SOVEREIGN IMMUNITY
GAME OF THRONES (IT'S A GREAT DAY FOR A RED WEDDING)

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CONTRACTING WITH THE KING – SCOPE AND BOUNDARIES OF SOVEREIGN IMMUNITY OR "THE GAME OF THRONES" (IT'S A GREAT DAY FOR A RED WEDDING)

I. INTRODUCTION

This article analyzes sovereign immunity and the extent the Texas Legislature waived sovereign immunity through enactment of the Texas Tort Claims Act (the "TCA" or "Act") and other statutes. The article begins by outlining the application and effect of common-law sovereign immunity. Next, the article analyzes various provisions of the Act, including the courts' interpretation of these provisions, focusing on: (1) sovereign immunity and tort liability of governmental entities at common law; (2) how sovereign immunity can be waived; (3) the waiver of sovereign immunity for tort liability under the Act; (4) the exclusions and defenses to liability under the Act; (5) submission of a premises-liability case to the jury; and (6) various miscellaneous issues that arise in tort suits against governmental entities.

II. SOVEREIGN IMMUNITY

Generally, governmental entities that enjoy sovereign immunity are not liable for the torts of their employees, absent a constitutional or statutory waiver of that immunity. Lowe v. Tex. Tech Univ. 540 S.W.2d 297, 298 (Tex. 1976); Terry A. Leanard, P.A. v. Glenn, 293 S.W.3d 669, 682 (Tex.App.—San Antonio 2009, pet. filed). The Act, for example, imposes liability based upon the condition or use of real and personal property and common law standards of liability. At the same time, where the Act or other statute or constitutional provision does not specifically waive governmental immunity from suit and liability, common law sovereign immunity remains the rule of law. Therefore, understanding the extent and basis for liability under the Act requires an understanding of sovereign immunity and common law premises liability.

A. A Brief History of Sovereign Immunity.

1. The Origins of Sovereign Immunity in American and Texas Jurisprudence.

Although the origins of sovereign immunity extend back to the English monarchy, it has been recognized in this country since the drafting of our Constitution. Alexander Hamilton spoke of sovereign immunity in the Federalist papers saying:

> It is inherent in the nature of sovereignty not to be amenable to suit of an individual without its consent. This is the general scheme and the general practice of mankind; and the exception, of one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.

THE FEDERALIST No. 81, at 487 [Alexander Hamilton][Clinton Rossitor Ed., 1961]. Hamilton made this statement in part to assuage fears that the new constitution would abrogate states' sovereign immunity. Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692 (Tex. 2003). State sovereign immunity was preserved by the Constitution. Alden v. Maine, 527 U.S. 706, 713, 119 S.Ct. 2240, 144 L.Ed. 2d 636 (1999); Meyers v. Texas, 410 F.3d 236, 240 (5th Cir. 2005). Thus, sovereign immunity is sometimes linked to the "futile fiction that 'the king can do no wrong' and sovereign immunity 'is an established principle of jurisprudence in all civilized nations [and in all states of the Union]'." Taylor, 106 S.W.3d at 694-95 (quoting Beers v. Arkansas, 61 U.S. 527, 529, 20 How. 527, 15 L.Ed. 991 (1857)).

In Texas jurisprudence, sovereign immunity was first recognized by the Texas Supreme Court, not by operation of the Constitution or statute. "In 1847, this court held that 'no State can be sued in her own court without her consent and then only in the manner indicated by that consent....' The Court did not cite the origin of that declaration, but it appears to be rooted in an early understanding of sovereignty." Id. (quoting Hosner v. De Young, 1 Tex. 764, 769 (1847)). Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 863 (Tex. 2002) (Enoch, J., dissenting). Thus, sovereign immunity in Texas jurisprudence came through recognition of the common law principle recognizing the inherent immunity of any governmental unit, not from statute or any particular provision of the constitution. See Wichita Falls State Hosp., 106 S.W.3d at 692.

2. The Purpose of Sovereign Immunity.

Generally, the courts recognize sovereign immunity as serving two purposes. The first purpose is to preclude second guessing of certain governmental actions and decisions. See Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc., 145 S.W.3d 170, 198 (Tex. 2004). See also City of El Paso v. Heinrich, 284 S.W.3d 366, 371-73 & n.6 (Tex. 2009) (litigation cannot be utilized "*to control state action by imposing liability on the State*" (italics in the original). Thus, policy level decisions, decisions regarding budgeting and allocation of resources, decisions regarding the provision of certain services (fire, police, and emergency services) and decisions regarding the design of public works cannot be the

bases of suit. Sw. Bell Tel., L. P. v. Harris County Toll Road Auth., 282 S.W.3d 59, 68 (Tex. 2009). "As we have often noted, the Legislature is best positioned to waive or abrogate sovereign immunity because it allows the Legislature to protect its policymaking function." Id. (internal quotation and citation omitted). See Tex. Home Mgmt. v. Peavy, 89 S.W.3d 30, 43 (Tex. 2002); TEX. CIV. PRAC. & REM. CODE § 101.021. Second, the courts recognize that sovereign immunity serves to protect the public treasury. Ben Bolt-Palito Blanco Consol. Ind. Sch. Dist. v. Tex. Political Subdivisions Prop. Cas. Self Ins. Fund, 212 S.W.3d 320 (Tex., 2006). Tex. Dep't of Transp. v. Sefzik, 2011 WL 5041969 (Tex. Oct. 21, 2011) *4; Rolling Plains Groundwater Cons. Dist. v. City of Aspermont, 2011 WL 5041964 (Tex. Oct. 21, 2011) *3; Wichita Falls State Hosp., 106 S.W.3d at 692. The purpose of sovereign immunity and governmental immunity "is pragmatic: to shield the public from the cost and consequences of imprudent actions of their government." Id. (internal quotation omitted). City of Houston v. Williams, 353 S.W.3d 128, 131 (Tex. 2011). In the Rusk State Hospital decision, the Supreme Court again affirmed, that one of the purposes of sovereign immunity and early rulings on the issue of immunity to file suit, is to avoid the wasting of tax dollars on defending suits, including on discovery, where claims are barred by immunity. Rusk State Hospital .v Black, 392 S.W.3d 88, 97, 106 (Tex. 2012) ; Heinrich, 284 S.W.3d 375 (one of the goals/purposes of sovereign immunity is to protect the public fisc). See also Hearts Bluff Game Ranch, Inc., v. State, 381 S.W.3d 468, 489 (Tex. 2012)(Texas Supreme Court refused to find a waiver of immunity in part because governmental entity would be left weighing whether "to act in the best interests of the people versus defending lawsuits").

This protection also extends to suits attempting to try the State's title to property. State v. Lain, 162 Tex. 549, 349 S.W.2d 579 (1961). But see Tex. Parks & Wildlife v. The Sawyer Trust, 354 S.W.3d 384 (Tex. 2011); Lain, 329, S.W.2d at 581; Parker v. Hunegnaw, 364 S.W.3d 398 (Tex. App.—Houston [14th Dist.] 2012); State v. BP Am. Prod. Co., 290 S.W.3d 345, 357-58 (Tex.App.—Austin 2009)(sovereign immunity does not bar suit where it has been determined that plaintiff and not the State has superior title and right of possession, therefore sovereign immunity did not preclude BP's trespass to try title suit against the State of Texas).

Allowing plaintiffs to bring suit and recover judgments would force governmental entities to take money from other activities (providing police protection, building public improvements, and providing social services) and expend those funds to defend law suits and pay judgments. Wichita Falls State Hosp., 106 S.W.3d at 698.; Catalina Dev., Inc. v. County of El Paso, 121 S.W.3d 704 (Tex. 2003). See *Rusk State Hospital .v Black*, 392 S.W.3d at 97, 106.

> Subjecting the government to liability may hamper governmental functions by shifting tax resources away from their intended purposes toward defending lawsuits and paying judgments. ... Accordingly the Legislature is better suited than the courts to weigh the conflicting public policies associated with waiving immunity and exposing the government to increased liability, the burden of which the general public must ultimately bear.

IT-Davy, 74 S.W.3d at 854. See Harris County Hosp. Dist. v. Tomball Reg'l Hosp., 283 S.W.3d 838, 847 (Tex. 2009) ([t]he judicial task is not to refine legislative choices about how to most effectively provide for indigent care and collect and distribute taxes to pay for it. The judiciary's task is to interpret legislation as it is written"); Sw. Bell Tel. at 68 ("[b]ut as we have often noted, the Legislature is best positioned to waive or abrogate sovereign immunity 'because this allows the Legislature to protect its policymaking function."); McIntyre v. Ramirez, 109 S.W.3d 741, 748 (Tex. 2003) ("[o]ur role … is not to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results; rather, our task is to interpret those statutes in a manner that effectuates the Legislature's intent").

The courts have recognized that one element of sovereign immunity, immunity from suit, is critical to allowing governmental entities flexibility in dealing with their contractual obligations. The Texas Supreme Court has repeatedly stated that immunity from suit serves the purpose of allowing governmental entities to avoid contractual obligations. Sovereign immunity and precluding suits for breach of contract prevent governmental entities from being bound by policy decisions of their predecessors. Id.; City of Houston v. Williams, 353 S.W.3d 128, 131 (Tex. 2011)(The purpose of sovereign immunity and governmental immunity "is pragmatic: to shield the public from the cost and consequences of imprudent actions of their government."); IT-Davy, 74 S.W.3d at 854. In the IT-Davy decision, the Supreme Court went so far as to say that forcing a contractor to obtain legislative permission to sue insures current officials are not bound by long term contracts made by their predecessors. Id. Thus, in the contractual realm, the Supreme Court has expressly recognized that immunity allows governmental entities to breach their contracts and rely upon immunity to preclude suit when it is

determined that contract no longer serves the best interest of the entity.

While Justice Hecht has stated that sovereign immunity must not be used as a means of stealing goods or services from contractors and a majority of that court continues to hold out the possibility that a governmental entity may waive immunity by contract, to date the Texas Supreme Court has not found a single instance in which a governmental entity has waived its immunity from suit by its conduct. See IT-Davy, 74 S.W.3d 860-61 (Hecht, J., concurring), 863-64 (Enoch, J., dissenting). Consequently, persons doing business with the State of Texas, counties, cities and other governmental entities in Texas may be doing so at their own risk. These contractors cannot depend upon being able to bring suit for damages in case the governmental entity breaches the contract. Contractors should adjust their price, closely monitor the governmental entity's performance of its obligations, not perform additional services or some combination of these in order to deal with the risk created by sovereign immunity. However, a recent decision by the First Court of Appeals reaches the conclusion that immunity from suit for contract can be waived by the State's conduct. Tex. S. Univ. v. State Street Bank & Trust Co., 212 S.W.3d 893 (Tex. App.— Houston [1st Dist.] 2007, pet. denied). But see Leach v. Tex. Tech Univ., 335 S.W.3d 386, 400 (Tex.App.—Amarillo 2011, writ pending) (refusing to find a waiver by conduct based on the Texas Supreme Court's holdings and refusing to follow the holding in State Street.)

Over the last two years, the Texas Supreme Court and the courts of appeal have combined these two separate reasons for sovereign immunity, precluding second guessing of decisions by the administrative and legislative branches and protecting the public treasury, into one over reaching basis for immunity. The courts now focus on sovereign immunity as serving the purpose of preventing litigation from being used to control the actions of the State and other governmental entities. Heinrich, 284 S.W.3d at 372-73; Combs v. City of Webster, 311 S.W.3d 85, 90-91 (Tex. App.—Austin, 2009). Interestingly the Texas Supreme Court considered the issue of "controlling" governmental entities through litigation, when it decided Cobb v. Harrington back in 1945. Cobb, 144 Tex. at 365-66.

3. What Governmental Entities Enjoy Sovereign Immunity?

Sovereign immunity extends far beyond the state itself. The state's agencies and political subdivisions also enjoy sovereign immunity. General Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 594 (Tex.2001); Lesley v. Veterans Land Board, 352 S.W.3d 479 (Tex. 2011); Lowe v. Tex. Tech Univ., 540 S.W.2d 297 (Tex. 1976); Tex. A&M Univ. v. Bishop, 996 S.W.2d 209, 212 (Tex. App.—Houston [14th Dist.] 1999, rev'd on other grounds, 35 S.W.3d 605 (Tex. 2000); Clark v. Univ. of Tex. Health Science Ctr., 919 S.W.2d 185, 187-88 (Tex. App.--Eastland 1996, n.w.h.). Consequently, state agencies, state universities, and counties have sovereign immunity. Lowe, 540 at 298 (Tex. 1976); Heigel v. Wichita County, 84 Tex. 392, 19 S.W. 562, 563 (1892). Additionally, sovereign immunity protects school districts, state junior colleges, hospital districts, and other special-purpose governmental districts. TEX. CIV. PRAC. & REM. CODE § 101.001(2)(A)-(B); San Antonio Independent School Dist. v. McKinney, 936 S.W.2d 279 (Tex. 1996). See Loyd v. ECO Res., Inc., 956 S.W.2d 110, 122-123 (Tex. App.–Houston [14th Dist.] 1997, no pet); Bennett v. Brown County Water Imp. Dist. No. 1, 272 S.W.2d 498 (Tex. 1954); Willacy County Water Control and Improvement Dist. No. 1 v. Abendroth, 177 S.W.2d 936 (Tex. 1944); Biclamowicz v. Cedar Hill Indep. School Dist., 136 S.W.3d 718 (Tex. App.–Dallas 2004, no pet. h.). "When performing governmental functions, political subdivisions derive governmental immunity from the State's sovereign immunity." City of Houston v. Williams, 353 S.W.3d 128, 131 (Tex. 2011).

Sovereign immunity as it applies to local governmental entities is often referred to as "governmental immunity." Harris County Hosp. Dist. v Tomball Reg'l Hosp., 283 S.W.3d at 842 ("[g]overnmental immunity, like the doctrine of sovereign immunity to which it is appurtenant, involves two issues: whether the State has consented to suit and whether the State has accepted liability").

Courts look to the "nature, purpose and powers of an entity in determining if the entity is a governmental entity that will enjoy sovereign or governmental immunity." In Ben Bolt-Palito Blanco Consol. ISD v Tex. Political Subdivisions Prop. Cas. Self Ins. Fund, 212 S.W.3d 320 (Tex. 2006), the Texas Supreme Court had to determine whether a governmental group risk pool made up of cities, counties, school districts, special purpose districts and other political subdivisions was a political subdivision of the state that enjoyed sovereign immunity. Id. In determining whether the pool was a governmental entity, the Supreme Court considered the fact that the Texas Government Code's definition of "local government" includes combinations of political subdivisions. Id. The Court went on to note that the pool had "powers of government and [had] ... the authority to exercise such [governmental] rights, privileges, and functions...." Id. at 325. Based on these factors, the Court held that where, as with the pool, an entity's "governing statutory authority demonstrates legislative intent to grant an entity the nature, purpose and powers of an arm of the state government, that entity is a

government unit unto itself." Id. at 325-26. See also LTTS Charter School, Inc. v. C2 Construction, Inc., 342 S.W.3d 73 (Tex. 2012): LTTS Charter School, Inc. v. C2 Construction, Inc., 358 S.W.3d 725, 734 (Tex. App.—Dallas 2012, pet. pending); Klein v. Hernandez, 315 S.W.3d 1(Tex. 2010) (by provision of statute Baylor Medical School is a state agency and enjoys sovereign immunity).

Governmental group risk or self-insurance pools are political subdivisions of the state that enjoy sovereign immunity. Id. Governmental group risk or self insurance pools are political subdivisions enjoying immunity in their own right and not just because they are composed of entities which have sovereign immunity. Id. at 326. The Court found that governmental self insurance or group risk pools are local governmental entities, similar to cities, and school districts. Id.

In LTTS Charter School, Inc. v. C2 Construction, Inc., 342 S.W.3d 73 (Tex. 2012), the Texas Supreme Court did not address whether an open-enrollment charter school is entitled to immunity from suit and immunity from liability but rather addressed whether an open-enrollment charter school is entitled to bring an interlocutory appeal under Chapter 51 of the Civil Practice and Remedies Code. Chapter 51 of the Civil Practice and Remedies Code, authorized governmental entities to bring interlocutory appeals from denial of motions raising immunity but does not define what constitutes a governmental entity. Id. The court turned to the TCA's definition of a "governmental unit" to decide what organizations as empowered to bring interlocutory appeals. The TCA defines governmental entities to include any "institution, agency, or organ of government the status and authority of which are derived from the Texas Constitution or from laws passed by the Legislature under the Constitution." Id. (quoting TEX. CIV. PRAC. & REM. CODE § 101.001(3)(D)). Rather than determining if open-enrollment charter schools have governmental status or authority derived from the Texas Constitution or laws passed by the Legislature under the Constitution, the Supreme Court followed the same analysis it relied upon in the *UIL* case to open-enrollment charter schools. Id.

Specifically, the Texas Supreme Court focused on the role, powers and limitations placed on open-enrollment charter schools in deciding whether they are governmental entities determining whether it was a governmental entity under the Tort Claims Act. Id. The Court noted that open enrollment charter schools are "indisputably" part of the Texas public education system, these schools have an explicit grant of authority under Title II of the Education Code, are schools open to general enrollment which receive funding from the State of Texas and cannot charge tuition. Id. These schools are subject to the Competitive Bidding Statute, the Public Information Act, and the Open Meetings Act. Id. These factors/characteristics led the Supreme Court to conclude that, "We are confident that the Legislature considers [open enrollment charter schools] to be an 'institution, agency, or organ of government' under the Tort Claims Act and thus entitled to take an interlocutory appeal here." Id.

The Supreme Court specifically left unresolved the question of whether open enrollment charter schools are immune from suit. LTTS Charter School, Inc. v. C2 Construction, Inc., 342 S.W.3d 73 (Tex. 2012). Additionally, the Supreme Court specifically noted that it was not addressing whether the Legislature has the authority to confer immunity from suit. Id. Previously, the Supreme Court held that the judiciary determines the scope of immunity, including which entities enjoy immunity from suit and which claims that are barred by, but only the Legislature can waive immunity. Id. The Court appears to be reminding the Legislator, governmental entities, and civil litigants that whether an entity enjoys immunity from suit, is determined by the judiciary and that the Texas Supreme Court will look to the purpose, powers, and restrictions on entities and how well they match those of known governmental entities in deciding if they enjoy immunity from suit. Id.

After the Texas Supreme Court's finding that open-enrollment charter schools were governmental entities entitled to take interlocutory appeals from jurisdictional rulings under Chapter 51 of the Civil Practice and Remedies Code, the Dallas Court of Appeals addressed the question of whether open-enrollment charter schools enjoyed immunity from suit. LTTS Charter School, Inc. v. C2 Construction, Inc., 358 S.W.3d 725, 734 (Tex. App.—Dallas 2012, pet. pending). The Dallas Court of Appeals began its analysis by acknowledging that the provisions of the Education Code under which charter schools are created provides indicated that open enrollment charter schools enjoyed immunity to the same extent as public school districts. Id. at 734. The Dallas Court went on to conclude that the language in the Education Code implies that open enrollment charter schools enjoy immunity from suit to the same extent that public schools and that any waiver of immunity from suit or liability for public schools would also apply to open enrollment charter schools. Id. 734-35.

Like the Supreme Court, the Dallas Court noted that the judiciary branch, not the legislative branch, determines the boundaries of the common law doctrine of sovereign immunity, including what entities enjoy immunity from suit. Id. at 735 (relying on City of Galveston, 217 S.W.3d at 471; Tooke, 197 S.W.3d at 331). The Dallas Court then followed the Supreme

Court's analysis in UIL as well as its previous decision in LTTS and looked at the role of open enrollment charter schools, as well as the powers and restrictions placed upon them, to conclude whether an open enrollment charter school enjoy immunity suit. The Dallas Court of Appeals noted that the Supreme Court had determined open enrollment charter schools, "(1) are statutorily declared to be part of the public school system of the state; (2) derive authority to wield the powers granted to traditional public schools and to receive and spend tax dollars (and in many ways to function as a governmental entity from a comprehensive statutory scheme); (3) have responsibility for implementing the state's system of public education; and (4) are generally subject to state laws and rules governing public schools, including regulation of open meetings and access to public information." Id. (citation and internal quotations omitted). Id. at 735. Thus, the Dallas Court of Appeals found that open enrollment charter schools do enjoy immunity from suit. Id. at 736.

The Austin Court of Appeals found that University Interscholastic League ("UIL") was a governmental entity that enjoys sovereign immunity through its connection with the University of Texas. The Austin Court found that UIL enjoys sovereign immunity because it is part of the University of Texas. UIL v. Sw. Officials Ass'n, Inc., 319 S.W.3d at 957-63. This holding was based on the fact that the UIL was referenced by statute as being part of the University of Texas, it had to report and account for all its activities and funds to state governmental entities, by statute it has rule making authority over high school sports and participation in those sports, the Texas Attorney General's office found that it was subject to the Public Information Act, UIL was subject to Sun Set Laws, and, like other state entities, by statute, mandatory venue for suits against UIL is in Travis County. UIL, 319 S.W.3d at 957-63.

The lesson of the Ben Bolt, UIL and Klein decisions is that, if a defendant is an entity that performs governmental related functions, it may enjoy governmental immunity for those functions. Klein, 315 S.W.3d 1. In Klein, the Texas Supreme Court noted that the Texas Health & Safety Code granted Baylor Medical School, a private medical school, full sovereign immunity in connection with the provision of medical care at an indigent care hospital by employees or students of Baylor Medical School. Id.

Whether a city enjoys sovereign immunity depends upon the capacity in which it acts. Cities act in either a governmental capacity or a proprietary capacity. *See* Dilley v. City of Houston, 222 S.W.2d 992, 993 (Tex. 1949); Barges v. City of San Antonio, 21 S.W.3d 347, 356 (Tex. App.–San Antonio 2000, pet. denied). Governmental functions are those functions imposed by law or assigned by the state. Id. Propriety functions are those functions that a municipality may, in its discretion, perform in the interest of the municipality's inhabitants. Id. When a city acts in a proprietary capacity, it is not acting as an arm of the government; it does not have sovereign immunity and is therefore liable as a private citizen for the torts of its employees. Dilley, 222, S.W.2d at 993. When a city acts in its governmental capacity it enjoys full sovereign immunity as an agent of the sovereign, the state. Id.

Beginning in 2003, the Texas Supreme Court began to delineate between the kind of immunity applicable to the State and its entities, and the kind of immunity applicable to local governmental entities that derive their immunity from the state but are not state agencies. Wichita Falls State Hosp. v. Taylor, 106, S.W.3d 692, 694 n. 3 (Tex. 2003). As the sovereign, the state and its agencies enjoy "sovereign immunity." Id. "In addition to protecting the State from liability . . . [sovereign immunity] also protects the various divisions of state government, including agencies, boards, hospitals, and universities. Id. (citing Lowe v. Tex. Tech Univ., 540 S.W.2d 297 (Tex. 1976)). On the other hand, "governmental immunity" is the proper title for the immunity from suit and liability enjoyed by political subdivisions of the state, such as counties, cities, and school districts. Harris County Hosp. Dist v. Tomball Reg'l Hosp., 283 S.W.3d 838, 842 (Tex. 2009); Wichita Falls State Hosp, 106, S.W.3d at 694 n. 3. Id. The protections of governmental and sovereign immunity are the same, except as we shall see, where a political subdivision of the state is sued by or sues, the State or its agencies. For convenience, the term "sovereign immunity" is used in this paper to refer to the immunity enjoyed both by the State of Texas and its agencies, as well as political subdivisions of the state.

4. What Branch of Government Can Waive Sovereign Immunity for a Class of Governmental Defendants or for a Particular Type of Claim?

While it may have been a decision of the Texas Supreme Court that first interjected sovereign immunity into Texas jurisprudence, the court has consistently held that any waiver of immunity rests within the sole discretion of the Texas Legislature.

> Most sovereigns have long abandoned the fiction that governments and their officials can 'do no wrong.' To varying degrees, states and the federal government have voluntarily relinquished the privilege of absolute immunity by waiving immunity in certain contexts.
>
> …

> Courts in other jurisdictions have occasionally abrogated sovereign immunity by judicial decree. We have held, however, that the Legislature is better suited to balance the conflicting policy issues associated with waiving immunity.

Wichita Falls State Hosp., 106 S.W.3d at 695-96 (emphasis added).

The Texas Supreme Court decisions are in conflict over the question of whether the Legislature can empower agencies of the administrative branch and/or local governmental entities to waive immunity. Compare Univ. of Tex. at El Paso v. Herrera, 322 S.W.3d 192, 201 (Tex. 2010)(court does not reach the issue of whether the University of Texas at El Paso can waive its immunity through its personnel policies) and City of Dallas v. Albert, 354 S.W.3d 368 (Tex. 2011); Tex. Nat'l Res. Consv. Comm'n v. IT-Davy, 74 S.W.3d 849, 857-58 (Tex. 2002). In IT-Davy, the contractor argued that the agency waived its immunity from suit by the terms of the contract. The Supreme Court rejected this argument holding, "Texas law is clear. Only the Legislature can waive sovereign immunity from suit in a breach-of-contract claim. Administrative agencies…are part of our government's administrative branch [and] consequently cannot waive immunity from suit. It also follows that administrative agents—even those who have authority to contract on the agency's behalf—cannot waive their agency's immunity from suit."

The Supreme Court had an opportunity to re-state the IT-Davy holding in 2010 but refused to address the issue of whether the Legislature refused to address the issue of whether the Legislature could empower agencies to waive their immunity from suit. See Herrera, 322 S.W.3d at 201. Herrera claimed that UTEP had waived immunity by means of its Personnel Handbook. Id. The Supreme Court did not reach the issue of whether UTEP had the power to waive its own immunity, instead deciding that the language in the handbook could not be read as a waiver of immunity. Id.; see Leach, 335 S.W.3d at 394-95 (finding that University's operating procedures enacted pursuant to the Education Code did not waive immunity). Similarly, the Texas Supreme Court has never expressly resolved the issue of whether a City's Charter can waive immunity, instead finding the language in the charter was insufficient to constitute a waiver. Tooke v. City of Mexia, 197 S.W.3d 325, 344 (Tex. 2006).

However, the Supreme Court's decision in Albert seems to indicate that the Court now takes the position that a governmental entity cannot waive its own immunity, except by way of creating a right to offset when it brings a claim against an opposing party. Albert arose out of claims by Dallas firefighters and policemen that they were not being paid in accordance with the terms of an ordinance passed by public referendum. Albert, 354 S.W.3d 368, 370. The City counterclaimed saying that some of the plaintiffs have indeed been overpaid. The officers asserted that the City had waived immunity by filing its counterclaim and/or by the passage of the ordinance. The Supreme Court agreed that once the City filed the counterclaim, the trial court had jurisdiction over any properly asserted germane claims that could offset the amount of the City's claims against the plaintiffs. Id. at 375. However, the Court held that the filing of the counter claim was NOT a waiver of immunity by the City. Id. The Supreme Court went on to hold, that just as the Dallas City Council could not waive immunity by passing an ordinance and the voters of the city could not waive immunity by ordinance resulting from a referendum. Id. at 379-380. Albert and Sharyland Water Supply Corp v. City of Alton suggest that at present the Supreme Court is unwilling to find that a governmental entity can take actions to waive its own immunity. Id.; Sharyland Water Supply Corp v. City of Alton, 354 S.W.3d 407 (Tex. 2011)(rejecting the idea that courts can find a waiver of immunity from suit by conduct).

The Texas Supreme Court has repeatedly noted that, because of the consequences that come with waiving immunity, the Legislature is in the best position to make those policy decisions. Albert, 354 S.W.3d 368, 379; Tomball Regional Hosp., 283 S.W.3d at 847 ([t]he judicial task is not to refine legislative choices about how to most effectively provide for indigent care and collect and distribute taxes to pay for it. The judiciary's task is to interpret legislation as it is written"); Sw. Bell Tel., L.P. v. Harris County Toll Road Auth., 282 S.W.3d 59, 68 (Tex. 2009) ("[b]ut as we have often noted, the Legislature is best positioned to waive or abrogate sovereign immunity 'because this allows the Legislature to protect its policymaking function"); McIntyre v. Ramirez, 109 S.W.3d 741, 748 (Tex. 2003) ("[o]ur role … is not to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results; rather, our task is to interpret those statutes in a manner that effectuates the Legislature's intent"). The court's deference to the Legislature to decide whether to waive immunity derives from both the principals related to separation of powers as well as the Legislature being better suited to make the decisions regarding allocation of resources. Tomball Reg'l Hosp., 283 S.W.3d at 848. See Sw. Bell Tel., L.P., 282 S.W.3d at 68.

At the same, the Texas Supreme Court has not "absolutely foreclosed the possibility that the judiciary may abrogate immunity by modifying the common

law." Id. Justices Hecht and Enoch have written concurring opinions in which they have noted that unless the Legislature addresses certain problems with sovereign immunity and/or the Tort Claims Act, the Texas Supreme Court may act to abrogate immunity for the purpose of forcing the Legislature to act. See IT-Davy, 74 S.W.3d 863 (Enoch, J. Dissenting) (stating the Supreme Court should abrogate sovereign immunity in all breach of contract cases). Tex. Dep't of Criminal Justice v. Miller, 51 S.W.3d 583, 590-592 (Tex. 2001) (Hecht, J., concurring) (noting that the distinction between use of property for which immunity has been waived and non-use of property for which there is no waiver creates distinctions that cannot be justified, articulated, explained, or understood; thus, judicial abolition of immunity may be necessary to prompt Legislature to enact legislation for determining when immunity is waived for the non-use of property).

B. Sovereign Immunity at Common Law and the Two Forms of Immunity.

Under common law, governmental entities enjoyed full sovereign immunity. State v. Snyder, 18 S.W. 106, 109 (Tex. 1886); Hosner v. De Young, 1 Tex. 764 (1847); Buchanan v. State, 89 S.W.2d 239, 240 (Tex. Civ. App.--Amarillo 1936, writ ref'd). Sovereign immunity protects the State, its agencies, political subdivisions and officials from suits for damages. Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 405 (Tex. 1997).

> Sovereign immunity embraces two principals: *immunity from suit* and immunity from liability. First, the State retains immunity from suit without legislative consent, even if the State's liability is not disputed. Second, the State retains *immunity from liability* though the Legislature has granted consent to the suit.

Id. (citations omitted); Tex. Dep't of Transp. v. Jones, 8 S.W.3d 636, 638 (Tex. 1999) ("[i]mmunity from liability and immunity from suit are two distinct principles."). The Texas Supreme Court went on to explain the differences between the two different aspects of immunity.

> *Immunity from suit* bars a suit against the State unless the State expressly gives its consent to the suit. In other words, although the claim asserted may be one on which the State acknowledges liability, this rule precludes a remedy until the Legislature consents to suit. ...
>
> *Immunity from liability* protects the State from judgments even if the Legislature has expressly given consent to the suit. In other words, even if the Legislature authorizes suit against the State the question remains whether the claim is one for which the State acknowledges liability. The State neither admits liability by granting permission to be sued.

Federal Sign v. Texas Southern Univ., 951 S.W.2d 401, 405 (Tex. 1997) (citations omitted); State v. Lueck, 290 S.W.3d 876 (Tex. 2009) ("[i]mmunity from suit is a jurisdictional question of whether the State has expressly consented to suit. … On the other hand, immunity from liability determines whether the State has accepted liability even after it has consented to suit"); Harris County. Hosp. Dist. v. Tomball Reg'l Hosp., 283 S. W.3d 838, 842 (Tex. 2009) ("[g]overnmental immunity, like the doctrine of sovereign immunity to which it is appurtenant, involves two issues: whether the State has consented to suit and whether the State has accepted liability"). See Rusk State Hospital .v Black, 392 S.W.3d at 95, 101, 103-06 (immunity from suit implicates and impacts a trial court's jurisdiction, although the members of the Texas Supreme Court disagree on whether its impacts subject-matter jurisdiction or personal jurisdiction); Dillard v. Austin Indep. Sch. Dist., 806 S.W.2d 589, 592 (Tex. App.—Austin 1991, writ denied); Holder v. Mellon Mortgage Co., 954 S.W.2d 786, 804 (Tex. App.—Houston [14th Dist.] 1997, *rev'd on other grounds*, 5 S.W.3d 654 (Tex. 1999); Missouri Pac. R.R. Co. v. Brownsville Navigation Dist., 453 S.W.2d 812, 813 (Tex. 1970); Harsfield, Governmental Immunity From Suit and Liability in Texas, 24 TEX. L. REV. 337 (1949); Jones, 8 S.W.3d at 638.

Thus, sovereign immunity bars both suit and liability absent express consent to suit and liability being given. Jones, 8 S.W.3d at 638; Federal Sign, 951 S.W.2d at 408; Holder, 954 S.W.2d at 808. Accordingly, any plaintiff bringing suit for money damages against the State had the burden of proving the state had waived immunity from both suit and liability. See City of Houston v. Arney, 680 S.W.2d 867 (Tex. App.—Houston [1st Dist.] 1984, no writ).

"A statute waives immunity from suit, immunity from liability, or both." Lueck, 290 S.W.3d at 880. Statutes such as the TCA and the Whistleblower Act waive immunity from suit and liability, thus making immunity from suit and liability "co-extensive." Lueck, 290 S.W.3d at 882. Thus, the plaintiff's ability to establish the trial court's jurisdiction is dependent upon her ability to prove liability. Id. See Hearts Bluff Game Ranch, Inc., v. State, 381 S.W.3d at 482-83.

The Texas Supreme Court held that the trial court lacked jurisdiction over the plaintiff's claims because the plaintiff could not establish that the government's actions proximately caused the taking of plaintiff's property. Id.

1. Sovereign Immunity as it Applies to Torts.

With regard to tort claims, the State and its political subdivisions enjoy complete sovereign immunity (both immunity from suit and liability). Lowe, 540 S.W.2d at 298. "A Texas state agency [and other political subdivisions] may not be sued or held liable for the torts of its agents in the absence of a constitutional or statutory provision that waives [their] governmental immunity for alleged wrongful acts." Tex. Parks & Wildlife Dep't v. Davis, 988 S.W.2d 370, 372 (Tex. App.—Austin 1999, pet. pending). See In re United Servs. Auto. Ass'n, 307 S.W.3d 299, 307 (Tex. 2010). Thus, a plaintiff must establish both a waiver of immunity from suit **and** liability in order to successfully pursue to judgment a tort claim against the State or any of its political subdivisions.

2. Sovereign Immunity as it Applies to Contract Claims.

Contract and quasi-contract claims against governmental entities warrant special consideration. Recent decisions of the Texas Supreme Court and several Texas appellate courts have clearly stated that governmental entities enjoy a limited degree of sovereign immunity – immunity from suit only.

> It has long been recognized that sovereign immunity protects the State from lawsuits for damages, absent legislative consent to sue the State. The term "sovereign immunity" actually includes two principles: immunity from suit and immunity from liability. Immunity from suit bars legal action against the State, even if the State acknowledges liability for the asserted claim, unless the legislature has given consent to sue. Immunity from liability protects the State from judgments, even if the legislature has expressly given consent to sue. When the State [or other governmental entity] enters into a contract with a private entity, it gives up its immunity from liability, but not its immunity from suit.

Aer-Aerotron, Inc. v. Tex. Dep't of Transp., 997 S.W.2d 687, 690 (Tex. App.—Austin 1999, pet. granted) (emphasis added).

See further discussion of sovereign immunity in contract cases in section III, D, 1, below.

3. *Heinrich* Sovereign Immunity as it Applies to Claims for Injunctive and Equitable Relief.

Sovereign immunity offers the State and its subdivisions protection from the use of litigation to control decision making or to access the public treasury. The court has long recognized an exception to immunity for suits brought against state *officials*, on the ground that those officials have acted outside of their statutory authority. Heinrich, 284 S.W.3d at 371-73; E.g., Cobb v. Harrington, 190 S.W.2d 709, 712 (Tex. 1945). State officials are likewise subject to the equitable remedy of mandamus. In re Smith, 333 S.W.3d 582, 585 (Tex. 2011)(sovereign immunity will not bar suit for mandamus, i.e., seeking to compel a ministerial act that does involve the exercise of discretion). E.g., Tex. Nat'l Guard Armory Bd. v. McCraw, 126 S.W.2d 627 (Tex. 1939). Thus, the doctrine of sovereign immunity did not apply to claims for injunctive relief seeking to force governmental officials to follow the law or to quit acting outside the scope of their authority. Henrich, 284 S.W.3d at 371; Anderson v. City of Seven Points, 806 S.W.2d 791, 793 (Tex. 1991); Bullock v. Calvert, 480 S.W.2d 367 (Tex. 1972); Thompson, 2003 WL 22964277. But see Potter Cnty. Attorney's Office v. Stars & Stripes Sweepstakes, 121 S.W.3d 460 (Tex. App. –Amarillo 2003, no pet.) (suit for injunctive relief barred by sovereign immunity because there was nothing illegal about seizure of eight-liner machine).

The Texas Supreme Court explained the basis for this exception in 1945 and reiterated it in 2009. In Cobb v. Harrington, the Texas Supreme Court explained;

> This is not a suit against the State. This is not a suit to impose liability upon the State or to compel the performance of its contract…. It is not an action that is in essence one for the recovery of money from the State or in which a judgment obtained would be satisfied by the payment out of funds in the State treasury. [T]he purpose of [this suit is not] to control the Land Commissioner when acting within the scope of authority lawfully conferred upon him. This action is for the purpose of obtaining a judgment declaring that respondents are not motor carriers as defined by the tax statute, and that petitioners, in endeavoring to compel respondents to pay the tax, are acting wrongfully and without legal authority. The acts of officials which are not lawfully authorized are not acts of the State, and an action against the officials by one whose rights have been invaded or violated by such acts, for the determination and protection of

> his rights, is not a suit against the State within the rule of immunity of the State from suit.

Cobb, 144 Tex. at 365-366 (citations omitted).

The Texas Supreme Court recently returned to this reasoning in the Heinrich decision where the court held: "[S]uits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity, even if a declaration to that effect compels the payment of money. To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act. Compare Epperson, 42 S.W.2d at 231 ("the tax collector's duty ... is purely ministerial") with Catalina Dev. Inc. v. County of El Paso, 121 S.W.3d 704, 706 (Tex.2003) (newly elected commissioners court immune from suit where it "acted within its discretion to protect the perceived interests of the public" in rejecting contract approved by predecessor) and Dodgen, 308 S.W.2d at 842 (suit seeking "enforcement of contract rights" barred by immunity in the absence of any "statutory provision governing or limiting the manner of sale"). Thus, *ultra vires* suits do not attempt to exert control over the State—they attempt to reassert the control of the State. Stated another way, these suits do not seek to alter government policy, but rather to enforce existing policy.

> [W]hile a lack of immunity may hamper governmental functions by requiring tax resources to be used for defending lawsuits … rather than using those resources for their intended purposes … this reasoning has not been extended to *ultra vires* suits.

Heinrich, 284 S.W.3d at 372-73.

These types of suits for injunctive relief have been held to fall within the courts' supervisory jurisdiction to protect against actions by officials or entities that are unconstitutional or *ultra vires*. Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Envtl. Quality, 307 S.W.3d 505, 513 (Tex.App.—Austin 2010, no pet.); Sw. Bell Tel. Co. v. Public Util. Comm'n, 735 S.W.2d 663, 667-68 (Tex.App.—Austin 1987, no writ). Thus, these claims are not barred either by sovereign immunity or official immunity. Heinrich, 284 S.W.3d at 379-80.

As noted by the Supreme Court in Heinrich, often times the key to establishing entitlement to injunctive relief is proving that the suit involves a ministerial act in which the persons sued have no, discretion in the act sought to be compelled, Heinrich, 284 S.W.3d at 371; Bagg v. Univ. of Tex. Med. Branch, 726 S.W.2d 582, 584-85 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.). Thus, suits such as Heinrich and Cobb are not actions where litigation is used to control a governmental entity but are instead instances where judicial action is necessary to reassert the control of the state and, thus, do not alter public policy but rather ensure public policy is followed by officials. Heinrich, 284 S.W.3d at 372-73.

Thus, suits of injunctive relief are barred by sovereign immunity if the purpose of the suit is to restrain a governmental entity or officials in the exercise of discretionary or constitutional authority. Mega Child Care, Inc., 145 S.W.3d 170, 198 (Tex. 2004). See also City of El Paso v. Heinrich, 284 S.W.3d 366, 372-73 & n.6 (Tex. 2009). Even *ultra vires* suits, which are the oppositive of a suit to control state action, "must not complain of a governmental officer's exercise of discretion but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial function." Id. The Texas Supreme Court explained, that, "In IT-Davy, we distinguished permissible declaratory-judgment suits against state officials 'allegedly act[ing] without legal or statutory authority' from those barred by immunity: 'In contrast [to suits not implicating sovereign immunity], declaratory-judgment suits against state officials seeking to establish a contract's validity, to enforce performance under a contract, or to impose contractual liabilities are suits against the State. *That is because such suits attempt to control state action by imposing liability on the State*. Id. at 371-72 (internal quotations and citations omitted; italics in original).

Thus, the Supreme Court in Heinrich distinguished that case from another case the Court had recently decided, Houston Munic. Employees Pension v. Ferrell, 248 S.W.3d 151 (Tex. 2007), because Ferrell's suit sought review of the pension board's discretionary decision making. Heinrich, 284 S.W.3d at 371, fn 3. The Court pointed out that Ferrell's suit might not have been barred by sovereign immunity if he had alleged the pension board was clearly violating its enabling statute. Id.

