application because St. Jude had allowed its license to expire on December 31, 2016, and therefore, there was no license that could be renewed. Rodriguez reiterated that St. Jude needed to "close and cease business because by continuing to operate and bill Medicare without a State HCSSA license [St. Jude] was committing Medicare Fraud." Rodriguez also explained to Sanchez

⁴ In its motion for summary judgment, St. Jude stated that "for purposes of this motion, St. Jude takes the DADS and HHSC assertions that they did not receive the application at face value and assumes them to be true."

⁵ In a March 31, 2017 letter to HHSC, St. Jude's legal counsel stated, "We have witnessed situations in the past, in which DADS has considered provider affidavits to support the timely filing of a renewal application. Thus, we are somewhat mystified by DADS' reluctance to consider St. Jude's affidavit."

that she was “going to notify CMS, [Palmetto], and send [a] surveyor out to [St. Jude] because she admitted she was knowingly operating her HCSSA without a license.”

On September 28, 2017, HHSC’s HCSSA Licensing Unit again informed St. Jude that its HCSSA license had expired and that it was “returning [its] invalid renewal application” and refunding the “\$1750 to the address on file.” It further instructed St. Jude to cease operating:

You failed to submit your application for renewal and your HCSSA license to operate an agency expired on December 31, 2016. Be advised that as of December 31, 2016, St. Jude Home Health license # 009466 is no longer valid.

Please note that it is a violation of the Texas Health and Safety Code, Chapter 142, and the Texas Administrative Code 40 § 97.1(a)(2) to operate an agency without a license. Failure to comply may result in a referral of the matter to the Office of the Attorney General or local prosecuting attorney for monetary and/or injunctive relief.

After receiving this notice, St. Jude started transferring patients and ceased operations as a home health agency. St. Jude contends this September 28, 2017 letter was the first time HHSC “unequivocally” told St. Jude its license had expired, and it had to cease operations.

On September 29, 2017, HHSC sent a Medicare/Medicaid Certification and Transmittal form to CMS. There, it notified CMS that St. Jude had “failed to renew their State Home and Community Support Services Agency (HCSSA) license which

expired on 12/31/2016, and has continued to operate and bill for Medicare services without a HCSSA license.”

On October 6, 2017, HHSC received a package from St. Jude via USPS express mail containing a check purporting to pay for “Lic. #009466 renewal 2017 late fees.” That same month, on October 23, 2017, HHSC received a package from St. Jude containing an initial application for a new HCSSA license.

On October 12, 2017, Palmetto informed St. Jude that its Medicare billing privileges were being revoked effective December 31, 2016, because its HCSSA license had been “revoked” on that date. St. Jude timely appealed that decision. On March 22, 2018, CMS upheld the revocation of St. Jude’s Medicare billing privileges based on the nonrenewal of St. Jude’s state license. CMS, however, determined that the effective date of the CMS revocation would be November 17, 2017, instead of December 31, 2016. CMS explained that “[g]iven that St. Jude’s [state] license expired as opposed to being revoked, according to 42 C.F.R. § 424.535(g), the appropriate effective date for the [CMS] revocation is 30 days after CMS or the CMS contractor mails notice of its determination to the provider or supplier. Given this, the appropriate [CMS] revocation effective date is November 16, 2017.” CMS rendered the following findings and decision:

St. Jude continued to operate and bill for Medicare services after the expiration of its HCSSA state license. Under 42 C.F.R. § 424.516(a)(1), St. Jude was compelled to maintain compliance with State licensure requirements and failed to do so when its license had expired on

December 31, 2016. Therefore, CMS finds that St. Jude's Medicare billing privileges were properly revoked for noncompliance with the Medicare enrollment requirements, pursuant to 42 C.F.R. § 424.535(a)(1). However, in line with 42 C.F.R. § 424.535(g), the revocation effective date is revised to November 17, 2017. . . CMS concludes that there is no error made by Palmetto in the determination of a revocation. The reconsideration request is denied and the revocation is upheld under revocation basis 42 C.P.R. § 424.535(a)(1). Therefore, CMS has decided not to grant [St. Jude] access to the Medicare Trust Fund (by way or issuance) of a Medicare number.⁶

On October 25, 2017, HHSC notified St. Jude it had received St. Jude's initial application for a new HCSSA license on October 23, 2017. HHSC informed St. Jude that HHSC was required to review completed applications within 45 days of receipt, including all pre-survey information, and that if St. Jude's application was incomplete, HHSC would send a letter requesting any necessary additional documentation.

On December 4, 2017, HHSC informed St. Jude that its HCSSA application for an initial license was incomplete or incorrect. HHSC instructed St. Jude to submit additional documentation and warned St. Jude that the documentation had to be postmarked at least 30 calendar days from the date of notice or HHSC would deny the application as incomplete. Among other things, HHSC instructed St. Jude to

⁶ On March 20, 2018, two days before CMS decided the appeal and changed the effective date of its revocation to November 17, 2017, Palmetto had sent St. Jude a demand for \$688,771.11 in alleged Medicare overpayments for services rendered after December 31, 2016, the original CMS revocation date.

“unselect” Licensed & Certified Home Health Services from the category of services applied for because St. Jude was not eligible to provide such services:

You are not eligible to provide Licensed & Certified Home Health Services. There has been a state-wide moratorium, effective July 29, 2016. The moratorium was extended until further notice and has expanded statewide. The moratorium applies to home health agencies. As long as it is in effect, there will be *no new initial License & Certified Home Health (L&CHHS) certified* agencies approved. This includes both parent and branch.

A “certified” home health service is one that holds certification issued by CMS. That certification is necessary to be paid for services rendered to Medicare and Medicaid eligible individuals. Aside from requesting a license to provide licensed and certified home health services, St. Jude also applied to provide services as a “Licensed Home Health Services” and “Personal Assistance Services (PAS).” St. Jude did not submit the requested documentation.

On January 11, 2018, HHSC informed St. Jude that it was denying St. Jude’s October 2017 application for an initial HHSCA license because HHSC had not received the correct or additional documentation requested on December 4, 2017. HHSC informed St. Jude that it had a right to appeal the denial of the application. There is no indication in the record that St. Jude took any further action in connection with this application.

