NUMBER 13-16-00499-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

B&T TOWING, LLC, Appellant,

v.

ROBERT W. SHERWOOD, INDIVIDUALLY, Appellee.

On appeal from the 94th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Benavides Memorandum Opinion Per Curiam

Appellant B&T Towing, LLC petitioned this Court for permission to appeal an interlocutory order that dismissed its claims against appellee Robert W. Sherwood, individually. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d) (West, Westlaw through 2015 R.S.); TEX. R. CIV. P. 168; TEX. R. APP. P. 28.3(a). Sherwood opposed

B&T Towing's petition for permissive appeal. We deny the amended petition and dismiss the appeal for want of jurisdiction.

I. BACKGROUND

According to B&T Towing's amended petition for permissive interlocutory appeal and its attached documents, B&T Towing sued appellee Robert W. Sherwood, a County Constable of Nueces County, Texas. B&T Towing generally complained of Sherwood's alleged failure to follow the Nueces County Commissioners Court order that established "services and maximum fees related to Nueces County law enforcement agency-initiated, incident-management, non-consent towing in Nueces County, Texas" (the Order). More specifically, B&T Towing filed an application for writ of mandamus against Sherwood in his official capacity, seeking to compel Sherwood to follow the Order. B&T Towing also filed a petition, alleging tort claims against Sherwood in his individual capacity for tortious interference with a contract, tortious interference with prospective relations, and conspiracy in restraint of trade.[1] B&T Towing did not sue Nueces County. B&T Towing asserted that jurisdiction over Sherwood in his individual and official capacities was proper because it "alleges ultra vires acts for which [B&T Towing] claims a right to prospective relief by way of [m]andamus from the [o]fficial and retrospective relief from the individual."

Pursuant to Texas Civil Practice and Remedies Code section 101.106, Sherwood moved the trial court to dismiss the intentional tort claims that B&T Towing filed against

[1] B&T Towing, LLC also sued Mrs. Woody Jr's, Inc, Erika's Wrecker Service, and E&J Auto Truck & RV for conspiracy in restraint of trade and Mrs. Woody Jr's for assisting or encouraging. Those defendants are not parties to this permissive appeal request.

him in his individual capacity. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f) (West, Westlaw through 2015 R.S.). Sherwood claimed that the causes of action "for tortious interference with a contract, tortious interference with prospective relations[,] and conspiracy in restraint of trade are based on conduct within the general scope of his employment and could have been brought against Nueces County under the Tort Claims Act." *See id*. Sherwood sought his dismissal as to these claims unless B&T Towing amended its pleadings to dismiss Sherwood and to name Nueces County as a defendant on or before the thirtieth day after the date the motion was filed. *See id*. On July 8, 2016, the trial court found Sherwood met his burden under section 101.106(f) and dismissed B&T Towing's claims that were filed against Sherwood, individually.

B&T Towing filed a motion to reconsider and, in the alternative, a motion for permissive interlocutory appeal. The trial court denied the motion to reconsider, affirming its July 8 finding that Sherwood met his burden under section 101.106(f). Regarding B&T Towing's request for permission to appeal, the trial court found that the order to be appealed involved the following controlling questions of law as to which there were substantial grounds for difference of opinion: (1) what is the correct legal standard to be applied to Sherwood's request for relief under section 101.106(f); and (2) what effect, if any, does B&T Towing's ultra vires claim against Sherwood in his official capacity have on the trial court's analysis of Sherwood's right to relief under section 101.106(f). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d); TEX. R. CIV. P. 168. The trial court further found that an interlocutory appeal of these issues would materially advance the ultimate termination of the litigation "because a finding of conspiracy between the

remaining Defendants will likely result in the need for a new trial if it is determined upon a final appeal that Defendant Sherwood's dismissal in his individual capacity was in error." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d); TEX. R. CIV. P. 168. Based on these findings, the trial court granted B&T Towing's alternative motion for permissive interlocutory appeal. *See* TEX. R. APP. P. 28.3(a).

B&T Towing timely filed its petition for permissive appeal in this Court on September 21, 2016 and its amended petition on September 27, 2016. *See id*. And on September 28, 2016, Sherwood filed his response to the petition for permissive appeal, claiming, among other things, that the order to be appealed does not involve a controlling question of law. *See id.* R. 28.3(f).