In Heinrich, The Texas Supreme Court held that a plaintiff can obtain prospective injunctive relief with a general ability to sue the State and governmental entities for equitable relief. Heinrich, 284 S.W.3d at 375-76. See also Labrado v. County of El Paso, 132 S.W.3d 581, 593 (Tex. App.–El Paso 2004, no pet. h.); Tex. A&M Univ. v. Thompson, 2003 WL 22964277 (Tex. App.–Austin 2003, no pet. h.); Tex. Dep't of Transp. v. City of Amarillo, 2005 WL 2367770 (Tex. App. –Amarillo 2005).

At the same time, a party cannot seek to avoid the defense of sovereign immunity by dressing up a suit for money damages as a claim for equitable relief. As noted by the Fourteenth Court of Appeals:

> In Cobb, the complainants brought suit to obtain a judgment declaring that ... state officials were ... acting wrongfully and without legal authority. The court held that this was not a suit against the state and thus was not barred by sovereign immunity. The court emphasized that the complainants were not seeking to impose liability on the state or to compel performance of a contract.

TRST Corpus, Inc., v. Financial Center, Inc., 9 S.W.3d 316, 323 (Tex. App.–Houston [14th Dist.] 1999, pet. denied); see Smith v. Lutz, 149 S.W.3d 752 (Tex. App.–Austin 2004, no. pet. h.)(not released for publication); Freedman v. Univ. of Houston, 110 S.W.3d 504 (Tex. App.– Houston [1st Dist.] 2003, no pet. h.); Bell v. City of Grand Prairie, 221 S.W.3d 317 (Tex. App.–Dallas 2007). The courts are obligated to look at the real nature of the relief sought. Thus, when the suit primarily seeks money damages, adding a claim for declaratory or injunctive relief will not allow the plaintiff to circumvent the bar to suit and liability created by sovereign immunity. Id; Bell v. City of Grand Prairie, 160 S.W.3d 691, 693-94 (Tex. App.-Dallas 2005, no pet.).

In Smith, the Austin Court notes that the plaintiff did not have a legitimate declaratory judgment claim because he could not point to anything other than the contract, such as a statute, that would require the university to take the actions in question. Id. Therefore, the court found the declaratory judgment claim was a pretext to bring a suit for breach of contract. Id. The Austin Court explained that, in its opinion, all declaratory judgment claims involving contracts with the state are barred by sovereign immunity. Id. "[D]eclaratory-judgment actions brought against state officials seeking to establish a contract's validity, to enforce performance under a contract, or to impose contractual liabilities *are* considered suits against the state because they seek to control state action or impose liability on the state. This second category of declaratory actions may not be maintained without legislative permission." Id. at 759-760 (emphasis in original). Following the rationale of the Austin Court of Appeals, a party that enters into a contract with a state agency or a subdivision of the state waives its right to use the Declaratory Judgment Act to determine its obligations and rights under the contract. See id.

This bar applies regardless of the way in which the claim is framed. See IT-Davy, 74 S.W.3d at 854; see also, e.g., City of Houston v. Williams, 216 S.W.3d 827 (Tex. 2007) (firefighters' suit for declaratory judgment was, in fact, a claim for money damages and, thus, required a waiver of the city's sovereign immunity). When the only injury alleged is in the past and the only plausible remedy is an award of money damages, a declaratory judgment claim is barred by sovereign immunity. Bell v. City of Grand Prairie, 221 S.W.3d 317 (Tex. App.–Dallas 2007). However, where the firefighters' suit for declaratory and injunctive relief would affect determination of seniority going forward, sovereign immunity did not bar the suit. Id.

At the same time, the fact that prospective equitable relief will result in the payment of money by a governmental entity or the mere inclusion of a claim for money damages does not mean that plaintiff is bringing a declaratory judgment act claim purely as a pretext for a breach of contract claim. Heinrich, 284 S.W.3d at 371-373; Labrado v. County of El Paso, 132 S.W.3d 581, 593-94 (Tex. App.–El Paso 2004 no pet. h.). The plaintiffs in Labrado were seeking a declaration that the county had violated the competitive bidding statute. Id. The fact that they included a claim for money damages did not bar their suit for declaratory relief on the issue of whether the county violated the competitive bidding statute. Id.

The Texas Supreme Court's decision in Heinrich does clarify what monetary relief can be obtained in suits seeking declaratory, injunctive, and mandamus relief. Ms. Heinrich brought suit against the El Paso Fireman and Policemen's Pension Fund after her pension payments were reduced by 1/3. Heinrich, 284 S.W.3d at 369. The pension reduced her payment by 1/3 because her son had reached age 23 and they had begun paying 1/3 of the pension amount to him. Id., at p.6. Heinrich sued alleging that the reduction in her pension payment was in violation of the statute governing the pension fund. Id. In the suit, Heinrich sought an injunction compelling the pension to pay her both for the fund they had withheld in the past as well as to make payments to her equal to 100% of the pension amount in the future. Id. After holding that sovereign immunity did not bar her claims and that pension fund board members in their official capacity had violated the applicable statute, the Supreme Court turned to the question of what relief could be granted to Ms. Heinrich. Id., at p. 9. The Court noted that, while the equitable claims were not barred by sovereign immunity, the relief Ms. Heinrich sought might revive sovereign immunity. "But the *ultra vires* rule is subject to important qualifications. Even if such a claim may be brought, the remedy may implicate immunity." Heinrich, 284 S.W.3d at 373. The Court then explained that retrospective monetary relief is generally barred by sovereign immunity. Id.at 373-374. "This does not mean, however, that the judgment that

involves the payment of money necessarily implicates immunity." Id. at 374. The Supreme Court then acknowledged that drawing a line on what relief could be granted without running afoul of sovereign immunity was "problematic." Ultimately, the Supreme Court held that "a claimant, who successfully proves an *ultra vires* claim is entitled to prospective injunctive relief as measured from the date of injunction." Id. p. 376. In doing so, the Supreme Court specifically overruled a portion of its holding in State v. Epperson, 42 S.W. 2d 228 (Tex. 1931). The Court explained that, to the extent the Epperson decision allowed recovery of retrospective monetary relief, that holding was overruled by Heinrich. Id. At the same time, the Supreme Court acknowledged that it is frequently difficult to distinguish between retrospective and prospective relief. Heinrich, 284 S.W.3d at 375. "That the programs are also compensatory in nature does not change the fact they are part of a plan that operates prospectively…." Id. (internal quotations and citations omitted). The Texas Supreme Court acknowledged that the United States Supreme Court had previously upheld, as prospective relief, a trial court order requiring state officials to spend six million dollars on education to remedy the effects of segregation. Id.

The Heinrich decision clearly sets out the limited circumstances in which a suit can be maintained based on a claim of *ultra vires* actions of government employees or officials in their official capacity. Id. "To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." Id. at 372. In re Smith, 333 S.W.3d at 585. However the suit need not be brought against the governmental official who first took the ultra vires act. See Parker v. Hunegnaw, 364 S.W.3d 398 (Tex. App.—Houston [14th Dist.] 2012). Parker, the mayor of the City of Houston, contended that she was not the proper party to the suit because she was not in office at the time of the acts complained of by the plaintiff. Id. The Fourteenth Court of Appeals rejected this argument noting that the plaintiff's claim was not merely about the official's act of purchasing the property but rather the wrongful possession under a claim of ownership. Id.

Following Heinrich, the Austin Court of Appeals held that *ultra vires* claims cannot challenge a decision made by a state agency that has exclusive jurisdiction over a particular matter. Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Envtl. Quality, 307 S.W.3d 505, 517-18 (Tex.App.—Austin 2010, no pet.). In this case, the Austin Court held that the Legislature had delegated to the Texas Commission on Environmental Quality exclusive authority to decide petitions for expedited consideration of obtaining an alternate water supply company. Id. The Austin Court held that, because the Legislature had given the TCEQ exclusive jurisdiction, an *ultra vires* suit could not be based upon the TCEQ reaching "an incorrect or wrong result when exercising its delegated authority." Id. The Austin Court reasoned that, because the TCEQ had authority to decide whether to grant the petition, it did not act without authority and could not be said to have acted *ultra vires*. Id.

Furthermore, the Texas Supreme Court in Heinrich held that, because *ultra vires* suits are predicated upon officials acting without legal authority, the proper defendants to such suits are the officials, in their official capacity. Id. at 373. The Court concluded that suits complaining of *ultra vires* actions may not be brought against a governmental unit possessed of sovereign immunity, but must be brought against the allegedly responsible government actor in his official capacity.

When a plaintiff's "allegations and requested declaration are, in substance, *ultra vires* claims [and the Plaintiff] sued only the [governmental entity] rather than … officials acting in their official capacities… under Heinrich, the [governmental entity] retains its sovereign immunity in this case and Texas courts are without subject-matter jurisdiction to entertain" the suit. Tex. Dep't of Ins. v. Reconveyance Servs., Inc., 306 S.W.3d 256, 258-59 (Tex. 2010) (reversing denial of plea to the jurisdiction based on failure to bring suit officials in their official capacity). *But see Rusk State Hospital .v Black*, 392 S.W.3d at 95, 101, 103-06 (immunity from suit implicates and impacts a trial court's jurisdiction, although the members of the Texas Supreme Court disagree on whether its impacts subject-matter jurisdiction or personal jurisdiction);

Following Heinrich, a plaintiff would be wise to quickly move forward with a hearing on their application for injunctive relief. He should put on all his evidence in support of an injunction and should do so even if the court is taking up a defendant's plea to the jurisdiction. By following this strategy, the plaintiff communes the clock on the date from which prospective relief can begin to run under the Heinrich decision. Id.

Recently the Texas Supreme Court has suggested that if a statute offers a remedy, including monetary relief, a plaintiff may not be able to pursue a Heinrich ultra vires claim. See In re Nestle USA, Inc., 359 S.W.3d 207, 208 (Tex. 2012). The petitioners in Nestle USA brought an original proceeding in front of the Texas Supreme Court seeking a declaration that the Texas franchise law was unconstitutional, and seeking an injunction prohibiting the comptroller from collecting the taxes as well as a writ of mandamus ordering the comptroller to refund taxes that had been collected from 2008 to 2011. Id. at 208. The Supreme

Court held that because the Legislature had created a comprehensive statute covering a particular subject and offered a means of obtaining monetary relief, the plaintiff must comply with the statute. Id. This holding can be seen as holding that *Heinrich ultra vires* claims are not available when a statutory frame work waives immunity and provides full relief. See id.

Additionally, the Declaratory Judgment Act ("DJA") provides a means by which a party in litigation with a governmental entity can recover its attorney's fees. Tex. A&M Univ.-Kingsville v. Lawson, 127 S.W.3d 866 (Tex. App. –Austin 2004 pet. filed); TML v. Prudential Ins. Co. of America, 144 S.W.3d 600 (Tex. App.–Austin 2004, pet. denied). But see Heinrich, 284 S.W.3d at 370 (however, the Declaratory Judgment Act is not a general waiver of sovereign immunity; it "does not enlarge a trial court's jurisdiction, and a litigant's request for declaratory relief does not alter a suit's underlying nature. Private parties cannot circumvent the State's sovereign immunity… by characterizing a suit for money damages… as a declaratory-judgment claim"). A party need not prevail on its suit under the DJA in order to recover its attorney's fees. Tex. A&M Univ.-Kingsville v. Lawson, 127 S.W.3d at 874-875. "A trial court may award just and equitable attorney's fees to a non-prevailing party. Id.

An amendment to the Code Construction Act throws doubt on the assumption that the DJA affects a waiver of the State's immunity from suit. TEX. GOV'T CODE § 311.034. By contrast, the Supreme Court has expressly held that the governmental immunity of municipal corporations is waived by the DJA. Tex. Educ. Agency v. Leeper, 893 S.W.2d 432 (Tex. 1994). In Leeper, the court held that the DJA's joinder provision waived municipal corporations' immunity from liability for attorney's fees by requiring their joinder to DJA suits. As opposed to municipal entities, the State need not be joined to such suits. *See* TEX. CIV. PRAC. & REM. CODE § 37.006(b). Section 311.034 precludes this provision from acting as a waiver of immunity, because a joinder provision shall not be construed as a waiver of immunity unless the provision expressly includes the State as a necessary party.

4. Sovereign Immunity Applies to Suits Involving Governmental Entities' Ownership in Land.

Sovereign immunity even bars suits seeking declaratory relief regarding a governmental entity's ownership of real property. Lesley v. Veterans Land Bd. Of State, 352 S.W.3d 479, 484 (Tex. 2011); Tex. Parks & Wildlife v. The Sawyer Trust, 354 S.W.3d 384 (Tex. 2011). Lesley involved a suit to determine ownership of mineral rights under properties owned by the Veterans Land Board. The Supreme Court held that because the plaintiffs were bringing a "suit for land" the VLB was immune from suit and the trial court thus lacks jurisdiction. Id. In Sawyer, the Supreme Court held that sovereign immunity barred the plaintiff's suit for declaratory relief and/or suits for trespass to try title to land. Texas Parks & Wildlife v. The Sawyer Trust, 354 S.W.3d 384 (Tex. 2011). However the court affirmed the right of a land owner to bring an ultra vires claim against a governmental official claiming that she is wrongfully claiming ownership or possession of property set out in its opinion State v. Lain, 162 Tex. 549, 349 S.W.2d 579 (1961); Texas Parks & Wildlife v. The Sawyer Trust, 354 S.W.3d 384 (Tex. 2011). See also Hearts Bluff Game Ranch, Inc., v. State, 381 S.W.3d at 489 (Texas Supreme Court refused to find a waiver of immunity because pleadings did not allege a legal basis on which the governmental entity would be left weighing whether "to act in the best interests of the people versus defending lawsuits").

Texas courts continue to analyze the application of the Heinrich and Lain principles to cases involving ownership of real property. Parker v. Hunegnaw, 364 S.W.3d 398 (Tex. App.—Houston [14th Dist.] 2012) is a good example of this. Because of his extensive international travel, the plaintiff in Parker executed a durable power of attorney granting a third party the right to convey specific lots the plaintiff owned in the Houston. Unbeknownst to plaintiff, his agent conveyed lots not covered by the durable power of attorney to the City of Houston. The plaintiff then brought suit against Parker, the mayor of Houston, in her official and individual capacity, to "quiet title" as well as for a declaration that the deeds conveying the property to the City were void and an injunction prohibiting Parker from continuing to possess the property. The allegations and relief sought in plaintiff's pleadings made it clear that ownership and control of the lot was the only relief he was seeking against Parker. Id. Parker filed a plea to the jurisdiction contending the claims were barred by governmental immunity.

The Fourteenth Court of Appeals, initially, determined what claims the plaintiff was bringing against Parker. The Court noted that [Parker] was not seeking declaratory relief or even a suit to "quiet title." Id. The Court concluded that the plaintiff was bringing a trespass to try title action because he was seeking a determination of ownership of the lots and resolving competing claims to property. Id. The Court then evaluated whether a trespass to try title claim can form the basis of a Heinrich *ultra vires* claim. Id. The court noted that an *ultra vires* claim will allow plaintiff to obtain perspective declaratory and injunctive relief. Id.

In determining if immunity barred the claims against Parker, the Fourteenth Court of Appeals

analyzed the Texas Supreme Court's decision in State v. Lain, 349 S.W.2d 573 (Tex. 1961), Sawyer Trust, and BP Am. The Court of Appeals began its analysis by reviewing the Texas Supreme Court's reasoning in Lain. It noted that a suit for recovery of title and possession of real property is not a suit against the State but is a suit against the officials asserting ownership and right to possession on behalf of the State. Id.

> One who takes possession of another's land without legal title is no less a trespasser because he is a state official or employee, and the owner should not be required to obtain legislative consent to institute suit to oust him simply because he asserts a good faith but overzealous claim that title or right to possession is in the state and he is acting for and on behalf of the state . . .[A] plea of sovereign immunity by government officials will not be sustained in a suit by the owner of land with the right to possession when the governmental entity has neither title nor right of possession.

Id. (quoting Lain, 349 S.W.2d at 581-82).

The Court of Appeals then noted that the Texas Supreme Court in Sawyer Trust rejected the argument that a trespass-to-try-title suit against an official is barred by immunity because the plaintiff is seeking relief binding a governmental entity, not the official. Id. The Court then noted that the Heinrich decision recognizes that *ultra vires* suits are suits which are for all practical purposes are suits against the state, yet the proper defendant is an official in his official capacity. Id. Finally, the Court rejected Parker's argument that the evidence she submitted to the trial court established that the City was the rightful owner of the property. The Court of Appeals noted that Parker's plea to the jurisdiction challenged only the adequacy of the plaintiff's pleadings which affirmatively demonstrated jurisdiction. Accordingly, the Court found that the plea to the jurisdiction was properly denied. Parker v. Hunegnaw, 364 S.W.3d 398 (Tex. App.—Houston [14th Dist.] 2012).

The Court also rejected Parker's argument that Lain's holding did not apply because she had committed no unlawful act since she became mayor after the City purchased the property at issue. Parker v. Hunegnaw, 364 S.W.3d 398 (Tex. App.—Houston [14th Dist.] 2012). The Court rejected this argument noting that the plaintiff's claim was not merely about the official's act of purchasing the property but rather the wrongful possession under a claim of ownership. Id.

Additionally sovereign immunity does not bar claims for violation of the constitution, including takings claims, or ultra vires claims. City of Dallas v Stewart, 361 S.W.3d 562 (Tex. 2012); Sawyer Trust at 390. While the Supreme Court acknowledges that prior to 1980 its opinions could be read to hold that sovereign immunity barred takings claims (see Sawyer Trust), following its decision in Steele v. City of Houston, 603 S.W.2d 786 (Tex. 1980), the Supreme Court has consistently held that immunity does not bar constitutional claims, including takings claims. City of Dallas v Stewart, 361 S.W.3d 562 (Tex. 2012). To establish a taking of property the plaintiff is required to plead and prove that the government exercised dominion and control over the property. Sawyer Trust at 390, 391.

5. Sovereign Immunity in Suits Between Governmental Entities.

Texas courts have begun to face the problem of applying sovereign immunity doctrine in cases brought by one governmental entity against another governmental entity. While the law in this area is unsettled, it appears that sovereign immunity protects the State from suits by other governmental entities, but does not protect other governmental entities from suit by the State.

In Tex. Dep't of Transp. v. City of Sunset Valley, 146 S.W.2d 637 (Tex. 2004), the Court held that sovereign immunity bars claims *against a state agency* by a city. The City of Sunset Valley brought suit against TexDOT for an unconstitutional taking, a breach of the Texas Transportation Code, and common-law nuisance. *Id.* The City prevailed at trial, and the judgment was affirmed in part on appeal. *Id.* The Supreme Court reversed and rendered judgment for TxDot, finding all the City's claims, except its taking claim under Article 1, section 9 of the Texas Constitution, were barred by sovereign immunity. *Id.* at 641-644.[1]

Subsequently, the Supreme Court has also held that sovereign immunity bars suit *by the state* against a home-rule city. City of Galveston v. State of Tex., 217 S.W.3d 466, 468-69 (Tex. 2007). This suit arose from damage to a state highway allegedly caused by the city's negligence regarding the placement and maintenance of water lines in close proximity to the highway. While the state and the city entered into an inter-governmental contact in 1982 for construction of state highway and calling for the city to relocate certain

[1] The Court found that the city had not demonstrated an ownership interest in the property taken and also ruled for TexDOT on the takings claim. *Id.*

utilities, the state did not bring suit under either the TCA or Chapter 2217. Id.

The majority began its analysis by noting that, "Political subdivisions in Texas have long enjoyed immunity from suit when performing governmental functions like that involved here. … [And] the Legislature has mandated that no statute should be construed to waive immunity absent clear and unambiguous language." Id. at 469. "This high standard is especially true for home-rule cities like Galveston. Such cities derive their powers from the Texas Constitution, not the Legislature." Id. The majority went on to state that the presumption of immunity was particularly appropriate in suits between governmental entities. "This heavy presumption in favor of immunity arises not just from the separation-of-powers principles but from practical concerns. In a world with increasingly complex webs of government units, the Legislature is better suited to make the distinctions, exceptions and limitations that different situations require." Id. at 469. The majority then points out that the Legislature has recently endeavored to steer resolution of governmental entities away from litigation. Id.

The majority then noted that the state has the power to waive a city's or other governmental entity's sovereign immunity. Id. at 471. "This is not a question of power but of authority. ... The State has the power to waive immunity from suit for cities, but no authority to do so without the Legislature's clear and unambiguous consent. There is no such authority here." Id. Thus, the court held the state's suit against the city was barred by sovereign immunity. Id. See Nueces County v. San Patricio County, 246 S.W.3d 651, 652 (Tex. 2008) (per curiam).

The court then offered three policy reasons for finding there was no waiver for claims brought by the state against political subdivisions and local governmental entities. If "a levee or skyscraper collapses, insure of fault and causation pale in comparison to issues of who can bear and repair such staggering losses. These are precisely the kinds of issues more suited to the Legislature than the courts." City of Galveston, 217 S.W.3d at 472. Next, "there are jurisdictional problems in asking courts to enforce a judgment again a government entity, even if it's a local one. ... Will courts order [local governments] to raise taxes, or impound funds for police, fire or sanitation workers so the State can collect? Or will the court order execution on city property-perhaps its parks, buses, water works, or airports." Id. at 472. Finally, the court found it would be fundamentally unfair to allow the state to use sovereign immunity to avoid suits by local governments and political subdivisions, but allow the state to sue and recover judgments against those entities without the Legislature having enacted a waiver of immunity. Id.

While the Legislature is best suited to determine when to waive immunity, the Judiciary defines the scope of the entities and claims covered by sovereign immunity, including immunity from suit. City of Galveston, 217 S.W.3d at 471; Tooke, 197 S.W.3d at 331. Accordingly the Texas Supreme Court has questioned whether the Legislature can grant immunity, including immunity from suit, to an entity by statute. LTTS Charter School, Inc. v. C2 Construction, Inc., 342 S.W.3d 73 (Tex. 2012). See also LTTS Charter School, Inc. v. C2 Construction, Inc., 358 S.W.3d 725, 734 (Tex. App.—Dallas 2012, pet. pending).

The majority rejected the state's argument, "that because the City's immunity is derived from the State, it defies logic to allow immunity to be asserted against the State. But the major flaw in this reasoning is that it assumed the State 'gave' immunity to cities. This is simply not the case. Cities are not created by the State, but by the Constitution and the consent of their inhabitants. Immunity was not bestowed by the legislative or executive act; it arose as a common-law creation of the judiciary." City of Galveston, 217 S.W.3d at 473.

The Supreme Court has likewise held that sovereign immunity barred suits by one county against another county Nueces Co. 246 S.W.3d at 653.

Sovereign Immunity bars suits by one governmental entity against another entity for money damages even where the suit alleges that the defendant's actions were illegal. The Nueces County decision arises out of a boundary dispute as to the border between San Patricio and Nueces counties. San Patricio prevailed on its claim establishing that land claimed by Nueces County was actually within San Patricio County. Id. San Patricio argued that it was also entitled to recover the amount of taxes Nueces County had collected on the property in question. San Patricio argued that sovereign immunity did not bar its claim for money damages, because Nueces County acted beyond its legal authority in collecting those taxes. Id. at 632. The Supreme Court rejected this argument stating that one could always argue that any tortious act, even car accidents and breaches of contract, are acts beyond a governmental entity's legal authority. Id. The Supreme Court, therefore, held that the claim for recovery of taxes collected by Nueces County was barred by sovereign immunity. Id.

6. Eleventh Amendment Immunity.

In examining the scope of the defense of sovereign immunity, it is important to distinguish between common law sovereign immunity and the State's immunity under the Eleventh Amendment of

the United States Constitution. While both sovereign immunity and Eleventh Amendment immunity are based upon the notion that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," cities and counties do not enjoy Eleventh Amendment immunity. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 119 S. Ct. 2199, 2204 (1999) (quoting Hans v. Louisiana, 134 U.S. 1, 13 (1890)) (quoting THE FEDERALIST NO. 81 (Alexander Hamilton); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 47, 115 S. Ct. 394, 404 (1994). See also, e.g., Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 280, 97 S. Ct. 568, 572-573 (1977); Lincoln County v. Luning, 133 U.S. 529, 530, 10 S. Ct. 363 (1890). Thus, if you are representing governmental entities other than the State or arms of the State, your client does not enjoy the protections afforded by the Eleventh Amendment. Williams v. Dallas Area Rapid Transp., 242 F.3d 315, 319-22 (5th Cir. 2001) (setting out the test for determining applicability of Eleventh Amendment; and noting that not all entities covered by the TCA enjoy the benefits of the Eleventh Amendment).

However, one should be aware that removing a case to federal court constitutes a waiver of immunity from suit in federal court and invokes the jurisdiction of the federal court. Meyers v. State of Tex., 410 F.3d 236 (5th Cir. 2005). The federal court must still look to state law to determine if the state has retained immunity from liability. Id. For a more detailed review of the fundamentals of Eleventh Amendment sovereign immunity, see Ann K. Wooster, Immunity of State from Civil Suits Under Eleventh Amendment - - Supreme Court Cases, 187 A.L.R. Fed. 175 (2004).

Recent United States Supreme Court decisions regarding Congress' authority to abrogate the States' Eleventh Amendment sovereign immunity may have opened the door to argue, pursuant to the Tenth Amendment, that when Congress lacks the authority to abrogate the State' s sovereign immunity, it cannot circumvent that immunity by abrogation of the immunity of the state's political subdivisions. See, e.g. Kimel v. Florida Bd. of Regents , 528 U.S. 62, 120 S. Ct. 631, 650 (2000); Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240 (1999); College Sav. Bank, 527 U.S. at 627, 119 S. Ct. at 2204; City of Boerne v. Flores, 521 U.S. 507, 536, 117 S. Ct. 2157, 2172 (1997). Exploration of the parameters and implications of such argument and its likelihood of success are beyond the scope of this paper.

Like sovereign immunity, Eleventh Amendment immunity is waived where the state consents to suit. Clark v. Barnard, 108 U.S. 426 (1883). The state's decision to waive Eleventh Amendment immunity must be voluntary and clearly indicate the state's intention to be subject to the jurisdiction of a federal court. Meyers, 410 F.3d at 241. Generally, courts will find waiver if (1) the state voluntarily invokes federal court jurisdiction, or (2) the state makes a "clear declaration" that it intends to submit itself to federal court jurisdiction. Id. The most common way in which this occurs is when the State removes a suit to federal court or intervenes in a lawsuit. See Lapides v. Bd. of Regents of the Univ. of Ga., 535 U.S. 613 (2002).

7. Liability of Cities at Common Law.

Immunity for cities is not absolute, as it is for the State, but rather depends upon whether the action giving rise to the claim was a governmental function or a proprietary activity.

> Prior to the enactment of the [TCA] a city was not liable for the negligent acts of its agents and employees in the performance of governmental functions. However, it was liable for unlimited damages when negligently performing proprietary functions.

Turvey v. City of Houston, 602 S.W.2d 517, 519 (Tex. 1980) (citing City of Austin v. Daniels, 335 S.W.2d 753 (Tex. 1960)). The test for whether the function was proprietary or governmental was laid out in City of Galveston v. Posnainsky.

> [I]n so far as municipal corporations of any class, and however incorporated, exercise powers conferred on them for purposes essentially public-purposes pertaining to the administration of general law made to enforce the general policy of the state, they should be deemed agencies of the state, and not subject to being sued for any act or omission ... [except] when the state, by statute, declares they may be. Nueces County v. San Patricio County, 246 SW3d 651, 652, (Tex. 2008) (internal quotations omitted).
> …
> In so far, however, as they exercise powers not of this character, voluntarily assumed--powers intended for the private advantage and benefit of the locality and its inhabitants--there seems to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damage to which an individual or private corporation exercising the same powers for the purpose essentially private would be liable.

Dillard, 806 S.W.2d at 593 (quoting City of Galveston v. Posnainsky, 62 Tex. 118, 125, 127 (1884)); Holder,

954 S.W.2d at 805. Accordingly, municipal immunity from tort and contract liability rested upon the determination of whether the City was acting as an agent of state government. Id. If it was not, the municipality enjoyed no immunity, and was held to the same standard of care as a private citizen engaged in that activity. Turvey, 602 S.W.2d at 519.

The proprietary function exception to the sovereign rule of governmental immunity applied only to municipalities. At one time, the Texas Supreme Court appeared to expand the proprietary function exception beyond municipalities. In Tex. Highway Comm'n v. Tex. Ass'n of Steel Importers, Inc., 372 S.W.2d 525, 529 (Tex. 1963), the court found the building of highways to constitute a proprietary activity. As a consequence of the highway commission's proprietary activities, the state was subject to suit and liability. Id. The court subsequently limited the proprietary function exception to cities. In Turvey, the court held that, "[t]he distinction between proprietary and governmental functions does not apply to counties." Turvey, 602 S.W.2d at 519. See Nueces Co., 246 S.W.3d at 652. In the City of Gladewater v. Pike, 727 S.W.2d 514, 519 (Tex. 1987) decision, the court added that "[a] proprietary function is one intended primarily for the advantage and benefit of persons within the corporate limits of the municipality rather than for use by the general public." Consequently, because the actions of the state, its boards and agencies are intended to benefit the state as a whole rather than residents of a particular municipality, their actions are always deemed to be governmental. See id. Similarly, countries are 'involuntary agents of the state without the power to serve local interests of their residents, [thus] countries have no proprietary functions; all their functions are governmental. Additionally, the Dallas Court of Appeals has found that open-enrollment charter schools do not perform proprietary functions, even where they lease out portions of their facilities to for profit entities. LTTS Charter School, Inc. v. C2 Construction, Inc., 358 S.W.3d 725, 734 (Tex. App.—Dallas 2012, pet. pending).

For the state, counties, and municipalities carrying out governmental functions, sovereign immunity precluded suit and liability in tort. Prior to 1970, governmental entities were not liable for torts committed by their officers or agents. See State v. Terrell, 588 S.W.2d 784, 786 (Tex. 1979) (the state cannot be held in tort absent constitutional or statutory waiver of immunity from suit and liability); Welch v. State, 143 S.W.2d 876 (Tex. Civ. App.--Dallas 1941, writ ref'd). Therefore, they could not be held liable under either an agency or respondent superior theory of liability for the acts of their employees, agents, and officers. Id.

III. THE WAIVER OF IMMUNITY BY STATUTE AND ACTION

To understand the Tort Claims Act's waiver of immunity, it is imperative to keep in mind that the TCA does not waive immunity from suit for tort claims generally—but only for a limited class of claims. The test of a plaintiff's pleadings is whether they sate a claim that falls within the category of claim allowed.

A. The Enactment of the TCA: What Law Controls?

The enactment of the TCA created a **limited** waiver of sovereign immunity for certain torts. Univ. of Tex. Med. Branch v. York, 871 S.W.2d 175, 177 (Tex. 1994); Terrell, 588 S.W.2d at 786. Through the TCA, the legislature waived immunity from both suit and liability for the claims authorized therein. See id; TEX. TORT CLAIMS ACT §§ 101.021-101.025 (West 2005). The Texas Supreme Court has specifically recognized that the TCA is a **limited** waiver of sovereign immunity. "The many compromises necessary to pass the Act obscured its meaning, making its application difficult in many cases... But one thing is clear: the waiver of immunity in the Tort Claims Act is not, and was not intended to be, complete." Dallas County Mental Health and Mental Retardation v. Bossley, 968 S.W.2d 339, 342 (Tex. 1998). See County of El Paso v. Dorado, 33 S.W.3d 44, 46-47 (Tex. App.–El Paso 2000, no pet. h.) (while sovereign immunity for counties and other governmental entities is not waived by the wrongful death statute, their immunity from suit and liability in wrongful death caused by the condition or use of property is waived by the TCA); Golden Harvest Co. Inc. v. City of Dallas, 942 S.W.2d 682, 686-7 (Tex. App.–Tyler 1997, writ denied) (prior to adoption of the TCA, the state and political subdivisions had full sovereign immunity from tort liability. The Legislature did not abolish immunity when it passed the TCA; rather it waived immunity in certain limited areas); Seamans v. Harris County Hosp. Dist., 934 S.W.2d 393, 395 (Tex. App.–Houston [14th Dist.] 1996, no writ) ("[t]he Tort Claims Act did not abolish the doctrine of sovereign immunity.... It merely operates to waive governmental immunity in certain circumstances."). The TCA defines in detail those circumstances in which sovereign immunity has been waived and, therefore, can be held liable in tort. Bennett v. Tarrant County Water Control and Imp. Dist. No. 1, 894 S.W.2d 441, 450 (Tex. App.–Fort Worth 1995, writ denied). Accordingly, a plaintiff bringing suit under the TCA must plead and prove that his/her claim fits within the Act's waiver of immunity. Tarrant County Hosp. Dist. v. Henry, 52 S.W.3d 434, 441 (Tex. App.–Fort Worth 2001, no pet.); Dorado, 33 S.W.3d at 46-48; Bennett, 894 S.W.2d at 450.

The San Antonio Court of Appeals laid out the scope of the Act's waiver of sovereign immunity:

> In order for immunity to be waived under the TTCA, the claim must arise under one of the three specific areas of liability for which immunity is waived and the claim must not fall under one of the exceptions from waiver. The three specific areas of liability for which immunity has been waived are: (1) injury caused by an employee's use of a motor-driven vehicle; (2) injury caused by a condition or use of tangible personal or real property; and (3) claims arising from premise defects.

Medrano v. City of Pearsall, 989 S.W.2d 141, 144 (Tex. App.–San Antonio 1999, no pet.).

Except to the extent replaced by the TCA, however, common law sovereign immunity, as well as proprietary liability for municipalities, continues to control suits against governmental defendants. Pike, 727 S.W.2d at 519; Seamans, 934 S.W.2d at 395; City of Denton v. Page, 701 S.W.2d 831 (Tex. 1986); Turvey, 602 S.W.2d at 519; Dobbins v. Tex. Turnpike Auth., 496 S.W.2d 744, 748 (Tex. Civ. App.–Texarkana 1973, writ ref'd n.r.e.). Accordingly, a suit will be dismissed if a plaintiff cannot point to a clear and unambiguous waiver of immunity in the TCA. See Kitchen, 867 S.W.2d at 786-87; Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993); Tex. Dep't of Transp. v. Horrocks, 841 S.W.2d 413, 416 (Tex. App.--Dallas 1992), *rev'd on other grounds*, 852 S.W.2d 498 (Tex. 1993); Hampton v. Univ. of Tex.-M.D. Anderson Cancer Ctr., 6 S.W.3d 627, 629 (Tex. App. –Houston [1st Dist.] 1999, no pet.) ("It is the plaintiff's burden to allege and prove facts affirmatively showing that the trial court has subject matter jurisdiction.").

At one time, any uncertainty over whether the TCA creates a waiver of immunity was construed in favor of the plaintiff. York, 871 S.W.2d at 177, n.3; Flores v. Norton & Ramsey Lines, Inc., 352 F. Supp. 150, 156 (W.D. Tex. 1972). Now, however, it appears that any uncertainty regarding whether the TCA creates a waiver is weighed in favor of finding no waiver and dismissing the suit based on sovereign immunity. York, 871 S.W.2d at 177, n.3. But see Tarrant County Hosp. Dist. v. Henry, 52 S.W.3d 434 (Tex. App. –Fort Worth, 2001), p. 4 ("[i]n determining whether under the [TCA] ... the waiver is to be liberally construed, this liberal construction must be balanced with legislative intent by waiving immunity to a limited degree"); City of San Augustine v. Parrish, 10 S.W.3d 734 (Tex. App.—Tyler 1999, pet. dism. w.o.j.) (applying a de novo standard of review for a plea to the jurisdiction and thereby construing the allegations in the petition as true and in favor of the plaintiff); Hampton, 6 S.W.3d at 631 (construing the plaintiffs' petition in their favor and refusing to dismiss a case for lack of subject matter jurisdiction because the plaintiffs' petition supported a cause of action under the TCA); Michael v. Travis County Hous. Auth., 995 S.W.2d 909 (Tex. App.–Austin 1999, no pet.) (the "waiver is to be liberally construed in order to effectuate the purposes of the Texas Tort Claims Act.").

Plaintiffs bringing a tort claim against a governmental entity bear the burden of establishing either that their claim falls within the TCA or some other waiver of sovereign immunity. See Turvey, 602 S.W.2d at 519; City of Orange v. Jackson, 927 S.W.2d 784 (Tex. App.–Beaumont 1996, no writ) (if there is no waiver of immunity under the TCA, the plaintiff's claim is barred by immunity); Arney, 680 S.W.2d at 874-75 (plaintiff claiming legislative waiver of immunity must demonstrate clear and unambiguous waiver, waiver is not presumed or implied); Hooper v. Midland County, 500 S.W.2d 552, 554 (Tex. App.–El Paso 1973, writ ref'd n.r.e.) (immunity still exists and precludes suit where the TCA does not apply). See also Hoffman v. Connecticut Dep't of Income Maint., 492 U.S. 96 (1989) ("[a]s we have repeatedly stated, to abrogate the States' Eleventh Amendment immunity from suit in federal court ... Congress must make its intention 'unmistakably clear in the language of the statute.'") (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)). In the case of a municipality, waiver can be established through pleading and proving that the defendant was involved in a proprietary activity. See Pike, 727 S.W.2d at 519; Turvey, 602 S.W.2d at 519; City of San Antonio v. Cortes, 5 S.W.3d 708 (Tex. App.—San Antonio 1999, no pet.) (giving examples of governmental vs. proprietary functions). Municipalities continue to have unlimited liability in common law proprietary functions claims. Pike, 727 S.W.2d at 519.

B. Waiver of Immunity by the Texas Constitution or Other Legislative Enactments.

In addition to the waiver of immunity provided by the TCA, other legislative enactments can waive immunity. See generally Federal Sign, 951 S.W.2d at 405.

The Texas Supreme Court has consistently stated that it will not find a statute waives sovereign immunity unless the legislation contains a clear and unambiguous expression of the Legislature's intent. City of La Porte v. Barfield, 898 S.W.2d 288, 291 (Tex. 1995); Univ. of Tex. Med. Branch v. York, 871 S.W.2d 175, 177 (Tex. 1994). The Supreme Court's

deference to the Legislature to determine whether to waive immunity arises both from both separation of powers as well as from the Legislature being in a better position to determine the allocation of resources by governmental entities that is inherent to any waiver of sovereign immunity. Tomball Reg'l Hosp., 283 S.W.3d at 848 ([t]he judiciary's task is not to refine legislative choices about how to most effectively provide for indigent care and collect and distribute taxes to pay for it. The judiciary's task is to interpret legislation as it is written"); Sw. Bell Tel., L.P. v. Harris County Toll Road Auth., 282 S.W.3d 59, 68 (Tex. 2009) ("[b]ut as we have often noted, the Legislature is best positioned to waive or abrogate sovereign immunity 'because this allows the Legislature to protect its policymaking function'"); McIntyre v. Ramirez, 109 S.W.3d 741, 748 (Tex. 2003) ("[o]ur role … is not to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results; rather, our task is to interpret those statutes in a manner that effectuates the Legislature's intent").

The Legislature enacted the Code Construction Act to confirm by statute this longstanding holding of the Texas Supreme Court. In 2001, the Legislature added section 311.034. That section provides:

> In order to preserve the Legislature's interest in managing the state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is affected by clear and unambiguous language.

TEX. GOV'T CODE § 311.034.

The "clear and unambiguous" standard applies even if the plaintiff relies upon something other than a statute to create a waiver of immunity. See Herrera, 322 S.W.3d at 201. Herrera relied upon the UTEP Personnel Handbook to create the waiver of immunity. The Supreme Court did not reach the issue of whether UTEP had the power to waive its own immunity, instead deciding that the language in the handbook could not be read as a clear and unambiguous waiver of immunity. Id.; see Leach, 335 S.W.3d at 394-95)(finding that University's operating procedures enacted pursuant to the Education Code did not waive immunity). Similarly, in Tooke the Texas Supreme Court did not decide whether a City's Charter can waive immunity, instead resolving the case on its finding that the language in the charter was not a clear and unambiguous waiver of immunity. Tooke v. City of Mexia, 197 S.W.3d 325, 344 (Tex. 2006).

In some instances, the Legislature's intent is so clearly expressed there can be no doubt that they intended to waive immunity. For example, the TCA expressly states that governmental entities can be liable for property damage, personal injury and death under certain circumstances. TEX. CIV. PRAC. & REM CODE § 101.021. In other instances, statutes do not contain explicit language waiving immunity. In these instances the courts have to attempt to determine the Legislature's intent from the statute and other available evidence. Wichita Falls State Hosp., 106 S.W.3d 692 (Tex. 2003).However, the Supreme Court has made it clear that it is the "rare" exception that a statute will be held as waiving sovereign immunity in the absence of a clear and unequivocal statement in the statute in question. "While we have on rare occasions found waiver of sovereign immunity absent 'magic words,' we have required clear indication of legislative intent to waive immunity under those circumstances." Sw. Bell Tel. 282 S.W.3d at 68. See Falls State Hosp., 106 S.W.3d 692, 697 (Tex. 2003)

In construing either the Texas Constitution or a particular statute to determine if sovereign immunity is waived, courts must follow established rules of construction. Tomball Reg'l Hosp., 283 S.W.3d at 842.

