

Affirmed and Memorandum Opinion filed April 22, 2025



In The

Fourteenth Court of Appeals

NO. 14-24-00137-CV

PINEY POINT HOMES, LLC, Appellant

V.

**DISTRICT CLERK MARILYN BURGESS, IN HER OFFICIAL
CAPACITY, Appellee**

**On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Cause No. 2023-30774**

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

Piney Point Homes, LLC, appellant, filed suit against District Clerk Marilyn Burgess, appellee, in her official capacity, among others, after over \$1 million dollars committed to the court's registry was disbursed to an allegedly unauthorized bank account. Piney Point claims that Burgess engaged in an ultra vires act by disregarding the trial court's order to disburse the registry funds to a specific bank account and is therefore responsible for the loss of the funds. *See* Tex. Loc. Gov't

Code §§ 117.121, .124. Burgess filed a plea to the jurisdiction, contending, among other things, that she retained immunity from Piney Point’s ultra vires claim because Piney Point failed to plead facts to support its claim. The trial court granted Burgess’s plea, and Piney Point timely appealed. In a single issue, Piney Point challenges the grant of the plea to the jurisdiction because Burgess’s “negligent loss” of the registry funds is not excused by sovereign immunity.¹ We affirm.

Background

In the related case that led to this litigation, Susan Meng and Tie Deng formed Piney Point, a business, to conduct real estate transactions and provide construction consulting to the Houston Hua Xia Chinese School. In order to fund the project, Yongfu Wang, Meng’s husband, loaned Piney Point money. Piney Point failed to repay the loan from Wang, and a dispute arose between Meng and Deng. Meng and Deng subsequently asserted a variety of claims against each other. While the Meng/Deng suit was underway, one of the residential properties that Piney Point constructed, sold. The proceeds from the sale—approximately \$1.4 million dollars—were deposited into the court’s registry. Wang was then impleaded into the litigation and asserted claims against Piney Point for failing to repay the loan.

The trial court appointed Robert Berleth (doing business as Berleth & Associates, PLLC) as receiver to “do any and all acts necessary to properly and lawfully conduct receivership,” including litigating all claims brought by and against

¹ Although the concepts of sovereign and governmental immunity are distinct, they are often used interchangeably. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n. 3 (Tex. 2003). Sovereign immunity refers to the State’s immunity from suit and liability and protects the State and its divisions, while governmental immunity protects political subdivisions of the State, including counties, cities, and school districts. *See id.* In asserting a claim against Burgess in her official capacity, Piney Point is asserting a claim against the governmental entity with which she is affiliated. *See Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). The parties do not dispute that Burgess is an elected official for the State.

Piney Point and winding down the company. Piney Point later settled Wang's claims for \$1,070,000. On April 18, 2023, the trial court signed an order directing the district clerk to disburse \$1,070,000 from the court's registry to Berleth through a wire transfer to his IOLTA account at Frost Bank. The trial court's order, signed by Shannon Lang, Wang's counsel, and Berleth indicated Berleth would provide specific wiring instructions to the accounting clerk and would pay Wang within three business days of receipt of the funds from the court's registry. After the trial court signed the order directing the district clerk to disburse the registry funds to Berleth, things took a turn.

According to Berleth, "hackers" infiltrated his email system and created fraudulent wire instructions that were used to divert the settlement funds intended for Wang from Berleth's account to an account at Chase Bank controlled by CHTN Antiques & Gems, LLC. CHTN's account had existed for only seven months, and Chase had flagged the account as potentially fraudulent. The district clerk's office processed the wire transaction in accordance with Berleth's specific wire instructions, and Chase Bank accepted the transfer. The funds were deposited into CHTN's account. Soon after, the funds were transferred to a bank in New Jersey and then transferred to Coinbase, where the funds were converted to cryptocurrency. Wang was never paid, and the funds were never recovered.

