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FILED
IN SUPREME COURT
OF TEXAS December 10, 2009
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VIA HAND DELIVERY
BLAKE HAWTHORNE, Clerk
BY _____ Deputy
Mr. Blake A. Hawthorne, Clerk
Supreme Court of Texas
201 W. 14th Street, Room 104
Austin, Texas 78701

RE: *Texas Lottery Commission v. First State Bank of DeQueen*, No. 08-0523
(scheduled for oral argument on December 16, 2009)

Dear Mr. Hawthorne:

In light of Plaintiffs' filing yesterday in response to our letter of December 4, 2009, the State of Texas asks that this letter be circulated to the members of the Court.

* * *

Plaintiffs' response begins by discussing jurisdiction—but their real focus is joinder. They make a heroic attempt to rehabilitate the district court's jurisdiction in this case. But their real hope, it seems, is to try to cure that jurisdictional defect here on appeal. That is understandable: After all, whereas the absence of jurisdiction below is dictated by this Court's recent (and unanimous) ruling in *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009), the availability of joinder on appeal is at least an open question for this Court.

Plaintiffs' attempt to join new parties on appeal is also meritless, however, because Texas Rule of Appellate Procedure 7.1(b) only authorizes the "substitution" (and not the joinder) of certain parties—and for that matter, it authorizes only the substitution of parties *other than* public officers. Nor is Plaintiffs' appeal to fairness and equity persuasive—the jurisdictional defect in this suit could have easily been addressed by Plaintiffs long ago, simply by joining government officials in the first place, as many litigants do.

1. Plaintiffs have not effectively rebutted the State's core contention regarding jurisdiction, as detailed in our December 4 letter—namely, that *Heinrich* is fatal to the district court's jurisdiction over Plaintiffs' *ultra vires* claim, because Plaintiffs sued the wrong party. When a plaintiff brings an *ultra vires* suit to enjoin future unlawful government action, *Heinrich* makes clear that the suit must be brought against government officials, not

governmental entities—and that “the governmental entities themselves—as opposed to their officers in their official capacity—remain immune from suit.” *Id.* at 372-73.

Plaintiffs offer two responses, both meritless. To begin with, they cite earlier decisions of this Court that, they say, authorize *ultra vires* suits against governmental entities. But that ignores what this Court did in *Heinrich*. As *Heinrich* explained, this Court’s previous decisions “have been less than clear regarding the permissible use of a declaratory remedy in this type of *ultra vires* suit.” *Id.* at 373. Some previous decisions may have suggested one thing, but they are contradicted by other earlier decisions of this Court. *See, e.g., Cobb v. Harrington*, 190 S.W.2d 709 (1945). In *Heinrich*, this Court made clear that *Cobb* is correct—and that *ultra vires* suits therefore must be brought against government officials, not governmental entities. Plaintiffs’ resort to contrary rulings from previous cases is thus little more than an attempt to overrule, *sub silentio*, this Court’s good efforts to clarify the law in *Heinrich*.

Because they have not brought a proper *ultra vires* claim under *Heinrich*, Plaintiffs alternatively attempt to construe the Uniform Declaratory Judgments Act (discussed in footnote 6 of *Heinrich*) as a waiver of sovereign immunity in this case (TEX. CIV. PRAC. & REM. CODE § 37.006(b)). But as our December 4 letter noted, § 37.006(b) applies only to suits involving constitutional invalidation—not statutory interpretation, as here. In addition, the express text of § 37.006(b) waives only the immunity of a “municipality” (and not a state entity), because only a municipality “must be made a party.” For both of these reasons, Plaintiffs cannot invoke § 37.006(b) as a basis for jurisdiction in this suit without violating this Court’s repeated admonitions, backed by statute, that any waiver of sovereign immunity must be expressed in “clear and unambiguous language.” TEX. GOV’T CODE § 311.034.

