# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-16-00726-CV**

**S. O., Appellant**

**v.**

**University of Texas at Austin President Gregory L. Fenves; University of Texas at Austin Registrar Vincent Shelby Stanfield; University of Texas Dean of Students Soncia Reagins-Lilly; University of Texas at Austin Professor Jeana Lungwitz; and University of Texas Regents Paul L. Foster, R. Steven Hicks, Jeffery D. Hildebrand, Ernest Aliseda, David J. Beck, Sara Martinez Tucker, Kevin Paul Eltife, Janiece M. Longoria, and James Conrad Weaver, In their Official Capacities, Appellees[1]**

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 419TH JUDICIAL DISTRICT**
**NO. D-1-GN-16-000517, HONORABLE KARIN CRUMP, JUDGE PRESIDING**

## M E M O R A N D U M  O P I N I O N

S.O. challenges the trial court's order granting the plea to the jurisdiction filed by appellees University of Texas at Austin President Gregory L. Fenves; University of Texas at Austin Registrar Vincent Shelby Stanfield; University of Texas Dean of Students Soncia Reagins-Lilly; University of Texas at Austin Professor Jeana Lungwitz; and University of Texas Regents Paul L. Foster, R. Steven Hicks, Jeffery D. Hildebrand, Ernest Aliseda, David J. Beck, Sara Martinez Tucker, Kevin Paul Eltife, Janiece M. Longoria, and James Conrad Weaver, who were all sued in their official capacities (collectively, the University officials). The trial court concluded that S.O.'s

[1] Pursuant to Rule 7.2 of the Texas Rules of Appellate Procedure, current University of Texas Regents Kevin Paul Eltife, Janiece M. Longoria, and James Conrad Weaver have been automatically substituted for former Regents Wallace L. Hall, Jr., Alex Cranberg, and Brenda Pejovich as appellees.

claims against the University officials were not ripe for review and dismissed the case for lack of subject-matter jurisdiction. We will reverse and remand.

## BACKGROUND

S.O. earned her doctoral degree in organic chemistry from the University of Texas at Austin (the University) in 2008. In 2012, the University instituted a disciplinary investigation into allegations of academic misconduct and, in 2014, attempted to "revoke" S.O.'s degree. The University informed S.O. that her degree had been revoked on February 12, 2014. Two days later, S.O. filed suit against certain University officials (the first lawsuit) asserting that the University's procedures related to its investigation and decision regarding her degree did not comport with the minimum constitutional standards guaranteed by the Texas Constitution's due course of law provision. *See* Tex. Const. art I, § 19. That day, S.O. and the University entered into a Rule 11 agreement specifying that the University would restore S.O.'s degree "subject to further discussions regarding additional process." The University officials then filed a plea to the jurisdiction in which they argued that, because the University had restored S.O.'s degree and initiated a student disciplinary proceeding to consider the allegations against her, S.O. had been provided all the relief she sought in her lawsuit, rendering it moot. The trial court granted the plea to the jurisdiction, and this Court affirmed.

After dismissal of the first lawsuit, the University proceeded with its investigation and, in January 2016, informed S.O. that it intended to hold a disciplinary hearing concerning allegations that S.O. had violated the University's "Institutional Rules," which could subject her to disciplinary sanctions. S.O. then brought the underlying proceeding in which she sought declaratory

and injunctive relief prohibiting the University officials from holding an internal disciplinary proceeding for the purpose of deciding whether to revoke her Ph.D. degree. S.O. alleged that such action was *ultra vires* conduct and a violation of her constitutional rights to due process and equal protection. S.O. also sought a temporary injunction to prevent the University from conducting any proceedings related to her Ph.D. degree pending resolution of her claims. The University officials filed a plea to the jurisdiction in which they asserted that the trial court lacked jurisdiction over S.O.'s claims because they were not ripe. *See Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000) ("The ripeness doctrine prevents premature adjudication of hypothetical or contingent situations.").