According to Burgess, the disbursement order contemplated that Berleth would provide specific wiring instructions for his IOLTA account at Frost Bank. However, the district clerk's office received two sets of wiring instructions—neither of which was for the IOLTA account at Frost Bank.² The first set of instructions was sent on April 24, 2023. In a document titled "Request for Disbursement of Registry

² It is unclear what happened to the IOLTA account at Frost Bank. The only mention of this account is the trial court's disbursement order.

Funds by Wire Transfer,” Berleth requested that the registry funds be wired to Bank of America, located at 7455 FM 1960 Road West, Houston, Texas 77070. Berleth identified the name on the account as “Berleth & Associates, PLLC” and provided the account and routing numbers. This disbursement request was signed and notarized by Berleth.

On May 2, 2023, Lang emailed Ruddy Velasquez with the district clerk’s office explaining that Berleth’s Bank of America account was compromised. In the email, she stated that “we have a new account for the disbursement in Cause No. 2019-52133. The revised form is attached.” The attached document (the second set of specific wiring instructions) was dated April 29, 2023 and titled “Request for Disbursement of Registry Funds by Wire Transfer.” This time, Berleth, apparently through Lang, requested that the registry funds be wired to Chase Bank located at 5445 Almeda Road, Houston, Texas 77004. Berleth identified the name on the account as “Berleth & Associates, PLLC” and provided the account and routing numbers. Like the first request, this disbursement request was also signed and notarized by Berleth.³

Pursuant to the second set of wiring instructions, the district clerk’s office sent the updated form to the county auditor for review. The auditor’s office authorized the district clerk’s office to disburse the funds in accordance with the wiring instructions received with the updated form. The funds were later disbursed to the Chase Bank account provided by Berleth. It was later discovered that the account belonged to CHTN. Even though Berleth was expecting to receive the funds within three days, he did not notify the district clerk’s office that the funds were not

³ Sheli Davis, a notary public, notarized both disbursement requests. Each disbursement request bears her notary seal, which includes Davis’s notary identification and the date her notary commission expires.

deposited in his account until two weeks later. By that point, the funds had already been transferred from CHTN's account and allegedly converted into cryptocurrency.

Berleth filed suit on behalf of Piney Point in the 269th District Court seeking a temporary restraining order to freeze the funds that were deposited into the Chase Bank account. The 269th District Court transferred the case to the 333rd District Court because that court had jurisdiction over the related case involving the Meng/Deng litigation. An agreed temporary injunction was issued, but the funds had already been transferred from the Chase Bank account. Piney Point then amended its petition to assert a claim against Burgess and others. Burgess answered and filed a combined plea to the jurisdiction and motion to dismiss, arguing, among other things, that the Legislature has not waived sovereign immunity, and Piney Point lacked standing to assert its ultra vires claim. After conducting a hearing, the trial court granted Burgess's plea to the jurisdiction and signed an order stating that the trial court lacked subject matter jurisdiction to consider the claims asserted against Burgess.

Standard of Review

Before a trial court may decide a case, it is essential that the trial court possess subject matter jurisdiction. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000). A plea to the jurisdiction is a dilatory plea and a proper method to challenge a trial court's subject matter jurisdiction. *Id.* at 554. The purpose of a plea to the jurisdiction is to defeat a pleaded cause of action without reaching the merits. *Id.* A plea to the jurisdiction can take two forms: (1) a challenge to the plaintiff's pleadings regarding the allegations of jurisdictional facts, or (2) an evidentiary challenge to the existence of jurisdictional facts. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004). Thus, the plea may challenge the

pleadings, the existence of jurisdictional facts, or both. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018). A plea to the jurisdiction questioning the trial court’s jurisdiction raises a question of law that we review de novo. *City of Hous. v. Collins*, 515 S.W.3d 467, 471 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

