TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00708-CV

BCCC Social Members Association, Appellant

v.

Barton Creek Resort LLC d/b/a Barton Creek Country Club, Appellee

FROM THE COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY
NO. C-1-CV-18-001011, THE HONORABLE TODD T. WONG, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

BCCC Social Members Association (the Association), a nonprofit association[1] of social members of the Barton Creek Resort LLC d/b/a/ Barton Creek Country Club (the Club), challenges the trial court's final order dismissing with prejudice for lack of jurisdiction the Association's damages claim against the Club for breach of the bylaws governing the relationship between the Club's members and owner. The Association claims that it had standing to bring its claim for its members and that even if it did not, the trial court should have permitted the Association to replead or should have dismissed without prejudice. For the following reasons, we agree with the trial court that it lacked jurisdiction over the Association's

[1] "'Nonprofit association' means an unincorporated organization, other than one created by a trust, consisting of three or more members joined by mutual consent for a common, nonprofit purpose." Tex. Bus. Orgs. Code § 252.001(2).

claim for breach of bylaws but modify the trial court's order to reflect that the Association's claim against the Club is dismissed without prejudice.

BACKGROUND

In January 2018, the Association sued the Club after the Club increased membership dues in 2017 "from $256 to $335, a 31% increase." The Association alleged that the Club is prohibited from raising dues more than 20% in a calendar year under certain "non-amendable provisions" that were contained in the 1999 and 2002 bylaws but are "[m]issing from the 2015 [b]ylaws and 2017 [b]ylaws." The Association pleaded that all its members "joined under the 1999 [b]ylaws or 2002 [b]ylaws, as amended" and "paid substantial initiation fees to join the Club" and prayed that the trial court "grant [the Association] judgment against the [Club] for its breach of the agreement with the [Association], grant the damages incurred by members of the [Association] in the Club's violation of the Non-Amendable Provisions and grant . . . attorney's fees, exemplary damages, court costs, and pre and post-judgment interest."

The Club moved to dismiss for lack of jurisdiction, claiming that the Association does not meet the requirements for associational standing for nonprofit associations pursuant to section 252.007(b) of the Texas Business Organizations Code and specifically arguing that participation of the Association's members is required. *See generally* Tex. Bus. Orgs. Code § 252.007(b); *see also id.* § 252.007(b)(3) (requiring for associational standing that "neither the claim asserted nor the relief requested requires the participation of a member"). The Club challenged jurisdiction on the pleadings alone and did not submit any evidence.[2] The

[2] The trial court conducted a hearing on the motion to dismiss, but the record does not include a reporter's record. *See Vernco Constr., Inc. v. Nelson*, 460 S.W.3d 145, 151 & n.4 (Tex. 2015) (per curiam) (noting that "[i]f evidence was introduced at the motion-to-dismiss hearing,

Association responded that "the participation of individual members to support damages is not necessary, since the damages apply equally to all the members of the [Association]." The Association also requested in the alternative that it "be entitled to replead" but did not explain how it would replead to establish jurisdiction. The Court granted the motion and dismissed the Association's claim with prejudice. The Association filed a motion for new trial and attached a proposed amended petition that requested declaratory and injunctive relief instead of money damages. The trial court denied the motion for new trial. The Association timely appealed.

STANDARD OF REVIEW

Standing is a component of subject matter jurisdiction. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). We review de novo a trial court's ruling on a plea to the jurisdiction.[3] *Texas Dep't of Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We determine if the pleader has alleged facts that affirmatively demonstrate jurisdiction, construing the pleadings liberally and looking to the pleader's intent. *Id.* "If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court[']s jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiff[] should be afforded the opportunity to amend." *Id.* at

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no reporter's record of that hearing has been included with the appellate record" and "[f]or nonevidentiary hearings . . . a reporter's record is superfluous").

