Docket No. 21-124205-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

KRISTEN BUTLER and SCOTT BOZARTH
Plaintiffs

v.

SHAWNEE MISSION SCHOOL DISTRICT BOARD OF EDUCATION
Defendant/Appellee.

ATTORNEY GENERAL DEREK SCHMIDT
Intervenor/Appellant

SUPPLEMENTAL BRIEF ON JURISDICTION BY APPELLEE SHAWNEE MISSION SCHOOL DISTRICT BOARD OF EDUCATION

Appeal from the District Court of Johnson County, Honorable David W. Hauber, Judge, District Court Case No. 2021-CV-2385

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Table of Contents

Case Law

Statutory Authority

Other Legal Authority

NATURE OF THE CASE

Intervenor, the Kansas Attorney General, seeks appellate review pursuant to K.S.A. 60-2101(b), 60-224(b)(2)(C) & 75-764 of the district court's Judgment and Final Order After Intervention by the Kansas Attorney General on July 15, 2021 ("Judgment" or "Final Order") declaring 2021 Senate Bill 40 unconstitutional. Aplt. Brf. p. 24; Notice of Appeal, R.O.A. Vol. 1 pp. 72-73. As requested by the Order, dated September 17, 2021, Defendant presents this supplemental brief to address whether a timely request for a hearing under Section 1(c)(1) of 2021 SB 40, L. 2021, ch. 7, § (c)(1), to challenge "an action taken, order issued, or policy adopted by" a board of education of a school district is a jurisdictional prerequisite for a civil action under Section 1(d)(1) of 2021 SB 40, L. 2021, ch. 7, § (d)(1).

STATEMENT OF ISSUES

1. Is a timely request for a hearing under Section 1(c)(1) of 2021 SB 40, L. 2021, ch. 7, § (c)(1), to challenge "an action taken, order issued, or policy adopted by" a board of education of a school district, a jurisdictional prerequisite for a civil action under Section 1(d)(1) of 2021 SB 40, L. 2021, ch. 7, § (d)(1)?

STATEMENT OF FACTS

Defendant is a Kansas unified school district. K.S.A. 72-1131, -1132 & -1138; Kan. Const. Art. 6 §§ 1 & 5. Plaintiffs are parents of students within Defendant's boundaries. Petition, p. 1 ¶ 2; R.O.A. Vol. 1 pp. 4-48. On March 12, 2020, the Kansas Governor declared a state of disaster emergency based on the COVID 19 pandemic which was ultimately extended through June 15, 2021. On July 27, 2020, Defendant adopted its Resolution on Affirming Reopening Plan. Petition; R.O.A. Vol. 1 pp. 4-48. On March 16,

2021, the Kansas legislature approved Senate Bill 40 (effective March 25, 2021). On May 6, 2021, Plaintiffs made a request to Defendant for a hearing pursuant to SB 40 Section 1(c)(1) seeking to challenge certain aspects of Defendant's Resolution on Affirming Reopening Plan. Petition, p. 2 ¶ 3; R.O.A. Vol. 1 pp. 4-48. On May 6, 2021, Defendant denied Plaintiffs' request because:

> The action taken, order issued, or policy adopted by the board did not happen within 30 days of the request. Please see paragraph 2 of the attached Order, dated April 28, 2021, issued by the Hon. Robert J. Wonnell, Judge of the District Court of Johnson County, Kansas. The Board of Education's Resolution on Affirming Reopening Plan was adopted more than 30 days ago (adopted July 27, 2020). The Board has not made any changes to this Resolution since it was adopted.

Petition, p. 2 ¶ 3; R.O.A. Vol. 1 pp. 4-48. Plaintiffs then filed this civil action in district court pursuant to SB 40 Section 1(d) on May 28, 2021. R.O.A. Vol. 1 pp. 4-48. The district court dismissed Plaintiffs' claims on July 15, 2021. R.O.A. Vol. 2 pp. 66-92. Intervenor filed this appeal. Notice of Appeal, R.O.A. Vol. 1 pp. 72-73. No appeal was filed by Plaintiffs.

ARGUMENTS AND AUTHORITIES

I. A timely request for a hearing under SB 40 Section 1(c)(1) is "a mandatory, but non-jurisdictional, prerequisite to filing suit that must be strictly enforced by the court."

A. Standards of Review

Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. State v. Dull, 302 Kan. 32, 61, (2015). Here, the jurisdictional question involves an

interpretation of 2021 SB 40 and statutory interpretation is subject to unlimited review. State v. Collins, 303 Kan. 472, 473-74, (2015).