Analysis

Piney Point sued Burgess for the district clerk’s alleged negligent loss of court registry funds under Chapter 117 of the Texas Local Government Code. Specifically, Piney Point complains that (1) the Legislature intended to waive sovereign immunity to suit and liability under sections 117.083 and 117.124 when court registry funds are lost and (2) Burgess violated section 117.121 by releasing the registry funds to an account not identified in the trial court’s disbursement order. On appeal, Piney Point asserts, among other things, that the trial court erred in granting Burgess’s plea to the jurisdiction because Burgess’s alleged ultra vires act waived her immunity.⁴ We first address whether sections 117.083 and 117.124 waived Burgess’s sovereign immunity. We then examine whether Burgess violated section 117.121. In doing so, we discuss whether Piney Point alleged and proved an ultra vires action.

I. Immunity

Sovereign immunity is the “well-established doctrine ‘that no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent.’” *Brown & Gay Eng’g, Inc. v. Olivares*, 461 S.W.3d 117, 121 (Tex.

⁴ Piney Point invites the court to consider why Texas residents should trust the district clerk’s office and whether this court’s disposition will affect confidence in public institutions. We need not and do not state a position on this invitation. *See Hotze v. IN Mgmt., LLC*, 651 S.W.3d 19, 34 (Tex. App.—Houston [14th Dist.] 2021, pet. denied) (citing *SpawGlass Const. Corp. v. City of Hous.*, 974 S.W.2d 876, 879 (Tex. App.—Houston [14th Dist.] 1998, pet. denied)) (“Courts may not give advisory opinions or decide cases upon speculative, hypothetical, or contingent situations.”).

2015) (quoting *Tooke v. City of Mexia*, 197 S.W.3d 325, 331 (Tex. 2006)). The doctrine operates to “shield the public from the costs and consequences of improvident actions of their government.” *Tooke*, 197 S.W.3d at 332.

In Texas, the immunity doctrine has two aspects: (1) immunity from suit even when the sovereign’s liability is not disputed and (2) immunity from liability even though the sovereign has consented to the suit. *See Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc.*, 571 S.W.3d 738, 746 (Tex. 2019). Immunity from suit implicates the court’s subject matter jurisdiction to resolve a dispute against the state. *Id.* (citing *Nazari v. State*, 561 S.W.3d 495, 500 (Tex. 2018)). On the other hand, immunity from liability only protects the state from money judgments and must be raised as an affirmative defense rather than by jurisdictional plea. *Id.* (citing *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 840 (Tex. 2018)). Unless waived, sovereign immunity protects the state and its agencies from lawsuits for damages. *See id.*; *see also Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017).

Generally, asserting a particular claim against a governmental official in her official capacity is the same as asserting that claim against the governmental entity with which the official is affiliated. *See Miranda*, 133 S.W.3d at 224 (providing that government entities and their employees, acting within the scope of their employment, are generally immune from liability in the absence of a waiver or consent); *see also Guthrie v. Garcia*, 352 S.W.3d 307, 309 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

II. Statutory Provisions

“It is well settled in Texas that for the Legislature to waive the State’s sovereign immunity, a statute or resolution must contain a clear and unambiguous expression of the Legislature’s waiver of immunity.” *Scarver v. Waller Cty.*, 346 S.W.3d 212, 217 (Tex. App.—Houston [14th Dist.] 2011, no pet. (quoting *Wichita*

Falls State Hosp. v. Taylor, 106 S.W.3d 692, 696 (Tex. 2003)).

Piney Point argues that sections 117.083 and 117.124 waive Burgess's sovereign immunity because the Legislature intended to "unequivocally" hold the district clerk "responsible" for a loss of funds resulting from negligence. Section 117.083, entitled "Loss of Registry Funds," appears in Subchapter D of Chapter 117 and provides that

[i]f registry funds held by a county clerk or a district clerk and deposited by the county with a depository selected under Subchapter B are lost for any reason, including a loss due to the insolvency of the depository, the county is liable to the rightful owner of the funds for the full amount of the funds due the owner.

Tex. Loc. Gov't Code § 117.083 (footnote omitted).

