In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00297-CV

KEN PAXTON, TEXAS ATTORNEY GENERAL, APPELLANT

V.

WALLER COUNTY, TEXAS, ET AL., APPELLEES

On Appeal from the 98th District Court
Travis County, Texas[1]
Trial Court No. D-1-GN-16-004091, Honorable Maya Guerra Gamble, Presiding

March 4, 2021

OPINION

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

Ken Paxton, Attorney General of Texas, appeals the trial court's order denying his plea to the jurisdiction. We reverse the order of the trial court.

[1]Originally appealed to the Third Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013).

Background

Posted near each entrance to the Waller County Courthouse is a sign, in all capital letters, stating:

> Warning
>
> Pursuant to Texas Penal Code Section 46.03(a)(3), a person commits an offense if the person intentionally, knowingly, or recklessly possesses or goes with a firearm, illegal knife, club, or prohibited weapon listed in Section 46.05(a) on the premises of any government court or offices utilized by the court, unless pursuant to written regulations or written authorization of the court. Violators may be charged with a third degree felony.

In May of 2016, Terry Holcomb, Sr., sent a letter to Waller County Judge Carbett "Trey" Duhon III, in which Holcomb asserted that the County's signage violated the Texas Penal Code and was "actionable under Texas Government Code § 411.209." Section 411.209 of the Government Code prohibits a political subdivision from posting notices barring entry to armed concealed-handgun license holders unless entry is barred by statute. TEX. GOV'T CODE ANN. § 411.209(a) (West Supp. 2020). The statute also authorizes the Attorney General to investigate and sue a political subdivision or state agency that posts an improper notice. *Id.* at (g).

In his letter, Holcomb stated that he would file a complaint with the Texas Attorney General and seek other legal remedies if the signs were not removed within three business days. The County, taking the position that the entire building was off-limits to license holders carrying handguns, declined to remove the signs. Instead, it filed a lawsuit for declaratory judgment, naming Holcomb as the defendant, seeking a declaratory judgment that (1) the signs do not violate section 411.209 and (2) section 46.03(a)(3)

prohibits an individual from carrying firearms and certain other weapons throughout a building that houses a government court. Those proceedings were resolved as discussed in *Waller Cty. v. Holcomb*, No. 01-20-00163-CV, 2020 Tex. App. LEXIS 8864 (Tex. App.—Houston [1st Dist.] Nov. 17, 2020, no pet.) (mem. op.).

Meanwhile, in August of 2016, the Attorney General brought this lawsuit for mandamus and civil penalties against Waller County, Judge Duhon, the four Waller County commissioners, and the Waller County clerk and clerk of the commissioners' court (collectively referred to as Waller County). The Attorney General claimed that the County was unlawfully attempting to prohibit licensed handgun owners carrying handguns from accessing the county courthouse building in its entirety, in violation of section 411.209. Waller County filed counterclaims for declaratory judgment. It sought a judgment determining that (1) the signs at the courthouse did not violate section 411.209, (2) section 46.03(a)(3) of the Penal Code prohibits individuals from carrying firearms and certain other weapons throughout the entire courthouse, (3) the Attorney General had misinterpreted those statutes as they apply to courthouses, and (4) the Attorney General was committing an ultra vires act by seeking civil penalties against Waller County. The County sought, in the alternative, a determination that section 411.209 is unconstitutional on its face or, alternatively, in its application. In response, the Attorney General filed a plea to the jurisdiction, asserting that sovereign immunity barred the County's counterclaims.

The trial court denied the Attorney General's plea to the jurisdiction and granted Waller County's motion to dismiss the petition for writ of mandamus. This interlocutory appeal followed.[2]

Analysis

The Attorney General raises five questions in his appeal, all of which implicate the overriding issue of whether the trial court erred in denying his plea to the jurisdiction against Waller County's counterclaims. We address, in turn, the Attorney General's arguments that his immunity was not waived by the Uniform Declaratory Judgments Act, by the commission of an ultra vires act, or by the filing of a claim for affirmative relief. We then consider the questions of whether the County is entitled to amend its pleadings and whether it may recover attorney's fees on its Uniform Declaratory Judgments Act claims.

Plea to the Jurisdiction

The State and its agencies are generally immune from suit in the absence of an express waiver of its sovereign immunity. *Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011). In suits where the State or its agencies are sued without legislative consent, this immunity from suit deprives a trial court of subject matter jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). A challenge to the trial court's subject matter jurisdiction is properly asserted in a plea to the jurisdiction. *City of Dallas v. Carbajal*, 324 S.W.3d 537, 538 (Tex. 2010). "As subject-matter jurisdiction is a question of law, we review the trial court's ruling on a plea to the

[2] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (West Supp. 2020).

jurisdiction de novo." *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 160 (Tex. 2016) (citing *Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 8 (Tex. 2015)).

