Affirmed in Part, Reversed and Remanded in Part, and Opinion filed December 28, 2023.

In The

Fourteenth Court of Appeals

NO. 14-22-00559-CV

JRJ PUSOK HOLDINGS, LLC, Appellant

V.

THE STATE OF TEXAS AND KYLE MADSEN IN HIS OFFICIAL CAPACITY AS DIRECTOR OF RIGHT OF WAY, Appellees

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On Appeal from the County Civil Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 1128555

OPINION

When the State acquires property through eminent domain, the former owner has a statutory right to repurchase the property if, among other conditions, the property subsequently becomes unnecessary for public use. The main question presented in this case is whether property acquired in the settlement of a

condemnation proceeding qualifies for purposes of the repurchasing statute as property acquired "through eminent domain." Our answer is yes.

BACKGROUND

In 2013, Joyce Hutcherson, Rudolph Pusok, and Jimmie Pusok (collectively, the "Individuals") were notified of the State's intent to acquire a portion of their property for the development of a highway improvement project. The State initially sought to negotiate a private sale of the property, without having to resort to a formal condemnation proceeding. And to that end, the State submitted a bona fide offer to the Individuals to purchase their property for more than $496,000. But the Individuals rejected that offer, and in 2014, after further negotiations had failed, the State filed a petition for condemnation.

Within three weeks of that filing, the parties agreed to settle the condemnation case. Pursuant to that settlement, the Individuals executed a special warranty deed, which conveyed the property to the State in exchange for more than $680,000. The deed recited that this consideration represented "a settlement and compromise by all parties as to the value of the property herein conveyed in order to avoid ED proceedings and the added expense of litigation." The Individuals also signed Rule 11 agreements, stating that they would not seek any additional compensation, damages, attorney's fees, or expenses. The State in turn moved to nonsuit the case, having asserted in its motion that the parties had "negotiated the sale of the subject property."

More than two years after the settlement, in 2016, the Individuals contacted the Texas Department of Transportation ("TxDOT"), inquiring into the status of the property that they had previously sold. The Individuals believed that a portion of the property had since become "surplus" because the highway improvement project had been rerouted. The Individuals further believed that they had a right to repurchase

the surplus property under Chapter 21 of the Texas Property Code. That chapter entitles a person, or his assigns, to repurchase property acquired through eminent domain if, among other conditions, the property becomes unnecessary for the public use for which the property was acquired. *See* Tex. Prop. Code § 21.101. That chapter also provides that the repurchase price must be the same as the price paid for the property when it was acquired through eminent domain. *See* Tex. Prop. Code § 21.103.

TxDOT refused to sell the property back to the Individuals. In TxDOT's view, the property had been acquired through settlement—not "through eminent domain," as required by Chapter 21.

Following TxDOT's refusal, the Individuals assigned their right of repurchase to JRJ Pusok Holdings, LLC ("Pusok"), which then filed this suit against the State and Kyle Madsen in his official capacity as TxDOT's Director of Right of Way (collectively, the "Defendants"). Pusok asserted three claims in its live pleading. The first claim was against the Defendants for violations of Chapter 21. The second claim was against the State for inverse condemnation. And the third claim was an ultra vires claim against Madsen, in which Pusok sought mandamus and declaratory relief.

The Defendants filed a plea to the jurisdiction, which was styled as a motion to dismiss. The Defendants attached evidence to their plea, which included the petition for condemnation, the special warranty deed, and the Rule 11 agreements. Pusok filed a response with the same evidence attached.

The trial court granted the Defendants' plea and dismissed Pusok's case with prejudice.

This appeal ensued.

CHAPTER 21

As the Individuals' successor in interest, Pusok alleged that it had a statutory right to repurchase certain property that was no longer necessary for the Defendants' highway improvement project. Pusok also alleged that the Defendants were liable under Chapter 21 by not honoring this right, and also by failing to give certain notices.

The Defendants asserted in their plea to the jurisdiction that sovereign immunity protected them from Pusok's allegations and that the trial court had no jurisdiction to rule on them. Under the common law doctrine of sovereign immunity, the State is immune from suit, which means that it cannot be sued in its own courts absent a waiver of immunity. *See Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 115 (Tex. 2010) (per curiam). The State's agencies and officials are also protected by this same type of immunity. *See Mission Consol. Indep. Sch. Distr. v. Garcia*, 253 S.W.3d 653, 655 n.2 (Tex. 2008).

