



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-17-00236-CV

IN RE NURSES LICENSE OF NANCY NICHOLS

On Appeal from the 47th District Court
Randall County, Texas
Trial Court No. 68,809-A, Honorable Dan L. Schaap, Presiding

June 18, 2018

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PARKER, JJ.

In 2015, appellant Nancy Nichols, appearing *pro se*, sued appellees the Texas Board of Nursing and the Texas Workforce Commission concerning the June 14, 2005 revocation of her license to practice nursing. The Board and the Commission filed pleas to the jurisdiction challenging the subject-matter jurisdiction of the trial court. The Board asserted Nichols failed to exhaust her administrative remedies in seeking judicial review of the order revoking her license and her additional tort claims were barred by sovereign immunity. The Commission alleged Nichols' claims against it were barred by sovereign immunity. The trial court sustained both jurisdictional challenges and dismissed Nichols'

claims against the Board and the Commission.¹ Still appearing *pro se*, Nichols appealed. We will affirm the orders of the trial court.

Analysis

The narrow legal question for this appeal is whether Nichols alleged a cause of action within the subject-matter jurisdiction of the trial court.

“A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject matter jurisdiction.” *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). It is not concerned with the merits of the claims alleged. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The determination of a trial court’s subject-matter jurisdiction begins with consideration of the plaintiff’s petition. *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *James v. Underwood*, 438 S.W.3d 704, 708 (Tex. App.—Houston [1st Dist.] 2014, no pet.). In that respect, it is the plaintiff’s burden to plead facts affirmatively showing that the trial court has jurisdiction. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). We liberally construe the pleadings in favor of the pleader, looking to her intent, and accepting as true the factual allegations alleged in the pleading. See *Miranda*, 133 S.W.3d at 226; *City of Fort*

¹ Nichols was entitled to immediately appeal the dismissal orders even though her claim against a third defendant, Tyson Fresh Meats, Inc., was not finally disposed of by the trial court. See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (West Supp. 2017) (permitting appeal from interlocutory order granting the plea to the jurisdiction of a governmental unit); *In re Nurses License of Nichols*, Nos. 07-17-00236-CV, 07-17-00433-CV, 2017 Tex. App. LEXIS 10868 (Tex. App.—Amarillo Nov. 17, 2017, no pet.) (per curiam, mem. op.) (severing from the present appeal and dismissing Nichols’ attempted appeal of an order that dismissed her claims against Tyson under Civil Rule 91a but reserved for later determination the amount of attorney’s fees and costs due Tyson).

Worth v. Crockett, 142 S.W.3d 550, 552 (Tex. App.—Fort Worth 2004, pet. denied) (op. on reh'g).

Sovereign immunity deprives a trial court of subject matter jurisdiction over the state and certain governmental units unless the state consents to suit. *Miranda*, 133 S.W.3d at 224. A governmental unit includes the state, the agencies of government, and all boards and commissions. TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(3)(A) (West Supp. 2017). The Board is a governmental unit, *Tex. St. Bd. of Nursing v. Pedraza*, No. 13-11-00068-CV, 2012 Tex. App. LEXIS 7459, at *12 n.4 (Tex. App.—Corpus Christi Aug. 31, 2012, pet. denied) (mem. op.), as is the Commission. See *Arndt v. Pinard Home Health, Inc.*, 495 S.W.3d 57 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (because of Commission's sovereign immunity, trial court lacked subject matter jurisdiction over a Commission accounts examiner who did not act ultra vires). The plaintiff in a suit against a governmental unit must affirmatively demonstrate the trial court's jurisdiction by alleging a valid waiver of immunity. *DART v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). The limited waiver of sovereign immunity provided by the Texas Tort Claims Act² does not extend to a suit for defamation or claims of intentional tortious conduct. *Ahmed v. Tex. Tech Univ. Health Sci. Ctr. Sch. of Med.*, No. 07-11-00176-CV, 2013 Tex. App. LEXIS 614, at *24 (Tex. App.—Amarillo Jan. 23, 2013, no pet.) (mem. op.). Nor is sovereign immunity waived for a claim for exemplary damages. TEX. CIV. PRAC. & REM. CODE ANN. § 101.024 (West 2011).

² See TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-109 (West 2011 & Supp. 2017).