[3] When a party challenges subject matter jurisdiction by a motion to dismiss for lack of jurisdiction, we generally construe the motion as a plea to the jurisdiction. *See Texas Nat. Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 866–67 (Tex. 2001) (treating "Motion to Dismiss for Lack of Jurisdiction Based on Sovereign Immunity" as plea to jurisdiction); *Erazo v. Sanchez*, 502 S.W.3d 894, 897 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("We construe motions to dismiss for lack of jurisdiction as pleas to the jurisdiction."); *County of Travis ex rel. Hamilton v. Manion*, No. 03-11-00533-CV, 2012 WL 1839399, at *1 n.1 (Tex. App.—Austin May 17, 2012, no pet.) (mem. op.) (referring to pleading titled "Motion to Dismiss for Lack of Jurisdiction" as "a plea to the jurisdiction").

226–27. "If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff[] an opportunity to amend." *Id.* at 227.

When, as here, the legislature has conferred standing through statute, judge-made criteria regarding standing do not apply and "the analysis is a straight statutory construction of the relevant statute to determine upon whom the Texas Legislature conferred standing." *Texas Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 433 (Tex. App.—Austin 2018, pet. filed). "Statutory construction presents a question of law that we determine de novo under well-established principles." *Paxton v. City of Dallas*, 509 S.W.3d 247, 256 (Tex. 2017) (citing *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016)).

DISCUSSION

We begin, as we must, with the language of the statute by which the legislature provides associational standing for nonprofit associations. *See Texas Ass'n of Bus.*, 565 S.W.3d at 433. Section 252.007(b) of the Texas Business Organizations Code provides:

> (b) A nonprofit association may assert a claim in its name on behalf of members of the nonprofit association if:
>
> (1) one or more of the nonprofit association's members have standing to assert a claim in their own right;
>
> (2) the interests the nonprofit association seeks to protect are germane to its purposes; and
>
> (3) neither the claim asserted nor the relief requested requires the participation of a member.

Tex. Bus. Orgs. Code § 252.007(b). The parties dispute primarily whether the Association established the third prong.

Participation of a Member

The Club asserts that the Association's "relief requested" of money damages affirmatively negates the existence of jurisdiction under the third prong because it would require "the participation of a member." *See id.* § 252.007(b)(3). Specifically, the Club alleges that "[t]he members' individual participation would be required, at the very least, to prove they are a social member of the Club, paid initiation fees, are not property-owner-members, paid monthly dues, are current on dues, and the amount they allegedly overpaid as a result of the 2017 increase" and to "prove their alleged letters and calls to the Club protesting the 2017 dues increase." In response, the Association argues that "the damages claims are common to the entire membership and shared in equal degree" and "are not peculiar to an individual member and would not require individualized proof."

To give context to the parties' dispute as to the third prong, section 252.007(b) adopts near verbatim the three-prong judicial standard for evaluating associational standing that the Texas Supreme Court adopted in 1993. *Compare id.* § 252.007(b), *with Texas Ass'n of Bus.*, 852 S.W.2d at 447 (quoting *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).[4] The Texas Supreme Court imported this standard for associational standing from

[4] In *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, the United States Supreme Court held that "the third prong of the association standing test is best seen as focusing on these matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution," and therefore "[b]ecause Congress authorized the union to sue for its members' damages, and because the only impediment to that suit is a general limitation, judicially fashioned and prudentially imposed, there is no question that Congress may abrogate the impediment." 517 U.S. 544, 557–58 (1996); *see Big Rock Inv'rs Ass'n v. Big Rock Petroleum, Inc.*, 409 S.W.3d 845, 849 (Tex. App.—Fort Worth 2013, pet. denied). Here, in contrast, the third prong is no longer a "judicially fashioned" requirement, but a legislatively incorporated requirement for a nonprofit association to bring claims in its name on behalf of its members. *See* Tex. Bus. Orgs. Code § 252.007(b)(3). Thus,

federal case law, as enunciated by the United States Supreme Court in *Hunt*. *See Hunt*, 432 U.S. at 343 (citing *Warth v Seldin*, 422 U.S. 490, 511, 515 (1975)); *see also New York State Club Ass'n v. City of New York*, 487 U.S. 1, 9 (1988); *International Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 282 (1986). *Hunt* cited the earlier *Warth* case, and it is the following passage in *Warth* that presents the crux of this dispute:

> The present case, however, differs significantly as here an association seeks relief in damages for alleged injuries to its members. [The association] alleges no monetary injury to itself, nor any assignment of the damages claims of its members. No award therefore can be made to the association as such. Moreover, in the circumstances of this case, the damages claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof. Thus, to obtain relief in damages, each member of [the association] who claims injury as a result of respondents' practices must be a party to the suit, and [the association] has no standing to claim damages on his behalf.

