IN THE SUPREME COURT OF TEXAS

NO. 07-0410

EMPLOYEES RETIREMENT SYSTEM OF TEXAS, PETITIONER,

v.

XAVIER DUENEZ AND IRENE DUENEZ, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

JUSTICE WAINWRIGHT, joined by JUSTICE JOHNSON, dissenting.

A drunk driver injured the Duenezes in an automobile accident. The Employees Retirement System of Texas (ERS) benefits plan paid approximately $400,000 in medical benefits to the family. ERS then sought to recover the benefits it paid to the Duenezes after they recovered $35 million from the tortfeasor who caused the injuries. ERS's right to seek reimbursement of the medical benefits paid arises by virtue of contractual subrogation rights in the benefits plan. The question in this case is a narrow one: Is the Duenezes' dispute of ERS's subrogation claim subject to the exclusive statutory jurisdiction of ERS to determine whether to pay "claims" under the plan and to decide issues "relating to" the payment of claims? I would hold that the statute and benefits plan vest ERS with exclusive jurisdiction over this dispute. Because the Court does not, I respectfully dissent.

I. Factual and Procedural Background

Xavier Duenez, a state employee, applied for benefits under ERS's HealthSelect of Texas Managed Care Plan (the Plan) for injuries he and his family sustained in an automobile accident with a drunk driver. As administrator of the Plan, Blue Cross Blue Shield of Texas (BCBS) certified that the requested care was covered and began paying benefits.[1] BCBS ultimately paid the Duenezes approximately $400,000 in benefits before the Duenezes changed insurers.

While BCBS was paying benefits to the Duenezes under the Plan, the Duenezes sued to recover damages for the injuries sustained in the accident and obtained a $35 million settlement from the tortfeasor.[2] The executive director of ERS sent the Duenezes' attorney a letter asserting a right to recoupment of approximately $400,000—$300,000 for subrogation claimed and a little over $100,000 for overpayment of medical benefits. It appears from the record that the approximately $100,000 in improperly paid benefits at issue here was also the subject of *Duenez I*, in which we held that ERS has exclusive jurisdiction over coverage decisions. 201 S.W.3d at 676. Upon learning of the settlement, BCBS sued under both subrogation and overpayment theories to recoup the $400,000 it paid to the Duenezes in benefits under the Plan and for declaratory judgment. BCBS's subrogation

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[1] After initially certifying coverage, BCBS later informed the Duenezes that the care was not covered and that BCBS planned to discontinue paying benefits. *Blue Cross Blue Shield of Tex. v. Duenez* (*Duenez I*), 201 S.W.3d 674, 675 (Tex. 2006). The Duenezes pursued a declaratory judgment that the care was covered. *Id.* We held that ERS has exclusive jurisdiction over coverage decisions and dismissed the case for want of jurisdiction. *Id.* at 676.

[2] The Duenezes sued the drunk driver and the owner of the convenience store that sold the drunk driver alcohol on the day of the accident, obtaining a $35 million jury verdict that the court of appeals affirmed. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 682–83 (Tex. 2007) (*Duenez II*). While F.F.P.'s petition was pending before this Court, the Duenezes settled the claims of Xavier, Irene, and Ashley Duenez. *Id.* We reversed and remanded the remaining claims of Carlos and Pablo Duenez for a new trial, holding that the trial court abused its discretion when it severed F.F.P.'s claims against the drunk driver and when it refused to submit jury questions to allow the jury to determine the drunk driver's proportionate responsibility. *Id.* at 683, 694.

rights in this case arise from a provision in article IX of the Plan, which entitles the Plan to reimbursement from the proceeds of a settlement for any benefits provided by the Plan.

BCBS joined ERS as a co-defendant in the lawsuit. *See* TEX. R. CIV. P. 39(a) (permitting joinder of a party necessary for the just adjudication of the lawsuit). ERS moved to dismiss the suit for want of jurisdiction, arguing it has exclusive jurisdiction over this subrogation dispute.[3] The trial court denied ERS's motion, and the court of appeals affirmed. 221 S.W.3d 809, 815.