The Texas Administrative Procedure Act (APA), TEX. GOV'T CODE ANN., Chapter 2001 (West 2016 & Supp. 2017), provides the procedural framework for revocation of a nursing license. *Pedraza*, 2012 Tex. App. LEXIS 7459, at *5. When jurisdiction to resolve a disputed matter is exclusively vested in an agency, parties “must first exhaust administrative remedies before a trial court has subject matter jurisdiction” to consider a dispute. *In re Southwestern Bell Tel. Co., L.P.*, 235 S.W.3d 619, 625 (Tex. 2007) (orig. proceeding). In a suit for judicial review of an adverse agency decision, an aggrieved party’s petition must demonstrate she first exhausted her administrative remedies. See *Janek v. Gonzalez*, No. 03-11-00113-CV, 2013 Tex. App. LEXIS 4781, at *17-18 n.4, *28, *30 (Tex. App.—Austin Apr. 17, 2013, no pet.) (mem. op.) (exhaustion argument considered for first time on appeal); *Macias v. Schwedler*, 135 S.W.3d 826, 829 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (affirming dismissal for want of jurisdiction in case were defendants’ motion to dismiss for lack of jurisdiction alleged plaintiff’s petition did not state facts showing exhaustion of administrative remedies before agency); *Roskey v. Cont’l Cas. Co.*, 190 S.W.3d 875, 880 (Tex. App.—Dallas 2006, pet. denied) (“The trial court makes its determination of jurisdiction based upon what is presented in the pleading and at the hearing”). Except under circumstances not present here, a timely filed motion for rehearing of an agency decision is a statutory prerequisite for the appeal of the agency decision to the district court. TEX. GOV'T CODE ANN. § 2001.145(a) (West 2016). “The purpose of a motion for rehearing is to apprise the agency of the claimed error and allow the agency the opportunity to correct the error or prepare to defend against it.” *Upper Trinity Reg'l Water Dist. v. Nat'l Wildlife Fed'n*, 514 S.W.3d 855, 870 (Tex. App.—Houston [1st Dist.] 2017, no pet.). Under the version of the APA applicable here, a motion for

rehearing in a contested case had to be filed by a party not later than the twentieth day after the date the party or the party's attorney was properly notified of a decision that might become final. TEX. GOV'T CODE ANN. § 2001.146(a).³ Statutory prerequisites to suit are jurisdictional requirements in all suits against a governmental entity. TEX. GOV'T CODE ANN. § 311.034 (West 2013). Thus, failure to exhaust administrative remedies before the agency, including the timely filing of a motion for rehearing, deprives the district court of jurisdiction to review the agency's decision. *Temple Indep. Sch. Dist. v. English*, 896 S.W.2d 167, 169 (Tex. 1995); *Lindsay v. Sterling*, 690 S.W.2d 560, 564 (Tex. 1985) (requirement of having motion for rehearing overruled, thus exhausting administrative remedies, is jurisdictional prerequisite to suit and cannot be waived by action of parties); *Tex. Dep't of Family & Protective Servs. v. Wallace*, No. 03-16-00631-CV, 2017 Tex. App. LEXIS 3386, at *4 (Tex. App.—Austin Apr. 19, 2017, pet. filed) (mem. op.) (same).

Whether a trial court possesses subject matter jurisdiction and whether a pleading alleges facts affirmatively demonstrating a trial court's subject matter jurisdiction are questions of law we review de novo. *Miranda*, 133 S.W.3d at 226.

³ In 2015, the Legislature extended the deadline for filing a motion for rehearing from 20 days to 25 days. Act of May 22, 2015, 84th Leg., R.S., ch. 625, § 9, 2015 TEX. GEN. LAWS 2058, 2060 (codified at TEX. GOV'T CODE § 2001.146(a) ("A motion for rehearing in a contested case must be filed by a party not later than the 25th day after the date the decision or order that is the subject of the motion is signed")); see Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 1, sec. 2001.146, 1993 TEX. GEN. LAWS 583, 748 (providing that a "motion for rehearing in a contested case must be filed by a party not later than the 20th day after the date on which the party or the party's attorney of record is notified as required"). The 2015 change of the deadline for filing a motion for rehearing "appl[ies] only to an administrative hearing that is set . . . on or after" September 1, 2015. *Id.* at §§ 11-12, 2015 Tex. Gen. Laws at 2061-62. Further, "A hearing set before [September 1, 2015], or any decision issued or appeal from the hearing, is governed by the law in effect when the hearing was set." *Id.* at § 11, 2015 Tex. Gen. Laws at 2061.