Warth, 422 U.S. at 515. The Association focuses on the distinction that "in the circumstances of this case, the damages claims are not common to the entire membership, nor shared by all in equal degree"; the Club focuses on the earlier statement that for an award of damages it must allege "monetary injury to itself" or "assignment of the damages claims of its members." *Id.*

Although Texas courts have not specifically addressed this exact distinction, the Texas Supreme Court, in *Texas Association of Business*, stated that "an organization should not be allowed to sue on behalf of its members when the claim asserted requires the participation of the members individually rather than as an association, such as when the members seek to recover money damages and the amount of damages varies with each member." 852 S.W.2d at 447. And our sister courts have used language describing this holding that would appear to

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regardless of any constitutional import, it is a statutory requirement for the associational standing of nonprofit associations to assert a claim in its name on behalf of its members.

generally preclude an association from satisfying the third prong if it seeks damages on behalf of its members. *See Mosaic Residential N. Condo. Ass'n v. 5925 Almeda N. Tower, L.P.*, No. 01-16-00414-CV, 2018 WL 5070728, at *13 (Tex. App.—Houston [1st Dist.] Oct. 18, 2018, no pet.) (mem. op.) ("[I]f the association seeks damages on behalf of its members or must otherwise prove the members' individual circumstances in order to obtain relief, participation of the individual members is required, and the third prong is not satisfied."); *City of Bedford v. Apartment Ass'n of Tarrant Cty., Inc.*, No. 02-16-00356-CV, 2017 WL 3429143, at *3 (Tex. App.—Fort Worth Aug. 10, 2017, pet. denied) (mem. op.) ("An association lacks standing to seek money damages unique to its individual members as a normal rule, but it does generally have standing to seek declaratory relief, injunctive relief, or some other type of prospective equitable relief on its members' behalf."); *City of Arlington v. Texas Oil & Gas Ass'n*, No. 02-13-00138-CV, 2014 WL 4639912, at *4 (Tex. App.—Fort Worth Sept. 18, 2014, no pet.) (mem. op.) ("Usually, an association's claim for damages on behalf of its members is barred by want of the association's standing to sue because such suits typically require each individual member to participate as a party in the litigation to establish his own damages."); *American Acad. of Emergency Med. v. Memorial Hermann Healthcare Sys., Inc.*, 285 S.W.3d 35, 43 (Tex. App.—Houston [1st Dist.] 2009, no pet.) ("If an association seeks damages on behalf of its members 'or must otherwise prove the members' individual circumstances to obtain relief, participation of the individual members is required, and the third prong is not satisfied.'" (quoting *Texas Mun. League Intergovernmental Risk Pool v. Burns*, 209 S.W.3d 806, 815 (Tex. App.—Fort Worth 2006, no pet.), *overruled on other grounds by Texas Mut. Ins. v. Chicas*, 593 S.W.3d 284 (Tex. 2019))); *Burns*, 209 S.W.3d at 815 ("But if the association seeks damages on behalf of its members or must otherwise prove the members' individual circumstances to

obtain relief, participation of the individual members is required, and the third prong is not satisfied.").

Likewise, federal courts generally have not permitted associations to bring claims for money damages for its members when the association does not assert monetary injuries to itself or the assignment of monetary claims from its members, although federal courts have not established a per se rule. *Compare Telecommunications Research & Action Ctr. on Behalf of Checknoff v. Allnet Commc'n Servs., Inc.*, 806 F.2d 1093, 1096 (D.C. Cir. 1986) ("[O]ur decision establishes no *per se* rule that associations may never represent their members when monetary relief is immediately at stake[.]"), *with id.* at 1097–98 (Bork, J., concurring) ("I write separately to suggest that, though the court properly does not decide the question, there may be good reason in the future to frame a *per se* rule against an association's standing, absent some specific statutory authorization, to assert damage claims on behalf of its members.")[5]; *see Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp.*, 801 F. Supp. 684, 691 n.5 (S.D. Fla. 1992) ("No court, however, has pronounced a per se rule against associational standing to pursue damage claims on behalf of its members."); *see also United Food and Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546, 554 (1996) ("*Hunt* . . . indicated that [individual] participation would be required in an action for damages to an association's members, thus suggesting that an association's action for damages running solely to its members would be barred for want of the association's standing to sue" and "[*Warth*] and later precedents have been

