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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SANQUIA JACOBS, minor, by PAULA MENZIE)	Appeal
DAVIS, her mother and next friend,)	from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 09 CH 49695
)	
ERWIN McEWEN, as Director the Illinois Department)	Honorable
of Children and Family Services, and LISA MADIGAN,)	Rita Novak,
as Attorney General for the State of Illinois,)	Judge Presiding.
)	
Defendants-Appellees.)	

JUSTICE JOSEPH GORDON delivered the judgment of the court.

Presiding Justice Epstein and Justice Howse concur in the judgment.

ORDER

¶ 1 *HELD*: Because the plaintiff’s complaint sought a writ of *mandamus* seeking to compel certain public employees to comply with a non-discretionary statutory duty, subject matter

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jurisdiction was not exclusive to the Court of Claims and, therefore, the circuit court erred in dismissing that complaint for lack of subject matter jurisdiction.

¶ 2 Plaintiff Sanquia Jacobs, a minor, was injured while in foster care and obtained a \$2.4 million judgment against her former foster mother, an employee of the Illinois Department of Children and Family Services (the Department). Plaintiff initiated this action against Erwin McEwen, the director of the Department and Lisa Madigan, the Illinois Attorney General (collectively defendants), seeking a writ of *mandamus* compelling them to "certify for payment" the judgment she obtained against Stringer. The circuit court dismissed plaintiff's complaint for lack of subject matter jurisdiction based on sovereign immunity grounds, finding that jurisdiction was proper in the Court of Claims. This appeal followed.

¶ 3 I. BACKGROUND

¶ 4 A. The Underlying Tort Action

¶ 5 In 2004, plaintiff filed a lawsuit against Kristin Stringer, her former Department-assigned foster mother, alleging that Stringer knowingly, recklessly, and negligently placed her in a bathtub full of hot water, resulting in burn injuries. Pursuant to the State Employee Indemnification Act (5 ILCS 350/2 (West 2008)) (the Act), the Attorney General initially provided Stringer's defense. However, the Attorney General later obtained permission to withdraw as counsel for Stringer after it concluded that "the acts or omissions giving rise to [plaintiff's] claim constitute intentional, wilful or wanton misconduct," therefore precluding

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it's continued representation of Stringer under the Act. Stringer did not obtain new counsel.

¶ 6 After she failed to appear for scheduled court dates, the court entered a default judgment against Stringer in favor of plaintiff in the amount of \$2,405,000. In an April 20, 2009 order, the court stated that "the acts and omissions of [Stringer] which caused plaintiff's injuries occurred within the scope of [Stringer's] employment as a foster parent." The court, however, held that Stringer's actions were neither intentional, nor constituted wilful or wanton misconduct.

¶ 7 Following the entry of the judgment, the Attorney General filed a petition for leave to intervene and a motion to "vacate and modify" the judgment, arguing that Stringer's conduct was outside the scope of her employment with the Department. On October 23, 2009, the court denied the Attorney General leave to intervene and declined to modify the judgment.

¶ 8 On May 19, 2009, plaintiff filed a citation to discover Stringer's assets. On December 10, 2009, the court entered an order stating that Stringer "holds a statutory chose in action against the State of Illinois for indemnity for the amount of the judgment," and requiring Stringer to "assign her cause of action for indemnity to [plaintiff] on such terms necessary to make such assignment sufficient at law to allow [plaintiff] to pursue collection of the judgment in her own name and right." Stringer then executed a document entitled "assignment" which stated that Stringer was assigning to plaintiff her "statutory right to indemnity by the State of Illinois" for the judgment against her.

¶ 9 B. The Mandamus Action

¶ 10 On December 11, 2009, plaintiff filed her initial complaint for *mandamus* against defendants in the circuit court, alleging that because she was the "assignee and owner" of Stringer's indemnity rights, and that the Act required them to "certify for payment" to her the judgment against Stringer. Defendants, however, moved to dismiss plaintiff's complaint, arguing that because plaintiff's complaint essentially presented a monetary claim against the State, principles of sovereign immunity precluded the circuit court from exercising jurisdiction. They also argued that plaintiff's allegations failed to establish that she was the assignee of any rights provided to Stringer.