The court generally has the obligation to consider if the district and appellate court's jurisdiction is lacking. *See* Resolution Trust Corp. v. Bopp, 251 Kan. 539, Syl. ¶ 2, (1992). However, where the answer on the merits is especially clear, as it is in this case, the court may "put aside ambiguous jurisdictional questions" under a statute "when precedent clearly dictates the result on the merits." State v. Delacruz, 307 Kan. 523, 529, (2018) (presuming without deciding, that the district court did not lose jurisdiction in direct contempt proceeding by virtue of a deficient journal entry) *citing* Alvarado v. Holder, 743 F.3d 271, 276 (1st Cir. 2014); Sherrod v. Breitbart, 720 F.3d 932, 936-37 (D.C. Cir. 2013) (holding that a court may presume jurisdiction and reach the merits when the answer to the merits issue is especially clear); Starkey *ex rel.* A.B. v. Boulder County Soc. Serv., 569 F.3d 1244, 1262-63 (10th Cir. 2009) (declining to consider a jurisdictional question where the party claiming jurisdiction would clearly lose on the merits); *accord In re* Todd, No. 110,958, 2014 WL 7152357, at *3 (Kan.App. 2014) (unpublished opinion) (Leben, J., concurring) ("In sum, the jurisdictional issue presents a fairly close question, but Todd cannot win on appeal on the merits. In these circumstances, I would simply rule on the merits and affirm the district court's judgment, which denied relief."), *rev. denied* 302 Kan. 1010 (2015). Here, the answer on the merits to the sole appellate issue – whether SB 40 is unconstitutional – is especially clear such that the district court's subject matter jurisdiction can be presumed.

B. A timely request for a hearing under SB 40 Section 1(c)(1) is "a mandatory, but non-jurisdictional, prerequisite to filing suit that must be strictly enforced by the court."

Subject matter jurisdiction is vested by statute or constitution and establishes the court's authority to hear and decide a particular type of action. Kingsley v. Kansas Dept. of Revenue, 288 Kan. 390, 395, (2009). In the absence of some statutory or constitutional authority, no subject matter jurisdiction exists for judicial review of an action by a political subdivision. *See* Brown v. Board of Education, 261 Kan. 134 (1996) (no subject matter jurisdiction exists for judicial review under K.S.A. 60-2102(d) because school board proceeding under K.S.A. 72-5453 [now 72-2283] was not quasi-judicial). Here SB 40 Section 1(d) establishes the statutory basis for the filing of a civil action for judicial review of a hearing by a school district board of education requested by an employee, student or student's parent pursuant to SB 40 Section 1(c)(1) to challenge certain actions taken by a school district in connection with the COVID-19 health emergency. Included in SB 40 Sections 1(c)(1) and 1(d) are deadlines, akin to a statute of limitations, by which a challenge or appeal must be made. SB 40 became effective March 25, 2021, and is not retroactive. *See* Journal Entry of Judgment, O'Hara v. Blue Valley School District (USD No. 229), et al., Dist. Ct. of Johnson County Kan. Case No. 21 CV 01464 (April 28, 2021); attached to Petition; R.O.A. Vol. 1 pp. 4-48.

Relatively recently, this Court "revisited the notion of subject matter jurisdiction in the context of using that label for due process violations or procedural infirmities." State v. Delacruz, 307 Kan. 523, 411 P. 3d 1207, 1214 (2018) *citing e.g.*, State v. Dunn, 304

Kan. 773, 811, (2016) (overruling long-standing precedent by holding that defective charging documents do not deprive state courts of subject matter jurisdiction to adjudicate criminal cases); State v. Ford, 302 Kan. 455, 465, (2015) (disapproving of precedent that had referred to procedural errors in the determination of defendant's competency to stand trial as depriving the district court of jurisdiction); *cf.* Arbaugh v. Y&H Corp., 546 U.S. 500, 511 (2006) (criticizing "drive-by jurisdictional rulings" where courts fail to distinguish between subject matter jurisdiction and other types of error); Sperry v. McKune, 305 Kan. 469, 486, (2016) (*citing* Chelf v. State, 46 Kan.App.2d 522 (2011), for the proposition that the failure to exhaust certain administrative remedies does not deprive district court of subject matter jurisdiction).