Section 117.124, entitled "Liability of Clerk," appears in Subchapter E of Chapter 117, which applies only to counties with a population of more than 1.3 million, and states that

(a) A clerk is not responsible for:

- (1) a loss of funds resulting from the failure or negligence of a depository; or
- (2) the safety of funds after deposit in a depository selected under this subchapter.

(b) A clerk is responsible for:

- (1) a loss of funds resulting from the clerk's official misconduct, negligence, or misappropriation of the funds; and
- (2) the safety of funds before deposit in a depository selected under this subchapter.

Id. § 117.124.

The supreme court has noted that some statutes leave no doubt about the Legislature's intent to waive immunity. *See Taylor*, 106 S.W.3d at 696. However,

the statutes at issue in this case do not contain “a clear and unambiguous expression of the Legislature’s waiver of immunity.” *Id.*; see also *Scarver*, 346 S.W.3d at 217. Although section 117.083 and 117.124 address liability, these statutes are silent as to waiver of immunity from suit. Nevertheless, sovereign immunity may be waived, absent “magic words.” See *Taylor*, 106 S.W.3d at 697. In circumstances where it is more difficult to discern legislative intent, the supreme court has provided several aids to determine whether the Legislature has clearly and unambiguously waived sovereign immunity:

First, a statute that waives the State’s immunity must do so beyond doubt, even though we do not insist that the statute be a model of “perfect clarity.” Second, when construing a statute that purportedly waives sovereign immunity, we generally resolve ambiguities by retaining immunity. In this respect, our methodology resembles that of the United States Supreme Court when it considers a purported waiver of the federal government’s sovereign immunity. If the text and history of the statute leave room to doubt whether the Legislature intended to waive sovereign immunity, we are less likely to find a waiver. Third, if the Legislature requires that the State be joined in a lawsuit for which immunity would otherwise attach, the Legislature has intentionally waived the State’s sovereign immunity. Finally, we are cognizant that, when waiving immunity by explicit language, the Legislature often enacts simultaneous measures to insulate public resources from the reach of judgment creditors. Therefore, when deciding whether the Legislature intended to waive sovereign immunity and permit monetary damages against the State, one factor to consider is whether the statute also provides an objective limitation on the State’s potential liability.

Id. at 609–98 (citations omitted).

In this case, the above-mentioned factors do not support Piney Point’s contention that sections 117.083 and 117.124 waive the district clerk’s immunity from suit for Piney Point’s claims. Although these statutes address liability of the clerk for a “loss” of registry funds, such language does not mean that immunity from suit is waived. See *Scarver*, 346 S.W.3d at 219. Additionally, these statutes are not

ambiguous regarding immunity from suit; they are silent. *See* Tex. Loc. Gov't Code §§ 117.083, 117.124; *see also* *Scarver*, 346 S.W.3d at 218–19. Even if the statutes at issue were ambiguous, it would be resolved in favor of retaining immunity. *See* *Scarver*, 346 S.W.3d at 219 (citing *Taylor*, 106 S.W.3d at 697). Also, sections 117.083 and 117.124 do not reflect a legislative requirement that a governmental entity be joined in a lawsuit nor do they contain any objective limitation on potential liability. *See* *Taylor*, 106 S.W.3d at 697–98.

We therefore conclude that sections 117.083 and 117.124 do not waive Burgess's immunity from suit. Having concluded that these provisions do not waive immunity from suit, we examine whether Burgess's alleged ultra vires act waived her immunity.

III. Ultra Vires Claim

In certain narrow circumstances, a suit against a state official can proceed even in the absence of a waiver of immunity if the official's actions are ultra vires. *City of El Paso, v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). An ultra vires action requires a plaintiff to “allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.” *Id.* An ultra vires claim based on actions taken “without legal authority” has two fundamental components: (1) authority giving the official some (but not absolute) discretion to act and (2) conduct outside of that authority. *Hall*, 508 S.W.3d at 239 (citing *Hous. Belt & Terminal Ry. Co. v. City of Hous.*, 487 S.W.3d 154, 158 (Tex. 2016)).