Procedural Background

On October 2, 2017, St. Jude filed a petition for writ of mandamus against HHSC, Rodriguez, and Charles Smith (“Smith”), the former Executive Commissioner for HHSC,⁷ arguing they had a “ministerial duty to issue the renewal license, to provide written notice of the reasons for nonrenewal, to provide informal review, and to refer the case to the [State Office of Administrative Hearings (“SOHA”)] for a contested case hearing to determine whether St. Jude timely mailed the [2016] renewal application and renewal fee.”⁸ St. Jude asserted the trial court had jurisdiction over the matter because it has jurisdiction to compel state officials to correct a clear abuse of discretion and to perform a ministerial task.⁹

Appellees responded by filing a plea to the jurisdiction, affirmative defenses, and a general denial. They argued that because St. Jude had allowed its license to expire, “any implied constitutional due process interest in the license had expired” and thus “HHSC/DADS’ regulatory processes based on an expired license could not have affected St. Jude’s abstract interests in an expired license.” They further argued

⁷ On appeal, HHSC substituted Phil Wilson, Acting Executive Commissioner of HHSC, in his official capacity for both Smith and Rodriguez.

⁸ On appeal, St. Jude does not appear to be challenging the trial court’s denial of its request to compel HHSC to issue the renewal license, provide written notice of the reasons for nonrenewal, or provide informal review. Rather, St. Jude limits its arguments to HHSC’s alleged obligation to grant St. Jude a contested case hearing before the SOAH.

⁹ Although St. Jude initially requested ancillary injunctive relief, it later dropped its claim for such relief.

St. Jude “has not identified any concrete injury that survives the expiration of its license. Therefore, St. Jude lacks standing to sue and this case should be dismissed for lack of subject matter jurisdiction.” Appellees also asserted immunity as an affirmative defense.

St. Jude filed a motion for summary judgment arguing it had a right to notice and hearing before its license could be terminated under “the statutes and rules at issue and/or the due process clauses of the Texas Constitution.” In its motion, St. Jude also asked the court to declare the status of St. Jude’s license between January 1, 2017 and September 28, 2017. St. Jude asserted “the status of St. Jude’s license during this time period, in specific whether it was revoked or whether it stayed in effect, will affect whether St. Jude obtains a new license and when and whether the state and/or the CMS will seek recoupment of amounts paid.”

Appellees filed a cross-motion for summary judgment and briefing in support of their plea to the jurisdiction. In support of their plea, they argued St. Jude (1) failed to plead or establish legislative consent to the filing of this action, (2) alleged no facts waiving sovereign, official, or governmental immunity, (3) failed to establish a justiciable controversy within the court’s jurisdiction, and (4) was not eligible for mandamus relief because St. Jude had an effective remedy because it

could apply for an initial HCSSA license.¹⁰ In support of their cross-motion for summary judgment, Appellees argued St. Jude (1) had not satisfied the requirements for renewal of its license, (2) did not have a statutory, regulatory, or due process right to notice and hearing on its expired license, and (3) could not establish a ministerial duty requiring Appellees to provide St. Jude a contested hearing.

In August 2018, the trial court held a hearing on the plea to the jurisdiction and the parties' motions for summary judgment. At the conclusion of the hearing, the trial court took the matter under advisement. In November 2019, the trial court granted Appellees' plea to the jurisdiction and motion for summary judgment and denied St. Jude's motion for summary judgment and petition for writ of mandamus. This appeal followed.

On appeal, St. Jude argues the trial court erred in determining it lacked jurisdiction to determine whether St. Jude had a right to notice and a hearing where the applicable statute expressly confers a right to a contested case hearing and where there were disputed questions of fact on the timeliness of St. Jude's 2016 renewal

¹⁰ Appellees also argued that to the extent St. Jude was seeking a declaration regarding the status of its expired license, a declaratory judgment action does not establish subject matter jurisdiction, rather, it provides a procedural device for deciding matters already within the court's subject matter jurisdiction. *See Cont'l Cas. Co. v. Rivera*, 124 S.W.3d 705, 712 (Tex. App.—Austin 2003, pet. denied) (citing *State v. Morales*, 869 S.W.2d 941, 947 (Tex. 1994)). Appellees asserted the court lacked jurisdiction over St. Jude's declaratory judgment action because St. Jude had not established a justiciable controversy within the court's jurisdiction.

application. St. Jude further argues the trial court erred in determining it lacked jurisdiction to determine whether due process prohibits the retroactive application of HHSC's termination decision.¹¹

Statutory and Regulatory Framework

HCSSAs are regulated under Chapter 142 of the Texas Health & Safety Code. HHSC has adopted rules governing its procedures for HCSSAs. *See* TEX. GOV'T CODE § 2001.004(1) (requiring state agency to “adopt rules of practice stating the nature and requirements of all available formal and informal procedures.”). These rules are set forth in Title 40 of the Texas Administrative Code. *See* 40 TEX. ADMIN. CODE § 97.1 (now 26 TEX. ADMIN. CODE § 558.1).

In 2014, DADS renewed St. Jude's HCSSA license. Under the version of Chapter 142 then in effect, the license was renewed for a two-year period with an expiration date of December 31, 2016. *See* TEX. HEALTH & SAFETY CODE § 142.006.¹² “Not later than the 120th day before the date a person's license is scheduled to expire,” HHSC must notify the license holder in writing about the impending expiration and provide the license holder with “an application for license renewal and instructions for completing the application.” *Id.* § 142.0105(c).

¹¹ St. Jude does not argue on appeal that the trial court erred in granting relief in favor of appellees on its claim for declaratory relief. Thus, that issue is not before us.

¹² Under the current version of the statute, licenses issued under Texas Health and Safety Code 142 are for three years. TEX. HEALTH & SAFETY CODE § 142.006(b) (“A license issued under this chapter expires three years after the date of issuance.”).

“A person who is otherwise eligible to renew a license may renew an unexpired license by submitting a completed application for renewal and paying the required renewal fee to the department not later than the 45th day before the expiration date of the license.” *Id.* § 142.0105(a); *see also* 40 TEX. ADMIN. CODE § 97.17(g)(2) (stating “[a]n agency must submit to DADS a complete and correct renewal application and the required license fee . . . postmarked no later than the 45th day before the expiration date of a license.”). If “an agency submits a renewal application that is postmarked later than the 45th day before the expiration date of a license, but no later than the expiration date of the license, DADS assesses” a late fee. 40 TEX. ADMIN. CODE § 97.17(g)(3); *see also* TEX. HEALTH & SAFETY CODE § 142.0105(b) (applicant who submits application less than 45 days before license expiration is subject to late fee).