¶ 11 Following a March 18, 2010 hearing on the defendants' motion, the circuit court partially granted defendants' motion to dismiss, determining that plaintiff's complaint did not sufficiently allege the basis for her status as the assignee of Stringer's indemnity rights. The circuit court, however, granted plaintiff leave to file an amended complaint, which she did on March 19, 2010. That amended complaint was substantially similar to her initial complaint, except attached to it were the December 10, 2009 circuit court order directing Stringer to assign her cause of action for indemnity to plaintiff and the assignment executed by Stringer purporting to do so.

¶ 12 On April 22, 2010, defendants moved to dismiss plaintiff's amended complaint, renewing their argument that principles of sovereign immunity barred the circuit court from exercising jurisdiction over the matter. Following an August 11, 2010 hearing, the circuit court granted defendants' motion. It noted that "the nature of the controversy here is one for

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indemnification, or perhaps even a collection of a money judgment. That plainly falls in the Court of Claims' Jurisdiction." The circuit court further held that "it seems the nature of the action is to collect money against a State agency. I believe that does belong in the Court of Claims. So with a great deal of uncertainty, I confess, I grant the State's motion to dismiss." In reaching its decision, the circuit court relied on the recent Illinois supreme court case of *State Building Venture v. O'Donnell*, 239 Ill. 2d 151 (2010) which, it stated, "reconfirms that a court is required to analyze the actions taken by a state official in order to determine ultimately whether the claim is brought against the State."

¶ 13 On September 8, 2010, plaintiff filed a motion to vacate the circuit court's April 22 order. While that motion was pending, plaintiff filed a petition in the Court of Claims seeking payment of her judgment against Stringer. On March 16, 2011, the circuit court denied plaintiff's motion and she timely appealed.

¶ 14 II. ANALYSIS

¶ 15 The sole issue on this appeal is whether the doctrine of sovereign immunity acts as a bar to the circuit court's jurisdiction over plaintiff's complaint for *mandamus*. Plaintiff argues that the circuit court erred in finding that it did not have jurisdiction to hear her case, while defendants contend that the circuit court correctly found that principles of sovereign immunity precluded it from exercising jurisdiction over plaintiff's complaint. For the reasons that follow, we agree with plaintiff.

¶ 16 We review the circuit court's dismissal of plaintiff's *mandamus* complain *de novo*. *Crawford Supply Co. v. Schwartz*, 396 Ill. App. 3d 111, 125 (2009).

¶ 17 "The purpose of the doctrine of sovereign immunity is that it 'protects the State from interference in its performance of the functions of government and preserves its control over State coffers.' " *Senn Park Nursing Center v. Miller*, 104 Ill. 2d 169, 188 (1984) (quoting *S. J. Groves & Sons Co. v. State*, 93 Ill. 2d 397, 401 (1982)). Article XIII, section 4 of the Illinois Constitution established the general rule that sovereign immunity is abolished in Illinois, "[e]xcept as the General Assembly may provide by law." Ill. Const. art XIII, § 4 (1970). In response to this provision, the Legislature adopted the State Lawsuit Immunity Act, which provides a narrow exception to that general rule, and prevents the State of Illinois from being made a defendant or party in any court, except as provided for by the Court of Claims Act. 745 ILCS 5/1 (West 2010).

¶ 18 Pursuant to the Court of Claims Act, the Court of Claims "shall have exclusive jurisdiction to hear and determine *** [a]ll claims against the State founded upon any law of the State of Illinois, *** [a]ll claims against the State founded upon any contract entered into with the State of Illinois, *** [and] [a]ll claims against the State for damages in cases sounding in tort." 705 ILCS 505/8(a), (b), (d) (West 2010). See also *Fritz v. Johnston*, 209 Ill. 2d 302 (2009) (no other tribunal other than the Court of Claims, including circuit courts, has jurisdiction to hear such claims).

¶ 19 A plaintiff generally cannot evade the principle of sovereign immunity "by making an action nominally one against the servants or agents of the State when the real claim is against the State of Illinois itself and when the State of Illinois is the party vitally interested." *Sass v. Kramer*, 72 Ill. 2d 485, 491 (1978). The determination of whether a suit brought against a

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State official is treated as a suit against the State, and is therefore barred by the doctrine of sovereign immunity “does not depend on the identity of the formal parties in the record, but on the issues involved and the relief sought.” *Senn Park Nursing Center v. Miller*, 104 Ill. 2d 169, 186 (1984).

