Opinion issued October 28, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00596-CV

DOUGLAS WILKER, Appellant/Cross-Appellee

V.

CARLOS A. PENICHE, Appellee/Cross-Appellant

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Case No. 2019-19445

MEMORANDUM OPINION

This is an accelerated interlocutory appeal from the trial court's denial of a plea to the jurisdiction based on sovereign immunity. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). Carlos Peniche sued Douglas Wilker, in his official capacity as License Analyst for the Department of Public Safety, seeking declarations that

Wilker lacks authority to enforce certain rules promulgated by DPS establishing the requirements and procedure for requesting the suspension of a judgment debtor's driver's license under the Motor Vehicle Safety Responsibility Act. TEX. TRANSP. CODE §§ 601.001–.454. Wilker filed a plea to the jurisdiction, asserting sovereign immunity. Peniche responded that Wilker's enforcement of the rules is ultra vires and thus subject to suit.

In his live pleading, Peniche argues that Wilker lacks the authority to enforce these rules not because enforcement of duly-promulgated DPS rules is outside the scope of Wilker's authority, but rather because the rules at issue here rest upon an erroneous construction of the Act—one that contravenes the statutory language, runs counter to the statute's general objectives, and imposes additional burdens, conditions, and restrictions inconsistent with the relevant statutory provisions. In other words, Peniche argues that Wilker lacks authority to enforce the rules because the rules are invalid. But whether an agency rule is valid is a separate issue from whether the rule's enforcement is authorized. Regardless of the DPS rules' validity (an issue we need not decide here), Wilker's authorized enforcement of them is not ultra vires.

We hold that Peniche has failed to meet his burden to plead and prove an ultra vires claim and that the trial court erred in denying Wilker's plea to the jurisdiction.

Accordingly, we reverse the trial court's order and render judgment dismissing Peniche's suit against Wilker for lack of jurisdiction.

Background

This appeal involves two parties: (1) plaintiff-appellee/cross-appellant Carlos Peniche and (2) defendant-appellant/cross-appellee Douglas Wilker.

Carlos Peniche is a subrogation attorney. As Peniche explains in his petition, a "significant portion of his practice involves automobile property damages lawsuits against uninsured drivers and owners of uninsured vehicles involved in vehicular accidents." In these lawsuits, Peniche "is typically retained by insurance carriers who pay for their insureds' damages caused by uninsured parties." When he obtains a judgment for money damages against uninsured motorists, it is often difficult to collect due to Texas law's generous protection of debtors. So as part of his strategy to collect from these often otherwise judgment proof debtors, Peniche routinely requests the suspension of their driver's licenses under the Motor Vehicle Safety Responsibility Act. *Id.* He submits these requests to DPS, the agency responsible for administering and enforcing the Act. *Id.* § 601.021(1).

Douglas Wilker is a License Analyst for DPS. As part of his job, Wilker reviews requests submitted by judgment creditors to suspend judgment debtors' driver's licenses under the Act and determines whether such requests comply with

DPS rules establishing the requirements and procedure for suspending a judgment debtor's driver's license.

Peniche sued Wilker,[1] seeking various declarations that Wilker lacks authority to enforce and follow these rules. Wilker filed a plea to the jurisdiction, asserting sovereign immunity. Peniche responded that Wilker's enforcement of the rules is ultra vires and thus subject to suit.

The parties conducted limited discovery, which included Wilker's deposition. The trial court then held a hearing on Wilker's plea. After the hearing, the trial court denied the plea. Wilker appeals, and Peniche cross-appeals from several other orders entered by the trial court during the course of the suit.

Wilker's Appeal

On appeal, Wilker argues the trial court erred in denying his plea to the jurisdiction because Peniche failed to plead and prove an ultra vires case or otherwise affirmatively demonstrate the trial court's jurisdiction to hear the cause.

A. Applicable law

Under the doctrine of sovereign immunity, absent an express legislative waiver, state employees are immune from suits arising from acts performed within the scope of their legal authority. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*,

[1] Peniche also sued DPS. DPS filed a Rule 91a motion to dismiss based on sovereign immunity, which the trial court granted. DPS is not a party to this appeal.

74 S.W.3d 849, 854 (Tex. 2002); *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). They are not, however, immune from suits arising from ultra vires acts. *City of Houston v. Houston Mun. Emps. Pension Sys.*, 549 S.W.3d 566, 576 (Tex. 2018). A state employee acts ultra vires if he (1) fails to perform a ministerial act or (2) acts without legal authority. *Id.* Peniche contends Wilker committed the second type of ultra vires acts—that is, he contends Wilker acted without legal authority in following and enforcing certain rules promulgated by DPS.

