Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-22-00540-CV

Al **SUAREZ**, as Mayor of the City of Converse; Jeff Beehler, as Place 5 Member, City Council of the City of Converse; Kathy Richel, as Place 1 Member, City Council of the City of Converse; Shawn Russell as Place 3 Member, City Council of the City of Converse; Marc Gilbert, as Place 6 Member, City Council of the City of Converse; Le Ann Piatt, City Manager of the City of Converse; Holly Nagy as Secretary of the City of Converse; and the City of Converse,
Appellants

v.

Katherine **SILVAS**,
Appellee

From the 438th Judicial District Court, Bexar County, Texas
Trial Court No. 2019CI22419
Honorable Aaron Haas, Judge Presiding

Opinion by: Lori I. Valenzuela, Justice

Sitting: Rebeca C. Martinez, Chief Justice
Luz Elena D. Chapa, Justice
Lori I. Valenzuela, Justice

Delivered and Filed: July 5, 2023

AFFIRMED AND REMANDED

This is the third appeal arising from the removal of Katherine Silvas "from office as a Converse City Council member for allegedly violating a provision of the City Charter—which allegedly invoked a forfeiture of office provision." *Suarez v. Silvas*, No. 04-21-00113-CV, 2022 WL 379965, at *1 (Tex. App.—San Antonio Feb. 9, 2022, no pet.) (mem. op.) ("*Suarez II*"); *see*

also Suarez v. Silvas, 613 S.W.3d 549 (Tex. App.—San Antonio 2020, no pet.) ("*Suarez I*"). We affirm and remand for further proceedings consistent with this opinion.

BACKGROUND

After Silvas was removed, she sued the City of Converse and other defendants (collectively, "appellants"). In her petition for declaratory judgment, she sought three declarations regarding the City Charter: (1) the City Council had no express authority to remove one of its members or to declare a forfeiture of office under the City Charter; (2) there was no express, self-enabling forfeiture under the City Charter; and (3) the City Charter on its face, or as applied, violated the law insofar as the Charter on its face or as applied prohibited members of the City Council from making a lawful request for public information to subordinates of the City Manager. Silvas also alleged the City Council acted ultra vires and without authority in its attempt to remove her. Silvas sought a temporary restraining order and temporary injunction. Appellants filed their first plea to the jurisdiction, which the trial court denied. Appellants then filed their first appeal.

In *Suarez I*, appellants asserted (1) Silvas did not seek a permissible declaration construing an ordinance or statute and did not challenge the constitutionality or validity of a statute or ordinance; (2) Silvas improperly sought retrospective relief for past actions, an ultra vires claim was not properly brought against the City, and Silvas did not allege any ultra vires claims against the City manager or City secretary; and (3) they were entitled to absolute legislative immunity. 613 S.W.3d at 555-57. Regarding the first argument pertaining to Silvas's declaratory judgment claim, this court held that "a home-rule city's charter is its constitution and not its statute or ordinance[; accordingly,] the trial court erred in denying the appellants' plea as to those claims in Silvas's pleadings seeking to have the charter provisions construed." *Id.* at 556. The court reversed the portions of the trial court's order (1) denying the City's plea to the jurisdiction as it related to all declaratory relief claims against the City and (2) denying the remaining appellants'

plea as it related to all declaratory relief claims other than Silvas's ultra vires claims and rendered judgment dismissing those claims. *Id.* at 559.

With regard to appellants' third argument on legislative immunity, the court determined the Council's actions in declaring that Silvas forfeited her office were not legislative in nature, but instead were actions taken to "enforce" the forfeiture provision contained in the City's Charter. *Id.* at 557. Accordingly, the court held "the appellants' actions were not protected by absolute legislative immunity." *Id.* at 557.

