

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-15-00029-CV

BEAUMONT INDEPENDENT SCHOOL DISTRICT, Appellant

V.

GEORGE W. THOMAS JR., Appellee

On Appeal from the 60th District Court
Jefferson County, Texas
Trial Cause No. B-195,084

MEMORANDUM OPINION

Beaumont Independent School District (BISD) appeals from the denial of its plea to the jurisdiction. George W. Thomas Jr. (Thomas) filed this lawsuit against BISD, wherein he alleges that he was a teacher employed by BISD and that he was wrongfully discharged after he reported “various illegal acts” to certain agencies. Thomas alleges what he describes as a claim under *Sabine Pilot* and a retaliation claim under the Texas Whistleblower Act. *See* Tex. Gov’t Code Ann. §§ 554.001-.010 (West 2012); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex.

1985). We reverse the trial court's denial of the plea to the jurisdiction as to Thomas's *Sabine Pilot* claim and dismiss that claim. Otherwise, without reference to the merits of his claims, we affirm the trial court's order denying the plea to the jurisdiction as to Thomas's retaliation claims under the Texas Whistleblower Act.

BACKGROUND

On December 23, 2013, Thomas filed Plaintiff's Original Petition against BISD and several individual BISD employees, including Dr. Timothy Chargois, Patricia Lambert, Sybil L. Comeaux, and Duaine Harris. Thomas alleged a claim under the Texas Whistleblower Act, and he alleged that the defendants terminated Thomas's employment after he reported the defendants' "various illegal acts" to the Texas Education Agency (TEA) and to law enforcement. Thomas filed "Plaintiff's First Amended Original Petition" on March 12, 2014, and according to BISD, Thomas "subsequently served the individual defendants with process on or about March 21, 2014." On May 5, 2014, Thomas filed "Plaintiff's Second Amended Original Petition" and named only BISD as a defendant.

On August 14, 2014, Thomas filed "Plaintiff's Third Amended Original Petition" which again included a Whistleblower claim, and therein he also added a claim for wrongful discharge under the *Sabine Pilot* doctrine. the Third Amended Original Petition was the live pleading at the time the trial court granted BISD's

plea to the jurisdiction. In his Third Amended Original Petition, Thomas asserts that he began teaching at South Park, a school within BISD, in 2008. According to Thomas, he served as the “In-school Suspension” (ISS) teacher until he was “permanently removed from that position August 26, 2013[,]” despite not having received any “adverse evaluations or reprimands during his tenure in that position.” Thomas alleges that in April of 2013, Duaine Harris, the South Park Middle School Principal, informed Thomas that the ISS students would no longer sign the classroom attendance sheet in the ISS room, but would instead sign in at a “different location.” Thomas contends that, despite Harris’s instructions, Thomas continued to require the ISS students to sign in on a “make-shift sign-in sheet” in order to verify ISS attendance. According to Thomas, Harris approached him in May of 2013, and Harris asked Thomas to show students were in attendance when they were actually “out of school suspended” or absent. Thomas claims that he refused to comply with the request and continued to require all ISS students to sign the makeshift ISS attendance sheet.

Thomas alleges that during the first week in June of 2013, Harris told Thomas that “they want me to put a teacher in ISS[,]” but Harris told him at that time that they would try to keep Thomas on campus. According to Thomas he “continued to be the ISS teacher until Summer Break.” Thomas contends that

“[s]hortly thereafter[.]” he consulted his Texas State Teacher’s Association (TSTA) representative regarding the “illegal acts requested by Principal Harris[.]” notified the Texas Education Agency and law enforcement agencies, and “began to cooperate with their investigations of the attendance fraud at South Park Middle School.” According to the Third Amended Original Petition, Thomas saw Harris at BISD’s convocation in the fall and Harris asked Thomas where the administration had placed Thomas for the fall term, and Thomas responded that his union representative instructed Thomas to return to the South Park campus for the fall term.

Thomas alleges that he was working at South Park Middle School when school resumed on August 26, 2013, and that is when Harris informed Thomas that his name was not on the roll as being a teacher at South Park Middle School and that Harris had talked to the administration and that the “decision to relieve [Thomas] was unchanged.” According to Thomas, he left the campus after retrieving his belongings from the ISS room, and “BISD has failed to employ [him] since that day.”