In addition to reinstatement of her nursing license, Nichols apparently also intended to bring causes of action for “libel, slander, malice, and perjury” against the Board. She sought recovery of exemplary damages as well.

Under the law we have cited, as a prerequisite to judicial review of the Board’s 2005 order revoking her nursing license, Nichols was required to file a timely motion for rehearing with the Board. Nichols did not allege by pleading or evidence in the trial court that she exhausted her administrative remedies before filing suit. Her failure to exhaust administrative remedies by filing a timely motion for rehearing means the trial court had no jurisdiction to review the Board’s revocation order. Nichols’ claims for damages resulting from alleged intentional torts are likewise not within the subject-matter jurisdiction of the district court because immunity from suit for those claims and any exemplary damage claim has not been waived.

As for Nichols’ claims against the Commission, in a hand-written “motion for clarification” filed in the trial court Nichols stated she did not intend to sue the Commission. Nonetheless, the Commission was served with citation and an attached assortment of documents. We have examined those documents and, assuming for the sake of argument they could collectively be said to speak a complaint against the Commission, it is not one for which the Legislature has waived sovereign immunity.

Incurable Jurisdictional Defect

In its answer filed April 24, 2017, the Board, among its defenses, asserted the district court lacked jurisdiction over Nichols’ request for judicial review as Nichols failed to “meet all statutory prerequisites or failed to exhaust administrative remedies.” On May

4, 2017, the trial court gave written notice that a hearing of all pending motions was scheduled for June 1, 2017. On May 15, 2017, the Board filed and served a brief supporting its plea to the jurisdiction. Therein it alleged it had no record that Nichols filed a motion for rehearing following its June 14, 2005 order revoking her license, and accordingly, Nichols failed to exhaust her administrative remedies prior to filing suit. The record contains no amended pleading from Nichols or, for that matter, a response from Nichols to the claim that she had not filed a motion for rehearing. Her brief in this Court is likewise silent on the matter.

Ordinarily, when a plaintiff's petition fails to allege jurisdictional facts she should be given the opportunity to cure the defect by amendment. *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). But this rule applies only if it is possible to cure the pleading defect. *Id.*

We find it would be futile to remand Nichols' licensing claim for repleading because the jurisdictional defect is incurable.⁴ And, concerning Nichols' claims for intentional torts and exemplary damages, no amended pleading could allege facts bringing those claims within a waiver of the state's sovereign immunity.

⁴ The record contains, among the large assortment of documents Nichols filed with the district clerk, a copy of a handwritten request seeking to have the Board's revocation order "removed." The item was addressed to the governor and "the honorable judge." As we construe the documents Nichols filed, her request was received by the Office of the Governor on October 24, 2006. The document bears the State Office of Administrative Hearings docket number 507-05-3106, which was the docket number of the Board's license-revocation proceeding against Nichols. Assuming, without deciding, that the document would have sufficed as a properly-filed request for rehearing, it was not timely filed and could not therefore have satisfied the jurisdictional prerequisite.

Conclusion

In her appellate brief Nichols does not address the trial court's jurisdiction. Rather, she presents nineteen merits-based issues with argument. Because we find the trial court correctly determined it lacked subject-matter jurisdiction we dismiss each of Nichols' appellate issues as we also lack jurisdiction to consider their merits. See *Groves v. Wind Energy Transmission Tex., LLC*, No. 11-12-00107-CV, 2012 Tex. App. LEXIS 6819, at *7-8 (Tex. App.—Eastland Aug. 16, 2012, no pet.) (mem. op.) (concluding in condemnation proceeding that because trial court lacked jurisdiction to consider untimely filed objections to special commissioners' condemnation award court of appeals also lacked jurisdiction) (citing *Pearson v. State*, 159 Tex. 66, 315 S.W.2d 935, 938 (1958)).

The trial court's orders granting the pleas to the jurisdiction filed by the Board and the Commission and dismissing Nichols' claims against those governmental units are affirmed.

James T. Campbell
Justice