ACCEPTED
14-24-00137-CV
FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS
4/17/2024 12:04 PM
DEBORAH M. YOUNG
CLERK OF THE COURT

No. 14-24-00137-CV

In the Court of Appeals
For the Fourteenth District Court of Texas

PINEY POINT HOMES, LLC
Appellant

v.

MARILYN BURGESS, DISTRICT CLERK, ET AL
Appellees

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

BRIEF OF APPELLEE MARILYN BURGESS, IN HER OFFICIAL CAPACITY

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NO ORAL ARGUMENT REQUESTED

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RESPONSE TO STATEMENT REGARDING ORAL ARGUMENT

Marilyn Burgess does not request oral argument in this accelerated appeal because the dispositive issues have been authoritatively decided by case law, the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

This case involves the straightforward issue of whether the trial court correctly concluded that a state official acting in her official capacity retains immunity when her staff disbursed court registry funds to a court-appointed receiver in accordance with his notarized wiring instructions. The fact that the receiver later claimed someone "hacked" his email account and sent a counterfeit affidavit has no bearing on sovereign immunity.

This Court held in *Scarver v. Waller County*, 346 S.W.3d 212 (Tex. App.—Houston [14th Dist.] 2011, no pet.), that the relevant statute—Chapter 117 of the Texas Local Government Code—does not waive immunity in cases like this. Accordingly, the issues for review can be decided on the pleadings.

RECORD AND PARTY REFERENCES AND CITATIONS

Harris County's brief uses the following references, with specific page numbers in brackets, unless otherwise noted.

Record References

The Clerk's record consists of one volume, referenced as follows:

Clerk's Record, filed February 20, 2024	CR. [page]

The Report's record consists of one hearing, referenced as follows:

Reporter's Record for hearing held January 30, 2024	RR. [page]

STATEMENT OF THE CASE

Nature of the Case: The District Clerk was ordered to transfer court registry funds to a court-appointed receiver's account in accordance with his wiring instructions. The receiver and attorney for the recipient sent verified instructions to wire the money to one of the receiver's other accounts. These instructions came from a confirmed email address with a written explanation for the account change, and the County Auditor approved the transaction. Two weeks after the receiver knew his client's $1,070,000 had been transferred, he claimed "hackers" had infiltrated his email and bank accounts, sent the District Clerk a forged affidavit for the wrong account, withdrawn the funds, and converted them into cyber currency.

The parties filed suit against the District Clerk, who filed a Plea to the Jurisdiction asserting sovereign immunity.

Trial Court: The Honorable Brittanye Morris,
333rd District Court of Harris County, Texas
Trial Court Cause No. 2023-30774

Trial Court's Disposition: On February 13, 2024, the trial court granted the District Clerk's plea to the jurisdiction because the Legislature has not waived immunity in cases like these and the court lacked jurisdiction to consider the claims against her.

STATEMENT OF JURISDICTION

District Clerk Marilyn Burgess does not dispute that this Court has jurisdiction to consider whether the trial court properly dismissed this case for lack of jurisdiction.

ISSUE PRESENTED

Harris County District Clerk Marilyn Burgess respectfully suggests that a more accurate statement of the Issue Presented is as follows:

> The District Clerk transferred registry funds to a court-appointed receiver in accordance with verified wiring instructions sent by the receiver and counsel for the recipient and approved by the County Auditor. Two weeks after the receiver knew his client's $1,070,000 had been transferred, he claimed "hackers" had infiltrated his email and sent false wiring instructions. He could not recover the funds, and one of the parties filed suit against the District Clerk under Chapter 117 of the Local Government Code.
>
> This Court held in *Scarver v. Waller County*, 346 S.W.3d 212 (Tex. App.—Houston [14th Dist.] 2011, no pet.), that Chapter 117 of the Texas Local Government Code allocates administrative responsibility for court registry funds among government entities but does not waive immunity or create a private cause of action against a district clerk for missing funds.
>
> Did the trial court properly find that the State has not waived immunity from suit or immunity from liability under Chapter 117?

TO THE HONORABLE JUSTICES:

Appellee Marilyn Burgess, in her official capacity, respectfully represents:

STATEMENT OF THE CASE

I.
FACTS

A. Meng claimed Deng stole more than $2 million from Piney Point Homes.

Plaintiff Piney Point Homes, LLC filed suit against eight parties, including Harris County District Clerk Marilyn Burgess, in her official capacity ("District Clerk"), after someone stole $1,070,000 paid to Robert Berleth, a court-appointed receiver in the related case of *Susan Meng v. Tie Deng*, No. 2019-52133, in the 333rd District of Harris County, Texas.

In the related case that led to this litigation, Susan Meng and Tie Deng formed a company called Piney Point Homes, LLC to conduct real estate transactions and provide construction consulting to the Houston Hua Xia Chinese School.[1] Meng's husband, Paul Wang, loaned the company money, Piney Point failed to pay the loan, and on July 30, 2019, Meng filed the related case to recover $190,000 that she claimed her partner, Deng, stole from the company.[2]

---

[1] CR.16-17; CR.47-48, referencing Plaintiff's Original Verified Petition in the related case of *Susan Meng v. Tie Deng*, No. 2019-52133, in the 333rd District of Harris County, Texas.

[2] CR.47-48, referencing Plaintiff's Original Verified Petition at 3-5 in the related case of *Susan Meng v. Tie Deng*, No. 2019-52133, in the 333rd District of Harris County, Texas.

On April 9, 2020, Meng amended her petition in the related case to claim that Deng and his companies "absconded with more than $2,000,000 from Piney Point."[3] Deng counterclaimed and filed seven amended third-party petitions. Deng claimed that Meng and her husband Wang committed fraud, engaged in self-dealing, denied him access to his property, and filed fraudulent liens against property in which he had an interest.[4] In August 2022, the District 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…"[5]

B. The parties settled their claims, and the district court ordered the District Clerk to pay receiver Robert Berleth $1,070,000 from the registry in accordance with Berleth's "specific wiring instructions."

Berleth liquidated Piney Point's assets and deposited the proceeds in the court registry. In March 2023, Piney Point and Wang settled their claims for $1,070,000. On April 18, 2023, the district court ordered the District Clerk's Office to "immediately disburse $1,070,000.00 from the Court's Registry" based on "specific wiring instructions" that Berleth was to provide. Berleth was ordered

[3] CR.47-48, referencing Plaintiff's First Amended Verified Petition at 4, *Susan Meng v. Tie Deng*, No. 2019-52133, in the 333rd District of Harris County, Texas.

[4] CR.47-48, referencing Tie Deng's Seventh Amended Counterclaims and Fifth Amended Third-Party Petition, *Susan Meng v. Tie Deng*, No. 2019-52133, in the 333rd District of Harris County, Texas.

[5] CR.17, 48, & 69, referencing Agreed Order for Appointment of Receiver, *Meng v. Deng*, No. 2019-52133, in the 333rd Judicial District of Texas.

to then pay the funds to Wang, through his counsel, Shannon Lang, within three days of receipt. CR.75.

C. The parties sent the District Clerk's Office specific wiring instructions to deposit $1,070,000 into Berleth's Chase account.