Because the Defendants are both the State and the official of a state agency, they properly asserted their sovereign immunity in a plea to the jurisdiction. *See Christ v. Tex. Dept. of Transp.*, 664 S.W.3d 82, 86 (Tex. 2023). Pusok accordingly had the burden of demonstrating that the trial court had jurisdiction over the Defendants through a constitutional or legislative waiver of immunity. *See Tex. Natural Resource Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

Pusok did not specifically identify a legislative waiver of immunity in its response to the plea to the jurisdiction. Instead, Pusok asserted that immunity had been waived through the Takings Clause of the Texas Constitution.

Now on appeal, Pusok shifts its argument and asserts that Chapter 21 provides a legislative waiver of immunity. Pusok also defends that argument with *State v. LBJ/Brookhaven Investors, L.P.*, 650 S.W.3d 922 (Tex. App.—Dallas 2022, pet. denied), a case that had not been decided at the time that the trial court was considering the Defendants' plea to the jurisdiction.

In *LBJ/Brookhaven*, the Fifth Court of Appeals acknowledged that Chapter 21 does not contain "magic words" of "clear waiver." *Id.* at 931. Nevertheless, the Fifth Court of Appeals determined that Chapter 21 contemplates suits against the State, and that Chapter 21 broadly grants trial courts authority over "all issues" in cases involving a claim for property acquired by eminent domain. *Id.* (citing Tex. Prop. Code § 21.003). The Fifth Court of Appeals explained that this authority must encompass claims involving the right of repurchase, otherwise "it would make little sense to give landowners the right to repurchase property previously taken by eminent domain yet deny them the ability to exercise the right." *Id.* at 932. The court accordingly concluded that "a full reading of Chapter 21, including the purpose of Subchapter E, waives the State's immunity for suits brought under the right of repurchase." *Id.*

The Defendants believe that *LBJ/Brookhaven* was wrongly decided, and they urge us not to follow it. But all of the arguments that they raise before our court were also raised in a petition for review in *LBJ/Brookhaven*, which the Texas Supreme Court recently denied. In light of this background, we conclude that *LBJ/Brookhaven* is persuasive, and we agree with its holding that Chapter 21 provides a legislative waiver of immunity in suits based on the right of repurchase.

Having decided that there is a legislative waiver of immunity, the question then becomes whether Pusok alleged a valid claim within that waiver. *See Rattray v. City of Brownsville*, 662 S.W.3d 860, 866 (Tex. 2023) ("A plaintiff must begin,

therefore, by alleging circumstances that fit within a provision of [a statute] that authorizes a waiver.”).

The Defendants argued in their plea to the jurisdiction that, even if Chapter 21 provided a legislative waiver of immunity, Pusok could not allege, or ultimately prove, that the subject property was acquired through eminent domain, as required by Chapter 21. In the Defendants’ view, property is acquired through eminent domain only when a certain process is completed, beginning with a petition for condemnation and ending with a judgment from the court. The Defendants then turned to evidence such as the special warranty deed, the Rule 11 agreements, and the motion for nonsuit, all of which demonstrated that the Individuals had agreed to settle the State’s condemnation case, rather than litigate it to completion with a final judicial decree. Based on that evidence, the Defendants argued that they had conclusively negated a jurisdictional fact in Pusok’s case.

Pusok did not produce any new or controverting evidence in its response, nor did Pusok otherwise suggest that there were fact issues preventing the trial court from granting the Defendants’ plea to the jurisdiction. Indeed, Pusok fully recognized that its predecessors had conveyed the property to the State in a settlement. However, Pusok argued that the settlement still resulted in the State having acquired the property through eminent domain, as contemplated by Chapter 21.

The parties essentially agree about all of the facts, but they disagree whether Chapter 21 applies to those facts. To resolve this disagreement, we must engage in a matter of statutory interpretation, for which our review is de novo. *See Tex. Dep’t of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002).

Chapter 21 provides that the right of repurchase belongs to a person, or his assigns, whose real property interest was acquired “through eminent domain.” *See*

Tex. Prop. Code § 21.101(a). There is no statutory definition for “eminent domain.” However, that phrase has a longstanding meaning at common law, which we can consider in our interpretation of Chapter 21. *See* Tex. Gov’t Code § 311.023(4).