II. Employees Retirement System's Exclusive Jurisdiction

When the Legislature creates an administrative right that did not exist at common law, it can prescribe the procedures for pursuing and enforcing the right. *Igal v. Brightstar Info. Tech. Group, Inc.*, 250 S.W.3d 78, 92 (Tex. 2008). The Legislature may confer exclusive jurisdiction on an administrative body to hear and decide disputes concerning the right created.[4] *Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002). When it does, a party must exhaust its administrative remedies before seeking review in a trial court. *Duenez I*, 201 S.W.3d at 675. Until a party exhausts its administrative remedies, Texas trial courts lack jurisdiction over the

[3] In *City of Corpus Christi v. Public Utilities Commission*, we held that an agency's interpretation of a statute is entitled to deference if: (1) it is reasonable, and (2) it does not conflict with the statute's plain language. 51 S.W.3d 231, 261 (Tex. 2001). In that case, although the Commission's interpretation allowed for over-collection of transition charges, we held that the Commission did not err. *Id.*; *see also State v. Pub. Utils. Comm'n*, 883 S.W.2d 190, 196 (Tex. 1994) (holding, in a case about the PUC's authority to provide a remedy that the Legislature did not specifically include, that "the contemporaneous construction of a statute by the administrative agency charged with its enforcement is entitled to great weight").

[4] Texas trial courts have "exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body." TEX. CONST. art. V, § 8.

dispute and must dismiss claims within the agency's exclusive jurisdiction. *Id.*; *Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006).

A. Statutory Interpretation

Whether ERS has exclusive jurisdiction over this subrogation dispute is a matter of statutory interpretation, which we review de novo. *David McDavid Nissan*, 84 S.W.3d at 221; *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002). The Texas Employees Group Benefits Act (the Act) gives ERS exclusive jurisdiction over "all questions relating to enrollment in or payment of a claim arising from . . . benefits provided" under the Plan. TEX. INS. CODE § 1551.352.[5] Neither party disputes that ERS paid medical benefits to the Duenezes in accordance with the Plan and has exclusive jurisdiction to determine the benefits to be paid.

The Plan also contractually governs subrogation. It provides as follows:

> a. This provision applies when another party (person or organization) is or may be considered responsible for payment because of a Participant's injury or sickness for which benefits under the Plan have been provided.
>
> b. To the extent of such services provided, the Plan is subrogated to all rights of recovery the Participant has[,] and the Plan may assert such rights independent of the Participant. Also, if the Participant has obtained or obtains a court judgment, settlement, arbitration, award, or other monetary recovery from another party, because of the injury or sickness, the Plan is entitled to reimbursement from the proceeds of recovery to the extent of benefits provided.

The Plan expressly provides ERS with a right to subrogation from the Duenezes' recovery obtained from a tortfeasor, whether through settlement or otherwise.

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[5] When this case arose, the Act was codified at article 3.50-2 of the Texas Insurance Code. The Act was later repealed and recodified with non-substantive revisions. *See* Act of May 22, 2001, 77th Leg., R.S., ch. 1419, §§ 3, 31(b)(6), 2001 Tex. Gen. Laws 4153, 4209 (current version at TEX. INS. CODE § 1551). Citations are to the current version of the Act.

By disputing ERS's plea to the jurisdiction, the Duenezes contest ERS's jurisdiction to decide the right to recover both portions of the benefits paid through its subrogation rights. Their argument first depends on a holding that ERS does not have exclusive jurisdiction over the dispute of the alleged overpayment of $100,000 in medical benefits. This argument directly attacks ERS's decision to pay, or to decide not to pay, benefits under the Plan. The statute is clear that ERS has exclusive jurisdiction over "all questions relating to . . . payment of a claim." *See Duenez I*, 201 S.W.3d at 676 (quoting TEX. INS. CODE § 1551.352). The Court agrees, but then determines that because the Duenezes are no longer insureds of the Plan, ERS loses its ability to enforce its decision regarding the payment of benefits. The Court's holding allows easy circumvention of ERS's exclusive jurisdiction to decide the very issue of payment of Plan benefits. Surely the Legislature did not intend that an insured would be able to avoid its reimbursement obligation by simply changing insurers before ERS can seek subrogation. The Court's approach presents a simple roadmap for former Plan participants to circumvent the statute and improperly move to the courts claims to retain overpayments of medical benefits.

The Duenezes also argue that, because subrogation is collateral to payment and coverage under the Plan, ERS's assertion of exclusive jurisdiction to determine whether it should be reimbursed the $300,000 in legitimate benefits paid pursuant to its contractual subrogation rights is not related to payment of a claim. *See, e.g.*, *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 644 (Tex. 2007) (involving a subrogation dispute in which coverage was not disputed); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 213 (Tex. 2003) (same).