As to appellants' challenge to Silvas's ultra vires claim, the court held as follows:

> . . . Silvas's request that the trial court declare the appellants' actions determining she forfeited her office to be void is not a request for retrospective monetary relief. Furthermore, Silvas's live pleadings clearly seek injunctive relief against the appellants to prevent them from taking any future action interfering with her serving as the Place 4 councilmember. Accordingly, *the relief Silvas sought did not "implicate immunity."* [citation omitted] [emphasis added]
>
> Under the ultra vires exception, however, "the governmental entities themselves—as opposed to their officers in their official capacity—remain immune from suit." [citation omitted] Because we have held the trial court erred in denying the appellants' plea as to Silvas's claim seeking a declaration to construe the Charter, and her ultra vires claims are the only claims remaining, the trial court erred in denying the plea as against the City itself. Although the appellants also contend Silvas did not assert any ultra vires claims against the city manager and city secretary, Silvas alleged they maintain the City's website which lists Place 4 on the Council as vacant and has a notice posted stating the Council is accepting applications for Place 4. Silvas further alleged the city manager and city secretary are responsible for compiling and processing the applications.

Id. at 557. Therefore, the court affirmed that portion of the trial court's order denying the plea as it related to Silvas's ultra vires claims against all appellants other than the City. *Id.* at 559-60.

In November 2020, Silvas was reelected and appellants filed a second plea to the jurisdiction arguing her claims should be dismissed as moot. The trial court denied the plea and appellants filed their second appeal. In *Suarez II*, appellants argued (1) Silvas lost standing because her ultra vires claims were now moot and (2) they were immunized against suit by the

City's motion to dismiss them under section 101.106(e) of the Texas Civil Practice and Remedies Code (hereinafter, the "Tort Claims Act"). 2022 WL 379965, at *2-3. The court concluded "Silvas failed to plead facts showing a concrete or particularized injury that could be redressed by the prospective relief she requested." *Id.* at *7. "Therefore, . . . Silvas's ultra vires claims are moot, and she lacks standing to maintain those claims against the City Officials." *Id.* However, Silvas argued that even if her ultra vires claims were moot, her claim for attorney's fees was not moot. *Id.* The court held, "Silvas sought court costs and attorney's fees under the Declaratory Judgments Act—which allows the trial court to exercise its discretion to award attorney's fees to Silvas, [a]ppellants, or no one." *Id.* at *8. Thus, the court concluded Silvas's and appellants' claims for costs and attorney's fees were still live and remanded to the trial court for it to exercise its discretion under the statute. *Id.*

On remand, appellants filed a third plea to the jurisdiction asserting two arguments under Tort Claims Act section 101.106. First, appellants argued that because Silvas sued the City pursuant to section 101.106(a), the trial court should dismiss all of Silvas's claims for attorney's fees and costs against the City employee defendants. Second, they argued that because the City employee defendants moved for dismissal pursuant to section 101.106(f), the trial court should dismiss all of Silvas's claims for attorney's fees and costs against the City employee defendants. Appellants also argued that Silvas did not have a proper claim under the Uniform Declaratory Judgment Act ("UDJA") because her ultra vires claims were moot. The trial court denied the plea and this appeal ensued.

In four issues, appellants assert the trial court erred when it denied their third plea to the jurisdiction (1) by denying defendants' statutory immunity under Tort Claims Act section 101.106, subsections (a) and (f); (2) because Silvas's claim for attorney's fees and costs was based on an unsuccessful request for declaratory judgment on her ultra vires claim, which does not fall within

the limited waiver under the UDJA; (3) as to defendants who have been previously nonsuited and their successors in office and as to defendants who no longer have an actual or legal existence; and (4) by implicitly finding that defendants had waived jurisdiction by making a defensive claim for attorney's fees.

STANDARD OF REVIEW

A plea to the jurisdiction challenges the trial court's subject-matter jurisdiction. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004). Subject-matter jurisdiction is a question of law; accordingly, we review de novo a trial court's ruling on a plea to the jurisdiction. *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007).

The plaintiff bears the initial burden of alleging facts that affirmatively demonstrate the trial court has subject-matter jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the case. *Miranda*, 133 S.W.3d at 226. When a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties to determine if a fact issue exists. *Id.* at 227. The standard of review for a jurisdictional plea based on evidence "generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a(c)." *Id.* at 228. In this case, no evidence was presented or considered and the issue before the trial court was purely a legal question.