> In construing the Constitution, as in construing statutes, the fundamental guiding rule is to give effect to the intent of the makers and adopters of the provision in question. We presume the language of the Constitution was carefully selected and we interpret words as they are generally understood. We rely heavily on the literal text. However, we may consider such matters as the history of the legislation, the conditions and spirit of the times, the prevailing sentiments of the people, the evils intended to be remedied, and the good to be accomplished.
> …
> In construing a statute, our objective is to determine and give effect to the Legislature's intent. We look first to the plain and common meaning of the statute's words. We determine legislative intent from the statute as a whole and not from isolated portions.

Id. (internal quotes and citations omitted).

The Supreme Court has identified four factors that it takes into consideration in determining whether the statute and other available evidence establishes the Legislature's clear and unequivocal intent to waive immunity. Tomball Reg'l Hosp., 283 S.W.3d at 844 (court will consider legislative history in determining whether the state waives immunity). The first of

these factors is that the statute in question must waive immunity "beyond doubt" even though it does not contain any magic language or the statute is not a model of "perfect clarity" Sw. Bell Tel., L.P., 282 S.W.3d at 68. "While we have on rare occasions found waiver of sovereign immunity absent 'magic words,' we have required clear indications of legislative intent to waive immunity under these circumstances." Id. See Wichita Falls State Hosp., 106 S.W.3d at 697. "We have found waiver [of immunity] when the provision in question would be meaningless unless the immunity were waived." Id. However, provisions of a statute that clearly establish liability are not rendered meaningless by the fact that the statute does not waive immunity from suit. Tomball Reg'l Hosp., 283 S.W.3d at 844-46. Similarly the Texas Supreme Court has held that the fact that a statute imposes a financial obligation does not establish that the Legislature intended to waive immunity from suit and create a private right of action. Sw. Bell Tel., L.P., 282 S.W.3d at 69. "The Legislature may require counties to earmark funds for a particular purpose without necessarily creating a private right of action, because, for example, it expects counties to comply, or because it considers the costs of litigation overly burdensome. Id.

The Texas Supreme Court again evaluated whether the provisions of a statute would have meaning unless it created a waiver of sovereign immunity in Oncor Electric Delivery Company LLC v. Dallas Area Rapid Transit, 369 S.W.3d 845 (Tex. 2012).. Oncor obtained PUC approval to construct electric transmission lines over property owned by two regional transportation authorities. Oncor attempted to negotiate the acquisition of the property from the regional transportation authorities, but when negotiations broke down instituted condemnation suits against both entities. The transportation authorities asserted that Oncor's suit was barred by immunity. Id.

The Supreme Court began its analysis by determining whether the term "person" within condemnation statutes applied to governmental entities. Section 181 of the Utility Code grants gas and electric utilities the power of imminent domain over the "property of any person or corporation." Id. (TEX. UTIL. CODE § 181.004). The Code Construction Act provides that when the word "person" is used in a statute it should be interpreted to include "'government or governmental subdivision or agency' 'unless the statute or text requires a different definition'." Id. (quoting TEX. GOV'T CODE § 31.005(2)). However, the use of the term "person" does not in and of itself establish legislative intent to waive sovereign immunity, "unless the context of the statute indicates no other reasonable construction." Id. (quoting TEX. GOV'T CODE § 31.034). Thus the Court had to determine whether the provisions of the Utility Code constituted a clear and unambiguous waiver of sovereign immunity. The Supreme Court again pointed out that a statute will not be found to constitute a waiver of governmental immunity unless the statute does so in a "clear and unambiguous" manner. Id. The Utility Code did not expressly waive immunity, but "the rule requiring a waiver of governmental immunity to be clear and unambiguous cannot be applied so rigidly that the almost certain intent of the Legislature is disregarded." Id. (quoting City of LaPorte v. Barfield, 898 S.W.2d 288, 292 (Tex. 1995)). The Court then explained that where a statute creates specific "restricted rights" it cannot be reasonably read to condition the exercise of those rights on a separate statutory waiver of immunity.

> [Where a statute's] only apparent purpose – is to provide for rights that can actually be exercised. If a statute leaves no reasonable doubt of its purpose, we will not require perfect clarity, even in determining whether governmental immunity has been waived. In applying the clear – and – unambiguous standard, we must look at whether a statute makes any sense if immunity is not waived.

Id. at 850.

The Court found that the applicable provision of the Utility Code must waive governmental immunity because the provision would have no purpose or meaning absent the creation of a waiver. In particular, the Court focused the restrictions the Legislature placed on a utility's ability to condemn the property of a governmental entity in finding a waiver of immunity. Specifically, the Court noted that the Utility Code granted the power of imminent domain to condemn public property to a very limited number of instances. Id. In particular, the right to condemn public land was: 1. Granted only to electric utility corporations, not gas utilities; 2. limited only to land owned by local governmental entities, not the state, and 3. limited to construction of transmission facilities on land as approved by the Public Utility Commission. Id. Based upon these restrictions, the Supreme Court concluded that the Utility Code would serve no purpose unless it created a waiver of immunity. Id.

The second factor taken into consideration is that any ambiguities are resolved in favor of finding no waiver of immunity. Id.; Kerrville State Hosp. v. Fernandez, 28 S.W.3d 1 (Tex. 2000).

The third factor is that "if the Legislature requires that the State be joined in a lawsuit for which immunity would otherwise attach, the Legislature has intentionally waived the State's sovereign immunity."

Wichita Falls State Hosp., 106 S.W.3d 692 (Tex. 2003). The fourth factor is whether the statute creates some cap or limit on the governmental entity's prospective damages. Id.

> [W]hen deciding whether the Legislature intended to waive sovereign immunity and permit monetary damages against the State, one factor to consider is whether the statute also provides an objective limitation on the State's potential liability.

Id.; Sw. Bell Tel., L.P., 282 S.W.3d at 69. Thus, the Supreme Court found that the Patient's Bill of Rights, section 321.002 of the Texas Health & Safety Code, did not waive sovereign immunity, in part, because the statute allowed recovery of exemplary damages. Id. "No Texas statute expressly permits suit against the State for exemplary damages." Id. There is another consideration, other than the four stated factors, that the Texas Supreme Court looks to in determining if a statute waives immunity. "We have also considered whether the statutory provisions [at issue] would serve any purpose absent a waiver of immunity." Harris Co. Hosp. Dist. v. Tomball Regional Hosp., 283 S.W.3d 838, 844 (Tex. 2009).

While not one of the "four factors" the Supreme Court lists, the high court also considers whether the statutory provision would serve any purpose absent if acting as a waiver of immunity. Tomball Reg'l Hosp. 283 S.W.3d at 844. At the same time, the fact that statutes foreclose the question of liability does not require a finding that the statute waives immunity from suit. Id. at 844-45.

Finally, governmental entities cannot complain about the retroactive application of statutes that waive immunity. Oncor Electric Delivery Company LLC v. Dallas Area Rapid Transit, 369 S.W.3d 845 (Tex. 2012). The Defendants in Oncor complained that giving retroactive application to the Utility Code violated the constitutional prohibitions against retroactive laws. Id. The Court rejected the authorities' argument explaining "the prohibition against retroactive application of laws does not apply to procedural, remedial, or jurisdictional statutes, because such statutes typically do not affect a vested right." Id. (quoting Univ. of Tex. Sw. Med. Ctr. at Dallas v. Arancibia, 324 S.W.3d 544, 548 (Tex. 2010)). Obviously, statutes that waive immunity are jurisdictional. Id. The Court also noted that, "a governmental entity cannot complain of a retroactive waiver of immunity since all governmental immunity derives from the State and a governmental entity acquires no vested right against the State." Id. (quoting Tooke v. City of Mexia, 197 S.W.3d 325, 345 (Tex. 2006)).

1. Statutes Held Not to Waive Immunity.

In recent years, the Texas Supreme Court has analyzed four statutes to determine if they created a waiver of immunity. In each case, the court found that the statute did not waive sovereign immunity.

Probably the most significant of these cases was the Wichita Falls State Hosp. case, where the court found that the Patient's Bill of Rights contained in the Texas Health & Safety Code did not allow patients in state operated mental health facilities to sue for mistreatment or neglect. The Patient's Bill of Rights, section 321.003 of the Health & Safety Code, permits a person harmed by a mental health facility's violation of the Patient's Bill of Rights to bring suit for money damages, injunctive relief or both. TEX. HEALTH & SAFETY CODE § 321.003(b). Section 321.003(a) states that a mental health facility or treatment facility that violates the provisions of the Patient's Bill of Rights or rules adopted pursuant to this chapter of the Health & Safety Code "is liable" to the person injured. Two years before the passage of the Patient's Bill of Rights in 1993, the Legislature enacted section 571.003 of the Health & Safety Code and defined "mental health facilities" as including facilities operated by the Texas Department of Mental Health and Mental Retardation, the federal government and a political subdivision of the State of Texas. TEX. HEALTH & SAFETY CODE § 571.003(1,2). Because the Health & Safety Code's definition of mental health facilities included facilities operated by the Department of Mental Health and other political subdivisions, the plaintiffs in the Wichita Falls State Hosp. case argued that the Patient's Bill of Rights constituted a waiver of sovereign immunity. Wichita Falls State Hosp., 106 S.W.3d at 698-699.

The Supreme Court found that the Patient's Bill of Rights did not constitute a waiver of sovereign immunity. First, the court noted that the provisions regarding liability contained in section 321 of the Health & Safety Code would serve an important purpose even if suit against governmental entities was barred. Id. The court found that unlike the anti-retaliation statutes addressed in Kerrville State Hosp. v. Fernandez, 28 S.W.3d 1 (Tex. 2000), the liability provisions of the Patient's Bill of Rights would remain viable and meaningful if the court found that it did not waive sovereign immunity. Second, the court noted that the legislative history did not indicate that the Patient' s Bill of Rights was passed as a result of concerns over the treatment of patients in facilities owned or operated by the state or political subdivisions of the state. Wichita Falls State Hosp., 106 S.W.3d at 700.

Third, the court noted that under the plaintiffs' reading of the statutes, the Patient's Bill of Rights authorized suit against mental health facilities operated by the federal government, thus waiving the federal

government's immunity from suit. Id. The court noted that because the Texas Legislature does not have the authority to waive immunity for the federal government and its agencies, this was inconsistent with the plaintiffs' analysis.

Fourth, the court noted that the statute did not require the state to be joined in litigation involving the Patient's Bill of Rights. Id. Fifth, the court noted that the statute did not limit liability and, indeed, authorized recovery of exemplary damages. Id. at p. 701. The court noted that no other statute that had been held to waive immunity allows recovery of exemplary damages from a governmental entity.

The court explained that, "We require the Legislature to express its intent beyond doubt and ... construe ambiguities in a manner that retains the State's sovereign immunity." Id. Thus, the court concluded that the Patient's Bill of Rights did not waive sovereign immunity. Accord, Beaumont State Center v. Kozlowski, 108 S.W.3d 899 (Tex. 2003).

In two other cases, the court found that provisions of the Water Code and the county presentment statute did not constitute waivers of immunity. In Texas Natural Resource Conversation Comm'n v. IT-Davy, a contractor argued that a provision of the Texas Water Code that allowed persons "affected by a ruling, order, decision, or other act of the [TNRCC]" to petition a Travis County district court to "review, set aside, modify, or suspend the act of the commission" constituted a waiver of sovereign immunity. *See* TEX. WATER CODE §§ 5.229(b), 5.351(a), 5.354; IT-Davy, 74 S.W.3d 855. The Court concluded that the Water Code merely gave trial courts limited power to review administrative actions of a regulatory nature. Id. at 858. The court held that this language was insufficient to constitute a waiver of sovereign immunity authorizing recovery of monetary damages.

In Travis County v. Pelzel & Assoc., Inc., 77 S.W.3d 246 (Tex. 2002), the court found that the county presentment statute did not constitute a waiver of sovereign immunity. Section 89.004 of the Local Government Code, also known as the County Presentment Statute, requires that "[a] person may not sue on a claim against a county unless the person has presented the claim to the commissioners court and the commissioners court has neglected or refused to pay all or part of the claim." TEX. LOC. GOV'T CODE § 89.004(a). The Supreme Court pointed out that the presentment statute did not contain the clear and unequivocal language contained in other statutes that waive immunity such as the Tort Claims Act, the Private Real Property Rights Preservation Act and the Whistleblower Act. Pelzel, 77 S.W.3d at 249. The court explained that the purpose of the presentment statute was to insure that commissioners court was notified of potential claims and afforded the opportunity to investigate and settle the claims. Id. Thus, the purpose of the presentment statute was very different than that of other statutes that waived immunity. Id. Finally, the court pointed out that the predecessor of the presentment statute had contained language authorizing counties to "sue and be sued" but the Legislature had deleted this language more than 100 years ago. Id. at 239-50. For these reasons, the Supreme Court found that the county presentment statute did not constitute a waiver of sovereign immunity. Id.

The Kerrville State Hosp. case clearly indicates that courts must now look beyond the express language of the statute at issue to determine whether the Legislature intended to waive sovereign immunity. Kerrville State Hosp., 28 S.W.3d at 9. See also, Watson v. Dallas Indep. School Dist., 135 S.W.3d 208, 220 (Tex. App. –Waco 2004, no pet.) (Implicit waivers of immunity occur when the provisions of a statute would be meaningless if immunity was not waived). Thus, when arguing whether a statute waives immunity, both parties should be prepared to present to the trial court *all* evidence – legislative history, other legislative materials, transcripts of committee or floor debate, and so on – that would appear to indicate the Legislature's intentions one way or the other. Moreover, the opinion indicates that a waiver of immunity should be found if all of the available evidence shows that it was more likely that the Legislature intended to subject governmental entities to liability.

Justice Hecht's dissent in Kerrville State Hosp. criticizes the court's attempt to distinguish the case at bar from the holding in the almost identical case of City of La Porte in which the court held that the Anti-Retaliation Law did waive local governmental immunity under the anti-retaliation statute. See id. at 11-13. Justice Hecht stated that the court "lowers the bar, holding that the Legislature can waive governmental immunity if its intent to do so seems reasonable." Id. at 13. He further stated:

> The Legislature may have decided, reasonably, plausibly, and even probably, that the State should be liable for retaliation against an employee who seeks workers' compensation benefits just as a private person would be, but it has not said so with the clear and unambiguous language it has often used in many other contexts, and that until now we have required. As long as that is really to be the standard for waiver of immunity, judges' ideas about reasonableness and policy cannot meet it.

Id.

Finally, the Texas Supreme Court held that the whistleblower provision of the Health & Safety Code, TEX. HEALTH & SAFETY CODE § 161.134, does not waive sovereign immunity. Dallas Metrocare Servs. v. Pratt , 124 S.W.3d 147 (Tex. 2003).

Texas Courts of Appeals have held that two other acts do not waive sovereign immunity. Sections 502.005, 006, 007 and 009 of the TEXAS HEALTH & SAFETY CODE require an employer to maintain a list of hazardous chemicals present at a work site and make the employees aware of the list before working at the site; provide appropriate safety data to employees who transport hazardous chemicals; maintain appropriate labels on containers of hazardous chemicals; and provide education and training to employees who use or handle hazardous chemicals. Watson v. Dallas Indep. Sch. Dist., 135 S.W.3d 208 (Tex. App.–Waco 2004, no pet). By its express terms the Hazard Communication Act applies to the State and political subdivisions of the State, including school districts. Id. "However, the Hazard Communications Act does not provide for an employee lawsuit to seek redress for violations of the statute. Accordingly, we conclude that the Hazard Communications Act does not waive immunity from a suit brought by an employee from alleged violations." Id.

The Texas Occupational Safety Act provides that "[i]t is a primary, continuing and non-delegable duty of the employer to provide a safe place and safe conditions in which his employees may work. TEX. LAB. CODE ANN. § 411.103. The Occupational Safety Act does not clearly and unambiguously express the Legislature's intent to waive sovereign immunity. Durbin v. Culberson County, 132 S.W.3d 650, 662 (Tex. App. –El Paso 2004, no pet; accord, Watson, 135 S.W.3d at 222.

In Tomball Reg'l Hosp., the Texas Supreme Court held that Article IX, Section 4 of the Texas Constitution, and sections 61.002 and 281 of the Health & Safety Code waive immunity from liability but do not waive immunity from suit. Tomball Reg'l Hosp., 283 S.W.3d at 844-45. While the statutes clearly provide the hospital districts are liable for the provision of indigent health care within their boundaries, none of the provisions in question clearly and unequivocally state that hospital districts are subject to suit for failing to pay for indigent medical care provided by other entities. Id.

Similarly, provisions of the Transportation Code and the Government Code that require counties and toll authorities to include the cost of relocating utilities into the expenses of right-of-way acquisition did not waive immunity from suit allowing utilities to sue and recover the costs they incurred for moving utilities. Sw. Bell Tel., L.P., 282 S.W.3d at 70.

2. Statutes Held to Waive Immunity.

a. Texas Commission on Human Rights Act.

The Texas Commission on Human Rights Act provides a limited waiver of immunity from suit and liability when a governmental entity has discriminated in employment on the basis of race, color, disability, religion, sex, national origin or age. Prairie View A&M Univ., 381 S.W.3d 510-514; TEX. LAB. CODE § 21.002; **Tex. Dep't of Criminal Justice v. Cooke, 149 S.W.3d 700, *4 (Tex. App. –Austin, May 20, 2004, no pet. h.). However, a plaintiff must file a timely charge of discrimination with the Texas Human Rights Commission in order to bring a discrimination suit under the Texas Commission on Human Rights Act. Prairie View A&M Univ., 381 S.W.3d 510-514. Additionally, in Cooke, the plaintiff failed to allege that he was denied the job for which he applied based on his race. Cooke, 149 S.W.3d 700 Therefore, the defendant's plea to the jurisdiction was properly granted because Cooke failed to plead facts that would affirmatively demonstrate the court had jurisdiction. Id. Thus, in order to bring a suit under the Human Rights Act, the plaintiff must plead and prove that she/he was discriminated against on the basis of race, color, disability, religion, sex, national origin or age.

b. Anti-Retaliation Act.

Chapter 451 of the TEXAS LABOR CODE, commonly known as the Anti-Retaliation Act, provides that, "A person may not discharge or in any other manner discriminate against an employee because the employee has ... filed a workers' compensation claim in good faith" or has otherwise participated in a workers' compensation claim in certain specified ways. TEX. LAB. CODE § 451.001.

The Texas Supreme Court has had to determine if statutes related to the Anti-Retaliation Act waived sovereign immunity from suit by employees against state agencies and local governmental entities. See Kerrville State Hosp., 28 S.W.3d at 9. However, the Anti-Retaliation Act does not apply to University of Texas and Texas A&M systems because their liability "as workers' compensation self-insurers distinguishes them from other state agencies and educational institutions for whose employees the State has waived sovereign immunity from anti-retaliation suits." Richards v. Tex. A&M Univ. Sys., 131 S.W.3d 550, 560 (Tex. App.—Waco 2004, pet. denied).

With regard to immunity of local governmental entities, the Supreme Court has determined that 2005 statutory amendments mean they enjoy immunity from anti-retaliation claims. Travis Cent. Appraisal Dist. v. Norman, 342 S.W.3d 54 (Tex. 2011). Diane Norman brought suit against Travis Central Appraisal District alleging that she was terminated shortly after filing a workers' compensation claim and that her termination

violated the anti-retaliation provisions of the Workers' Compensation Act set forth in the Labor Code. Id. While the Supreme Court had previously held in City of LaPorte v. Barfield, 898 S.W.2d 288, 291 (Tex.1995).that the anti-retaliation provisions of the Workers' Compensation Act applied to local governmental entities, the Central Appraisal District asserted that statutory amendments eliminated the waiver of immunity that had previously existed. Id. at 55-60. The Supreme Court began by explaining its rationale in City of LaPorte v. Barfield, which held that immunity had been waived for anti-retaliation claims against local governmental entities. The Supreme Court explained that there was no express waiver of immunity within the Anti-Retaliation statute. Id. at 56. The Court explained, however, that because the Political Subdivision law was enacted after the Anti-Retaliation law and referenced the Anti-Retaliation statute, the Political Subdivision law thus created a waiver of immunity for workers' compensation retaliation claims. Id. at 56-57.

The Texas Supreme Court then noted that in 2005, the Legislature made various changes to the Workers' Compensation Act intended to improve provision of medical care and the efficiency of the workers' compensation system. Id. at 57. "Among the many amendments was the addition of a new section . . . regarding political subdivisions that elect to self-insure. . . . included in this new section was a broadly worded provision stating that '[n]othing in this chapter waives sovereign immunity or creates a new cause of action.'" Id. at 57 (quoting TEX. LABOR CODE § 504.053(e)).

The Supreme Court then acknowledges that there is no indication that the amendment to the Political Subdivision law was intended to revoke a previously created waiver of immunity. "Why this provision was included in that particular section is not apparent from its context, but . . . the provision plainly purports to apply to the entire chapter, which, of course includes the part that Barfield interpreted to waive the government's immunity for retaliatory discharge claims." Id. The Supreme Court then held that the changes to the Political Subdivision law eviscerated the waiver of immunity previously found in the Political Subdivision statute. Id.

The plaintiff argued that because the amendment referred to "sovereign immunity" and not "governmental immunity" it did not undo the prior waiver. The plaintiff contended that because governmental immunity applies only to political subdivisions of the State, such as, cities, school districts, counties, and appraisal districts, the Legislature would have needed to say that nothing in this chapter waives governmental immunity. Id. The Supreme Court rejected this argument noting that the Political Subdivision statute applies to political subdivisions of the State, as opposed to the State itself, and thus there can be "no doubt that the immunity referenced in the 2005 no-waiver provision refers to immunity applicable to subdivisions." Id. at 58.

The Court concluded by explaining that while the amended Political Subdivisions law contained numerous internal inconsistencies, the 2005 amendment prohibits the finding that the statute established a clear and unambiguous waiver of sovereign immunity for claims under the anti-retaliation statute. Id. at 59.

The Norman decision creates a paradox between the respective liability of state entities versus local governmental entities under the workers' compensation anti-retaliation provisions. The anti-retaliation provision was found to be applicable to local governmental entities, political subdivisions of the State, as a result of the Political Subdivisions statute. Id. However, the anti-retaliation provision was found applicable to the State and its agencies through the State Applications Act. Kerrville State Hosp. v. Fernandez, 28 S.W.3d 1, 3 (Tex. 2000). Because there have been no amendments to the State Applications Act, the State and its agencies remain subject to suit and liability under the anti-retaliation provisions of the Workers' Compensation Act. Tex. Dep't of Aging & Disability Servs. v. Beltram, 350 S.W.3d 410 (Tex. App.—El Paso 2011); Tex. Workforce Comm'n v. Olivas, 349 S.W.3d 174 (Tex. App.—El Paso 2011); Tex. Dep't of Family & Protective Servs v. Parra, 347 S.W.3d 362 (Tex. App.—El Paso 2011).

c. Whistleblower Act.

The Whistleblower Act, TEX. GOV'T CODE § 554.003(a), waives sovereign immunity for a public employee who is suspended, terminated or otherwise subjected to an adverse employment action because he in good faith reported a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority. See Tex. Dep't of Human Servs. v. Green, 855 S.W.2d 136, 143 (Tex. App.—Austin 1993, pet. denied). The Whistleblower Act states that, "[s]overeign immunity is waived… to the extent of liability for the relief allowed under this chapter for a violation of this chapter." Tex.Gov't Code Section 554.0035. The Texas Supreme Court has held that section 554.0035 requires that, in order to establish immunity from suit, a plaintiff must allege and prove that he: (1) reported a violation of law, (2) in good faith, and (3) reported the violation to an appropriate law enforcement authority. Lueck, 290 S.W.3d at 882. The employee's belief that the person they report to being an appropriate law enforcement authority must be objectively and subjectively reasonable. Univ. of Tex. Southwestern Med. Cent. v. Gentilello, 2013 WL

781598 (Tex. 2013). The plaintiff's subjective belief takes into consideration his education, background and experience. Id. To be a law enforcement authority, the person must have authority to enforce, investigate or prosecute violations of law or have authority to promulgate regulations governing the conduct. Id. A person is not an appropriate law enforcement authority, if it only has power of internal compliance or "purge noncompliance. Id. Thus, Gentilello's suit could not survive a plea to the jurisdiction where he reported to another doctor in the law school who could not enforce the regulations at issue. Id. Similarly, Coach Mike Leach, who had attended law school, Whistleblower claims were properly dismissed on a plea in abatement when he alleged he made a report of a violation of law to an appropriate law enforcement authority when he filed suit against Texas Tech. Leach, 335 S.W.3d at 395-97.

d. Administrative Procedure Act (APA).

The Administrative Procedure Act, Tex. Gov't Code Ann, section 2001.038, waives immunity from suit. Tex. Logos, L.P. v. Tex. Dep't of Transp., 241 S.W.3d 105 (Tex.App—Austin 2007, no pet). Section 2001.038's waiver of immunity is very limited in that it only authorizes a district court to resolve whether an administrative rule is valid or applicable. Friends of Canyon Lake, Inc. v. Guadalupe-Blanco River Auth., 96 S.W.3d 519, 529 (Tex.App.—Austin 2002, pet. denied). Combs v. City of Webster, 311 S.W.3d at 99-100; Smith, 311 S.W.3d at 79. However, in order to challenge a rule under the APA, the plaintiff must allege and prove that the rule or its threatened application interferes with or impairs a legal right or privilege of the plaintiff. TxDPS v. Salazar, 304 S.W.3d at 903-904. Furthermore, the courts' jurisdiction under the APA is limited to whether the agency's rules were not passed in accordance with APA's rulemaking requirements and/or appear contrary to the plain wording of the APA and not the agency's discretionary decisions regarding the rules it adopts. Combs v. City of Webster, 311 S.W.3d at 99-100. See In re Smith, 333 S.W.3d at 585 (sovereign immunity will not bar suit for mandamus but only if the performance of the action is question is non-discretionary or a ministerial act.)

Furthermore, the APA does not authorize suits for all agency actions which might aggrieve a plaintiff. Not all statements by agencies are rules. Where the action at issue is not a rule under the APA, there is no waiver of immunity and the courts have no jurisdiction to review that action under the APA. Combs v. City of Webster, 311 S.W.3d at 99-100. In order to be a rule, the statement must be one of general applicability, and must affect the interest of the public at large. TxDPS v. Salazar, 304 S.W.3d at 904-905.

e. Uniform Declaratory Judgments Act.

The Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE § 37.001-.011, allows private parties to seek declaratory relief against state officials who act without legal or statutory authority or otherwise declare their rights and interests. IT-Davy, 74 S.W.3d at 855. The DJA is a remedial statute designed "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(b); IT-Davy, 74 S.W.3d at 855. Thus, the DJA is not a general waiver of sovereign immunity; it "does not enlarge a trial court's jurisdiction, and a litigant's request for declaratory relief does not alter a suit's underlying nature... private parties cannot circumvent the State's sovereign immunity… by characterizing a suit for money damages… as a declaratory- judgment claim. Id.; see Heinrich, 284 S.W.3d at 370-371.

1. Types of Claims that can be brought under the DJA and the proper defendants to such suits.

Whether the DJA waives immunity for a particular suit is a question of law for the court to determine. Tex. Dep't of Pub. Safety v. Moore, 985 S.W.2d 149, 153 (Tex. App.—Austin 1998). See Creedmoor, 307 S.W.3d at 513, fn.4 (if there is a question of fact that implicates jurisdiction, then the Court rather than the jury must resolve the issue).

Following Heinrich and its progeny, the courts have found that the DJA waives immunity for three categories of declaratory judgment actions.

First, immunity from suit is waived if a party joins a governmental entity and seeks a declaration that an ordinance or statute is invalid, based on either constitutional or nonconstitutional grounds. Heinrich, 284 S.W.3d at 373 n. 6; City of Elsa v. M.A.L., 226 S.W.3d 390, 391–92 (Tex.2007); Lakey v. Taylor, 278 S.W.3d 6, 15 (Tex.App.-Austin 2008, no pet.); see also City of Beaumont v. Bouillion, 896 S.W.2d 143, 148–49 (Tex.1995).

Second, immunity from suit is waived if a party joins a governmental entity and seeks a declaration construing an ordinance or statute. Tex. Lottery Comm'n v. First State Bank of DeQueen, 325 S.W.3d 628, 633–34 (Tex. 2010) (noting that governmental entities do not enjoy immunity where they are joined as parties to construe conflicting legislative pronouncements (citing Heinrich, 284 S.W.3d at 373 n. 6)); Tex. Educ. Agency v. Leeper, 893 S.W.2d 432, 445–46 (Tex.1994) (stating that governmental entities are not immune from suits seeking a construction of their legislative pronouncements). In these suits, the proper defendant is the governmental entity. See Heinrich, 284 S.W.2d at 372-73; TEX. CIV. PRAC. & REM. CODE Section 37.006.

Third the DJA authorizes "Private parties [to seek] declaratory relief against state officials who allegedly act without legal or statutory authority. Creedmoor, 307 S.W.3d at 513-14 (quoting Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d at 849, 855 (Tex. 2002). These are the *ultra vires* claims discussed in detail in the Heinrich case. Heinrich, 284 S.W.2d at 372-73.

> To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.

The essence of an *ultra vires* claim is that the agency acted beyond its statutory authority. UIL, 319 S.W.3d at 964-65, citing City of Austin v. Austin Gaslight & Coal Co., 69 Tex. 180, 7 S.W. 200 (Tex. 1887). See City of North Richland Hills v. Home Town Urban Partners, Ltd., 340 S.W.3d 900, 912(Tex. App.–Ft. Worth 2011) (claim for denial of applications in contravention of City's own ordinances and statutes is an *ultra vires* claim and must be brought against officials in official capacity).

If the claim challenges actions taken under an ordinance or statute rather than the validity of the ordinance or statute itself, the governmental entity is immune from suit on the claim. Creedmoor, 307 S.W.3d at 513.

Ultra vires actions are actions taken in contravention of the law and, thus, are not the actions of the governmental entity. Heinrich, 284 S.W.2d at 372-73. Thus, the governmental entity remains immune from suit, and the ONLY proper defendants to *ultra vires* claims are officials in their official capacity because governmental entities remain immune from suit. Reconveyance, 306 S.W.3d at 258-59; Heinrich, 284 S.W.2d at 372-73; City of Dallas v. Turley, 316 S.W.3d 762, 768 (Tex. Civ. App.–Dallas 2010); City of North Richland Hills, 2011 WL 1601028 at 8, (because plaintiff only sued the city, and city retained immunity, plea to the jurisdiction must be granted).

a. Can Money Damages Be Recovered Under an *Ultra Vires* Claim.

In Heinrich, the Supreme Court held that a plaintiff bringing an *ultra vires* claim may be entitled to recover monetary relief. Heinrich, 284 S.W.2d at 373-77. Ms. Heinrich could obtain monetary relief from the date that her application for injunctive relief was ruled on by the trial court, but could not otherwise obtain retrospective monetary relief. Id. Recently, the El Paso Court of Appeals held that a plaintiff could pursue an *ultra vires* claim against the City of El Paso regarding the handling of an application for relocation funds from the City. City of El Paso v. Bustillos, 324 S.W.3d 200, 207 (Tex. App.—El Paso 2010). The Court explained that, "While the original petition and first amended petition may have requested money damages, Plaintiffs' second amended petition removed the requests for monetary relief. Appellees seek only a declaration that their rights were violated, and an opportunity to have their applications reviewed in the same manner as the others. While review of the application may result in a monetary payment of relocation assistance, suits requiring compliance with statutory or constitutional provisions are not prohibited by immunity even if the compliance involves payment of money. Plaintiffs properly pled a violation of their constitutional rights, and as such the suit is not barred by governmental immunity." City of El Paso, 324 S.W.3d at 207.

2. The fact that a plaintiff couches a claim as being under the DJA does not create a waiver of immunity.

The DJA is a limited, not a general waiver, of sovereign immunity and it does not enlarge a court's jurisdiction. Creedmoor, 307 S.W.3d at 515. Accordingly, an otherwise proper DJA claim seeking to construe or invalidate a statute is nonetheless barred by sovereign immunity if the remedy would have the effect of establishing a right to relief against the State that implicates sovereign immunity and for which immunity has not been waived. Creedmoor, 307 S.W.3d at 515; Smith, 311 S.W.3d at 80. See City of North Richland Hills, 340 S.W.3d at 911 ("if a litigant joins a governmental entity and seeks an otherwise proper declaratory judgment construing or invalidating a statute, this claim is nonetheless barred by governmental immunity if the declaration sought would have the effect of establishing a right to relief against the governmental entity for which governmental immunity has not been waived." See Heinrich, 284 S.W.2d at 372; City of Houston v. Williams, 216 S.W.3d 827, 828–29 (Tex. 2007); State v. BP Am. Prod. Co., 290 S.W.3d 345, 360 (Tex.App.-Austin 2009, pet. filed")); City of Dallas, 316 S.W.3d at 768 (DJA is not a general wavier of sovereign immunity, for this reason the UDJA cannot be used as a vehicle to obtain declarations having the effect of establishing a right to relief against the state for which immunity has not been waived. City of Dallas, 316 S.W.3d at 768 (citing State v. BP, 290 S.W.3d at 360)" But see Leach, 335 S.W.3d at 399 ("simply because both types of claims [for permissible declaratory relief as well as for relief barred by immunity] may be included in the same petition does not ipso facto mean that the constitutional allegation is a mere 'disguised attempt to obtain money damages" for a breach of

contract.") "If the claim challenges actions taken under an ordinance or statute rather than the validity of the ordinance or statue itself, the governmental entity is immune from suit." City of Dallas, 316 S.W.3d at 768.

This rule applies even to *ultra vires* suits. Even if the claim is *ultra vires* and the only injury the plaintiff has sustained is in the past and the only remedy is monetary relief, then suit is barred by sovereign immunity because the claim is exclusively for retrospective monetary relief. Potter Cnty. v. Tuckness, 308 S.W.3d 425, 430, fn.7 (Tex. App.—Amarillo 2010); Creedmoor, 307 S.W.3d at 515. But see, Combs v. City of Webster, 311 S.W.3d at 99-100.

Waiver of immunity from suit for a suit for money damages cannot be established just by a plaintiff couching her claims as a suit for declaratory relief. Chenault v. Phillips, 914 S.W.2d 140, 141 (Tex. 1996) ; City of Corinth, 293 S.W.3d at 368. See also City of Houston v. Williams, 216 S.W.3d 827, 829 (Tex. 2007).

In order to determine if the DJA waives immunity from suit, the courts are obligated to look at the real nature of the relief sought. See City of Houston v. Williams, 216 S.W.3d at 829; Creedmoor, 307 S.W.3d at 515; Leach, 335 S.W.3d at 398-99. This was pointed out by the Amarillo Court of Appeals in the case involving former Texas Tech head football coach. The fact that a breach of contract claim and a claim for violation of constitutional rights appears in the same pleading does not mean that the declaratory judgment claim is a suit for money damages; instead the court must examine the nature of the relief sought from the claim under the DJA. Leach, 335 S.W.3d at 399-400.

Thus, when the suit primarily seeks money damages, adding a claim for declaratory or injunctive relief will not allow the plaintiff to circumvent the bar to suit and liability created by sovereign immunity. Id.; Bell, 160 S.W.3d at 693-94. The courts determine whether the DJA waives immunity from suit, the courts distinguish between suits that seek to interpret the terms of a contract or determine whether someone acted within their authority as compared with suits that seek to compel contractual performance. IT-Davy, 74 S.W.3d at 855-56. The DJA waives immunity in the first type of case but does not in the second type of case. Id.

For example, in Smith, the Austin Court held that the plaintiff was not pursuing a legitimate declaratory judgment claim because he could not point to anything other than the contract, such as a statute, that would require the university to take the actions in question. Id. Therefore, the court found the declaratory judgment claim was a pretext to bring a suit for breach of contract. Id. The Austin Court explained that, in its opinion, all declaratory judgment claims involving contracts with the state are barred by sovereign immunity. Id. "[D]eclaratory-judgment actions brought against state officials seeking to establish a contract's validity, to enforce performance under a contract, or to impose contractual liabilities *are* considered suits against the state because they seek to control state action or impose liability on the state. This second category of declaratory actions may not be maintained without legislative permission." Id. at *4 (emphasis in original). Following the rationale of the Austin Court of Appeals, a party that enters into a contract with a state agency or a subdivision of the state waives its right to use the Declaratory Judgment Act to determine its obligations and rights under the contract. See id.

Immunity from suit bars claims and causes of actions regardless of the way in which the claim is framed. See IT-Davy, 74 S.W.3d at 854; see also, e.g., City of Houston v. Williams, 216 S.W.3d 827 (Tex. 2007) (firefighters' suit for declaratory judgment was, in fact, a claim for money damages and, thus, required a waiver of the city's sovereign immunity). When the only injury alleged is in the past and the only plausible remedy is an award of money damages, a declaratory judgment claim is barred by sovereign immunity. Bell v. City of Grand Prairie, 221 S.W.3d 317 (Tex. App.–Dallas 2007). However, where the firefighters' suit for declaratory and injunctive relief would affect determination of seniority going forward, sovereign immunity did not bar the suit. Id.

Moreover, the fact that plaintiff does not seek monetary relief is not dispositive of whether sovereign immunity bars a claim under the DJA. Creedmoor, 307 S.W.3d at 515. For example, a plaintiff cannot use the DJA to challenge a non-appealable order or order that is not subject to judicial review. Creedmoor, 307 S.W.3d at 515. Even if plaintiff alleges the order is unconstitutional or is *ultra vires*, the DJA does not waive immunity from suit where the courts are otherwise prohibited from exercising jurisdiction. Creedmoor, 307 S.W.3d at 515 (even if the agency reached the wrong result in ruling on an application, suit was barred when the agency's decision was final and non-appealable). Similarly, the DJA does not waive immunity if the purpose of suit is to control state action or compel an official to exercise her discretionary powers in a particular way. Combs v. City of Webster, 311 S.W.3d at 99. (statute needs to contain language, "acceptable to the official," to create discretion).

3. Attorney's Fees and other factors related to bringing a DJA claim.

A plaintiff who prevails on a claim under the Uniform Declaratory Judgments Act MAY recover attorney's fees. Lawson, 127 S.W.3d at 867; TML, 144 S.W.3d 600.

A party need not prevail on its suit under the DJA in order to recover its attorney's fees. Tex. A&M Univ.-Kingsville v. Lawson, 127 S.W.3d at 874-875. "A trial court may award just and equitable attorney's fees to a non-prevailing party. Id. However, various courts of appeals have held that a party cannot maintain a viable DJA claim if the only relief unique to their claim for declaratory relief is their claim for attorney's fees. Tex. Dep't of Pub. Safety v. Alexander, 300 S.W.3d 62, 78 (Tex. App.—Austin 2009 pet. filed) (declaratory relief cannot be used solely as a vehicle to obtain attorney's fees); City of Grey Forest v. Vernon, 254 S.W.3d 548, 554 (Tex. App.—Amarillo 2008, pet. denied); Boatman v. Lites, 970 S.W.2d 41, 43 (Tex.App.—Tyler 1998, no writ). Additionally, if a claim is not properly brought under the DJA, including naming the proper parties—i.e. naming officials in *ultra vires* claims; then the plaintiff cannot recover their attorney's fees. City of Dallas, 316 S.W.3d at 771; City of North Richland Hills, 340 S.W.3d at 911. Also, if the plaintiff is not bringing a DJA claim, then he cannot use the DJA to recover attorney's fees. City of Dallas, 316 S.W.3d at 771; City of North Richland Hills, 340 S.W.3d at 913.

Like all other suits, a plaintiff bringing claims under the DJA must plead and prove the elements of a justifiable controversy. For example, the plaintiff must plead and prove a live "case and controversy." A DJA cause of action can be maintained only where there is a justifiable controversy between the parties as to their rights and status that the declaration would actually resolve. Chenault v. Phillips, 914 S.W.2d 140, 141 (Tex. 1996); City of Corinth v. NuRock Dev., Inc., 293 S.W.3d 360, 368 (Tex. App.-Fort Worth 2009, no pet.) Similarly, a plaintiff must establish she has standing in order to bring suit under the DJA. In order to establish standing, the plaintiff must prove a particularized legally protected interest that is actually or imminently affected by the alleged harm. Salazar, 304 S.W.3d at 905-06. Some of the Salazar plaintiffs claims under the DJA were dismissed for lack of standing because the plaintiffs could not establish that they had a particularized interest or injury caused by the fact that their driver's licenses were vertically rather than horizontally oriented. Salazar, 304 S.W.3d at 905-06.

f. Local Government Code, Education Code, and Water Code.

The Local Government Code, the Education Code and the Water Code are discussed in section II(B)(2).

g. Waivers of Immunity by "Sue and be Sued" Language.

The phrase "sue and be sued" is contained in numerous statutes and city charters. Tooke v. City of Mexia, 197 S.W.3d 325 (Tex. 2006) 49 Tex. Sup. Ct. J. 819, Tex., June 30, 2006. In recent years, many plaintiffs have relied upon this language to argue that the governmental entity has waived immunity from suit.