A claimant bears the burden of pleading facts that show the district court has subject matter jurisdiction; therefore, in our review, we determine whether the County's pleadings, construed in its favor, allege sufficient facts affirmatively demonstrating the trial court's jurisdiction to hear the case. *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012). Only if the pleadings affirmatively negate jurisdiction should the plea to the jurisdiction be granted without affording the County an opportunity to replead. *Miranda*, 133 S.W.3d at 227.

Does the UDJA Waive the Attorney General's Immunity?

In its pleadings, Waller County asserted that the trial court had jurisdiction over its counterclaims under the Uniform Declaratory Judgments Act ("UDJA"). The UDJA is remedial; its purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations . . . ." TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(b) (West 2020). The Act is not a grant of jurisdiction, but rather is a procedural device for deciding cases already within a court's jurisdiction. *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex. 1996) (original proceeding) (per curiam). Under the UDJA, a limited waiver of governmental immunity is granted for certain declaratory judgment claims that challenge the validity of a statute, ordinance, contract, or franchise. TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a) (West 2020); *City of New Braunfels v. Carowest Land, Ltd.*, 432 S.W.3d 501, 530 (Tex. App.—Austin 2014, no pet.). This waiver only

applies to challenges to validity; it is not enough for a litigant to challenge the actions of a governmental entity under a statute, ordinance, contract, or franchise. *See Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011) ("Sefzik is not challenging the validity of a statute; instead, he is challenging TxDOT's actions under it, and he does not direct us to any provision of the UDJA that expressly waives immunity for his claim.").

In this case, Waller County expressly sought declarations of its rights under statutes. Specifically, Waller County prayed for declaratory judgment (1) "that Penal Code § 46.03(a)(3) prohibits an individual from carrying firearms and other prohibited weapons throughout an entire building that houses a government court, including but not limited to the Waller County Courthouse," (2) "that signs, including but not limited to those posted by Waller County, at a building that houses a government court citing Penal Code § 46.03(a)(3) do not violate Government Code § 411.209," (3) "that the Attorney General's Ruling Letter and Writ of Mandamus misinterpreted Government Code § 411.209 and Penal Code § 46.03(a)(3) as those sections apply to courthouses," and (4) "that the Attorney General is committing an ultra vires act by determining Waller County has violated state law and threatening to pursue civil penalties against Waller County based upon an incorrect application of the law."

These requests do not seek a declaration concerning the validity of section 411.209 of the Government Code or section 46.03 of the Penal Code. Rather, they seek a declaration that construes these statutes and the County's rights thereunder: the County is asking the court to declare that both its interpretation of the law, and its signage regarding firearms based on that interpretation, are correct.

The UDJA does not waive sovereign immunity for "bare statutory construction" claims. *McLane Co. v. Texas Alcoholic Beverage Comm'n*, 514 S.W.3d 871, 876 (Tex. App.—Austin 2017, pet. denied). Because the County is seeking a declaration of its rights under these statutes, not challenging their validity, we conclude that the Attorney General's immunity is not waived under the UDJA.[3] *See Sefzik*, 355 S.W.3d at 622.

Does the County's Ultra Vires Claim Waive the Attorney General's Immunity?

In a related argument, Waller County claims that the Attorney General's immunity is waived because he is committing an ultra vires act by determining that the County has violated state law and seeking to impose civil penalties against the County. *See Houston Belt*, 487 S.W.3d at 157-58 ("[G]overnmental immunity does not bar claims alleging that a government officer acted *ultra vires*, or without legal authority, in carrying out his duties."). However, to fall within the ultra vires exception, a lawsuit "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." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

Here, the Attorney General filed suit pursuant to section 411.209 of the Government Code. Under subsections (f) and (g) of the statute, the Attorney General "must investigate [a] complaint to determine whether legal action is warranted" before bringing suit for violations of the statute. TEX. GOV'T CODE ANN. § 411.209(f),(g). "The

[3] Waller County pled, in the alternative, that section 411.209 of the Government Code is unconstitutional on its face or unconstitutional as applied, but those claims were not challenged in the Attorney General's plea to the jurisdiction.

Attorney General alone has the authority to investigate an alleged violation and decide if it merits further action." *Holcomb v. Waller Cty.*, 546 S.W.3d 833, 838 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (citing TEX. GOV'T CODE ANN. § 411.209(f)-(g)). The statute thus grants the Attorney General the discretion to determine whether to pursue legal action under section 411.209, as he did in this case. Because his determination was authorized by statute, the Attorney General had discretion to make the decision. *See Klumb*, 458 S.W.3d at 9-10.

Waller County maintains that the Attorney General nonetheless exceeded the bounds of his authority in bringing suit, because the County "did not and has not violated § 411.209(a)." But this claim goes to the merits of the legal action initiated by the Attorney General, i.e., whether the Attorney General's legal assessment is correct, and not to the authority of the Attorney General to pursue the claim. An allegation that the Attorney General erred in determining that legal action against the County was warranted is not the same as a showing that the Attorney General exceeded his authority.