Lang communicated with Berleth about the status of her client's funds, and on Tuesday, May 2, 2023 at 12:38 p.m., emailed the District Clerk's Office from her account at shannon.lang@shannonlanglaw.com.[6] The email contained the subject line "Meng v. Deng, No. 2019-52133" and the body of the email stated:

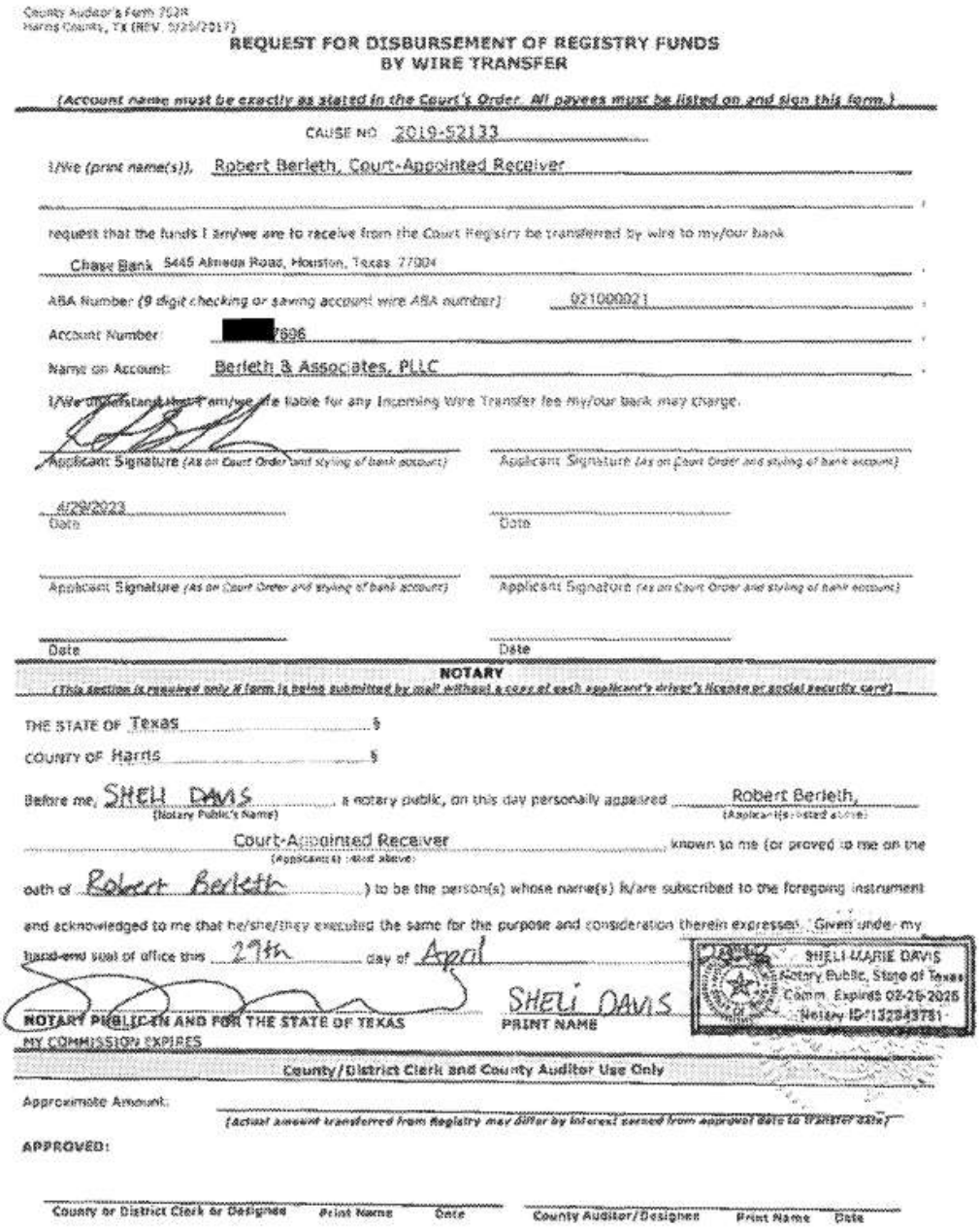
> Ms. Valasquez,
>
> Our receiver [Berleth] reports that his Bank of America account was compromised so we have a new account for the disbursement in Cause No. 2019-52133. The revised form is attached. My apologizes for the inconvenience; do you still expect that the wire can be initiated tomorrow?

CR.81.

While the order originally contemplated that Berleth would ask for the funds to be transferred to his Frost account (CR.75), Lang explained that Berleth needed to change his wiring instructions—first to his Bank of America account and then to his Chase account. To support this, Lang attached an executed affidavit signed by Berleth and notarized (with both stamp and seal) by Sheli Davis. That affidavit

[6] No one disputes that Lang is an officer of the court authorized to communicate with the District Clerk's Office about her client's settlement and that she forwarded actual communications she received from Berleth.

provided the "specific wiring instructions" required by the court order and instructed that the funds be wired to Berleth's Chase account. CR.84. Lang acknowledged that she (and Berleth) expected the funds to be sent on May 3. CR.81. A redacted copy of Berleth's affidavit is reproduced below:



County Auditor's Form 702R
Harris County, TX (REV. 9/29/2017)

REQUEST FOR DISBURSEMENT OF REGISTRY FUNDS BY WIRE TRANSFER

(Account name must be exactly as stated in the Court's Order. All payees must be listed on and sign this form.)

CAUSE NO. 2019-52133

I/We (print name(s)): Robert Berleth, Court-Appointed Receiver

request that the funds I am/we are to receive from the Court Registry be transferred by wire to my/our bank

Chase Bank 5445 Almeda Road, Houston, Texas 77004

ABA Number (9 digit checking or saving account wire ABA number) 021000021

Account Number [redacted]7896

Name on Account: Berleth & Associates, PLLC

I/We understand that I am/we are liable for any incoming Wire Transfer fee my/our bank may charge.

Applicant Signature (As on Court Order and styling of bank account) — Applicant Signature (As on Court Order and styling of bank account)

4/28/2023 — Date — Date

Applicant Signature (As on Court Order and styling of bank account) — Applicant Signature (As on Court Order and styling of bank account)

Date — Date

NOTARY

(This section is required only if form is being submitted by mail without a copy of each applicant's driver's license or social security card)

THE STATE OF Texas §

COUNTY OF Harris §

Before me, SHELI DAVIS, (Notary Public's Name) a notary public, on this day personally appeared Robert Berleth, Court-Appointed Receiver (Applicant(s) listed above) known to me (or proved to me on the oath of Robert Berleth) to be the person(s) whose name(s) is/are subscribed to the foregoing instrument and acknowledged to me that he/she/they executed the same for the purpose and consideration therein expressed. Given under my hand and seal of office this 28th day of April

SHELI MARIE DAVIS
Notary Public, State of Texas
Comm. Expires 02-26-2025
Notary ID 132343781

NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS — SHELI DAVIS PRINT NAME

MY COMMISSION EXPIRES

County/District Clerk and County Auditor Use Only

Approximate Amount:

(Actual amount transferred from Registry may differ by interest earned from approval date to transfer date)

APPROVED:

County or District Clerk or Designee — Print Name — Date — County Auditor/Designee — Print Name — Date

CR.84.

The District Clerk's Office sent these documents to the County Auditor for review. On May 4 at 8:49 a.m., the Auditor's Office authorized the District Clerk's Office to disburse the funds in accordance with Berleth's wiring instructions. CR.86-88. On May 4 at 11:07 a.m., the District Clerk's Office advised Lang: "[t]he wire has been approved. Please confirm once the funds have been received in the bank account." CR.90.

Lang admits sending this email and affidavit instructing the District Clerk's Office to wire $1,070,000 from the Court registry to Berleth's Chase account. Lang never attempted to verify the accuracy of the information she provided to the District Clerk's Office or follow up when her client still had not received $1,070,000 two weeks after it was expected.

D. The District Clerk's Office disbursed the funds in accordance with Berleth and Lang's specific wiring instructions, but the parties claim not to have the money.

Chase accepted this $1,070,000 wire transfer for the account of "Berleth & Associates, PLLC" but deposited it into the account of "CHTN/Nguyen." That account had existed for only seven months, and Chase had internally flagged it as being potentially involved in fraud. CR.24.