[5] In *Telecommunications Research and Action Center on Behalf of Checknoff v. Allnet Communication Services, Inc.*, the court noted that its decision in that case does not establish a per se rule because it was confronting neither "a situation in which the monetary relief sought is merely ancillary to prospective injunctive or declaratory relief" nor "a case for damages in which the association possesses a special representation responsibility to the members on whose behalf it sues." 806 F.2d 1093, 1096 (D.C. Cir. 1986). Likewise, these circumstances are not present in the case before us.

understood to preclude associational standing when an organization seeks damages on behalf of its members."); *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) ("We know of no Supreme Court or federal court of appeals ruling that an association has standing to pursue damages claims on behalf of its members."); *Sanner v. Board of Trade of City of Chi.*, 62 F.3d 918, 923 (7th Cir. 1995) ("We are not aware of any cases allowing associations to proceed on behalf of their members when claims for monetary, as opposed to prospective, relief are involved."); *United Union of Roofers, Waterproofers, & Allied Trades No. 40 v. Insurance Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990) ("The Union acknowledges that no federal court has allowed an association standing to seek monetary relief on behalf of its members. The courts that have addressed this issue have consistently held that claims for monetary relief necessarily involve individualized proof and thus the individual participation of association members, thereby running afoul of the third prong of the *Hunt* test."); *Committee to Protect our Agric. Water v. Occidental Oil & Gas Corp.*, 235 F. Supp. 3d 1132, 1169 (E.D. Cal. 2017) ("No federal court has held that an association has standing to seek monetary relief on behalf of its members, however.").

In support of its position, the Association cites three cases. *See Concerned Owners of Thistle Hill Estates Phase I, LLC v. Ryan Rd. Mgmt., LLC*, No. 02-12-00483-CV, 2014 WL 1389541, at *6 (Tex. App.—Fort Worth Apr. 10, 2014, no pet.) (mem. op.); *see also Florida Paraplegic Ass'n v. Martinez*, 734 F. Supp. 997, 1000–01 (S.D. Fla. 1990); *Pugh v. Evergreen Hosp. Med. Ctr.*, 312 P.3d 665, 667 (Wash. Ct. App. 2013). Assuming without deciding that these cases were correctly decided, we conclude that they are distinguishable from the circumstances here. In *Ryan Road Management*, the association "did not seek recoupment of the fees for any of its individual members but rather sought recoupment of any such monies for

itself, so that such monies could be spent to benefit the Subdivision" and therefore only required proof of "alleged wrongful expenditures" not proof of the members' entitlement to compensatory money damages, as would be required here. 2014 WL 1389541, at *6. In *Martinez*, the money damages sought were solely nominal damages, which requires no individualized proof, in contrast to the compensatory damages sought here. 734 F. Supp. at 1001 ("Because in this case plaintiff now seeks nominal damages only, the court can determine the damage to members of the plaintiff in a discrete and insular manner[.]"); *see MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 665 (Tex. 2009) (noting "nominal damages" usually means "an award of one dollar" or "trifling sum" (quoting *Harkins v. Crews*, 907 S.W.2d 51, 61 (Tex. App.—San Antonio 1995, writ denied); *Black's Law Dictionary* 418 (8th ed. 2004))). And *Pugh* involved a union possessing special representation responsibility as "the exclusive bargaining unit" seeking monetary relief as backpay ancillary to the request for injunctive relief. 312 P.3d at 666 & n.1 (noting union brought suit "in its associational capacity for injunctive relief and back pay for missed rest breaks" and incorporating facts from companion case *Pugh v. Evergreen Hospital Medical Center*, 311 P.3d 1253 (Wash Ct. App. 2013)); *Pugh*, 311 P.3d at 1254 (noting that "the Washington State Nurses Association (WSNA)" is "the exclusive bargaining unit for RNs at Evergreen"); *see Allnet Commc'n Servs.*, 806 F.2d at 1096 (contemplating unique situations in which association may have associational standing to seek monetary relief including when association possesses special representation responsibility or when money damages are ancillary to injunctive relief).

