COURT OF APPEALS

SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00010-CV

NORTHWEST INDEPENDENT SCHOOL DISTRICT, JOSH WRIGHT, MARK SCHLUTER, DEVONNA HOLLAND, JUDY COPP, ANN DAVIS-SIMPSON, MEL FULLER, LILLIAN RAUCH, AND KAREN G. RUE	APPELLANTS

V.

CARROLL INDEPENDENT SCHOOL DISTRICT	APPELLEE

FROM THE 141ST DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 141-210251-05

NO. 02-16-00014-CV

IN RE NORTHWEST INDEPENDENT SCHOOL DISTRICT	RELATOR

ORIGINAL PROCEEDING

DISSENTING OPINION

As an original member of the panel in *Carroll I* and *Carroll II*, I must respectfully dissent to the majority's opinion in the appeal because I believe that a majority of this court did limit what the trial court could consider *as to the issues raised in Northwest ISD's second plea to the jurisdiction*. The supreme court declined to review that majority opinion. In accordance with principles of stare decisis, then, this court should not allow the trial court to force Northwest ISD to try issues of law that this court has already decided, even if only by a 4-3 majority. *See Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986); *Thomas v. Torrez*, 362 S.W.3d 669, 679 (Tex. App.—Houston [14th Dist.] 2011, pet. dism'd) (noting that court of appeals was bound by its own precedent); *Anheuser-Busch Cos. v. Summit Coffee Co.*, 934 S.W.2d 705, 709 (Tex. App.—Dallas 1996, writ dism'd by agr.); James Wm. Moore & Robert Stephen Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 Tex. L. Rev. 514, 515–17 (1943). The resolution of this appeal is dictated by the standard of review set forth by the supreme court in *Texas Department of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004), which I believe the majority has failed to apply.

In the panel's opinion in *Carroll I*, written by then Chief Justice John Cayce, we reversed the trial court's judgment granting Northwest ISD's first plea to the jurisdiction.[1] 245 S.W.3d 620, 626 (Tex. App.—Fort Worth 2008, pet. denied). The grounds raised in that plea were that a school district is not a person under section 37.011 of the civil practice and remedies code, that the subject matter of the case was not appropriate for relief under section 37.004(a) of the civil practice and remedies code, that a boundary dispute may not be asserted as a declaratory judgment action, that "the exclusive method for changing boundary lines between school districts" is that set forth in section 13.051 of the education code, and that Carroll ISD was improperly attempting to circumvent the quo warranto procedure. Tex. Civ. Prac. & Rem. Code Ann. §§ 37.004(a), 37.011 (West 2015); Tex. Educ. Code Ann. § 13.051 (West 2012). The trial court's order granting the plea to the jurisdiction was based on its specific finding that "the underlying claim . . . i.e., . . . that the existing boundary line between two Texas independent school districts should be modified . . . must be submitted to the

[1]Northwest ISD filed its original plea to the jurisdiction combined with its original answer in response to Carroll ISD's original petition. After Carroll ISD filed a first amended petition, Northwest ISD filed another combined document containing the same plea to the jurisdiction and its first amended answer. The trial court's docket sheet indicates that instead of granting this plea, the trial court granted Northwest ISD's special exceptions and allowed Carroll ISD to replead multiple times. Northwest ISD filed yet another combined plea to the jurisdiction (this time with additional grounds) and third amended answer in response to Carroll ISD's fourth amended petition; this is the plea to the jurisdiction that was at issue in *Carroll I*. We consider this first grouping the "first plea to the jurisdiction."

appropriate authority or authorities as required by the Texas Education Code." We determined that Carroll ISD's declaratory judgment claim was not barred *under section 13.051 of the education code* because Carroll ISD was not seeking to detach the annexed area for purposes of that section in that Carroll ISD was contending that the disputed area had never been part of Northwest ISD's territory in the first place; thus, any move of the line, according to what Carroll ISD had pled, would be a correction of a long-ago error rather than a deannexation. *Carroll I*, 245 S.W.3d at 624–25. The other grounds in Northwest ISD's motion—which we addressed in case the trial court's ruling could be upheld on those grounds—did not involve the issue raised in this appeal. Therefore, our holding was and should be limited to the only ground for dismissal raised by Northwest ISD in that particular plea to the jurisdiction. *Id.* I note that in that opinion, we acknowledged that there is "an existing boundary line" that Carroll ISD contends is not the actual boundary line. *Id.* at 624.

In *Carroll II*, we reviewed the grounds for dismissal raised in subsequent plea-to-the-jurisdiction documents[2] filed by Northwest ISD, some of which were the same as those raised in its first plea to the jurisdiction. *Carroll II*, 441 S.W.3d 684, 691–93 (Tex. App.—Fort Worth 2014, pet. denied) (en banc) (op. on reh'g).

[2]After remand in *Carroll I*, Northwest ISD filed a second plea to the jurisdiction in response to Carroll ISD's fourth amended petition, which it supplemented twice. It then filed another, subsequent combined plea to the jurisdiction and fifth amended answer in response to Carroll ISD's fifth amended petition. We consider this grouping of documents the "second plea to the jurisdiction."