Although this Court declined to decide whether to adopt Chelf's holding, the Kansas Court of Appeals in Chelf engaged in a thorough re-examination of the effect of failing to timely exhaust administrative remedies on subject matter jurisdiction in the context of Kansas Department of Correction required by K.S.A. 75-52,138. Sperry v. McKune, 305 Kan. 469, 384 P. 3d 1003, 1014-1015 (2016) ("the Chelf court explained its analysis in detail, applying guidance from the United States Supreme Court regarding how to distinguish statutes that impose conditions upon a court's jurisdiction and those that merely impose procedural conditions that do not affect jurisdiction"). Similar to the question posed by the Court in this case, the issue in Chelf was whether the failure of the plaintiff to ***timely*** exhaust administrative remedies established by statute as a condition precedent to the filing of a civil action deprived the court of subject matter jurisdiction. Chelf v. State, 46 Kan.App. 2d 522, 263 P. 3d 852, 858-60 (2011) (analyzing K.S.A. 75-52,138 and

its enabling regulations). The Kansas Court of Appeals in Chelf began by noting that an apparent conflict existed between prior Kansas appellate court decisions regarding whether the failure to exhaust administrative remedies provided for in K.S.A. 75-52,138 and its enabling regulations deprived the court of subject matter jurisdiction. *Compare* Corter v. Cline, 42 Kan.App.2d 721, 724, (2009) (holding that failure to exhaust administrative remedies deprived the court of jurisdiction to consider claims brought under K.S.A. 60-1501); Boyd v. Werholtz, 41 Kan.App.2d 15, 19, (2008) (same); Litzinger v. Bruce, 41 Kan.App.2d 9, 11-12, (2008) (same); Laubach v. Roberts, 32 Kan. App.2d 863, 869-70, (2004) (same); *with In re* Pierpoint, 271 Kan. 620, 625 (2001) (inmate exhaustion requirement is merely a prerequisite to suit subject to equitable principles such as waiver and estoppel); McMillan v. McKune, 35 Kan.App.2d 654, 659-61, (2006); McComb v. State, 32 Kan.App.2d 1037, 1042, *rev. denied* 278 Kan. 846 (2004). The Kansas Court of Appeals in Chelf then turned to an examination of recent United States Supreme Court opinions addressing the confusion between jurisdictional constraints and non-jurisdictional concepts culminating in the "administrable bright line" drawn by Arbaugh v. Y & H Corp., 546 U.S. 500, 515-16, (2006):

> "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. [Citation omitted.] But when [the Legislature] does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character."

The Kansas Court of Appeals in Chelf noted that the U.S. Supreme Court has "consistently has adhered to the Arbaugh standard in evaluating the jurisdictional nature of statutory provisions" and "each time it has considered a statute requiring a plaintiff to proceed in

another forum or seek redress in other ways as a precondition to the continuing viability of a legal action, the Court has characterized the requirement as a claim-processing rule separate and distinct from the concept of subject matter jurisdiction." *See* Reed Elsevier, Inc. v. Muchnick, 559 U.S. ___, 130 S.Ct. 1237, 1248, (2010) (requirement to register copyright before filing lawsuit alleging infringement thereof); Union Pacific R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. of Adjustment, Central Region, 558 U.S. ___, 130 S.Ct. 584, 591, (2009) (requirement to conference before seeking arbitration); Jones v. Bock, 549 U.S. 199, 202, (2007) (requirement to file claim with prison authorities before filing federal lawsuit alleging unconstitutional prison conditions); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394, 102 S.Ct. 1127 (1982) (requirement to file charge with EEOC before filing in court). This has continued since the decision in Chelf. *See* Ft. Bend County, Texas v. Davis, ___ U.S. ___, 139 S.Ct. 1843, 1848-1852 (2019) (Title VII's charge-filing requirement is not jurisdictional).

Applying U.S. Supreme Court's method of analysis, the Kansas Court of Appeals in Chelf examined the statute before it, K.S.A. 75-52,138, and concluded that it did "not have the hallmarks of a jurisdictional decree." *Citing* Arbaugh, 546 U.S. at 515-16, (statutory requirement will not be deemed jurisdictional unless the statute itself reflects a clear indication that the legislature wanted the requirements to be jurisdictional). Instead, the Kansas Court of Appeals in Chelf concluded that K.S.A. 52,138 "merely 'establishes a condition' — exhaustion — 'that plaintiffs ordinarily must satisfy' before filing a civil action against the state, which essentially creates a procedural bar virtually indistinguishable from a statute of limitations." *Citing* Muchnick, __ U.S. ___, 130 S.Ct.

at 1242. Thus, Kansas Court of Appeals in Chelf held that "the exhaustion requirement set forth in K.S.A. 75-52,138 is a mandatory, but non-jurisdictional, prerequisite to filing suit that must be strictly enforced by the court." This same reasoning has been adopted by other Court of Appeals panels, leading to the conclusion that the requirements of K.S.A. 75-52,138 are non-jurisdictional. *E.g.*, Pittman v. Bliss, No. 113577, 2015 WL 9302708, at *4 (Kan. App. 2015) (unpublished opinion) (citing Chelf); Sperry, 2015 WL 3632752, at *7 (same); Burdine v. State, No. 108152, 2013 WL 1943075, at *3 (Kan. App. 2013) (unpublished opinion) (same); Redford v. State, No. 106787, 2013 WL 781102, at *6 (Kan. App. 2013) (unpublished opinion) (same).