II. THE LAW

A. Permissive Appeals

Texas Civil Practices and Remedies Code section 51.014, subsections (d), (e), and (f), Texas Rule of Civil Procedure 168, and Texas Rule of Appellate Procedure 28.3 delineate the procedure for filing a permissive appeal. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d–f); TEX. R. CIV. P. 168; TEX. R. APP. P. 28.3.

1. Texas Civil Practices and Remedies Code Section 51.014

Section 51.014 of the Texas Civil Practices and Remedies Code provides a "narrow exception to the general rule that only final judgments and orders are appealable," and we strictly construe its jurisdictional requirements. *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001); *see Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 841 (Tex. 2007); *see also King-A Corp. v. Wehling*, No. 13–13–00100–

CV, 2013 WL 1092209, at *3 (Tex. App.—Corpus Christi Mar.14, 2013, no pet.) (mem. op.) (per curiam). If the record fails to show the propriety of appellate jurisdiction, we must dismiss the appeal. *Gulf Coast Asphalt Co., L.L.C. v. Lloyd*, 457 S.W.3d 539, 541 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Rawlins v. Weaver*, 317 S.W.3d 512, 514 (Tex. App.—Dallas 2010, no pet.).

Section 51.014(d) provides that a trial court may permit an appeal from an interlocutory order that would not otherwise be appealable "if the order involves a controlling question of law as to which there is a substantial ground for difference of opinion" and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d); *see* TEX. R. CIV. P. 168. There has been little development in the case law construing section 51.014(d). *Gulf Coast Asphalt Co.*, 457 S.W.3d at 544. Relevant to B&T Towing's petition, when determining whether substantial grounds for disagreement exist, courts have considered whether the question presented to the court is novel or difficult, whether controlling law is doubtful, whether controlling law is in disagreement with other courts of appeals, and whether there simply is little authority upon which the district court can rely. *See id*. at 545 (citing Renee Forinash McElhaney, *Toward Permissive Appeal in Texas*, 29 St. Mary's L.J. 729, 747–49 (1998) (suggesting that courts look to federal cases interpreting similar language in the federal counterpart to section 51.014 that is contained at 28 U.S.C. § 1292(b)); *Undavia v. Avant Med. Group, P.A.*, 468 S.W.3d 629, 632–34 (Tex. App.—Houston [14 Dist.] 2015, no pet.); *see also King-A Corp.*, 2013 WL 1092209, at *3.

2. Texas Rule of Civil Procedure 168

Regarding the content of the trial court's order, Texas Rule of Civil Procedure 168 provides, in relevant part, the following: "Permission [to appeal] must be stated in the order to be appealed. . . . The permission must identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation." TEX. R. CIV. P. 168.

3. Texas Rule of Appellate Procedure 28.3

A petition for permissive appeal filed in this Court must contain a clear and concise argument regarding why the order to be appealed meets the requirements of section 51.014. *See* TEX. R. APP. P. 28.3. The requesting party must establish that: (1) the order subject to appeal involves "a controlling question of law as to which there is a substantial ground for difference of opinion"; and (2) an immediate appeal "may materially advance the ultimate termination of the litigation." *Id.*; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d); TEX. R. CIV. P. 168.

B. Election of Remedies in Suits Against a Governmental Unit, Its Employees, or Both

Section 101.106, the election of remedies section of the Act, contains six subsections dealing with grants of immunity and procedural requirements for suits seeking to recover from a governmental unit, its employee, or both. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(a)–(f); *see Newman v. Obersteller*, 960 S.W.2d 621, 623 (Tex. 1997) (concluding that section 101.106 is an immunity statute). Subsection (f) applies when suit is filed against an employee of a governmental unit and he seeks dismissal.

Id. at § 101.106(f).

Section 101.106(f) provides:

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

Id. In other words, "[s]ection 101.106(f) of the Texas Tort Claims Act provides that a suit against a government employee acting within the general scope of his employment must be dismissed 'if it could have been brought under this chapter [that is, under the Act] against the governmental unit.'" *Franka v. Velasquez*, 332 S.W.3d 367, 369 (Tex. 2011) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f)). And, "'all [common-law] tort theories alleged against a governmental unit . . . are assumed to be 'under [the Tort Claims Act]' for purposes of section 101.106.'" *Id.* at 369 (editorial marks in original) (quoting *Mission Consol. Indep. School Dist. v. Garcia*, 253 S.W.3d 653, 659 (Tex. 2008) and reviewing cases that "firmly establish" this rule). Regarding negligence claims against employees, the *Franka* Court explained that

> [p]roperly construed, section 101.106(f)'s two conditions are met in almost every negligence suit against a government employee: he acted within the general scope of his employment and suit could have been brought under the Act—that is, his claim is in tort and not under another statute that independently waives immunity. In such cases, the suit "is considered to be against the employee in the employee's official capacity only", and the plaintiff must promptly dismiss the employee and sue the government instead. . . . The immunity issue need not be determined until the governmental unit is in the suit and the issue can be fully addressed.