In February 2016, the trial court held a hearing on S.O.'s request for a temporary injunction and on the University officials' plea to the jurisdiction. The trial court did not at that time grant temporary injunctive relief nor did it rule on the University officials' plea. In March, S.O. filed a motion for summary judgment. While that motion was pending, the University informed S.O. that it would conduct its disciplinary hearing on October 21, 2016.[2] When the University did not go forward with the proceeding on October 21, 2016, the trial court signed an order reciting that S.O.'s claims were not ripe for review and granting the University officials' plea to the jurisdiction. The trial court dismissed S.O.'s claims, and S.O. perfected this appeal.[3] In two issues S.O. argues that

[2] The record reflects that the hearing did not occur on October 21, 2016, and was rescheduled to take place on April 28, 2017.

[3] On April 20, 2017, this Court granted S.O.'s request for a writ of injunction preventing the hearing from going forward pending disposition of this appeal or further order of this Court. *See In re S.O.*, No. 03-17-00164-CV, 2017 WL 1534210 (Tex. App.—Austin Apr. 20, 2017, orig. proceeding) (mem. op.).

(1) the trial court erred in concluding that her request for a declaratory judgment that the University officials were acting *ultra vires* was not ripe for review and dismissing it for lack of subject-matter jurisdiction, and (2) assuming the University officials' actions were not *ultra vires*, the rules the University intends to apply to the disciplinary hearing do not provide her with adequate due process protection given the nature of the interest at risk and are, for that reason, unconstitutional. Of these two issues, the only one properly before the Court is the first issue, which challenges the trial court's ruling that S.O.'s claims were not ripe. The trial court made no ruling on the merits of S.O.'s complaints regarding whether the internal disciplinary hearing rules afford her due process.

**STANDARD OF REVIEW**

The trial court's subject-matter jurisdiction may be challenged through a plea to the jurisdiction. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The determination of whether a trial court has subject-matter jurisdiction begins with the pleadings. *See Miranda*, 133 S.W.3d at 226. The pleader has the initial burden of alleging facts that affirmatively demonstrate the trial court's jurisdiction to hear the cause. *Id.* (citing *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993)). Whether the pleader has met this burden is a question of law that we review de novo. *Id.* We construe the pleadings liberally in favor of the plaintiff and look to the pleader's intent. *Id.* If 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 plaintiff should be afforded the opportunity to amend. *Id.* at 227. When, as here, the plea to the jurisdiction challenges the sufficiency of the pleadings

rather than any of the jurisdictional facts alleged by the plaintiff, we take as true the facts alleged and construe them liberally in favor of jurisdiction. *Id.* at 226; *First-Citizens Bank & Trust Co. v. Greater Austin Area Telecomms. Network*, 318 S.W.3d 560, 564 (Tex. App.—Austin 2010, no pet.) ("When a plea to the jurisdiction challenges the pleadings, we determine whether the plaintiff has alleged sufficient jurisdictional facts to show the trial court's subject-matter jurisdiction, using a liberal construction in favor of the plaintiff.").

**DISCUSSION**

The University officials' plea to the jurisdiction asserted that S.O.'s claims are not ripe. Ripeness implicates subject-matter jurisdiction and emphasizes the requirement of a concrete injury in order to present a justiciable claim. *Gibson*, 22 S.W.3d at 851; *Patterson v. Planned Parenthood*, 971 S.W.2d 439, 442 (Tex. 1998). Ripeness is concerned with when an action can be brought and seeks to conserve judicial time and resources for real and current controversies rather than hypothetical or remote disputes. *Gibson*, 22 S.W.3d. at 851. A claimant is not required to show that an injury has already occurred, provided the injury is imminent or sufficiently likely. *Id.* at 852; *Patterson*, 971 S.W.2d at 442. "Ripeness concerns not only whether a court *can* act—whether it has jurisdiction—but prudentially, whether it *should*." *Perry v. Del Rio*, 66 S.W.3d 239, 249-50 (Tex. 2001) (emphasis in original). "In addition to restraining courts from issuing unconstitutional advisory opinions, ripeness also has a pragmatic, prudential aspect that aims to conserve 'judicial time and resources for real and current controversies, rather than abstract, hypothetical or remote disputes.'" *Texas Court Reporters Certification Bd. v. Esquire Deposition Servs., L.L.C.*, 240 S.W.3d 79, 92 (Tex. App.—Austin 2007, no pet.). These prudential concerns are foundational to the court's

