

IN THE SUPREME COURT OF TEXAS

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No. 07-0410
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EMPLOYEES RETIREMENT SYSTEM OF TEXAS, PETITIONER,

v.

XAVIER DUENEZ AND IRENE DUENEZ, RESPONDENTS

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS
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JUSTICE HECHT, dissenting.

Strange as it may seem, a state agency has sued itself to have its own jurisdiction declared exclusive, then moved to dismiss its action for want of jurisdiction, and now complains that the trial court denied its motion. To be clear: the agency does not contend that it should have won a declaratory judgment; it contends that its motion to dismiss *its own action* should have been granted. One may ask: why doesn't the agency simply take a nonsuit? If the agency is trying to obtain judicial approval of its claim of exclusive jurisdiction, the plan has backfired: the court of appeals held against the agency.¹ But a party's dispute with itself is nonjusticiable.

There is much argument with citation of many cases to establish the long-recognized general principle that no person may sue himself. Properly understood the general principle is sound, for courts only adjudicate justiciable controversies. They do not

¹ 221 S.W.3d 809 (Tex. App.–Corpus Christi-Edinburg 2007).

engage in the academic pastime of rendering judgments in favor of persons against themselves.²

The court of appeals should have dismissed this interlocutory appeal.³

The Court's opinion does not clearly set out the peculiar posture of this case, which is so unusual that it must be carefully understood. The Employees Retirement System of Texas (ERS), a state agency,⁴ provided health and accident benefits to Xavier Duenez, a state employee,⁵ under a plan administered by Blue Cross and Blue Shield of Texas (BCBST). The plan paid for health care for Duenez's daughter Ashley, who along with her parents and siblings was injured in a car accident with a drunk driver. The driver had purchased beer at a convenience store just before the accident, and Duenez and his wife Irene sued the store owner under the Texas Dram Shop Act.⁶ The Duenezes obtained a substantial judgment, and BCBST requested a partial assignment to protect ERS's right of subrogation. When the Duenezes refused, BCBST sued them as well as ERS, alleging that ERS was "a person whose joinder as a party to this litigation is needed for just adjudication." BCBST

² *United States v. Interstate Commerce Comm'n*, 337 U.S. 426, 430 (1949) (quoted in *United States Fid. & Guar. Co. v. Goudeau*, 272 S.W.3d 603, 612 (Tex. 2008) (Green, J., joined by Jefferson, C.J., and Johnson, J., dissenting)).

³ See *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445-446 (Tex. 1993) (standing, as a matter of subject matter jurisdiction, may be raised for the first time on appeal).

⁴ Article XVI, § 67(b)(2) of the Texas Constitution requires the Legislature to "establish by law an Employees Retirement System of Texas to provide benefits for officers and employees of the state". The Legislature has done so in chapters 811-815 of the Texas Government Code. Section 811.003 provides that "[t]he retirement system is a public entity."

⁵ Benefits were provided under the Texas Employees Uniform Group Insurance Benefits Act, Act of April 21, 1975, 64th Leg., R.S., ch. 79, 1975 Tex. Gen. Laws 208, as amended, formerly TEX. INS. CODE art. 3.50-2, recodified as the Texas Employees Group Benefits Act, now TEX. INS. CODE §§ 1551.001-.407.

⁶ TEX. ALCO. BEV. CODE § 2.02.

requested the following relief: “[a] declaration of the respective rights and other legal relations of ERS, BCBST as ERS’ administering firm and manager, Xavier Duenez, Irene Duenez, and Ashley Duenez”; “[a] declaration that ERS/BCBST is entitled to have [the Duenezes] execute and deliver to ERS/BCBST . . . an appropriate partial assignment”; attorney fees; and costs. ERS answered with a general denial, characterizing itself as “Defendant ERS”.

The case languished for several years while the Dram Shop case was on appeal, until the Duenezes settled their claims for their injuries and Ashley’s for \$35 million.⁷ The Duenezes then filed a pleading entitled “cross claim and third party action”, “seeking a judicial declaration that [the Duenezes] owe no subrogation to Blue Cross/Blue Shield”, or alternatively, “that any subrogation to which Plaintiff is entitled to [is] subject to the common fund doctrine”. The pleading did not mention ERS. ERS filed an amended answer to BCBST’s petition and “motion to dismiss for lack of jurisdiction”, asserting that its sovereign immunity from suit had not been waived, that by statute it had exclusive jurisdiction to determine its right to subrogation,⁸ and that administrative remedies had not been exhausted. ERS sought relief only against BCBST — that the court “dismiss the Plaintiff’s Petition” and “that Plaintiff take nothing”. ERS did not mention the Duenezes’ cross-claim.

⁷ According to the Duenezes, settlement funds were allocated \$12,644,000 to Ashley, \$6,104,000 to Irene, \$3,052,000 to Xavier, and \$13,200,000 to attorney fees and expenses. The judgment for the claims of two other Duenez family members injured in the accident was reversed and remanded by this Court in *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680 (Tex. 2007).

⁸ ERS cited TEX. INS. CODE § 1551.352.