B. Standard of review

Because sovereign immunity from suit defeats a trial court's subject matter jurisdiction, it is properly asserted in a plea to the jurisdiction. *City of Conroe v. San Jacinto River Auth.*, 602 S.W.3d 444, 457 (Tex. 2020); *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004).

The trial court decides the plea by reviewing the real substance of the pleadings (rather than their characterization or form) as well as any evidence relating to the jurisdictional issue. *See Miranda*, 133 S.W.3d at 226–28; *Dallas Cty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998); *Univ. of Tex. Med. Branch at Galveston v. Kai Hui Qi*, 402 S.W.3d 374, 389 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

If the pleadings do not affirmatively demonstrate subject matter jurisdiction, the trial court grants the plea. *See Miranda*, 133 S.W.3d at 226–27. If the pleadings do affirmatively demonstrate subject matter jurisdiction, and the evidence raises a genuine issue of material fact on the jurisdictional issue, the trial court denies the plea, and the issue is resolved by the factfinder. *Id.* at 228. But if the evidence is undisputed or otherwise fails to raise a genuine issue of material fact, the trial court rules on the plea as a matter of law. *Id.*

We review the trial court's ruling de novo, construing the pleadings liberally in the plaintiff's favor and reviewing the evidence under the standard applied in an appeal from a traditional summary judgment. *Id.* at 226–28.

C. Analysis

Peniche contends Wilker acted without legal authority in following and enforcing certain rules promulgated by DPS establishing the requirements and procedure for requesting the suspension of a judgment debtor's driver's license under the Motor Vehicle Safety Responsibility Act. Thus, to determine whether the trial court erred in denying Wilker's plea to the jurisdiction, we must first determine the scope of Wilker's legal authority. *Hall v. McRaven*, 508 S.W.3d 232, 234 (Tex. 2017) ("*Ultra vires* claims depend on the scope of a state official's authority."). We must then review the pleadings to determine whether the real substance of Peniche's complaint is that Wilker acted without legal authority. *See Bossley*, 968 S.W.2d at

343 (reviewing "real substance" of plaintiff's complaint to determine whether petition pleaded waiver of sovereign immunity); *Kai Hui Qi*, 402 S.W.3d at 389 ("In determining whether sovereign immunity has been waived, courts look to the real substance of a plaintiff's cause of action, not the plaintiff's characterization of her claims."). If it is, we must finally review the evidence to determine whether it raises a genuine issue of material fact on the jurisdictional issue.

1. Wilker's legal authority

To determine the scope of Wilker's legal authority, we begin with the relevant statutory and administrative scheme.

Under the Act, a person may not operate a motor vehicle in Texas unless financial responsibility is established for the vehicle through one of the listed statutory means. TRANSP. § 601.051. The purpose of this requirement, and of the Act in general, is "to protect potential claimants from losses resulting from automobile accidents." *Hofstetter v. Loya Ins. Co.*, No. 01-10-00104-CV, 2011 WL 1631938, at *7 (Tex. App.—Houston [1st Dist.] Apr. 28, 2011, pet. denied) (mem. op.) (quoting *Wright v. Rodney D. Young Ins. Agency*, 905 S.W.2d 293, 295 (Tex. App.—Fort Worth 1995, no writ)).

In furtherance of this purpose, the Act mandates that DPS suspend the driver's license of an uninsured motorist upon receipt of a certified copy of an unsatisfied

judgment against the motorist for money damages arising from a traffic crash.[2] TRANSP. § 601.332(a)(1). The DPS Public Safety Commission must promulgate rules and regulations to administer and carry out this mandate. *See id.* § 601.021(1) ("Department Powers and Duties; Rules. The [DPS] shall: administer and enforce this chapter."); TEX. GOV'T CODE § 411.004(3) (granting DPS Public Safety Commission authority to "adopt rules considered necessary for carrying out the department's work"). These rules and regulations are codified in the Administrative Code, Title 37, Chapter 25, entitled, appropriately enough, "Safety Responsibility Regulations." 37 TEX. ADMIN. CODE §§ 25.1–.21.

Two of these rules are at issue in this appeal. First, there is Rule 25.3(a), which provides that "[a] judgment resulting from a crash must arise out of ownership, maintenance, or use of a motor vehicle by the judgment debtor upon a public highway, or be a suit on a settlement agreement resulting from a motor vehicle crash." *Id.* § 25.3(a). Second, there is Rule 25.3(c), which provides that "[a]ction against a judgment debtor will not be taken unless [DPS] receives a certified copy of the judgment, form SR-42 (Transcript of Civil Proceedings), and form SR-62 (Notice of Unsatisfied Judgment), from the person requesting such action." *Id.* § 25.3(c).