In contrast to the conclusion reached by the courts concerning the non-jurisdictional nature of the requirements of K.S.A. 75-52,138 and its enabling regulations, this Court has concluded that compliance with K.S.A. 12-105b is necessary before a court may obtain subject matter jurisdiction over a claim against a municipality or its employees. Sleeth v. Sedan City Hosp., 298 Kan. 853, 317 P. 3d 782, 792 (2014); *see also* Gessner v. Phillips County Comm'rs, 270 Kan. 78 80-82, (2000).[1] K.S.A. 12-105b(d), in applicable part, states:

> "Any person having a claim against a municipality which could give rise to an action brought under the Kansas tort claims act ***shall file a written notice as provided in this subsection before commencing such action***. ... In the filing of a notice of claim, substantial compliance with the provisions and requirements of this subsection shall constitute valid filing of a claim.... Once notice of the claim is filed, ***no action shall be commenced until after the claimant has received notice from the municipality that it has denied the claim or until after 120 days has passed*** following the filing of the notice of claim, whichever occurs first.... ***No person may initiate an action***

[1] Although not relevant to this appeal, KS.A. 12-105b was subsequently amended to make it clear that the statute also prohibits suit against a municipal employee absent compliance with the statute.

> ***against a municipality unless the claim has been denied in whole or part***. Any action brought pursuant to the Kansas tort claims act shall be commenced within the time period provided for in the code of civil procedure or it shall be forever barred, except that, if compliance with the provisions of this subsection would otherwise result in the barring of an action, such time period shall be extended by the time period required for compliance with the provisions of this subsection."

(Emphasis added.)

In concluding that compliance with K.S.A. 12-105b(d) was jurisdiction, this Court looked not just to the wording of K.S.A. 12-105b(d) which this Court found to be "determinative", but also looked "to the legislative history as to what was intended to be cured by the enactment of this subsection." Sleeth at 792-94. Specifically, this Court noted the League of Kansas Municipalities' Task Force on Tort Reform recommendation pertaining to the current subsection (d) of K.S.A. 12-105b which was as follows: "[R]equire written notice of claims by persons alleging injury from acts of municipalities ***as a jurisdictional prerequisite*** to commencing a lawsuit under the [Kansas Tort Claims] Act." Minutes of the House Judiciary Committee, February 5, 1987, Hearing on H.B. 2023 (emphasis added).

Similarly, this Court has concluded that failure to exhaustion all available administrative remedies under the Kansas Judicial Review Act, K.S.A. 77-601 through 77-631, which has provisions that closely align to K.S.A. 12-105b(d), deprives a district court of subject matter jurisdiction. Kingsley v. Kansas Dept. of Revenue, 288 Kan. 390, 395, 408-09 (2009); K.S.A. 60-2101(d). The same holds true in the context of a writ of habeas corpus, where failure to comply with the provisions of K.S.A. 60-1501 creates a jurisdictional bar. *In re* Pierpoint, 271 Kan. 620, 625 (2001). Of course, the failure to

timely file a notice of appeal is also considered jurisdictional. K.S.A. 60-2103(a); *see* Jones v. Continental Can Co., 260 Kan. 547, 550, (1996).

Thus, in order to answer the question posed by this Court as to whether a timely request for a hearing under SB 40 Section 1(c)(1) is a jurisdictional prerequisite for a civil action under SB 40 Section 1(d)(1), SB 40 must be analyzed to determine whether its language and legislative history are more akin to statutes such as K.S.A. 12-105b, K.S.A. 60-1501 and K.S.A. 60-2101(d) (which contain conditions precedent to the filing of a civil action that must be exhausted in order to establish subject matter jurisdiction) or a statute such as K.S.A. 75-52,138 (which contains an administrative exhaustion requirement that is "a mandatory, but non-jurisdictional, prerequisite to filing suit" that is similar in effect to a statute of limitations). *Compare* Sleeth v. Sedan City Hospital, 298 Kan. 853, 868, (2014) (failure to file the notice deprives the district court of subject matter jurisdiction over the claim); *and* Kingsley v. Kansas Dept. of Revenue, 288 Kan. 390, 408-09, (2009) (court lacked subject matter jurisdiction to consider a petition when a person does not exhaust all available administrative remedies under the Kansas Judicial Review Act); *with* Chelf v. State, 46 Kan.App.2d 522, 263 P. 3d 852, 858-60 (2011) ("the exhaustion requirement set forth in K.S.A. 75-52,138 is a mandatory, but non-jurisdictional, prerequisite to filing suit that must be strictly enforced by the court").