Black’s Dictionary defines eminent domain as the “the inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking.” Nothing in this definition indicates that a judicial decree is necessary to the exercise of eminent domain, as the Defendants have suggested.

In *City of San Antonio v. Grandjean*, 91 Tex. 430, 41 S.W. 477 (1897), the Texas Supreme Court specifically disavowed the need for such a decree. The Court explained that eminent domain is exercised “against the will of the owner,” that the owner’s opposition to the appropriation is what renders the exercise of eminent domain necessary, and that “it is not consistent with the theory of the doctrine that any conveyance from the owner or decree of court is essential to pass title.” 91 Tex. at 434, 41 S.W. at 479. The Court also explained that the exercise of eminent domain is complete simply when the proper authority determines that a taking is needed, the taking occurs, and the private property owner is compensated for the taking, with or without a writing. *Id.*

We believe that this common law understanding of eminent domain applies to Chapter 21, especially in the absence of any statutory definition conditioning the exercise of eminent domain on the issuance of a judicial decree.

The evidence here showed that the State took the Individuals’ property for the development of a highway improvement project, and that the State compensated the Individuals for the taking. This evidence conclusively established that the State acquired the subject property “through eminent domain.”

The Defendants suggest that the settlement somehow negates the exercise of eminent domain, in part because the special warranty deed recited that the parties had reached a compromise "in order to avoid ED proceedings and the added expense of litigation." But in that earlier transaction, the State had the inherent right to take the subject property for public use, and the Individuals were powerless to stop the taking. Any language in their settlement or deed does not change the manner of acquisition, which was fundamentally involuntary and in the manner of eminent domain. *See Benefit Realty Corp. v. City of Carrollton*, 141 S.W.3d 346, 349–51 (Tex. App.—Dallas 2004, pet. denied) (concluding that a church's sale of property to a city was "involuntary" because the city council had passed a resolution authorizing the taking of the property by eminent domain if private negotiations had failed).

The Defendants also suggest that there is a statutory distinction between acquisitions "by purchase" and acquisitions "by the exercise of eminent domain," but the lone statute that they cite is outside of Chapter 21, and in a different code altogether. *See* Tex. Transp. Code § 203.051(a).

The Defendants also refer to the enacting legislation, which provides that the applicable version of Chapter 21 applies "only to a condemnation proceeding in which the petition is filed on or after the effective date of this Act and to any property condemned through the proceeding." *See* Act effective Sept. 1, 2011, 82d Leg., R.S., ch. 81, § 24, 2011 Tex. Gen. Laws 354, 363. The Defendants focus on this last phrase—that the property must have been "condemned through the proceeding"—and they argue that this jurisdictional fact has been conclusively negated with the evidence of the settlement. This argument fares no better. The State condemned the property by initiating the proceeding. As before, the Individuals were powerless to stop the condemnation. The settlement merely determined the amount of their

compensation. It did not alter the method in which the property was acquired, which was by eminent domain.

In their plea to the jurisdiction, the Defendants also argued that the trial court lacked jurisdiction on the grounds that this claim was not justiciable. They asserted that Pusok lacked a justiciable interest in the property because Pusok's predecessors divested their interest in the property when they conveyed it. The Defendants have not repeated this argument in their appellees' brief, which contains no mention of justiciability whatsoever. Even if they had urged this point again, we would reject it. Pusok's interest in the property is its statutory right of repurchase, and there is nothing in the record to suggest that Pusok or its predecessors waived that right.

In one last point, the Defendants assert in their appellees' brief that they never judicially admitted that the subject property was rendered unnecessary for the public use for which it was acquired, which would otherwise need to be proven before Pusok could exercise the right of repurchase. *See* Tex. Prop. Code § 21.101(a)(3). The Defendants make this assertion because Pusok believed in the proceedings below that they had made such an admission. We need not opine as to whether there was a judicial admission, because at this stage we are merely reviewing the trial court's ruling on a plea to the jurisdiction, and the Defendants never argued in their plea that the evidence conclusively established that the property was still necessary for the public use for which it was acquired.

