NUMBER 13-17-00505-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

MICHAEL MCCANN, **Appellant,**

v.

KANDI TORRES, KEISHA COLLINS, OLIVER J. SMITH, JENNIFER SMITH, AND JANET SALLES, **Appellees.**

On appeal from the 36th District Court of Bee County, Texas.

MEMORANDUM OPINION

Before Justices Contreras, Longoria, and Hinojosa
Memorandum Opinion by Justice Contreras

Appellant Michael McCann, pro se, appeals the judgment of the trial court dismissing his suit against appellees Kandi Torres, Keisha Collins, Oliver J. Bell, Jennifer Smith, and Janet Salles for want of jurisdiction. We affirm.

I. BACKGROUND

McCann is an inmate at the McConnell Unit of the Texas Department of Criminal Justice (TDCJ) Correctional Institutional Division, and appellees are TDCJ employees. In his live petition, McCann alleged that appellees stole stamps and improperly denied his access to mail in order to retaliate against him for his use of the grievance system.[1] He alleged causes of action of retaliation, fraud and conspiracy to commit fraud, theft and conspiracy to commit theft, conspiracy, violations of his constitutional right to free speech, and violation of the federal RICO Act. *See* 18 U.S.C.A. §§ 1961–1968 (West, Westlaw through P.L. 115-193). The petition sought declaratory judgment, injunctive relief, punitive damages, court costs, and pre- and post-judgment interest.

Appellees Torres, Collins, and Bell filed a motion for summary judgment based on

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[1] Specifically, McCann's live petition contained the following statement of facts:

> On or about January 6, 2013, Kandis Torres, and all listed defendants have conspired with the Grievance Department, Director's Review Committee (DRC), M.S.C.P. and Oliver Bell, to violate my constitutional rights of freedom of speech, fraud, conspiracy to commit fraud, theft and conspiracy to commit theft, which violated the RICO Act. Defendants have a daily use of their campaign of harassment.
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> Plaintiff files grievance with no returns then retaliated for the grievances that do go through by Mailroom Staff. Plaintiff has had numerous stamps stolen through the mailroom that never happened before, which Torres said would happen, and did. Torres, Collins, Smith and Salles have committed fraud by failing to make a proper disposition on legal papers that I write out, and are mailed to Plaintiff by a typing service. Defendants put on the denial form offender to offender mail instead of denying "legal work," which is fraud.
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> There are also no quality control numbers on any of the Defendants['] denial papers. The Defendants deny photographs that are not sexually explicit or altered, yet the DRC and MSCP will uphold these non-sexually explicit photos and uphold any and all of my offender to offender mail when such is legal work coming from a free world service. Defendants denied Newsweek because of Governor Perry's antics on TV during running for President and National Geographic twice.
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> Oliver J. Bell fails to control the DRC and MSCP and implement any necessary changes to avoid the types of violations occurring. These defendants have conspired to violate my rights and continue to do so. From theft of mail and Rico Acts, theft of stamps, with fraud all this could be eliminated with "consent decrees" or injunctive relief against Oliver Bell to enact better quality control, stop having ambiguous policies and rules on I-153, stamps, photographs and legal material. D.R.C. and M.S.C.P. fail to correct any violations with Smith Answering, Step 2 and M.S.C.P. responses.

official immunity and sovereign immunity, which the trial court denied. This Court affirmed the trial court's denial of summary judgment as to the theft, fraud, conspiracy, and RICO Act claims. *Torres v. McCann*, No. 13-15-00187-CV, 2016 WL 3225880, at *7 (Tex. App.—Corpus Christi June 9, 2016, no pet.) (mem. op.). However, we reversed the trial court's ruling as to McCann's constitutional free speech and retaliation claims, and we rendered judgment dismissing those claims. *Id*.

On remand, appellees filed a motion to dismiss for lack of jurisdiction, arguing that McCann failed to meet his burden to demonstrate waiver of appellees' sovereign immunity to suit under the Texas Tort Claims Act (TTCA). While the motion was pending, the trial court rendered orders compelling appellees to respond to McCann's discovery requests. Appellees petitioned this Court for a writ of mandamus compelling the trial court to vacate the discovery orders, and we conditionally granted the writ, concluding that the trial court should not proceed on the merits of the suit until the jurisdictional issues have been determined. *In re Torres*, No. 13-17-00172-CV, 2017 WL 2665986, at *6 (Tex. App.—Corpus Christi June 21, 2017, orig. proceeding) (mem. op.).