ARE APPELLANTS ENTITLED TO STATUTORY IMMUNITY FROM SILVAS'S CLAIM FOR ATTORNEY'S FEES?

Appellants assert the trial court erred by denying their third plea to the jurisdiction because they are entitled to statutory immunity under Tort Claims Act section 101.106. Appellants contend

Silvas sued the City pursuant to subsection (a)[1] of section 101.106 and they moved for dismissal under subsection (f)[2] of section 101.106; therefore, the trial court should have dismissed all of Silvas's claims for attorney's fees and costs against the City employee defendants.

Appellants' argument characterizes Silvas's ultra vires suit as an "official-capacity" suit. "[O]fficial-capacity suits seek to impose liability upon the governmental entity the official represents, and any judgment in such a suit is collectible only against the governmental entity, not against the official's personal assets." *Morgan v. City of Alvin*, 175 S.W.3d 408, 414 (Tex. App.—Houston [1st Dist.] 2004, no pet.). Therefore, appellants contend any award of attorney's fees and costs would be against the City and not the individual employee defendants. According to appellants, because this court determined the City was immune from Silvas's claims, the individual employee defendants are also immune to any claims for attorney's fees and costs. In a somewhat related issue on appeal, appellants also assert the trial court "erred in implicitly finding (if it did) that [appellants'] claim for attorney's fees in a prayer in an appellate brief waived governmental immunity."

Silvas counters that this argument merges the City with the governmental officials acting in their official capacity in an ultra vires manner. We agree. "Governmental immunity protects the State's political subdivisions from suit and liability." *Schroeder v. Escalera Ranch Owners' Ass'n, Inc.*, 646 S.W.3d 329, 332 (Tex. 2022). "However, governmental immunity will 'not bar a

[1] "The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter." TEX. CIV. PRAC. & REM. CODE § 101.106(a).

[2] "If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed." *Id.* § 101.106(f).

suit against a government officer for acting outside his authority—i.e., an ultra vires suit.'" *Id.* "[I]t is clear that suits to require [government] officials to comply with statutory or constitutional provisions are not prohibited by [governmental] immunity, even if a declaration to that effect compels the payment of money." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). "To fall within this ultra vires exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *Id.* The *Suarez I* court held the City remained immune from Silvas's ultra vires claim, but she alleged "a proper ultra vires claim" against the City employee defendants. 613 S.W.3d at 556-57. Therefore, we reject appellants' argument that because the City is immune from Silvas's ultra vires claims, the individual employee defendants are also immune to any claims for attorney's fees and costs.[3]

TRIAL COURT'S DISCRETION TO AWARD ATTORNEY'S FEES UNDER THE UDJA

Appellants next assert Silvas failed to plead a valid waiver of governmental immunity for her claims for attorney's fees and costs under the UDJA. Appellants concede this court previously held Silvas's ultra vires claims seeking injunctive relief to prevent them from taking any future action interfering with her serving on City Council did not "implicate immunity." *Id.* at 557. However, appellants contend the UDJA does not waive their governmental immunity for attorney's fees and costs because Silvas's pleadings do not challenge the validity of an ordinance, statute, or franchise.

[3] The *Suarez II* court also rejected appellants' argument under the Tort Claims Act. In that appeal, the court considered appellants' argument that they were immune from suit by operation of subsection (e) of section 101.106. 2022 WL 379965, *8; *see* TEX. CIV. PRAC. & REM. CODE § 101.106(e) ("If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit."). The *Suarez II* court held, "[t]he Tort Claims Acts does not apply to Silvas's suit. Silvas sued the City and Appellants under the Declaratory Judgments Act." 2022 WL 379965, *9.