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[2] The unsatisfied judgment must be at least 61 days old. *See* TRANSP. § 601.331(a).

Thus, under the relevant rules and regulations, to suspend the driver's license of a judgment debtor, a judgment creditor must provide DPS three documents: (1) a certified copy of the judgment, (2) a transcript of the civil proceedings, and (3) a notice of the unsatisfied judgment. *Id.* These documents must show the crash occurred on a "public highway." *Id.* § 25.3(a). If DPS receives a suspension request satisfying these requirements, it is required to send an order of suspension to the judgment debtor. *Id.* § 25.3(d).

Having summarized the relevant statutory and administrative scheme, we now turn to the evidence of the scope of Wilker's authority within that scheme. This evidence consists entirely of Wilker's deposition testimony.

In his deposition, Wilker testified that he is employed by DPS as a License Analyst IV; that his job is to process suspension requests submitted to DPS according to DPS rules codified in the Administrative Code; that he has no authority to approve a request unless it complies with the applicable rules; and that he has no authority to alter these rules or to make any rules himself. Peniche did not present any evidence to rebut Wilker's deposition testimony. Wilker's testimony is thus undisputed and establishes as a matter of law the scope of his legal authority.

We now consider the real substance of Peniche's complaint to determine whether he has pleaded an ultra vires claim.

2. Peniche's complaint

In his live pleading, Peniche seeks five categories of declarations. We discuss each in turn.

First, Peniche seeks declarations regarding Rule 25.3(c)'s requirement that a judgment creditor provide DPS with a certified copy of the unsatisfied judgment. *Id.* § 25.3(c); *see also* TRANSP. § 601.332(a)(1) ("[O]n receipt of a certified copy of a judgment . . . the department shall suspend the judgment debtor's . . . driver's license and vehicle registration."). Peniche contends this requirement imposes an additional restriction inconsistent with the Act, which he construes as allowing judgment creditors to provide DPS a copy of the judgment verified by the declaration of a qualified Texas attorney in lieu of one certified by the trial court. Peniche therefore seeks declarations that qualified Texas attorneys may verify judgments under the Act and that Wilker acts outside his legal authority in refusing to accept unsatisfied judgments verified by Peniche but not certified by the trial court.

The real substance of the allegations forming the basis of these requested declarations is not that Wilker acts outside his legal authority in enforcing Rule 25.3(c)'s requirement of a certified judgment; instead, it is that the requirement itself is invalid. *See Tex. State Bd. of Examiners of Marriage & Family Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 33 (Tex. 2017) (agency rule is invalid if it "(1) contravenes specific statutory language; (2) runs counter to the general objectives of

the statute; or (3) imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions"). But whether a rule is valid is a separate issue from whether the rule's enforcement is authorized. *See Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011) (per curiam) (distinguishing challenge to "validity of statute" from challenge to State's "actions under it"). We hold that Peniche's allegations regarding Wilker's enforcement of Rule 25.3(c)'s requirement of a certified judgment are insufficient to show an ultra vires act.

Second, Peniche seeks declarations regarding Rule 25.3(c)'s requirement that a judgment creditor provide DPS with a Form SR-62 (Notice of Unsatisfied Judgment). 37 ADMIN. § 25.3(c). The form requires judgment creditors to certify the unsatisfied judgment arises from "an accident that occurred on a public highway as defined in Section 601.162 and did not occur on private property."[3]

Peniche contends this requirement imposes an additional restriction inconsistent with the Act, which he construes as not requiring the accident to have occurred on a "public highway." Peniche therefore seeks declarations that the Act does not require the accident to have occurred on a public highway and that Wilker acts outside his legal authority in requiring judgment creditors to provide Form SR-62s certifying the accident occurred on a public highway.

[3] Form SR-62, Notice of Unsatisfied Judgment, is available online at: https://www.dps.texas.gov/internetforms/getForm.ashx?id=SR-62.pdf.

Again, the real substance of the allegations forming the basis of these requested declarations is not that Wilker acts outside his legal authority in enforcing Rule 25.3(c)'s requirement of a Form SR-62; instead, it is that the requirement itself is invalid. We hold that Peniche's allegations regarding Wilker's enforcement of Rule 25.3(c)'s requirement of a Form SR-62 are insufficient to show an ultra vires act.

