Vacated, Ordered Dismissed, Majority and Concurring Opinions filed July 13, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-99-00500-CV

———————————

FLEET TRANSPORTATION, INC. AND SWIFTSEA MANAGEMENT, LTD., Appellants

V.

BUTLER & BINION, L.L.P. AND LUIS SALINAS, JR., Appellees

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 95-40454

M A J O R I T Y O P I N I O N

Appellant, Fleet Transportation, Inc., appeals the trial court's grant of summary judgment in favor of appellees, Butler & Binion L.L.P. and Luis Salinas Jr.; appellant, Swiftsea Management, Ltd., appeals the trial court's denial of its petition in intervention to the lawsuit. Because we determine the trial court lacked subject matter jurisdiction, we vacate the trial court's judgment and dismiss the case.

BACKGROUND

Fleet sued Butler & Binion and one of its partners, Salinas, for malpractice allegedly arising out of Salinas' representation of Swiftsea in an underlying suit Fleet had prosecuted successfully against Swiftsea. Without going into detail regarding the underlying suit, Fleet sued Swiftsea to recover assets allegedly fraudulently transferred to Swiftsea from Fleet. The case proceeded to trial and the jury returned a verdict favorable to Fleet, awarding it $1 million in actual damages and $18 million in punitive damages. Before entering judgment, the trial court ordered the parties to mediation. Apparently, after failed negotiations, Salinas and the Swiftsea shareholder representative decided not to attend the court ordered mediation.[1] The trial court entered judgment on the jury verdict of $19 million and further ordered that all of Swiftsea's claims or causes of action be assigned to Fleet.

Based on the assignment of Swiftsea's claims in the judgment, Fleet instituted this legal malpractice suit (without joining Swiftsea) against Butler & Binion and Salinas. Butler & Binion and Salinas moved for summary judgment. On December 4, 1998, the trial court granted the motion and entered final judgment for appellees. Swiftsea thereafter petitioned for intervention in the suit. Butler & Binion and Salinas motioned to strike the intervention; the trial court granted the motion and struck Swiftsea's petition in intervention.

Fleet appeals the granting of summary judgment and Swiftsea appeals the striking of its petition in intervention.

STANDING

While Butler & Binion and Salinas argued several grounds in their motion for summary judgment, we find one argument - that Fleet did not have standing to assert Swiftsea's legal

---

[1] While we do not address the merits of the cause of action, we take a negative view of attorneys - officers of the court - deciding not to attend a mediation ordered by the trial court. Such conduct is best dealt with by the trial court.

malpractice claim because of the prohibition in Texas against assignment of such claims - to be dispositive to this appeal.[2]

"[S]tanding implicates the trial court's subject matter jurisdiction." *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex.1996). Standing deals with whether a litigant is the proper person to bring a lawsuit, not whether that party can ultimately prevail on its claims. *See Amerada Hess*, 973 S.W.2d at 680. Standing consists of some interest peculiar to the person. *See id*. To establish standing, a litigant must demonstrate a personal stake in the controversy. *See Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex.1984). Standing generally requires a real controversy between the parties, which will be actually determined by the relief sought. *See Texas Ass'n of Bus.*, 852 S.W.2d at 446.

Because standing is a component of subject matter jurisdiction, we consider the plaintiffs' standing under the same standard by which we review subject matter jurisdiction. *Cedar Crest Funeral Home, Inc. v. Lashley*, 889 S.W.2d 325, 330 (Tex. App.—Dallas 1993, no writ). That standard requires the pleader to allege facts that affirmatively demonstrate the court's jurisdiction to hear the case. *See id*. We construe the pleadings in favor of the plaintiffs and look to the pleaders' intent. *See id*. If the plaintiffs lack standing, the trial court has no jurisdiction over the merits of the claim, and the entire cause must be dismissed. *See id*.

---

[2] Butler & Binion and Salinas have confused the jurisdictional concept of standing with the ability to prove the merits of a cause of action. *See Amerada Hess Corp. v. Garza*, 973 S.W.2d 667, 680 (Tex. App.—Corpus Christi 1996, no writ). Standing is a component of subject matter jurisdiction. *See id*. Rather than a motion for summary judgment, a plea to the jurisdiction is generally the proper vehicle by which a party contests the trial court's authority to determine the subject matter of the cause of action. *See TRST Corpus, Inc. v. Financial Center, Inc.*, 9 S.W.3d 316, 320 (Tex. App.—Houston [14th Dist.] 1999, pet. filed). A plea to the jurisdiction is a dilatory plea whose purpose is to defeat the cause of action without defeating the merits of the case. *See id*. To address the issue of standing in the trial court, Butler & Binion and Salinas could have asserted a plea to the jurisdiction, rather than a motion for summary judgment. Regardless, because standing is a jurisdictional issue, it is properly before us. *See Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993) (subject matter jurisdiction is an issue that may be raised for the first time on appeal).