None of the justices thought that those grounds should be revisited. *Id.* at 688, 694–95. The new plea-to-the-jurisdiction ground raised by Northwest ISD in *Carroll II* was that Carroll ISD's claims were actually an election contest governed exclusively by the election code and therefore an impermissible collateral attack on the commissioners' court orders implementing the election results.

In the opinion that I authored, which was joined in full by Justices McCoy and Meier and in part by Justice Dauphinot, I reviewed Carroll ISD's then-live petition against the new grounds for dismissal asserted by Northwest ISD. *Id.* at 688–90. I concluded that to the extent Carroll ISD's petition could be read to claim that the boundary line between the two districts was incorrectly drawn in the 1949 commissioners' court orders implementing the election results establishing the boundaries of Northwest ISD—under the theory that the legal description references to the "County Line between Denton and Tarrant Counties" (the County Line) meant whatever the then-disputed boundary line was ultimately determined to be—such a challenge would be an impermissible election contest and collateral attack on those orders; thus, Northwest ISD was entitled to a dismissal to the extent Carroll ISD was making such a claim. *Id.* at 691–93.

Although I did not expressly state this in the opinion, I note now that the 1949 commissioners' court orders specifically incorporate the legal descriptions of the school district boundaries. And although the metes and bounds legal description establishing Northwest ISD references one of the parts of the

boundary as being the County Line, it also clearly refers to the entire land area as containing 136,322 total acres or 213 square miles. If the County Line were disputed at that time or not fixed for purposes of those commissioners' court orders, then there would have been no way to calculate a total acreage or square mileage for the newly created school district. Thus, although the commissioners' court orders referred to a distinct area with defined boundary lines, Carroll ISD would have this court and the trial court believe that it had disputed this boundary line since its inception despite (1) its failure to present any supportive factual evidence in response to Northwest ISD's plea to the jurisdiction that it has ever disputed this defined boundary line before the final judgment in *Denton Cty. v. Tarrant Cty.*, 139 S.W.3d 22 (Tex. App.—Fort Worth 2004, pet. denied), and (2) the deposition testimony of its 2010 superintendent that Carroll ISD believed that the boundary line that the parties had honored since the inception of Carroll ISD was correct until it "discovered . . . through court action that . . . the line may have moved north." Absent evidence of a latent ambiguity, which Carroll ISD has after every opportunity failed to produce, Carroll ISD's argument that the boundary line established in 1949 is somewhere other than as established in those orders is a contest of or collateral attack on those orders.

Although in *Carroll II* a majority determined that the County Line arguments would amount to an impermissible election contest or collateral attack, keeping in mind the standard of review that requires us to liberally construe pleadings, I also concluded that to the extent Carroll ISD's petition could be read to seek a

declaratory judgment establishing the existing line as referred to in the commissioners' court orders establishing the districts, then Northwest ISD was not entitled to a dismissal as to that one possible, broad reading of Carroll ISD's petition. 441 S.W.3d at 692–93. Because our review of the trial court's ruling was governed by the standard articulated in *Miranda*, we were mindful of the principle that "[i]f the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court[']s jurisdiction *but do not affirmatively demonstrate incurable defects in jurisdiction*, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend." 133 S.W.3d at 226–27 (emphasis added). Thus, we considered Northwest ISD's jurisdictional arguments in light of whether Carroll ISD could possibly replead to avoid the jurisdictional issues raised. *See id.*

In her concurring and dissenting opinion in *Carroll II*, Justice Dauphinot made clear that she "agree[d] with much of the substance of the majority opinion" and therefore concurred in part. *Carroll II*, 441 S.W.3d at 694. She disagreed with remanding any part of the suit because she believed that Carroll ISD's petition could not be read so broadly as to encompass a request for a declaratory judgment construing the meaning of the boundary line in the commissioners' court orders because of a latent ambiguity. *Id.* at 695. In other words, she disagreed with how broadly *Miranda* should be applied to Carroll ISD's then-live pleading. Justice Gardner's dissenting opinion, joined by Justices Walker and Gabriel, also agreed with the parts of my opinion declining to revisit *Carroll I*. *Id.*

The dissenting justices did not believe that Carroll ISD's then-live pleading could be read in any way as an election contest or impermissible collateral attack of the commissioners' court orders. *Id.* Therefore, four justices agreed that any attempt by Carroll ISD to establish the Tarrant-Denton County line located on the ground as a result of the (separate) litigation between those two counties as the districts' boundary line would be an impermissible collateral attack on the commissioners' court orders putting the school district elections into effect.