In 1970, the year the TCA went into effect, the Texas Supreme Court addressed the issue of whether the phrase "sue and be sued" in a navigation district's enabling statute constituted a waiver of immunity from suit. Missouri Pac. R. Co. v. Brownsville Navigation Dist., 453 S.W.2d 812 (Tex. 1970). The Brownsville Navigation District suit arose from a railroad's claim for indemnity under a written contract with the district. The Texas Supreme Court noted that a navigational district was a subdivision of the state that would enjoy full sovereign immunity, meaning it would be immune from suit absent a waiver. Id. at 12-13. The court then pointed out that the district's enabling legislation provided it could "sue and be sued." Id. The court held that this language is "quite plain and gives general consent for the District to be sued in the courts of Texas in the same manner as other defendants." Id. at 13. The court held that the "sue and be sued" language in the district's enabling statute constituted a waiver of immunity from suit and, thus, the railroad could maintain its breach of contract action against the district. Id.

Many courts of appeals have followed the holding in the Brownsville Navigation District case and have held that statutes, city charters, and/or enabling legislation which provide that a governmental entity can "sue or be sued" waive immunity from suit. See United Water Servs., Inc. v. City of Houston, 137 S.W.3d 747 (Tex. App.–Houston [1st Dist.] 2004, pet. filed) See, e.g., City of Texarkana v. Cities of New Boston, 141 S.W.3d 778 (Tex. App. –Texarkana 2004, no pet.); Goerlitz v. City of Midland, 101 S.W.3d 573, 577 (Tex. App.–El Paso 2003, pet. filed); Tarrant County Hosp. Dist. v. Henry, 52 S.W.3d 434, 449 (Tex. App.–Fort Worth 2001, no pet. h.); Welch v. Coca Cola Enter., Inc., 36 S.W.3d 532, 538 (Tex. App–Tyler 2000, pet. withdrawn); Bates v. Tex. State Technical College, 983 S.W.2d 821, 827 (Tex. App.–Waco 1998, pet. denied); Engelman Irrigation Dist. v. Shields Bros., Inc., 960 S.W.2d 343, 348 (Tex. App.–Corpus Christi 1997, pet. denied); Dillard v. Austin Indep. Sch. Dist., 806 S.W.2d 589, 594 (Tex. App.–Austin 1991, writ denied).

The Dallas Court did not agree with the other courts of appeals and held that the phrase "sue and be sued" standing alone did not waive immunity from suit. The Dallas Court noted that the Texas Supreme Court has departed from the logic employed in Brownsville Navigation District over the last thirty years. Ten years after Brownsville Navigation District, the Supreme Court held that any waiver of immunity from suit must be expressed by the Legislature in

"clear and unambiguous language." Satterfield & Pontikes Constr. v. Irving Indep. Sch. Dist., 123 S.W.3d 63, 67 (Tex. App.–Dallas 2003, pet. filed). See City of Dallas v. Reata Constr. Corp., 83 S.W.3d 392, 398 (Tex. App.–Dallas 2002).

In late June 2006, the Texas Supreme Court resolved the conflict between the courts of appeals and specifically overruled its holding in the Brownsville Navigation District case. Tooke v. City of Mexia, 197 S.W.3d 325 (Tex. 2006) 49 Tex. Sup. Ct. J. 819, Tex., June 30, 2006. In Tooke the Supreme Court noted that in many instances the phrase "sue and be sued" was used in statutes to provide that an entity (governmental or non-governmental) could bring suit in its own name. Id. The Court pointed out that frequently the use of that phrase has nothing to do with immunity. Id. Thus, because the phrase "sue and be sued" "means many different things in many different statutes, it cannot be said to be a clear and unambiguous waiver of immunity." Id.

While in some instances the phrase "sue and be sued" may constitute a waiver of immunity from suit, it should no longer be considered conclusive evidence of waiver. Instead, the phrase must be analyzed in the context of the specific statute clearly and ambiguously waives immunity. Tomball Reg'l Hosp, 283 S.W.3d at 843.

h. Waiver of Immunity by Phrase "Implead and be Impleaded" or "May Plead and be Impleaded".

As with the phrase "sue and be sued," in recent years many plaintiff have argued that the phrase "may implead and be impleaded" constitutes a waiver of immunity from suit. Again, the courts of appeals split over whether that language constitutes a waiver. Compare City of Houston v. Clear Channel Outdoor, Inc., 161 S.W.3d 3 (Tex. App.–Houston [14th Dist] 2004 (finding the language constituted a waiver); Goerlitz v. City of Midland, 101 S.W.3d 573, 577 (Tex. App.–El Paso 2003, pet. filed)(same); with Jackson v. City of Galveston, 837 S.W.2d 868, 871 (Tex. App.–Houston [14th Dist.] 1992, pet. denied) (holding that language did not constitute a waiver of immunity from suit).

Again, the Supreme Court's decision in Tooke resolved the dispute and found that phrase standing alone did not constitute a waiver of immunity from suit. Tooke v. City of Mexia, 197 S.W.3d 325 (Tex. 2006). Like the phrase "sued and be sued", the court noted that the phrase "may plead and be impleaded" has been used in numerous statutes since 1858 and is used in many current statutes. Tooke, 197 S.W.3d at _328-329. Historically, the purpose of the phrase appeared to be to give various organizations the power to bring suit and be sued in their own name. Id. Based on the Legislature's intent in its various uses of the words plead and implead over the last 160 years, the court found that the phrase "plead and be impleaded" was not, in itself a clear and unambiguous waiver of immunity from suit because there was no other language in the statute indicating a clear and unambiguous intent to waive immunity. Id. The court specifically held that the phrase as it appeared in the section 51.075 of the Local Government Code was not a waiver of immunity from suit. Id. While a phrase containing the phrase "plead and be impleaded" my in other instances constitute a waiver of immunity from suit that can only be determined by reference to the specific statute and consideration of the legislative intent behind that statute. Id.

i. No Violation of Open Courts Provision by Adding "Sue and be Sued" to Statute.

Amending a statute to require legislative permission to sue, where permission was not required previously, does not violate the open courts provision of the Texas Constitution. In 1985, the University of Houston's enabling statute was amended to provide that the provision of its enabling statute which stated that the University could "sue and be sued" did not constitute a waiver of immunity from suit. See Freedman v. Univ. of Houston, 110 S.W.3d 504, 508 (Tex. App.–Houston [1st Dist.] 2003, no pet.). Under the earlier version of the statute, the Legislature held had been to have waived immunity from suit. After the amendment, a claim could not be brought against the University without first obtaining a legislative waiver of immunity from suit. Compare Freedman, 110 S.W.3d at 508 with Fazekas v. Univ. of Houston, 565 S.W.2d 299, 302 (Tex. Civ. App.–Houston [1st Dist.]1978, writ ref'd n.r.e.). The First Court held that the modification in the statute did not violate the open courts requirement of the Texas Constitution. Freedman, 110 S.W.3d at 508. The Freedman court reasoned that the amendment did not foreclose bringing suit or leave the plaintiff without remedy, but only required legislative consent before filing suit. Id. This is consistent with the general principle that the assertion of immunity cannot violate the constitution. See Fed. Sign, 951 S.W.2d at 410-11.

3. Plaintiffs Must Strictly Comply With the Statute Waiving Immunity.

Section III. A. above points out that when bringing suit under the TCA, the plaintiff's claim must strictly comply with the waiver created by that act. Indeed, any ambiguity in a statutory waiver is construed against the plaintiff, and against jurisdiction. Tex. Dep't of Transp. v. York, 284 S.W.3d 844, 846 (Tex. 2009) ("York II") Taylor, 106 S.W.3d at 701. "Legislative consent to waive sovereign immunity by statute must be by 'clear and unambiguous language'

and suit can then be brought 'only in the manner indicated by that consent.'" York II, 284 S.W.3d at 846. This is true of all waivers of immunity. A plaintiff bringing suit under a waiver of sovereign immunity must comply with the jurisdictional prerequisites for bringing suit and must make certain that his/her claim fits within the waiver created by the statute. See Prairie View A&M Univ. v. Chatha, 381 S.W.3d 500 (Tex 2012); Hawkins v. Cmty. Health Choice, Inc., 127 S.W.3d 322 (Tex. App. –Austin 2004, no pet.); Tex. Dep't of Criminal Justice v. Cooke, 149 S.W.3d 700, 704 (Tex. App.–Austin 2004, no pet). For example, a plaintiff must file a timely charge of discrimination with the Texas Human Rights Commission in order to bring a discrimination suit under the Texas Commission on Human Rights Act. Prairie View A&M Univ., 381 S.W.3d 510-514. Similarly, a plaintiff cannot bring a claim under chapter 2260 unless he has given timely notice of the state's breach of the contract. Hawkins, 127 S.W.3d at 324. Similarly, a plaintiff cannot bring suit under the Whistleblower statute unless he exhausts any available grievance process in accordance with that statute. Harris County v. Lawson, 122 S.W.3d 276 (Tex. App.–Houston [1st Dist.] 2003, pet. filed) ("that statutory prerequisite that a plaintiff in a Whistleblower action timely initiate a grievance is a jurisdictional requirement, the failure of which may be challenged by way of a plea to the jurisdiction"); Tex. S. Univ. v. Carter, 84 S.W.3d 787, 792 (Tex. App.–Houston [1st Dist.] 2002, pet. dism'd by agr.); Leatherwood v. Prairie View A&M Univ., 2004 WL 253275, at *3 (Tex. App.–Houston [1st Dist.] 2004, no pet. h.). In addition to complying with any conditions precedent to filing suit, the plaintiff must also establish that his claim fits within the waiver of immunity created by the statute in question. See Hawkins, 127 S.W.3d at 322; Cooke, 149 S.W.3d at 700. Thus, a plaintiff bringing suit under the Texas Commission on Human Rights Act must establish that he/she was discriminated against on the basis of his/her race, color, disability, religion, sex, national origin or age. Id. Otherwise, he cannot prevail in establishing liability. Id. A plaintiff bringing a premises claim under the TCA based on a licensee's theory, where the governmental entity is liable for special defects of which it had actual or constructive knowledge, must prove the condition at issue was a special defect in order to prevail. York II, 284 S.W.3d at 847-48.

An identical result occurred in In re Nestle USA, Inc., 359 S.W.3d 207, 208 (Tex. 2012). In this case the Texas Supreme Court not only held that a plaintiff must comply strictly comply with a statute waiving immunity but also suggested that Heinrich *ultra vires* claims may not be available where a statute waives immunity and provides the relief sought by the party. Id. at 210. The petitions in Nestle USA case brought an original proceeding in front of the Texas Supreme Court seeking a declaration that the Texas franchise law was unconstitutional, seeking an injunction prohibiting the comptroller from collecting the taxes as well as a writ of mandamus ordering the comptroller to refund taxes that had been collected from 2008 to 2011. Id. at 208. The Court begins its opinion by noting that the petitioners did not pay their taxes under protest or request a refund from the comptroller. Id. at 208. The Supreme Court noted that Chapter 112 of the Texas Tax Code allowed taxpayers to bring suit to recover franchise taxes but established specific prerequisites for bringing suit. Id. In order to bring suit for a franchise tax overpayment, the Tax Code requires the taxpayer to (1) pay the taxes owed; (2) state that the payment is made under protest; (3) the statement must set forth all of the grounds for the protest and detail the basis for seeking to recover payment; (4) seek rehearing after the comptroller denies the refund claim; and (5) bring suit against both the comptroller and the attorney general within thirty days after the motion for rehearing is denied. Id. at 208-209. The Court went on to note that Chapter 112 of the Tax Code prohibited the issuing of any type of injunctive relief, declaratory relief, writs of mandamus, or prohibitions other than orders issued as provided for in the statute. Id. at 209. The Courts even noted that the statute allowed for an exception to the requirements of prepayment of taxes, when such a prerequisite would prohibit a taxpayer from being able to obtain relief through the courts (i.e., where the taxpayer cannot initially afford to pay the taxes). Id.

The Court found that the provisions of Chapter 112 were the exclusive remedy for a taxpayer to protest the levying of franchise taxes. Id. at 210. The Court noted that the franchise tax statute had undergone numerous revisions and established the exclusive means by which the taxpayer could seek relief. Id. The Court concluded that because taxpayer rights and actions were created by a statute and the courts' jurisdiction are limited to suits which fully complied with the statute. Id. at 212. The Supreme Court went on to note that compelling a tax refund by mandamus action would be the granting of retrospective relief, which it noted, even by the way of extraordinary or injunctive relief, is generally barred absent legislative consent. Id. Thus, the Supreme Court decision in In re Nestle USA appears to hold that where the Legislature has created a comprehensive statute covering a particular subject and offering a means of obtaining monetary relief, the plaintiff must comply with the statute and cannot use *Heinrich ultra vires* claims as a means of otherwise seeking financial recover. Id.

Thus, a plaintiff must comply with the terms of statute that waives immunity both in any prerequisites

to bringing a claim, as well as establishing that liability is predicated upon events that fall within the scope of the waiver of immunity from liability. Prairie View A&M Univ. v. Chatha, 381 S.W.3d 500 (Tex 2012); York II, 284 S.W.3d at 847-48,

C. Waiver of Immunity by the Governmental Unit Being Sued.

1. Waiver by Failure to Assert Immunity as a Defense.

A governmental entity can waive common law immunity from liability while immunity from suit cannot be waived. Jones, 8 S.W.3d at 638. In Jones, the supreme court noted that the two elements of sovereign immunity (immunity from liability as opposed to immunity from suit) serve different purposes that effect whether they can be waived by the governmental entity's failure to assert them in the litigation. Id.

> Immunity from liability and immunity from suit are two distinct principles. Immunity from liability protects the state from judgment even if the Legislature has expressly consented to the suit. Like other affirmative defenses to liability, it must be pleaded or else it is waived. Immunity from liability does not affect a court's jurisdiction to hear a case.
>
> In contrast, immunity from suit bars an action against the state unless the state expressly consents to the suit. The party suing the governmental entity must establish the state's consent, which may be alleged either by reference to a statute or to express legislative permission. Since as early as 1847, the law in Texas has been that absent the state's consent to suit, a trial court lacks subject matter jurisdiction.

Id. (citations omitted). See also City of San Antonio v. Pollock, 2004 WL 1054842 (Tex. App.–San Antonio 2004, no pet. h.); Tex. Dep't of Criminal Justice v. King, 2003 WL 22937252, p. 5 (Tex. App.–Waco 2003, pet. filed). See Rusk State Hospital v. Black, 392 S.W.3d at 103-106 (Lehrmann, J, concurring and dissenting)(immunity from suit implicates and impacts a trial court's jurisdiction, although three Texas Supreme Court Justices find that it primarily implicates the court's personal jurisdiction over the entity, which can be waived). The parties to a suit cannot even by agreement confer subject matter jurisdiction on a court. Therefore, immunity from suit cannot be waived, while immunity from liability can be waived.

Because jurisdiction is fundamental to a court's ability to hear a case, immunity from suit may be raised at any time (it can be raised for the first time on appeal) or even sua sponte by the trial court, or by an appellate court. See Jones, 8 S.W.3d at 638. See also Rusk State Hospital .v Black, 392 S.W.3d at 95 (immunity can even be raised for the first time on appeal where it was not raised at the trial court). The supreme court in Jones went on to hold that a plea to the jurisdiction is an appropriate means of challenging whether the plaintiff has established a waiver of immunity from suit. Id. Moreover, the court went on to point out that a governmental entity is entitled to an interlocutory appeal from the denial of a plea to the jurisdiction based on immunity from suit. See Jones, 8 S.W.3d at 638 (holding that the court of appeals erred in affirming the denial of the plea to the jurisdiction without first determining whether the plaintiff's pleading alleged facts sufficient to establish a waiver of immunity from suit).

Thus, sovereign immunity (immunity from suit and liability) should be raised not only as affirmative defenses, but also should be asserted in special exceptions and/or in a plea to the jurisdiction or a motion for summary judgment. Id.; Burnet Cnty. Sheriff's Dep't v. Carlisle, 2001 WL 23204, fn. 6 (Tex. App.—Austin 2001). A prudent attorney may want to file special exceptions and a plea in abatement. In the Estate of Lindburg decision, the Texas Supreme Court held that sovereign immunity could properly be raised when asserted in special exceptions and on appeal. Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg, 766 S.W.2d 208, 211 (Tex. 1989). In Lueck the Supreme Court held that a governmental entity is not precluded from using a plea to the jurisdiction to dispose of a suit based on immunity from suit, even if that issue could also be raised by a motion for summary judgment or special exceptions. State v. Lueck, 290 S.W.3d 876, 884 (Tex. 2009). In fact, in many cases the best course of practice is to assert immunity from suit in a plea to the jurisdiction and pursue it through an interlocutory appeal to avoid the expense of discovery and trial. Id. See UIL, 319 S.W.3d at 963, fn.8, (citing Emp. Ret. Sys. v. Putnam, LLC, 294 S.W.3d 309, 323, holding trial court need not allow discovery before ruling on plea to jurisdiction where party's status as a public entity was conclusively resolved as a matter of law). See Creedmoor-Maha Water Supply Corp v. Texas Comm'n on Environmental Quality, 307 S.W.3d 217, 226 (Tex.App.—Austin 2010, no pet)(whenever a plea to the jurisdiction is based upon the plaintiff's pleadings, then no evidence is presented at the hearing and as a result, no discovery is needed before the court rules upon the plea to the jurisdiction); City of Galveston v. Gray, 93 S.W.3d 587, 590 (Tex. App.—

Houston [14th Dist.] 2002, pet denied); In re Hays County Sheriff's Department, 2012 WL 6554815 (Tex.App.—Austin 2012)(Pemberton, J, concurring).

(a) Taking an interlocutory appeal from an interlocutory ruling on sovereign immunity.

An interlocutory appeal can be taken regardless of the type of motion (plea to the jurisdiction, motion to dismiss or motion for summary judgment) through which immunity from suit is raised. Austin State Hosp. v. Graham, 347 S.W.3d 298 (Tex. 2011). Because section 51.014(a) gives appellate court's jurisdiction over interlocutory appeals from rulings on sovereign immunity from pleas to the jurisdiction, motions to dismiss and motions for summary judgment, if a valid interlocutory appeal is otherwise taken sovereign immunity can be raised for the first time on appeal. *Black*, 392 S.W.3d at 95.

Graham brought suit against Austin State Hospital and two of its doctors alleging medical malpractice claims. Id. at 299. Because Graham sued both the hospital and two employees, the hospital moved to dismiss the doctors pursuant to Texas Civil Practice and Remedies Code § 101.106(e). Id. The doctors also moved to dismiss under sections 101.106(a) and (e). Id. Graham then nonsuited the hospital and asserted that its motion to dismiss was thereby mooted. The trial court denied the doctors' motion and did not rule on the hospital's motion. Id. The hospital and the doctors appealed and the Court of Appeals held that it did not have jurisdiction over the doctors' appeal because section 51.041(a) of the Civil Practice and Remedies Code allowed the doctors to appeal only from a denial of a motion for summary judgment. Id. at 300.

The Supreme Court held that section 51.014 allows appeals by governmental entities or their employees where a motion in the trial court challenged that court's jurisdiction. Id.

> "[W]e have held under section 51.014(a) that an interlocutory appeal may be taken from a refusal to dismiss for want of jurisdiction whether the jurisdictional argument is presented by plea to the jurisdiction or some other vehicle such as a motion for summary judgment. . . . if the trial court denies the governmental entity's claim of no jurisdiction, whether it has been asserted by a plea to the jurisdiction, a motion for summary judgment, or otherwise, the Legislature has provided that an interlocutory appeal may be brought. The reference to plea to the jurisdiction is not a particular vehicle but the substance of the issue raised."

Id. (internal quotations and citations omitted). The Court explained that there is no reason for limiting appeals under section 51.014(a)(5) which references "motions for summary judgment", when section 51.014(a)(8) is not so limited. Id. The Texas Supreme Court concluded, "[t]he point of section 51.014(a)(5) . . . is to allow an interlocutory appeal from rulings on certain issues, not merely rulings in certain forms. Therefore, we hold that an appeal may be taken from orders denying an assertion of immunity . . . regardless of the procedural device used." Id. at 301. For further discussion of interlocutory appeals see section VII D Supra.

2. Waiver by Filing Suit or Bringing Counterclaim.

Texas courts have long held that by filing suit, a governmental entity waives immunity from suit. Pelzel, 77 S.W.3d at 250; IT-Davy, 74 S.W.3d at 861 (Hecht, J., concurring); Kinnear v. Tex. Comm'n on Human Rights, 14 S.W.3d 299, 300 (Tex. 2000); Shobe, 58 S.W. at 949; Anderson, Clayton & Co. v. State, 62 S.W.2d 107, 110 (Comm'n App. 1933, op. adopted). The Supreme Court explained that "[w]hen the State invokes the jurisdiction of one of its own courts it does so not as a sovereign, but as any other litigant." Anderson, Clayton & Co. v. State, 62 S.W.2d 107, 110 (Tex. 1933).

Subsequent to the Anderson, Clayton decision in June of 2006, the Texas Supreme Court held that when a governmental entity files suit its waives immunity from suit for counterclaims that are (1) related to (2) properly defensive to and (3) act as no more than an offset against the claims asserted by the government entity. Reata Construction Corp. v. City of Dallas, 197 S.W.3d 371 (Tex. 2006). The Supreme Court withdrew its 2004 opinion in Reata in which it held that, "by filing a suit for damages, a governmental entity waives immunity from suit for any claim that is incident to, connected with, arises out of, or is germane to the suit or controversy brought by the State." Reata Construction Corp. v. City of Dallas, 2004 WL 726906 (Tex., April 2, 2004, op. withdrawn). In the second Reata opinion, the Supreme Court pointed out that the purpose of sovereign immunity is to protect tax resources from being used to defend suits and paying judgments. Reata, 197 S.W.3d 371 (Tex. 2006). The court acknowledged that: (1) When a governmental entity files suit it has made a decision to expend resources to pay litigation costs; and (2) It is "fundamentally unfair to allow a governmental entity to assert affirmative claims against a party while claiming it [has] immunity as to the party's claims against it." Id. However, the court reasoned that the purpose of immunity to protect tax resources means that when a governmental entity files claims it waives immunity from suit only to the extent of allowing

claims that offset the governmental entity's recovery. "If the opposing party's claims can operate only as an offset to reduce the government's recovery, no tax resources will be called upon to pay a judgment, and the fiscal planning of the governmental entity should not be disrupted." Id. The court went on to hold that,

> "[W]here the governmental entity has joined into the litigation process by asserting its own affirmative claims for monetary relief, we see no ill befalling the governmental entity or hampering of its governmental functions by allowing adverse parties to assert, as an offset, claims germane to, connected with, and properly defensive to those asserted by the governmental entity. ... Once it asserts affirmative claims for monetary recovery, the City must participate in the litigation process as an ordinary litigant, save for the limitation that the City continues to have immunity from affirmative damage claims against it for monetary relief exceeding amounts necessary to offset the City's claims. ... Accordingly, when the City filled its affirmative claims for relief as an intervenor, the trial court acquired subject-matter jurisdiction over claims made against the City which were connected to, germane to, and properly defensive to the matters on which the City based its claim for damages. Absent the Legislature's waiver of the City's immunity from suit, however, the trial court did not acquire jurisdiction over a claim for damages against the City in excess of damages sufficient to offset the City's recovery, if any."

Id. at 377. (emphasis added, citations omitted.). See State v. Fid. & Deposit Co. of Maryland, 223 S.W.3d 309, 310-11 (Tex. 2007). Thus, the holding in Reata, allows governmental entities to give a trial court jurisdiction by bringing litigation without facing any risk of having a judgment rendered against it because opposing parties can bring claims only to offset the governmental entity's recovery. Id.

When a governmental entity files suit, the trial court and courts of appeal have to sort through each claim and the factual basis of each claim to determine which claims are germane to and connected to the claims being brought by the governmental entity. State v. Fid. & Deposit Co. of Maryland, 223 S.W.3d 309, 310 (Tex., 2007).

In Sweeny Community Hospital v. Mendez, the First Court of Appeals did a detailed analysis of when claims are connected to and germane to claims brought by the governmental entity. Sweeny Community Hosp. v. Mendez , 226 S. W.3d 584 (Tex. App.–Houston [1st Dist.] 2007). Sweeny Community Hospital sued Mendez for breach of contract. Mendez brought counterclaims for breach of contract, fraud, retaliation under section 161.134 of the Health & Safety Code, retaliation under section 161.134 of the Health & Safety Code, tortious interference, and defamation. Id. The hospital admitted that by filing suit it waived immunity as to Mendez's claims for breach of contract and fraud, but challenged the trial court's jurisdiction to entertain Mendez's other claims. Id.

The court began its legal analysis by noting that the dictionary defines "germane" as "closely akin," "relevant and appropriate," "closely or significantly related," and "relevant and pertinent." Id. Based on these definitions, the court of appeals held that the term germane means "incident to, connect with, arises out of" the same set of facts, and its breadth is not narrower than what would constitute a compulsory counterclaim. Sweeny Community Hosp. v. Mendez, 226 S. W.3d 584 (Tex. App.–Houston [1st Dist.] 2007, no pet.). A compulsory counterclaim is a claim which "arises out of the transaction or occurrence that is the subject of the opposing party's claims." TEX. R. CIV.P. 97. Next, the court pointed out that the term connected "means united, joined or lined and joined together in sequence; linked coherently and having parts or elements logically linked together." Sweeny Community Hosp. v. Mendez, 226 S.W.3d 584 (Tex. App.–Houston [1st Dist.] 2007, no pet.).

The First Court of Appeals held that, while the elements of the retaliation, tortious interference and defamation claims were materially different from the elements of the hospital's claims, "the core facts are the same and determining whether Sweeny and Mendez met their obligations under the contract is necessary to the claims asserted by both Sweeny and Mendez." Id.

The court then turned to the requirement that the counterclaims needed to be properly defensive to the claims of the governmental entity. Properly defensive means the "trial court does not acquire jurisdiction over a claim for damages against the governmental entity in excess of damages sufficient to offset the governmental entity's recovery." Riata II, 197 S.W.3d at 377. The fact that the amount of damages sought by the counterclaims exceeds the damages sought by the governmental entity does not mean the counterclaims are barred by immunity. Sweeny Community Hosp. v. Mendez , 226 S. W.3d 584 (Tex. App.–Houston [1st Dist.] 2007, no pet.). Offset claims can include causes of action seeking punitive and actual damages. Id. The fact that the offset claims seek damages in excess of those sought by the governmental entity "is a curable deficiency that can be fixed by amending the

pleading to seek no more damages than the governmental entity may be awarded upon final trial." Id.

The waiver of immunity from suit is effectuated regardless of the form in which the claims are made. The Texas Supreme Court held that the waiver of immunity from suit is waived regardless of whether the claims are asserted by the entity as the plaintiff or intervenor. "[W]e see no substantive difference between a decision by the City to file an original suit and the City's decision to file its claim as an intervenor..." Reata, 2006 WL 1792219. Claims for relief asserted by counterclaim have also been held to waive immunity from suit. City of Dallas v. Saucedo-Falls, 172 S.W.3d 703 (Tex. App.–Dallas 2005, pet. filed); City of Grand Prairie v. Irwin Seating Co., 170 S.W.3d 216 (Tex. App.–Dallas 2005, pet. filed).

The Courts of Appeals were split on whether suing for attorney's fees invokes a general waiver of immunity from suit and made the governmental entity subject to counterclaims under Reata. A majority of the Courts of Appeals held that bringing a claim for attorney's fees alone did not constitute a general waiver of immunity. Tex. Dep't of Criminal Justice v. McBride, 317 S.W.3d 731 (Tex. 2010). See Powell v. Tex. Dep't of Criminal Justice, 251 S.W.3d 783 (Tex. App.—Corpus Christi 2008, pet. filed). Compare Bexar Metro. Water Dist. v. Educ. & Econ. Dev. Joint Venture, 220 S.W.3d 25, 32 (Tex. App.—San Antonio, pet. filed); Lamesa Indep. Sch. Dist. v. Booe, 251 S. W.3d 831, 833(Tex. App.—Eastland 2008, no pet.).

The Texas Supreme Court resolved this question in Tex. Dep't of Criminal Justice v. McBride. The court held:

> "In this case, McBride, not the Department, filed suit. In its answer, the Department denied McBride's allegations and prayed for attorney's fees and costs incurred in defending the case. Other than fees and costs, the Department asserted no claims for relief. Unlike Reata, in which the City injected itself into the litigation process and sought damages, the Department's request for attorney's fees was purely defensive in nature, unconnected to any claim for monetary relief. When that is the case, a request for attorney's fees incurred in defending a claim does not waive immunity under Reata…" Tex. Dep't of Criminal Justice v. McBride, 317 S. W. 731 (Tex. 2010).

Also because recovery under a counterclaim brought without a waiver of sovereign immunity offsets any recovery by the governmental entity bringing claims, the dismissal of the governmental claims by summary judgment or otherwise means the counterclaims must be dismissed based on sovereign immunity. Employees Ret. Sys. of Tex. v. Putnam, 294 S.W.3d 309, 325 (Tex.App.—Austin 2009, no pet.).

The significance of the Reata decision is minimized by the fact that the legislature has waived immunity from suit for breach of contract actions against cities, school districts, junior colleges, and special purpose districts as well as for some contract claims against counties. See Chap. 262 and 271 TEX. CIV. PRAC.& REM. CODE. Thus, in most instances contractors will not have to assert a waiver of immunity from suit by the entity's filing of claims as a means for maintaining breach of contract claims against governmental entities.

However, filing suit does not waive immunity from liability. Thus, by filing suit, a governmental entity subjects itself to the jurisdiction of the trial court but, in order to prevail, an opposing party must still establish a waiver of immunity from liability. See Pelzel, 77 S.W.3d at 250; IT-Davy , 74 S.W.3d at 861 (Hecht, J., concurring). But see Meyers v. State of Tex., 410 F.3d at 239 (removing a case to federal court constitutes a waiver of immunity from suit in federal court and invokes the jurisdiction of the federal court; the court must still look to state law to determine if some form of immunity from liability exists).

a. Effect of Summary Disposition or Non-Suiting Governmental Entity's Claims

The Supreme Court has held that a governmental entity's decision to non-suit its claims or the granting summary judgment on the governmental entity's claims does not impact the trial court's jurisdiction. Sharyland Water Supply Corp. v. City of Alton, 354 S. W.3d 407, 413-414 (Tex. 2011); Albert, 354 S.W.3d 368, 377 (Tex. 2011). However, the trial court retaining jurisdiction is over very little real value to parties in litigation with governmental entities, because bringing a claim by a governmental entity grants the trial court jurisdiction only creates jurisdiction to the extent of an offset. Sharyland at 413-414; Albert, at 377.

3. Waiver by Estoppel.

The San Antonio Court of Appeals has held that sovereign immunity cannot be waived by promissory estoppel. In Maverick County Water and Improvement Dist. v. Reyes, 2003 WL 22900914 (Tex. App.—San Antonio, Dec. 10, 2003, no pet.), the plaintiff, Ms. Reyes, suffered damages after a canal broke and flooded her property. After the flood, the president of the board of Maverick County Water and Improvement District (the "District") allegedly admitted liability for Reyes' damages and promised to compensate her.

Later, the District denied Reyes' claim in a letter. Reyes then brought suit against the District claiming breach of contract, promissory estoppel, inverse condemnation and nuisance. The appeals court agreed with the District that sovereign immunity protected it against all of Reyes' claims. With regard to the promissory estoppel claim, the court held that the doctrine of promissory estoppel does not apply against a governmental unit when it would impair the exercise of its public or governmental functions. Because Reyes' claim arose out of the District's distribution of its water for irrigation and electricity purposes, the application of promissory estoppel would impair the exercise of the District's governmental function. Id. at *2.

This argument—to the extent it would work against a City carrying out a governmental function—is precluded in suits against the State, because estoppel does not apply in suits where the State is a defendant. State v. Durham, 800 S.W.2d 63, 67 (Tex. 1993). Moreover the Supreme Court appears to have rejected the argument that the actions of a governmental entity can create an equitable waiver of immunity. Sharyland Water Supply Corp., 354 S. W.3d 407, 414.

However, the Texas Supreme Court has suggested that under certain circumstances it would find a waiver of immunity by estoppels where the governmental entities actions make it inequitable for a governmental entity to assert immunity. See Federal Sign, 951 S.W.2d at 412 (Hecht, J. concurring). Justice Hecht's concurring opinion in Federal Sign clearly indicated that under some circumstances a governmental entity behavior which induced the plaintiff to perform the contract would estop the governmental entity that received the benefits of the contract from asserting immunity from suit. Id. For many years litigants continued to bring "waiver by conduct" suits against governmental entities based on Hecht's concurring opinion in Federal Sign and his subsequent opinions. See IT-Davy, 74 S.W.3d at 863 (Enoch, J., dissenting). Even when the Texas Supreme Court stated that it was rejecting the notion that a governmental entity can waive immunity from suit by conduct, the First Court of Appeals found that Texas Southern University had fraudulently induced performance and therefore had waived its immunity from suit by its conduct. . Tex. S. Univ. v. State Street Bank & Trust Co., 212 S.W.3d 893 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) The First Court's reasoning in State Street was clearly predicated upon the notion that because Texas Southern University "lured" performance and then disclaimed the contract, it was stopped by its behavior from asserting immunity. Id. Compare to Tex. Parks & Wildlife Dep't v E. E. Lowrey Realty, Ltd., 235 S.W.3d 692, 695 n.2 (Tex. 2007) (stating that "Lowrey could only pursue a breach of contract claim against the State if he first obtained legislative consent . . .");

More recently, the Texas Supreme Court has acknowledged that it had found waiver by estoppel in cases other than breach of contract cases. "In [State v.] Biggar, 897 S.W.2d 11, 11-12, 14 (Tex. 1994)] we recognized an inverse condemnation claim [and found a waiver of sovereign immunity] in part because of the State's bad faith in using its power to gain an unfair economic advantage over the property owner." Hearts Bluff Game Ranch, Inc., v. State, 381 S.W.3d at 484. Thus the Supreme Court continues to acknowledge that under certain circumstances it will find a waiver of immunity by estoppels where a governmental entity would otherwise reap the benefits of unjust behavior. See id.

D. Waiver of Immunity from Suit in Breach of Contract Cases.

1. The Courts Struggle With Whether a Governmental Entity Can Waive Immunity From Suit by Their Conduct.

Starting in 1997, the Texas courts began wrestling with waiver of immunity from suit in breach of contract cases. The courts struggled to determine if and when a governmental entity could waive immunity from suit by its conduct and whether statutory references to "sue and be sued" or "impleaded and be impleaded" were statutory waivers of immunity from suit.

This long strange journey began with the Texas Supreme Court's long-awaited opinion in Federal Sign. In Federal Sign, the Texas Supreme Court restated the well-established rule of law that when the State, or one of its political subdivisions, enters into a contract with a private entity, it waives its immunity from *liability* with respect to any breach of contract claim. Federal Sign v. Texas Southern University, 951 S.W.2d 401, 408-09. The Federal Sign court clarified, however, that the mere act of entering into a contract *does not* waive its immunity from *suit*. While acknowledging that sovereign immunity was a creature of common law and not statute, the court reiterated that waivers of sovereign immunity are the sole province of the legislature. See id. at 409.

The majority opinion then went out of its way to emphasize that this opinion was limited to the question of whether the mere act of signing a contract waives a governmental entity's immunity from suit:

> We hasten to observe that neither this case nor the ones on which it relies should be read too broadly. We do not attempt to decide this issue in any other circumstances other than the one before us today. There may be

> other circumstances where the State may waive its immunity by conduct other than simply executing a contract so that it is not always immune from suit when it contracts.

Id. at 408 n.1 (emphasis added).

Speculation regarding whether the court was willing to consider the argument that immunity from suit can be waived by a governmental body's actions was further fueled by Justice Hecht's concurring opinion, an opinion that was joined by three other justices. See id. at 412 (Hecht, J., concurring).

The concurring opinion suggested that at least three of the court's current justices were willing to find that a governmental entity's actions in a contractual setting may constitute a waiver of immunity from suit. See id. at 412-13 (Hecht, J., concurring). Justice Hecht asked,

> Would the result be different if Federal Sign had already installed the scoreboards and TSU refused to pay the agreed price? Or if TSU had accepted the scoreboards, acknowledged that Federal Sign had fully complied with the contract, but refused to pay the agreed price? Or if TSU refused to pay in order to force Federal Sign to make a concession on another contract?

Id. at 412 (Hecht, J. concurring).

He then stated, "We do not attempt to decide such hypotheticals today, but they do suggest that the State may waive immunity by conduct other than simply executing a contract, so that it is not always immune from contract suits." Id. at 412-13 (Hecht, J. concurring). The concurring opinion went further by pointing out that the holding is strictly limited to the facts of Federal Sign. Id. at 413 (Hecht, J., concurring). Justice Hecht stated, "In short, today's decision does not hold that the State is always immune from suit for breach of contract absent legislative consent; it holds only that the mere execution of a contract for goods and services without more does not waive immunity from suit." Id. (Hecht, J., concurring). He further noted that "the Court's opinion is limited, despite some occasional broad language." Id. at 412 (Hecht, J., concurring).

After Federal Sign, it appeared that a waiver of immunity from suit could be established in one of three ways: (1) a specific legislative grant of permission to sue in a specific case; (2) a statute, including enabling legislation that establishes a waiver of immunity from suit; or (3) conduct beyond the mere execution of the contract that constitutes a waiver of immunity from suit. Id.; see also Aer-Aerotron, at 690-91; Loyd, 956 S.W.2d at 122-23; Holder, 954 S.W.2d at 804.

Several courts of appeal quickly took up Federal Sign's invitation to decide the issue. The Austin, Houston, and San Antonio courts have each considered "waiver by conduct" claims in the aftermath of the Supreme Court's opinion in Federal Sign. See Tsumi, Inc. v. Tex. Parks & Wildlife Dep't, 23 S.W.3d 58, 61 (Tex. App.—Austin 1999, pet. denied); Aer-Aerotron, 997 S.W.2d at 690-91; Tex. State Univ. v. Araserve Campus Dining Servs., Inc., 981 S.W.2d 929, 930-31 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); Alamo Community College Dist. v. Obayashi Corp., 980 S.W.2d 745, 747-49 (Tex. App.—San Antonio 1998, pet. denied). The courts of appeal have consistently held that the issue of waiver by conduct must be determined on a case-by-case basis, with the central inquiries being (1) whether there has been complete performance by the private entity and (2) whether the governmental entity has received and accepted the benefit of such performance. When these inquires have been answered in the affirmative, the courts of appeal have held that the conduct of the governmental entity waived the entity's immunity from suit.

Conversely, in Tsumi, the Austin Court of Appeals found no waiver by conduct when Tsumi failed to allege or establish either (1) its complete performance and the department's refusal to pay the agreed price, or (2) the department's acceptance of goods and services, acknowledgment of full performance by Tsumi, and refusal to pay the agreed upon price. Tsumi, 23 S.W.3d at 63-64. It should also be noted that Tsumi's claims were based on an alleged oral agreement between the parties. See id. at 64. The court mentioned, however, that the question whether an oral contract with the State was legally enforceable was not before the court. See id.

Initially, it appeared that Federal Sign and its progeny were to have a broad and far ranging effect on governmental liability in contract cases. However, the Supreme Court's opinion in General Servs. Comm'n v. Little-Tex Insulation Co, 39 S.W.3d 591 (Tex. 2001) appeared to have rejected the notion that the State or its agencies can waive immunity from suit by accepting full performance of a contract. Although the court recognized that it might have suggested otherwise in previous decisions, the court explained that, regardless of any prior judicial suggestions, circumstances had changed that warranted a different result. See id . at 595.

In 2007 the First Court of Appeals again held that immunity from suit for contract can be waived by the State's conduct. Tex. S. Univ. v. State Street Bank & Trust Co., 212 S.W.3d 893 (Tex. App.— Houston [1st Dist.] 2007, pet. denied). However, the Amarillo

Court of appeals refused to follow the First Court of Appeals holding that immunity can be waived by conduct. Leach v. Tex. Tech Univ., 335 S.W.3d 386, 400 (Tex.App.—Amarillo 2011, writ pending). The Supreme Court appears to have ended any debate about waiver by conduct holding that the actions of a governmental entity can create an equitable waiver of immunity. Sharyland Water Supply Corp., 354 S. W.3d 407, 414.

2. Passage of Article 2260: "It Seems Fate (or the Texas Legislature) Takes a Hand."

After Federal Sign, the Legislature enacted a dispute-resolution procedure to resolve certain breach of contract cases against the State." General Servs. Comm'n, 39 S.W. 3d at 595-96 (referring to the 1999 Legislative enactment of Chapter 2260 of the Texas Government Code). The administrative scheme of Chapter 2260 of the Texas Government Code "retains sovereign immunity but provides an administrative process to resolve those claims which applies to all written contracts." In deference to the established rule of law that only the Legislature may waive sovereign immunity, the court held that, absent special statutory provisions to the contrary, "a party may not pursue a breach-of-contract claim against the State without first participating in Chapter 2260's administrative process." Id.. Thus, a plaintiff in a breach of contract claim against a "unit of state government," as defined by Chapter 2260, cannot rely upon the governmental unit's receipt of benefits of a contract to establish waiver of immunity from suit." Id.; see TEX. GOV'T CODE § 2260.001(4) (West 2000).

a. Application of Chapter 2260.