¶ 20 “Sovereign immunity affords no protection *** when it is alleged that the State's agent acted in violation of statutory or constitutional law or in excess of his authority, and in those instances an action may be brought [against an individual State agent] in circuit court.” *Healy v. Vaupel*, 133 Ill. 2d 295, 308 (1990). “[A]n action to compel a public official to perform a clear and mandatory duty is not a suit against the State,” and may be properly heard in the circuit court. *John M. Bransfield Co. v. Kingery*, 283 Ill. App. 405, 412-13 (1936). However, “[w]here the suit is brought against a State official and the judgment or decree although nominally against the official could operate to control the actions of the State or subject it to liability, the cause in effect is a suit against the State.” (quotation marks and citations omitted). *Senn Park*, 104 Ill. 2d at 187.

¶ 21 Here, plaintiff asserts that defendants had a nondiscretionary statutory duty under the Act to certify the judgment she obtained against Stringer for payment. Because they refused to do so, she argues, they can be compelled to perform that duty, via a writ of *mandamus*, in the circuit court.

¶ 22 Section 2(a) of the Act provides for the legal representation by the Attorney General and, when liability is found, for the indemnification of State employees in civil actions “arising out of any act or omission occurring within the scope of the employee’s State employment.”

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5 ILCS 350/2(a) (West 2008). Section 2(b) of the Act requires the Attorney General to withdraw from representation of a state employee if it determines that “the act or omission which gave rise to the claim was not within the scope of the employees’s State employment or was intentional, wilful or wanton misconduct.” 5 ILCS 350/2(b) (West 2008). Section 2(b) further provides that if the Attorney General withdraws from representing a State employee because the employee’s actions were intentional, wilful or wanton conduct, but a court finds otherwise, “the State shall indemnify the State employee for any damages awarded and court costs and attorneys' fees assessed as part of any final and unreversed judgment.” 5 ILCS 350/2(b) (West 2008).

¶ 23 The Act further provides that "where notice in accordance with this Section has been given to the Attorney General, *** the State shall indemnify the State employee for any damages awarded and court costs and attorneys' fees assessed as part of any final and unreversed judgment, or shall pay such judgment." 5 ILCS 350/2(d) (West 2008).

¶ 24 The Act then sets forth the procedures for certifying payments to State employees from the State treasury. It states that once a final judgment has been entered against an employee:

"such judgment or settlement shall be certified for payment by such chief administrative officer and by the Attorney General. The judgment or settlement shall be paid from the State Treasury on the warrant of the Comptroller out of appropriations made to the Department of Central Management Services specifically designed

for the payment of claims covered by this Section." 5 ILCS
350/2(e)(ii) (West 2008).

¶ 25 Under these provisions of the Act, it is apparent that once certain preconditions are met, the chief administrative officer of the department is required to certify for payment judgments entered against State employees for acts or omissions committed while those employees were acting within the scope of their employment. Nothing in the language of the Act purports to give the director the discretion to deny certification of such a judgment.

¶ 26 Here, there is no dispute that the Attorney General withdrew its representation of Stringer because it believed her actions were intentional, wilful or wanton, or, that despite the Attorney General's belief, the trial court found that Stringer was acting within the scope of her employment and that her conduct was neither intentional, wilful, or wanton. Nor is there any dispute that plaintiff obtained a judgment against Stringer for her injuries, that the State was statutorily required to indemnify Stringer by virtue of her State employment, or that Stringer ostensibly assigned her right to be indemnified by the State to plaintiff. Plaintiff now seeks, via a writ of *mandamus*, to compel the defendants to perform what, based on the language of the Act, appears to be a non-discretionary statutory duty to certify for payment a judgment against Stringer.

¶ 27 "*Mandamus* is an extraordinary remedy that may be used to compel a public officer to perform his official duties that do not involve an exercise of discretion." *Ford v. Walker*, 377 Ill. App. 3d 1120, 1124 (2007). "A writ of *mandamus* will not be granted unless the plaintiff can show a clear, affirmative right to relief, a clear duty of the defendant to act, and clear

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authority in the defendant to comply with the writ." *Lewis E. v. Spagnolo*, 186 Ill. 2d 198, 229 (1999). It is axiomatic that when a state official fails to comply with a non-discretionary statutory duty, a plaintiff may seek a writ of *mandamus* in a circuit court compelling him to perform that duty, even if doing so would require the disbursement of State funds. *In re Lawrence M.*, 172 Ill. 2d 523, 527 (1996) ("A suit against State officials which seeks to compel them to perform their duty is not held to be a suit against the State even though the duty to be performed arises under a certain statute, and the payment of State funds may be compelled"). "Compelling a state official to act in accordance with the law, even if so acting involves the payment of state funds, differs from an action seeking actual money damages from the State and the state official in his official capacity." *McFatridge*, 2011 IL App (4th) 100936, at ¶47.