2. Unlike their jurisdictional argument, Plaintiffs’ joinder argument is not precluded by recent, unanimous precedent of this Court. Nevertheless, Plaintiffs’ attempt to invoke Texas Rule of Appellate Procedure 7.1(b) fails for several reasons.

First, Plaintiffs’ effort is flatly inconsistent with the text of Rule 7. Plaintiffs invoke Rule 7.1, but that provision expressly applies only to the substitution of “Parties Who Are Not Public Officers” (emphasis added). Only Rule 7.2 authorizes the substitution of public officers—and only under special conditions which Plaintiffs concede they do not satisfy.

Moreover, Plaintiffs’ effort fundamentally misunderstands the purpose of “substitution” under Rule 7. In this context, “substitution” is a term of art—a tool that exists when the interests of a party to the litigation are later transferred to a non-party. Under those circumstances, court rules reflect common sense, by allowing for the substitution of the

successor in interest as a party. And although Texas courts have not addressed this issue to date, numerous other legal authorities reinforce this common judicial understanding of “substitution.”¹

This case, of course, involves no such transfer of interest. The Texas Lottery Commission has not ceased to exist. It has not been replaced by a new, successor entity. And while certain officials may exercise certain authorities on behalf of the Commission, none of them has succeeded to the interests of the Commission. Commission officials will come and go—only the Commission will continue to exist in perpetuity.

What Plaintiffs really need is joinder, not substitution. But unfortunately for Plaintiffs, joinder is not available once final judgment has been rendered—not even in the district court, let alone on appeal.²

At the end of the day, it would have been surprising to learn that the Texas Rules of Appellate Procedure could somehow be used to cure jurisdictional defects in the trial court.

¹ See, e.g., BLACK’S LAW DICTIONARY (8th ed. 2004) (defining “substitution of parties” as “[t]he replacement of one litigant by another because of the first litigant’s death, incompetency, *transfer of interest*, or, when the litigant is a public official, separation from office”) (emphasis added); *Miller v. Bank of Am. Nat’l Trust & Savings Ass’n*, 126 P.2d 444, 447 (Cal. Ct. App. 1942) (“The purpose of a substitution of parties to an action, in the event of death or the transfer of an interest, is that there may be some individual or entity to *represent the transferred interest* during the continuation of the litigation. When the interest is transferred during litigation, by death or by assignment to a stranger to the action, it follows that a substitution of parties should be made.”) (emphasis added); *Mondale v. Comm’r of Taxation*, 116 N.W.2d 82, 85 (Minn. 1962) (“Substitution . . . means stepping into the shoes of one who has acquired a status, in the same capacity as the one who is replaced.”); *Vocke v. City of Dayton*, 303 N.E.2d 892, 894 (Ohio Ct. App. 1973) (rejecting attempt to use “substitution of parties” to join new parties). And notably, under the predecessor rule to Rule 7.1(b)—Rule 9(d)—substitution was expressly limited to “a successor to a party in the appellate court,” and we have found no indication that removal of this language in Rule 7.1(b) was intended to be substantive, rather than stylistic. (For their part, Plaintiffs cite a number of *non*-Rule 7.1(b) rulings—most of which involve *bona fide* transfers of interest, and none of which involve the joinder of parties in order to cure a jurisdictional defect in the district court, in any event.)

² See, e.g., *U.S. Bank Nat’l Ass’n v. Stanley*, No. 14-08-00567-CV, 2009 WL 2933417, *8 & n.6 (Tex. App.—Houston [14th Dist.] Sept. 15, 2009, no pet. h.) (disregarding “apparent attempt to add additional defendants on appeal”); *Mitchell v. Laflamme*, 60 S.W.3d 123, 132 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (“A trial court cannot grant a motion to amend the pleadings after it has rendered judgment.”); *Boarder to Boarder Trucking, Inc. v. Mondy, Inc.*, 831 S.W.2d 495, 499 (Tex. App.—Corpus Christi 1992, no writ) (“after judgment is rendered, it is too late to amend, whether by a trial amendment or an amendment complete in itself”); *Morris v. Hargrove*, 351 S.W.2d 666, 668 (Tex. Civ. App.—Austin 1961, writ ref’d n.r.e.) (amendment too late after summary judgment).