For all of the foregoing reasons, we conclude that Pusok alleged a valid waiver of immunity under Chapter 21, and that the Defendants did not negate an essential jurisdictional fact. As to this claim under Chapter 21, the trial court erred by granting the Defendants' plea to the jurisdiction.

INVERSE CONDEMNATION CLAIM

Pusok alleged in its inverse condemnation claim that the State became liable for an unconstitutional taking when the State refused Pusok's offer to repurchase the property. The State responded that the trial court must dismiss this claim, again because of sovereign immunity.

The State's sovereign immunity is waived under the Takings Clause of the Texas Constitution for a valid inverse condemnation claim. *See State v. Bhalesha*, 273 S.W.3d 694, 697 (Tex. App.—Houston [14th Dist.] 2008, no pet.). But if a plaintiff fails to plead a valid inverse condemnation claim, then the trial court lacks jurisdiction and the claim must be dismissed. *Id.*

A person asserting a valid inverse condemnation claim must have a vested property right at the time of the taking. *See Greater Houston Dev., Inc. v. Harris County*, No. 14-10-00364-CV, 2010 WL 4950634, at *3 (Tex. App.—Houston [14th Dist.] Dec. 7, 2010, no pet.) (mem. op.). A vested right is "something more than a mere expectancy based upon an anticipated continuance of an existing law." *See Honors Academy, Inc. v. Tex. Educ. Agency*, 555 S.W.3d 54, 61 (Tex. 2018). Stated another way, a right is not vested if it "is predicated upon the anticipated continuance of an existing law and is subordinate to the legislature's right to change the law and abolish the interest." *See Tex. Dept. of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 655 (Tex. 2022).

The State argues that Pusok's right of repurchase is not vested because the legislature could change or abolish it at any time. The State emphasizes that the statutory right of repurchase did not exist until after 2003, and it was modified by the legislature in 2011. Thus, the State asserts that Pusok's claim is entirely predicated upon an anticipated continuance of existing law.

To whatever extent that Pusok based its claim on an uncompensated taking, the State further argues that the claim is invalid because the evidence conclusively established that Pusok's predecessors received compensation for their property.

We believe that both of the State's arguments are legally sound.

Pusok contends on appeal that the State has misconstrued its claim. According to Pusok, there was a reversionary or future interest in the property, which the State took when it refused the offer to repurchase.

Pusok does not cite to any evidence for this alleged reversionary or future interest. Pusok cites instead to two cases, *El Dorado Land Co. v. City of McKinney*, 395 S.W.3d 798 (Tex. 2013) and *Leeco Gas & Oil Co. v. Nueces County*, 736 S.W.2d 629 (Tex. 1987). Both of those cases recognize that a reversionary or future interest in real property is compensable under the Takings Clause, but those cases are factually distinguishable because the interest in each of them was memorialized in a deed. *See El Dorado*, 395 S.W.3d at 799 ("If the City decided not to use the property [as a community park], the deed further granted El Dorado the right to purchase the property."); *Leeco*, 736 S.W.2d at 630 ("Leeco retained a reversionary interest in the deed whereby the County would keep the property 'so long as a public park is constructed and actively maintained' by the County on the property."). By contrast, the deed in this case contains no reversionary or future interest. It merely contains a reservation for oil, gas, and sulfur.

Pusok also suggests that it retained a reversionary interest pursuant to Chapter 21, but that interest is not vested because, as the State has argued, the interest could be changed or abolished at any time.

For all of these reasons, we conclude that the trial court properly dismissed Pusok's inverse condemnation claim as invalid.

ULTRA VIRES CLAIM

Pusok's final claim focused on the notice and offer requirements of Chapter 21. The notice requirement states that a notice of a former property owner's right of repurchase shall be sent "not later than the 180th day after the date an entity that acquired a real property interest through eminent domain determines that the former property owner is entitled to repurchase the property." *See* Tex. Prop. Code § 21.102. And the offer requirement states that, if the former property owner expresses an intent to repurchase the property, "the entity shall offer to sell the property interest to the person for the price paid to the owner by the entity at the time the entity acquired the property through eminent domain." *See* Tex. Prop. Code § 21.103(b). Pusok alleged that Madsen failed to comply with these requirements, and that his noncompliance was ultra vires, for which mandamus and declaratory relief was warranted.