¶ 28 The seminal case dealing with this issue is the Illinois supreme court case of *Senn Park Nursing Center v. Miller*, 104 Ill. 2d 169 (1984). In *Senn Park*, the plaintiffs, several nursing-home facilities, sought a writ of *mandamus* seeking to compel the director of public aid to reimburse them for certain expenses in accordance with procedures set forth in the Illinois State Medicaid plan. *Senn Park*, 104 Ill. 2d at 189. The trial court granted the official's motion for summary judgment, finding that because the plaintiffs' suit was a monetary claim against the State, jurisdiction was proper in the Illinois Court of Claims. *Senn Park*, 104 Ill. 2d at 175. Our supreme court, however, held that even though the relief requested by the plaintiffs would have required the director to pay them with State funds, the circuit court nevertheless had jurisdiction over the matter because the plaintiffs' complaint

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sought to compel a public official to “perform a clear and mandatory duty.” *Senn Park*, 104 Ill. 2d at 189. Rejecting the State’s argument that principles of sovereign immunity dictated that the cause be heard in the Court of Claims, the supreme court held that “the State cannot justifiably claim interference with its functions when the act complained of by plaintiffs is unauthorized by statute.” *Senn Park* 104 Ill. 2d at 188.

¶ 29 The *Senn Park* court distinguished “present claims” brought against the State, which had the potential to subject the State to liability for damages and thus belonged in the Court of Claims, from suits where the plaintiff sought to “enjoin the defendant from taking actions in excess of his delegated authority and in violation of plaintiff’s protectable legal interests.” *Senn Park*, 104 Ill. 2d at 188-89 (quoting *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540, 548 (1977)). The latter type of suit, the court held, did not violate principles of sovereign immunity and could be properly brought in the circuit court. Thus, the court found that because the State official had failed to perform a duty required of him by the State plan, the plaintiffs were entitled to *mandamus* relief in the circuit court. *Senn Park* 104 Ill. 2d at 189.

¶ 30 More recently, the appellate court was faced with a similar issue to that in *Senn Park* in *McFatrige v. Madigan*, 2011 IL App (4th) 100936. There, the plaintiff’s, a former State’s Attorney, filed a complaint for *mandamus* seeking to compel the Attorney General to approve the payment of expenses he incurred while defending a malicious prosecution lawsuit brought by two individuals he had previously prosecuted. The Attorney General denied his requests for representation because it believed his actions constituted intentional, wilful or

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wanton misconduct. *McFatridge*, 2011 IL App (4th) 100936, at ¶5-15. The circuit court granted the Attorney General’s motion to dismiss the plaintiff’s complaint, but, according to the appellate court, “failed to provide any rationale for its decision.” *McFatridge*, 2011 IL App (4th) 100936, at ¶17.

¶ 31 The plaintiff appealed, arguing that the court erred in dismissing his *mandamus* complaint because the Attorney General lacked the discretion to refuse to pay his attorney fees. The Attorney General, however, argued that the court’s decision was proper because the plaintiff’s complaint was barred by the doctrine of sovereign immunity. *McFatridge*, 2011 IL App (4th) 100936, at ¶21. Rejecting the Attorney General’s argument, the appellate court first noted that the Act does not afford the State discretion to refuse to indemnify a State employee, once a trier of fact finds that the employee’s conduct was not intentional, wilful or wanton, even if the Attorney General declines representation on those grounds. *McFatridge*, 2011 IL App (4th) 100936, at ¶31.