The parties in the underlying suit now claim none of them received the money and that the funds were taken from the Chase account by an unknown

person, transferred to a New Jersey bank, then a Coinbase account, and finally converted into cyber currency over several weeks. CR.19. They allege that Lang provided the District Clerk with a fraudulent affidavit and wiring instructions that she received from Berleth. CR.18. Berleth admits the email came from his account but claims he did not send it and that "hackers" are responsible for infiltrating his account and perpetuating an elaborate scheme.[7]

Astonishingly, although the parties expected to receive $1,070,000 by wire on May 4 (CR.90), none of them notified the District Clerk's Office about any problems until May 18. There is no indication that any of them made any attempt to track the alleged cyber currency through either Coinbase or the blockchain.[8] Instead, they filed suit demanding that Marilyn Burgess spend public funds to reimburse them for money they were paid but claim they cannot find.

[7] CR.18, Plaintiff's First Amended Petition at ¶ 25. Berleth's implausible theory requires that an unidentified person (1) know the name and docket number of the *Meng* case, (2) know there was an order requiring that the District Clerk disburse $1,070,000 to Berleth in accordance with his wiring instructions, (3) have access to the affidavit Berleth previously sent to Lang, (4) falsify that affidavit by changing the banking information, (5) have access to Berleth's password-protected law office email account, (6) use that account to email the affidavit and instructions to Lang in the hope she would forward it to the District Clerk's Office without verifying its veracity, (7) hope Chase would accept the funds from the District Clerk's Office even though the account names did not match, (8) withdraw the money and transfer it to two more banks, and (9) hope Berleth and Wang would do nothing for long enough to allow him to remove the funds and convert them to cyber currency. While Berleth vaguely admits that he knows who took the money, he has not identified that person or explained how these events occurred.

[8] See, e.g., https://www.blockchain.com/explorer

II.
PROCEDURAL HISTORY

On May 17, 2023, Berleth filed suit on behalf of Piney Point in the 269th District Court seeking a temporary restraining order to freeze the $1,070,000 that the alleged "hacker" removed from the Chase account listed in his May 4, 2023 affidavit. CR.4-10. The 269th District Court transferred the case to the 333rd District Court because that court had jurisdiction over the related case. CR.7.

The 333rd District Court issued a temporary injunction freezing the Chase account (CR.9-10), but by the time Berleth and Piney Point took action, the funds were long gone. Piney Point then amended its pleadings to make claims against eight defendants, including Burgess. CR.14-26.

On August 28, 2023, Harris County District Clerk Burgess answered (CR.32-38) and filed a Plea to the Jurisdiction and Motion to Dismiss. CR.39-73. On January 22, 2024, Piney Point responded. CR.105-113. On January 30, 2024, Burgess filed a Reply Brief. CR.124-140. The district court permitted the parties to present a thorough oral argument. RR.1-34. On February 1, 2024, Burgess filed a Supplemental Brief. CR.148-157. On February 2, 2024, Piney Point filed a Supplemental Brief. CR.158-160. On February 13, 2024, the district court granted Burgess' Plea to the Jurisdiction. CR.161. On February 21, 2024, Piney Point filed a notice of appeal. CR.168.

SUMMARY OF THE ARGUMENT

Piney Point asks this Court to disregard the Eleventh Amendment of the United States Constitution and centuries of legal doctrine based on its opinion that sovereign immunity is "unfair." Appellant's Brief at 16-17. Piney Point hypothesizes that it would be the "right thing" for this Court to require Texas taxpayers to insure attorneys who handle multi-million dollar transactions without insurance, allow their email and bank accounts to be repeatedly and implausibly "hacked," and say nothing for weeks as court registry funds bounce around the country before being converted into cyber currency.

This is one of the least compelling cases for a litigant to ask a court to overturn the doctrine of sovereign immunity, and "the Texas court system" is not a "line of defense" against lawyers who lose their clients' money. Appellants' Brief at 12. Even if Piney Point persuaded this Court that "the citizens of Texas have good reason to question the doctrine of immunity," (Appellants' Brief at 12), Piney Point's claims against Marilyn Burgess would still be subject to dismissal because she had no personal role in disbursing court funds in this case and could not have acted *ultra vires*. See Burgess affidavit at CR.91.

The District Court properly granted Burgess' plea to the jurisdiction for the following reasons:

A. Piney Point failed to sue the proper entities.

Piney Point sued Burgess in her official capacity, which is actually a suit against the State. The State has not been named or served, and even if it had been, it would have sovereign immunity from Piney Point's claims. *Hickman v. Silva*, No. CA C-12-209, 2013 WL 644356, at *3 (S.D. Tex. Jan. 25, 2013).

B. Piney Point failed to plead an *ultra vires* claim.

Piney Point's *ultra vires* claim fails for three reasons. First, Piney Point does not allege the District Clerk's Office acted without *any* legal authority. Instead, it claims the office was presented with "*conflicting*" instructions and "*inconsistencies and irregularities*" and used its discretion in a manner Piney Point claims was negligent. That is insufficient to state an *ultra vires* claim. *Hall v. McRaven*, 508 S.W.3d 232, 241 (Tex. 2017).

Second, an *ultra vires* claim requires that an official violate an enabling law that creates the bounds of the office's authority, rather than a collateral law that arises while the official performs her duties. *Hall*, 508 S.W.3d at 241-242. The District Clerk acted well within her authority when she undertook to disburse court registry funds, and Piney Point's allegation is that her staff misinterpreted a collateral order while exercising that valid authority.

Third, Piney Point lacks standing because it fails to identify any valid remedy

under its *ultra vires* claim. Piney Point admits that it cannot recover money damages, yet that is the only remedy it seeks. There is no prospective injunctive relief that will bring back the court registry funds in Piney Point's account. *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018).

C. The Legislature has not waived immunity to permit claims under Chapter 117 of the Texas Local Government Code, and even if it had, the District Clerk complied with the statute.

The Legislature has not waived immunity under Chapter 117 of the Texas Local Government Code, and this Court foreclosed on Piney Point's ability to use these statutes in *Scarver v. Waller County*, 346 S.W.3d 212 (Tex. App.—Houston [14th Dist.] 2011, no pet.). Chapter 117 does not contain the waiver language required by *Wichita Falls State Hospital v. Taylor*, 106 S.W.3d 392 (Tex. 2003), and Piney Point's cases are inapposite or pre-date this case. The statute's "liability" for registry funds refers to internal responsibility within the government, and there is no third-party enforcement mechanism to recover lost funds or objective cap on damages that would indicate a waiver of immunity.

Even if Chapter 117 permitted suit, the District Clerk's Office complied with § 117.121 by wiring funds from the court registry after: (1) the designated recipient submitted a written request for the transfer, (2) the District Clerk's Office gave written approval, and (3) the County Auditor's Office countersigned the approval.

ARGUMENT

I.
STANDARD TO REVIEW A TRIAL COURT'S GRANT OF A PLEA TO THE JURISDICTION

A party may file a plea to the jurisdiction to have a case dismissed for lack of subject matter jurisdiction. *McLane Champions, LLC v. Houston Baseball Partners LLC*, No. 21-0641, 2023 WL 4306378, at *3 (Tex. June 30, 2023), citing *Buzbee v. Clear Channel Outdoor, LLC*, 616 S.W.3d 14, 22 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

The question of whether a court has subject matter jurisdiction is a matter of law, and a trial court should determine whether it has jurisdiction at the earliest opportunity before moving on with litigation. *Texas Department of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 at 226, 229 (Tex. 2004). A plaintiff has the burden of showing that the trial court has jurisdiction. *Miranda*, 133 S.W.3d at 225-26. If the pleadings negate the existence of jurisdiction, a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Miranda*, 133 S.W.3d at 227. In this case, the trial court correctly found that the pleadings negated the existence of jurisdiction for the reasons explained below. This Court reviews these findings *de novo*. *Miranda*, 113 S.W.3d at 226.