HHSC must process a renewal application within 45 days after receipt. *See* 40 TEX. ADMIN. CODE § 97.31(b)(1) (now 26 TEX. ADMIN. CODE § 558.31) (“The first time frame begins on the date DADS’ HCSSA Licensing Unit receives an application and ends on the date a license is issued. . . The first time frame is no longer than 45 days.”); *see also* 40 TEX. ADMIN. CODE § 97.31(a)(1) (“In this section, the date of an application is the date the DADS’ Home and Community Support Services Agencies (HCSSA) Licensing Unit *receives* the application.”) (emphasis

added).¹³ Before it can deny an agency’s application for the renewal of its license, HHSC must give the license holder notice of the reason for its decision and give the license holder “an opportunity to show compliance with all requirements of law for the retention of the license” 40 TEX. ADMIN. CODE § 97.601(f)(1). “After an opportunity to show compliance, DADS sends a license holder a written notice that: (A) informs the license holder of DADS decision; and (B) provides the agency with an opportunity to appeal DADS decision through a formal hearing process.” *Id.* § 97.601(f)(3); *see also id.* § 97.601(g) (requiring HHSC to send license holder notice by fax and either by certified mail with return receipt requested or hand-delivery of denial of its renewal application).

If, however, “an agency submits a renewal application to DADS that is postmarked after the expiration date of the license, DADS denies the renewal application” 40 TEX. ADMIN. CODE § 97.17(i). The agency in such a case is “not eligible to renew the license,” “must cease operation on the date the license expires,” and “must apply for an initial license.” *Id.* “A person whose license has expired may not engage in activities that require a license.” TEX. HEALTH & SAFETY CODE § 142.0105(a); *see also* 40 TEX. ADMIN. CODE § 97.17(a) (“In order to continue providing services to clients, an agency must renew its license.”).

¹³ The time frame is longer if HHSC receives an incomplete application. *See* 40 TEX. ADMIN. CODE § 97.31(b)(1)-(2). HHSC must send a written notice to the agency that the application is incomplete within 45 days.

Standard of Review and Applicable Law

Appellate courts review a plea challenging the trial court's subject matter jurisdiction *de novo*. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Allegations that a state official deprived a regulated person of a constitutional right are also reviewed *de novo*. *Scally v. Tex. State Bd. of Med. Exam'rs*, 351 S.W.3d 434, 446 (Tex. App.—Austin 2011, pet. denied) (“We review claims regarding deprivation of constitutional rights *de novo* because they present questions of law.”) (citing *Granek v. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 771–72 (Tex. App.—Austin 2005, no pet.)). Questions of statutory interpretation are also questions of law that must be decided *de novo*. *Harlingen Fam. Dentistry, P.C., v. Tex. Health & Hum. Servs. Comm'n*, 452 S.W.3d 479, 482 (Tex. App.—Austin 2014, pet. dism'd) (citing *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008)).

Appellate courts review a trial court's grant of summary judgment *de novo*. *Bd. of Trs. of the Hous. Firefighters Relief and Ret. Fund v. City of Hous.*, 466 S.W.3d 182, 187 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (citing *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009)). When both parties move for summary judgment, each bears the burden of establishing it is entitled to judgment as a matter of law. *City of Hous.*, 466 S.W.3d at 187 (citing *City of Garland v. Dall. Morning News*, 22 S.W.3d 351, 356 (Tex.

2000)). The appellate court may determine all questions presented, affirm the summary judgment entered, reverse and render a judgment for the other party, if appropriate, or reverse and remand if neither party has met its summary judgment burden. *See id.*; *see also Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass'n*, 205 S.W.3d 46, 50 (Tex. App.—Dallas 2006, pet. denied).

Requirements for Mandamus Relief

A district court has exclusive original jurisdiction over mandamus proceedings except when the Texas Constitution or a statute confers original jurisdiction in another tribunal. *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 775 (Tex. 1999) (orig. proceeding). The Texas Constitution empowers trial courts to issue writs of mandamus to compel public officials to perform ministerial acts. TEX. CONST. art. V, § 8; *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991) (“A writ of mandamus will issue to compel a public official to perform a ministerial act.”); *see also City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009) (“[I]t is clear that suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity.”).

An original proceeding in a trial court for a writ of mandamus is a civil action subject to trial and appeal on substantive legal issues and rules of procedure like any other civil action. *See Anderson*, 806 S.W.2d at 792 n.1. Texas law generally authorizes mandamus relief to compel a public official either to perform a ministerial

duty or to correct a clear abuse of discretion. *See Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). The movant typically must establish that (1) a public official failed to perform a ministerial duty or committed a clear abuse of discretion and (2) there is no adequate remedy at law. *See Republican Party v. Dietz*, 940 S.W.2d 86, 88 (Tex. 1997) (orig. proceeding); *City of Hous.*, 466 S.W.3d at 187.

An act is ministerial, or nondiscretionary, when “the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion.” *See Anderson*, 806 S.W.2d at 793. A writ of mandamus may issue when the facts and circumstances dictate only one rational decision under unequivocal, well-settled, and clearly controlling legal principles. *In re Amos*, 397 S.W.3d 309, 312 (Tex. App.—Dallas 2013, orig. proceeding). When a public official has a legal duty to perform a nondiscretionary act, a demand for performance of that act has been made, and the official refuses to perform, a party is entitled to mandamus relief against the official or body. *See id.*; *Sheppard v. Thomas*, 101 S.W.3d 577, 581 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). Whether a statute creates a ministerial duty is a question of law. *City of Hous.*, 466 S.W.3d at 188.

Mandamus may also issue to correct an abuse of discretion that deprives someone of their due process rights. *See In re Bennett*, 960 S.W.2d 35, 40 (Tex.

1997) (holding court of appeals abused its discretion by issuing writ of mandamus directing trial court to vacate sanctions order where sanctioned counsel was afforded due process by being given notice of trial court’s intent to consider sanctions and opportunity to respond); *see also CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996) (holding relator had right to mandamus relief because “trial court exceeded the limitations imposed by the Due Process Clause of the federal Constitution.”).

**Ministerial Duty Under the Texas Health & Safety Code
and the Texas Administrative Procedure Act**

St. Jude petitioned for a writ of mandamus compelling the named HHSC officials to, among other things, refer the case to the SOAH for a contested case hearing to determine whether St. Jude timely mailed its license renewal application in 2016. In its first issue, St. Jude argues the trial court erred in granting Appellees’ plea to the jurisdiction because HHSC officials “had a ministerial duty to provide [St. Jude] a hearing on the timeliness of St. Jude’s renewal application and on the effective date for any nonrenewal.” Alternatively, St. Jude argues the “due process clauses of the Texas Constitution require an evidentiary hearing” on the “timeliness of the renewal application and on the effective date of the nonrenewal.”¹⁴

¹⁴ St. Jude also asked the trial court to compel HHSC officials to perform other alleged ministerial acts, including issuing the renewal license and providing written notice of the reasons for nonrenewal, but St. Jude does not appear to be challenging the denial of mandamus with respect to such requested relief.