As previously noted, the trial court in the underlying suit included in its final judgment an order of assignment of Swiftsea's claims and causes of action to Fleet. In its original petition, Fleet asserted that it was awarded Swiftsea's causes of action for legal malpractice, negligence, and gross negligence against Butler & Binion and Salinas by virtue of that final judgment. These are the only facts alleged by Fleet to show a right to bring the suit before us.

It is true that causes of action are generally assignable, *see* TEX. PROP. CODE ANN. § 12.014 (Vernon 1984 & Supp. 2000), and are property rights which can be subject to turnover order. *See Charles v. Tamez*, 878 S.W.2d 201, 205 (Tex. App.—Corpus Christi 1994, writ denied). However, assignments of legal malpractice claims are invalid in Texas.[3] *See Zuniga v. Groce, Locke, & Hebdon*, 878 S.W.2d 313, 318 (Tex. App.—San Antonio 1994, writ ref'd); *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 389 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.).

Based on the plain language of the Supreme Court in *Zuniga*[4] and this court in *Vinson & Elkins* prohibiting the assignment of legal malpractice claims, we hold that the ordered assignment of Swiftsea's malpractice claim against Butler & Binion and Salinas to Fleet was invalid. Because the assignment of the malpractice claim was invalid, Fleet had no standing to assert Swiftsea's legal malpractice claim. Absent standing, we hold Fleet failed to invoke the

---

[3] While the assignment in this case was one ordered by the trial court in its final judgment, rather than a voluntary assignment between Swiftsea and Fleet, we see no reason why there should be a distinction between voluntary and court-ordered assignments of legal malpractice claims. The public policy reasons for the prohibition discussed in *Zuniga* are no different whether the assignment is voluntary or court-ordered.

[4] After The San Antonio Court of Appeals decided *Zuniga*, the Texas Supreme court "refused writ" on the case. The result of the Supreme Court's refusal to grant writ was to declare that the court of appeals' decision was correct and that the principles of law set forth in the opinion were correctly determined. *See* TEX. R. APP. P. 56.1(c) (a writ or petition refused court of appeals' opinion has same precedential value as an opinion of the Supreme Court); *Baker v. Mallios*, 971 S.W.2d 581, 583 (Tex. App.—Dallas 1998), *aff'd* 11 S.W.3d 157 (Tex. 2000). We will refer to the discussion and holding of *Zuniga* as that of the supreme court. *See Vinson & Elkins*, 946 S.W.2d at 391 n.5. *See also, State Farm Fire and Cas. Co. v. Gandy*,925 S.W.2d 696, 707 (Tex. 1996) (Supreme Court referring to the San Antonio court's *Zuniga* opinion as its own).

subject matter jurisdiction of the trial court. The trial court thus lacked the power to adjudicate the cause of action and should have entered an order of dismissal.

PETITION IN INTERVENTION

Swiftsea complains the trial court erred in striking its petition to intervene in Fleet's asserted cause of action.

A prerequisite to intervention is that the intervenor must have a justiciable interest in the controversy. *See Camacho v. Samaniego*, 954 S.W.2d 811, 828 (Tex. App.—El Paso 1997, pet. denied) (citing *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex.1990)). It is implicit, therefore, that there be a controversy before the trial court. Here, however, we have determined that Fleet, lacking standing, failed to invoke the jurisdiction of the trial court. Swiftsea could not belatedly invoke the jurisdiction of the trial court for, nor confer standing on, Fleet by attempting to intervene.[5] At that point in the proceedings there was no controversy before the court in which Swiftsea could intervene. We hold that the trial court did not err in striking Swiftsea's petition in intervention to Fleet's attempted lawsuit.

Accordingly we vacate the judgment and dismiss the case.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed July 13, 2000.
Panel consists of Justices Fowler, Edelman, and Draughn.[*]
Do Not Publish — TEX. R. APP. P. 47.3(b).

---

[5] Whether Swiftsea could have originally brought the lawsuit in its own right under the attendant circumstances is not before us and we express no opinion in that regard.

[*] Senior Justice Joe L. Draughn sitting by assignment.