II.
PINEY POINT'S CLAIMS AGAINST MARILYN BURGESS IN HER OFFICIAL CAPACITY ARE ACTUALLY CLAIMS AGAINST HER EMPLOYER, WHICH HAS IMMUNITY IN THIS CASE

Piney Point filed suit against Marilyn Burgess "only in her capacity as Clerk under the Texas Local Government Code." CR.15 at ¶ 7. An official capacity suit against a public employee is "a suit against the municipality the official represents." *Gomez v. Housing Authority of the City of El Paso*, 148 S.W.3d 471, 482 (Tex. App.—El Paso 2004, pet. denied). See also, *Hallmark v. City of Fredericksburg*, 94 S.W.3d 703, 708 (Tex. App.—San Antonio 2002, pet. denied) ("[i]t is well-settled that a suit against a public official in his 'official capacity' is, in effect, a suit against the municipality or governmental entity the official represents."); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Esteves v. Brock*, 106 F.3d 674, 677 (5th Cir. 1997); *Garza v. Harrison*, 574 S.W.3d 389, 399 (Tex. 2019) (An official capacity suit is "another way of pleading an action against the governmental employer.") This is true whether based on an employee's direct conduct or alleged negligent supervision. *Gomez*, 148 S.W.3d at 482.

A district clerk is an elected official for the State of Texas. In a case alleging the district clerks of two counties failed to provide proper notice under Texas Civil Practices and Remedies Code § 7.001, the Southern District of Texas noted:

> To the extent that Plaintiff is suing Defendants [the district clerks] in their official capacities, his claims are effectively ones against the State of Texas. As such, they are barred by the Eleventh Amendment.

Hickman v. Silva, CA C-12-209, 2013 WL 644356, at *3 (S.D. Tex. Jan. 25, 2013).

"[C]ourt clerks generally act as an arm of the state as a state official." *Dunn v. Smith*, No. 5:22-CV-00178-H, 2022 WL 3335675, at *2 (N.D. Tex. July 20, 2022), appeal dismissed, No. 22-10777, 2022 WL 18673217 (5th Cir. Sept. 8, 2022), quoting *United States v. Texas*, 566 F. Supp. 3d 605, 659 2021 WL 4593319 (W.D. Tex. Oct. 6, 2021). Accordingly, "clerks are entitled to Eleventh Amendment immunity for claims asserted against them in their official capacities as state actors." *Dunn,* 2022 WL 3336575, at *2. See also, *Davis v. Tarrant County*, 565 F.3d 241, 228 (5th Cir. 2009).[9]

Piney Point has not sued the State or the County, and this is the first reason the claims against Burgess were properly dismissed. Burgess raised this issue in the court below (CR.54-55), but Piney Point failed to address it on appeal.

[9] A district clerk can be a county official in some situations, but the distinction is immaterial in this case. In *Hale*, a litigant sued Harris County because she believed the district clerk destroyed, forged, and altered court documents. The First Court of Appeals found the county was entitled to immunity as one of the State's "governmental units." *Hale v. Harris County*, 2021 WL 3556685 (Tex.App.—Houston (1 Dist.)), at *3. Further, Texas Rule of Civil Procedure 33 prevents Harris County from being liable in this case because the County was not named in the suit. "Suits by or against a county or incorporated city, town or village shall be in its corporate name." "If the purpose of a suit is to hold a county liable or in any way to affect its interests the county is a necessary party." *Estes v. Commissioners Court of Hood County*, 116 S.W.2d 826, 828 (Tex. Civ. App.—Fort Worth 1938, no writ).

III.
PINEY POINT FAILS TO PLEAD FACTS TO SUPPORT AN *ULTRA VIRES* CLAIM AND ACKNOWLEDGES THAT EVEN IF IT HAD, IT COULD NEVER RECOVER MONEY DAMAGES

(Response to Appellants' Brief at 18-28.)

A. The District Clerk properly challenged Piney Point's *ultra vires* claim through a plea to the jurisdiction.

The Supreme Court established in *Heinrich* that a defendant sued in her official capacity has the same governmental immunity as her employer and is entitled to have a defective *ultra vires* suit dismissed on a plea to the jurisdiction. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 378-380 (Tex. 2009). If the plea is denied, the official can file an interlocutory appeal. *Id.*; Tex. Civil Prac. & Rem. Code § 51.014(a)(8); *Chambers-Liberty Counties Navigation Dist. v. State*, 575 S.W.3d 339, 343 (Tex. 2019).

B. The district court properly dismissed Piney Point's *ultra vires* claim because Piney Point alleges negligence, rather than an illegal act.

For an *ultra vires* claim to be proper and subject to the court's jurisdiction, it must allege specific facts to show the official acted without any legal authority or failed to perform a ministerial act. "[M]erely asserting legal conclusions or labeling a defendant's actions as 'ultra vires,' 'illegal,' or 'unconstitutional' does not suffice to plead an *ultra vires* claim—what matters is whether the facts alleged constitute actions beyond the governmental actor's statutory authority, properly

construed." *Kilgore Independent School District v. Axberg*, 535 S.W.3d 21 (Tex. App.—Texarkana 2017, no pet.), quoting *Tex. Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 702 (Tex. App.—Austin 2011, no pet.).

Further, "[n]ot every mistake or misinterpretation of the law amounts to an *ultra vires* act." *Hall v. McRaven*, 508 S.W.3d 232, 241 (Tex. 2017). This is because sovereign immunity protects officials from negligence claims, and even if an official is ultimately wrong about his authority to act, he retains immunity if he used discretion or reasonable deliberation.

The Supreme Court cautions not to allow *ultra vires* claims to circumvent sovereign immunity because "an *ultra vires* doctrine that requires nothing more than an identifiable mistake would not be a narrow exception to immunity: it would swallow immunity." *Hall*, 508 S.W.3d at 242-243. Courts may not "create a new vehicle for suits against the state to masquerade as *ultra vires* claims" and have "repeatedly announced and endorsed" the narrow scope of these claims. *Houston Belt & Terminal Railway Co. v. City of Houston*, 487 S.W.3d 154, 164 (Tex. 2016).

In *Hall*, the chancellor of the University of Texas refused to provide student admission records to a regent because the chancellor incorrectly determined the records were protected. *Hall v. McRaven*, 508 S.W.3d 232 (Tex. 2017). While the chancellor had no legal authority to withhold the records, the Supreme Court had

no legal authority to make him hand them over because the chancellor's "legal mistake" was not an *ultra vires* act. The Supreme Court was troubled by the practical consequences of being unable to remedy the violation, yet recognized that the chancellor must retain sovereign immunity. *Hall*, 508 S.W.3d 232 at 241.

The facts do not support Piney Point's claim that the deputy clerk who approved the transfer lacked any legal authority. The District Clerk did not transfer funds into a random bank account for no reason. It acted under Chapter 117 of the Local Government Code to disburse registry funds under a court order that it dutifully attempted to comply with. It received approval from the County Auditor and honored written wiring instructions from the court-appointed receiver and Lang—an officer of the court whose client was the final recipient of the funds.

At most, Piney Point alleges the deputy clerk was faced with two contradictory choices: (1) comply with Berleth's "specific wiring instructions" and deposit the funds into the Chase account that Berleth and Lang identified or (2) do nothing because Berleth never provided the full account number or wiring instructions for his Frost account.

Even if the deputy clerk had the information necessary to wire the funds "into the particular Frost Bank account named in the order" (Appellant's Brief at 22) as Piney Point now insists, that would have violated Berleth's wiring

instructions and risked more than a million dollars by sending it into an account Berleth said was "compromised." That is a Hobson's choice.