Here, in contrast, the Association does not have a special representation responsibility, the original petition did not seek injunctive relief to which the monetary damages would be ancillary, and individualized proof will be required to demonstrate compensatory

money damages for the Association's members. On this record and under the circumstances of this case, we conclude that the mere fact that the damages calculation formula may produce the same compensatory damages calculation for each of the Association's members is insufficient to satisfy section 252.007(b)'s third prong that "neither the claim asserted nor the relief requested requires the participation of a member." *See* Tex. Bus. Orgs. Code § 252.007(b)(3).[6] Accordingly, the trial court did not err in concluding that the Association did not affirmatively establish jurisdiction under section 252.007(b).

Right to Replead

After a trial court rules on a plea to the jurisdiction, a plaintiff generally is entitled to a reasonable opportunity to amend its pleadings to attempt to cure the jurisdictional defect if the defect can be cured. *See Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). "[T]he right to amend typically arises when the pleadings fail to allege enough jurisdictional facts to demonstrate the trial court's jurisdiction." *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 559 (Tex. 2016). Here, however, the Association does not seek to plead new jurisdictional facts to support its breach of the bylaws claim for money damages, but

[6] Some federal cases interpret the United States Supreme Court's language that "'so long as the nature of the claim and of the relief sought does not make the individual participation of *each injured party indispensable* to proper resolution of the cause, the association may be an appropriate representative of its members entitled to invoke the court's jurisdiction'" as implying "that an association may assert a claim that requires participation by *some* members." *Hospital Council of W. Penn. v. City of Pittsburgh*, 949 F.2d 83, 89 (3d Cir. 1991) (emphases in original) (quoting *Warth v Seldin*, 422 U.S. 490, 511 (1975)); *see Association of Am. Physicians & Surgeons, Inc. v. Texas Med. Bd.*, 627 F.3d 547, 551 (5th Cir. 2010) (collecting cases permitting association to "prove its case with a sampling of evidence from its members"). However, these federal cases are not applicable because the relevant statute here requires that "neither the claim asserted nor the relief requested requires the participation of *a* member." Tex. Bus. Orgs. Code § 252.007(b)(3) (emphasis added).

to plead new claims—i.e., claims for declaratory and injunctive relief.[7] As described in its reply brief before this Court, the Association claims that it "can, if given the opportunity, assert other viable claims on its behalf" including "injunctive relief enjoining the [Club] from enforcing the dues increase," "a declaration that the dues increase violated the express provisions of the Bylaws, and/or is a prohibited assessment," or "a declaration that [the Association's] members who paid the improper dues increase, are entitled to a refund." In effect, the Association is "not propos[ing] to add more jurisdictional facts" but suggesting that it "can 'cure' the jurisdictional defect by changing the claims [it is] bringing." *See id.* at 559. However, "remand is a mechanism for parties, over whose claims the trial court may have jurisdiction, to plead facts tending to establish that jurisdiction, not for parties, over whose claims the trial court does not have jurisdiction, to plead new claims over which the trial court does have jurisdiction." *Id.*

In its briefing before this Court, the Association also claims that one "option would be to have the members assign the damage claims to the [Association], which would then be suing on its own behalf for damages." But this implies an action that the Association and its members can take to create jurisdiction, not a jurisdictional fact for which repleading should be provided to cure pleading deficiencies to establish jurisdiction. *See McMillan v. Aycock*, No. 03-18-00278-CV, 2019 WL 1461427, at *3 (Tex. App.—Austin Apr. 3, 2019, no pet.) (mem. op.) ("Pleading additional facts that describe events occurring after suit was filed

[7] The Association claims that in its original petition "it sought a determination that [the Club] breached its agreement with the [Association's] members" and "[t]hat portion of the requested relief clearly did not involve damages but just requested a determination that [the Club] breached its agreement with [the Association's] members." But we agree with the Club that "on its face, the Original Petition did not request a declaratory judgment, nor any prospective relief regarding the parties' future relationship."

and, indeed, after the plea to the jurisdiction was granted, would not operate to cure the jurisdictional defect.").