A. Jurisdiction Over Mandamus Proceedings

Appellees argue the trial court lacked subject-matter jurisdiction over St. Jude’s mandamus claim because St. Jude failed to establish HHSC officials had a ministerial duty to provide St. Jude with a contested hearing on the timeliness of its license renewal application. Whether HHSC officials had a ministerial duty to provide St. Jude with a contested case hearing, however, goes to the merits of the mandamus claim; it does not deprive the trial court of jurisdiction over the claim. *See McAllen Hosps., L.P. v. Suehs*, 426 S.W.3d 304, 316 (Tex. App.—Amarillo 2014, no pet.) (holding that whether HHSC had alleged duty went to merits of mandamus claim and “is of no moment when determining the issue of the district court’s jurisdiction to hear the matter”); *see also Anding v. City of Austin*, No. 03-18-00307-CV, 2020 WL 2048255, at *6 (Tex. App.—Austin Apr. 29, 2020, no pet.) (mem. op.) (rejecting argument trial court did not have subject matter jurisdiction over request for mandamus relief because while absence of ministerial duty “would dictate the denial of the requested mandamus relief” it would not “operate to deprive the district court of subject-matter jurisdiction over the” claim); *Enriquez v. Wainwright*, No. 03-18-00189-CV, 2018 WL 6565017, at *2 (Tex. App.—Austin Dec. 13, 2018, no pet.) (mem. op.) (same).¹⁵

¹⁵ Because this case was transferred to us from the Third Court of Appeals, we must decide this case in accordance with the precedent of that court. TEX. R. APP. P. 41.3.

In *McAllen Hospitals, L.P. v. Suehs*, 426 S.W.3d 304 (Tex. App.—Amarillo 2014, no pet.), the plaintiff hospitals sued HHSC and its Office of Inspector General (OIG) after the OIG sought to recoup funds previously paid by HHSC to the hospitals for Medicaid reimbursement. *Id.* at 309–10. The hospitals asserted claims for declaratory relief and alleged that the actions of the HHSC and OIG constituted a taking without due process or due course of law. *Id.* at 310. The hospitals also requested mandamus relief seeking a writ compelling the defendants to, among other things, follow certain appeal procedures and comply with certain notice requirements. *Id.* HHSC and the OIG filed a plea to the jurisdiction based on sovereign immunity, which the trial court granted. *Id.* The court of appeals agreed the trial court did not have jurisdiction over the hospitals’ claims for constitutional deprivations, judicial review, and declaratory relief, and affirmed the trial court’s order granting the plea on those claims. *Id.* at 318. For the hospitals’ mandamus claims, however, the court held the trial court had subject matter jurisdiction over the mandamus petition, in part because the Texas Constitution empowers district courts to issue writs of mandamus to compel public officials to perform ministerial acts. *Id.* The court of appeals explained that whether HHSC officials in fact had a ministerial duty to act went to the merits of the mandamus claim and was “of no moment when determining the issue of the district court's jurisdiction to hear the

matter.” *Id.* at 316. The court determined that, based on the record, the trial court never reached the merits of the mandamus claim and thus committed error:

Here, the trial court’s orders did not touch on the merits of the Hospitals’ mandamus claims; it did not grant or deny mandamus relief. Perhaps, one could contend, implied within the trial court’s orders is its conclusion that the Hospitals failed to show themselves entitled to mandamus relief, but that is not how the trial court expressly disposed of the case. We cannot fairly read the trial court’s orders as doing anything more than granting the [HHSC’s] plea to the jurisdiction, which means that the trial court had concluded, based on the pleadings and evidence before it, that it lacked subject-matter jurisdiction over the claims.

Id. at 317. Because the trial court had jurisdiction over the mandamus petition, the court of appeals reversed the trial court’s order granting the plea on this basis and remanded the hospitals’ mandamus claims to the trial court for consideration of the writ on the merits. *Id.* at 318.

The Austin Court of Appeals reached a similar result in *Anding v. City of Austin*, No. 03-18-00307-CV, 2020 WL 2048255 (Tex. App.—Austin Apr. 29, 2020, no pet.) (mem. op.). Relevant here, the Andings sought mandamus relief against a municipal court judge related to his review of an administrative hearing over certain ordinance violations. *Id.* at *1. The judge asserted a plea to the jurisdiction arguing the trial court lacked jurisdiction over the Andings’ petition for writ of mandamus because they had an adequate remedy at law, and they were not seeking to compel a ministerial act. *Id.* at *6. The trial court sustained the plea and dismissed the Andings’ petition for writ of mandamus. *Id.* On appeal, the court concluded the

trial court had jurisdiction over the Andings' petition because they were seeking to compel a public official—the municipal court judge—to perform a ministerial act.

Id. Whether the act the Andings sought to compel the judge to perform was truly ministerial went to the merits of the claim:

[The municipal court judge] argued and the district court apparently agreed that mandamus was not available because the Andings had an adequate remedy by appeal and because the relief sought was not the performance of a ministerial act. Such a ruling would not, however, operate to deprive the district court of subject-matter jurisdiction over the Andings' claim. Instead, such a conclusion would dictate the denial of the requested mandamus relief, a decision that could then be appealed as in any other civil suit.

Id. The court reversed the trial court's order granting the plea to the jurisdiction and remanded the case for the trial court to consider the merits of the mandamus claim.

Id. at *7.

The Austin Court of Appeals had reached a similar result two years earlier in *Enriquez v. Wainwright*, No. 03-18-00189-CV, 2018 WL 6565017 (Tex. App.—Austin Dec. 13, 2018, no pet.) (mem. op.). In *Enriquez*, an inmate filed a petition for writ of mandamus seeking to compel prison officials to perform what he argued were ministerial acts. *Id.* at *1. The prison officials filed a plea to the jurisdiction arguing the trial court lacked jurisdiction over the petition because the acts the inmate sought to compel were discretionary, and not ministerial. *Id.* at *2. The trial court granted the plea. *Id.* The court of appeals held the trial court had jurisdiction over the mandamus petition, without regard to the merits. *Id.* at *3 (“A plea to the

jurisdiction should not be used to address whether a petitioner is entitled to mandamus relief. The trial court had jurisdiction over Enriquez’s request for mandamus relief, without regard to its merits.”). The court reasoned that even if the officials were correct that the relief sought was not the performance of a ministerial act, “[s]uch a ruling would not, however, operate to deprive the court of subject-matter jurisdiction over Enriquez’s claim. *Id.* at *2. Instead, such a conclusion would simply dictate the denial of the requested mandamus relief, a decision that could then be appealed as in any other civil suit.” *Id.*

On appeal, St. Jude argues the trial court erred in determining it lacked jurisdiction to determine “whether the HHSC/DADs has a ministerial duty to provide St. Jude a [contested] hearing on the timeliness of St. Jude’s renewal application.” The trial court, however, did not dismiss St. Jude’s petition for writ of mandamus on jurisdictional grounds. The record in this case reflects the trial court decided the petition for writ of mandamus on the merits, as evidenced by the court’s ruling. Specifically, the trial court’s order states:

“IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that [HHSC’s] plea to jurisdiction is GRANTED, [HHSC’s] objections to [St. Jude’s] affidavits are OVERRULED, [HHSC’s] Cross-Motion for Summary Judgment is GRANTED, [St. Jude’s] Motion for Summary Judgment is DENIED, and [*St. Jude’s*] *Petition for Writ of Mandamus is DENIED.*”

(Emphasis added).