Piney Point admits the deputy clerk was presented with orders that were "*conflicting*" with "*glaring inconsistencies and irregularities.*" CR.106. This was not a purely ministerial act, and it required the kind of discretion protected by immunity. Negligently complying with an order is not the same as acting without any legal authority, and the existence of conflicting instructions makes this a garden-variety negligence claim for which the District Clerk has sovereign immunity.

In response, Piney Point cites the *Metzger* and *Eikenburg* cases. Appellant's Brief at 20-21. *Metzger* involved a divorce litigant who deposited appeal funds and then filed a "maze of litigation" trying to get different courts to release them. *Metzger v. Jackson*, No. 01-10-00144-CV, 2010 WL 2991163, at *1 (Tex. App.—Houston [1st Dist.] July 29, 2010, pet. denied). The First Court of Appeals, citing Tex. Loc. Gov't Code § 117.121(a), held that only the court with jurisdiction over the funds could order them released. *Id.* Similarly, *Eikenburg* involved which court had jurisdiction to release registry funds. *Eikenburg v. Webb*, 800 S.W.2d 781, 782 (Tex. App.—Houston [1st Dist.] 1993, no writ). In this case, no one disputes that the 333rd District Court had jurisdiction over the registry funds and signed an order releasing them to Berleth, and these cases are inapposite.

C. The district court properly dismissed Piney Point's *ultra vires* claim because Piney Point alleges misinterpretation of a collateral matter, rather than an enabling law.

An *ultra vires* act usually involves an official acting outside the scope of an enabling law (which creates the bounds of the office's authority) rather than a collateral law that arises while the official performs her duties. *Hall v. McRaven*, 508 S.W.3d 232, 241-242. In *Houston Belt*, a city official engaged in an *ultra vires* act when he believed his position authorized him to charge a railroad $3 million per year in drainage fees. *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 159 (Tex. 2016). That was an *ultra vires* act because the official fundamentally misunderstood the scope of his job.

In contrast, in *Hall*, discussed above, a chancellor's acts were not *ultra vires* because he understood the bounds of his authority as chancellor but misinterpreted a collateral law while exercising that authority. Piney Point does not allege the District Clerk lacked authority to transfer court registry funds at all—it alleges that her office—like *Hall*—misinterpreted a collateral order that even Piney Point admits was "*conflicting*" and contained "*inconsistencies and irregularities*." CR.106. Thus, the act complained about was not *ultra vires*.

D. The district court properly dismissed Piney Point's *ultra vires* claim because Piney Point failed to seek an actionable remedy.

To maintain an *ultra vires* claim, Piney Point must also establish it is entitled to the remedy sought. *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018). "In Texas, the standing doctrine requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court." *Id.* at 487, quoting *Heckman v. Williamson County*, 369 S.W.3d 137 at 154 (Tex. 2012) (emphasis added). Standing is a constitutional prerequisite to suit, and "[t]he doctrine of standing, just like governmental immunity, goes to whether or not a court has subject matter jurisdiction to decide a case." *Id.*

To have standing in an *ultra vires* case, a plaintiff must show he: (1) suffered an injury, (2) the injury is fairly traceable to the defendant's conduct, and (3) the injury is likely to be redressed by the requested relief. *Meyers*, 548 S.W. 3d at 486. This third redressability prong requires plaintiff to "show that there is a substantial likelihood that the requested relief will remedy the alleged injury." *Meyers*, 548 S.W.3d at 485, quoting *Heckman*, 369 S.W.3d at 155.

1. Piney Point acknowledges it cannot recover money damages.

The only remedy available in an *ultra vires* suit is "prospective declaratory and injunctive relief." *Enriquez v. Rodriguez-Mendoza*, No. 03-12-00220-CV, 2013 WL 490993, at *3 (Tex. App.—Austin Feb. 1, 2013, no pet.) The Supreme Court

holds that "retrospective monetary claims are generally barred by immunity." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 374 (Tex. 2009), citing *City of Houston v. Williams*, 216 S.W.3d 827, 828 (Tex. 2007). This is because the purpose of an *ultra vires* action is to require officials to comply with the law. *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477 (Tex. 2018); *Chambers*, 575 S.W.3d at 345 ("Retrospective monetary relief is generally barred. Only *prospective* injunctive relief is available on an *ultra vires* claim.")(internal citation omitted; emphasis in original).

Piney Point does not seek a future injunction—it seeks monetary compensation for a past event.[10] In its brief, Piney Point recognizes this, admits that it is not entitled to monetary relief, and "acknowledges this impediment to its suit." Appellate Brief at 25.

2. Piney Point has no other remedy.

Even if Piney Point had sought an injunction, there is no relief that would remedy the alleged injury. Texas courts lack jurisdiction over any *ultra vires* suit that seeks retrospective relief because an *ultra vires* claim is designed to require

[10] Piney Point's live pleading seeks: "(a) Actual damages; (b) Exemplary damages; (c) Pre-judgment and post-judgment interest; (d) Costs; (e) Attorneys' fees; and (f) All other relief to which Plaintiff is justly entitled." CR.25-26. Piney Point is not entitled to categories (a) through (e) and failed to explain what "other relief" it sought.

officials to comply with the law in the future—not remedy mistakes of the past. *Chambers*, 575 S.W.3d 339.

In *Garcia*, the Supreme Court considered an *ultra vires* claim to prevent the use of red light cameras based on the alleged unconstitutionality of a state statute. *Garcia v. City of* Willis, 593 S.W.3d 201 (Tex. 2019). The Court held that Garcia lacked standing because the relief he sought was for the past use of cameras, and there was no evidence he would receive tickets for running red lights in the future. *Garcia*, 593 S.W.3d at 206-207.

If the District Clerk was still holding funds in Piney Point's registry account and refused to wire them to Berleth, Piney Point might have asked to have those funds transferred. But Piney Point does not seek future compliance—it presumably wants the Court to go back in time and retroactively order the District Clerk to transfer funds from its court registry account to a Frost account that Berleth claims was compromised. Those funds are gone, and Piney Point's court registry account is empty. A court cannot go back in time, and no prospective remedy can address Piney Point's *ultra vires* claim.

There is no actionable remedy available to Piney Point, and it lacks standing to bring an *ultra vires* claim. Accordingly, the Court lacks jurisdiction over this claim.

E. Piney Point's insurance arguments are incorrect and irrelevant. (Response to Appellant's Brief pages 25-28.)

Finally, Piney Point argues that the possibility of insurance "is a reason to recognize that the purpose of immunity may not exist in this case." Appellants' Brief at 25. However, that has no bearing on immunity for several reasons.

First, Piney Point acknowledges there is no evidence in the record of any insurance to cover this claim. Appellants' Brief at 25, citing CR. 154, RR.23-24. Further, footnote 2 of Piney Point's Brief misstates the purpose of a public officer's bond. This bond is not insurance—it is money the official must personally deposit (typically through a bonding company) and pay back to the surety if the official is found liable. See, e.g., Tex. Gov't Code § 604.003. Thus, Burgess or her employer would ultimately have to pay any judgment.

Second, there are two components to sovereign immunity—immunity from suit even when the sovereign's liability is not disputed, and immunity from liability even when the sovereign has consented to suit. *Rosenberg Development Corporation v. Imperial Performing Arts, Inc.*, 571 S.W.3d 738, 746 (Tex. 2019). The existence of an insurance policy would not alter either component of immunity, and Piney Point provides no authority to suggest that it does.