On November 6, 2014, BISD filed a plea to the jurisdiction (with exhibits). According to BISD, Thomas was hired by BISD in 2009 as a “substitute employed at will[.]” and he “does not hold a teaching certificate[.]” In the plea to the

jurisdiction, BISD argues that Thomas's wrongful-discharge claim is barred by governmental immunity because the Texas legislature has not waived governmental immunity from a wrongful-discharge claim under the *Sabine Pilot* doctrine, and further that the trial court lacks jurisdiction over Thomas's Whistleblower claim because it is barred by the statute of limitations. BISD also contends that Thomas cannot establish he suffered an adverse employment action and cannot establish a causal link between his report and BISD's decision to relieve him from his ISS monitoring assignment. According to the appellate record, BISD never served Thomas with a notice of hearing on the plea to the jurisdiction and no oral hearing was held on the plea. On January 12, 2015, the trial court signed an order denying the plea without issuing findings of fact and conclusions of law. BISD timely filed an interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8) (West Supp. 2015).

ISSUES ON APPEAL

BISD raises four issues on appeal. In issue one, BISD asserts that Thomas's wrongful-discharge claim brought pursuant to the *Sabine Pilot* doctrine is barred by BISD's governmental immunity. In issue two, BISD argues Thomas's retaliation claim under the Texas Whistleblower Act was untimely and therefore barred. In issues three and four, BISD contends that the evidence conclusively

establishes that, under the Texas Whistleblower Act, Thomas did not suffer a qualifying adverse employment action and no causation exists between Thomas's alleged report of wrongdoing and the adverse employment action claimed.

STANDARD OF REVIEW

We review de novo a trial court's disposition of a plea to the jurisdiction. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We focus first on the plaintiff's petition to determine whether the facts that were pleaded affirmatively demonstrate that subject matter jurisdiction exists. *Id.* We construe the pleadings liberally in favor of the plaintiff. *Id.* If the plaintiff has not affirmatively pleaded facts to support jurisdiction or to negate jurisdiction, the matter is one of pleading sufficiency, and the court should provide the plaintiff with the opportunity to amend its pleadings to cure jurisdictional defects. *Id.* at 226-27.

If a plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court may consider evidence and must do so when necessary to resolve the jurisdictional issues raised. *Id.* at 227; *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). When evidence is submitted that implicates the merits of the case, our standard of review generally mirrors the summary judgment standard under Texas Rule of Civil Procedure 166a(c). *Miranda*, 133 S.W.3d at 228; *see*

also Tex. R. Civ. P. 166a(c). The burden is on the governmental unit to present evidence to support its plea. *Miranda*, 133 S.W.3d at 228. If the governmental unit meets its initial burden, the burden then shifts to the plaintiff to show that a disputed material fact exists regarding the jurisdictional issue. *Id.* We take as true all evidence that is favorable to the plaintiff and indulge every reasonable inference and resolve any doubts in the plaintiff's favor. *Id.* If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact question will be resolved by the fact finder. *Id.* at 227-28. If the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, however, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228. When a trial court does not make findings of fact and conclusions of law, we will affirm the trial court's order denying the plea to the jurisdiction if it can be upheld on any legal theory that finds support in the evidence. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

THOMAS'S *SABINE PILOT* CLAIM

In issue one, BISD asserts that Thomas's wrongful-discharge claim brought pursuant to the *Sabine Pilot* doctrine is barred by BISD's governmental immunity. We agree. Sovereign immunity from suit deprives a court of subject matter jurisdiction and is therefore properly asserted in a plea to the jurisdiction. *Harris*

Cty. v. Sykes, 136 S.W.3d 635, 638 (Tex. 2004); *Miranda*, at 225-26; see *City of Dallas v. Albert*, 354 S.W.3d 368, 374 (Tex. 2011) (noting that “waivers of sovereign immunity or consent to sue governmental entities must generally be found in actions of the Legislature[.]”). Governmental immunity protects political subdivisions of the State from lawsuits for damages. See *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). Because it is a governmental unit, a school district is generally immune from suit under the doctrine of sovereign immunity. See *LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992). Governmental immunity, like the doctrine of sovereign immunity, involves two issues: whether the State has consented to suit and whether the State has accepted liability. *Harris Cty. Hosp. Dist. v. Tomball Reg’l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009) (citing *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003)). Immunity from suit is jurisdictional and bars suit; immunity from liability is not jurisdictional and protects from judgments. *Tomball*, 283 S.W.3d at 842 (citing *Miranda*, 133 S.W.3d at 224). Immunity is waived only by clear and unambiguous language. See Tex. Gov’t Code Ann. § 311.034 (West 2013) (“[A] statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language.”); see also, e.g., *Pharr-San Juan Alamo Indep. Sch. Dist. v. Acosta*, 230 S.W.3d 277, 279-80 (Tex.