¶ 32 The *McFatridge* court then, in addressing the Attorney General’s sovereign immunity argument, rejected its contention that principles of sovereign immunity barred the trial court’s consideration of the plaintiff’s complaint because it sought to control the Attorney General’s exercise of discretion. *McFatridge*, 2011 IL App (4th) 100936, at ¶45. Reiterating the rule laid down in *Senn Park*, the court stated that “the determination of whether a suit is brought against the State and thus barred by the doctrine of sovereign immunity does not depend on the identity of the formal parties in the record, but on the issues involved and the relief

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sought. *McFatrige*, 2011 IL App (4th) 100936, at ¶47 (quoting *Senn Park*, 104 Ill. 2d at 186. The court then went on to state that:

¶ 33 “A suit to compel state officials to act in accordance with the law is not regarded as an action against the state and is not barred by sovereign immunity even though the payment of state funds may be involved. [Citation.] Compelling a state official to act in accordance with the law, even if so acting involves the payment of state funds, differs from an action seeking actual money damages from the State and the state official in his official capacity.”

McFatrige, 2011 IL App (4th) 100936, at ¶47.

¶ 34 The court then concluded, with respect to the plaintiff’s *mandamus* action against the Attorney General, that “[b]ecause the Attorney General has no discretion outside of these matters to deny reimbursement, sovereign immunity cannot be raised as a defense.”

McFatrige, 2011 IL App (4th) 100936, at ¶48.

¶ 35 The holding of our supreme court in *Senn Park*, as followed in *McFatrige*, is wholly consistent with the preexisting authorities which distinguished between an action for damages against the State as opposed to an action seeking to compel a State official, whether by injunction (*Board of Education v. Cronin*, 69 Ill. App. 3d 472, 473 (1979) or writ of *mandamus* (*Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540 (1977); *Board of Trustees v. Illinois Community College Board*, 63 Ill. App. 3d 969 (1978)), to perform a

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nondiscretionary statutory duty, shall not be considered a suit against the State itself so as to be barred by sovereign immunity.

¶ 36 In *Cronin*, two school districts filed suit against the defendant, the State superintendent of education, seeking to prevent him from withholding certain funds previously allocated to them by the Illinois Office of Education. *Board of Education v. Cronin*, 69 Ill. App. 3d 472, 473 (1979). Before addressing the merits of the plaintiffs' case, the *Cronin* court first answered the threshold question of whether jurisdiction over the matter rested exclusively with the Court of Claims. *Cronin*, 69 Ill. App. 3d at 473-74. The appellate court found that jurisdiction in the circuit court was proper, stating that "[t]he mere fact that an action would cause money to be paid from the State treasury is not dispositive" of whether a suit against a state official may proceed in the circuit court. *Cronin*, 69 Ill. App. 3d at 474. The *Cronin* court went on to hold that because the plaintiffs' suit challenged the defendant's refusal to comply with mandatory sections of a statute, jurisdiction with the circuit court was proper. *Cronin*, 69 Ill. App. 3d at 475. ("For this reason, the suit by District 206 is not a suit against the State, but a suit against its agents to compel their conformance with the law. As such, it was within the jurisdiction of the circuit court").

¶ 37 Similarly, in *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540 (1977), a corporation filed a *mandamus* action against the Director of Public Aid seeking an injunction preventing him from suspending the corporation from participation on the Illinois medical assistance program. Our supreme court held that sovereign immunity did not bar the action because the corporation was "not attempting to enforce a present claim against the State, but,

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rather, [sought] to enjoin the defendant from taking actions in excess of his delegated authority and in violation of plaintiff's protectable legal interests." *Trainor*, 68 Ill. 2d at 548.

¶ 38 Finally, in *Board of Trustees v. Illinois Community College Board*, 63 Ill. App. 3d 969 (1978) the plaintiff, a district school board, filed an application seeking reimbursement for accumulated credit hours pursuant to State law. The State board refused to certify the claim, and the plaintiff filed a *mandamus* action in the circuit court against the State board to require certification of its claim. The circuit court granted summary judgment in favor of the plaintiff, and the defendants appealed, arguing, *inter alia*, that principles of sovereign immunity prevented the circuit court from exercising jurisdiction over the matter. *Board of Trustees*, 63 Ill. App. 3d at 970-71. Upholding the circuit court's ruling, the appellate court held that because the plaintiff's suit sought to compel the State board to perform a nondiscretionary duty, the claim did not need to be heard in the Court of Claims, stating that "[a] suit against State officials which seeks to compel them to perform their duty is not held to be a suit against the State, and the payment of State funds may therefore be compelled [in the circuit court]." *Board of Trustees*, 63 Ill. App. 3d at 971.