Remanding the case would serve no legitimate purpose because the Association's pleading defects as to its money damages claim for breach of bylaws cannot be cured and it has not suggested how the jurisdictional defect may be cured for this claim. *See Koseoglu*, 233 S.W.3d at 840 ("But Koseoglu's pleading defects cannot be cured, and he has made no suggestion as to how to cure the jurisdictional defect."). Nor does the Association's proposed amended petition demonstrate how any pleading defects as to the jurisdiction defect over the money damages claim could be cured; instead, it omits the money damages claim. The trial court did not err in dismissing the case without providing an opportunity to replead.

Dismissal without Prejudice

"In general, a dismissal with prejudice is improper when the plaintiff is capable of remedying the jurisdictional defect." *Harris County v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004); *see McMillan*, 2019 WL 146127, at *3 ("A plea to the jurisdiction does not challenge the merits of a claim, but simply challenges the trial court's subject-matter jurisdiction without regard to the merits. Thus, dismissal with prejudice is improper if a plaintiff is capable of remedying the jurisdictional defect."). Here, however, we have concluded that the jurisdictional pleading defect cannot be cured. Accordingly, the Club argues that dismissal with prejudice is appropriate because the Association "should not be permitted to relitigate jurisdiction once that issue has been finally determined." *Sykes*, 136 S.W.3d at 639.

Nevertheless, although the Association's request for the opportunity "to have the members assign the damage claims to the [Assocation], which would then be suing on its own

behalf for damages" cannot cure the jurisdictional defect as it relates to the present case, it might confer standing on the Association to file suit in the future. *See McMillan*, 2019 WL 1461427, at *3 (noting while acquiring rights to claims after suit and plea was filed "cannot cure the jurisdictional defect as it relates to the present case," "it might theoretically operate to confer standing on [the plaintiff] to file suit in the future"); *see also Warth*, 422 U.S. at 515 (stating inverse position that because association "alleges no monetary injury to itself, nor any assignment of the damages claims of its members" "[n]o award therefore can be made to the association as such"); *Southwestern Bell Tel. Co. v. Marketing on Hold Inc.*, 308 S.W.3d 909, 916 (Tex. 2010) ("The assignability of a cause of action is generally freely permitted, but assignments may be invalidated on public policy grounds."); *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 705–11 (Tex. 1996) (describing "contexts" where Texas Supreme Court "ha[s] invalidated assignments of choses in action that tend to increase and distort litigation").[8] Thus, as we recently held, while the trial court properly dismissed the suit without permitting it an opportunity to amend its pleadings, the dismissal should have been without prejudice. *See McMillan*, 2019 WL 1461427, at *3 (modifying order dismissing with prejudice to dismiss without prejudice); *cf. Hirczy de Mino v. University of Hous.*, No. 03-03-00311-CV, 2004 WL 2296131, at *7 (Tex. App.—Austin Oct. 14, 2004, pet. denied) (mem. op.) (noting plaintiff "has no cause of action for breach of contract unless he can secure legislative consent" and, in this case, "it would be illogical to dismiss with prejudice a cause of action that has neither definitively accrued, nor definitively failed for lack of legislative consent").

[8] We express no opinion as to the effect or validity of any assignment as that matter is not before us. *See Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (noting Texas courts have no jurisdiction to render advisory opinions).

CONCLUSION

For the reasons stated above, we modify the trial court's order to reflect that the Association's claim against the Club is dismissed without prejudice. As modified, the trial court's order dismissing the Association's claim is affirmed.

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Melissa Goodwin, Justice

Before Justices Goodwin, Baker, and Triana

Modified and, as Modified, Affirmed

Filed: June 3, 2020