Therefore, unlike in *McAllen*, *Anding*, and *Enriquez*, we need not remand the matter to the trial court to consider the merits of the mandamus petition because it is apparent the trial court has already done so. Further, because we conclude the HHSC officials did not have a ministerial duty to provide St. Jude with the requested hearing, we affirm the trial court's decision denying St. Jude's writ of mandamus.

B. Ministerial Duty to Provide St. Jude with a Contested Hearing

Appellees and St. Jude both moved for summary judgment over whether HHSC had a ministerial duty to provide St. Jude with notice and a contested hearing on the timeliness of St. Jude's 2016 renewal application and whether HHSC committed a clear abuse of discretion by not doing so. The trial court granted Appellees' cross-motion for summary judgment and denied St. Jude's motion for summary judgment.

On appeal, St. Jude argues HHSC had a legal duty under Texas Health & Safety Code Section 142.011(c) and (d) and the Texas Administrative Procedure Act to provide St. Jude with a contested case hearing on the timeliness of its 2016 renewal application. It argues "HHSC/DADs did not have the authority to unilaterally decide that St. Jude failed to timely mail its renewal application and to base an effective revocation of St. Jude's license on that unilateral decision." It argues "HHSC/DADs had a clear legal duty under section 142.011(d) to provide a contested hearing."

Sections 142.011 (c) and (d) of the Texas Health & Safety Code state:

- (c) The department may suspend or revoke a home and community support services agency's license to provide certified home health services if the agency fails to maintain its certification qualifying the agency as a certified agency. A home and community support services agency that is licensed to provide certified home health services and that submits a request for a hearing as provided by Subsection (d) is subject to the requirements of this chapter relating to a home and community support services agency that is licensed to provide home health services, but not certified home health services, until the suspension or revocation is finally determined by the department or, if the license is suspended or revoked, until the last day for seeking review of the department order or a later date fixed by order of the reviewing court.
- (d) A person whose application is denied or whose license is suspended or revoked is entitled to a hearing if the person submits a written request to the commission. Chapter 2001, Government Code, and the department's rules for contested case hearings apply to hearings conducted under this section and to appeals from department decisions.

TEX. HEALTH & SAFETY CODE § 142.011(c) & (d). Section 2001.003(1) of the Texas Administrative Procedure Act ("APA") defines a contested case as "a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing." TEX. GOV'T CODE § 2001.003(1).

Section 142.011(c) of the Texas Health & Safety Code entitles an applicant to a hearing if its "application is denied or [its] license is suspended or revoked." TEX. HEALTH & SAFETY CODE § 142.001(c). Section 97.601 of the Texas Administrative

Code requires HHSC to provide notice and a hearing, if requested, prior to the revocation or suspension of an agency's license or denial of an application. 40 TEX. ADMIN. CODE § 97.601. Thus, St. Jude is entitled to written notice and a hearing before its license is suspended, revoked, or if its application is denied. TEX. HEALTH & SAFETY CODE § 142.011(c) & (d); 40 TEX. ADMIN. CODE §§ 97.601(f), 97.601(h)(4). None of those events transpired.

The record reflects HHSC did not receive St. Jude's December 2016 application to renew its HCSSA license. St. Jude does not dispute this point. HHSC thus could not have denied an application it never received. HHSC also did not revoke or suspend St. Jude's license before its December 31, 2016 expiration date, and it could not have done so after expiration of the license because no license existed after that point.

There is no provision in the Health & Safety Code or the APA that requires HHSC to inform a license holder that it did not *receive* a renewal application for its license before the license expiration date.¹⁶ Furthermore, Section 142.011(c), upon which St. Jude relies, applies only if an agency (license holder) fails to maintain its certification qualifying the agency as a certified agency during the term of the

¹⁶ Section 142.0105(c) requires HHSC to notify a license holder in writing about the impending expiration of a license and to provide the license holder with "an application for license renewal and instructions for completing the application." TEX. HEALTH & SAFETY CODE § 142.0105(c). HHSC fully complied with this requirement.

license, in which case HHSC may revoke or suspend the license. *See* TEX. HEALTH & SAFETY CODE § 142.011(c) (“The department may suspend or revoke a home and community support services agency’s license to provide certified home health services if the agency fails to maintain its certification qualifying the agency as a certified agency.”). St. Jude’s license expired on December 31, 2016, and HHSC sent St. Jude a “NOTIFICATION OF CHANGE” in February 2017 stating the type of action as “Agency closed effective 12/31/2016, due to Expired license.” HHSC did not revoke or suspend St. Jude’s HHSCA license.

We further note that Palmetto did not revoke St. Jude’s CMS certification until September 2017. CMS affirmed its revocation of St. Jude’s medical billing privileges but determined the effective date of the revocation would be November 17, 2017, instead of December 31, 2016. Thus, HHSC did not suspend or revoke St. Jude’s license because of any failure of St. Jude to maintain its certification with CMS. On the contrary, CMS/Palmetto revoked St. Jude’s CMS certification because St. Jude no longer had an HCSSA state license.

St. Jude nonetheless argues HHSC officials had a duty to provide St. Jude a hearing on the timeliness of its 2016 renewal application under the Austin Court of Appeals’ decision in *Hawkins v. Community Health Choice, Inc.*, 127 S.W.3d 322 (Tex. App.—Austin 2004, no pet.). In *Hawkins*, Community Health Choice was under contract with HHSC to provide managed care to Medicaid enrollees under the

state's managed care program. *Id.* at 323. A dispute arose between the parties concerning a claim for reimbursement that the parties were not able to resolve after several months. *Id.* at 323–24. Community Health Choice notified HHSC that it intended to sue for breach of contract and requested that the dispute be referred to SOAH under Texas Government Code Section 2260.102. *Id.* Under Section 2260.102, a contractor who is not satisfied with the results of a contract negotiation with HHSC may file a request for a hearing and “[o]n receipt of a request” for a hearing, HHSC “shall refer the claim to the State Office of Administrative Hearings for a contested case hearing under Chapter 2001, Government Code, as to the issues raised in the request.” TEX. GOV'T CODE § 2260.102(c). HHSC argued it did not have to refer the claim to SOAH because Community Health Choice's pre-suit notice for its breach of contract claims was untimely thus depriving SOAH of jurisdiction over the dispute. *Hawkins*, 127 S.W.3d at 324.