Third, Peniche seeks declarations regarding Rule 25.3(c)'s requirement that a judgment creditor provide DPS a Form SR-42 (Transcript of Civil Proceedings). *Id.* The form must be certified by the judge, justice of the peace, or clerk. Peniche contends this requirement violates the Act, which he construes as permitting him to provide DPS a form created and certified by himself as an officer of the court familiar with the relevant facts of the case. Peniche therefore seeks declarations that his self-created and -certified form may be provided to DPS in lieu of the SR-42 and that Wilker acts outside his legal authority in refusing to accept Peniche's form in lieu of the SR-42.

Like the allegations forming the bases of the first two categories of requested declarations, the real substance of the allegations forming the basis of these requested declarations is that the rule's requirement is invalid, not that Wilker lacks authority to enforce the rule. We hold these allegations are insufficient to show an ultra vires act.

Fourth, Peniche seeks declarations regarding an alleged requirement that judgment creditors provide DPS evidence that an investigating officer placed responsibility on the judgment debtor. Peniche contends that DPS requires judgment creditors to provide DPS a crash report or other documentation in which the "investigating officer lists contributing factors that indicate" the judgment debtor was "responsible" for the crash. Peniche contends this requirement violates the Act and therefore seeks declarations that Wilker acts outside his legal authority in requiring that judgment creditors provide evidence that an investigating officer placed responsibility on the judgment debtor. But there is no evidence the Act or rules establish such a requirement or that such a requirement is or has been otherwise imposed by Wilker.

Wilker affirmatively denies Peniche's contention that DPS requires judgment creditors to produce evidence that an investigating officer placed responsibility on the judgment debtor. Peniche does not cite to any statutory provision, rule, or other legal authority imposing such a requirement on judgment creditors. Nor does he cite to an example of Wilker or another DPS employee imposing such a requirement on Peniche or any other judgment creditor seeking the suspension of a judgment debtor's driver's license. Instead, in support of his contention, Peniche cites to a page from the DPS website entitled, "Crash Suspension."[4] It states, as relevant here:

[4] *See* https://www.dps.texas.gov/section/driver-license/crash-suspension.

> Your driver license can be suspended under the Texas Safety Responsibility Act if you meet the following criteria:
>
> - You were involved in an automobile crash;
> - The investigating officer lists contributing factors that indicate you were responsible;
> - You did not have automobile insurance at the time of the crash; and
> - The crash resulted in injury, death, and/or property damage of $1,000 or more.

But this page does not address the circumstances under which DPS must suspend the driver's license of a judgment debtor; instead, it addresses the circumstances under which DPS must suspend the driver's license of a motorist who has not yet been sued. *See* TRANSP. § 601.152(a)(2) ("[T]he department shall suspend the driver's license and vehicle registrations of the owner and operator of a motor vehicle if . . . the department finds that there is a reasonable probability that a judgment will be rendered against the person as a result of the accident."). We hold that the jurisdictional evidence negates the allegations forming the basis of these requested declarations.

Fifth, Peniche seeks a general declaration that Wilker acts outside his legal authority by imposing overly restrictive rules. But as discussed above, Wilker does not "impose" any rule; he merely follows them in determining whether a suspension

request should be granted or denied. We hold that the jurisdictional evidence negates the allegations forming the basis of this requested declaration.

* * *

We hold that Peniche has failed to meet his burden to plead and prove an ultra vires claim or otherwise affirmatively demonstrate the trial court's jurisdiction to hear his declaratory-judgment action against Wilker. Because the jurisdictional bar arises not from Peniche's lack of factual allegations but from the nature of his claims, we further hold that he should not be afforded the opportunity to replead. *See Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 559 (Tex. 2016) (plaintiff is not entitled to right to amend when "jurisdictional bar arises not from a lack of factual allegations but from the nature of the [plaintiff]'s claims"). We sustain Wilker's first[5] and third issues.

Peniche's Cross-Appeal

On September 3, 2020, Peniche filed a notice of cross-appeal. In his notice, he appeals from the trial court's (1) June 12, 2019 order denying in part his motion to compel discovery from DPS, (2) July 2, 2019 order denying his motion for summary judgment as to DPS, (3) July 10, 2019 order granting DPS's amended Rule

[5] Because our holding is dispositive, we need not address Wilker's second issue, in which he argues the trial court erred in denying his plea because Peniche lacks standing.

91a motion to dismiss, and (4) failure to rule on his motion to void the July 10, 2019 order of dismissal.

Peniche also has filed an unopposed motion to supplement the record to include his notice of cross-appeal. We grant Peniche's motion to supplement.

As to Peniche's cross-appeal, Wilker has filed a motion to dismiss it for lack of jurisdiction. Peniche has responded in opposition. Wilker has replied.