This point raises a question of the scope of the legislative grant of exclusive authority. The statute's grant of jurisdiction over "all questions relating to . . . payment of a claim" is broader than the Duenezes argue and the Court holds. In interpreting a statute, we "give words their ordinary meaning." *Geters v. Eagle Ins. Co.*, 834 S.W.2d 49, 50 (Tex. 1992); *see also In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d 609, 612 (Tex. 2006). In this case, the ordinary meaning comports with the accepted legal meaning, in that both definitions would only require the matter to have some connection with payment. *See* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1626 (1st ed. 1996) (defining "relate" as "to bring into or establish association, connection, or relationship"); *see also In re Morrison*, 555 F.3d 473, 479 (5th Cir. 2009) (defining bankruptcy courts' jurisdiction over cases related to the bankruptcy estate). The Legislature granted ERS's executive director exclusive authority to determine questions that have a connection or relationship to payment of a claim for benefits under the Plan—a definition that clearly extends beyond merely determining the actual payment of a claim. *See* § 1551.352.

We are mindful that the Legislature enacted a comprehensive regulatory scheme to govern health insurance for state employees. *See* TEX. INS. CODE § 1551.001, *et seq*. Its expressly stated purposes are both to improve the state's relations with its employees and to "provide uniformity in life, accident, and health benefit coverages." § 1551.002. The statute grants the Board of Trustees broad powers to "implement this chapter and its purposes." § 1551.052. Because this case relates to the recoupment of benefits paid under the Plan, I believe it falls within the broad scheme created by the Legislature to "provide uniformity."

In addition, ERS asserts its claim for subrogation in this case alongside a claim for overpayment of benefits, over which ERS would clearly have jurisdiction as a "question relating to . . . payment of a claim." ERS will have to parse the benefits paid, first by determining how much of the benefits were overpaid, which is clearly within ERS's jurisdiction, and then determining whether the Duenezes owe subrogation on the remaining amount. When two claims are so intertwined, it would not only be inefficient, but also against the Legislature's goal of promoting uniformity, to allow ERS to exercise its exclusive jurisdiction over part of the dispute and the trial court to decide the remainder, perhaps changing or nullifying ERS's payment decisions. This is untenable. Courts have the authority to change ERS's decisions, but only on appeal from ERS's final decision under a substantial evidence scope of review. TEX. GOV'T CODE §§ 2001.171, .174.

To interpret this provision as the Duenezes suggest would nullify a portion of the statute. *See In re Caballero*, 272 S.W.3d 595, 600 (Tex. 2008); *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008). The statute grants exclusive authority to determine "all questions relating to . . . payment of a claim arising from . . . benefits provided under this chapter." § 1551.352. This statutory language encompasses more than the payment of benefits—it encompasses payment of *a claim arising from* benefits provided.

Subrogation relates to the payment of a claim. *See Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 774 (Tex. 2007) (recognizing that subrogation depends on payment of a loss); *Fortis Benefits*, 234 S.W.3d at 644; *Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526, 530 (Tex. 2002) (recognizing that a statutory provision requiring employees to reimburse insurance carriers for payments made to the employees is a subrogation provision); *Medina v. Herrera*, 927 S.W.2d 597,

604 (Tex. 1996) ("Generally, an insurer paying a claim under a policy becomes equitably subrogated to any cause of action the insured may have against a third party responsible for the injury."). Subrogation arises from and depends on payment of a loss or debt and is limited to the amount of payments made by the subrogee to the subrogor. *Mid-Continent*, 236 S.W.3d at 774; *Argonaut*, 87 S.W.3d at 530. In other words, subrogation determines who ultimately pays the claim—ERS or the third party, such as the tortfeasor in this case. Whether the payment comes from the Plan or a plan participant's recovery should be ERS's initial decision to make.

Because subrogation relates to payment of the Plan participants' claims, contractual subrogation claims under the Plan should fall within ERS's exclusive jurisdiction. TEX. INS. CODE § 1551.352. The language of the statute governs. *City of Rockwell v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008); *Hogue*, 271 S.W.3d at 256.

The Court seems to suggest that BCBS and ERS colluded on a plan to sue in court and then seek dismissal for lack of jurisdiction. Nothing in the record suggests that ERS and BCBS had such a plan, and nothing in the Plan or statute requires a lawsuit as a predicate to administrative subrogation. Even if BCBS made a litigation misstep by bringing its claim in a court of law and joining ERS as a defendant, BCBS's misstep does not mean that ERS demanded dismissal of "its own claim," as the Court asserts. ___ S.W.3d ___. And such a misstep does not change the language of the statutes vesting ERS with exclusive authority to adjudicate matters relating to payment of claims or the language of the health care plan under which the Duenezes received hundreds of thousands of dollars.