The UDJA provides that "[a] person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." TEX. CIV. PRAC. & REM. CODE § 37.004(a). In *Suarez I*, appellants argued Silvas did not assert a permissible claim for a declaration regarding the construction or validity of a statute or ordinance. 613 S.W.3d at 555-56. To resolve this issue, the court had to "first decide whether the Charter [was] a statute or ordinance as those terms are used in section 37.004(a) of the Declaratory Judgments Act." *Id.* at 556. The court held the City's Charter was "its constitution and not its statute or ordinance"; therefore, "the trial court erred in denying the appellants' plea as to those claims in Silvas's pleadings seeking to have the charter provisions construed." *Id.* Accordingly, consistent with our holding in *Suarez I*, we conclude Silvas did not bring a permissible claim under the UDJA. However, this conclusion does not necessarily mean Silvas is not entitled to her attorney's fees under the UDJA. To resolve this issue we must consider whether the UDJA allows only prevailing parties to obtain their attorney's fees.

The UDJA does not require that the trial court award attorney's fees. *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998). The UDJA provides that "[i]n any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. Thus, a party's entitlement to attorney's fees in a declaratory judgment action depends on what is equitable and just, and the trial court's power is, in that respect, discretionary. *Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist.*, 198 S.W.3d 300, 319 (Tex. App.—Texarkana 2006, pet. denied); *see also Bocquet*, 972 S.W.2d at 21 ("The Act's other two limitations on attorney fees awards are that they must be equitable and just.

Matters of equity are addressed to the trial court's discretion."); *In re Est. of Kuykendall*, 206 S.W.3d 766, 772 (Tex. App.—Texarkana 2006, no pet.) ("The trial court's decision whether to award attorney's fees in a declaratory judgment case depends on the court's conclusion whether it is just and equitable to do so under all the circumstances of the case . . ..").

An award of attorney's fees under the UDJA is not dependent on a finding that a party "substantially prevailed." *See Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996); *Bocquet*, 972 S.W.2d at 20 ("The Declaratory Judgments Act does not require an award of attorney fees to the prevailing party."). "In the exercise of its discretion, the trial court may award attorney's fees to the prevailing party, may decline to award attorney's fees to either party, or may award attorney's fees to the nonprevailing party." *Montfort v. Trek Res., Inc.*, 198 S.W.3d 344, 358 (Tex. App.—Eastland 2006, no pet.); *Moosavideen v. Garrett*, 300 S.W.3d 791, 802 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) ("the trial court is not required to award attorney's fees to the prevailing party in a declaratory judgment, and, indeed, may award attorney's fees to the nonprevailing party"); *see also NP Anderson Cotton Exch., L.P. v. Potter*, 230 S.W.3d 457, 467 (Tex. App.—Fort Worth 2007, no pet.) ("When a party pleads several causes of action including a request for a declaratory judgment and an award of attorney fees and is subsequently awarded declaratory relief but denied other relief, the party is entitled only to those attorney fees attributable to the declaratory judgment action."). As such, the fact that Silvas did not prevail on her UDJA claims does not dictate as a matter of law that she should not be awarded attorney's fees. The decision to award or not award attorney's fees in this case remains in the discretion of the trial court.

ISSUE REGARDING CERTAIN NAMED DEFENDANTS

Finally, appellants assert the trial court erred when it denied the third plea to the jurisdiction as to the following defendants: Jeff Beehler, Kathy Richel, Holly Nagy, and Le Ann Piatt because

they have been previously nonsuited or are no longer members of the City Council. All four of these individuals were the movants named in the third plea to the jurisdiction and are appellants in this appeal. Appellants also assert the trial court erred when it denied the third plea to the jurisdiction as to Christopher Clark, Jaqueline Angulo, and Nancy Droneberg because they are successor council members to Beehler, Richel, and Russell. Clark, Angulo, and Droneberg were not parties to the third plea to the jurisdiction. On appeal, Silvas states "there are two officials who are still public officers and against whom [she] has alleged the original ultra vires conduct. Those are [Al] Suarez and [Marc] Gilbert and those two remain in [the] suit and appeal in their individual capacities." If the trial court decides to award attorney's fees, we are confident the trial court will recognize the appropriate remaining City Council members. Therefore, we do not address the merits of this argument.

CONCLUSION

We affirm the trial court's August 23, 2022, Order Denying Defendants' Third Plea to the Jurisdiction and we remand the cause to the trial court for further proceedings consistent with this opinion.

Lori I. Valenzuela, Justice