Plaintiffs have offered nothing persuasive to overcome that basic instinct. In sum, Rule 7.1(b) does not authorize joinder, of public officers, after final judgment, on appeal, in order to cure a jurisdictional defect in the district court.

3. Because the district court below lacked jurisdiction, the proper result in this case is vacatur of the judgment below and dismissal of the case for lack of jurisdiction—not remand for further proceedings.

For their part, Plaintiffs request remand “in the interest of justice,” in lieu of dismissal. But they offer no explanation as to how they would be disadvantaged by filing a new suit in the district court (but this time, against the proper defendants under *Heinrich* and *Cobb*), rather than by litigating in that same court but on remand. The State is unaware of any procedural obstacles that would prevent such a filing, or any disadvantages that would result.

4. Finally, Plaintiffs appeal to fairness and equity, and disparage jurisdictional limitations as mere technicalities. But this too falls short for several reasons.

To be sure, as a matter of judicial efficiency, it would have been better for any jurisdictional defects to have been identified (and, if possible, cured) earlier in the process. But that observation does not further Plaintiffs’ cause. After all, the jurisdictional defects in Plaintiffs’ complaint could have been cured long ago by Plaintiffs themselves, had they simply joined governmental officials as defendants in the district court—as many litigants routinely do, and as Plaintiffs would have been wise to do in light of *Cobb*, later reaffirmed by *Heinrich*. And in all events, “judicial economy cannot confer subject matter jurisdiction.” *Burns v. Burns*, 2 S.W.3d 339, 345 n.6 (Tex. App.—San Antonio 1999, no pet.).

What’s more, there is no unfairness here, because the State should prevail in this litigation in any event. It is difficult to imagine how the Legislature—in enacting HB 1799 to establish important consumer protections for lottery winners against predatory business practices—intended to accomplish essentially nothing. Yet that is what Plaintiffs argue.

Indeed, because Plaintiffs’ interpretation of HB 1799 is incorrect, the district court will lack jurisdiction, no matter who Plaintiffs sue next. After all, courts have jurisdiction to hear only *valid ultra vires* claims. To avoid sovereign immunity under *Cobb* and *Heinrich*, an *ultra vires* suit “must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.” 284 S.W.3d at 372 (emphasis added). The Court took special care to note this in *Heinrich*, because the only reason an *ultra vires* suit would not be “prohibited by sovereign immunity” is if the government officials’ conduct is indeed “without legal authority.” *Id.*

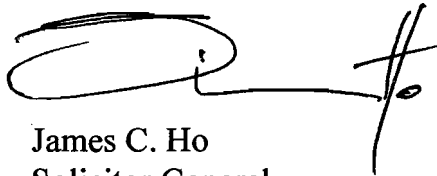
Letter to Blake A. Hawthorne, Clerk
December 10, 2009
Page 5

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In sum, there are two distinct jurisdictional defects that infect this case: (1) the lack of a proper defendant, and (2) the lack of a valid *ultra vires* claim in any event, *id.* Accordingly, the Court could address both jurisdictional defects in this case. But the lack of a proper defendant, alone, provides a sufficient—and simpler—basis for ending this suit.

For the reasons stated herein, as well as in the State's previous briefing, the Court should deny the conditional motion to substitute new parties, vacate the judgment below, and dismiss the case for want of jurisdiction.

Sincerely,

A handwritten signature in black ink, appearing to be 'JCH', written over a horizontal line.

James C. Ho
Solicitor General

JCH/lo

cc: Jeffrey S. Boyd (*via PDF and Certified Mail, Return Receipt Requested*)
Max R. Tarbox (*via PDF and Certified Mail, Return Receipt Requested*)