Id. at 381 (citing TEX. CIV. PRAC. & REM. CODE ANN. 101.106(f)). The court distinguished

between negligence and intentional tort claims by noting only that "[w]hether an employee's intentional tort is within the scope of employment is a more complex issue." *Id.* (citing RESTATEMENT (THIRD) OF AGENCY 7.07 (2006) ("An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.")).

IV. DISCUSSION

In its petition for permission to appeal, B&T Towing contends that the trial court improperly dismissed Sherwood in his individual capacity. It claims that it is entitled to a permissive interlocutory appeal because the order of dismissal involves two controlling questions of law. *See* TEX. R. APP. P. 28.3(e)(4); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d)(1). It also asserts that the appeal would materially advance the ultimate termination of its suit. *See* TEX. R. APP. P. 28.3(e)(4); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d)(2).

A. Questions of Law

1. What Standard Should Have Been Used?

The first controlling question that B&T Towing identifies addresses the applicable standard for determining whether suit should have been filed against a governmental employee or the governmental unit for which he was employed in a motion-to-dismiss proceeding under section 101.106(f). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f). For the purposes of this opinion, we will assume, without deciding, that this question is a controlling question of law. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d). We must then determine whether there is a substantial ground for a

difference of opinion regarding this question. *See id.*; *Gulf Coast Asphalt*, 457 S.W.3d at 545.

B&T Towing asserts that the applicable standard requires a showing of whether the complained-of acts arose from the defendant's performance of (1) discretionary duties in (2) good faith as long as he was (3) acting within the scope of his authority. *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994) (explaining that official immunity protects a public official from suit arising from performance of his (1) discretionary duties (2) in good faith (3) within the scope of his authority). The trial court disagreed and considered the following: (1) was B&T Towing's suit based on conduct within the general scope of Sherwood's employment; and (2) could suit have been brought against Nueces County under the Texas Tort Claims Act (the Act). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f).

We note that the plain language of section 101.106(f) and the case law discussing this section identify and expressly provide two conditions to be considered when a motion to dismiss is filed. *See*, *e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 101.106; *Franka*, 332 S.W.3d at 369, 381 (explaining that if both conditions are met, the suit "is considered to be against the employee in the employee's official capacity only, and the plaintiff must promptly dismiss the employee and sue the government instead"); *see also Garcia*, 253 S.W.3d at 656 (noting that section 101.106 "force[s] a plaintiff to decide at the outset whether an employee acted independently and is thus solely liable, or acted within the general scope of his or her employment such that the governmental unit is vicariously liable"). The conditions are (1) whether the complained-of conduct fell within the general

scope of that employee's employment, and (2) whether suit could have been brought against the government entity under the Act. *See*, *e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 101.106; *Franka*, 332 S.W.3d at 369, 381; *see also Garcia*, 253 S.W.3d at 656. B&T Towing argues that the proper standard in this motion-to-dismiss proceeding involves a determination of official immunity. Yet it provides no authority for its argument, and we find none. Instead, applying the reasoning of the supreme court in *Franka*, the immunity issue need not be decided until it is determined that the employee and not the government unit is in the suit and then the issue of immunity can be fully addressed. *See* 332 S.W.3d at 381.

Based on the above, the controlling law is not doubtful—the conditions set out in section 101.106(f) of the civil practices and remedies code form the standard. *See Gulf Coast Asphalt*, 457 S.W.3d at 545. We have found no disagreement among the courts of appeals, and there is ample authority upon which the courts can rely. *See id.* And while the issue presented by B&T Towing is arguably a novel presentation, it is not a difficult question. *See id.* We conclude that, even if this is a controlling question, there is not a substantial ground for a difference of opinion regarding what standard should have been applied in this case. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d); *Gulf Coast Asphalt*, 457 S.W.3d at 545.