For example, no insurance policy would eliminate the need for Harris County and its employees to incur the expense of defending this suit through

discovery and trial. That includes lost time and productivity by county employees required to take off from their public duties, respond to discovery, and attend depositions and a potential trial. As discussed below, one of the purposes of immunity from suit is to avoid tying up public resources in litigation, and it is a key reason why Texas Civil Practices & Remedies Code §51.014(a)(8) permits the government to file an interlocutory appeal in cases like this.

Third, no political subdivision or official has the power to simply waive sovereign immunity—and certainly not by purchasing an insurance policy. In *Foster*, the Teacher's Retirement System created an insurance plan for retirees that included a contract with a plan administrator promising to pay "the amount of Plan benefits included in any judgment or settlement with respect to a lawsuit involving a claim for Plan benefits" and providing a procedure to file suit. *Foster v. Teacher Retirement System*, 273 S.W.3d 883 at 887-887 (Tex. App.—Austin 2008, no pet.).

While the Teacher's Retirement System appeared to waive sovereign immunity by acknowledging that it could be sued, that waiver had no effect because "it is the Legislature's sole province to waive or abrogate sovereign immunity." *Foster*, 273 S.W.3d at 887, quoting *Federal Sign v. Texas State University*, 951 S.W.2d 401, 409 (Tex.1997).

Similarly, neither Harris County nor Marilyn Burgess can waive immunity,

and if Harris County had insurance, the insurance company itself might be entitled to immunity. In *Humana*, the San Antonio Housing Authority adopted a self-funded insurance plan for its employees administered by Humana Insurance Company. An employee was denied benefits and sued. The San Antonio Court of Appeals held that the Housing Authority's immunity extended to Humana and:

> [t]o hold otherwise would implicate [governmental] funds and expose [Humana] to liability from which its principal is protected and, more importantly, would undercut the public policy that favors allowing [governmental units] to contract with private entities to more effectively provide services to government employees.

Humana Ins. Co. v. Mueller, No. 04-14-00752-CV, 2015 WL 1938657, at *5 (Tex. App.—San Antonio Apr. 29, 2015, pet. denied), quoting *Foster*, 273 S.W.3d at 890.

Piney Point's cases are not on point. First, it cites *IT-Davy* for the proposition that "[i]f a claim does not aim to reduce the public fisc, it does not implicate the very rationale for sovereign immunity." Appellants' Brief at 25. *IT-Davy* involves a contractor who performed work for the state, but the state failed to pay $6,723,655 in additional costs. *Texas Natural Resources Conservation Commission v. IT-Davy*, 74 S.W.3d 849, 851 (Tex. 2002). The state retained sovereign immunity, and this case does not support Piney Point's argument.

Piney Point cites *Rosenberg* for the idea that "modern" sovereign immunity is "political, pecuniary, and pragmatic." Appellant's Brief at 26. In that case, a

corporation created by a municipality to promote economic development was not entitled to sovereign immunity because it was not a state or a political subdivision and did not perform key governmental services. *Rosenberg*, 571 S.W.3d at 750-751. The District Clerk's Office does perform key governmental services outlined in Article 5, § 9 of the Texas Constitution. *Rosenberg* cuts against Piney Point's argument by making clear that sovereign immunity is "designed to guard against the unforeseen expenditures associated with the government's defending lawsuits and paying judgments." *Id.* (emphasis added), quoting *Brown & Gay Engineering, Inc. v. Olivares*, 461 S.W.3d 117, 123 (Tex. 2015). This is precisely the type of case the Supreme Court says the government should not have to defend.

Next, Piney Point cites a federal case where the Port of New Orleans tried to evade liability based on sovereign immunity. Under Louisiana law, the Port was a "separate legal identity from the State of Louisiana" and not entitled to immunity under federal admiralty law. *Principe Compania Naviera, S. A. v. Board of Commissioners of Port of New Orleans*, 333 F. Supp. 353, 355 (E.D. La. 1971). That is also inapplicable to the case at bar.

Piney Point's reliance on *Godwin* is also misplaced. That is a 1970 Maryland case where a state appellate court noted that some legal scholars believed the United States should not have retained sovereign immunity "when the separation

from the mother country and its monarchy occurred at the time of the War for American Independence…" *Godwin v. County Commissioners of St. Mary's County*, 256 Md. 326, 333, 260 A.2d 295, 298 (1970). Nevertheless, that court found that Maryland did retain immunity and affirmed the dismissal of a claim against county commissioners for failing to maintain a road that led to a car accident.

In *Genesee County Drain Commissioner*, a Michigan court of appeals held that one government entity cannot even sue another for money damages. It noted that "the taxpaying citizen, who already pays dearly for government employees to perform governmental functions, would pay an unacceptably high price if every wrong or alleged wrong committed by the government or its agents were regarded as compensable." *Genesee County Drain Commissioner v. Genesee County*, 309 Mich. App. 317, 325, 869 N.W.2d 635, 640 (2015).

None of these cases help Piney Point, and none of Piney Point's arguments about insurance have any bearing on sovereign immunity. The only relevance that insurance has to this case is that none of the attorneys involved in Piney Point's high-dollar litigation appear to have their own insurance, yet they expect the taxpayers to insure the loss of their clients' funds after the receiver's email and multiple bank accounts were inexplicably "hacked" and they failed to protect their client's money for two weeks as the "hackers" converted it to cyber currency.

IV.
HARRIS COUNTY AND BURGESS HAVE IMMUNITY FROM PINEY POINT'S CLAIMS UNDER CHAPTER 117 OF THE LOCAL GOVERNMENT CODE

(Response to Appellant's Brief at 28-39.)

A. Piney Point must overcome a strong presumption of immunity.

Texas first recognized in 1847 that "[a] state cannot be sued in her own courts without her own consent, and then only in the manner indicated by that consent." *Rufus K. Hosner v. John Deyoung, Surveyor, etc.*, 1 Tex. 764 (1847). This is to preserve the dignity of the State, protect public resources, and "shield the public from the costs and consequences of improvident actions of their governments." *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006).

Sovereign immunity has two components: immunity from suit and immunity from liability. *City of Houston v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011). The State retains immunity from suit unless the Legislature has expressly waived it for a particular claim. *Federal Sign v. Texas Southern University,* 951 S.W.2d 401, 405 (Tex. 1997) (superseded by statute on other grounds); *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007). Even when the Legislature gives consent to sue, public entities and their officials are still shielded from money judgments based on immunity from liability. Thus, a plaintiff must show that the Legislature has waived both immunity from suit and immunity from liability. *Id.*, 217 S.W.3d at 469.

In 2001, the Legislature codified Texas Gov't Code § 311.034, which requires "clear and unambiguous language" to waive immunity:

> In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language . . . Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.

Tex. Gov't Code § 311.034; *Texas National Resources Conservation Com'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002). Since then, the Supreme Court has repeatedly reaffirmed the high burden a party asserting a waiver of immunity bears.

B. A statute must either use "magic words" or meet the strict requirements of *Taylor* to waive immunity.
(Response to Appellant's Brief pages 28-32.)

When a statute purportedly waives immunity, "special rules of construction apply, as the Legislature has mandated that no statute should be construed to waive immunity absent 'clear and unambiguous language.'" *State v. Oakley*, 227 S.W.3d 58, 62 (Tex. 2007). Typically, this requires the Legislature to use "magic words" such as stating that "sovereign immunity to suit is waived." *Wichita Falls State Hospital v. Taylor*, 106 S.W.3d 692, 696-97 (Tex. 2003). Only on "rare occasions" will the Supreme Court find that the Legislature waived immunity without these "magic words." *Id.* In those cases, a plaintiff has a heavy burden to show:

(1) that the statute waives the State's immunity "beyond doubt",

(2) if there is any ambiguity, the court must find no waiver of immunity, and

(3) if a statute waives immunity, it should also have "simultaneous measures to insulate public resources from the reach of judgment creditors." See, e.g., Tex. Civ. Prac. & Rem. Code §§ 101.023-024; Tex. Gov't Code §§ 554.003, 2007.023. Any statute that does not have an objective cap on damages is likely to not waive immunity.