¶ 39 Here, as in the aforementioned cases, we are faced with a situation where a plaintiff has filed a *mandamus* action seeking to compel a state official to perform "a clear and nondiscretionary task," rather than attempting to enforce a present claim against the State. *McFtridge*, 2011 IL App (4th) 100936, at ¶48. Plaintiff, in this *mandamus* action, is not seeking a determination of her rights or attempting to hold the State liable by suing its agents.

In fact, there is no dispute on this appeal as to whether the State was required to indemnify Stringer as that was determined in the underlying tort action. Instead, plaintiff's suit merely seeks to prevent defendants in a manner unauthorized by statute. See *O'Donnell*, 239 Ill. 2d at 164. As previously discussed, nothing in the language of the Act purports to give defendants the discretion to refuse indemnification. Thus, because plaintiff's *mandamus* suit seeks to compel state officials to perform mandatory statutory duties, and does not attempt to subject the State to liability or seek a determination of her rights, it cannot be considered a suit against the State and jurisdiction over this matter properly resides in the circuit court. See *Kingery*, 283 Ill. App. at 412-13.

¶ 40 This distinction between present claims against the State, which seek determinations of rights or to subject the State to liability, and claims seeking the implementation of those rights is exemplified in *State Building Venture v. O'Donnell*, 239 Ill. 2d 151 (2010), which both defendants and the circuit court relied upon. This case is distinguishable from the case at bar. In *O'Donnell*, the plaintiff entered into a lease with the Illinois Department of Central Management Services (CMS) for a space in the James R. Thompson Building in Chicago. A dispute arose as to whether the lease could be renewed automatically at the plaintiff's sole discretion, and the plaintiff filed suit against the defendant, the director of CMS, seeking a declaration of its rights under the lease. It alleged that the defendant had incorrectly interpreted the enabling statute which authorized the lease of commercial spaces within the Thompson Center, and sought a declaratory judgment finding that the State was, in fact, authorized to enter into the lease with it and seeking costs and fees. *O'Donnell*, 239 Ill. 2d at

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156. The plaintiff moved for summary judgment and the court granted that motion, agreeing with the plaintiff's interpretation of the statute. Defendant appealed, arguing, among other things, that principles of sovereign immunity barred consideration of the action in the circuit court. The appellate court affirmed and the defendant appealed to the supreme court.

O'Donnell, 239 Ill. 2d at 156-57.

¶ 41 The Illinois supreme court found that because the plaintiff's claim for damages represented "an actual controversy relating to CMS's present interpretation of CMS's rights under the terms of the lease" and was "founded on a contract entered into between [the plaintiff] and the state," (*O'Donnell*, 239 Ill. 2d at 164-65) the plaintiff's claim fell "squarely within the exclusive jurisdiction of the Court of Claims" and was barred by sovereign immunity. *O'Donnell*, 239 Ill. 2d at 165.

¶ 42 In reaching its conclusion, the court found that the plaintiff could not rely on the officer suit exemption to sovereign immunity because the plaintiff's complaint did not "concern[] the scope of the Director of CMS's authority" and did "not allege the Director had taken any action in excess of its delegated authority under the enabling statute." *O'Donnell*, 239 Ill. 2d at 163. The court specifically distinguished the nature of the case before it from its decision in *Senn Park*, stating, "*Senn Park* is clearly distinguishable from this case because the plaintiffs in *Senn Park* sought prospective injunctive relief, in the form of an order of *mandamus*. [The plaintiff] is not seeking to prevent [the defendant] from acting an unauthorized manner. Rather, [the plaintiff was] seeking a declaration of its rights under a lease agreement and the enabling statute." *O'Donnell*, 239 Ill. 2d at 164. Thus, the Illinois

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supreme court's decision in *O'Donnell* remains fully consistent with the court's earlier decision in *Senn Park* and its progeny.

¶ 43 Unlike *O'Donnell*, the instant case does not involve an action seeking a declaration of rights under a contract, nor does it represent a present claim for damages. Instead, much like *Senn Park* and its progeny, plaintiff here is seeking a writ of *mandamus* to compel defendants to perform nondiscretionary duties expressly required of them by statute. Accordingly, the court's reliance on *O'Donnell* was misplaced, and we find that jurisdiction over this matter properly resided in the circuit court.