App.—Corpus Christi 2007, pet. denied) (school district entitled to governmental immunity absent a clear and unambiguous statutory waiver of the district’s immunity).

Thomas states on appeal that he “intends to amend his pleadings to omit any wrongful discharge claim pursuant to the *Sabine Pilot* doctrine.” The Texas Legislature has not waived governmental immunity under *Sabine Pilot*. See *Midland Indep. Sch. Dist. v. Watley*, 216 S.W.3d 374, 381 (Tex. App.—Eastland 2006, no pet.); *Nueces Cty. v. Thornton*, No. 13-03-011-CV, 2004 Tex. App. LEXIS 2103, at *16 (Tex. App.—Corpus Christi Mar. 4, 2004, no pet.) (mem. op.); *Salazar v. Lopez*, 88 S.W.3d 351, 353 (Tex. App.—San Antonio 2002, no pet.) (citing *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994)); *Univ. of Tex. Med. Branch at Galveston v. Hohman*, 6 S.W.3d 767, 777 (Tex. App.—Houston [1st Dist.] 1999, pet. dism’d w.o.j.); *Carroll v. Black*, 938 S.W.2d 134, 134-35 (Tex. App.—Waco 1996, writ denied). We sustain issue one.

THOMAS’S RETALIATION CLAIM UNDER THE TEXAS WHISTLEBLOWER ACT

In issue two, BISD argues that Thomas’s retaliation claim under the Texas Whistleblower Act was untimely and therefore barred. According to BISD, although Thomas timely filed his Original Petition on December 23, 2013, which

according to BISD was the day the limitations period expired, Thomas did not serve BISD with citation until March 21, 2014, “more than twelve weeks after the limitations period had expired.” Thomas argues on appeal that he was not given the opportunity to establish that he used due diligence in serving BISD because the plea to the jurisdiction was denied and he was never given notice of any hearing or setting regarding the plea to the jurisdiction. BISD relies on *Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007) and *Allen v. Dies*, No. 09-10-00157-CV, 2011 Tex. App. LEXIS 4507, at *3 (Tex. App.—Beaumont June 16, 2011, pet. denied) (mem. op.), in arguing that a claim under the Texas Whistleblower Act is properly dismissed as untimely where the plaintiff fails to serve the defendant within the statutory thirty-day period and cannot show that it exercised reasonable diligence in effecting service.

Proulx involved a suit for personal injuries. *Proulx*, 235 S.W.3d at 214. The Texas Supreme Court determined that the summary judgment evidence failed to conclusively establish that the plaintiff did not exercise diligence in effecting service and reversed the court of appeals’ judgment. *Id.* In doing so, the Texas Supreme Court explained that if a plaintiff diligently obtains service after the expiration of the statute of limitations, the date of service relates back to the date of filing. *Id.* at 215. If a defendant affirmatively pleads the defense of limitations and

shows that service occurred after the limitations deadline, the burden shifts to the plaintiff to prove diligence. *Id.* at 216.

In *Allen*, the plaintiff sued the defendants for breach of fiduciary duty. 2011 Tex. App. LEXIS 4507, at *1. Defendants filed a traditional and no-evidence motion for summary judgment and argued, in part, that plaintiff's breach of fiduciary duty claim was barred by the applicable four-year statute of limitations. *Id.* This Court applied the general rule stated in *Proulx* and affirmed the trial court's summary judgment in favor of the defendants because plaintiff did not "adequately explain her effort in procuring service during the more than four months after she filed suit and more than three months after the limitations period expired." *Id.* at **6-7.

The Whistleblower Act provides that a "state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." Tex. Gov't Code Ann. § 554.002(a). The Act expressly waives the employing entity's immunity from an employee's suit alleging a violation of the Act. *Id.* § 554.0035. Sections 554.005 and 554.006 provide the statute of limitations for claims under the Texas Whistleblower Act.