To be cognizable, an ultra vires claim must challenge the government official's authority, not whether the government official made an incorrect decision. *See Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Envtl. Quality*, 307 S.W.3d 505, 517-18 (Tex. App.—Austin 2010, no pet.) ("allegations that TCEQ reached an incorrect or wrong result when exercising its delegated authority" did not invoke district court's jurisdiction to remedy ultra vires agency action). Thus, even if we were to assume that the County has not violated section 411.209, it does not follow that the Attorney General exceeded his authority in pursuing the claim. When an official is granted discretion to

interpret the law, an act is not ultra vires merely because it is erroneous; "[o]nly when these improvident actions are *unauthorized* does an official shed the cloak of the sovereign and act *ultra vires*." *Hall v. McRaven*, 508 S.W.3d 232, 243 (Tex. 2017). An official's erroneous decision, made within the bounds of his authority, does not give rise to an ultra vires claim. *Id.* at 241; *see also Sullivan v. Sheridan Hills Dev. L.P.*, No. 14-15-00630-CV, 2017 Tex. App. LEXIS 3970, at *11 (Tex. App.—Houston [14th Dist.] May 2, 2017, pet. denied) (mem. op.) ("A complaint about how the officer exercised his discretion is not an ultra vires complaint."); *Edinburg Consol. Indep. Sch. Dist. v. Smith*, Nos. 13-16-00253-CV, 13-16-00254-CV, 2016 Tex. App. LEXIS 5591, at *39 (Tex. App.—Corpus Christi May 26, 2016, no pet.) (mem. op.) ("[M]erely asserting legal conclusions or labeling a defendant's actions as ultra vires, illegal, or unconstitutional is insufficient to plead an ultra vires claim—what matters is whether the facts alleged constitute actions beyond the governmental actor's statutory authority, properly construed."); *Beacon Nat'l Ins. Co. v. Montemayor*, 86 S.W.3d 260, 267 & n.5 (Tex. App.—Austin 2002, no pet.) (where department had authority to interpret form, "[w]hether TDI's interpretation is correct or incorrect cannot be the factor that confers jurisdiction" under ultra vires doctrine); *N. Alamo Water Supply Corp. v. Texas Dep't of Health*, 839 S.W.2d 455, 459 (Tex. App.—Austin 1992, writ denied) ("The fact that the [agency] might decide 'wrongly' in the eyes of an opposing party does not vitiate the agency's jurisdiction to make [the] decision.").

Section 411.209 of the Government Code authorizes the Attorney General to investigate alleged violations of the statute and decide whether further legal action is warranted. TEX. GOV'T CODE ANN. § 411.209(d). We cannot conclude that the Attorney

General acted outside of his authority in making that determination. Therefore, the County has failed to allege a viable ultra vires claim against the Attorney General, and the Attorney General's immunity has not been waived on that basis.

Did the Attorney General Waive Immunity by Seeking Affirmative Relief?

The Attorney General raises one more defensive theory "in an abundance of caution," arguing that he did not waive immunity by filing this lawsuit because Waller County's counterclaims do not offset any potential recovery by the Attorney General. We, like the Attorney General, do not read the County's pleadings to allege an offset, and no such argument is raised in the County's brief or in its response to the Attorney General's plea to the jurisdiction. As this issue has not been raised by the County, we need not address it here. *See* TEX. R. APP. P. 47.1.

Is the County Entitled to Amend its Pleadings?

Because Waller County did not plead a viable claim under the Uniform Declaratory Judgments Act or a viable ultra vires claim to establish the trial court's subject matter jurisdiction, the Attorney General's immunity was not waived.

Waller County has requested that, if this Court finds the Attorney General's arguments for immunity compelling, the case should be remanded to allow the County an opportunity to cure any defects. *See Sefzik*, 355 S.W.3d at 623 (where plea to the jurisdiction upheld on sovereign immunity grounds, plaintiff allowed to replead if defect can be cured). Although a claimant generally deserves a reasonable opportunity to amend a defective pleading, a claimant need not be afforded such an opportunity where,

as here, the pleading demonstrates an incurable defect or negates the existence of jurisdiction. *See Miranda*, 133 S.W.3d at 227-28; *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007).

Is the County Entitled to Attorney's Fees?

In his final issue on appeal, the Attorney General urges that, because he has retained immunity from Waller County's declaratory judgment claims, he has also retained immunity from the County's attendant claim to attorney's fees under the UDJA. As with its declaratory judgment claims, the County has failed to affirmatively demonstrate the trial court's jurisdiction over its request for attorney's fees. *See City of Dallas v. Turley*, 316 S.W.3d 762, 767 (Tex. App.—Dallas 2010, pet. denied). Therefore, we conclude that the County is not entitled to attorney's fees and sustain this issue.

Conclusion

We reverse the trial court's order denying the Attorney General's plea to the jurisdiction and remand to that court for entry of an order granting the plea and for further proceedings consistent with this opinion.

Judy C. Parker
Justice