(1) To what entities and what contracts does 2260 apply?

Following the Supreme Court's opinions on waiver of immunity by conduct, the Legislature passed Chapter 2260 of the Government Code. But this statute did not resolve the uncertainty regarding the circumstances under which governmental entities could be sued for breach of contract.

Chapter 2260 applies only to entities it defines as a unit of state government. Id. Chapter 2260 states,

> "Unit of state government" means the state or any agency, department, commission, bureau, board, office, council, court, or other entity that is in any branch of state government and that is created by constitution or statute of this state, including a university system or institution of higher education.

Id. Chapter 2260 specifically excludes from counties, municipalities, courts of a county or municipality, special purpose districts, and other political subdivisions of Texas. Id. See Abilene Housing Authority v. Gene Duke Builders, Inc., 226 S.W.3d 415 (Tex. 2007). Thus, local governments and special purpose districts may be found liable in contract under applicable provisions of the Local Government Code or based upon having waived immunity from suit by accepting the benefits of a contract. See Federal Sign, 951 S.W.2d at 405-06.

As initially enacted, chapter 2260 applied to all contracts entered into by the states, their agencies, and other "units of state government," as that phrase is defined in the act. See Smith v. Lutz, 149 S.W.3d 752 (Tex. App.–Austin 2004, no pet. h.) (not released for publication). However, the Legislature amended chapter 2260 to specify that the contract resolution process does not apply to contracts "executed and awarded on or before August 30, 1999." TEX. GOV'T CODE ANN. § 2260.002.

Chapter 2260 applies to all written contracts for the sale of goods, services, or construction. TEX. GOV'T CODE ANN. § 2260.001(a)(1). See Univ. of Tex. Med. Branch at Galveston v. Harrison, 2003 WL 21803314 (Tex. App.–Houston [14th Dist.] Aug 7, 2003, pet. denied). The Houston Court of Appeals appeared to hold that plaintiffs could not pursue a claim under chapter 2260 because their contract, which involved releasing relatives' bodies to the UT Medical Branch for use in medical research, was not for the sale of goods, services, or construction. Id.

It should also be noted that chapter 2260 requires each contract executed by a unit of state government to include a provision "stating that the dispute resolution process used by the unit of state government under this chapter must be used to attempt to resolve a dispute arising under the contract." TEX. GOV'T CODE ANN. § 2260.004(a) (Vernon 2000). In General Services Comm'n v. Little-Tex, 39 S.W.3d 591 (Tex. 2001), no such provision was contained in the subject contract because the statute had not been passed at the time the contract was executed. In finding that the dispute was governed by chapter 2260, however, the court appeared either to ignore the requirements of section 2260.004, or the requirements of that section were never brought to its attention. See Little-Tex, 39 S.W.3d 591. To date, there are no cases addressing what, if any, relief is available to a contractor whose contract either is not covered by the scope of 2260 or does not contain the disclaimer regarding the resolution of claims as required by section 2260.004(a). See also Smith v. Lutz, 149 S.W.3d 752 (Tex. App.–Austin 2004, no pet. h.) (not released for publication)(a contractor who

cannot pursue relief under chapter 2260 has no legal redress for the state's breach of contract).

(2) Relief from and compliance with 2260[2]

To pursue a claim under chapter 2260, the plaintiff must meet all of the requirements of that chapter, including giving the state notice of a breach of contract no later than 180 days after the date of the event giving rise to the claim. TEX. GOV'T CODE ANN. § 2260.51; Hawkins v. Community Health Choice, Inc., 127 S.W.3d 322 (Tex. App.–Austin 2004, no pet. h). Timely notice is a prerequisite to pursuing a claim under 2260. Id.; State v. Kreider, 44 S.W.3d 258, 264 (Tex. App.–Fort Worth 2001, pet. denied).

Contractors covered by 2260 must pursue relief under that chapter before seeking any other type or form of relief. Tex. Dep't of Transp. v. Jones Brothers, 92 S.W.3d 477, 484 (Tex. 2002). A contractor cannot obtain legislative permission to sue until it has completed the administrative process set out in chapter 2260. Id. For a period of time there was a question whether the contractor must pursue relief under 2260 if the State or its agency has filed suit against the contractor. See State v. Fid. & Deposit Co. of Maryland, 223 S.W.3d 309, 310 (Tex. 2007). The Supreme Court consistently held that filing suit waives an entity's immunity from suit. Pelzel, 77 S.W.2d at 250; City of Sherman v. Shobe, 58 S.W. 949 (1900). In 2005 the Legislature ended this uncertainty when it amended chapter 2260 to allow contractors sued by a state agency to pursue counterclaims in court. TEX. GOV'T CODE § 2260.005.

Just as a plaintiff cannot seek to avoid immunity from suit by attempting to transform a breach of contract claim into an *ultra vires* suit against a state official, a contractor cannot avoid the requirements and limitations of chapter 2260 by alleging that a breach of contract claim is really a tort claim. The plaintiffs in Univ. of Tex. Med. Branch at Galveston v. Harrison, 2003 WL 21803314 (Tex. App.–Houston [14th Dist.] 2003, pet. denied) brought claims against UTMB alleging negligence, breach of contract, fraud and intentional infliction of emotional distress. Plaintiffs alleged that, after they donated bodies of family members for medical research, UTMB sold body parts to private companies for profit and failed to ensure that the ashes returned to the families following cremation were those, and only those, of each deceased family member. The plaintiffs contended that UTMB's actions violated provisions in their contractual arrangements with UTMB to donate the family members' bodies. UTMB appealed after the trial court denied UTMB's plea to the jurisdiction.

The Fourteenth Court of Appeals reversed the trial court, finding no waiver of immunity. The Court of Appeals held that chapter 2260 does not apply to a plaintiff's personal injury claims. Id. at *2. The court went on to note that UTMB was alleged to have breached no tort duty independent from its contractual duties. The court then explained, "because UTMB is alleged to have breached no tort duty that is independent from its contractual duties . . . [plaintiffs'] claims . . . sound in contract rather than tort, and are thereby subject to the requirement for consent . . . ." Id. at *3. See also Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 823 S.W.2d 591, 597 (Tex. 1992) (as a general rule, the failure to perform the terms of a contract is a breach of contract, not a tort).

Interestingly, chapter 2260 provides limited relief for contract claims only to the extent that the administrative law judge finds the contractor's damages are less than $250,000. Chapter 2260 provides that an administrative law judge may conduct a hearing and issue a written decision based on the evidence presented. TEX. GOV'T CODE ANN. § 2260.104 (Vernon 2000). The act goes on to provide that the state governmental entity shall pay a contractor's claim if the administrative law judge finds that the contractor's claim is valid under Texas law **and** "the total amount of damages, after taking into account any counterclaim, is less than $250,000.00." TEX. GOV'T CODE ANN. § 2260.105 (Vernon 2000). However, if the administrative law judge determines that a contractor's damages are $250,000 or more, then the administrative law judge may recommend that the Legislature:

> (1) appropriate money to pay the claim or part of the claim if the administrative law judge finds, by a preponderance of the evidence, that under the laws of this state the claim or part of the claim is valid; or
> (2) not appropriate money to pay the claim and that consent to suit under Chapter 107, Civil Practice and Remedies Code, be denied.

TEX. GOV'T CODE ANN. § 2260(b) (Vernon 2000). Accordingly, in the event the damages sustained are more than $250,000, then the only relief

[2] The Transportation Code contains a provision similar to Chapter 2260. Chapter 223 of the Transportation Code provides an administrative resolution process for disputes arising from contracts related to "highway projects." TEX. TRANSP. CODE Ch. 223. A party cannot pursue claims against TxDOT without first exhausting the administrative remedies provided in chapter 223. TEX. TRANSP. CODE Ch. 223, Section 201.112. See State v. Fidelity and Deposit Co., of Maryland, 223 S.W.3d 309, 310 (Tex. 2007).

that can be obtained under chapter 2260 is an administrative law judge' s recommendation that the Legislature pay the claim. In that case the contractor is left to lobby the Legislature to pay its claim.

Section 2260.102 further provides that, if the contractor is not satisfied with the results of negotiations of his dispute with the governmental unit, he may file, with the governmental unit, a request for a State Office of Administrative Hearings ("SOAH"). TEX. GOV'T CODE § 2260.102(a). Once the governmental unit receives the contractor's request for a SOAH hearing, it is obligated, as a matter of law, to refer the matter to SOAH. Hawkins v. Community Health Choice, Inc, 127 S.W.3d 322 (Tex. App.–Austin 2004, no pet. h.). If the agency fails to refer the case to SOAH, a writ of mandamus will lie to compel the referral. Id. The agency cannot justify its failure to make the referral on the contention that the contractor failed to fulfill a procedural prerequisite to pursuing a claim under Chapter 2260. Id.

(3) Suits against the State and State agencies which pre-date the effective date of 2260; does waiver by conduct live on?

The Austin Court of Appeals has held that there is no remedy for the state's breach of contracts that predate the effective date of chapter 2260. Smith v. Lutz, 149 S.W.3d 752 (Tex. App.–Austin 2004, no pet. h.) (not released for publication). The Legislature amended chapter 2260 to specify that the contract resolution process does not apply to contracts "executed and awarded on or before August 30, 1999." TEX. GOV'T CODE ANN § 2260.002. Dr. Smith entered into his contract with the University of Texas before August 30, 1999. As a result, he could not seek relief under chapter 2260. Thus he was left to pursue claims under Federal Sign and its progeny. This in turn raised the question of whether Federal Sign's allusions to waiver by conduct would find a willing reception at the Supreme Court.

In addressing this issue, the Austin Court concluded that it was obligated to find Dr. Smith had no remedy for the University 's alleged breach of contract because that result was dictated by the Texas Supreme Court's opinion in Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849 (Tex. 2002).

In fact, in the Texas Supreme Court's opinion in IT-Davy four of the Supreme Court justices that joined in the majority opinion in IT-Davy acknowledged a continued willingness to find a waiver by conduct under the right circumstances. IT-Davy, at 860-61 (Hecht, J., concurring). Since the passage of chapter 2260, the Texas Supreme Court has continued to discuss and, indeed, struggle with the notion of whether and under what circumstances a governmental entity can waive immunity from suit by its conduct. The Supreme Court has referred to "waiver by conduct" as equitable waiver of immunity from suit. See Catalina Dev. Inc. v. County of El Paso, 121 S. W.3d 704 (Tex. 2003). To appreciate this developing area of the law, it is helpful to view the cases chronologically.

The majority decision in IT-Davy appeared to foreclose any possibility that governmental entities could waive immunity from suit by their conduct. IT-Davy brought suit alleging it was owed money for additional work it did under a contract with the TNRCC's predecessor, the Texas Water Commission, for cleaning up a hazardous waste site in Houston. IT-Davy, 75 S.W.3d at 851. The TNRCC agreed to pay IT-Davy an additional $700,000 over the contract amount, but IT-Davy claimed that it was owed an additional $6.7 million.

Former Justice Baker wrote the majority opinion. He rejected IT-Davy's argument that the TNRCC had waived its immunity from suit either by entering into the contract in question or by its conduct. IT-Davy's contract contained a provision stating that all claims or disputes would be decided by arbitration or in court. Id. at 857. IT-Davy asserted that including this provision in the contract waived immunity because the TNRCC had agreed to allow disputes to be resolved in litigation. Justice Baker rejected this argument pointing out that, "Texas law is clear. Only the Legislature can waive sovereign immunity from suit in a breach-of-contract claim." Id. at 858. Neither the agency nor any officer or agent of the agency, could waive immunity from suit because only the Legislature has that authority.

With regard to waiver by conduct, Justice Baker again pointed out that the Texas Supreme Court had, for more than 150 years, held steadfastly to the rule that "it is the Legislature's sole providence to waive or abrogate sovereign immunity." Id. at 857. Baker noted that creating a waiver-by-conduct exception would force the state to expend resources to litigate the waiver-by-conduct issue and would defeat many of underlying policy reasons for sovereign immunity and immunity from suit. Id. Thus, Baker suggested that waiver by conduct would defeat the underlying policy rationale for sovereign immunity, namely protecting the public treasury and allowing governmental entities to respond to change in circumstances, while being able to terminate contracts without risking liability. See id. at 854, 857. Baker concluded his discussion of waiver by conduct by stating that, "[w]e reject IT-Davy's argument that we should fashion such a waiver-by-conduct exception in a breach-of-contract suit against the State." Id. at 857. This statement

suggested that the Supreme Court would no longer consider arguments that sovereign immunity or immunity from suit had been waived by conduct of the governmental entity.

In his concurring opinion, Justice Hecht, and three other justices, stated that they were not foreclosing the possibility of finding that a governmental entity waived immunity from suit by its conduct. As explained in the opening paragraphs of the concurring opinion:

> I cannot join in the broad language of Justice Baker's opinion that indicates that the State is always immune from suit for breach of contract absent legislative consent.
>
> ...
>
> In his opinion for the Court in Federal Sign ... Justice Baker noted that there may be "circumstances where the State may waive its immunity by conduct other than by simply executing a contract so that it is not always immune from suit when it contracts." In his opinion today he appears to have abandoned this view stating that "allowing ... governmental entities to waive immunity by conduct that includes accepting benefits under a contract would be fundamentally inconsistent with our established jurisprudence." He does not explain this about-face. **The Court was correct in Federal Sign**.

Id. at 860-61 (Hecht, J., concurring) (emphasis added).

Justice Hecht agreed with Justice Baker's policy analysis that governmental units must offer flexibility to subsequent administrations to terminate contracts where they no longer serve the people's best interests. Id. at 861. However, Enoch said that sovereign immunity should not be a license for a governmental entity to "chisel" a contractor out of full payment just because it can get away with doing so by asserting the defense of sovereign immunity. Id.

While this concurring opinion was not as expansive as Hecht's concurring opinion in Federal Sign, it has great significance because three other judges who are still on the court joined in the opinion. In fact, none of the four judges who joined in the majority opinion, and did not join in Hecht's concurring opinion, remain on the court. Therefore, Justice Hecht's concurring opinion indicates that at least four judges on the court are willing to find that, under some circumstances, a governmental entity may waive its immunity from suit.

The Hecht opinion is also important because it points to other circumstances where a governmental entity, by its conduct, will or may waive its immunity from suit. Hecht notes that, "[i]t has long been held that the State can waive immunity by filing suit." Id. See also Pelzel, 77 S.W.3d at 250. Hecht further noted that "[t]here may be [other circumstances], such as debt obligations" where a governmental entity by its actions waives immunity from suit. IT-Davy, 74 S.W.3d at 861 (Hecht, J., concurring).

Once again, Justice Enoch filed a dissenting opinion. Justice Enoch began by arguing that, because sovereign immunity is a doctrine created at common law, the court should be free to determine when immunity has been waived. Id. at 863 (Enoch, J., dissenting). Justice Enoch repeated his standing argument that immunity from suit should be waived whenever a governmental entity enters into a contract. Id. at 863-64. Enoch argues that whether a contractor gets paid for its work for the State should not depend upon its ability to lobby the Legislature to grant permission to sue. Id. at 863. Finally, Enoch criticized Justice Hecht for continuing to hold out hope to contracting parties that under some set of circumstances he and other judges would find a waiver of immunity by conduct. Id. He complained that this language only encouraged contractors to spend money bringing suit to be told that the facts of their case were not egregious enough to warrant a finding of waiver by conduct. Id.

Less than a month later, the Texas Supreme Court issued another immunity opinion in a breach-of-contract case in Travis County v. Pelzel & Associates, Inc., 77 S.W.3d 246 (Tex. 2002). Pelzel was distinguishable from IT-Davy and other decisions because the defendant was a local governmental entity, as opposed to a state agency. Id. Accordingly, the contractors could not pursue an administrative hearing on the breach-of-contract claim. Justice Hankenson wrote the opinion for the court rejecting Pelzel's argument that Travis County had waived its immunity from suit. Justice Hankenson's opinion holds that Travis County's withholding payments to Pelzel, pursuant to a liquidated damages provision of the contract, did not waive immunity from suit. Pelzel, 77 S.W.3d at 252. "When a governmental unit adjusts a contract price according to the contract's express terms, it does not, by its conduct, waive immunity from suit, even if the propriety of that adjustment is disputed." Id.

The significance of the Pelzel decision went beyond the holding that Travis County's withholding of payments due to a contractor did not constitute waiver by conduct. Justice Hankenson's opinion, joined by seven other judges, is significant because it did not reject completely the idea that a governmental entity can waive immunity from suit by conduct. Because the opinion discusses the possibility of waiver

by conduct, it indicates that the IT-Davy decision cannot be read as foreclosing any possibility of a governmental entity waiving immunity from suit by conduct.

In May 2003, the Supreme Court issued its opinion in Catalina Development. Catalina Development had been the successful bidder to buy certain real property that El Paso County was offering for sale. El Paso County had advertised for bids to buy the land and subsequently had accepted Catalina's bid. The county had deposited the buyer's earnest money check and had sent the buyer an earnest money contract to sign. While the matter was up before the El Paso Commissioners Court for final approval at different times, the Commissioners Court never took final action approving the sale. Eventually, three new members of the commissioners court came into office and the court voted to rescind its offer to sell the real property. The Supreme Court found that advertising to sell the property, accepting a bid, accepting a deposit of earnest money, and sending an earnest money contract to a potential buyer did not constitute conduct resulting in a waiver of immunity from suit.

Because the court did not completely reject the idea that a governmental entity could waive immunity from suit by conduct, it indicates that the court is willing to consider certain circumstances where immunity is lost through the actions of the governmental entity. "Although in Federal Sign we suggested that some circumstances might warrant recognizing a waiver by conduct, the equitable basis for such a waiver simply does not exist under this set of facts." Catalina Development, Inc. v. City of El Paso, 121 S. W.3d 704, 706.

Thus, the court continues to take the position that waiver by conduct must be analyzed on a case-by-case basis. The result is that the court has yet to find a circumstance under which immunity from suit is waived by conduct, but it is willing to acknowledge that such a possibility exists. Contractors, especially those contractors that cannot pursue administrative claims under chapter 2260 of the Government Code, are forced to decide whether it is worth the expense and effort to bring suit for breach of contract against a governmental entity and litigate through the district and appellate courts whether the governmental entity waived immunity through its conduct.

b. Suits for Breach of Contract Against Governmental Entities That Are Not State Agencies.

(1) Suits for breach of contract against Counties.

In 2003, the Legislature chose to waive immunity from suit for counties in certain limited instances. The Legislature appears to have enacted section 262.007 of the Local Government Code in response to the Pelzel opinion. Section 262.007 provides that:

> A county that is a party to a written contract for engineering, architectural, or construction services or for goods related to engineering, architectural, or construction services may be sued, pled or be impleaded or defend or be defended on a claim arising under the contract.

TEX. LOC. GOV'T CODE ANN. § 262.007(a). A party bringing suit against a county for breach of an engineering, architectural, or construction services contract may recover the balance owed under the contract, the amount owed for change orders or additional work, reasonable attorney's fees, and interest as allowed by law. Id. A party bringing such a suit is expressly prohibited from recovering consequential damages, exemplary damages, or damages for unabsorbed home office overhead. Id.

While section 262.007 gives relief to contractors who face the Pelzel problem, it only creates greater complexity in evaluating whether a governmental entity can be sued for breach of contract. Counties can now be sued for breach of contract if the contract relates to engineering, architectural, or construction services. Id. In all other matters, however, a contractor bringing suit against a county must establish a waiver of immunity by specific act of the Legislature, or contend that there was a waiver by conduct.

(2) Suits for breach of contract against Cities, School Districts, Junior College Districts and Special Districts.

In 2005, the Legislature passed HB 2039 which amended Chapter 271 of the Local Government Code and authorized suits against cities, school districts and junior college districts and special-purpose districts. Chapter 271 waives immunity for breach of contract against political subdivisions of the state, other than counties and units of state government. It expressly waives immunity from suit for municipalities, school districts, junior college districts and special-purpose districts. Governmental self insurance or group risk pools are local governmental entities and can be sued for breach of contract under Chapter 271. Abilene Housing Authority, 226 S.W.3d at 416-17; Ben Bolt-Palito Blanco Consol. I.S.D., 212 S.W.3d 328-29. It authorizes suits and arbitration proceedings against the covered entities. Unlike chapter 262 of the Local Government Code which waives suit only for certain contracts entered into by counties, HB 2039 covers written contracts for goods or services that are properly executed by the entity.

While on its face Section 271.152 appears to apply to any agreement where a party contracts to provide any goods or services to a local governmental entity, Section 271.152 has been interpreted to only apply to those contracts where a local government receives more than "an indirect, attenuated" benefit. See Kirby Lake Dev. Ltd. v. Clear Lake City Water Auth., 320 S.W.3d 829, 839 (Tex. 2010) ("[T]he statute does not apply to contracts in which the benefit that the local governmental entity would receive is an indirect, attenuated benefit."); Brazos River Auth. v. Brazos Elec. Power Co-op., 2010 WL 2523438, at *3-4 (Tex. App.—Waco, June 23, 2010, pet. filed) (lease agreement and electricity purchase agreement held no subject to Section 271.152's wavier of immunity); Berkman v. City of Keene, 311 S.W.3d 523, 525-27 (Tex. App.—Waco 2009, no pet.) (city's contract to furnish water and sewer services was not a contract for the provision of goods and services to city under waiver-of-immunity statute); East Houston Estate Apartments, LLC v. City of Houston, 294 S.W.3d 723, 736 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (loan agreement city entered into with former private owner of apartment complex to provide funding to former owner to rehabilitate complex to provide low-income housing was not a contract for 'services" to city and, thus, statutory wavier of governmental immunity from suit for breach of contract for providing goods or services to local government entity did not apply to waive city's immunity with respect to former owner's breach of contract claim against it.)

Section 271.152 is a limited waiver of immunity and the operative terms of any agreement must be reviewed to determine if the contract in question falls within the limited waiver of immunity. As noted in East Houston Estate Apartments:

> If every contract that confers some attenuated benefit on a governmental entity constitutes a contract for a 'service,' the limitation of contracts covered by section 271.152 to 'contract for goods or services provided to the entity' loses all meaning. Nothing in the statute or in its legislative history supports such an interpretation. Had the legislature intended to waive immunity from liability for every contract participated in by the State, it could have done so. We must interpret the limitation as having some meaning.

Id., at 736.

Thus, in every suit under Chapter 271, the court must determine whether the contract at issue falls within the limited waiver under Section 271.152. Determining if the contract falls within the statute is a question of law for the court. MCI Telecomms. Corp. v. Tex. Utils. Elec. Co., 995 S.W.2d 647, 650 (Tex. 1999).

In City of Houston v. Williams, the Texas Supreme Court addressed the requirement of Chapter 271 and held that many common law rules regarding contract claims apply to determining whether the plaintiff has established a waiver of immunity from suit and/or liability. The Williams plaintiffs were former Houston firefighters alleging they were underpaid for amounts due them at the termination of their employment with the City. The plaintiffs brought suit against the City for breach of contract pursuant to Chapter 271 of the Local Government Code. While the plaintiffs had not executed contracts directly with the City of Houston, they contended that a contract was created by the City's ordinances, agreements between the City and their union, and/or Chapter 143 of the Local Government Code. City of Houston v. Williams, 353 S.W.3d 128, 131 (Tex. 2011).

The Supreme Court noted that Chapter 271 applies to contracts "subject to this subchapter" as defined by Section 271.151(2) of the Local Government Code. City of Houston v. Williams, 353 S.W.3d 128, 134-45 (Tex. 2011). To be subject to a claim under Chapter 271 and create a waiver of immunity from suit, a contract must: (1) be in writing; (2) state the essential terms of the agreement; (3) provide for delivery of goods or services; (4) to the local governmental entity; and (5) be executed on behalf of the local governmental entity. Id. at 135. The Supreme Court first noted that Chapter 271 does not require contracts to be bilateral and that unilateral contracts can be subject to its waiver of immunity. Id. at 135.

> [A] unilateral contract is created when a promissor promises a benefit if a promissee performs . . .. The requirement of mutuality is not met by the exchange of promises; rather, the valuable consideration contemplated in exchange for the promise is something other than a promise, i.e., performance. A unilateral contract becomes enforceable when the promissee performs. . . . A unilateral contract occurs when there is only one promise and the other accepts by actual performance rather than by mutual promises.

Id. (internal quotations, citations and ellipses omitted). From this basis, the Court then looked at whether the City's ordinances, agreements with the union, and/or Chapter 143 of the Local Government Code created a contract subject to Chapter 271.

The Court first considered whether the City's ordinances created a unilateral contract. The Court explained that a municipality utilizes ordinances as means of conducting its activities and when ordinances evidence an intent to contract the Texas Supreme Court has construed the ordinance as a contract. Id. at 137. The Court also noted that a contract can be created and evidenced by multiple related documents. Id. at 137. Additionally, the multiple documents need not contain all of the contractual terms, instead only need to provide the essential terms to the agreement. Id. Particular words are not required to create a contract and the fact that an ordinance or other document does not use the term "contract" does not prevent it from creating a contract. Id. The Court found that the City's ordinances reflected the City's intention to enter into a unilateral contract through their extensive use of the word "shall." Id. at 138. The Court pointed out that the referenced "shall" established a mandatory obligation on the City's behalf once the firefighters took actions which constituted performance. Id. The Court also found that because the ordinances referenced firefighters they were making an offer to a discreet group of persons to the ordinances identified as eligible employees within the fire department. Id.

The Court next pointed out that the ordinances promised the firefighters specific compensation in the form of overtime and termination pay. Id. The City had defined in detail the duties and responsibilities of firefighters generally and of the three particular divisions of its fire department, namely, fire prevention, fire suppression, and fire alarm inspection and regulation. Id. As explained by the Supreme Court the promises found in the City's ordinances, "required acceptance by performance . . .. The firefighters each performed such services for various periods of time, rendering the City's promises binding . . .." Id. The Court pointed out that the ordinances did provide the essential terms for an employment agreement because they set out the compensation to be received as well as the duties and responsibilities to be performed. Id. at 139. See LTTS Charter School, Inc. v. C2 Construction, Inc., 358 S.W.3d 725, 734 (Tex. App.—Dallas 2012, pet. pending)(essential terms of non-employment contracts requires only the time for performance, the price to be paid, and the services to be rendered be specified). The firefighters provided services to the City and that the ordinances were executed by the City, thus the remaining requirements of Chapters 271 were met. City of Houston v. Williams, 353 S.W.3d at 139. But see, LTTS Charter School, Inc. v. C2 Construction, Inc., 358 S.W.3d 725, 740 (Tex. App.—Dallas 2012, pet. pending)(while open-enrollment charter school's governing board had discussed the contract it had never authorized its execution and thus Chapter 271 did not waive the charter school's immunity from suit.)

The Court rejected the City's argument that the formation of such a unilateral contract violated the provision of the Texas Constitution requiring the creation of a sinking fund in connection with incurring debt. The Court found that the City's contractual expenses created by the contract with the firefighters could be covered by current revenues and thus the unilateral contract did not violate the Texas Constitution. Id. Furthermore, the Supreme Court rejected the City's argument that the ordinances could not create a contractual claim because the ordinances stated they did not create a vested right of compensation and were subject to repeal. Id. The Supreme Court held that these statements did not disclaim the City's intent to enter into a contract and only provided that, "an employee may have a valid employment contract, promising the benefits will accrue upon performance, but those benefits will not vest until the employee actually performs. . . . At most, the disclaimer indicates that the promises contained in the Ordinances remained illusory until the Firefighters performed." Id. at 140. Lastly, the Court rejected the City and various amici concerns that its holding would transform vast numbers of city ordinances and contracts. Id. at 143.

Next, the Supreme Court turned to the firefighter's argument that Chapter 143 of the Local Government Code created a contract between the City and firefighters. The Court rejected this argument based on the requirement that the document which evidences a contract must reflect the parties' intent to be bound. Id. at 143. The Court noted that while Chapter 143 may be incorporated by reference into a contract, it cannot evidence the City's intent to contract because it was drafted and passed by the Legislature, not by the City. Id. at 143.

Next, the Supreme Court considered whether contracts between the City and the Firefighters' Union could constitute contracts within the meaning of Chapter 271. The City contended that the firefighters lacked standing to bring claims for breach of agreements between the City and the union because they were not parties to those contracts. The Supreme Court pointed out that Texas law has long recognized third parties have standing to bring suit for breach of contract where they are intended beneficiaries of the agreement. Id. at 145. The terms of the agreements (setting out wages, hours, conditions of employment, benefits, and overtime pay) were all intended for the benefit of the firefighters, not the union. Id. Thus the Court held that because the firefighters were intended beneficiaries of the agreements between the City and union, the firefighters could bring suit for breach of those agreements. Id. at 145-46. The Supreme Court

went on to find that the contracts between the City and the union met all of the other requirements of a contract covered by Chapter 271 and thus the City did not enjoy immunity from suit for claims that it breached those contracts. Id. at 149.

The provision of goods and services as a precursor or condition to the conveyance of real property is not the provision of "goods or services" for the purposes of Chapter 271. Somerset Indep. Sch. Dist. v. Casias, No. 04-07-00829, 2008 WL 1805533, at *3 (Tex. App.—San Antonio, Apr. 23, 2008, pet. denied) (not designated for publication).

In Somerset, the school district was sued for breach of an earnest money contract for the purchase of a tract of land. As a condition to closing, the school district agreed to reimburse the sellers up to $9,000 for environmental cleanup of the property. Id. at *1. If the cost of the cleanup exceeded $9,000 then the contract would terminate unless the parties amended the contract to adjust the cap on the amount expended for environmental cleanup. Id. The sellers alleged that when the cost was projected to exceed $9,000, the school district's attorney agreed to the cap increase. Id. After the sellers paid about $28,000 for the environmental cleanup, the school district terminated the contract. Id.

The sellers sued and argued that a waiver of immunity from suit had occurred under Chapter 271 because the provision of the environmental cleanup services constituted services to the school district. Id. at *3. The court of appeals noted, however, that the school district's obligations under the contract were conditioned on the cleanup and that the school district would not be liable if the contract did not close. Id. The court held that "[a]though the environmental clean-up was a condition to closing, the contract itself was for the sale of land and is not included in section 271.152's limited waiver of immunity." Id. See Brown Water Marine Serv., Inc. v. Aransas County Navigation Dist. No. 1, No. 13-07-00055-CV, 2008 WL 1822727, at *2 n.1 (Tex. App.—Corpus Christi, Apr. 24, 2008, pet. filed) (not designated for publication) (noting that lease of district property did not concern goods or services); Valley Mun. Util. Dist. No. 2 v. Rancho Viejo, Inc., No. 13-07-00545-CV, 2008 WL 384320, at *4 (Tex. App.—Corpus Christi, Feb. 14, 2008, no pet.) (not designated for publication) (holding agreement granting easement to district for sanitary sewer lift station was not for providing goods or services); City of San Antonio v. Reed S. Lehman Grain, Ltd., No. 04-04-00930-CV, 2007 WL 752197, at *3 n.2 (Tex. App.—San Antonio, Mar. 14, 2007, pet. denied) (not designated for publication) (noting dedication of sewer line easement provided interest in real estate to city, not goods or services); Bexar Metro. Water Dist. v. Educ. & Econ. Dev. Joint Venture, 220 S.W.3d 25, 32 (Tex. App.—San Antonio 2006, pet. dism'd w.o.j.) (noting that district remains immune from claims for breach of contract for sale of real estate).

At the same time, the Supreme Court has held that the definition of "goods and services" should be "liberally construed." Kirby Lake Dev., 320 S.W.3d at 839 (citing Ben Bolt, 212 S.W.3d at 327). "'[S]ervices has a rather broad and general meaning. It includes generally any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed." Id. In Ben Bolt, the court held that an insurance contract encompassed the provision of services where governmental entities that were members of the pool elected the governing board and the board's committees resolved claims disputes. Ben Bolt, 212 S.W.3d at 327. In Friendswood, the Supreme Court held that an agreement to hire third parties to build facilities as well as streets, roads and bridges constituted a contract for the provision of services. Clear Lake City Water Auth v. Friendswood Dev. Co., Ltd., 256 S.W.3d 735, 751 (Tex. App.—Houston [14th Dist.] 2008). Similarly, in Kirby Lake, the Supreme Court held that a contract for the construction, development, and lease of drinking water and sewer facilities as well as baring the risk of loss or damage to those facilities was a contract for services. Kirby Lake, 320 S.W.3d 839-40.

HB 2039 authorizes the local government to establish notice and alternative dispute resolution procedures that must be complied with before filing suit or initiating arbitration proceedings. The notice and alternative dispute resolution requirements are enforceable to the extent they do not otherwise conflict with Chapter 171.

HB 2039 specified what damages can and cannot be recovered, including attorneys' fees. The bill allows recovery of the balance due under the contract, delay damage claims, additional charges for change orders that were requested or approved by the governmental entity, and interest as allowed by law. HB 2039 prohibits the recovery of consequential damages, other than those otherwise authorized by the act. Accordingly, a contractor cannot prevail on claims for lost profits. Tooke, 197 S. W.3d 325. The act also bars claims for exemplary damages and unabsorbed home office overhead. Attorneys' fees can be recovered only if the contract specifically authorizes recovery by a prevailing party. Thus, the contract must state that a prevailing party will recover its attorneys' fees. This provision also suggests that a governmental entity prevailing in the defense of a breach of contract action can recover its fees from the contractor.

Courts look to the "nature, purpose and powers of an entity in determining if the entity is a governmental entity that will enjoy sovereign immunity." In Ben

Bolt-Palito Blanco Consol. ISD v. Tex. Political Subdivisions Prop. Cas. Self Ins. Fund, 212 S.W.3d 320 (Tex. 2006), the Texas Supreme Court had to determine whether a governmental group risk pool made up of cities, counties, school districts, special purpose districts and other political subdivisions was a political subdivision of the state that enjoyed sovereign immunity. Id. In determining whether the pool was a governmental entity, the Supreme Court considered the fact that the Texas Government Code's definition of "local government" includes combinations of political subdivisions. Id. The Court went on to note that the pool had "powers of government and [had] ... the authority to exercise such [governmental] rights, privileges, and functions...." Id. at 325. Based on these factors, the Court held that where, as with the pool, an entity's "governing statutory authority demonstrates legislative intent to grant an entity the nature, purpose and powers of an arm of the state government, that entity is a government unit unto itself." Id. at 325-26.

Governmental group risk or self-insurance pools are political subdivisions of the state that enjoy sovereign immunity. Id. Governmental group risk or self insurance pools are political subdivisions enjoying immunity in their own right and not just because they are composed of entities which have sovereign immunity. Id. at 326. The Court found that governmental self insurance or group risk pools are local governmental entities, similar to cities, and school districts. Id.

HB 2039 does not waive immunity from suit in tort cases, whether based on negligence or intentional tort. Nor does the bill waive any defenses to a breach of contract action, other than sovereign immunity. Furthermore, the bill only waives immunity from suit in state court, not federal court.

While the bill's enactment date is September 1, 2005, its effective date is retroactive. The bill's provisions waiving immunity and limiting damages apply to contracts executed prior to September 1, 2005, if sovereign immunity **has not been waived**. The bill's retroactive effect cannot be challenged by local governments because all governmental immunity is derived from the state and local governments having no vested right to retain immunity prospectively or retroactively. Tooke, 197 S.W.3d 325.. Contracts entered into prior to September 1, 2005 and for which sovereign immunity has been waived, are governed by the law in effect on the date the contract was executed. The Texas Supreme Court has held that governmental entities cannot complain about the retroactive application of statutes that waive immunity. Oncor Electric Delivery Company LLC v. Dallas Area Rapid Transit, 369 S. W.3d 845 (Tex. 2012)("the prohibition against retroactive application of laws does not apply to procedural, remedial, or jurisdictional statutes, because such statutes typically do not affect a vested right." The Court also noted that, "a governmental entity cannot complain of a retroactive waiver of immunity since all governmental immunity derives from the State and a governmental entity acquires no vested right against the State." (quoting Univ. of Tex. Sw. Med. Ctr. at Dallas v. Arancibia, 324 S.W.3d 544, 548 (Tex. 2010)).

The Dallas Court of Appeals has held that open-enrollment charter schools are subject to suit and liability under Chapter 271. LTTS Charter School, Inc. v. C2 Construction, Inc., 358 S.W.3d 725 (Tex. App.—Dallas 2012, pet. pending). The Court pointed out that because open-enrollment charter schools enjoy governmental entities, if Chapter 271 did not apply to open-enrollment charter schools, those schools would be immune from suits for breach of contract claims. Id. at 741. If open-enrollment charter schools are immune from breach of contract claims they would enjoy greater immunity than public schools. Id. at 741. The Dallas Court went on to note that courts are to presume the Legislature "intended a just and reasonable result by enacting a statute" and because it would seem illogical for lawmakers to imbue open enrollment charter schools with greater immunity than cities, counties, school districts, and other purely governmental entities. Id. at 741-42. The Dallas Court of Appeals held that open enrollment charter schools were subject to Chapter 271. Id. at 741-42.

c. *Ultra vires* suits for breach of contract.

As set forth in sections above, starting in 1999, the Texas legislature passed a series of statutes which, to a large degree, allowed contract claims to be brought against the state, state agencies, counties, municipalities, schools districts, and other governmental entities. As explained in previous sections, these statutes appeared to make the Federal Sign line of cases almost completely irrelevant. The only governmental entities that enjoy immunity from suit contract claims are counties and state agencies. Counties can only be sued for contract claims arising from written construction contracts dealing with engineering or architectural services. See Tex. Loc. Gov't Code Am. § 262.007 (a). Any person wishing to pursue a contract claim, against a state agency had to first pursue an administrative claim, and only after resolution of the administrative claim can they petition the Texas legislature for permission to bring suit in state court. Tex. Gov't Code Ann. Ch 2260. Because contractors with state agencies either do not want to pursue the administrative process, or because county contractors cannot characterize their agreement as a written contract for the provision of construction, architectural or engineering services, there continue to be some cases in which a plaintiff relies upon the

Federal Sign line of cases to argue for a waiver of immunity from suit in a contract case.

Surprisingly, the Supreme Court's decision in Heinrich appears to have opened a new door and/or revived the possibility of bringing contract claims outside of the statutory scheme of bringing contract claims established since 1999. Interestingly, the plaintiff in Heinrich did not even bring suit for breach of contract. Mrs. Heinrich's husband was a member of the El Paso Police Department. Heinrich, 284 S.W.3d at 369. Mr. Heinrich was killed in the line of duty. Id. After his death, the El Paso Firemen and Policemen Pension Fund began paying Ms. Heinrich survivor benefits equal to 100% of the monthly pension her husband had earned. Id. Almost 20 years after her husband's death, the pension board reduced her monthly payments by 1/3 when her son turned 23. That 1/3 of the pension began being paid to Heinrich's son. Id. at p.369.

When the board reduced her pension payments, Heinrich filed suit alleging that board members had violated the statute governing the operation of the pension fund. Id. Heinrich sought both declaratory and injunctive relief. Heinrich did not bring a suit for breach of contract. Id.

The defendants filed pleas to the jurisdiction asserting that governmental immunity shielded the governmental entities from liability. In evaluating whether Heinrich's claims were barred by sovereign immunity, the Supreme Court focused, in part, on a sixty–eight year old opinion. State v. Epperson, 42 S.W. 2d 228, 231 (Tex. 1931).

> In [Epperson] we held that a suit against a tax collector for recovery of money (alleged to be due under a contract and withheld unlawfully) was not barred by immunity. There, we noted that the tax collector had no discretion under the governing law to deny payment on the Epperson's contract.

Heinrich, 284 S.W.3d at 371. The Supreme Court went on to explain its earlier decision,

> [T]he rule arising out of Epperson is that, while suits for contract damages against the state are generally barred by immunity, where statute or the constitution requires that government contracts be made or performed in a certain way, leaving no more room for discretion, a suit alleging a government official's violation of the law is not barred, even though it necessarily involves a contract.

Id. at 372.

The Supreme Court went on to note that it had explained the Epperson rationale in WD Haden Co v. Dodgen, 308 S.W. 2d 838, 841 (Tex. 1950). In WD Haden, the Supreme Court stated that Epperson,

> appears to fall into the class of cases projected by United States v. Lee, 106 US 196 (1982). In that class of cases, it is held that suits for property alleged to be unlawfully or wrongfully withheld from the rightful owner by officers of the state are not suits against the sovereign itself and may be maintained without permission of the sovereign. WD Haden, 302 S.W. 2d 841.

Thus, the Heinrich court concluded that, while Epperson could not bring suit to enforce specific performance of his contract, he could compel payment through a suit seeking an injunction of mandamus compelling payments of amounts due on the contract. Heinrich, 284 S.W.3d at 371.

In other words, where statutory or constitution provisions create an entitlement to money, suits seeking to require state officials to comply with the law are not barred by immunity merely because they compel the state to pay funds to the plaintiff.

> This rule is generally consistent with the letter and spirit of our later case law. In IT–Davy, we distinguished permissible declaratory judgment suits against state officials allegedly acting without legal or statutory authority from those barred by immunity: in contrast to suits not implicating sovereign immunity, declaratory judgment suit against state officials seeking to establish a contract's validity, to enforce performance under a contract, or to impose contractual liabilities are suits against the State. That is because such suits attempt to control state action by opposing liability on the state.