Community Health Choice sued HHSC and requested the trial court to issue a writ of mandamus directing HHSC's Commissioner to refer the claim to SOAH for a contested case hearing. *Id.* HHSC filed a plea to the jurisdiction arguing the failure to provide timely pre-suit notice deprived the court of jurisdiction. *Id.* The trial court denied the plea to the jurisdiction and granted the writ of mandamus compelling HHSC to refer the dispute to SOAH under Chapter 2260 of the Government Code. *Id.* The Third Court of Appeals affirmed the trial court's

issuance of the writ of mandamus. *Id.* at 327. It held that the plain language of Section 2260.102 unambiguously required HHSC to refer the claim to SOAH. TEX. GOV'T CODE § 2260.102(c) (stating “shall refer the claim to the State Office of Administrative Hearings for a contested case hearing”). The court further held that a “question regarding whether a party has in fact complied with the pre-suit notice requirements of chapter 2260 is a question of fact that, like the issues underlying the breach-of contract claim, must be referred to SOAH.” *Hawkins*, 127 S.W.3d at 327. Here, unlike in *Hawkins*, there is no statute or administrative rule that unambiguously requires HHSC to provide St. Jude with a hearing on the timeliness of its renewal application.

Moreover, under the Texas Administrative Code, it is HHSC's *receipt* of a renewal application that triggers HHSC's obligations to review and evaluate the application. For example, HHSC's 45-day period to dispose of an application does not commence until HHSC *receives* the application. *See* 40 TEX. ADMIN. CODE § 97.31(a)(1) (“In this section, the date of an application is the date the DADS' Home and Community Support Services Agencies (HCSSA) Licensing Unit *receives* the application.”) (emphasis added). This is consistent with similar provisions discussing the *submission* of applications to HHSC, including Section 142.0105(a) which provides that a “person who is otherwise eligible to renew a license may renew an unexpired license by *submitting* a completed application for renewal and

paying the required renewal fee to the department not later than the 45th day before the expiration date of the license.” TEX. HEALTH & SAFETY CODE § 142.0105(a); *see also generally* 40 TEX. ADMIN. CODE § 97.17(g)(3). Thus, no matter when St. Jude mailed its 2016 renewal application, HHSC did not have an obligation to act until it received the application, and it is undisputed HHSC never received the renewal application St. Jude alleges it mailed on December 16, 2016.

Because HHSC officials do not have a ministerial duty to provide St. Jude with a hearing under the circumstances presented here, we conclude the trial court did not err by denying St. Jude’s petition for writ of mandamus.

Due Process

In its second issue on appeal, St. Jude argues the trial court erred in holding it lacked jurisdiction to determine “whether due process prohibits the retroactive application of the State’s termination decision.” It argues the “due process clauses of the Texas Constitution” entitle it to an evidentiary hearing over the timeliness of its renewal application. It also argues it is entitled to a contested hearing concerning the “effective date of any nonrenewal.” HHSC argues St. Jude does not have a due process claim because it does not have a vested property interest entitling it to constitutional protection. Thus, HHSC argues, the court lacked subject-matter jurisdiction.

A. Existence of a Vested Property Interest in the HCCSA License

St. Jude argues the due process clause of the Texas Constitution entitles it to an evidentiary hearing before a neutral decision-maker on the timeliness of its renewal application because it “has a property interest in its license.” According to St. Jude, once the state granted St. Jude a license, St. Jude had a property interest “that cannot be taken without affording due process.” HHSC responds that due process considerations are not implicated because St. Jude did not have a property interest in its license beyond its expiration date.

The dispositive question for our purposes is whether St. Jude had a vested property interest triggering due process protections. “Property interests ‘are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.’” *Honors Acad., Inc. v. Tex. Educ. Agency*, 555 S.W.3d 54, 61 (Tex. 2018) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)); see also *Bailey v. Smith*, 581 S.W.3d 374, 389 (Tex. App.—Austin 2019, pet. denied). Only vested rights are constitutionally protected. *Id.* “To have a constitutionally protected property interest, a person must have a ‘legitimate claim of entitlement’ rather than a mere ‘unilateral expectation.’” *Id.* (quoting *Roth*, 408 U.S. at 577). Put another way, a constitutionally protected interest is “something more than a mere expectancy based upon an anticipated continuance of an existing law.” *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 15 (Tex. 2015)

(quoting *City of Dall. v. Trammell*, 101 S.W.2d 1009, 1014 (1937)). A due process claim is not viable, and thus barred by sovereign immunity, if the party lacks a vested property or liberty interest on which to base its due process claim. *See Honors Acad.*, 555 S.W.3d at 67–68 (rejecting due process claim on sovereign-immunity grounds because of lack of vested interest or property right).

“A license is merely a permit or privilege to do what otherwise would be unlawful. The object of a license is to confer a right or power which does not exist without it.” *Payne v. Massey*, 196 S.W.2d 493, 495 (1946); *see LMV-AL Ventures, LLC v. Tex. Dep’t of Aging & Disability Servs.*, 520 S.W.3d 113, 127 (Tex. App.—Austin 2017, pet. denied). HCCS grants HCCSA licenses to entities like St. Jude for a defined period. Under the statutory scheme at the time, a license issued under Section 142.006(b) “expire[d] two years after the date of issuance.”¹⁷ A license holder does not have a right to retain its license beyond its initial two-year period. Rather, a license holder may, at its discretion, submit a renewal application to renew its license. An applicant, however, is not entitled to automatic renewal of its license. Rather, upon submission and receipt of the renewal application, HHSC must review the application and decide whether to grant or deny it. Thus, even if St. Jude had a vested property interest in its license *during* its term, it did not have a vested right in

¹⁷ HCCSA licenses now expire after three years. *See* TEX. HEALTH & SAFETY CODE § 142.006(b) (effective September 1, 2019).

renewal of its license. It merely had an expectancy interest in its potential renewal. *See Riley v. Tex. State Bd. of Exam'rs of Prof Couns.*, 315 S.W.3d 135, 140 (Tex. App.—Austin 2010, pet. denied) (noting where license has statutory expiration date and expires on its own terms, any property interest expires with license); *see also LMV-AL Ventures*, 520 S.W.3d at 129 (holding trial court did not err in granting summary judgment on LMV's due process claim because LMV has no vested or otherwise protected right to license approval, which was only arguable right presented by facts of case); *Sefzik v. Tex. Dep't of Transp.*, 267 S.W.3d 127, 138 (holding applicant seeking to erect outdoor advertising sign “merely sought a governmental benefit to which he was not already entitled. As such, Sefzik merely had an expectation of the governmental benefit—his expectation is not a protected property right.”).