However, on remand, Carroll ISD made it clear that it has no intention of repleading in accordance with the holding in *Carroll II*. In its Sixth Amended Petition, filed after this court issued its corrected judgment in *Carroll II*, Carroll ISD once again amended its petition to add ultra vires claims against the named school officials for exercising and purporting to exercise Northwest ISD's authority "over the territory that is in dispute in this litigation" because that territory is "located within the boundaries of" Carroll ISD. Carroll ISD again contended that when the boundary was described in the 1949 and 1959 commissioners' court orders, "there was a long-standing dispute over the location of the Tarrant/Denton County Line." By amending its petition solely to add ultra vires claims contending that Northwest ISD officials have wrongfully exercised jurisdiction in the Disputed Area, Carroll ISD has pleaded the exact same theory four of this court's then justices rejected. Because the second plea to the jurisdiction was based on questions of law rather than the resolution of jurisdictional facts, our holding in *Carroll II* was a resolution of a question of law,

and, as such, the trial court is bound by it even though our ruling was on an interlocutory appeal. Therefore, in deciding the scope of its jurisdiction to try the case, the trial court was bound by this court's pronouncements in its opinion, judgment, and mandate, which clearly decided the issue of law in Northwest ISD's favor. *See Hudson*, 711 S.W.2d at 630.

During oral argument in these pending proceedings, Carroll ISD's counsel made much of this court's decision to issue a corrected judgment in this case, stating that only this court knows why we would do such a thing. But the simple answer is this: because Carroll ISD asked us to. Our original judgment read as follows: "This court has considered the record on appeal in this case and holds that there was error in part of the trial court's order. . . . We remand the case to the trial court for further proceedings on appellee's declaratory judgment claim." Carroll ISD filed a motion for rehearing in which it complained that there was no clear majority supporting the judgment. In quoting the above judgment, it underlined the words "there was error" and "remand." It noted that "[w]hile six justices have voted for remand, they all do not agree that 'there was error.'" To correct the problem, Carroll ISD urged this court to petition the supreme court to appoint a tiebreaking justice. *See* Tex. R. App. P. 41.2(b). In response, we issued a corrected judgment that removed the conclusion regarding error:

> We affirm the trial court's denial of appellant Northwest Independent School District's plea to the jurisdiction to the extent that appellee Carroll Independent School District seeks a declaratory judgment regarding the meaning of the orders and judgments creating the actual boundary location between the two school districts.

> Therefore, we remand the case to the trial court for further proceedings on this declaratory judgment claim.

I believe that this corrected judgment accurately reflected a common agreement amongst six justices: three justices thought the trial court had jurisdiction only to the extent Carroll ISD was seeking a declaratory judgment regarding the meaning of the orders and judgments as to the long-honored and existing boundary line, and three others—not a majority—believed that Carroll ISD was not seeking to pursue an election contest; those three did not dispute that Carroll ISD could nevertheless seek a declaratory judgment regarding the meanings of the commissioners' court orders.[3] Either way, jurisdiction of the case would vest in the trial court upon the issuance of this court's mandate, *see Cessna Aircraft Co. v. Aircraft Network, LLC*, 345 S.W.3d 139, 144 (Tex. App.—Dallas 2011, no pet.), and the trial court was bound by the majority's conclusion on the question of law raised in the second plea to the jurisdiction, *Denton Cty.*, 139 S.W.3d at 23.

Because Carroll ISD did not replead in accordance with this court's majority opinion on the question of law in *Carroll II*, the trial court should have followed that holding, granted the third plea to the jurisdiction, and dismissed

[3]In hindsight, it is understandable how the trial court would have difficulty interpreting the extent of its jurisdiction after *Carroll II*, as tends to be the case with any plurality decision with multiple opinions. Although perhaps it would have been more expedient to petition the supreme court to assign a tie-breaking justice, at the time we considered and issued our corrected judgment, the case had been pending in the trial and appellate courts for over nine years.

Carroll ISD's claims in accordance with the principles set forth in *Miranda*. I would reverse the trial court's denial of the third plea to the jurisdiction and render judgment dismissing Carroll ISD's petition. Because that ruling would moot the mandamus, I would dismiss the mandamus petition as moot.

I share everyone's frustration with the tortured procedural course this case has followed in the trial court and appellate courts. To quote a sister court, "This case has created the ironic situation in which the procedural device of the interlocutory appeal—designed to quickly resolve questions of sovereign immunity—has generated unwarranted delay by permitting successive appeals under Tex. Civ. Prac. & Rem. Code § 51.014(8) (permitting the interlocutory appeal of an order that 'grants or denies a plea to the jurisdiction by a governmental unit . . .')." *City of Houston v. Harris*, 192 S.W.3d 167, 170 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (citing *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 358 (Tex. 2001)). Unfortunately, by failing to defer to this court's prior majority holding on an issue of law in *Carroll II*, the majority decision on this third plea to the jurisdiction undermines the principle of stare decisis, having the unintentional effect of contributing to even further taxpayer and party expense, delay, and the wasting of judicial resources. For that reason

and the other reasons set forth in this dissenting opinion, I must respectfully dissent to the majority opinion.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

DAUPHINOT, J., joins.

DELIVERED: October 20, 2016