Not every mistake or misinterpretation of the law amounts to an ultra vires act. *Hall*, 508 S.W.3d at 241. A government officer may act “without legal authority” if she exceeds the bounds of her granted authority or if her acts conflict with the law itself. *See Hous. Belt*, 487 S.W.3d at 158. The basic justification for this ultra vires exception to sovereign immunity is that ultra vires acts—or those acts without

authority—should not be considered acts of the state at all. *Cobb v. Harrington*, 190 S.W.2d 709, 712 (1945).

In support of its argument that immunity is waived, Piney Point relies primarily on section 117.121. *See* Tex. Loc. Gov't Code § 117.121(a). According to Piney Point, Burgess acted without legal authority because she disregarded the trial court's disbursement order by releasing the registry funds to an account not identified in the order. Piney Point insists that the disbursement order was "highly specific, naming the amount to be transferred, the method of transference, and the precise bank account to which the funds were to be transferred."

To fall within the ultra vires exception, a suit 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. *Heinrich*, 284 S.W.3d at 372. Ministerial acts are those "where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015) (quoting *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex. 1994)).

Under section 117.121, money cannot be paid out of the court registry except on "written order of the court with proper jurisdiction." Tex. Loc. Gov't Code § 117.121(a). All drafts issued for the disbursement of the registry funds must be submitted to the county auditor for the auditor's countersignature before delivery or payment. *Id.* § 117.121(b). A clerk is responsible for a loss of funds resulting from the clerk's official misconduct, negligence, or misappropriation of funds. *Id.* § 117.124.

In this case, Piney Point cannot circumvent immunity by alleging an ultra vires act. The record does not establish Piney Point proved Burgess acted without

legal authority in disbursing the registry funds. *See Heinrich*, 284 S.W.3d at 372. The trial court's disbursement order, signed April 18, instructed Burgess to

immediately disburse \$1,070,000.00 from the Court's Registry Account No. 86205 (consisting of \$1,366,328.77 in principal, plus all accrued interest), to the Court-appointed Receiver in this case, Robert Berleth, by way of ACH wire transfer to his IOLTA account (Frost Bank account number *****386, with Robert Berleth to provide specific wiring instructions to the Accounting Clerk).

The disbursement order required Berleth to provide additional information needed for the district clerk to release the registry funds to Berleth by wire transfer. As mentioned, Berleth first submitted a request to the district clerk's office for disbursement to his Bank of America account and subsequently submitted a second request that the funds be transferred to his account at Chase. Both sets of wiring instructions provided to the district clerk's office included the cause number; identified Berleth as the court-appointed receiver; identified the name on the account, as well as the account and routing numbers for the respective accounts; and were signed and notarized by Berleth. It cannot be said that Burgess acted without legal authority in complying with the specific wiring instructions provided by Berleth as contemplated by the court's order. *See Tex. Loc. Gov't Code* § 117.121(a); *see also Hall*, 508 S.W.3d at 238–39. Further, in accordance with the Texas Local Government Code, Burgess received approval from the county auditor before disbursing the registry funds to the account identified by Berleth in his wiring instructions. *See Tex. Loc. Gov't Code* § 117.121(b), (c) (enumerating the requirements for disbursing registry funds by electronic transfer).

The record also does not establish that Piney Point proved Burgess failed to perform a purely ministerial act. *See Heinrich*, 284 S.W.3d at 372. Indeed, Piney Point's only complaint is that Burgess allegedly exceeded the bounds of her granted authority. We therefore conclude that Piney Point failed to meet either of the bases

for establishing an ultra vires action.

Accordingly, we overrule Piney Point's sole issue.

Conclusion

We affirm the judgment of the trial court as challenged on appeal.

/s/ Maritza Antú
Justice

Panel consists of Justices Jewell, Bridges, and Antú.