Id. at 371-372 (internal quotations and citations omitted).

While the Texas Supreme Court may have intended this language to reconcile the Epperson and IT-Davy, decisions, the likely result is that Heinrich will be seen as opening a new avenue to bring breach of contract claims outside of the statutory scheme established by the Texas Legislature. Contractors will now bring suit seeking equitable relief, in the form of injunctions or mandamuses, to compel payment. These plaintiffs will argue that they are not bringing suit on the contract but are bringing suit because the refusal to

make the payments is an *ultra vires* act in violation of a statute or the Texas Constitution.

> In all likelihood, these claims will fail because it will be the rare instance where a party can find a statute or provision of the Constitution which compels payment and leaves no discretion to the official or officials on whether or not to make payment. See Id.

d. Immunity from suit in breach of settlement agreements.

The Texas Supreme Court has found one circumstance where a governmental entity waives immunity by entering into a particular type of contract. In Tex. A&M Univ.-Kingsville v. Lawson, 87 S.W.3d 518 (Tex. 2002), the Supreme Court held that immunity from suit is waived when a governmental entity enters into a settlement agreement. Id. Lawson brought suit against Texas A&M Kingsville under the Whistleblower Act. The Legislature has waived sovereign immunity from suit and liability for violations of the Whistleblower Act. Id. at 521. Texas A&M settled the suit with Lawson. The settlement provided that Texas A&M would pay Lawson $62,000 and required the university to forward any reference calls for Lawson to the director of personnel. The settlement agreement provided that the director of personnel would respond to any reference inquiries by stating that Lawson was employed as an "assistant professor," stating the amount of his annual salary, and stating that they could not provide any other information. Id. at 519.

Lawson subsequently brought suit against Texas A&M asserting they had breached the settlement agreement. Id. Lawson alleged the university responded to reference calls from potential employers differently than it had agreed to in the settlement. Id. Lawson claimed Texas A&M had told one employer he had been an "instructor" and refused to elaborate on what that meant. Id. Texas A&M filed a plea to the jurisdiction asserting the trial court lacked jurisdiction on the basis that there was no waiver of the university's immunity from suit. Id.

The Supreme Court started its analysis by pointing out that it had left to the Legislature's discretion whether to waive sovereign immunity in particular types of claims or for particular types of governmental entities. Id. at 521. The Supreme Court then noted that the Legislature had waived immunity from suit for violations of the Whistleblower Act. Id.

> Lawson was therefore entitled to sue the university for violating the [Whistleblower] statute and if he prevailed, to hold the university liable. We agree with the trial court that when a governmental entity is exposed to suit because of waiver from immunity, it cannot nullify that waiver by settling the claim with an agreement on which it cannot be sued. The government cannot recover waived immunity by settling without defeating the purpose of the waiver in the first place. Id.

The court pointed out that there were sound policy reasons for finding that Lawson could bring suit for breach of the settlement agreement. No plaintiff would settle with a governmental entity, especially if the contract was executory at the time of its signing, because the government could then breach the contract and rely upon immunity from suit to defeat any subsequent claim. Id.; see also IT-Davy, 74 S.W.3d 862 (Hecht, J. concurring) (a governmental agency should not be able to utilize sovereign immunity as a way to deny contractors amounts they were rightfully owed). Additionally, allowing a governmental entity to defeat Lawson's suit for breach of the settlement agreement would violate the intent of the Legislature in waiving immunity for the underlying claim. Lawson, 87 S.W.3d at 521-22.

There is some uncertainty regarding the scope of the holding in Lawson. One reading of Lawson is that, any time the government enters into a settlement agreement, it waives immunity from suit for any claims on that contract. This reading of Lawson, suggests that, when the government induces a party to settle the litigation, the act of entering into the settlement agreement waives immunity from suit. In other words, proponents of this view argue that a governmental entity is equitably estopped from raising immunity from suit once it has induced the party to enter into the settlement agreement.

The second reading of Lawson is far more limited. This reading suggests that the Lawson holding applies only to settlements where sovereign immunity did not apply to the underlying suit. The proponents of this view point to the Supreme Court's admonition that a governmental entity should not recover immunity waived by the Legislature by inducing the plaintiff to enter into a settlement agreement that it subsequently breaches. This view points out that the Lawson court stated that waiving immunity was the exclusive province of the Legislature. Any waiver created by Lawson must, therefore, be limited in nature because it was created by the courts. Proponents of this view also point out that the Lawson decision was predicated upon the fact that Texas A&M did not enjoy any form of immunity in the underlying suit because the suit was brought under the Whistleblower Act. Thus, it is only where immunity is not at issue in the first suit that the mere act of entering into the settlement agreement

would waive immunity from suit. These proponents would point out that any other reading of Lawson would be inconsistent with Federal Sign and every subsequent decision of the Texas Supreme Court addressing immunity and breach of contract actions. See, e.g., Catalina Development, Inc. v. County of El Paso, 121 S. W.3d 704, 705 (Tex. 2003); Travis County v. Pelzel & Associates, Inc, 77 S.W.3d 246, 248 (Tex. 2002).

e. Recovery of attorneys' fees in a breach of contract action.

A party in a breach of contract action with a governmental entity may have to look to the Declaratory Judgment Act ("DJA") for the recovery of its attorneys' fees. See Tex. A&M Univ.-Kingsville v. Lawson, 127 S.W.3d 866 (Tex. App.–Austin 2004, pet. denied). Section 38.001 of the Civil Practice and Remedies Code allows a party that successfully brings a breach of contract action to recover its attorney's fees. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001. However, because section 38.001 allows recovery of attorneys' fees from individuals and corporations, it does not allow for recovery of attorneys' fees from governmental entities. Id.; Base-Seal, Inc. v. Jefferson County, 901 S.W.3d 783, 786-87 (Tex. App.–Beaumont 1995, writ denied); State v. Bodisch, 775 S.W.2d 73, 76 (Tex. App.–Austin 1989, writ denied). Thus, absent another statutory authorization for recovery of attorneys' fees, such as section 262.007(a) of the Local Government Code, the DJA may provide the only means for recovery of attorneys' fees. See Lawson, 127 S.W.3d at 874-875. A party need not prevail on their suit under DJA to recover its attorneys' fees under that statute. Id.

E. Other Statutes That May Waive Immunity From Suit.

1. Local Government Code § 51.075.

As noted in section IIB(2)(b)(4) above, the Texas Supreme Court recently held that the phrases "sue and be sued" and "plead and be implead" are not in and of themselves waivers of immunity from suit. Tooke, 197 S.W. 3 325. Prior to the Tooke opinion, the courts of appeals were split on whether the phrase "sue and be sued" contained in section 51.075 of the Local Government Code waived immunity from suit for cities. Id. Tooke and its companion cases held that the "sue and be sued" phrase in the Local Government Code does not waive immunity from suit. Id.; City of Houston v. Allco, Inc., 206 S.W.3d 113 (Tex. 2006). Furthermore, with regard to tort claims, the TCA, not the Local Government Code, determines whether there is a waiver of immunity. Reata Construction Corp., 197 S.W.3d 371 (Tex. 2006), 49 Tex. Sup. Ct. J. 811 (Tex., June 30, 2006).

2. Texas Water Code § 49.066(a).

Section 49.066(a) of the Water Code provides that "[a] district may sue and be sued in the courts of this state in the name of the district by and through its board. A suit for contract damages may be brought against a district only on a written contract of the district approved by the district's board." TEX. WATER CODE ANN. § 49.066(a) (West 2000). This provision indicates there is no immunity from suit for written contracts approved by the district's board. Otherwise, the inclusion of the limiting phrase would be rendered meaningless. The courts will find that language is a waiver of immunity where doing otherwise would render a provision of a statute meaningless. Wichita Falls State Hosp. v. Taylor, 106 S.W.3d.

However, any question regarding whether immunity from suit in breach of contract actions against water districts was resolved by the enactment of chapter 271 of the Local Government Code that allows suits for breach of contract against special purpose districts. TEX. LOC. GOV'T CODE § 271.152.

The Tooke opinion appears to foreclose any argument that the language in the Water Code creates a waiver of immunity from suit beyond suits for breach of contract. Tooke, 197 S.W.3d 325 (finding that use of the phrase "sue and be sued" when included in organic statutes does not in and of itself constitute a waiver of immunity from suit).

3. Texas Education Code § 11.151.

Section 11.151 of the Education Code authorizes school districts and junior college districts to "sue and be sued." Again, Tooke and its companion cases hold that this provision of the Education Code does not constitute a waiver of immunity from suit. Id.; Columbus Ind. Sch. Dist. v. Five Oaks Achievement Center, 197 S.W.3d 384 (Tex. 2006).

The Amarillo Court of Appeals did not address the issue of whether section 109.001(c) of the Education Code that empowered Texas Tech's Board of Regents to control the Tech University system, empowers the Regents to waive immunity for claims against the school. Leach, 335 S.W.3d at 393-95.

4. Waiver by other Statute or Agency Action.

A statute "shall not be construed" as waiving immunity unless the "waiver is effected by clear and unambiguous language." TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2010). As the courts have consistently held, this provision of the Government Code requires any waiver of immunity to be clear and unambiguous. In the Leach case, the Amarillo Court rejected the coach's argument that Texas Tech was empowered by statute to waive its own immunity. Leach, 335 S.W.3d at 394-95. Similarly, the Austin Court of Appeals in Foster v. Teacher Ret. Sys., 273

S.W.3d 883, 886–87 (Tex.App.-Austin 2008, no pet.) rejected the argument that, when the Legislature vested the Teacher Retirement System with the power to adopt necessary rules and procedures, it empowered the agency to waive its immunity. The Austin Court went on to note that administrative agencies created by the Legislature cannot waive immunity on behalf of the Legislature. Id.

5. Waiver of City's Immunity From Suit by City Charter.

Many city charters contain provisions stating that the city can "sue or be sued" and/or that the city can "plead and be implead." Tooke and its companion cases provide that these phrases do not waive immunity from suit. Tooke, 197 S.W.3d 325; City of Houston, 206 S.W.3d 113. Furthermore, the Supreme Court left open the question of whether a city even has the authority to waive its immunity from suit. Tooke, 197 S.W.3d 325; City of Houston, 206 S.W.3d 113; City of Houston v. Jones, 197 S.W.3d 391 (Tex. 1996). Finally, the TCA controls over the provisions of a city charter in determining if there is a waiver of immunity for tort claims. Reata Construction Corp., 197 S.W.3d 371 (Tex. 2006), 49 Tex. Sup. Ct. J. 811, (Tex., June 30, 2006).

IV. COMMON-LAW PREMISES LIABILITY

Under the law of premises liability, landowners and those who control land and buildings can be held liable when a person is injured by a condition of or on the premises. Premises liability law developed separate from general negligence liability. Generally speaking, it has always been more difficult to prevail in a premises liability case than in a negligence suit.

The higher standard of liability in premises cases grew out of the preferential status given to landowners under British common law. According to Prosser, in a civilization based upon private ownership of land, it is important for economic development that liability not discourage land ownership and the development of real estate. Prosser, Law of Torts at 386 (5th ed. 1984). Thus, a possessor of land is obligated only to make use of his property in a manner which does not represent an unreasonable risk of harm to others. In striking a balance between encouraging economic development and the safety of the public, the courts looked to the plaintiff's "status" on the land to determine the owner's duty to him. Thus, the owner's duty depends upon whether the injured party is a trespasser, licensee, or invitee. A person injured by a dangerous condition on the premises must prove that the owner breached the duty owed to their class of premises users.

To serve the purpose of encouraging ownership and development of real property, the courts have dictated that a premises liability suit is not one of several causes of action that may be asserted against an owner/occupier -- it is the only cause of action. Pifer v. Muse, 984 S.W.2d 739, 742 (Tex. App.–Texarkana 1998, no pet.) ("If the injury was caused by a condition created by the activity rather than the activity itself, the plaintiff is limited to a premises liability theory of recovery."). This is a matter of substantive law that cannot be overcome by the plaintiff's artfulness in pleading his claim. Lucas v. Titus County Hosp. Dist., 964 S.W.2d 144, 153 (Tex. App.–Texarkana 1998, pet. denied) ("If the plaintiff was injured by a condition created by the activity rather than the activity itself, the plaintiff is limited to the premises liability theory of recovery."). A plaintiff may plead a cause of action based upon premises liability and other types of causes of action. However, when a plaintiff is injured by a "premises defect" he is entitled to recover only on the premises liability cause of action, and his judgment will stand up on appeal only if he pled, proved, and obtained findings on each element of a premises case. See H.E. Butt Grocery Co. v. Resendez, 988 S.W.2d 218, 219 (Tex. 1999).

If other avenues of ordinary negligence liability were available in suits against an owner/occupier, the essential protection premises liability law provided to owners/occupiers of premises would be lost. For example, in the event a landowner could be held liable for ordinary negligence in connection with a dangerous premises condition, there would be no need for a claimant to prove the necessary elements of a premises liability case (gross negligence or the owner/occupier's prior knowledge of the dangerous condition). As a practical matter, virtually every premises case would be tried on a negligence theory, because liability would be so much easier to establish. Lucas, 964 S.W.2d at 153 ("It is true that a negligent activity is often more advantageous to the plaintiff than a premise liability theory because of additional elements that the plaintiff may be required to prove.").

A. Standard of Care.

Premises liability is limited liability. Owners and occupiers of land and buildings do not owe a duty of ordinary care to all persons who come onto their premises. "In Texas, the duty owed by a premises owner or occupier is determined by the status [trespasser, licensee, or invitee] of the complaining party." Gunn v. Harris Methodist Affiliated Hosp., 887 S.W.2d 248, 250 (Tex. App.–Fort Worth 1994, n.w.h.).

1. Trespasser.

A trespasser is one who enters upon another's property without right, lawful authority, or expressed or implied invitation, permission or license. Park v. Troy Dodson Const. Co., 761 S.W.2d 98, 100 (Tex. App.–Beaumont 1988, writ denied); Mendoza v. City

of Corpus Christi, 700 S.W.2d 652, 654 (Tex. App.–Corpus Christi 1985, writ ref'd n.r.e.). A possessor of land owes a trespasser only the legal duty to refrain from injuring him willfully, wantonly, or through gross negligence. Lampasas v. Spring Ctr., Inc., 988 S.W.2d 428 (Tex. App.–Houston [14th Dist.] 1999, no pet.) ("The only duty a premises owner or occupier owes a trespasser is not to injure him willfully, wantonly, or through gross negligence. [citations omitted]. Moreover, a trespasser must take the premises as he finds it, and if he is injured by unexpected dangers, the loss is his own. [citations omitted]"). Spencer v. City of Dallas, 819 S.W.2d 612, 617 (Tex. App.--Dallas 1991, n.w.h.); Weaver v. KFC Mgmt., Inc., 750 S.W.2d 24, 26 (Tex. App.–Dallas 1988, writ denied).

2. Licensee.

"A licensee enters land of another with the permission of the landowner, but does so for his own convenience or on business for someone other than the owner. Consent to enter may be express or implied." Id.

The duty owed to a licensee is not to injure him through willful, wanton, or gross negligence. There is an exception to this rule when the: (1) occupier knows of a dangerous condition on the premises; (2) licensee does not know of the condition; and (3) condition is not perceptible to the licensee and cannot be inferred from facts within his present or past knowledge. Lower Neches Valley Auth. v. Murphy, 536 S.W.2d 561 (Tex. 1976). In the case of a dangerous condition of which the landowner has actual knowledge, he has a duty to warn of the defect or make the premises reasonably safe. State Dep't of Highways v. Payne, 838 S.W.2d 235, 237 (Tex. 1992); State v. Tennison, 509 S.W.2d 560, 562 (Tex. 1974). Tex. Parks & Wildlife Dep't v. Davis , 988 S.W.2d at 370.

3. Invitee.

An invitee has been described as one who enters on another's land with the owner's knowledge and for the mutual benefit of both. Rosas v. Buddies Food Store, 518 S.W.2d 534, 536 (Tex. 1975) (citing Restatement (Second) of Torts, § 332 (1965)).

The standard of care owed to an invitee is set out in the Texas Supreme Court's decision in Corbin:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if he (a) knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to such invitees, and ... [b] fails to exercise reasonable care to protect them against the danger.
>
> Thus, when an occupier has actual or constructive knowledge of any condition on the premises that poses an unreasonable risk of harm to invitees, he has a duty to take whatever action is reasonably prudent under the circumstances to reduce or to eliminate the unreasonable risk from that condition. [3]

Corbin v. Safeway Stores, Inc., 648 S.W.2d 292, 295 (Tex. 1983); Meeks v. Rosa, 988 S.W.2d 216, 217 (Tex. 1999); Resendez, 988 S.W.2d at 219.

It is only in cases of injury to an invitee that the occupier must exercise reasonable care to inspect the premises and is charged with knowledge of dangerous conditions in which an inspection would disclose.

Even in the case of an invitee, a duty to act does not arise until there is a condition on the premises that creates an unreasonable risk of harm to users of the property. According to Corbin's statement of duty owed to invitees, it may appear that such suits are tried upon a general negligence standard. In fact, the supreme court's description of the invitee standard of care has encouraged this perception.

> The standard of conduct required of a premises occupier toward his invitees is the ordinary care that a reasonably prudent person would exercise under all pertinent circumstances.... Liability depends on whether the owner acted reasonably in light of what he knew or should have known about the risks accompanying a premises condition.

Mendoza, 700 S.W.2d at 654; Corbin, 648 S.W.2d at 295 ("[I]n subsequent cases, we emphasized that an invitee's suit against a store owner is a simple negligence action").

However, one critical difference remains between premises liability for invitees and a simple negligence case. A licensee must first establish the principal element of a premises liability case, namely the existence of a dangerous condition before the

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[3] Section 343 of the Restatement of Torts Second, from which the Texas Supreme Court established the standard of care owed to an invitee, also requires that the premises defect be one the possessor of land should expect that the plaintiff "will not discover or realize the danger, or will fail to protect themselves against." Corbin, 648 S.W.2d at 295. The Texas Supreme Court, however, eliminated this element of the invitee's cause of action when it "abolished the negligence defense of assumption of the risk and the 'no duty' doctrine." Id. at 295, fn. 1.

defendant has a duty to act. In Izaguirre, the supreme court held that an owner/occupier's duty arises only from the existence on the premises of a dangerous condition that could result in injury. The existence of a dangerous condition is the first element of any premises liability case. Brownsville Navigation Dist. v. Izaguirre, 829 S.W.2d 159, 160 (Tex. 1992). See Meeks, 988 S.W.2d at 306-07; Resendez, 988 S.W.2d at 219; Johnson County Sheriff's Posse, Inc. v. Endsley, 926 S.W.2d 284, 285 (Tex. 1996); Seideneck v. Cal Bayreuther Assoc., 451 S.W.2d 752, 754 (Tex. 1970).

Izaguirre involved a man who was loading a trailer that was disconnected from its tractor with its front resting on extendable supports. Id. The ground was soft and muddy from rain. The front supports of the trailer were resting on a board for stability. The board broke, causing the load to shift, and resulting in the trailer rolling over on Izaguirre. Plaintiffs contended the ground should have been covered with harder material that would not have given way, or that the district should have warned of the danger of the ground shifting. Id. The court held that ordinary dirt did not represent a dangerous condition, and in the absence of a premises defect, the premises occupier could not be held liable. Id.

B. Common Law Premises Liability Continues to Depend Upon the Classification of the Plaintiff's Entry Upon the Premises.

The supreme court has been presented with numerous opportunities to abolish the common law distinctions between trespasser, licensee, and invitee, and thereby establishing an ordinary care standard of duty for landowners. The supreme court has refused, however, to eliminate the common law classification standards of liability, despite the strong urging in several concurring opinions. Nixon v. Mr. Property Mgmt. Co., Inc., 690 S.W.2d 546 (Tex. 1985). Nixon was decided years after both Tennison and Murphy. The supreme court did not modify the holdings of those two cases at all. Id. The only conclusion that can be drawn from Nixon is that the supreme court intends that land occupiers, including governmental entities, will not be held to an ordinary negligence standard in premises liability cases. See id.; Valley Shamrock, Inc. v. Vasquez, 995 S.W.2d 302, 306-07 (Tex. App.—Corpus Christi 1999, no pet.); Richardson v. Wal-Mart Stores, Inc., 963 S.W.2d 162, 164 (Tex. App.—Texarkana 1998, no pet.).

C. What Constitutes a Dangerous Condition?

In cases brought by an invitee or licensee, the existence of a dangerous condition is the first element the plaintiff must establish in order to prevail. Seideneck, 451 S.W.2d at 754. Not every premises condition that causes injury is a dangerous condition. See Izaguirre, 829 S.W.2d at 160. To constitute a dangerous condition, a premises defect must meet two conditions. First, the premises must constitute an unreasonable risk to the licensee or invitee. Seideneck, 451 S.W.2d at 754. Second, the condition must have been one that the plaintiff should not have anticipated under the existing circumstances. See Izaguirre, 829 S.W.2d at 160; State Dep't of Highways and Pub. Transp. v. Kitchen, 867 S.W.2d 784 (Tex. 1993). As explained by the supreme court in Izaguirre, it is a matter of common knowledge that dirt becomes soft and muddy when wet. Id. Therefore, the premises owner should not have to warn of or make reasonably safe a condition that a reasonable and prudent person would have anticipated encountering under the applicable conditions. Izaguirre, 829 S.W.2d at 160; Kitchen, 867 S.W.2d at 786. See Cobb v. Tex. Dep't of Criminal Justice, 965 S.W.2d 59, 62 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (a defect is an "imperfection, shortcoming, or want of something necessary for completion.").

D. Generally, a Defendant Landowner or Possessor Cannot be Held Liable on a Lesser Standard of Care.

An occupier being sued by a person injured on her premises has the right to claim the limitation of duty established under common law premises liability. A plaintiff who tries a premises liability case on a negligence theory does so at his own risk. See Clayton W. Williams, Jr., Inc. v. Olivo, 952 S.W.2d 523, 529 (Tex. 1997); Wal-Mart Stores, Inc. v. Bazan, 966 S.W.2d 745, 746 (Tex. App.—San Antonio 1998, no pet.); Physicians & Surgeons Gen. Hosp. v. Koblizek, 752 S.W.2d 657 (Tex. App.—Corpus Christi 1988, writ denied). Ms. Koblizek, an invitee at the hospital, alleged that she tripped in an area where two different types of floor surfaces came together. While their pleadings alleged all of the elements of an invitee premises liability case, the Koblizeks requested that the case be submitted to the jury on a general negligence charge. Id. at 659. In accordance with the charge, the jury found only that the hospital was negligent in allowing different surface levels to exist in between a bathroom hallway and lobby area and that this negligence was the proximate cause of the plaintiff's injury. Id. The defendant objected to the charge as failing to contain findings essential to a premises liability cause of action and failing to include definitions and instructions necessary to define the limited nature of the hospital's duty. Id. The court of appeals reversed and rendered a take nothing judgment based upon the plaintiffs ' failure to obtain jury findings essential to their premises liability cause of action (i.e., whether the defendant hospital knew or

should have known of the condition of the floor or whether the condition presented an unreasonable risk of harm). Id. at 660. See Tennison, 509 S.W.2d at 562; State Dep't of Highways and Pub. Transp. v. Carson, 599 S.W.2d 852 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.). But see State v. McKinney, 886 S.W.2d 302, 303-04 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (jury's affirmative answer to general negligence charge was sufficient where all elements of a premises liability suit had been proven as a matter of law).

There are only two circumstances in which a premises occupant can be held liable on a lesser standard of liability. First, the occupier may waive limited liability and allow the case to proceed to the jury as a negligence case. Parker v. Highland Park, 565 S.W.2d 512, 519 (Tex. 1978). Under those circumstances, the defendant will be held to the standard of what a reasonable and prudent person would do under the same or similar circumstances. Second, the plaintiff can claim that she was injured not by a premises defect, but rather by an activity being conducted on the premises. This second group of cases are pled and tried under the "negligent activity" theory of liability.

While "negligent activity" liability is a means of circumventing the higher burden of proof in premises liability law, application is very limited. When a plaintiff is injured as a result of a "negligent activity" being conducted on the premise, the landowner is held to an ordinary care standard of liability. Keetch v. Kroger Co., 845 S.W.2d 262, 264 (Tex. 1992). "Negligent activity" liability exists only when the plaintiff was injured as a direct and immediate result of an activity conducted on the premises, rather than as a consequence of a defect in the premise. In Keetch, the supreme court held that a plaintiff can recover under the "negligent activity" theory rather than premises liability only if the: (1) injury was caused by or as a contemporaneous result of the activity; and (2) activity was the cause in fact of the injury. Id.

Keetch arose out of a slip and fall in a grocery store. The plaintiff alleged the store was negligent in spraying flowers with "Green Glo" in a way that overspray collected on the floor causing a dangerously slick condition. The trial court submitted the case to a jury on a premises liability theory and refused to submit the "negligent spraying activity" theory. The jury failed to find that Kroger knew or should have known of the dangerous condition, resulting in a take nothing verdict. The supreme court affirmed the decision of the court of appeals, while explaining the limited application of the negligent activity liability.

> Recovery on a negligent activity theory requires that the person had been injured by or as a contemporaneous result of the activity itself rather than by a condition created by the activity.
>
> There was no ongoing activity when Keetch was injured. Keetch may have been injured by a condition created by the spraying but she was not injured by the activity of spraying. At some point, almost every artificial condition can be said to have been created by an activity. We decline to eliminate all distinction between premises conditions and negligent activities.

Id. (emphasis added).

Following, the rationale set forth in Keetch, the Corpus Christi Court of Appeals held that the injury must not only be contemporaneous with the injury, but the injury must occur in the immediate area where the negligent activity was being conducted. Stanley Stores v. Veazy, 838 S.W.2d 884, 886 (Tex. App.—Beaumont 1992, writ denied). As explained by the Corpus Christi court:

> Our understanding of Keetch is that before submitting a negligence activity theory of recovery, a trial court should first consider from the evidence and pleadings if the injury was created by and contemporaneous to an ongoing activity.
>
> …
>
> [In this case], we have an ongoing activity [a Pepsi tasting display] in one area of the store and a slip and fall on a substance generated from that activity in another area of the store. Keetch says, "recovery on a negligent activity theory requires that a person has been injured by or as a contemporaneous result of the activity itself rather than by the condition created by the activity".
>
> [T]he evidence must show that the injuries were directly related to the activity itself.
>
> Applying Keetch to the case before this court, there is a lack of supportive evidence to justify the trial court's admission of a negligent activity cause of action. We find no connection between injury and the ongoing Pepsi display which would lead us to conclude that the injury occurred as a contemporary result of the ongoing activity.

Id. (emphasis in original).

Through Keetch and its progeny, the supreme court and the courts of appeals clearly intend for premises liability law to fulfill its historic function of providing meaningful limitations of a landowner's liability. Specifically, if the plaintiff's injuries are a result of the condition of the premises (i.e., a slick floor) then the case must be tried under the established principals of premises liability. Keetch, 845 S.W.2d at 264. A claimant may not avoid that limited liability simply by alleging that she was injured as a result of an "activity" carried out on the premises rather than the condition of the premises itself. See id. This same analysis is revisited by the courts in determining whether a TCA suit arises from a premises defect or from the condition or use of personal property.

E. Proving the Owner has Knowledge of the Dangerous Condition.

Keetch is also significant for its holding that an owner/occupier's creation of a condition does not conclusively establish that he had knowledge that the condition was dangerous.

> Proof that the premises owner or occupier created a condition which poses an unreasonable risk of harm may constitute circumstantial evidence that the owner or occupier knew of the condition. However, creating the condition does not establish knowledge as a matter of law for purposes of premises liability.

Id. at 266. As explained by Justice Hecht: "an employee may accidentally spray something on the floor without actually knowing it." Id. at 267 (Hecht, J., concurring).

F. Submission of a Premises Liability Case to the Jury.

Premises liability cases remain exempt from the requirements of Texas Rule of Civil Procedure 277, which dictates that whenever feasible a case should be submitted to the jury on broad form questions. TEX. R. CIV. P. 277 (Vernon Supp. 2001). The disjunctive submission of a premises liability case, requiring the jury to specifically find for the plaintiff on each element of his cause of action, is not a basis for reversal. H.E. Butt Grocery Co. v. Warner, 845 S.W.2d 258, 259-60 (Tex. 1992). Furthermore, even if a premises case is submitted in broad form, this does not abrogate the requirement that the court's charge includes in its definitions and instructions each and every element of a premises liability cause of action. Keetch, 845 S.W.2d at 266-67; Olivio, 952 S.W.2d at 529; Univ. of Tex. Med. Branch at Galveston v. Davidson, 882 S.W.2d 83, 86 (Tex. App.—Houston [14th Dist.] 1994, no writ) (reversing the trial court and rendering that the plaintiff take nothing because she could not recover on a general negligence theory as a matter of law).

G. Premises Liability for Governmental Entities at Common Law.

The classification of users of governmental premises and other principles of common law premises liability had no application to governmental entities before the enactment of the TCA, because they enjoyed sovereign immunity. While the TCA constitutes a limited waiver of immunity, common law principles of sovereign immunity are still applicable in determining the extent of a governmental entity's liability.

V. THE TEXAS TORT CLAIMS ACT

This section of the paper addresses various provisions of the TCA as well as the cases interpreting the TCA. The discussion is broken down into the following topic areas: (1) whom is covered by the TCA; (2) under what circumstances does the Act permit suit; and (3) what are the exclusions and exceptions to liability under TCA.

A. What Governmental Entities and Actions are Covered by the TCA?

Section 101.001 of the TCA sets forth the meanings of certain terms critical to the application of the TCA.

1. Section 101.001(3), Entities and Activities Covered by the TCA.

The TCA applies only to "governmental unit[s]." See TEX. CIV. PRAC. & REM. CODE §§ 101.001-101.021 (West 2005). Section 101.001(3) defines governmental units as including: (1) the state and all its agencies; (2) political subdivisions of the state (including but not limited to cities, counties, school districts, junior college districts, water improvement districts, and water control districts); (3) an emergency service organization; and (4) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the Legislature under the Constitution. TEX. TORT CLAIMS ACT § 101.001(3) (a copy of the entire Act is provided at the end of this paper). Just as with sovereign immunity, the TCA applies and extends to all agencies, political subdivisions, and other institutions which are derived from the state constitution and laws." See Tarrant County v. Dobbins, 919 S.W.2d 877, 884 (Tex. App.--Fort Worth 1996, writ denied); Brown v. Montgomery County

Hosp. Dist., 905 S.W.2d 481, 483 (Tex. App.—Beaumont 1995, writ denied); Dillard, 806 S.W.2d at 593. But see Dallas Area Rapid Transp., 242 F.3d at 319-22 (the standard for determining the applicability of the Eleventh Amendment is different from standard for determining applicability of TCA). Under these standards, the following governmental entities have been held to be covered by the TCA:

(a) County hospital districts and county owned hospitals, Sharpe v. Mem'l Hosp., 743 S.W.2d 717, 718 (Tex. App.—Houston [1st Dist.] 1987, no writ); Tarrant County Hosp. Dist. v. Ray, 712 S.W.2d 271, 273-74 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.); Wheeler v. Yettie Kersting Mem'l Hosp., 866 S.W.2d 32, 45 (Tex. App.— Houston [1st Dist.] 1993, no writ);

(b) A city owned hospital, City of Austin v. Davis, 693 S.W.2d 31, 34 (Tex. App.—Austin 1985, writ ref'd n.r.e.); Huckabay v. Irving Hosp. Auth., 879 S.W.2d 64, 66 (Tex. App.—Dallas 1993, no pet.);

(c) Independent school districts and junior college districts, Barr v. Bernhard, 562 S.W.2d 844, 846 (Tex. 1978); Brown v. Houston Indep. Sch. Dist., 763 F. Supp. 905, 908 (S.D. Tex. 1991); LeLeaux v. Hamshire-Fannett Indep. Sch. Dist., 835 S.W.2d 49, 51 (Tex. 1992); Freeman v. Del Mar College, 716 S.W.2d 729, 771 (Tex. App.—Corpus Christi 1986, no writ);

(d) Community centers providing mental health and mental retardation services, Rodriguez v. Tex. Dep't of Mental Health and Mental Retardation, 942 S.W.2d 53 (Tex. App.--Corpus Christi 1997, no writ); Deep E. Tex. Reg'l Mental Health & Mental Retardation Servs. v. Kinnear, 877 S.W.2d 550, 564 (Tex. App.—Beaumont 1994, no writ); OP. TEX. ATT'Y GEN. NO. JM-538 (1986); and

(e) Regional transit authorities created pursuant to state statute, OP. TEX. ATT'Y GEN. NO. MW-10 (1979).[4]

2. Section 101.001(2), Employees, Agents, and Independent Contractors.

The TCA creates liability for governmental units for the acts of its employees, agents, and officers. TEX. TORT CLAIMS ACT §§ 101.021-101.022. The Act defines "employee[s]" as:

> [A] person, including an officer or agent, who is in the paid service of governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks, the details of which the governmental unit does not have the right to control.

TEX. TORT CLAIMS ACT § 101.001(2). When the active tort-feasor is employed by a governmental unit and is subject to the control of any officer, agent, or elected official of that governmental unit, his actions can form the basis of liability. Id.

Liability is limited by the statute to that which arises from the actions of paid employees. See Harris County v. Dillard, 883 S.W.2d 166 (Tex. 1994); but see Tex. Dep' t of Family and Protective Servs. v. Atwood, 176 S.W.3d 522, 529-530 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (foster parents of regulated foster home not employees under TCA). Still, a governmental unit can be held vicariously liable for the negligence of an unpaid volunteer. See Smith v. Univ. of Tex., 664 S.W.2d 180, 190-91 (Tex. App.—Austin 1984, writ ref'd n.r.e.). The Smith case arose out of a track and field meet sponsored by the University of Texas. Id. at 181. Price, the head track coach and an employee of the University, was responsible for organizing and conducting the meet. Id. at 183. Price appointed a volunteer, Drolla, to oversee the shot-put event. Id. Drolla was charged with overseeing and running the event as well as the use of the shot-put area of the stadium. Id. Smith alleged that Drolla was negligent in failing to establish safety guidelines regarding the use of the shot-put facilities, which Smith claimed caused his injuries. Id. at 189. The factor which distinguishes Smith from Harris County and any other case that may involve the negligence of a volunteer is that the plaintiff in Smith alleged that a paid employee was responsible for the volunteer's actions. As the majority in Harris County recognized, Smith represents a way to get around the TCA's exclusion of the actions of volunteers from the state's waiver of immunity. See Harris County, 883 S.W.2d at 167-168, n.2; City of Dayton v. Gates, 126 S.W.3d 288, 289 (Tex. App. –Beaumont 2004, no pet. h.) (section 101.062's liability for volunteers does not expand scope of liability under section 101.021(1)). See also Rodriguez, 942 S.W.2d at 56 (governmental

[4] The Texas Attorney General's Office opined that health districts are not included within the definition of "governmental unit." OP. TEX. ATT'Y GEN. NO. JM-1077 (1989).

entity which is highly regulated by another state agency or is dependent on federal funds funneled through regulating agency is not an employee of agency or department).

The Texas Supreme Court confronted a fact situation similar to the Harris County case. Bishop v. Tex. A&M Univ., 35 S.W.3d 605 (Tex. 2000), arose from an injury in the production of a play by the Texas A&M drama club. Bishop was injured when stabbed with a knife that was used as a prop in a play. Id. Another student missed the stab pad and stabbed Bishop in chest. The decision to use the knife was made by a director and a prop assistant that the court of appeals found to be independent contractors. Id. The court of appeals reasoned that A&M could not be held liable for negligence of an independent contractor. Id. The actions of the drama club and the play were also overseen by two A&M faculty members. Since the faculty members were not paid specifically for work with the drama club, the court of appeals held that the faculty members were acting as volunteers for whom the university was not liable. Id.

The supreme court rejected the notion that the faculty advisors were not employees when they oversaw the drama club on two different basis. First the supreme court pointed out that:

> [First the] fact that Drs. Curley and Lesko [the faculty advisors] did not receive additional remuneration for their service to the university as faculty advisors is not dispositive of whether they were employees for purposes of liability under the Tort Claims Act. The evidence in support of the judgment demonstrates that although faculty members are not required to act as advisors, [A&M] considered Drs. Curley and Lesko's service to the university as faculty advisors when calculating their overall compensation. Unlike the volunteer reserve-deputy sheriff in Harris County v. Dillard, who was never in the paid service of a governmental unit and therefore was not an employee under the Tort Claims Act, Drs. Curley and Lesko remained in the paid service of the university while advising the Drama Club and received a benefit from their advisory positions.

Id.

The supreme court went on to point out that the purpose of having faculty advisors precluded them from being considered volunteers. In order to gain recognition as a student organization at A&M, an organization such as the Drama Club had to have faculty advisors. The official student-organizations policy manual provides that as an advisor to an organization such as the drama club, the advisors must know the rules pertaining to A&M organizations, be aware of liability issues and advise the organization to make reasonable and prudent decisions. Based upon this provision of the student-organization manual, the supreme court found that the faculty advisors were responsible for enforcing A&M's policies; including A&M's policy prohibiting the use of deadly weapons. Based upon the role of the faculty advisors and the fact they were paid by the University, the court found that there was sufficient evidence to support a jury finding that the faculty advisors were acting as A&M's employees at the time Bishop was injured and that the TCA provided that A&M was liable for the negligence of its employees that resulted in injuries to Bishop. Id.

Following the Bishop I rationale, a governmental entity can be held liable even when its employees are carrying out functions for which they are not directly paid. Id. The chances of being held liable increase if the employee serving in the unpaid position is responsible for seeing that the organizations policies and procedures are followed. See id .

The actions of independent contractors are excluded from liability under the TCA. The Supreme Court had the opportunity to address this issue when the Bishop case returned to the Court in 2005. Tex. A&M Univ. v. Bishop, 156 S.W.3d 580 (Tex. 2005). In Bishop II, the court had to address the question of whether the play's directors were employees of the university or an independent contractor. The Court acknowledged its previous holding that the faculty advisors were acting as university employees in their involvement in the play where the plaintiff was injured. Id. at 582-82. But the court noted that the university could only be liable if one of its employees used or put into use the property that caused the injury. Id. at 583. The Supreme Court pointed out that the directors of the play selected the knife and the stab pad that resulted in the plaintiff's injuries. Id. Therefore, the plaintiff could only prevail if the directors were employees. Id.

The plaintiff argued that because the university could hire and fired the directors, the university could control the props to be used in the play, the university could approve the script for the play, and the directors were paid for their work with university funds, the directors must have been employees. Id. The Supreme Court acknowledged that this evidence was relevant but pointed out that the TCA defines an "employee" as a person in the paid service of a governmental unit, but provides that the term "does not include an independent contractor or a person who performs tasks the details of which the governmental unit does not have the legal right to control." Id. at 584. The court then looked to the factors for determining if someone is an independent contractor, namely: (1) The

independent nature of his business; (2) his obligation to furnish necessary tools, supplies, and material to perform the job; (3) his right to control the progress of the work, except as to final results; (4) the time for which he is employed; and (5) the method of payment, whether by time or by the job. Id. at 584-85. The directors performed specialized tasks, were paid by the job, furnished their own props, had no contract with the university, and were not put on the university's tax rolls. The court then noted that the university' s ability to terminate the directors and oversee the script and props shows only a minimum form of control. Id. Thus the Supreme Court found the directors were independent contractors and Texas A&M could not be held liable for their negligent use of the props in the play. Id. See also Univ. of Tex. Health Science Center v. Schroeder, 190 S.W.3d 102 (Tex. App.–Houston [1st Dist.] 2005, no pet.)(university was not liable for the actions of a medical student because the student was not an employee of the university).

Similarly, the Fourteenth Court of Appeals held that a county could not be held liable for the actions of a doctor with staff privileges at a county-owned hospital. Harris v. Galveston County, 799 S.W.2d 766, 788 (Tex. App.—Houston [14th Dist.] 1990, writ denied). Harris was injured while he was a patient at a county hospital. Id. She claimed her injuries resulted from the negligence of Dr. Borne. Borne was not a county employee, but had staff privileges and was entitled to use the hospital 's facilities. Id. at 767. The court of appeals affirmed the entry of summary judgment in favor of the county. Id. at 768.

Generally, a physician is considered to be an independent contractor with respect to hospitals at which he has staff privileges. The Texas Tort Claims Act provides that an independent contractor is not an employee. Thus, if we assume the facts alleged by appellant are true, they do not establish a right of action under the Act against [Galveston County]. Id. See TEX. TORT CLAIMS ACT § 101.001(2).

The actions of independent contractors are excluded from liability under the TCA. The Fourteenth Court of Appeals held that a county could not be held liable for the actions of a doctor with staff privileges at a county owned hospital. Harris v. Galveston County, 799 S.W.2d 766, 788 (Tex. App.—Houston [14th Dist.] 1990, pet. denied). Harris was injured while a patient at a county hospital. Id. She claimed her injuries were the result of the negligence of Dr. Borne. Borne was not a county employee, but had staff privileges and was entitled to use the hospital's facilities. Id. at 767. The court of appeals affirmed the entry of summary judgment in favor of the county. Id. at 768.

> Generally, a physician is considered to be an independent contractor with respect to hospitals at which he has staff privileges. The Texas Tort Claims Act provides that an independent contractor is not an employee. Thus, if we assume the facts alleged by appellant are true, they do not establish a right of action under the Act against [Galveston County].