2. What Was the Effect of Alleging Ultra Vires Acts?

B&T Towing presents a second question of law. The trial court's order identified this question as follows: "[W]hat, if any, effect does Plaintiff's ultra vires claim against Defendant Sherwood in his official capacity have on the [c]ourt's analysis of Defendant

Sherwood's right to relief under 101.106(f)."[2] But, in its petition for permissive appeal, B&T Towing expresses the controlling question differently—"Whether claims for retrospective damages may be sustained against a government official in his [individual] capacity when an ultra-vires act is alleged and ultimately proved?" B&T Towing asserts that this question "can best be summed up as" follows: "Can a government official be liable for retrospective damages in his individual capacity when ultra-vires acts are alleged?"

a. Rule 168 Requirements

Rule 168 specifically requires the trial court's written order identify the questions of law. *See* TEX. R. CIV. P. 168. The trial court must also find, in its order, that these questions are controlling and that there is a substantial ground for a difference of opinion. *See id.* In its petition requesting permission to appeal, B&T Towing presents the question in terms of Sherwood's liability for retrospective damages when ultra vires acts are alleged against Sherwood in his individual capacity. But the trial court's order did not specifically identify B&T Towing's question, as required by rule 168. *See id.* The trial court did not set out B&T Towing's question as a controlling question. *See id.* It did not state that there was a substantial ground for a difference of opinion regarding B&T Towing's question. *See id.* Instead, the trial court's order identified a controlling question of law that addressed the effect of ultra vires claims against Sherwood in his

[2] The trial court's order included the following conclusion: "ultra vires claims may only be brought against governmental employees in their official capacities for prospective relief; therefore, Plaintiff's ultra vires claim has no bearing on Plaintiff's claims against Defendant Sherwood individually for retrospective relief, and thus Defendant Sherwood's request for relief under 101.106(f)."

official capacity on the court's analysis of relief under section 101.106(f). From our review of the record, B&T Towing's question in its petition appears to address issues different from those identified in the question set out in the trial court's order. Thus, the requirements of rule 168 have not been satisfied as to the question presented for our review. *See id.*

b. Rule 28.3(e)(4) Requirements

Nonetheless, the appellate rules require the petition for permissive appeal to "argue clearly and concisely why the order to be appealed involved a controlling question of law as to which there is a substantial ground for difference of opinion." TEX. R. APP. P. 28.3(e)(4). As to the question set out by the trial court, B&T Towing does not mention, discuss, or analyze that specific question. *See* TEX. R. APP. P. 28.3(e)(4); *see also Richardson v. Kays*, No. 02–03–241–CV, 2003 WL 22457054, at *2 (Tex. App.—Fort Worth Oct. 30, 2003, no pet.) (mem. op.) (per curiam) (denying an application to appeal that did "not mention, discuss, or analyze why the issue . . . involves a controlling question of law as to which there is a substantial ground for difference of opinion"). And, regarding the question identified by B&T Towing in its petition, B&T Towing has not argued clearly and concisely that question. *See* TEX. R. APP. P. 28.3(e)(4). B&T Towing has not addressed why its question involves a controlling question of law as to which there is a substantial ground for difference of opinion. *See id.*

3. Summary

Given the limited nature of interlocutory appeals and the requirement that we construe statutes authorizing such appeals strictly, *see Bally Total Fitness*, 53 S.W.3d at

355, we conclude that the question regarding the proper standard for determining a motion to dismiss under section 101.106(f) is not a controlling question of law as to which there is a substantial ground for difference of opinion and upon which a permissive appeal may be based. *See* TEX. R. APP. P. 28.3; TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d); *see also* TEX. R. CIV. P. 168. We further conclude that the question regarding the effect of ultra vires acts in certain instances has not been adequately briefed. *See* TEX. R. APP. P. 28.3(e)(4).

B. Ultimate-Termination Prong

Addressing the second prong of a permissive appeal, B&T Towing contends that this permissive appeal will materially advance the ultimate termination of the suit. *See* TEX. R. APP. P. 28.3(e)(4); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d). Having concluded that there is no controlling question of law for our review, we need not address the ultimate-termination prong because it is not dispositive of this appeal. *See* TEX. R. APP. P. 47.1.

IV. CONCLUSION

Because B&T Towing has not satisfied the statutory requirements of section 51.014(d), we deny its amended petition for permission for permissive appeal and dismiss the appeal for want of jurisdiction.

PER CURIAM

Delivered and filed the
27th day of October, 2016.