determination of ripeness, in which it considers (1) the fitness of the issues for judicial decision, and (2) the hardship occasioned to a party by the court's denial of judicial review. *See City of Waco v. Texas Nat. Res. Conservation Comm'n*, 83 S.W.3d 169, 177 (Tex. App.—Austin 2002, pet. denied) (citing *Office of Pub. Util. Counsel v. Public Util. Comm'n*, 843 S.W.2d 718, 724 (Tex. App.—Austin 1992, writ denied)); *see also Atmos Energy Corp. v. Abbott*, 127 S.W.3d 852, 857 (Tex. App.—Austin 2004, no pet.) ("In addition to its constitutional roots, the prohibition against issuing advisory opinions has a pragmatic, prudential aspect based on the desire to conserve judicial time and resources 'for real and current controversies, rather than abstract, hypothetical or remote disputes' and to avoid making bad law." (citing *Patterson*, 971 S.W.2d at 443)).

S.O.'s suit sought a declaration pursuant to the Uniform Declaratory Judgments Act that, by conducting a hearing for the purpose of determining whether to revoke her Ph.D. degree, the University officials are acting beyond their statutorily conferred authority and are violating her constitutional rights to due process and equal protection. *See* Tex. Civ. Prac. & Rem. Code §§ 37.001-.011 (UDJA). A declaratory judgment action under the UDJA is available if (1) a justiciable controversy exists and (2) the controversy can be resolved by court declaration. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). "[A] person seeking a declaratory judgment need not have incurred actual injury; a declaratory judgment action will lie if the facts show the presence of 'ripening seeds of a controversy.'" *City of Waco*, 83 S.W.3d at 175 (citing *Texas Dep't of Banking v. Mount Olivet Cemetery Ass'n*, 27 S.W.3d 276, 282 (Tex. App.—Austin 2000, pet. denied) (quoting *Texas Dep't of Pub. Safety v. Moore*, 985 S.W.2d 149, 153-54 (Tex. App.—Austin 1998, no pet.))). A justiciable controversy is one in which a real and substantial controversy

exists involving a genuine conflict of tangible interest and not merely a theoretical dispute. *Moore*, 985 S.W.2d at 154. Jurisdiction under the UDJA "primarily depends on the nature of the controversy; whether the controversy is merely hypothetical or rises to the justiciable level." *Id*.

Viewing S.O.'s pleadings in her favor, as we must, she alleges that the University does not itself have the authority to divest one of its graduates of a conferred degree through its internal disciplinary proceedings. S.O. complains not simply of the actual revocation of her degree, should that occur,[4] but the fact that the University has put the status of her degree in question and is requiring her to defend it in a proceeding that she alleges the University officials are not authorized to conduct. Thus, S.O.'s pleadings seek a declaration that the University officials' conduct is *ultra vires*, not a declaration that under the facts and circumstances presented revocation is not warranted. The nature of the controversy, therefore, is whether the University officials' act of conducting a disciplinary proceeding to consider revoking S.O.'s degree is *ultra vires*, regardless of its outcome. This controversy is neither hypothetical, contingent, nor remote. In fact, during the pendency of this appeal, the University scheduled a hearing to take place on April 28, 2017.[5]

A declaration concerning whether the University officials are acting with or without legal authority will resolve S.O.'s UDJA claim. A justiciable controversy therefore exists regarding whether the University officials are acting beyond their statutory authority. That controversy provides a jurisdictional basis for a UDJA action seeking a declaration regarding the University

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[4] To the extent S.O.'s pleadings complain of or seek a declaration regarding the actual revocation of her degree, an event that has not occurred, that claim is not ripe.

[5] The hearing did not go forward after this Court granted S.O.'s request for a writ of injunction pending resolution of this appeal. *See In re S.O.*, 2017 WL 1534210, at *2.

officials' authority to conduct the internal disciplinary proceeding at issue in this case. *See* Tex. Civ. Prac. & Rem. Code § 37.002(b) (UDJA is remedial statute designed "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations"); *Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002) (private parties may invoke UDJA to seek declaratory relief against state officials who allegedly act without legal or statutory authority).