A close examination of 2021 SB 40 Section 1 reveals that it creates "a mandatory, but non-jurisdictional, prerequisite to filing suit that must be strictly enforced by the court" rather than a subject matter jurisdictional bar to the filing of a civil action. First, Section 1(d)(1) provides that "An employee, a student or the parent or guardian of a student

aggrieved by a decision of the board of education under subsection (c)(2) may file a civil action in the district court of the county in which such party resides or in the district court of Shawnee county, Kansas, ***within 30 days after such decision is issued by the board***." (emphasis added). It is worth noting that this 30 day time period is similar to what this Court has construed to be a jurisdictional deadline for filing an appeal under K.S.A. 60-2101(d). *See* K.S.A. 60-2103; *see* Jones v. Continental Can Co., 260 Kan. 547, 550, (1996). However, that is not the deadline at issue in this matter.

In turn, Section 1(c)(2) of 2021 SB 40 provides that "***Upon receipt of a request under paragraph (1)***, the board of education shall conduct a hearing within 72 hours of receiving such request for the purposes of reviewing, amending or revoking such action, order or policy. The board shall issue a decision within seven days after the hearing is conducted." (emphasis added). Section 1(c)(1) of 2021 SB 40 provides that "An employee, a student or the parent or guardian of a student ***aggrieved by an action taken, order issued or policy adopted by the board of education of a school district pursuant to subsection (a)(1)***, or an action of any employee of a school district violating any such action, order or policy, ***may request a hearing by such board of education*** to contest such action, order or policy ***within 30 days after the action was taken, order was issued or policy was adopted by the board of education***. Any such request shall not stay or enjoin such action, order or policy." (emphasis added). Finally Section 1(a)(1) of 2021 SB 40 provides that "During the state of disaster emergency related to the COVID-19 health emergency described in K.S.A. 2020 Supp. 48-924b, and amendments thereto, only ***the board of education*** responsible for the maintenance, development and operation of a

school district shall have the authority to ***take any action, issue any order or adopt any policy made or taken in response to such disaster emergency*** that affects the operation of any school or attendance center of such school district, including, but not limited to, any action, order or policy that:

(A) Closes or has the effect of closing any school or attendance center of such school district;

(B) authorizes or requires any form of attendance other than fulltime, in-person attendance at a school in the school district, including, but not limited to, hybrid or remote learning; or

(C) ***mandates any action by any students or employees of a school district while on school district property***."

(emphasis added).

Nowhere in SB 40 Section 1 is the jurisdiction of the court ever expressly addressed and it is certainly not expressed in terms of jurisdiction to consider whether Plaintiffs' request for a hearing was correctly denied by Defendant or to address the statute's constitutionality. Therefore, SB 40 Section 1 does "not have the hallmarks of a jurisdictional decree." *See* Chelf *citing* Arbaugh, 546 U.S. at 515-16, (statutory requirement will not be deemed jurisdictional unless the statute itself reflects a clear indication that the legislature wanted the requirements to be jurisdictional). There is no legislative history suggesting that the Kansas legislature intended the deadlines in SB 40 Sections 1(c)(1) or 1(d) to be jurisdictional. In the absence of *indicia*, these deadlines

should be construed as "mandatory, but non-jurisdictional, prerequisite[s] to filing suit that must be strictly enforced by the court." *See* Chelf.

CONCLUSION

A timely request for a hearing under Section 1(c)(1) is a "mandatory, but non-jurisdictional, prerequisite[s] to filing suit that must be strictly enforced by the court" that is necessary to challenge "an action taken, order issued, or policy adopted by" a board of education of a school district by means of a civil action under Section 1(d)(1). Therefore, the fact that Plaintiffs' request to Defendant for a hearing was not timely under Section 1(c)(1) did not deprive the district court of subject matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 4th day of October, 2021, the above and foregoing was electronically filed with the Clerk of the court using the Court's electronic filing system and a served upon the following by e-mail:

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