The Duenezes amended their cross-claim to seek the identical relief against ERS as well as BCBST, and to request abatement of any administrative proceedings before ERS, pending conclusion of the lawsuit. ERS responded to this pleading only by reasserting its claim to exclusive jurisdiction, not by moving to dismiss the Duenezes' cross-claim. BCBST amended its petition to request declarations:

- “that ERS has exclusive jurisdiction . . . to determine whether the group health care coverages and benefits provided by ERS . . . with administrative support from Blue Cross are or are not subject to . . . any . . . legal or equitable doctrine”;
- “that the statutory remedies provided to Xavier Duenez with respect to ERS’ decisions regarding subrogation for benefits paid to Xavier Duenez are exclusive”;
- “that ERS/Blue Cross is entitled to recover its full subrogation interest from Defendants”; and
- “of the respective rights and other legal relations of ERS, Blue Cross as ERS’ administering firm, Xavier Duenez, Irene Duenez, and Ashley Duenez”.

BCBST added a request for “[m]onetary judgment in favor of ERS/Blue Cross for the full amount of the ERS subrogation interest”. The amount of that interest, as asserted in letters from ERS to the Duenezes’ counsel, was \$295,105.57.⁹

At the hearing on ERS’s motion to dismiss, the trial court was puzzled why BCBST would sue yet assert that the only remedy was administrative. The court asked BCBST’s counsel: “If you thought you had administrative relief, why did you file a case in District Court?” Though counsel’s answer was not entirely clear, he said this:

⁹ ERS also asserted that it overpaid \$113,174.76 in benefits that Duenez improperly claimed.

When we found out about [the judgment in the Dram Shop case], we thought, what is the best way to preserve whatever right we have, whatever subrogation right we have. They [*i.e.*, the Duenezes] had already indicated to the ERS that they didn't think ERS had jurisdiction over anything, and it became clear to us that we were not going to be able to get their attention proceeding through administrative proceedings only. Therefore, we decided the way to preserve whatever subrogation interest there is — they say there really isn't one, we say there's a dollar-for-dollar one — the best way to preserve that is to file a lawsuit. . . . Now, ERS did not join in that lawsuit, we, Blue Cross, as the administering firm, filed what we, as Blue Cross, thought would be the best thing to do at the time. Now, for the record today, we are on board with ERS in terms of the ERS exclusive authority

The trial court denied ERS's motion to dismiss and ordered that administrative proceedings be abated.

The court of appeals recognized that BCBST and ERS have identical interests in this case:

Although ERS is named as a defendant by BCBS's live petition, ERS is a defendant in name only. ERS is not adverse to BCBS's claims. In fact, BCBS's claims have been pled for the express benefit of ERS Not only are the parties not adverse to each other, they also have an ongoing agency relationship controlled by statute. . . .

BCBS brings its lawsuit in its capacity "as ERS's administrating firm" — as an agent for ERS. In addition, ERS maintains on appeal that BCBS has no right or interest in the settlement proceeds, a contention that BCBS has not contested. . . . Based on its pleadings, it is unclear why BCBS named ERS as a defendant.

ERS moved to dismiss this lawsuit. The trial court denied its request. In this appeal, ERS argues that it has exclusive jurisdiction over subrogation disputes, including the subrogation claim filed by BCBS on its behalf. BCBS has not filed an appellate brief with this Court. It is worth noting, however, that BCBS's live petition requests from the district court, in the alternative to a money judgment, "[a] declaration that ERS has primary jurisdiction and authority" over the parties' subrogation dispute. It therefore appears that the interests of BCBS and ERS are fully aligned in this litigation, even though BCBS has named ERS as a defendant.¹⁰

¹⁰ 221 S.W.3d 809, 812 (Tex. App.—Corpus Christi-Edinburg 2007) (citations and footnote omitted).

The court of appeals nevertheless proceeded to tackle the issue of ERS's statutory authority because ERS and the Duenezes disagree. But ERS never moved to dismiss the Duenezes' cross-claim. ERS's motion to dismiss was expressly directed at BCBST's suit. The Duenezes certainly have no standing to support the trial court's jurisdiction over BCBST's suit. Were BCBST's suit dismissed, the Duenezes claim would be unaffected unless they were somehow in privity with BCBST, and they are not. To be sure, the Duenezes are interested in the extent of ERS's authority to decide subrogation issues, but they are no more interested in a dispute between BCBST and ERS than an amicus curiae would be. Indeed, it would be to the Duenezes' benefit if BCBST's suit were dismissed — including its claim against the Duenezes for \$295,105.57, attorney fees, and costs.

ERS's interlocutory appeal from the trial court's order denying its motion to dismiss BCBST's suit raised no justiciable issue. We should grant ERS's petition for review, vacate the court of appeals' judgment, and dismiss the appeal.¹¹ Because the Court does not do so, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: July 3, 2009

¹¹ See *New York Underwriters Ins. Co. v. Sanchez*, 799 S.W.2d 677, 679 (Tex. 1990) (per curiam) (reversing the court of appeals' judgment and rendering judgment dismissing the appeal for lack of jurisdiction because the trial court had not rendered a final judgment) (citing *Long v. Humble Oil & Refining Co.*, 380 S.W.2d 554, 555 (Tex. 1964) (per curiam)); see also *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 164 (Tex. 2004); *Brown v. Todd*, 53 S.W.3d 297, 306 (Tex. 2001).