Taylor, 106 S.W.3d at 697.

It is not enough for a statute to permit individuals and public entities to "sue and be sued," "plead and be impleaded," "prosecute and defend," "defend or be defended," "answer and be answered," or "complain and (or) defend." Although these words may appear to waive immunity, they do not unless there is strong supporting context. As the Supreme Court explains:

> Scores of Texas statutes provide, variously, that individuals and entities, public and private, may "sue and (or) be sued", "(im)plead and (or) be impleaded", "be impleaded", "prosecute and defend", "defend or be defended", "answer and be answered", "complain and (or) defend", or some combination of these phrases, in court. The phrases are also used in municipal charters and ordinances and in corporate articles and bylaws. Read in context, they sometimes waive governmental immunity from suit, sometimes do not, and sometimes have nothing whatever to do with immunity, referring instead to the capacity to sue and be sued or the manner in which suit can be had (for example, by service on specified persons). Because immunity is waived only by clear and unambiguous language, and because the import of these phrases cannot be ascertained apart from the context in which they occur, we hold that they do not, in and of themselves, waive immunity from suit.

Tooke v. City of Mexia, 197 S.W.3d 325, 328-29 (Tex. 2006).

Texas law contains many examples of statutes that appear to create causes of action but are not explicit enough to waive immunity. For example, in *Harris County Hospital District*, the Supreme Court held that Health and Safety Code § 281.056(a) did not waive the Harris County Hospital District's immunity from suit even though the statute clearly permitted boards of hospital districts to "sue and be sued." The Court held:

> When an entity's organic statute provides that the entity may "sue and be sued," the phrase in and of itself does not mean that immunity to suit is waived. *Tooke,* 197 S.W.3d at 337. Reasonably construed, such language means that the entity has the capacity to sue and be sued in its own name, but whether the phrase reflects legislative intent to waive immunity must be determined from the language's context. *Id.* Thus, section 281.056(a) does not in and of itself waive HCHD's immunity. *See id.* at 334, 337. Nor does section 281.056(a)'s language indicate a waiver of HCHD's immunity when considered in context with the remainder of section 281.056 which specifies who will represent the district in civil proceedings. This section anticipates the district's involvement in civil proceedings of some nature at some point, but it does not address immunity from suit.

Harris County Hospital District v. Tomball Regional Hospital, 283 S.W.3d 838, 843 (Tex. 2009).

Piney Point cites *Fernandez* for the proposition that this court should apply a lower standard and simply try to determine whether the statute's purpose would be served by waiving immunity. Appellant's Brief at 29-32, citing *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1 (Tex. 2000). In *Fernandez*, the Supreme Court held that the Legislature waived immunity for state employees who were discriminated

against for filing worker's compensation claims. This case is inapposite for several reasons. First, in *Fernandez*, the Legislature designated the specific defendant to be sued. Second, it permitted a claim to the limits of the Texas Tort Claims Act, which established an objective cap on damages. *Id.*, 28 S.W.3d at 4, 6-7. Finally, the law fit into the state worker's compensation scheme, which clearly waived immunity. *Id.*, 28 S.W.3d at 7-8. None of those factors exist in the case at bar.

Even more importantly, *Fernandez* was decided before the Legislature codified Texas Gov't Code § 311.034 to require "clear and unambiguous language" to waive immunity and before *Taylor* required evidence of waiver "beyond doubt" and "simultaneous measures to insulate public resources from the reach of judgment creditors." See, e.g., Tex. Civ. Prac. & Rem. Code §§ 101.023-024; Tex. Gov't Code §§ 554.003, 2007.023. Thus, *Fernandez* is not only distinguished; it is also overruled in part.

Piney Point's reliance on *Chevron* is also misplaced. That case involved a person with poor vision who applied to work on a Gulf Oil Corporation (now Chevron) oil platform in the 1980s. The Americans with Disabilities Act had not yet been passed, and she sued under a similar state law. *Chevron Corp. v. Redmon*, 745 S.W.2d 314 (Tex. 1987). This case not only predates Texas Gov't Code § 311.034 and *Taylor*, but it does not discuss sovereign immunity at all.

C. The Legislature has not waived immunity, permitted suits, or established a damage cap under Chapter 117, and Burgess complied with these statutes.

(Response to Appellant's Brief pages 32-37.)

1. Tex. Loc. Gov't Code § 117.121 does not waive immunity.

Against this backdrop, Piney Point relies on Chapter 117 to support its claims against Burgess. First, it argues Burgess failed in her duties as custodian of registry funds under Tex. Loc. Gov't Code § 117.121. Even if Burgess was somehow negligent, § 117.121 does not waive immunity. It provides no "magic words," cause of action, enforcement mechanism, or objective damage cap. Piney Point does not even suggest what authority § 117.121 provides to file suit.[11]

Putting aside the fact that Piney Point cannot file suit under § 117.121, there is no genuine issue of material fact that Burgess complied with the statute. A district clerk may wire funds from the court registry if: (1) the designated recipient submits to the clerk a written request for the transfer, (2) the clerk gives written approval, and (3) a county auditor countersigns the approval. Tex. Loc. Gov't Code § 117.121(c).

The District Clerk received not only a written request from Berleth and Lang—but also a notarized request to wire funds to an account designated by

[11] Piney Point also acknowledges in its Brief that Chapter 117 does not even impose a fiduciary duty on the District Clerk to hold the funds. Instead, Chapter 117 notes the District Clerk is "only" a custodian. Appellant's Brief at 32, citing Tex. Loc. Gov't Code § 117.120.

Berleth and Lang. CR.81-84. Further, the auditor countersigned the approval. CR.86. Even if § 117.121 permitted suit against Burgess or Harris County, such a claim would have been properly dismissed because Burgess enforced a higher standard than the Legislature required.

2. Tex. Loc. Gov't Code § 117.124 does not waive immunity.

Piney Point also relies on Tex. Loc. Gov't Code § 117.124, which provides that in a county with a population of more than 1.3 million, a clerk is "responsible" for the loss of funds resulting from the clerk's official misconduct, negligence, or misappropriation of funds. Even if Burgess had lost these funds (she did not) and was negligent (she was not), § 117.124 does not provide an independent cause of action for third parties to sue the District Clerk.

First, the statute does not contain the "magic words" that "sovereign immunity to suit is waived." *Taylor*, 106 S.W.3d at 696-97. It does not even say the clerk can "sue and be sued," "plead and be impleaded," "prosecute and defend," "defend or be defended," "answer and be answered," or "complain and (or) defend"—words that Texas courts have held are still inadequate to waive immunity without further context. *Tooke*, 197 S.W.3d at 328-29.

Second, the context of Chapter 117 makes clear that it only establishes a district clerk's "responsibility" or "liability" related to the internal workings of

government. The purpose of Chapter 117 is to promulgate "various provisions addressing the selection, qualification, and designation of depositories as well as the accounts held there" and to allocate within government "the responsibility for ensuring the safety of the funds to different entities at various stages." *Scarver v. Waller County*, 346 S.W.3d 212, 214 (Tex. App.—Houston [14th Dist.]). There is no third-party enforcement mechanism.[12]

Third, this Court has already held that a district clerk cannot be sued under Chapter 117. In *Scarver*, this Court considered a case where a district clerk disbursed funds from a court registry to the wrong party without obtaining a court order at all. *Scarver v. Waller County*, 346 S.W.3d 212, 214 (Tex. App.—Houston [14th Dist.] 2011, no pet.). Scarver—like Piney Point—sued the district clerk (and the county) for negligent disbursement of registry funds under Chapter 117 of the Texas Local Government Code.