Id. See TEX. TORT CLAIMS ACT § 101.001(2).

3. Section 101.001(5), Scope of Employment.

As with respondeat superior liability, a governmental entity will be held liable only for the torts of its employees committed within the scope of their employment. Hein v. Harris County, 557 S.W.2d 366, 368 (Tex. Civ. App.--Houston [1st Dist.] 1977, writ ref' d n.r.e.); TEX. TORT CLAIMS ACT § 101.001(5). The Act defines the "scope of employment" as being "the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority." The scope of employment, therefore, establishes the limits of the governmental liability for the acts of its employees.

Hein demonstrates the application of this principal. Hein, a Harris County employee, was shot by another Harris County employee, Marvin Carlton. Id. at 367. Hein and Carlton were assigned to install traffic signs in a rural area of Harris County. On the day of the accident, Carlton brought a pistol to work in order to shoot snakes encountered while installing signs. After completing their work, they went to a nearby home owned by a friend of Carlton "for the purpose of calling back to the camp to receive further instructions as was customary." Id. Before they left the house, Carlton took out the pistol to show it to his friend. While attempting to remove the bullet clip, the gun accidentally discharged injuring Hein. Carlton was not within the scope of his employment at the time he shot Hein, despite the fact he went to a friend's house to call to the sign shop in accordance with the county's policy. Id.

> The evidence establishes that Carlton's negligent conduct occurred at the time when he was merely showing the pistol to a friend. He had completed the business which brought him to the friend's house and had delayed his departure for that purpose. The rule is that when a servant turns aside, no matter how short the time, from the prosecution at the master's work to engage in an affair wholly his own, he ceases to act for

> the master, and responsibility for his actions in pursuing his own business or pleasure is upon him alone. The actions of Carlton in attempting to remove the clip from the pistol ... was something wholly disconnected from his employment and not for the benefit of his employer. When he turned aside from the prosecution of his duties for the county, although for only a short time, he ceased to act for the county and the responsibility of any act done by him during this time rested on him alone.

Id. (citations omitted) (emphasis added).

Hein holds that any departure from an employee's assigned work will preclude liability under the TCA. Id. Other courts may limit the Hein decision as holding only that when the employee's actions bear no relationship to the performance of a governmental function, will they be held to be outside the scope of employment.

In contrast to the Hein decision is Harris County v. Gibbons, 150 S.W.3d 877 (Tex. App.—Houston [14th Dist.] 2004, no pet.), finding that an off duty deputy sheriff was in the course and scope of employment when he rear ended another vehicle in his patrol car. At the time of the accident, Deputy Robert Barber's shift had ended and he was driving his patrol car to a second job. He pulled up to a stop light and was checking the license of a truck stopped near him to see if it was stolen. As he was looking down to check his on-board computer, his car rolled forward and hit Gibbon's car. The County contended that it could not be held liable for Barber's negligence because he was not in the scope of his employment at the time of the accident. The Fourteenth Court of Appeals rejected this argument based on the following factors: (1) as a certified peace officer, he had a legal obligation to investigate the matter if he believed a crime, the truck being stolen, had occurred; (2) he was performing a function of his job at the time of the accident; (3) he signed onto his radio at the time he was checking on the truck; and (4) he was entitled to compensatory pay for his work in checking on the truck and taking any other action related to what he found; and (5) after the accident they went to his patrol station and filled out necessary paper work. Id.

The holdings in Hein and Gibbons establishes that the determination of whether the employee is on duty at the time of the events giving rise to the suit is not determined by whether they are "on the clock." Rather, the courts look to whether the employee's actions were related to their job duties in deciding whether the employees was working at the time of the events in question and whether the governmental entity is liable for their negligence. See Hein v. Harris County, 557 S.W.2d 366 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ refused n.r.e.); Gibbons, 150 S.W.3d at 877.

B. Extent of Waiver of Sovereign Immunity Under the TCA.[5]

1. Section 101.021: How an Employee's Immunity From Liability Affects the Plaintiff's Ability to Bring Suit Under This Section.

While section 101.021 clearly waives immunity, the plaintiff's ability to successfully pursue a claim under this section depends upon whether suit based on the tortious conduct of an employee and whether suit against that employee would be barred by official immunity. Section 101.021 is broken into two separate subsections. Subsection 1 provides that a governmental entity can be sued for property damages, personal injury, or death resulting from the operation or use of a motor-driven vehicle or motor-driven equipment. TEX. TORT CLAIMS ACT § 101.021(1). A person can bring suit arising from operation of a motor-driven vehicle or motor-driven equipment only if the employee operating that equipment would be personally liable to the claimant according to Texas law. Id. Thus, the Texas Supreme Court has held that if suit against the employee operating motor-driven equipment or motor-vehicle is barred by official immunity, then suit against his governmental employers is also barred. DeWitt v. Harris County, 904 S.W.2d 650, 653 (Tex. 1995); K.D.F. v. Rex, 878 S.W.2d 589, 597 (Tex. 1994); City of Houston v. Kilburn, 849 S.W.2d 810, 812 (Tex. 1993).

Subsection 2 of section 101.021 allows suit for personal injury or death caused by the condition or use of tangible personal or real property. TEX. TORT CLAIMS ACT § 101.021(2). It does not permit strict liability claims. See EPGT Tex. Pipeline, L.P. v. Harris County Flood Control Dist., 176 S.W.3d 330 (Tex. App.–Houston [1st Dist.] 2004, pet. dism'd).

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[5] It must be kept in mind that the remedies authorized and created by the TCA are in addition to any other remedies or redress a party may have against a governmental entity. TCA § 101.003. See Kerrville HRH, Inc. v. City of Kerrville, 803 S.W.2d 377, 381 (Tex. App.—San Antonio 1990, pet. denied) (plaintiff was not precluded from bringing Deceptive Trade Practices Act claims against the city by the TCA); Burgess v. City of Houston, 718 F.2d 151, 154-55 (5th Cir. 1983) ("the Act, however, preserves a claimant's common law right to seek unlimited damages for negligence of a municipality while performing a proprietary function").

This section only allows suit, however, if the governmental unit would be liable under Texas law "were it a private person." Id. The supreme court has held that the "were it a private person" language precludes suit against a governmental entity if the claim is predicated on a respondeat superior theory and suit against the governmental employee would be barred by official immunity. DeWitt, 904 S.W.2d at 653-54.

> Consistent with subsection 1, we construed subsection 2 of section 101.021 to predicate the governmental unit's respondeat superior liability upon the liability of its employee.
>
> When, as in this case, the governmental unit's liability under section 101.021(2) is based on respondeat superior for an employee's negligence arising from the misuse of tangible personal property, the liability is derivative or indirect ....
>
> Here, official immunity, like any other affirmative defense the employee may have, becomes relevant to the governmental entity 's liability. ... [W]ere it a private person, the county would be entitled to assert any affirmative defenses its employee has to liability. ... In this case, the affirmative defense is official immunity. It would serve no legislative purpose to declare a waiver of sovereign immunity when the basis of liability is respondeat superior and the acts of the employee are covered by official immunity.
>
> We hold that the county is not liable under section 101.021(2) for the negligence of its employee when the employee has no liability because of official immunity.

Id.; see also Pollock, 2004 WL 1054842; King, 2003 WL 22937252, at *5. Therefore, when suit is based upon section 101.021(1) or a respondeat superior theory under 101.021(a), the plaintiff bears the burden of establishing that suit against the individual employees, who's actions caused the damages, is not entitled to official immunity. See id. at 654.

Keep in mind, that the official immunity determination will not be relevant to all claims brought under section 101.021(2). As the supreme court noted in DeWitt, certain cases under the TCA, such as premise liability cases, are not predicated upon a respondeat superior theory. Id. at 653. These are typically cases that arise from the condition of tangible personal or real property. See City of Corinth v. Gladys, 916 S.W.2d 618, 623 (Tex. App.—Fort Worth 1996, no writ). In these cases, official immunity is not an available defense because suit is based upon the condition of the property, rather than how the property was used by an employee. See id.

2. Section 101.106: Election of Remedies.

Section 101.106 forces plaintiffs, at the commencement of the suit, to make an irrevocable election on who will be sued and bars further litigation upon a settlement or judgment in the suit.

Section 101.106 is entitled Election of Remedies and states:

(a) The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.
(b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.
(c) The settlement of a claim arising under this chapter shall immediately and forever bar the claimant from any suit against or recovery from any employee of the same governmental unit regarding the same subject matter.
(d) A judgment against an employee of a governmental unit shall immediately and forever bar the party obtaining the judgment from any suit against or recovery from the governmental unit.
(e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.
(f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant

on or before the 30th day after the date the motion is filed.

TEX. TORT CLAIMS ACT §101.106

1. 101.106 (a) and (b)

Sub-sections (a) and (b) force/require a plaintiff to make an irrevocable selection of defendants, either suing the individuals or officials when she files suit. As each sub-section clearly states, filing suit against the entity bars any effort to bring suit against the employee or employees involved in the incident that gives rise to the claims, and vice versa. TEX. CIV. PRAC. & REM. CODE § 101.106 (a),(b). Waxahachie Indep. School Dist. v. Johnson, 181 S.W.3d 781, 785 (Tex. App.–Waco 2005, pet. filed). The amended section goes on to state that the filing of suit against an employee constitutes an "irrevocable election" barring any suit for recovery against the governmental entity regarding the same subject matter unless the governmental unit consents. TEX. TORT CLAIMS ACT § 101.106(b). Tex. Dep't of Ag. v. Calderon, 221 S.W.3d 918 (Tex. App.–Corpus Christi, 2007).

It is critically important to note that the application of sub-sections (a) and (b) is not limited to claims brought under the TCA. The express language of these sub-sections state that the election of defendant applies to claims "regarding the same subject matter." TEX. CIV. PRAC. & REM. CODE § 101.106 (a),(b). Thus, the election of defendant will bar even non-TCA claims if they arise from the same subject matter of the claims for which the election has been made. See Franka v. Velasquez, 332 S.W.3d 367, 381 (Tex. 2011); Leach, 335 S.W.3d at 399-400. Coach Leach's claims against various university officials were dismissed because he had filed suit against Texas Tech University.

However, where the governmental entity or its employees move to substitute the entity as the proper defendant, 101.106(b) will not bar the plaintiff from pursuing claims against the entity. Tex. Tech Univ. Health Sciences Ctr. v. Villagran, 369 S.W.3d 523 (Tex. App.—Amarillo 2012, pet. pending). In Villagran the plaintiff initially brought suit against doctors employed by the Texas Tech University Hospital. When one of the doctors moved to dismiss claims against him pursuant to section 101.106(f) of the Civil Practice and Remedies Code, the plaintiffs amended their pleading and dismissed their claims against that doctor, retained other doctors as parties but added Texas Tech University as a defendant. Tech then filed a motion to dismiss all of the remaining doctors. By separate motion, Tech filed a motion to dismiss all claims against it contending that because the plaintiffs' had brought suit against the university's employees, the claims against the university were barred by section 101.106(b) of the TCA. The Amarillo Court rejected Tech's argument noting that subparagraph (f) of section 101.106 provides for the substitution of the governmental employer in place of an employee or official that has been sued. Id. The Court pointed out that Tech's reasoning that a suit against employees bars claims against the entity would make section 101.106(f) meaningless. Id.

The irrevocable election created by section 101.106 applies regardless of whether state law claims are brought in federal or state court. See Aguilar v. Ramirez, 2004 WL 1353723 (Tex. App.–Corpus Christi 2004, pet. denied) (mem. op.),

2. 101.106(c) and (d)

Subections (c) and (d) bar subsequent litigation once a judgment is entered or the case is settled. Sub-section (c) provides that a settlement shall immediately and forever bar claims against employees of the governmental entity regarding the same subject matter. TEX. TORT CLAIMS ACT § 101.106(c). As with sub-sections (a) and (b), the prohibition applies to all claims that involve the same "subject matter," and bar claims even if they are not brought under the TCA. Thus, a plaintiff needs to be careful in settling claims because this will bar further litigation arising from the "subject matter" of the claims that were settled.

Once a judgment against the employee is entered, sub-section (d) bars other claims from being brought against the governmental entity. "A judgment against an employee of a governmental unit shall immediately and forever bar the party obtaining a judgment from any suit against or recovery from the governmental unit." Section 101.106(d). The bar under sub-section (d) applies even if the suit is dismissed for want of jurisdiction. A dismissal based on sovereign immunity is a final judgment that would bar claims under the act from being brought against governmental employees. Harris County v. Sykes, 136 S.W.3d 635 (Tex. 2004). The plaintiffs in Sykes initially brought suit against Harris County. Id. Harris County filed a plea to the jurisdiction asserting that there was no waiver of immunity from suit. Id. The plaintiffs then amended their petition and, in the amended petition, added Carl Borchers, a corrections officer in the Harris County jail, as a defendant, both individually and in his official capacity. Id. The trial court thereafter granted Harris County's plea to the jurisdiction, finding no waiver of immunity from suit. Id. After the County 's plea to the jurisdiction was granted, Borchers moved for summary judgment on the grounds that section 101.106 barred any suit against him because a final judgment had been entered on the plaintiffs' claims against the County. Id. The Supreme Court held that the old version of section 101.106, before the 2003 amendments, "applies not only when there has been a

judgment against a governmental entity prior to suit against the employee but also when the settlement or judgment against the governmental entity occurs at anytime before or during the pendency of the action against the employee. ... The bar applies regardless of whether the judgment is favorable or adverse to the governmental entity." Id. at 640. Earlier in the opinion the Texas Supreme Court had held that when a plaintiff has had a reasonable opportunity to amend its pleadings after a governmental entity filed the plea to the jurisdiction and the plaintiff's amended pleading does not allege facts establishing a waiver of immunity, the trial court should dismiss the suit. Id. See Texas Dep't of Crim. Justice v. Campos, 384 S.W.3d 810, 815-16) (where plaintiffs have amended their pleadings three times over 9 years after the first plea to the jurisdiction was filed, then they have had adequate opportunity to emend their pleadings to assert claims for which immunity has been waived and the case should be dismissed). "Such a dismissal is with prejudice because a plaintiff should not be permitted to relitigate jurisdiction once that issue has been fully determined." Sykes, 136 S.W.3d at 639. Based on the fact that any dismissal of the suit against the County would be with prejudice, the court held that section 101.106 barred the suit against Major Borchers. Id.; see Fiske v. Heller, No. 03-03-00387-CV, 2004 WL 1404100 (Tex. App.—Austin 2004, no pet.) (mem. op.).

Courts of appeals have held that section 101.106 barred claims arising from the same actions or circumstances and that the section applies regardless of whether the original action was filed in federal or state court. In Aguilar v. Ramirez, 2004 WL 1353723 (Tex. App.–Corpus Christi 2004, pet. denied) (mem. op.), the plaintiffs originally filed suit in federal court, bringing claims against Aguilar 's employer, the Department of Public Safety and the State of Texas. The federal court dismissed all of plaintiffs' claims, including their claims under the Texas Tort Claims Act. The dismissal of the claims under the Tort Claims Act was based on the absence of a waiver of immunity. Aguilar relied upon the dismissal in federal court to support his motion for summary judgment under section 101.106. The Corpus Christi court held that the dismissal of the federal court action was a judgment sufficient to trigger the bar created by section 101.106. The court specifically found that the federal court' s finding that sovereign immunity was not waived by the Tort Claims Act was a judgment for purposes of application of section 101.106. Furthermore, the court rejected the plaintiffs' arguments that they were bringing negligence claims against Aguilar whereas they had brought constitutional and intentional tort claims in their federal causes of action. "Whether the plaintiff's claim against the governmental unit falls under the Tort Claims Act is relevant; whether the plaintiff's claim against the employee falls under the Tort Claims Act is not. ... [T]he legislature used the broad term 'same subject matter.' ... The term 'same subject matter' in section 101.106 means 'arising out of the same actions, transactions, or occurrences.' See Coronado v. Milam, 2004 WL 1195879 (Tex. App.—San Antonio 2004, pet. denied) (section 101.106 barred suit against individual officers based upon dismissal of federal action against the City of San Antonio where federal and state suit involved the same subject matter); McGown v. Huang, 120 S.W.3d 452 (Tex. App.—Texarkana 2003, pet. denied). In McGown, the Texarkana court noted that the terms of section 101.106 are read very broadly to convey immunity to all employees involved whose conduct gives rise to the claim, regardless of whether their conduct formed the basis of the judgment in the action against the governmental entity. In McGown, the plaintiffs' suit against the hospital district was dismissed because the two actors of whose conduct the plaintiffs complained were not employees of the hospital district. The fact that the plaintiff had brought claims against the hospital district however, barred a subsequent action against a nurse employed by the district. The court explained that section 101.106 applies when the second action involves the same subject matter regardless of whether it is based on the same causes of action. The court also explained that while the application of section 101.106 may be harsh, when a party chooses to bring an action pursuant to the Tort Claims Act, "she is bound by its provisions and limitations, including section 101.106." Id. at 459.

The Sykes and Aguilar cases were in line with cases that had interpreted section 101.106 broadly to restrict plaintiffs' rights under the Act. See, e.g., Gonzalez v. El Paso Hosp. Dist., 940 S.W.2d 793, 795 (Tex. App.—El Paso 1997, no writ)(judgment need not be against the governmental until before the procedural bar applies), and Putthoff v. Anchrum, 934 S.W.2d 164, 174 (Tex. App.—Fort Worth 1996, writ denied) (section 101.106 bars suit when the judgment is based on plaintiff's failure to comply with the Act's notice requirements).

3. 101.106(e)

A plaintiff cannot avoid the irrevocable election of defendant created by sub-sections (a) and (b) by naming both the entity and employees as defendants. If a plaintiff brings suit against both a governmental unit and its employee, the employee "shall immediately be dismissed on the filing of a motion by the governmental unit." Section 101.106(e). Villasan, M.D. v. O'Rourke, 166 S.W.3d 752 (Tex. App.–Beaumont 2005, pet. filed) (upon filing motion trial court was obligated to dismiss suit against employees).

4. 101.106(f)

Finally, sub-section (f) provides that, if a suit is filed against an employee based on conduct within the general scope of the employee's employment that plaintiff could had brought under the Tort Claims Act against the governmental unit itself, the suit is considered an action brought against the employee in his official capacity. Moreover, the suit against the employee will be dismissed unless the plaintiff amends her pleadings dismissing the employee and naming the government unit as a defendant within 30 days after a motion is filed. Section 101.106(f).

Suits against an employee arising from actions within the scope of the employee's employment is, in effect, a suit against the governmental entity. Univ. of Tex. Health Sci. Ctr. v. Bailey, 332 S.W.3d 395, 400-01 (Tex. 2011). Consequently, when a suit against an employee is "based on conduct within the general scope of that employee's employment," the suit constitutes an action in the employee's official capacity and is, thus, a suit against the entity. Id. Therefore, even if the plaintiff later substitutes the entity in as the defendant, the statute of limitations is considered as tolled when the suit against the employee was filed. Id.

In Bailey, the plaintiff sued a physician who is a professor employed by a state university medical school. Id. at 397. After the statute of limitations on medical malpractice suits had run, Bailey moved the trial court to order the Baileys to substitute his employer as the defendant. Id. The Baileys brought the entity in to the suit as the defendant and non-suited the claims against the physician. Id. at 398. The medical school answered the suit and both plaintiff and the medical school moved for summary judgment regarding whether the claims were barred by the statute of limitations. Id. at 399. The Texas Supreme Court held that, because the plaintiff had sued the physician for actions within the scope of his employment, the physician was sued in his official capacity and, thus, the suit was, from inception, a suit against the medical school. Id. at 401. See Franka, 332 S.W.3d at 381. Thus, the substitution of the governmental entity as a party after the statute of limitations had run did not make the claims time barred because the governmental entity had been a party to the suit (regardless of whether they were joined as a defendant in their own name or sued in the name of their employee in his official capacity). Bailey, 332 S.W.3d at 401.

Like other provisions of 101.106, sub-section (f) applies to claims beyond those permitted by the TCA. See Franka, 332 S.W.3d at 381. Sub-section (f) provides that an employee who has been sued based on actions within the course and scope of her employment can move to dismiss the claims against her. Id. However, sub-section (f) references suits against the employee, "if [the suit] could have been brought under this chapter against the governmental entity…." TEX. CIV. PRAC. & REM.CODE § 101.106(f). Courts of Appeal have held that the employee could not get dismissed under sub-section f unless the employee proved that the plaintiff could bring suit against the governmental entity under the TCA. Id. at 371. Thus, the employee could not get dismissed unless she could prove that the immunity had been waived and her employer could be held liable under the TCA. Id.

In Franka, the Supreme Court held that an employee is entitled to dismissal under 101.106(f) if the suit is a tort claim regardless of whether or not the plaintiff can bring suit against the defendant's employer. Id. at 380-82. Thus, the employee can get dismissed under sub-section (f) if the claim sounds in tort whether or not sovereign immunity has been waived allowing suit to be brought against the defendant's employer. Id.

The Supreme Court has also held that a non-suit cannot be used as a means of preventing the trial court from ruling on the issue of immunity from suit. The Supreme Court noted that the doctors had filed their own motion to dismiss and were entitled to immediate dismissal. Austin State Hosp. v. Graham, 347 S.W.3d 301 (Tex. 2011). "A nonsuit cannot prejudice the rights of an adverse party to be heard on a pending claim for affirmative relief. Id.

3. Section 101.021: Liability for Operation or Use of Motor-Driven Vehicle or Motor-Driven Equipment.

A governmental entity is liable for the property damage, personal injury and wrongful death resulting from the negligent operation or use of a motor-driven vehicle or motor-driven equipment. TEX. TORT CLAIMS ACT § 101.021(1). The Act does not define what constitutes a motor vehicle or motorized equipment. Id.[6] In determining whether something constitutes a motor vehicle, courts look at how that term is defined in other statutes. Ozolins v. Northlake Cmty. Coll., 805 S.W.2d 614 (Tex. App.–Fort Worth 1991, no writ); Estate of Garza v. McAllen Indep. Sch. Dist., 613 S.W.2d 526, 527, n.1-2 (Tex. App.–Beaumont 1981, writ ref'd n.r.e.). Other statutes

[6] The Act specifically excludes from motor-driven equipment, items used in the operation of flood gates or water release equipment by river authorities created under the laws of this state or medical equipment located in hospitals. TCA § 101.001(3). See Bennett v. Tarrant County Water Control and Improvement Dist. No. 1, 894 S.W.2d at 452.

define motor vehicles as: (1) vehicles of every type in which persons can be transported or drawn upon that are self propelled, but excluding vehicles moved by human power or used exclusively on stationary rails or tracks; (2) land vehicles such as motorcycles, truck-tractors, farm-tractors, passenger cars, and buses; and (3) objects having two or more wheels. Id.; Ozolins, 805 S.W.2d at 615. Following these definitions, the Fort Worth Court of Appeals found that a sailboat did not constitute a motor-driven vehicle under the terms of the TCA. Id.[7]

The supreme court has also established a test for determining when the plaintiff's injuries arise from the operation and use of a motor vehicle. In order for the TCA's waiver of immunity to apply, there must be "a nexus between the injury negligently caused by a governmental employee and the operation or use of a motor-driven vehicle...." LeLeaux, 835 S.W.2d at 51; Dallas Area Rapid Transit v. Whitley, 104 S.W.3d 540, 543 (Tex. 2003). The "operation or use" must be that of the governmental employee, and not that of a third person. LeLeaux, 835 S.W. 2d at 51. Thus, before the governmental unit will be liable, the use and operation of the vehicle must be the direct cause of the injuries, as opposed to being merely the setting in which the plaintiff was injured. Whitley, 104 S.W.3d at 540; see Hopkins v. Spring Indep. Sch. Dist., 736 S.W.2d 617, 619 (Tex. 1987); Morales v. Barnett, 219 S.W.3d 477 (Tex. App.–Austin, 2007) (no nexus between death of track athlete's death and use of car or blinkers on car); Estate of Garza, 613 S.W.2d at 528 (plaintiff's damages were caused by a knife and not the use of a motor vehicle); Jackson v. City of Corpus Christi, 484 S.W.2d 806, 809 (Tex. Civ. App.–Corpus Christi 1972, writ ref'd n.r.e.). Accordingly, injuries have been found to arise out of the negligent operation and use of a vehicle when:

(a) The plaintiff was run over by a prisoner driving a stolen sheriff's department car that a deputy left running outside the jail. Finnigan v. Blanco County, 670 S.W.2d 313 (Tex. App.–Austin 1984, no writ);

(b) The plaintiffs alleged a bus driver's failure to activate warning flashers resulted in their daughter being struck by another car upon exiting the school bus, Hitchcock v. Garvin, 738 S.W.2d 34, 36-38 (Tex. App.–Dallas 1987, no writ) (holding that summary judgment evidence presented a fact question on whether the plaintiffs' injuries arose out of the operation and use of the school bus);

(c) The bus driver honked the bus horn to signal the plaintiff that it was safe to cross the street. Austin Indep. Sch. Dist. v. Gutierrez, 54 S.W.3d 860 (Tex. App.–Austin 2001, pet. denied). School district held liable because bus driver took affirmative action in honking the horn which contributed to cause plaintiff's injuries. Id. at 866.

(d) The plaintiff was struck by a police car, driven by an on-duty officer, Guzman v. City of San Antonio, 766 S.W.2d 858, 860-61 (Tex. App.–San Antonio 1989, no writ);

(e) The plaintiff was run down in the road after being dropped off in the wrong place by the school bus, Contreras v. Lufkin Indep. Sch. Dist., 810 S.W.2d 23, 26 (Tex. App.–Beaumont 1991, writ denied); but see Goston v. Hutchison, 853 S.W.2d 729, 734 (Tex. App.–Houston [1st Dist.] 1993, no writ) (questioning Contreras holding);

(f) Employee attached a rope to pickup truck and concrete picnic table to move table, and student became entangled in rope and was dragged. Vidor Ind. School Dist. v. Bentsen, 2005 WL 1653873 (Tex. App.–Beaumont 2005 no pet.)(mem. op.).

Conversely, injuries do not arise from the operation and use of a motor vehicle when the:

(a) Plaintiff was made to exit bus because of dispute with another passenger. The plaintiff was assaulted by other passenger after exiting the bus. Whitley, at 3.

(b) Plaintiff was injured in a classroom and was merely transported by bus when she left school, Hopkins, 736 S.W.2d at 619;

(c) Plaintiff struck her head on emergency door exit while playing in school bus that was parked and not in use, LeLeaux, 835 S.W.2d at 51-52;

(d) Plaintiff's injuries resulted from a student using a cigarette lighter to set off a smoke detector in a school district vehicle, Pierson v. Houston Indep. Sch. Dist., 698 S.W.2d

[7] School districts and junior college districts can only be held liable for the negligent operation of a motor vehicle. Ozolins, 805 S.W.2d at 815; TCA § 101.051. Unlike other governmental units covered by the Act, school districts and junior college districts cannot be held liable under the TCA for the use and operation of personal and real property or for premises defects. See Gravely v. Lewisville Indep. Sch. Dist., 701 S.W.2d 956 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.) (school district was not liable for injuries sustained by spectator when bleachers at a school athletic event collapsed).

377, 380 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.);

(e) Student was stabbed while riding on a school bus, Estate of Garza, 613 S.W.2d at 527-28;

(f) Injuries allegedly resulted from the failure to transport patient in emergency ambulance, Brantley v. City of Dallas, 545 S.W.2d 284, 287 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.);

(g) Injuries resulted from a police officer's failure to remove a stalled vehicle or direct traffic around the stalled vehicle, Jackson, 484 S.W.2d at 809-10;

(h) Plaintiff students were injured in an automobile accident after being dropped off at an unauthorized bus stop and getting a ride with a friend, Goston, 853 S.W.2d at 733-34;

(i) Students were injured by the reckless driving of another student in a school parking lot, Heyer v. N. E. Indep. Sch. Dist., 730 S.W.2d 130, 131-32 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.);

(j) Plaintiff was injured while working on a carburetor in an auto mechanics class, Naranjo v. Southwest Indep. Sch. Dist., 777 S.W.2d 190, 192-93 (Tex. App.—Houston [14th Dist.] 1989, writ denied);

(k) Plaintiff school children were injured as a result of allegedly negligent planning and layout of school bus stop locations, Luna v. Harlingen Consol. Indep. Sch. Dist., 821 S.W.2d 442 (Tex. App.—Corpus Christi 1991, pet. denied); and

(l) Plaintiff was injured as a result of failure to provide a stop arm on a school bus, Cortez v. Weatherford Indep. Sch. Dist., 925 S.W.2d 144 (Tex. App.—Fort Worth 1996, no writ).

(m) "Use" of equipment to perform road and ditch grade work was done two years before flooding. See Ector County v. Breedlove, 168 S.W.3d 864 (Tex. App.—Eastland 2004, no pet.).

(n) Arrestee was injured when a car hit the patrol car he was placed in. See City of Kemah v. Vela, 149 S.W.3d 199 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

(o) Student injured when he got off school bus and fell into ditch, where student left bus to help women injured in auto accident with bus. Arlington Ind. School Dist. v. Kellam, 2006 WL 240276 (Tex. App.–Fort Worth 2006, no pet.).

Therefore, the mere involvement of or proximity of a motor vehicle to an accident will not give rise to liability. LeLeaux, 835 S.W.2d at 52; see State v. McAllister, 2004 WL 2434347 (Tex. App.—Amarillo 2004, pet. filed) (no liability where state employee picking up roadside trash hit by truck driven by third-party). Liability exists only when the injuries were actually caused by the operation or use of a motor vehicle under the control of the governmental unit named as a defendant. Id. at 51. In cases involving school buses, "when the allegations of negligence are related to the direction, control, and supervision of the students, the suit is barred; when the allegations of negligence are related to the negligent use of the motor vehicle itself, the suit is not barred." Goston, 853 S.W.2d at 733 (citing Estate of Garza, 613 S.W.2d at 528). See also City of El Campo v. Rubio , 980 S.W.2d 943, 945-46 (Tex. App.--Corpus Christi 1998, pet. dism'd w.o.j.) (affirming denial of City's plea in abatement where injuries were alleged to have resulted from a police officer's instructing a non-licensed passenger to drive vehicle to police station).

Furthermore, liability will not attach unless the motor vehicle is owned or controlled by the defendant governmental unit. Heyer, 730 S.W.2d at 131-32. The plaintiff in Heyer was struck by a car driven by another student and not owned by the school district. Id. The court held that because the school district did not own or control the car, the plaintiff could not bring suit under the TCA. Id.

At the same time, governmental entities can be liable for injuries caused by vehicles that they do not own if they control the vehicle. As explained by the Texas Supreme Court in LeLeaux, within the meaning of the TCA, "operation" of a motor vehicle means "doing or performing a practical work" and "use" of a motor vehicle means to put or bring into action or service, to employ for or apply to a given purpose." LeLeux, 835 S.W.2d at 51. See Robinson v. Univ. of Tex. Med. Branch, 171 S.W.3d 365, 369 (Tex. App.–Houston [14th Dist.] 2005, no pet.).

Based on this rationale, Galveston County was liable for injuries to a governmental employee injured when he fell from the raised bed of a dump truck that was not owned or driven by the governmental entity where county employees supervised the driver and provided spotters who signaled the driver when to move forward and when to stop. County of Galveston v. Morgan, 882 S.W.2d 485, 490 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

The spotters were county employees. They were a necessary part of the job. The spotters told the truck driver when to move forward, how far to move, when to raise his bed, how far to raise it, when to lower his bed, and when to stop. The movement of the truck and the laying of the [roadway material] was within the spotters' sole discretion. If a driver moved his truck contrary to the spotters' direction he could be fired.

Although the spotters were not the drivers of the trucks, the spotters "used or operated" the trucks by exercising complete control over their "use or operations" [and thus the County could be liable for their negligence]. Id.

The standard of care and liability to which a governmental entity is held depends upon whether it is acting as a common carrier. If the governmental unit is a common carrier, it is held to a higher standard of care. Bryant v. Metro. Transit Auth., 722 S.W.2d 738, 739 (Tex. App.—Houston [14th Dist.] 1986, no writ). For example, a common carrier is obligated to prevent passengers from being assaulted on its vehicles and to offer care and assistance to any passenger that is attacked. Id. Compare Estate of Garza, 613 S.W.2d at 527-28 (school not required to prevent assaults on bus). A governmental entity, however, does not act as a common carrier in operating school buses or utilizing motor vehicles to carry out governmental functions. Estate of Lindburg, 766 S.W.2d at 212-13; Guzman, 766 S.W.2d at 860 (operation of police vehicle). In these circumstances, governmental entities are held only to a negligence standard of care, i.e. the actions of a reasonable person under this same or similar circumstance. Estate of Lindburg, 766 S.W.2d at 212-13. Thus, unless the defendant is acting as a common carrier, it is held to a negligence standard. Id.

Finally, keep in mind that the recovery of property damages is limited only to claims arising out of the use of motorized equipment or motor vehicles. Unless the plaintiff's damages were caused by the negligent operation or use of a motor-driven equipment vehicle, he is precluded from recovering property damage. State Dep't of Highways and Pub. Transp. v. Pruitt, 770 S.W.2d 638 (Tex. App.—Houston [14th Dist.] 1989, no writ). Thus, while a plaintiff may be able to maintain an action under the TCA, outside of the provisions regarding liability for the operation or use of a motor vehicle, he will not recover a judgment for any property damage he has sustained. See id.

4. Section 101.021(2): Liability for the Condition or Use of Tangible Personal Property.

Section 101.021(2) establishes liability for personal injury and death caused by the condition or use of tangible personal property if a private person would be liable according to Texas law. The cases interpreting this section have focused on two issues. First, what constitutes tangible personal property? Second, when do the plaintiff's damages arise from the condition or use of personal property?

(a) What constitutes "Tangible" Property?

While it is easy to define what constitutes tangible personal property, the courts have had considerable trouble applying the definition to records, documents and medical test results. The supreme court has defined tangible property to be "something that has a corporeal, concrete and palpable existence." York, 871 S.W.2d at 178 (footnote omitted). Even without the York definition, medical instruments, hospital beds, tools, equipment, football helmets, props in plays, etc., are obviously personal property. See City of Baytown v. Townsend, 548 S.W.2d 935, 939 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) (bolt protruding from net post on municipal tennis courts was a piece of tangible property for which liability could attach). Before York, Texas courts had generally held that documents do not constitute tangible personal property. See Montoya v. John Peter Smith Hosp., 760 S.W.2d 361, 364 (Tex. App.--Fort Worth 1988, pet. denied) (information written on a triage slip does not constitute tangible personal property, the use of which can give rise to liability); Seiler v. Guadalupe Hosp., 709 S.W.2d 37, 38-39 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (information in emergency room records do not constitute tangible personal property); Robinson v. City of San Antonio, 727 S.W.2d 40, 43 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.) (protective order reduced to writing deemed not tangible property); Wilkins v. State, 716 S.W.2d 96, 98 (Tex. App.—Waco 1986, writ ref'd n.r.e.) (permit authorizing use of state highway to transport mobile home was not a piece of tangible personal property).

With the York ruling, a line of decisions permitting governmental liability based on medical records and other documents based on liability for misuse of the machines that generated the documents has been effectively overruled. See, e.g., Tex. Youth Comm'n v. Ryan, 889 S.W.2d 340, 344-45 (Tex. App.--Houston [14th Dist.] 1994, n.w.h.). In Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 33 (Tex. 1983), the supreme court held that a graph depicting results of an electrocardiogram was a piece of tangible personal property. The court reasoned that because the document reflected the results of a test performed by a piece of tangible property, the document must also be tangible personal property. Id. Similarly, the Beaumont Court of Appeals held that a plaintiff could recover against the Department of Corrections for the negligent sending of a telegram. Tex. Dep't of Corrections v. Winters, 765 S.W.2d 531, 532 (Tex. App.—Beaumont 1989, writ denied). Cf. Thomas v. Brown, 927 S.W.2d 122, 127-28 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (policy implemented by Texas Department of Corrections was not tangible property and liability could not be based on enforcing policy). The Winters court concluded that the results of the use of tangible personal property, a computer system, were tangible personal property. Id. Although it stopped short of explicitly disapproving Salcedo, the supreme court's decision in York has imposed a new

rule of law with regard to allegedly negligent use of medical records and documents.

In York, the plaintiff's medical record had noted a red and swollen hip and significant change in demeanor. York, 871 S.W.2d at 176. The treating physician was found at trial to have misused tangible property by failing to correctly interpret these symptoms as indicating a need to have the hip x-rayed, resulting in a delay in the diagnosis of a broken hip. Id. The supreme court rejected this reasoning, arguing instead that "[i]nformation ... is intangible; the fact that information is recorded in writing does not render the information tangible property." Id. at 179. See also Tex. Dep't of Pub. Safety v. Petta, 44 S.W.3d 575 (Tex. 2001) (while instructional manuals are tangible, the information contained in the manual is not tangible property, thus inadequacies in manuals cannot be the basis of suit under TCA because negligent training and supervision claims must be predicated on condition or use of tangible property); Kassen v. Hartley, 887 S.W.2d 4, 14 (Tex. 1994) (use, misuse or non-use of medical records, patient file, and emergency room procedures manual will not support a claim under TCA); Terry A. Leonard, P.A., 293 S.W.3d at 685 (the failure to review medical records that would have shown the prescribed medicine was contra-indicated was not a use of property); Riggs v. City of Pearland, 177 F.R.D. 395, 406 (S.D. Tex. 1997) (allegations of inadequate medical care and treatment does not allege a "use of tangible property" with the ambit of the TCA); Marroquin v. Life Mgmt. Ctr., 927 S.W.2d 228, 230 (Tex. App.—El Paso 1996, pet. dism' d w.o.j.) ("[i]njuries resulting from the misuse of information, even if that information is recorded in writing, does not provide a waiver of governmental immunity for injuries caused by the use of tangible personal property.") Holland v. City of Houston, 41 F. Supp. 2d 678, 712 (S.D. Tex. 1999) (misinterpreting or reaching incorrect conclusions from information does not involve use of tangible property under TCA). The Salcedo holding was distinguished from this case by the reasoning that interpretation of the graph in that case was actually an intended use of the machine, and therefore within the waiver of immunity. York, at 178.

The distinction is unsatisfactory, and the logic of York suggests that Salcedo should have been overruled and it should not be relied upon in the future. The York court did, however, note that "Salcedo does not permit claims against the State for misuse of information." Id. at 179. Thus, the new rule appears to be that any negligence action against the state based upon misuse of a report of any kind will be rejected on the grounds of the state's sovereign immunity from the suit. See, e.g., Kelso v. Gonzales Healthcare Sys., 136 S.W.3d 377 (Tex. App.–Corpus Christi 2004, pet. filed) (immunity not waived by allegation that results of EKG were improperly used); and Salas v. Wilson Mem'l Hosp., 139 S.W.3d 398 (Tex. App.—San Antonio 2004, no pet.) (immunity not waived by allegation that results of test for sexually transmitted disease (STD) were misused by staff's failure to recognize that there was no STD).

The Texas Supreme Court has applied the York rationale outside the context of medical records. Dallas County v. Harper, 913 S.W.2d 207 (Tex. 1995), arose from a suit based upon a District Clerk's releasing the plaintiff's indictment for theft. The Waco Court of Appeals held that sovereign immunity did not bar the plaintiff's claims against Dallas County because the indictment was "tangible personal property" within the definition of the TCA. Id. The supreme court reversed the court of appeals and rendered judgment for the County because:

> In University of Tex. Med. Branch v. York, we held that simply reducing information to writing on paper does not make the information "tangible personal property." ... An "indictment" is "the written statement of a grand jury accusing a person ... of some act or omission." ... An indictment is no more than a grand jury's pronouncement reduced to writing. It is not tangible personal property for purposes of waiver under the Texas Tort Claims Act in these circumstances.

Id. at 207-08 (citations omitted). Similarly the failure to train, as well as the failure furnish training materials and instructions to officers is not actionable because the property at issue is not tangible within the meaning of the TCA. Petta, 44 S.W.3d at 580-81 (immunity was not waived for claims of failure to train or provide training materials to law enforcement officers). Therefore, neither the use or misuse of information contained in governmental records, nor the release of governmental records can constitute a use or misuse of "personal property" that will give rise to liability under the TCA. Id.; York, 871 S.W.2d at 179; see City of Dallas v. Rivera, 146 S.W.3d 334 (Tex. App.—Dallas 2004, no pet.) (city's written force guidelines, training manuals, or other documentary evidence are not tangible personal property); Seamans, 934 S.W.2d at 393 (failure to transit information regarding donation of daughter's body to science not actionable); Marroquin, 927 S.W.2d at 230-31 (failure to use building was not use of tangible property).

(b) What constitutes the "Use" of Personal Property.

(1) The Governmental Entity Must Use the Property.