See id. Section 554.005 requires an employee seeking relief under the Whistleblower Act to file suit no later than the 90th day after the date on which the alleged violation (1) occurred or (2) was discovered by the employee through reasonable diligence. *See id.* § 554.005. Section 554.006 provides that a public employee must initiate action under the grievance procedures of the employing governmental entity before filing suit, and the procedures must be invoked no later than the ninetieth day after the alleged violation occurred or was discovered through reasonable diligence. *Id.* § 554.006. Reading sections 554.005 and 554.006 together, the time used by the plaintiff in following the grievance procedures is tolled and excluded from the ninety-day time limit to bring a suit under section 554.005. *Castleberry Indep. Sch. Dist. v. Doe*, 35 S.W.3d 777, 781 (Tex. App.—Fort Worth 2001, pet. dismiss’d w.o.j.).

In the case at bar, BISD does not argue that Thomas failed to timely file his claim within the ninety-day time frame provided in the statute, rather BISD argues only that Thomas failed to use reasonable diligence in serving his claim upon BISD. Regardless of whether the general rule stated in *Proulx* applies to a suit under the Whistleblower Act, the appropriate avenue for raising a statute of limitations defense under the Whistleblower Act is in a motion for summary judgment, not in a plea to the jurisdiction. *See Castleberry*, 35 S.W.3d at 782; *see*

also Tex. R. Civ. P. 94 (statute of limitations is an affirmative defense); *Moore v. Univ. of Houston-Clear Lake*, 165 S.W.3d 97, 100 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (defendant’s challenge to a claim based on the statute of limitations in the Whistleblower Act would be an affirmative defense which cannot be raised in a plea to the jurisdiction) (citing *Univ. of Houston v. Elthon*, 9 S.W.3d 351, 356-57 (Tex. App.—Houston [14th Dist.] 1999, pet. dism’d w.o.j.), *disapproved of on other grounds, Miranda*, 133 S.W.3d at 224); *City of New Braunfels v. Allen*, 132 S.W.3d 157, 161-63 (Tex. App.—Austin 2004, no pet.) (refusing to overrule the holding in *Olofsson* that noncompliance with the limitations provision under the Whistleblower Act is not jurisdictional); *Tex. Dep’t of Mental Health & Mental Retardation v. Olofsson*, 59 S.W.3d 831, 833 (Tex. App.—Austin 2001, pet. dism’d) (noncompliance with the limitations provision of the Whistleblower Act gives rise to the affirmative defense of limitations, but is not grounds for a plea to the jurisdiction). Issue two is overruled.

In issues three and four, BISD contends that the evidence conclusively establishes that, under the Texas Whistleblower Act, Thomas did not suffer a qualifying adverse employment action and no causation exists between Thomas’s alleged report of wrongdoing and the adverse employment action claimed. In arguing issues three and four, BISD relies on the absence of any response being

filed by Thomas to BISD's plea to the jurisdiction in the trial court. More specifically, BISD contends that this Court must assume that the jurisdictional facts alleged in BISD's plea are true as a matter of law. BISD filed a plea to the jurisdiction, but Thomas was never served with a written notice of hearing nor was a hearing or submission date obtained by BISD or otherwise communicated to Thomas's counsel, and the trial court denied the plea without holding a hearing. Thomas argues on appeal that he would have filed a response but he was never given notice of any submission or hearing for the plea and once the plea to the jurisdiction was denied by the trial court, there was no need for him to file a response. Thomas further argues that he was not given an opportunity to provide evidence of jurisdictional facts for this Court's review due to lack of notice under Rule 21 of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 21(b).

BISD's plea to the jurisdiction relating to Thomas's Whistleblower claim required the trial court to examine the evidence relating to the facts pertaining to whether there was an adverse employment action and causation. "When the consideration of a trial court's subject matter jurisdiction requires the examination of evidence, the trial court exercises its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case, mindful that this determination must be made as

soon as practicable.” *Miranda*, 133 S.W.3d at 227. On the record now before us, we cannot say that the trial court abused its discretion in denying the plea to the jurisdiction because the trial court could have reasonably concluded that the plea to the jurisdiction should be denied to allow the record to be more fully developed. *Id.* Accordingly, we need not address the merits of issues three and four.

CONCLUSION

As to Thomas’s wrongful-discharge claim under *Sabine Pilot*, we reverse the trial court’s denial of BISD’s plea to the jurisdiction and dismiss that claim. As to Thomas’s retaliation claim under the Texas Whistleblower Act, we affirm the trial court’s denial of the plea to the jurisdiction and remand the cause to the trial court for further proceedings.

AFFIRMED IN PART; REVERSED AND RENDERED IN PART.

LEANNE JOHNSON
Justice

Submitted on September 24, 2015
Opinion Delivered January 28, 2016

Before McKeithen, C.J., Horton and Johnson, JJ.