The trial court subsequently granted appellees' motion to dismiss and this appeal followed.

II. DISCUSSION

A. Applicable Law and Standard of Review

The doctrine of sovereign immunity provides that "no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent." *Tooke v. City of Mexia*, 197 S.W.3d 325, 331 (Tex. 2006) (citing *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847)). Sovereign immunity, which applies to state agencies such as TDCJ, defeats a trial court's subject matter jurisdiction unless the Texas Legislature has consented to

suit. *Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 388 (Tex. 2011); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225 (Tex. 2004); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). Whether a trial court has subject matter jurisdiction is a question of law that we review de novo. *Miranda*, 133 S.W.3d at 226; *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

The plaintiff has the initial 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 construe the pleadings liberally in favor of the pleader, look to the pleader's intent, and accept as true the factual allegations in the pleadings. *See Miranda*, 133 S.W.3d at 226, 228. When the existence of jurisdictional facts is challenged, we consider relevant evidence submitted by the parties to resolve the jurisdictional issues raised, even when the evidence implicates the merits of the cause of action. *Id*. at 227; *see City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009). In considering the evidence, we take as true all evidence favorable to the non-movant and indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Miranda*, 133 S.W.3d at 227–28.

The TTCA waives sovereign immunity for certain types of claims made against governmental units, but not for intentional torts such as fraud and theft. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021, .022, .025, .057(2) (West, Westlaw through 2017 1st C.S.); *City of Watauga v. Gordon*, 434 S.W.3d 586, 594 (Tex. 2014). The TTCA also contains an election-of-remedies provision, section 101.106(f), which 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.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f). However, a suit against a governmental employee in his individual capacity for a tort occurring outside the scope of his employment seeks personal liability and is not barred by immunity. *Molina v. Alvarado*, 463 S.W.3d 867, 870–71 (Tex. 2014); *see Univ. of Tex. Health Sci. Ctr. at Houston v. Rios*, 542 S.W.3d 530, 532 (Tex. 2017).

B. Analysis

McCann argues that "[d]eprivation of property without compensation and using fraud to cover up acts of organized crime under the RICO Act is not within [appellees'] scope of employment." But as we noted in the earlier appeal, the specific conduct alleged in McCann's petition—whether couched as theft, fraud, conspiracy, or RICO Act violations—is appellees' rejection of mail addressed to McCann, and this conduct was undertaken pursuant to a policy enacted by the Texas Board of Criminal Justice (the Board). *See Torres*, 2016 WL 3225880, at *1.[2] The Board duly enacted this policy

[2] We noted specifically:

> The summary judgment evidence shows that administrators of the McConnell mailroom rejected McCann's mail nine times in the first half of 2012. Two of the deliveries were rejected pursuant to the section of [Board Policy] 3.91 which prohibits receipt of "sexually explicit images" through the mail. Both deliveries contained images of nude women.
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> Administrators rejected seven more shipments of mail which contained either unused stamps or what appeared to be legal documents bearing the names of other inmates in TDCJ facilities, such as parole applications and divorce petitions. The record contains a prison report which explained that McCann had been assisting other inmates with legal work. These inmates had been compensating McCann in various ways, such as sending him unused stamps. In rejecting the stamps and legal documents, administrators cited reasons including: "offender handling another offender's mail," "circumventing the mail via a third party," or that the shipments contained "stamps obtained through trafficking and trading." The third revised version of [Board Policy] 3.91 generally barred an inmate from receiving mail from another inmate.

Torres v. McCann, No. 13-15-00187-CV, 2016 WL 3225880, at *1 (Tex. App.—Corpus Christi June 9, 2016, no pet.) (mem. op.). On our own motion, we take judicial notice of the record filed in the prior appeal. *See* TEX. R. EVID. 201; *Estate of York*, 934 S.W.2d 848, 851 (Tex. App.—Corpus Christi 1996, writ denied) (holding that an appellate court may take judicial notice of its own records in a case involving the same

pursuant to its statutory authority to govern TDCJ. *See id*. (citing TEX. GOV'T CODE ANN. § 492.001 (West, Westlaw through 2017 1st C.S.)). Therefore, the conduct was within the general scope of appellees' employment with TDCJ. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(5) (West, Westlaw through 2017 1st C.S.) (defining "scope of employment" as "the performance for a governmental unit of the duties of an employee's office or employment," including "being in or about the performance of a task lawfully assigned to an employee by competent authority"); *cf*. RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (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.").