[12] If Chapter 117 could be enforced, it would have to be by the government through other remedies. For example, Art. 5 § 24 of the Texas Constitution provides a process to remove county officers for failing to perform official duties. Art. 16, § 10 says that when public officers neglect their duties, "[t]he Legislature shall provide for deductions" of their salaries. The Legislature has also passed criminal statutes to hold officers responsible for failing to perform their duties. See, e.g., Tex. Penal Code § 39.02. Neither these provisions—nor Chapter 117—gives Piney Point the right to breach governmental immunity and file suit against Burgess or Harris County.

This Court held that Chapter 117 does not waive the district clerk or county's immunity from suit, even when the district clerk disburses money from a court registry with no order at all. *Scarver*, 346 S.W.3d at 220. This case is directly on point and conclusively forecloses on Piney Point's claims against Burgess and Harris County under the Local Government Code.

In response, Piney Point places great emphasis on the word "liability" in the statute's heading while acknowledging that a heading "does not limit or expand a statute's meaning" but might "inform the inquiry into the Legislature's intent." Appellant's Brief at 33. However, as noted, the word "liability" is not enough to waive immunity.

Piney Point cites *TIC Energy*, a case where a Union Carbide employee was injured in a workplace accident and the question was whether the Worker's Compensation Act covered that employee. The case did not deal with the heightened standard for waiving immunity, and the court looked to the heading as the final piece of evidence to confirm a lengthy analysis. In contrast, Piney Point has no meaningful analysis to show how Chapter 117 waived immunity, and there is nothing for the heading to confirm—particularly in light of the enhanced burden that Piney Point faces under Texas Gov't Code § 311.034 and *Taylor*.

3. Tex. Loc. Gov't Code § 117.083 does not waive immunity.

Although Piney Point failed to sue Harris County and failed to cite Tex. Local Government Code § 117.083 in its response to the plea to the jurisdiction in the court below, it now contends that § 117.083 provides a right to recover against Harris County. That statute notes that a county is liable for funds lost while they are "deposited by the county with a depository selected" by the county and for reasons such as "the insolvency of the depository." Tex. Loc. Gov't Code § 117.083. In other words, this statute applies to funds actually on deposit with "a federally insured bank or banks" that the county selects. Tex. Loc. Gov't Code § 117.021(a). It does not apply after those funds have been removed from the bank.

Piney Point acknowledges that the funds in question were not lost while deposited with a federally insured depository selected by the county—they were transferred to Berleth in connection with his wiring instructions and "lost" during the two weeks that Berleth failed to account for them.[13] Thus, on its face, § 117.083 does not apply to the facts of this case.

In addition, § 117.083 is part of Chapter 117 of the Local Government Code, and the same arguments apply to it that apply to § 117.124. The statute does not

[13] These funds could not be considered lost until after they were transferred. They were sent to someone with access to Berleth's email account and password, detailed knowledge of his cases and bank accounts, and the ability to notarize documents on his behalf. During one hearing in the court below, Berleth claimed he knew who had the funds, but declined to share that information.

contain the "magic words" that "sovereign immunity to suit is waived." *Taylor*, 106 S.W.3d at 696-97. It does not expressly provide a right to sue or a mechanism for collecting damages. *Scarver*, 346 S.W.3d at 220. And, it was passed in 1987—prior to Texas Gov't Code § 311.034 and *Taylor*, which tightened the standards for waiving immunity.

Piney Point cites *Osburn* for the principle that it can bring suit under Chapter 117. In that case, a district clerk paid court registry funds to a third-party despite being ordered by a judge not to do so. Osburn—the party entitled to the funds—brought a claim under Art. I, § 17 of the Texas Constitution. The court of appeals held that Article I provides a remedy for property deliberately taken by the government for a public purpose, but not when a district clerk pays registry funds to the wrong party. *Osburn v. Denton County*, 124 S.W.3d 289, 293 (Tex. App.—Fort Worth 2003, pet. denied).

The Fort Worth Court of Appeals suggested in *dicta* that there might be a remedy available under Chapter 117, but it never analyzed the claim, the parties never briefed the issue, and there was never any ruling. Piney Point acknowledges that *Osburn*—unlike *Scarver*—is not binding. Appellant's Brief at 36-37.

V.
RESPONSE TO PINEY POINT'S POLICY ARGUMENTS

(Response to Appellant's Brief at 37-42.)

Finally, Piney Point asks a number of rhetorical questions such as "What is responsibility without liability?" "What is a right without a remedy?" and "Why would anyone trust the Clerk's office or the district court's registry going forward?" Appellant's Brief at 37 & 40. These are policy questions more appropriately directed to the Texas Legislature.

To the extent Piney Point suggests that a court registry cannot be trusted, or that a district clerk can "steal funds from the court registry" without consequence (Appellant's Brief at 40), that is clearly incorrect. As Piney Point acknowledges, there is little case law on this topic because problems with court registry funds are so rare. If funds were stolen, state law provides mechanisms to remove officials from office and criminal liability that includes restitution.[14]

Piney Point's musings about the increase in cybercrime only reinforce that attorneys should protect their bank and email accounts, maintain insurance, respond promptly to evidence of hacking, and follow up when a client is missing more than a million dollars for two weeks. Importantly, the District Clerk's Office was not hacked and did not lose court registry funds. The private attorneys in this

[14] See footnote 12, discussing Tex. Const. Art. 5, § 24 & Art. 16, § 10 and Tex. Penal Code § 39.02.

case lost their clients' money through lax security and inattention, and the public should not be required to insure these lawyers for their mistakes. That would be a misuse of public funds and erode "public confidence in public institutions." Appellant's Brief at 42.

VI.
ARGUMENTS INCORPORATED BY REFERENCE

Piney Point made several arguments in the trial court that were abandoned on appeal. For example, in the trial court, Piney Point invoked Tex. Civ. Prac. & Rem. Code § 7.001, *et seq.*, which the District Clerk addressed at CR.60-62. Piney Point also asserted constitutional claims under the Fourteenth Amendment of the United States Constitution and Art. I of the Texas Constitution. These arguments were addressed in the court below at CR.62-64. Finally, the District Clerk pointed out in the trial court that it would be futile to permit Piney Point to amend its petition or file individual claims against Burgess or her staff because they are entitled to qualified immunity and judicial immunity to the extent they were acting on behalf of the 333rd District Court. These arguments were made at CR.66-72.

Although these points were not raised on appeal, out of an abundance of caution, the District Clerk incorporates by reference her arguments in the court below.

CONCLUSION AND PRAYER

The District Clerk's Office transferred registry funds to a court-appointed receiver in accordance with his wiring instructions and after receiving approval from the County Auditor. Two weeks after the receiver knew his client's $1,070,000 had been transferred, he claimed someone "hacked" his email, sent a forged affidavit to the District Clerk to redirect the funds, and then stole them.

The District Clerk acted within her authority to process this transaction and Piney Point has not identified a remedy to support an *ultra vires* claim. Further, this Court held in *Scarver v. Waller County*, 346 S.W.3d 212 (Tex. App.—Houston [14th Dist.] 2011, no pet.), that Chapter 117 of the Local Government Code allocates administrative responsibility for court registry funds among government entities and does not create a private cause of action against a district clerk for missing registry funds.

The District Clerk's Office fulfilled its obligations under the relevant statutes, and even if it had somehow been negligent, retains sovereign immunity for Piney Point's claims. Accordingly, the district court correctly dismissed this case, and this Court should affirm in all respects and award costs to the District Clerk.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 17th day of April 2024 a true and correct copy of the foregoing instrument was served by the Court's electronic filing system and via email on the following:

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