The decision in *Riley v. Texas State Board of Examiners of Professional Counselors*, 315 S.W.3d 135 (Tex. App.—Austin 2010, pet. denied) is instructive. Riley received her license to practice professional counseling in 1983. *Id.* at 137. She renewed her license annually for 19 years, but on December 31, 2002, her license expired due to her failure to file a renewal application by the license expiration deadline. *Id.* She argued her failure was excused because the Board of Examiners of Professional Counselors had not provided her with a pre-expiration notice in accordance with the Texas Occupations Code. *Id.* After first learning her

license had expired, Riley submitted a renewal application, but the Board denied her request. *Id.* Riley requested and obtained a hearing with SOAH to contest the denial of her renewal application. *Id.* After the hearing, the Board determined that its failure to prove it had sent a pre-expiration notice to Riley did “not relieve” Riley of her “responsibility to renew her license” and was no “defense to her failure to renew.” *Id.* Riley requested a rehearing, which the Board denied. *Id.* The trial court entered judgment in favor of the Board affirming the Board’s decision. *Id.*

On appeal, Riley argued the Board’s denial of her renewal application without first providing her a pre-expiration notice violated her constitutional right to due process. *Id.* at 140. The court disagreed, holding

Assuming without deciding that Riley had a property interest in her license warranting protection under the federal and state constitutions, any such interest had an expiration date. Riley might have been entitled to notice and an opportunity to be heard in the event that the Board sought to revoke her license *during its term*. See, e.g., *House of Tobacco, Inc. v. Calvert*, 394 S.W.2d 654, 657 (Tex. 1965) (due process applies to revocation of cigarette distribution license). Here, however, Riley’s license expired in accordance with its statutory expiration date and Riley did not comply with the statutory renewal procedures. Therefore, the expiration of Riley’s license did not cause the loss of a protected property right. See *Smith v. Travis County Bail Bond Bd.*, 559 S.W.2d 693, 694 (Tex. Civ. App.—Austin 1977, no writ).

Riley, 315 S.W.3d at 140 (emphasis added).

The same is true here. HHSC did not seek to revoke or suspend St. Jude’s license during its term. St. Jude retained its license for its full two-year period through December 31, 2016. Thus, St. Jude was not deprived of its license. At most,

St. Jude was deprived of the opportunity to renew its license for another term. Because the granting of an application for renewal of a license is potential, rather than definitive, St. Jude did not have a vested right in any renewal or future license. *See Shrieve v. Tex. Parks & Wildlife Dep't*, No. 03-04-00640-CV, 2005 WL 1034086, at *5–6 (Tex. App.—Austin May 5, 2005, no pet.) (mem. op.) (holding that Shrieve’s expectation of permit was not protected property interest); *see also LMV-AL Ventures*, 520 S.W.3d at 129; *Riley*, 315 S.W.3d at 140 (holding property interest expired with license).

St. Jude argues *Riley* is inapplicable because Riley received a contested hearing. But that was not the dispositive issue guiding the court’s due process analysis.¹⁸ Rather, the court focused on the existence of a vested property right, which right would have entitled Riley to due process protections. The decision in *Riley* makes clear that a license holder does not have a vested property interest in an expired license or in the expectation of renewal.

St. Jude’s reliance on *House of Tobacco, Inc. v. Calvert*, 394 S.W.2d 654 (Tex. 1965) and *Francisco v. Board of Dental Examiners*, 149 S.W.2d 619 (Tex. Civ. App. 1941, error writ ref’d) is misplaced. In those cases, *House of Tobacco*

¹⁸ *Riley* did not involve a claim for writ of mandamus nor did the court have to determine whether a contested hearing applied to the circumstances at issue. Prior to the filing of her suit, Riley had requested and received a hearing under the Texas Occupations Code, a statute different than the one involved in this appeal.

and Francisco had a vested interest in a license or permit that had been cancelled or revoked *during* its term. In *House of Tobacco*, the State Comptroller of Public Accounts notified the petitioner that its annual cigarette distribution permit would be cancelled, effective five days later, due to certain alleged violations. *House of Tobacco*, 394 S.W.2d at 657. And in *Francisco*, a dentist filed suit to reinstate his license, which had been revoked by the Board of Dental Examiners on the ground he had been convicted of forgery. *Francisco*, 149 S.W.2d at 620. In both cases, the petitioners challenged agency actions that resulted in cancellation of their valid and existing permit and license while both were still in effect. That is not the situation here.

St. Jude was not deprived of its existing license (or threatened with deprivation of its existing license). The only alleged interest St. Jude had was in its expectation that it could renew its license, which is not a vested property right subject to constitutional protection. *See Honors Acad., Inc.*, 555 S.W.3d at 67–68 (rejecting due process claim on sovereign-immunity grounds because of lack of vested interest or property right); *see generally LMV-AL Ventures*, 520 S.W.3d at 129; *Riley*, 315 S.W.3d at 140; *Shrieve*, 2005 WL 1034086, at *5–6.

Any property interest St. Jude held in connection with its license expired upon expiration of the license on December 31, 2016. Because St. Jude did not have a vested right in renewal of its license, it did not plead a viable due process claim.

B. Retroactive Application of the State’s Termination Decision

St. Jude also contends the trial court erred in determining “that it lacked jurisdiction to determine whether due process prohibits the retroactive application of the State’s termination decision.” First, HHSC did not issue a “termination” decision. Rather, HHSC sent St. Jude a “NOTIFICATION OF CHANGE” stating the type of action as “Agency closed effective 12/31/2016, due to Expired license.” It also informed Palmetto that St. Jude “ha[d] failed to renew [its] HCSSA license and CMS has requested that DADS contact the agency’s MAC [Medicare Administrative Contractor]”

Second, as Appellees correctly note, St. Jude did not raise a due process claim on any alleged “retroactive application” of the license expiration date either in its petition for writ of mandamus or motion for summary judgment. St. Jude’s due process argument in the trial court was limited to whether due process required Appellees to provide St. Jude with notice and a hearing on the timelessness of its renewal application. During the hearing on the motions, the trial court stated as much. As the judge explained:

So what I understand the Plaintiff’s argument to be, at least in part, is even if the rules and the law don’t specifically say we’re entitled to notice and the opportunity to be heard, due process requires that. And due process requires us to have a chance to submit to somebody our evidence, whether it meets the requirements under the law or not, that we really did submit this and that it was either lost in the mail or it was lost at the agency.