B. Exercise of Jurisdiction

Even if a statute appears to grant an agency exclusive jurisdiction over certain claims, such jurisdiction may be limited if the agency lacks procedural mechanisms to resolve the claims and the agency is unable to award monetary damages. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 207–08 (Tex. 2002). This indicates that the Legislature did not intend to grant exclusive jurisdiction over a certain type of claim. *Id.* Although I believe the plain meaning of the ERS statute grants exclusive jurisdiction quite broadly, the effect would be tempered by further analysis. For example, we held in *Butnaru* that the Motor Vehicle Board's exclusive jurisdiction did not extend to claims for tortious interference and declaratory judgment due to: (1) the Motor Vehicle Code's failure "to establish any procedure through which the Board may resolve [the claims]," and (2) "the Board's inability to award monetary damages." *Id.* at 207–08.

The jurisdiction of the Motor Vehicle Board at issue in *Butnaru* extended to "Code-based claims," such as the denial of an application for a dealership. *Id.* at 207. The plaintiffs asserted a tort claim that would have to be proven under the common law. *Id.* at 208. We held that, because the types of claims asserted and the damages sought were so unlike the types of cases the Board usually heard, nothing in the statutory scheme suggested that the Legislature intended to replace common law remedies with administrative remedies. *Id.* (citing *Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 18 (Tex. 2000)). Whether ERS has the capability to resolve the types of claims asserted bears on the scope of the legislative grant of jurisdiction.

In this case, the Plan creates the subrogation claim asserted by ERS, which arises from ERS's payment of benefits to the Duenezes. *See Fortis Benefits*, 234 S.W.3d at 647 (emphasizing that "the

policy declares the parties' rights and obligations"). The Plan is within ERS's particular expertise. This contrasts with *Butnaru*, where two independent parties unrelated to the agency sued in an agency proceeding based on substantive tort law. On the other hand, probate, marital, and tax questions, which the Court fears would also fall within ERS's exclusive jurisdiction under our definition, would be more similar to the situation in *Butnaru*. ERS has not attempted to exercise exclusive jurisdiction over such collateral matters, but if it did, it would be clear that the Legislature did not intend to extend exclusive jurisdiction that far. *See Butnaru*, 84 S.W.3d at 208.

It is true that ERS has not adopted substantive rules specifically governing the resolution of administrative subrogation proceedings; however, this appears to be the first such subrogation dispute a Plan beneficiary has pursued through the courts. ERS presumably determines the majority of subrogation claims through the administrative process without dispute. Importantly, the enabling statute grants ERS the authority to adopt rules "it considers necessary to implement this chapter and its purposes," including the rules governing subrogation proceedings. *See* § 1551.052. The attorney general points out that the Legislature tied ERS's exclusive jurisdiction to "a pervasive regulatory scheme," thus arguing that the lack of an express provision for subrogation does not limit ERS's jurisdiction. *See In re Entergy Corp.*, 142 S.W.3d 316, 321–22 (Tex. 2004). I agree.

As the court of appeals and the Court note, the lack of substantive guidance on subrogation disputes stands in contrast to other matters within ERS's exclusive jurisdiction, such as eligibility for benefits and coverage, both covered by the Act. 221 S.W.3d at 815; §§ 1551.101–.159, .202–.206. However, ERS's subrogation rights are available only under the Plan, not under the Act. The substantive right to subrogation and the obligation to reimburse ERS are created by the Plan, and the

agency and the Plan beneficiary are both stakeholders in the dispute. In fact, no equitable defenses apply when subrogation rights arise from a contract, as they do in this case. *Fortis Benefits*, 234 S.W.3d at 647. Rather, "the policy declares the parties' rights and obligations." *Id.* Hence, the dispute is much different from the one addressed in *Butnaru*. *See* 84 S.W.3d at 206.

Further, unlike the Motor Vehicle Code at issue in *Butnaru*, the Act provides a general framework for ERS to resolve contested subrogation issues. The statute directs that the executive director make all determinations over which he has jurisdiction, which, in this case, came in the form of a letter to the Duenezes. § 1551.352. The participant then has the opportunity to appeal the determination to the ERS Board of Trustees. § 1551.351(d). Here, the Duenezes appealed to the Board of Trustees;[6] however, the trial court abated the agency proceeding pending a determination of its jurisdiction. Had the appeal proceeded, the Duenezes would have been entitled to a contested case hearing by the ERS Board of Trustees with the opportunity to present defenses. *See* TEX. INS. CODE §§ 1551.351(d), .355(d); s*ee also* TEX. GOV'T CODE §§ 2001.051–.103 (providing minimum standards of uniform procedure for administrative hearings in contested cases). If still dissatisfied after the appeal, the Duenezes, having exhausted all of their administrative remedies, would then be