This Court has previously recognized that, in the context of agency authority, the "fitness" component of the ripeness analysis may turn on whether the issues presented are legal in nature as opposed to requiring development of particularized facts in light of agency expertise. *Compare City of Waco*, 83 S.W.3d at 175-77 (holding that UDJA claim that agency acted beyond statutory authority "presents a purely legal inquiry" that "will not benefit from the development of additional facts"), *with Beacon Nat'l Ins. Co. v. Montemayor*, 86 S.W.3d 260, 268 (Tex. App.—Austin 2002, no pet.) (distinguishing *City of Waco* and holding that UDJA claims there "require[d] determination of several factual matters which have not been sufficiently developed"); *see also Perry*, 66 S.W.3d at 250 (employing similar analysis in determining the "fitness" for judicial resolution of issues regarding agency's statutory authority by considering whether issues are primarily legal rather than factual in nature, whether further factual development in agency would significantly aid court's ability to decide issue, and whether court's decision would be informed by agency's specialized expertise in applying statute to concrete facts). We conclude that S.O.'s claims regarding the University officials' authority fall in the former category. The scope of the University

officials' authority presents a legal inquiry involving construction of the Texas Education Code as applied to existing facts.[6]

The record establishes that the University is currently attempting to schedule and conduct the internal disciplinary revocation hearing S.O. alleges to be an *ultra vires* act. No purpose would be served by requiring S.O. to wait until the completion of the proposed disciplinary proceedings to challenge the University officials' action. *See, e.g.*, *Strayhorn v. Lexington Ins. Co.*, 128 S.W.3d 772, 780 (Tex. App.—Austin 2004), *aff'd sub nom. Lexington Ins. Co. v. Strayhorn*, 209 S.W.3d 83 (Tex. 2006) ("In the case of an agency allegedly acting outside of its statutory powers, the 'purposes underlying the exhaustion rule are not applicable: judicial and administrative efficiency are not served, and agency policies and expertise are irrelevant, if the agency's final action will be a nullity.'" (quoting *Larry Koch, Inc. v. Texas Nat. Res. Conservation Comm'n*, 52 S.W.3d 833, 839-40 (Tex. App.—Austin 2001, pet. denied))). *Ultra vires* claims are an exception to immunity precisely because they seek *prospective* injunctive relief to require state officials to act within their statutory and constitutional authority and thus do not attempt to exert control over the state but to "reassert the control of the state." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). Once the University officials have conducted the hearing, S.O. may no longer have a claim for prospective relief to enjoin the hearing that is not barred by sovereign immunity. *See id*. at 376 (noting that prospective declaratory relief is permitted for *ultra vires* claims, while retrospective relief is beyond *ultra vires* exception to sovereign immunity); *Texas Logos, L.P. v.*

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[6] We observe, however, that adjudication of S.O.'s separate complaint regarding the constitutionality of the procedural mechanics of the proposed internal disciplinary proceeding would require additional factual development and is therefore not ripe.

*Texas Dep't of Transp.*, 241 S.W.3d 105, 119-20 (Tex. App.—Austin 2007, no pet.) (holding that sovereign immunity barred *ultra vires* claims seeking to invalidate previously executed state contract because that remedy was retrospective in nature). And, once the disciplinary proceeding has been held, S.O.'s *ultra vires* claims will become moot because the very conduct she complains the University officials have no authority to pursue—the hearing to consider revocation of her degree—will have already occurred. These considerations weigh in favor of the conclusion that S.O.'s UDJA claims are "fit" for judicial resolution.

S.O. has alleged a justiciable controversy that will be resolved by the declarations she seeks. This justiciable controversy regarding whether the University officials are acting beyond statutory authority provides a jurisdictional basis for her UDJA claims. *See Texas Mun. Power Agency v. Public Util. Comm'n*, 100 S.W.3d 510, 516 (Tex. App.—Austin 2003, pet. denied) (UDJA action "to interpret scope of an agency's statutory authority . . . is sufficient to invoke the trial court's jurisdiction"). Construing S.O.'s pleadings in her favor, we conclude that her claims for a declaration under the UDJA that the University officials' conduct is *ultra vires* are ripe for adjudication. Consequently, we hold that the trial court had jurisdiction to hear S.O.'s UDJA claims alleging *ultra vires* conduct.[7]

[7] We express no opinion as to the merits of S.O.'s claims, which we remand to the trial court for adjudication.

## CONCLUSION

For the reasons stated in this opinion, we reverse the trial court's order granting the plea to the jurisdiction and remand this cause to the trial court for further proceedings consistent with this opinion.

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Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Bourland

Reversed and Remanded

Filed: June 15, 2017