As a state official, Madsen is entitled to sovereign immunity, but a suit against him can proceed even in the absence of a waiver of immunity if his official actions are ultra vires. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). To satisfy this ultra vires exception to sovereign immunity, "a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimate prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *Id.*

Pusok argues that the notice and offer requirements are ministerial because the statutory provisions contain mandatory language—like "shall send [notice]", and "shall offer to sell"—which means that Madsen would have a nondiscretionary duty to act. But Pusok overlooks that both of these requirements hinge on Madsen's "determin[ation] that the former property owner is entitled to repurchase the

property," which means that Madsen must also determine whether the property was acquired "through eminent domain." *See* Tex. Prop. Code § 21.102.

When, as here, an official has been given authority to make some sort of decision or determination, there is a critical distinction between alleged acts that are truly outside of the official's decision-making authority (which are not shielded by sovereign immunity) and alleged acts that the official merely "got it wrong" while acting within his authority (which are shielded). *See Honors Academy, Inc. v. Tex. Educ. Agency*, 555 S.W.3d 54, 68 (Tex. 2018) ("Ultra vires claims depend on the scope of the state official's authority, not the quality of the official's decisions."); *Hall v. McRaven*, 508 S.W.3d 232, 242 (Tex. 2017) ("When the ultimate and unrestrained objective of an official's duty is to interpret collateral law, a misinterpretation is not overstepping such authority; it is a compliant action even if ultimately erroneous.").

Madsen had the authority to determine whether Pusok was entitled to repurchase the property. Because Pusok has merely alleged that Madsen exercised that authority incorrectly, we conclude that Pusok has not demonstrated that the ultra vires exception applies. *Cf. Harris Cnty. Appraisal Dist. v. Braun*, 625 S.W.3d 622, 635 (Tex. App.—Houston [14th Dist.] 2021, no pet.) ("Because the appraiser had the legal authority to determine the merits of Braun's requested homestead exemption, Braun cannot argue that the ultra vires exception applies on the basis that the ultimate disposition of her exemption was incorrect.").

REMAINING ISSUES

In the event that this court were to decide that sovereign immunity was not a bar to one or more of Pusok's claims, the Defendants ask this court to determine whether the claim could still be heard by the statutory county court, where Pusok

filed its suit. We must address this issue because, as we explained above, sovereign immunity does not bar Pusok's claim under Chapter 21.

The statutory county court has jurisdiction to "hear a suit for the recovery of real property." *See* Tex. Gov't Code § 25.1032(d)(6). The Defendants assert that this statutory grant of jurisdiction does not apply because "Pusok is not seeking a judgment awarding it any real property." We disagree with that characterization. By seeking to enforce its right of repurchase, Pusok has brought a suit for the recovery of real property that was previously taken through eminent domain. We therefore conclude that the statutory county court had jurisdiction to hear Pusok's claim under Chapter 21.[1]

In a separate issue, Pusok argues that the trial court erred by finding that Pusok's only recourse was to a participate in a certain bidding scheme. We need not address this argument given our conclusion that Pusok's claim under Chapter 21 is not barred by sovereign immunity. We also need not consider whether the trial court improperly dismissed any claims with prejudice, as opposed to without prejudice. *See* Tex. R. App. P. 47.1.

CONCLUSION

We affirm the portion of the trial court's order dismissing for want of jurisdiction Pusok's inverse condemnation claim against the State and Pusok's ultra

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[1] A statutory county court exercising civil jurisdiction concurrent with the constitutional jurisdiction of the county court has concurrent jurisdiction with the district court in civil cases in which the matter in controversy exceeds $500 but does not exceed $250,000. *See* Tex. Gov't Code § 25.0003(c)(1). Pusok did not plead an amount in controversy here, but when a suit is for an interest in real property, rather than damages, the value of the property interest at issue determines the amount in controversy. *See Eris v. Giannakopoulos*, 369 S.W.3d 618, 622 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd). Pusok has indicated on appeal that it only seeks to a recover a portion of the property that was previously taken, and that this portion has an approximate value of $21,525, which is within the jurisdictional limits of the statutory county court.

vires claim against Madsen. We reverse the portion of the trial court's order dismissing for want of jurisdiction Pusok's claim under Chapter 21 and we remand that claim to the trial court for additional proceedings consistent with this opinion.

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justices Bourliot and Hassan.