[6] If the participant failed to file a timely appeal, his or her administrative remedies would similarly be exhausted. Just as an appeal to the Board of Trustees would qualify as a contested case, so too would the decision of a participant not to appeal. *See* TEX. GOV'T CODE § 2001.003(1) ("'Contested case' means a proceeding . . . in which the legal rights, duties, or privileges of a party are to be determined by a state agency after *an opportunity* for adjudicative hearing." (emphasis added)); *see* 25 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 423.02 (2007). If the participant failed to appeal the determination of the executive director of ERS, such determination must necessarily represent the final determination of the administrative agency. *See* § 2001.144. At that point, ERS would be able to enforce its judgment in the trial court. *See* § 2001.202 (stating that the attorney general may, at the request of ERS, represent its interest in a trial court to "compel compliance with the final order," but that representation by the attorney general "is in addition to any other remedy provided by law").

free to file suit in a trial court in Travis County.[7] *See* TEX. INS. CODE § 1551.359 ("A person aggrieved by a final decision of the Employees Retirement System of Texas in a contested case . . . is entitled to judicial review of the decision."); TEX. GOV'T CODE § 2001.171 (providing that a person who has exhausted all administrative remedies available within an agency and is aggrieved by a final decision in a contested case is entitled to judicial review); *Cash. Am. Int'l*, 35 S.W.3d at 15 ("When the Legislature vests exclusive jurisdiction in an agency, exhaustion of administrative remedies is required.").[8] The procedures through which ERS resolves other disputes based on the Plan are already in place and can accommodate the subrogation dispute at issue here.

Second, in *Butnaru*, the plaintiffs sought monetary damages based on the common law claim of tortious interference and a declaratory judgment for a breach of contract claim. 84 S.W.3d at 206. We held that the agency's inability to award monetary damages or a declaratory judgment undermined the argument that its jurisdiction extended to those claims. *Id.* at 206–07. Unlike the agency in *Butnaru*, ERS has the authority to obtain reimbursement of funds, the damages sought here. *See* TEX. INS. CODE § 1551.351(a)–(b) (allowing reimbursement of funds obtained through fraudulent or quasi-fraudulent means). The remedies provided under the Act "are the exclusive remedies available to an employee, participant, annuitant, or dependant." *Id.* § 1551.014; *see Unigard Sec. Ins. Co. v. Schaefer*, 572 S.W.2d 303, 307 (Tex. 1974) ("When the Legislature specifies a particular extent of

[7] If the Board of Trustees finds in favor of the participant, ERS could request that the attorney general bring an action in trial court on its behalf. *See* TEX. GOV'T CODE § 2001.202.

[8] Clearly, then, filing suit is not a prerequisite to exhausting administrative remedies, as the Court suggests. ___ S.W.3d ___. Suit would be filed only after the administrative process has concluded, either by the Duenezes, unhappy with the result, or by ERS, to enforce the decision of the administrative body.

insurance coverage, any attempt to void or narrow such coverage is improper and ineffective."). Conspicuously absent from that list of parties is ERS. ERS has the authority to bring an action under the statute and then to enforce that judgment in the trial court. *See, e.g.*, TEX. INS. CODE § 1551.351(a); TEX. GOV'T CODE § 2001.202. Therefore, ERS is not limited exclusively to the remedies specifically provided in section 1551 and has the authority to fashion appropriate procedures and remedies to be used in subrogation disputes. TEX. INS. CODE §§ 1551.014, .052.

The Court relies on its assertion that ERS's procedures were never designed for collecting a claim. ___ S.W.3d ___. However, ERS must have the procedures for recovering money already paid in benefits, because the statute explicitly allows them to do so in another context. §§ 1551.351(b)(3), (5) (quasi-fraudulent conduct). After receiving a final judgment in the administrative proceeding, ERS would enforce its judgment in the trial court in the same manner it would enforce the recovery of payments made based on quasi-fraudulent conduct or any other administrative decision. *See* TEX. GOV'T CODE § 2001.202 (stating that the attorney general may, at the request of ERS, represent its interest in trial court to "compel compliance with the final order," but that representation by the attorney general "is in addition to any other remedy provided by law").

III. Conclusion

For the reasons discussed above, I conclude that the Legislature has granted ERS exclusive jurisdiction over this subrogation dispute. *In re Entergy Corp.*, 142 S.W.3d at 322. I would reverse the court of appeals' judgment and dismiss the case for want of jurisdiction. TEX. R. APP. P. 59.1.

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Dale Wainwright
Justice

OPINION DELIVERED: July 3, 2009