Further, McCann's claims "could have been brought under [the TTCA] against" TDCJ. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f); *Franka v. Velasquez*, 332 S.W.3d 367, 370 (Tex. 2011); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 659 (Tex. 2008) ("Because the [TTCA] is the only, albeit limited, avenue for common-law recovery against the government, all tort theories alleged against a governmental unit, whether it is sued alone or together with its employees, are assumed to be 'under [the TTCA]' for purposes of section 101.106.").

McCann contends on appeal that his claims do not implicate sovereign immunity due to application of the *ultra vires* doctrine. Under that doctrine, sovereign immunity will not bar a claim that is directed toward determining or protecting a party's rights against a state official acting without legal or statutory authority. *See Beeman v. Livingston*, 468 S.W.3d 534, 538 (Tex. 2015); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex.

subject matter between the same parties).

2009) (noting that sovereign immunity does not bar suits that seek "to require state officials to comply with statutory or constitutional provisions," even if a declaration to that effect compels the payment of money). This is because suits to compel state officers to act within their official capacity do not attempt to subject the State to liability. *IT-Davy*, 74 S.W.3d at 855. To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion but rather must allege that the officer acted without legal authority or failed to perform a purely ministerial act. *Beeman*, 468 S.W.3d at 538; *City of El Paso*, 284 S.W.3d at 372. Moreover, in an *ultra vires* action, the plaintiff may seek only prospective remedies such as injunctive relief, rather than retrospective remedies such as damages. *City of El Paso*, 284 S.W.3d at 373–74 (citing *Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (noting that under analogous federal immunity law, claims for prospective injunctive relief are permissible, while claims for retroactive relief are not because such relief is "in practical effect indistinguishable in many aspects from an award of damages against the State")).

We disagree that the *ultra vires* doctrine applies to McCann's suit. First, though McCann asserts on appeal that he "is not suing for damages," his live petition explicitly asks for punitive damages. *See id*. Second, though the live petition asks for injunctive relief in the form of a "consent decree" to "improve" mail processing forms, that request does not seek to compel appellees to comply with existing law; instead, it seeks to alter the policies that they are responsible for carrying out. *See Lopez v. Serna*, 414 S.W.3d 890, 895 (Tex. App.—San Antonio 2013, no pet.) (concluding that the *ultra vires* exception did not apply because "officers were acting within their legal authority to confiscate property determined to be in violation of TDCJ policy"); *see also Redburn v. Garrett*, No. 13-12-00215-CV, 2013 WL 2149699, at *7 (Tex. App.—Corpus Christi May 16, 2013, pet.

denied) (mem. op. on reh'g) (holding that, although appellant sought only injunctive relief against city officials, "a party can obtain an injunction only by showing a probable right to recovery through a claim or cause of action" and "the underlying claim was trespass, a tort, which brings this matter within the scope of the [TTCA]").

Because McCann's allegations are based on conduct within the general scope of appellees' employment and his claims could have been brought against TDCJ, the trial court was required by the TTCA to dismiss the suit unless McCann filed amended pleadings dismissing appellees as parties, which he did not do. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f).[3] Accordingly, the trial court did not err in granting appellees' motion to dismiss. McCann's issue on appeal is overruled.

III. CONCLUSION

We affirm the trial court's judgment.

DORI CONTRERAS
Justice

Delivered and filed the 2nd
day of August, 2018.

[3] In the prior appeal, we held that the appellants—appellees in the present case—waived their issue regarding sovereign immunity due to inadequate briefing. *See Torres*, 2016 WL 3225880, at *6–7 (citing TEX. R. APP. P. 38.1(i)). Under the law of the case doctrine, "a decision rendered in a former appeal of a case is generally binding in a later appeal of the same case." *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 182 (Tex. 2012). But a decision rendered on an issue before the appellate court does not absolutely bar re-consideration of the same issue on a second appeal. *Briscoe v. Goodman Corp.*, 102 S.W.3d 714, 716 (Tex. 2003). Instead, application of the doctrine lies within the discretion of the appellate court and depends on the particular circumstances surrounding that case. *Id*.

McCann does not argue on appeal that the trial court's judgment is erroneous under the law of the case doctrine, nor does he argue that the doctrine precludes us from considering the sovereign immunity issue here. But even if he did make that argument, we would reject it under circumstances of this case. *See id*. In particular, the law of the case doctrine does not bar consideration of the sovereign immunity issue because we did not address that issue on its merits in the earlier appeal. *See Torres*, 2016 WL 3225880, at *6–7.