¶ 44 Although not argued below, defendants now, for the first time on this appeal, contend that even if defendants were required to certify plaintiff's judgment against Stringer under section 350/2(b) of the Act, her *mandamus* claim would nevertheless fail because of limitations set forth in section 405-105(12) of the Civil Administrative Code ("the Code"). That section of the Code authorizes the Illinois Department of Central Management ("CMS") to "establish and implement a program to coordinate the handling of all fidelity, surety, property, and casualty insurance exposures of the State and the departments." 20 ILCS 405/405-105 (West 2009).

¶ 45 Specifically, section 405-105(12) provides that CMS shall:

"[a]dminister a plan the purpose of which is to make payments on final settlements or final judgments in accordance with the State Employee Indemnification Act. [Citation.] The plan shall be funded through appropriations from the General Revenue

Fund specifically designated for that purpose. * * * Subject to sufficient appropriation, the Director [of CMS] shall approve payment of any claim, without regard to fiscal year limitations, presented to the Director [of CMS] that is supported by a final settlement or final judgment when the Attorney General and the chief officer of the public body against whose employee the claim or cause of action is asserted certify to the Director [of CMS] that the claim is in accordance with the State Employee Indemnification Act and that they approve of the payment. In no event shall an amount in excess of \$150,000 be paid from this plan to or for the benefit of any claimant.” 20 ILCS 405/405-105(12) (West 2009).

¶ 46 Sections 405-105(12) and 350/2(e)(ii) both require that the entry of a final judgment be certified by the Attorney General and the director of the department against which a claim is asserted before that claim is paid. While the means of certifying the judgment seem to be parallel under both sections, only section 405-105(12) places any limitation on the amount to be certified. Defendants contend that this limit must be read *in pari materia* with section 350/2(e)(ii) to likewise limit the amount to be certified under that section to \$150,000. Defendants do not purport to raise a jurisdictional argument based on section 405-105(12), but only one that implicates the amount to be paid to plaintiff. In fact, our courts have held, that the section is not meant to strip the circuit court of its jurisdiction. See *Henderson v.*

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Beckman Texaco, 213 Ill. App. 3d 1054, 1059 (1991) (holding, with respect to an older version of the section, that it “was not intended to have a jurisdictional effect”).

¶ 47 Plaintiff asserts that defendants are estopped from attempting to raise any defense predicated upon section 405-105(12) for the first time on appeal because the issue of whether that section limits the amount that she may recover was never raised in or considered by the circuit court. We disagree with this contention. Even though defendants would not be barred from raising a defense under section 405-105(12) for the first time on appeal if it cogently protected the judgment below, that is not the case here. The amount to be paid was not implicated in the ruling from which this appeal is taken since this appeal was dismissed for lack of subject matter jurisdiction, and therefore the amount plaintiff may recover remains open for determination. The only issue in the circuit court was merely whether plaintiff’s *mandamus* action could be pursued in the circuit court, rather than the Court of Claims, a question which, for the reasons previously discussed, was already answered in the affirmative. Given the limited scope of our review, the determination of this issue is best left for the circuit court on remand.

¶ 48III. CONCLUSION

¶ 49 For the foregoing reasons, we reverse the circuit court's dismissal of this action for lack of subject matter jurisdiction, and remand for further proceedings consistent with this decision.

¶ 50 Reversed and remanded.¹

¹We note that under 5 ILCS 350/2(b) (West 2008), the State is bound by the findings of the circuit court as to whether the indemnitee acted willfully or wantonly, and as to whether she acted outside the scope of her employment, even where those findings are made, as in this case, pursuant to an uncontested default prove up after the Attorney General's withdrawal, as it was compelled to do under the above referenced provisions of the Act. This may well leave a gap which would permit collusion between the indemnitee and the underlying tort plaintiff to require the State to indemnify the indemnitee even where the State might otherwise have successfully precluded the trier of fact from rendering such a finding, had it been permitted to intervene. However, there is no indication that such collusion did occur in this case. More overridingly, the State here chose not to appeal from the trial court's denial of its motion to intervene, which it made after a default judgment was already entered against Stringer in the underlying tort action. Nor did the State seek leave to intervene at any earlier time once it withdrew from its representation of Stringer in the underlying tort action. Thus, pursuant to the record in this appeal, the facts upon which our decision is predicated unequivocally invoke the provisions of 5 ILCS 350/2(b) (West 2008) of the Act as cited in the last sentence of paragraph 22 above so as to mandate the certification for payment of the underlying judgment by defendants.