. . . .

So the question is, are they entitled to some sort of notice before the license expires. So if they were required to file it at least 45 days before expiration, were they entitled to some sort of notice, at a minimum, between that 45th day and the day it expired?

We thus conclude St. Jude did not preserve its due process claim as to any alleged “retroactive application” of the license expiration because it did not raise it in the trial court with sufficient specificity for the court to be aware of the complaint and make a ruling on it. *See* TEX. R. APP. P. 33.

Even if St. Jude had raised such an argument in the trial court it still would not prevail. In its reply brief, St. Jude argues it preserved its due process claim¹⁹ and that in addition to its property interest in the license itself

St. Jude also has a significant property interest in its money. The practical effect of making the termination of St. Jude’s license retroactive to before the HHSC and the federal agency gave notice of the termination is that St. Jude would not be paid for services rendered before formal action was taken by the agencies or would be paid and face recoupment from the agencies or their fiscal intermediary. St. Jude presented summary judgment evidence in support of that aspect of its due process property interest in the form of Palmetto’s (the Medicare Fiscal Agent’s) demand for repayment of \$688,771.11 in alleged

¹⁹ In its reply brief, St. Jude argues it raised its due process issue in a supplemental application for relief filed days after its original petition for writ of mandamus and that it briefed the issue in its motion for summary judgment. St. Jude stated it had requested a supplemental clerk’s record presumably containing its supplemental filing, but no supplemental clerk’s record was ever filed with this Court. In any event, regardless of St. Jude’s pleadings, it is apparent from the hearing transcript that the trial court did not understand St. Jude to be raising a due process claim with respect to the alleged retroactive application of the license expiration date, and to the extent it attempted to do so, St. Jude’s counsel did not disabuse the trial court of that misunderstanding.

overpayments based on the HHSC/DADS date of termination of December 31, 2016.

During the August 2019 trial court hearing, St. Jude's counsel informed the trial court that Palmetto's demand for payment of \$688,771.11 in alleged overpayments for services St. Jude provided after December 31, 2016 concerned Medicare, and that as a result of CMS's 2018 decision that St. Jude's Medicare billing privileges would be revoked effective November 17, 2017, instead of December 31, 2016, as Palmetto had originally determined, St. Jude had "gotten the Medicare money or ha[d] been told [it] will." St. Jude thus explained that the only outstanding issues were whether HHSC would fine or penalize St. Jude for operating without a state license after December 31, 2016, or refer the case to the county attorney for prosecution. St. Jude was also concerned that some private pay companies "might later go back and determine that they [were not required] to pay [St. Jude] for services rendered between January 1, 2017, and September 28, 2017, because [St. Jude was not] licensed" by the state during this time. Although St. Jude's counsel also informed the trial court that some private pay companies had withheld payment and she believed St. Jude had letters that would "verify[] the harm and the amounts at issue," no such letters are included in the record.²⁰

²⁰ Because the letters are not included in the record, it is not clear whether the private pay parties who allegedly had withheld payment were doing so based on St. Jude's failure to be licensed by the state.

St. Jude’s relies on *McNeill v. Phillips*, 585 S.W.3d 109 (Tex. App.—Houston [14th Dist.] 2019, pet. granted) to advance its due process claim, but that case is distinguishable.²¹ In that case, McNeill had a contract with HHSC to provide prescription drugs under Medicaid and the Vendor Drug Program. *Id.* at 112. Pursuant to the contract, HHSC audited McNeill’s pharmacy and concluded it had overpaid McNeill by \$70,266.36. *Id.* After an informal review process, HHSC reduced the amount of the overpayment to \$64,549.30. *Id.* When McNeill failed to pay the demanded amount within the allotted period, HHSC requested a vendor hold to recoup the amount of the overpayment. *Id.* at 113. The court held that McNeill had a protected due process interest in the converted money. *Id.* at 118–19 (“It would appear to be beyond debate that money is a legitimate property interest in contemporary American society and that the interest in protecting it from State-sponsored conversion is a fundamental interest entitled to Due Process protections.”).

Unlike in *McNeill*, there is no evidence that CMS, Palmetto, or HHSC placed a hold on St. Jude’s account or were seeking to recoup any alleged overpayments. Nor does St. Jude assert HHSC converted money it was entitled to receive. Rather, St. Jude contends that Appellees’ alleged decision in September 2017 to make the

²¹ *McNeill* was transferred to the Fourteenth Court of Appeals from the Third Court of Appeals.

license's expiration date "retroactive" to December 31, 2016,²² means St. Jude *may* not be paid for services rendered during the nine-month period between January 1 and September 2017 or that such funds, if paid, *may* be subject to recoupment. In other words, St. Jude asserts it has a vested property interest in money it *may* be owed but deprived of in the future or in money it has received but later *may* be subject to recoupment. *McNeill* does not support a due process claim based on these potential scenarios that may never come to fruition. *See LMV-AL Ventures*, 520 S.W.3d at 128 (holding party's expectancy interest "does not rise to the level of a vested property right protected by constitutional due process considerations"). Moreover, according to St. Jude, HHSC is not involved in the reimbursement of services rendered by St. Jude to Medicare- and Medicaid-eligible individuals.²³ Thus, any decision over payment for such services or any future recoupment for payment of the same does not rest with HHSC. For these reasons, *McNeill* is inapplicable.

Because St. Jude did not establish it has a vested property interest subject to due process protections, the trial court did not err in granting Appellees' plea to the

²² HHSC did not make the license expiration date "retroactive." As we held, the license expired by its terms on December 31, 2016.

²³ In its brief, St. Jude clarified that with "respect to some type of providers in the Medicaid program, the HHSC is the party that reimburses for services provided. That is not the case for providers like St. Jude. Instead reimbursement is through a third party under contract with CMS."

jurisdiction on St. Jude's due process claims. *See Honors Acad., Inc.*, 555 S.W.3d at 67–68 (rejecting due process claim on sovereign-immunity grounds because of lack of vested interest or property right).

Conclusion

We affirm the trial court's denial of St. Jude's petition for writ of mandamus and motion for summary judgment and affirm the trial court's order granting Appellees' plea to the jurisdiction and motion for summary judgment on St. Jude's claims.

Veronica Rivas-Molloy
Justice

Panel consists of Chief Justice Radack and Justices Rivas-Molloy and Guerra.