We later issued a notice of intent to dismiss Peniche's cross-appeal for lack of jurisdiction. In our notice, we explained in detail why this court appeared to lack jurisdiction as to the cross-appeal. The deadline for Peniche to respond to our notice of intent to dismiss has come and gone. But Peniche has not filed a response to our notice explaining why we are mistaken about our lack of jurisdiction.

Peniche appeals from the trial court's June 12 order denying in part his motion to compel discovery from DPS. But discovery orders are not reviewable in an interlocutory appeal. Instead, a party must seek review in one of two ways. He may appeal from a discovery order after the entry of a final judgment. *See Walker v. Packer*, 827 S.W.2d 833, 841–42 (Tex. 1992). Or he may seek review of a discovery order via a mandamus petition. *See id.* Thus, we lack the jurisdiction to address this ruling here.

Peniche appeals from the trial court's order denying his motion for summary judgment as to DPS. But an order denying summary judgment generally is not

reviewable in an interlocutory appeal. *See Frank's Int'l v. Smith Int'l*, 249 S.W.3d 557, 559 n.3 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (appellate courts lack jurisdiction to address denial of summary-judgment motion, except when trial court grants one side's motion and denies the other's, thereby resulting in a final appealable judgment). Thus, we lack the jurisdiction to address this ruling here.

Peniche appeals from the trial court's July 10 order granting DPS's motion to dismiss. There is statutory authority for reviewing this order on an interlocutory basis. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (party may appeal from interlocutory order granting "a plea to the jurisdiction by a governmental unit"); *Tex. Dep't of Crim. Justice v. Simons*, 140 S.W.3d 338, 349 (Tex. 2004) (party may appeal from interlocutory order on motion to dismiss part of suit for lack of jurisdiction regardless "whether the jurisdictional argument is presented by plea to the jurisdiction or some other vehicle" because "plea to the jurisdiction" refers "not to a particular procedural vehicle but to the substance of the issue raised").

Nonetheless, we still lack jurisdiction to address this ruling because Peniche failed to timely appeal from it. An appeal from an interlocutory order, like this one, is an accelerated appeal. TEX. R. APP. P. 28.1(a). In an accelerated appeal, a party must file his notice of appeal within 20 days after the trial court signs the order. TEX. R. APP. P. 26.1(b). Peniche did not comply with this deadline. And the deadlines for

filing a notice of appeal are jurisdictional. *Gutierrez v. Stewart Title Co.*, 550 S.W.3d 304, 309 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

In Peniche's response to Wilker's motion to dismiss, he argues that his appeal from the July 10 order nevertheless is timely due to Rule 26.1(d) of the Texas Rules of Appellate Procedure, which provides that if any party timely files a notice of appeal, another party may do so within the time period stated in the rule (20 days after the challenged order in this instance, as this is an accelerated appeal) or 14 days after the first filed notice of appeal, whichever is later. Peniche did file his notice of cross-appeal within 14 days of Wilker's August 20, 2020 notice of appeal (from the trial court's August 11, 2020 order denying his jurisdictional plea). But Rule 26.1(d) is an exception to the general rule that a notice of appeal from a judgment entered in a civil suit must be filed within 30 days after the judgment is signed. TEX. R. CIV. P. 26.1. In contrast, in an accelerated appeal, like this one, absent a motion for extension of time, the deadline for filing a notice of appeal is strictly set at 20 days, without exception. TEX. R. APP. P. 26.1(b), 26.3, 28.1(b); *In re K.A.F.*, 160 S.W.3d 923, 927 (Tex. 2005). Thus, Peniche's notice of cross-appeal was not filed by the required deadline, and we therefore lack the jurisdiction to address the trial court's order granting DPS's motion to dismiss.

Peniche appeals from the trial court's failure to rule on his motion to void its July 10 order granting DPS's motion to dismiss. But a failure to rule on a pending

motion is not reviewable on interlocutory appeal. Instead, a failure to rule is reviewable only by way of a mandamus petition. *E.g.*, *In re Wilmington Tr.*, 524 S.W.3d 790, 791 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding); *City of Galveston v. Gray*, 93 S.W.3d 587, 592–93 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding). Thus, we lack the jurisdiction to address this non-ruling.

In sum, we lack the jurisdiction to address the three rulings and one non-ruling from which Peniche cross-appeals. We grant Wilker's motion to dismiss Peniche's cross-appeal and dismiss the cross-appeal for lack of jurisdiction.

Conclusion

We reverse the trial court's order and render judgment dismissing Peniche's suit for lack of jurisdiction.

Gordon Goodman
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Farris.