Assuming the items in question constitute personal property, their condition or use gives rise to liability in three different ways. One basis of liability under section 101.021(2) is liability predicated upon injuries resulting from the negligent use of tangible property by an employee acting within the scope of his employment. Winters, 765 S.W.2d at 532; Hein, 557 S.W.2d at 366. Thus, a governmental entity will be held liable for its agent's use or misuse of personal property. Id. See Borrego v. City of El Paso, 964 S.W.2d 954, 957 (Tex. App.—El Paso 1998, pet. denied) (allegation of defect or inadequacy of tangible property is not necessary to state a cause of action if some use of the property as opposed to some condition of the property caused the injury). Negligent entrustment, however, does not state a cause of action under the TCA. Durbin v. City of Winnsboro, 135 S.W.3d 317, 321-25 (Tex.App.–Eastland 2004, pet. filed); Tex. Dep't. of Criminal Justice v. Lone Star Gas Co., 978 S.W.2d 176, 178 (Tex. App.–Texarkana 1998, no pet.)

The Borrego decision demonstrates how an actionable injury can arise from use of property when there is no allegation that the property was defective. In Borrego, the plaintiff was injured when he was strapped to a backboard after an auto accident. EMS technicians left Borrego tied to the board in the middle of the street. When a car came through police barriers, City personnel ran. Borrego could not move, and was hit by the car. There was no contention that the backboard was defective. Rather, the City was held liable because it was the negligent use of the property that caused the injury. Id. However, the Borrego decision is not to suggest that under the TCA, suit cannot be predicated upon injuries caused by defective property. In San Antonio State Hosp. v. Cowan, 128 S.W.3d 244 (Tex. 2004), the Texas Supreme Court confirmed that the "use" must be by the governmental unit, and that merely allowing someone to use his personal property does not constitute "use" such as to waive immunity. "[S]ince 1973 we have consistently defined 'use' to mean '"to put or bring into action or service; to employ for or apply to a given purpose."' Id. at 246 (citations omitted). Therefore, the hospital did not waive immunity by allowing a suicidal patient to retain his walker and suspenders, which he then used to hang himself. The court distinguished the case of Overton Mem'l Hosp. v. McGuire, 518 S.W.2d 528 (Tex. 1975), in which a hospital waived immunity by its use of a hospital bed without rails. "The hospital did not merely allow the patient access to the bed; it actually put the patient in the bed as part of his treatment. The use of property respondents allege does not rise to this level." Id.; 128 S.W.3d at 246-247. See Dallas County v. Posey, 290 S.W.3d 869 (Tex. 2009). See also, Tex. Dep't of Criminal Justice v. Hawkins,169 S.W.3d 529, 533 *(*Tex.App.–Dallas 2005, no pet.), (holding that TDCJ's allowing escaping convicts access to weapons, which the convicts later used to kill a security guard, did not constitute TDCJ's using the weapons).

In Rusk State Hospital, the Texas Supreme Court evaluated whether a plaintiffs' pleadings and the trial court record could establish the "use" of property for a plastic bag that an psychiatric utilized to commit suicide. Rusk State Hospital, 392 S.W.3d at 97. The court again explained that Section 101.021(2) of the Act waives immunity for the use of tangible property, only when the governmental entity itself uses the property. Id. at 97. The court again explains that under the TCA a governmental entity does not "use" property within the meaning of the TCA when it "merely allows someone else to use it." Id. For a waiver of immunity to be based on the condition of tangible property under Section 101.021(2), the condition of the property must approximately cause the injury or death.

> A condition does not proximately cause an injury or death if it does no more than furnish the means to make the injury or death possible; that is, immunity is waived only if the condition (1) poses a hazard in the intended and ordinary use of the property and (2) actually causes an injury or death.

Id. at 97-98. The Supreme Court then addressed the Blacks' claims with respect to the plastic bag that decedent used to attempt suicide. The Blacks pointed to evidence in the record that the hospital's own policy classified a plastic bag as inherently dangerous for inpatient psychiatric hospitals. The Blacks' pleadings asserted that the hospital was negligent in providing, furnishing, or allowing their son to have access to the bag and that this constituted the condition or use of tangible personal property for which immunity would be waived by the TCA.

The Supreme Court rejected the Blacks' arguments noting that their contention about the use of property would mean that any time a governmental entity provided, furnished, or allowed access to tangible property it would constitute the use of property under the Act. Id. at 98. The court noted that it had previously held that in order for something to constitute a use of property, the governmental entity must put or bring the property into action or service and employ the property for or apply it to its given purpose. Id. The court noted that it had previously held in Cowan that the San Antonio State Hospital

allowing a patient access to suspenders and a walker, did not constitute the use of property within the meaning of Section 101.102(2).

Following Cowan, the Texas Supreme Court held that merely putting an inmate into a holding cell with a phone that had a cord attached was not actionable when the inmate hung himself on the cord. Posey, 290 S.W.3d at _871. The Supreme Court pointed out that liability under section 101.021(2) requires that the property be put to use by the governmental entity. Id. Furthermore, there is no waiver of immunity where the property is "used" for the purpose of committing an intentional tort. Texas Department of Criminal Justice v.Campos, 384 S.W.3d 810 (Tex. 2012). The plaintiffs in Campos allged the officers used tangible personal property for the purpose of helping them perpetuate intentional torts, sexually assaulting the plaintiffs. Id. at 814. The plaintiffs asserted that the TCA waived immunity for their claims against the department because the officers used tangible personal property to carry out the assaults. Id. The Texas Supreme Court held that because liability for intention torts is expressly excluded from liability under the TCA, where the property was only used for the purpose of committing an intentional tort there is no waiver of immunity under the TCA. Id. at 814. See Petta, 44 S.W.3d at 576 (officer hitting the plaintiff's window and shooting out her tires for the purpose of committing a sexual assault was not a use of property because those actions were intentional and fell within the exclusions for claims arising from intentional torts).

(2) There Must be a Nexus Between the Condition of the Property and Injury.

Moreover, Posey reinforces the requirement that there must be a nexus between the condition of the property and the injury. "To find proximate cause, there must be a nexus between the condition of the property and the injury." Id. While the phone cord allowed Posey to commit suicide, there was nothing defective about the cord which caused injury to Posey. Id. Similarly, if a landowner fails to show the necessary nexus between the alleged use of property and his injuries, then the use of property is inadequate as a matter of law to support a lawsuit. Tex. Parks & Wildlife Dep't v. E.E. Lowery Realty, Ltd., 235 S.W.3d 692 (Tex. 2007) (holding that fire caused during repair work on dock was insufficient to support claim based on use of a motor vehicle).

When medicine is properly administered , *i.e.*, according to the non-state physician's directive, there is no condition or use of property that will result in a waiver of immunity. Somervell County Healthcare Authority v. Sanders, 169 S.W.3d 724 (Tex.App.–Waco 2005, no pet.)(holding that giving medication as directed by patient's private physician did not constitute waiver of immunity even though medication had tendency to exacerbate patient's fall risk and patient ultimately died from a fall).

The condition of the plaintiff does not alter the scope of the governmental entity's duty under the Act. The plaintiffs in both Posey and Cowan argued that the governmental entity was liable because they knew, or should have known, of the suicidal ideation of the patient/inmate. In both instances, the Texas Supreme Court rejected this argument. "Posey's parents argue that the county failed to properly assess Posey as a suicide risk…. However, the quality of Posey's [suicide] assessment has no bearing on the county's immunity. In Cowan, we held that immunity was not waived even though the patient was committed for having suicidal tendencies. … So, even if Posey had apparent suicidal tendencies, the county would still be immune under Cowan because it did no more than place Posey in a cell with a corded telephone which he, himself, used to commit suicide. Posey, 290 S.W.3d at 872.

Finally, decisions regarding the location of tangible property may not be actionable. Campos, 384 S.W.3d at 815. In Campos the plaintiffs alleged the failure to locate surveillance cameras within the correctional facility was a use of property. Id. The Texas Supreme Court held that the improper placement or location of cameras were not a "use" of property under the TCA. Id.

(3) The Property Must Be Defective.

Another way that the state may waive its immunity is by furnishing property that is defective, inadequate or lacking an integral safety component. Jenkins v. Tex. Dep't of Criminal Justice, 2004 WL 1117171, *3 (Tex. App.–Corpus Christi 2004, no pet. h.); McBride v. TDCJ-ID, 964 S.W.2d 18, 22 (Tex.App.–Tyler 1997, no pet.); Tex. Dep't of MHMR v. McClain, 947 S.W.2d 694, 697-98 (Tex. App.–Austin 1997, writ denied); and Tex. Dep't of Corrections v. Jackson, 661 S.W.2d 154, 158 (Tex. App.–Houston [1st. Dist.]1983, writ ref'd n.r.e.). Additionally, that the act causing the injury was undertaken by a third party does not relieve the state from liability. McClain, 947 S.W.2d at 697. See also Lowe, 540 S.W.2d at 300-01; Overton Mem'l Hosp. v. McGuire, 518 S.W.2d 528, 529 (Tex. 1975); Tex. State Technical College v. Beavers, 218 S.W.3d 258 (Tex. App.–Texarkana 2007). In these cases, the agent supplies the instrumentality through which the plaintiff is injured. Lowe, 540 S.W.2d at 300 ("we hold that the affirmative allegation of furnishing defective equipment to Lowe states a case within the statutory waiver of immunity arising from some condition or

some use of tangible property"); McGuire, 518 S.W.2d at 528-29 ("[w]e believe that injuries proximately caused by negligently providing a bed without bed rails are proximately caused by some condition or some use of tangible property under circumstances where a private person would be liable"); Henry, 52 S.W.3d 434 (Tex. App. – Fort Worth 2001, no pet.); City of Midland v. Sullivan, 33 S.W.3d 1, 7-8 (Tex. App.--El Paso 2000, pet. dism'd w.o.j.) ("[t]he injury must be proximately cause by the condition or use of the property").

The Fourteenth Court and the Waco Courts of Appeals have recently disagreed on whether immunity is waived when medical equipment is misused, causing the plaintiff's illness to be improperly diagnosed. In Univ. of Tex. Med. Branch v. Thompson, 2006 WL 1675401 (Tex.App.–Houston [14th Dist.] 2006, no pet. h.), the court held that sovereign immunity was not waived when the plaintiff's appendicitis went undiagnosed by use of stethoscopes and other equipment in such a way that medical personnel failed to recognize the illness, because the real substance of the suit was failure to detect and treat the illness. In Univ. of Tex. Med. Branch v. Blackmon, 169 S.W.3d 712 (Tex.App.–Waco 2005, vacated for lack of jurisdiction 195 S.W.3d 98(Tex. 2006), the court held that improper use of a stethoscope and pulse oxymeter caused the failure to diagnose the plaintiff' s pneumonia and thus immunity was waived. The facts in Blackmon were egregious, including the plaintiff prisoner turning blue, her fellow inmates yelling to no avail for her to be given medical attention, and her dying in her room within twelve hours of her last visit to the clinic.

In Rusk State Hospital, the Supreme Court rejected the argument that the plaintiff's could establish a waiver of immunity based on the "condition or use" or property where the property, a plastic bag used to commit suicide was not defective. Rusk State Hospital, 392 S.W.3d at 98. In Rusk State Hospital, the plaintiffs contended that the plastic bag used by their son constituted a condition of personal property identical to the condition of the football player's uniform that the Supreme Court found was a condition or use of property in Lowe v. Texas Tech University, 540 S.W.2d 297 (Tex. 1976). The Supreme Court, however, pointed out that in Lowe, the plaintiff, a football player, was ordered to remove his knee brace and re-enter the game and play without the brace. Lowe, 540 S.W.2d at 302. The Supreme Court then explained that the holding in Lowe was based on the fact that Texas Tech had effectively given Lowe a uniform that was defective because it lacked a knee brace. Id. at 99. The court pointed out that it had limited the holding in Lowe to cases in which a governmental actor provides property that lacks an integral safety component and the lack of the integral safety component caused the plaintiff's injuries. Id. (citing Kerrville State Hospital v. Clark, 923 S.W.2d 582, 585 (Tex. 1996)). By contrast, the Supreme Court pointed out that the plastic bag at issue was not inherently unsafe. Id. "…[T]he TCA waives immunity for an inherently dangerous condition of tangible personal property only if the condition poses a hazard when the property is put to its intended and ordinary use, which the plastic bag was not." Id. The court rejected the contention that the plastic bag was inherently unsafe and constituted a condition for which suit could be brought under the TCA because there were no inherently dangerous aspects to the bag that made the decedent's death possible. Id.

(4) "Use" versus "Non-Use" of Property

The third means of potential liability under 101.021(2) is for the non-use of property. Whether, liability can arise from the non-use of personal property has been a question of reoccurring debate and uncertainty. Until 1989, numerous courts had held the non-use of property could not form the basis of a claim for "condition or use of personal property" under the Act. Cf. Tex. Dep't of Corrections v. Herring, 513 S.W.2d 6 (Tex. 1974) (failure to provide adequate medical care and treatment does not constitute an allegation of the use of tangible property within the TCA); Diaz v. Central Plains Reg'l Hosp., 802 F.2d 141 (5th Cir. 1986) (refusal to admit patient does not fall within waiver of governmental immunity for the condition or use of tangible property); Vela v. Cameron County, 703 S.W.2d 721 (Tex. App.--Corpus Christi 1985, writ ref'd n.r.e.) (failure to provide life guards and/or life saving measures did not constitute negligent condition or use of tangible property). This all seemed to change with the supreme court' s opinion in Robinson v. Central Tex. Mental Health and Mental Retardation Ctr., 780 S.W.2d 169 (Tex. 1989). The plaintiff in Robinson alleged that her son died because he was not provided with a life jacket when taken swimming by MHMR employees. Id. at 169. The supreme court held that the failure to provide a life preserver was a condition or use of personal property. Id. at 171. See Lowe, 540 S.W.2d at 300 (the failure to provide a football player with protective equipment constituted actionable use of property). But cf. Marroquin, 927 S.W.2d at 230 (decision to keep doors unlocked on the inside of building was not an incomplete use of tangible property).

Thereafter, relying on supreme court opinions in Robinson and Lowe, the plaintiffs in Kassen brought suit claiming that non-use of medication was an actionable use of personal property under the TCA. The supreme court rejected this argument and noted:

> We have never held that a non-use of property can support a claim under the Texas Tort Claims Act. Section 101.021, which requires the property's condition or use to cause the injury, does not support this interpretation. See LeLeaux, 835 S.W.2d at 51 (stating that "use" means "to put or bring into action or service; to employ for or apply to a given purpose"). ... We conclude that the non-use of available drugs during emergency medical treatment is not a use of tangible personal property that triggers waiver of sovereign immunity [under the TCA].

Kassen, 887 S.W.2d at 14 (some citations omitted). The supreme court reiterated the Kassen rationale in Kerrville State Hosp. v. Clark, 923 S.W.2d 582 (Tex. 1995). Clark holds that the "failure to administer an injectionable drug is 'non-use' of tangible personal property and therefore does not fall under the waiver provisions of the Act." Id. See Dallas County v. Alegjo, 243 S.W.3d 21 (Tex. App.–Dallas 2007, no pet.) (failure to administer a different anti-psychotic medicine was not a use of property); McCall v. Dallas County Hosp. Dist., 997 S.W.2d 287, 289-90 (Tex. App.—Eastland 1999, no pet. h.) (hospital's failure to use available medical equipment is not actionable under the TCA). Accord, Spindletop MHMR Center v. Beauchamp, 130 S.W.3d 368, 371 (Tex. App.–Beaumont 2004, pet. filed).

Despite the strong language of the Kassen opinion, there appears to be limited room for continued application of the Robinson and Lowe holdings. In Clark , the supreme court explained:

> [Robinson and Lowe] represent perhaps the outer bounds of what we have defined as use of tangible personal property. We did not intend, in deciding these cases, to allow both use and non-use of property to result in waiver of immunity under the Act. Such a result would be tantamount to abolishing governmental immunity, contrary to the limited waiver the Legislature clearly intended. The precedential value of these cases is therefore limited to claims in which a plaintiff alleges that a state actor has provided property that lacks an integral safety component and that the lack of this integral component led to the plaintiff' s injuries. For example, if a hospital provided a patient with a bed lacking bed rails and the lack of this protective equipment led to the patient's injury, the Act's waiver provisions would be implicated.

Id. at 585 (citations omitted, emphasis added).[8] See also Beavers, 218 S.W.3d at 260; Weeks v. Harris County Hosp. Dist., 785 S.W.2d 169 (Tex. App.—Houston [14th Dist.] 1990, writ denied). Thus, the imposition of liability in Lowe and Robinson is appropriate under the TCA when the plaintiff: (1) was provided with defective equipment; or (2) was not provided with safety equipment that would necessarily accompany the items that were provided.

The holding in City of North Richland Hills v. Friend, 370 S.W.3d 369 (Tex. 2012) reiterates the Texas Supreme Court's holding in *Kassen* that the nonuse of property will rarely state a cause of action under the TCA. Sara Friend collapsed while standing in line at a water park owned by the City of North Richland Hills. City employees attempted to resuscitate Friend but were unable to retrieve a defibrillator from a storage closet in the park. Sara Friend ultimately died and her family brought suit against the City alleging that the failure to use a defibrillator constituted a condition or use of personal property actionable under the TCA. Id.

While the Supreme Court acknowledged earlier cases holding that the failure to use property could be actionable under the TCA it reinforced that nonuse of equipment will rarely be actionable under the TCA. The Court began by pointing out that it is well-settled that mere nonuse of property does not suffice to invoke Section 101.021(2)'s waiver [of immunity from suit]. City of North Richland Hills v. Friend, 370 S.W.3d 369. The Court acknowledged that the Lowe and Robinson decisions held that where the property used lacked an "integral safety component" then failure to use property stated a cause of action within Section 101.021(2) of the TCA. Id. The Court found that if Friend's allegation that the failure to use the defibrillator constituted a claim that an "integral safety component" was missing, then a plaintiff could always state a cause of action by identify some type or piece of equipment that could have been used in a particular instance. Id. "Such a formulation threatens to eviscerate any limiting principle on 'condition or use' entirely and would enable plaintiffs . . . to enlarge the scope of the waiver provided by Section 101.021(2) . . .." Id. The Supreme Court also noted that adopting the plaintiff's argument that identifying a related piece of equipment that was not used as meeting the integral safety component exception "would create a disincentive for governmental units to provide any

[8] The Clark opinion defines the use of property as putting or bringing the property "into action or service; to employ for or apply to a given purpose." Clark, 923 S.W.2d at 584; Marroquin, 927 S.W.2d at 230-31.

form of health or safety equipment at their establishments. Counsel for the Friends acknowledged at oral argument that the Friends' theory would, paradoxically, fail if the City had stood by and watched Sara die rather than attempt to use the oxygen mask and other airway equipment [to save her life]." Id.

The Fort Worth Court of Appeals cited Robinson and Lowe in holding that immunity was waived because ice scoops were integral safety components of ice barrels, and the lack of the scoops caused injuries. See also Posey, 290 S.W.3d 869, 871 (failure to replace phone with one that did not have a cord was misuse or non-use of property, neither of which is actionable under the TCA). In Univ. of N. Tex. v. Harvey, 124 S.W.3d 216 (Tex. App.–Fort Worth 2003, pet. filed), a participant in a drill camp at the University of North Texas sued after she contracted severe food poisoning there. The camp staff had placed ice out in barrels for the campers to use, but did not provide scoops. Witnesses testified that there was debris in the ice and that it was not safe to provide the ice without scoops. 73% of the campers who consumed the ice became ill. Plaintiff's expert testified that the E. coli outbreak was likely caused by the ice. The court held, however, that sovereign immunity was not waived for strict liability claims or for negligence claims based on failure to wash food, undercooking food, or lack of hygiene in food preparation. See Beavers, 218 S.W.3d at 260.

A patient in a state hospital, however, cannot prove a waiver of immunity by alleging that he was provided property lacking an integral safety component when he is really alleging a failure to care for or supervise him. State v. King, 2003 WL 22839389, (Tex. App.–Tyler 2003, pet. denied) (hospital staff's failure to monitor suicidal patient who then hung himself with his shoelaces, was not waiver of immunity by providing beds without sufficient identification and shoes with shoelaces). Note that King was decided before Cowan, discussed above. Presumably if the Tyler court had had the benefit of the Cowan opinion, the Tyler court could have had yet another rationale to support its holding.

(5) There Must Be a Nexus Between the Use of the Property and Plaintiffs Injuries.

Regardless of the basis on which the plaintiff seeks to establish liability under 101.021(2), she must prove a nexus between the property at issue and injuries that are the basis of the suit. Posey, 290 S.W.3d 869. The property itself need not be the instrumentality of the alleged injury, but it must have been a contributing factor to the injury. Holder, 954 S.W.2d at 807; Gonzales v. City of El Paso, 978 S.W.2d 619, 623 (Tex. App.—El Paso 1998, no pet); Salcedo, 659 S.W.2d at 32; Smith, 946 S.W.2d at 501. The requirement of causation mandates more than mere involvement of property, although exactly how much more has not been clearly defined by Texas courts. "For a defective condition to be the basis for complaint, the defect must pose a hazard in the intended and ordinary use of the property." Posey, 290 S.W.3d 869, 872 (while the cord on the phone allowed the inmate to commit suicide, there was no defect in the cord which caused an injury); Miller, 51 S.W.3d at 588 (misuse of medication that masked illness is not use of property that caused the injury); Dallas County Mental Health & Mental Retardation v. Bossley, 968 S.W.2d 339, 342-343 (Tex. 1998); Holder, 954 S.W.2d at 807. Property does not cause the injury if it does no more than furnish the condition that makes the injury possible. Posey, 290 S.W.3d 869, 872 (the exposed wires on the telephone cord would have been actionable if they had caused electric shock to the inmate, but the fact that the exposed wires allowed inmate to hang himself, was not actionable); Bossley, 968 S.W.2d at 343 (citing Union Pump Co. v. Allbritton, 898 S.W.2d 773, 776 (Tex. 1995)); accord Robinson, 171 S.W.3d at 369 (for the use of property to be the basis of liability, it must be the instrumentality of the harm); Ordonez v. El Paso County, 224 S.W.3d 240, (Tex. App.—El Paso 2005, no pet.) (no waiver when arrestee killed after being placed in prison holding tank with rival gang members); Hawkins, 169 S.W.3d at 533-535, (no waiver when security guard was shot by escaped convicts using a gun stolen from the prison during the escape when the shooting occurred 11 days and 300 miles after the escape); Tex. Tech Univ. v. Gates, 2004 WL 2559937 (Tex. App.–Amarillo 2004, pet. denied) (use of adjustable awning and tape for play stage ceased when stage completed; their presence only created condition that made student's fall possible); King, 2003 WL 22839389 at *3-4 (hospital staff's confusion about which bed suicidal patient was in, and subsequent failure to monitor him, was not use of bed such as to waive immunity); Webb County v. Sandoval, 126 S.W.3d 264, 267 (Tex. App.–San Antonio 2003, no pet.) (nothing about chicken nuggets caused the child to choke; rather it was her failure to chew them). But see Delaney v. Univ. of Houston, 835 S.W.2d 56, 59 (Tex. 1992) (university could be held liable for rape of student in her dorm room based on its failure to repair a broken lock on the door of the dorm that allowed the attacker to enter the building).

The property must have been directly involved in the injury for there to be a waiver of immunity. Churchwell v. City of Big Spring, 2004 WL 905951 (Tex.App.–Eastland 2004, no pet.)(mem. op.) (not designated for publication) (no waiver of immunity when dog was released from city pound two weeks before he attacked plaintiff).

5. Section 101.022: Standard of Liability for All Premises and Special Defect Cases.

While section 101.021(2) establishes liability for the condition or use of real property, its application is very limited as a result of another provision of the TCA. Section 101.022 establishes the standard of liability for all premises and special defect cases. Suits involving premises or special defect must be tried in accordance with section 101.022 or the defendant is entitled to judgment as a matter of law. See York II, 284 S.W.3d at 847-48. (failure to get jury finding on ordinary defect meant there was no waiver of sovereign immunity); Koblizek, 752 S.W.2d at 657 (plaintiff's failure to obtain jury findings as to the elements of a premises liability case means the governmental unit cannot be held liable); Carson, 599 S.W.2d at 852 (same). Consequently, claims that appear to arise out of defects in real property, are usually brought under section 101.022.

Liability under section 101.021 has arisen only in cases where the plaintiff is injured from negligence involving activities conducted on real property and not as a result of defects in the real property. See Smith, 664 S.W.2d at 187-90. As discussed previously, Smith involved injuries sustained during a track meet held on real property owned by the University of Texas. Id. Liability did not arise from a defect in the real property, but from the use of the property for a track meet. Id. The Austin Court of Appeals held that the plaintiff could maintain an action for injuries he sustained as a result of the use of the real property for a track meet. Id.; see Genzer v. City of Mission, 666 S.W.2d 116, 120-21 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.) (property used for fireworks display).

An argument can be made that every action taken by a governmental employee occurs on real property. However, to afford plaintiffs a cause of action for injuries sustained while "using" the real property would effectively abrogate the TCA.

6. Joint Enterprise Liability Under Section 101.021(2).

Under the TCA, a governmental entity that enters into a joint enterprise is liable for the torts of other members of the joint enterprise. See Tex. Dep't of Transp. v. Able, 35 S.W.3d 608, 616 (Tex. 2000); Sipes,146 S.W.3d at 283. Able arose out of an auto accident that occurred in a high occupancy vehicle ("HOV") lane on U.S. Highway 290. The Ables collided head-on with a vehicle driving with its lights off in the wrong direction down the HOV lane. The operation and control of the HOV lane, including the barriers that would stop a car from driving the wrong way down the HOV lane, were under the control of the Houston Metropolitan Transit Authority ("Metro"). The jury found that Metro was negligent and grossly negligent. The jury also found that the Texas Department of Transportation ("TxDOT") was not negligent but that TxDOT was engaged in a joint enterprise with Metro related to the operation of the HOV lane on the day of the accident. Based upon the joint enterprise finding, the trial court entered a judgment against TxDOT that was affirmed by the court of appeals.

In its appeal to the Supreme Court, TxDOT sought to have the judgment reversed on the grounds that there was no waiver of immunity under the TCA that would allow it to be held liable once the jury had found that TxDOT was not negligent. In the alternative, TxDOT argued there was no evidence to support the jury's finding that TxDOT had entered into a joint enterprise with Metro.

The supreme court turned first to the contention that there was no waiver of immunity under which TxDOT could be held liable. The court pointed out that §101.021(2) provides liability for the condition or use of real or personal property when a governmental entity would be liable to the plaintiff if the governmental entity was a private person. See id . at 612-13. The court pointed out that subsection 2, unlike section 101.021, does not require a governmental employee to have been negligent as a condition precedent to the governmental entity's being liable to the plaintiff. See id. at 612. The court then noted that

> in the context of private parties ... "the theory of joint enterprise is to make each party thereto the agent of the other and thereby to hold each responsible for the negligent act of the other." If there is a joint enterprise between Metro and TxDOT, and if TxDOT would have been liable for Metro's negligence had TxDOT been a private person, then we must conclude that the state had waived its immunity and that TxDOT is liable under the plain meaning of section 101.021(2).

Id. at 613 (quoting Shoemaker v. Estate of Whistler, 513 S.W.2d 10, 14 (Tex. 1974)).

The court then turned to TxDOT's complaint that there was no evidence to support the jury's finding that it had entered into a joint enterprise with Metro. The court pointed out that under Texas law there are four elements of a joint enterprise: (1) an express or implied agreement among the members of the group, (2) a common purpose to be carried out by the group, (3) a community of pecuniary interest among the members of the group, and (4) an equal right to voice in the management of the joint enterprise that gives each party an equal right of control. TxDOT asserted that

the plaintiffs failed to produce evidence of a common pecuniary interest or an equal right of control.

With regard to a common pecuniary interest, the supreme court pointed out that the Master Agreement entered into by TxDOT and Metro regarding the construction and operation of the HOV lanes stated that "the parties also acknowledge that the construction, operation, and maintenance of the transit ways involves the investment of substantial sums for mass transit purposes." Id. at 614. The court went on to note that the construction of the HOV lanes involved the use of federal, state, and local funds. See id. The court concluded that there was a common pecuniary interest because

> [t]he Master Agreement plainly recognizes that the Transitway Project involved substantial sums of money and contemplated a sharing of resources in order to make better use of this money. It may well have been that the monetary and personal savings produced from the pooling of resources was substantial. The documents also clearly contemplate an economic gain that could be realized by undertaking the activities in this manner. The Transitway Project was not a matter of "friendly or family cooperation and accommodation" but was instead a transaction by two parties that had a community of pecuniary interest in that purpose.

Next, the court considered whether there was any evidence to support the jury's finding that TxDOT had an equal right of control. The court began by noting that an equal right to control means "'each [participant] must have an authoritative voice or, . . . must have some voice and right to be heard.'" Id. (quoting Shoemaker, 513 S.W.2d at 16). With this predicate, the court pointed out that under the Master Agreement, Metro was primarily responsible for day-to-day operations and maintenance of the HOV lanes, but the HOV lanes affected operations of a controlled-access highway that was under TxDOT's control. "[T]herefore, [TxDOT] has an interest and responsibility in the operation and maintenance of [the HOV lanes]." The court pointed out that the Master Agreement states that TxDOT had ultimate control and supervision of the highway upon which the HOV lanes were constructed. See id. at 615. TxDOT argued that the Master Agreement gave Metro sole control over the enterprise and that it had no equal right of control. See id. The supreme court rejected this argument stating that "a member of a joint enterprise [cannot] escape liability to a third party simply by delegating responsibility for [a] component of the joint enterprise that caused injury to the third party . . . ." Id. The court also pointed out that TxDOT had employees that were members of the Transitway Management Team. The Team met monthly to address issues including operation plans for the HOV lanes. Additionally, any amendments or changes to the operation plans for the HOV lanes could be made only with consent of both TxDOT and Metro. See id. at 616. Finally, the Team developed Transitway rules that were designed to insure safe and effective operation of the HOV lanes and was responsible for evaluating and recommending changes to traffic control devices used in connection with the HOV lanes. Thus, the court concluded that while Metro employees may have carried out procedures and been principally responsible for day-to-day operations of the HOV lanes, TxDOT had a voice and a right to be heard in matters affecting the day-to-day operations. The court overruled TxDOT's point of error that there was no evidence to support the jury's finding of joint enterprise. See id.[9]

The Able case has far reaching implications for suits brought under the TCA for condition or use of real or personal property. Governmental entities frequently enter into agreements related to maintenance and operations of roadways. However, in Sipes, the Fort Worth court of appeals considered whether an agreement where the State would improve the highway and the City would fund improvements and do other work was a waiver of immunity. Although the City had "a voice to be heard concerning limited aspects of the construction," the court found that there was no joint enterprise because the City did not have equal control over the construction project. Sipes v. City of Grapevine, 146 S.W.3d 273 (Tex. App.–Forth Worth 2004, pet. filed). These agreements may be sufficient to create a joint enterprise between the parties. Under the Able decision, if a plaintiff is able to establish liability of any party to that agreement, each other party will also be liable. Moreover, governmental entities frequently enter into agreements related to the operation of facilities that are funded jointly. Each of these agreements may be sufficient to create a joint enterprise under which each will be liable for the negligence of another party related to the condition or use of personal property. But see Sipes, 146 S.W.3d at 273. In fact, a substantial number of governmental entities are reporting that they

[9] Because TxDOT was raising a no evidence point, the court was required to affirm the jury's finding if its review of the record revealed more than a scintilla of evidence to support each element of the joint enterprise finding. See id.

are seeing a dramatic number of joint enterprise claims since the supreme court released its opinion in Able.

Joint enterprise no longer appears to be a viable means of recovery against all local governmental entities other than counties with the passage in 2005 of HB 2039. The purpose of the bill was to amend chapter 271 of the Local Government Code to allow suits for breach of contract against cities, school districts, junior college districts, and special purpose districts. However, the bill also provides that contracts entered into by a local governmental entity is not a joint enterprise for liability purposes. Thus, the bill would seem to exclude local governmental entities from potential liability under the joint enterprise theory of recovery. Interestingly, HB 2039 protects cities, school districts, junior college districts, and special purpose districts from joint enterprise liability, but leaves counties still subject to liability under the Able decision.

7. Section 101.0215: Municipal Liability for Proprietary and Governmental Functions.

Section 101.0215 establishes both what constitutes a proprietary rather than a governmental activity as well as a municipality's liability for each. Subsection (a) contains a laundry list of governmental functions for which a municipality can be held liable only under the TCA.[10] Generally, entities acting in their governmental capacity are not subject to estoppel. Weatherford v. City of San Marcos, 157 S.W.3d 473 (Tex. App.—Austin 2004, pet. denied). Since the provision is not an independent waiver of governmental immunity, a plaintiff must still establish the applicability of the TCA under some other section (usually section 101.021 or 101.022) before invoking section 101.0215 to establish municipal liability. Bellnoa v. City of Austin, 894 S.W.2d 821, 826 (Tex. App.–Austin 1995, no writ); City of San Antonio v. Winkenhower, 875 S.W.2d 388, 391 (Tex. App.–San Antonio 1994, writ denied).

Subsection (b) provides that the TCA

> does not apply to the liability of a municipality for damages arising from its proprietary functions, which are those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality, including but not limited to: (1) the operation and maintenance of a public utility; (2) amusements owned and operated by the municipality; and (3) any activity that is abnormally dangerous or ultra hazardous.

TEX. CIV. PRAC. & REM. CODE § 101.0215(b) (West 2005). Carrying out any function constituting a proprietary activity under subsection (b) means that the municipality enjoys no immunity from suit or liability and there is no limitation upon the amount of damages the plaintiff can recover. Pontarelli Trust v. City of McAllen, 465 S.W.2d 804, 807-808 (Tex. Civ. App.–Corpus Christi 1971, no writ); Dillard, 806 S.W.2d at 593-94; see Pike, 727 S.W.2d at 521. However, any conflict between subsections (a) and (b) regarding whether a given activity is proprietary or governmental is resolved in favor of the finding that it is governmental. TEX. TORT CLAIMS ACT § 101.0215(c). See General Elec. Co. v. City of Abilene, 795 S.W.2d 311, 312-13 (Tex. App.–Eastland 1990, no writ).

The courts look to the nature of the activity and the persons benefited in determining whether a function is governmental or proprietary. The laundry list of governmental functions contained in section 101.0215(a) is not exhaustive. See TEX. TORT CLAIMS ACT § 101.0215(a). If the activity in question is not on the laundry list, the test of whether it is proprietary is whether it benefits the public-at-large or just persons living within the municipality.

> The governmental function of a city has been defined as those acts which are public in nature, and performed by the municipality "as the agent of the state in the furtherance of general law for the interest of the public at large."
>
> Proprietary functions ... are intended primarily for the benefit of those within the corporate limits of the municipality.

See Gates v. City of Dallas, 704 S.W.2d 737, 738-39 (Tex. 1986).

If some aspects of the activity are governmental and others are proprietary, the City will be held to have engaged in a proprietary function. City of Port Arthur v. Wallace, 171 S.W.2d 480, 481 (Tex. 1943); City of Dallas v. Moreau, 718 S.W.2d 776, 780 (Tex. App.–

[10] Prior to the enactment of this section, the determination of what activities were proprietary was left to the courts. See City of San Antonio v. Hamilton, 714 S.W.2d 372, 374-75 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.). The determination of what is proprietary and governmental is now addressed by this section, but the list of governmental functions has been held to be non-exhaustive. De La Garza v. City of McAllen, 881 S.W.2d 599, 606 (Tex. App.—Corpus Christi 1994), *rev'd on other grounds*, 898 S.W.2d 809 (Tex. 1995).

Corpus Christ 1986, writ ref'd n.r.e.). Moreover, the municipality bears the burden of establishing that the activity in which it was engaged was governmental in nature. See City of Houston v. Bush, 566 S.W.2d 33, 35 (Tex. Civ. App.–Beaumont 1978, writ ref'd n.r.e.); see also City of El Paso v. Morales, 2004 WL 1859912, at *9 (Tex. App.–El Paso 2004, pet. denied)(mem. op.) (finding question of fact whether city was performing proprietary or governmental function).

The following municipal activities have been found to be proprietary functions, for which the City enjoyed no immunity or limits on its liability:

(a) Acting as a self insurance plan for provision of health benefits to its employees and their dependents. Gates, 704 S.W.2d at 738;
(b) Undertaking the management of a firefighters retirement fund. Herschbach v. City of Corpus Christi, 883 S.W.2d 720, 730 (Tex. App.–Corpus Christ 1994, pet. denied);
(c) Operation of a municipal cemetery. Pike, 727 S.W.2d at 519; and
(d) Maintenance of municipal storm sewers. City of Round Rock v. Smith, 687 S.W.2d 300, 302-03 (Tex. 1985).

As in common law, the determination of whether an activity is a proprietary or governmental function applies only to municipalities. Neither states nor counties perform any proprietary functions. Jezek v. City of Midland, 605 S.W.2d 544 (Tex. 1980); Atchison, Topeka & Santa Fe Ry. Co. v. Tex. State Dep't of Highways, 783 S.W.2d 646 (Tex. App.—Houston [14th Dist.] 1989, no writ). Accordingly, section 101.0215 has no application to governmental units that are not municipalities.

8. Section 101.022: Liability for Premises Defects.

This section of the paper addresses: (1) whether a claim arises from a premises defect or the condition or use of personal property; and (2) the two standards of liability for premises defects (ordinary premises defects and special defects).

a. Determining Whether the Suit is Based Upon the "Condition or Use of Property" or a "Premises Defect."

There are two very different waivers of immunity and standards of liability under the TCA. For claims arising from the "condition or use of property" the standard of liability is the same as the "governmental unit would [face], were it a private person ... according to Texas law." See Tex. Dep't of Transp. v. Ramming, 861 S.W.2d 460, 466 (Tex. App.—Houston [14th Dist.] 1993, writ denied). On the other hand, the waiver of immunity and extent of liability are very limited in premise defect cases. See Hawley v. State Dep't of Highways and Pub. Transp., 830 S.W.2d 278, 281 (Tex. App.–Amarillo 1992, no pet).

> Section 101.022 [entitled Duty Owed: Premises and Special Defects] does not purport to create governmental liability but rather to limit the duty owed by the government. Thus, the language of § 101.022 still creates a limitation upon the liability created under § 101.021 and does not, ... create a separate cause of action measured by an ordinary care standard.

Therefore, one of the first issues that should be addressed in analyzing a suit under the TCA is whether claim arises from: (1) the "condition or use of property"; or (2) a "premises" defect.

The courts look to the common definitions of "premises" and "defect" to decide whether or not the case at bar arises from a "premises defect." Tex. Dep't of Transp. v. Henson, 843 S.W.2d 648, 652 (Tex. App.—Houston [14th Dist.] 1992, writ denied); Univ. of Tex.-Pan Am. v. Valdez, 869 S.W.2d 446, 448-49 (Tex. App.—Corpus Christi 1993, writ denied); see Davidson, 882 S.W.2d at 86.

> The word "premises" is commonly defined as "a building or part of a building with its grounds or other appurtenances." A legal definition of premises is "land and tenements; an estate including land and buildings their own; ... land and its appurtenances."

Henson, 843 S.W.2d at 652; Davidson, 882 S.W.2d at 85-86; Valdez, 869 S.W.2d at 448-49.

The permanent or temporary status of the object that caused the injury can determine whether it is an "appurtenance," thus making it part of the "premises." Henson, 843 S.W.2d at 652. Following this rationale, the Fourteenth Court of Appeals found that an injury resulting from a barrel sign did not constitute a premises liability claim. Henson's pickup truck stuck two barrel signs on a state highway. The barrel signs were used as warning devices to demark the edge of traffic lanes and a construction area. Henson was injured when a warning sign panel became detached from the barrel and came through the windshield of his vehicle. The barrel signs were "movable, portable, and temporary in nature, much like construction equipment ... not intended to be a permanent part of the highway." Id. at 653. Based upon these temporary characteristics of the barrel sign, the court concluded that the barrel signs did not constitute part of the premises.

Accordingly, the plaintiff's injury arose from the "condition or use" of property rather than a premises defect.

Other courts of appeals have also followed the temporary versus permanent rationale to find that other claims did not arise from "premises defects." In Townsend, 548 S.W.2d at 939-40, the plaintiff was injured by a bolt protruding from the turnbuckle of a tennis court net. The bolt was part of the mechanism used to adjust the level of the net. The court held that the bolt and the turnbuckle to which it was attached were not part of the premises. Consequently, the claims did not represent a premises defect claim. Id.; see Harris County v. Dowlearn, 489 S.W.2d 140 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.) (unattached wall panel used to divide rooms was not part of premises; injury resulting therefrom is not a premise liability claim); see also Mokry v. Univ. of Tex. Health Sci. Ctr., 529 S.W.2d 802 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.); Lowe, 540 S.W.2d at 297; Robinson, 780 S.W.2d at 169; Ramming, 861 S.W.2d at 460; McGuire, 518 S.W.2d at 528 (injury caused by a hospital bed without side rails).

At the same time, suits that focus on permanent parts of a building or real property are "premises" liability claims. Billstrom arose from injuries to a mental patient injured when he fell to the ground while trying to climb out of a window. Billstrom v. Mem'l Med. Ctr., 598 S.W.2d 642 (Tex.App—Corpus Christi 1980). The plaintiffs complained of the condition of the security screen and the window. The court found the screen and window to be permanent parts of the building and held that the claim arose from a premises defect. As explained by the court of appeals:

> Although appellant's allegations regarding the screen and window concern the condition of tangible property, they are actually "premise defects" within both the generally accepted common and legal definitions of the words. The appellant's allegations deal with a defect in the appurtenance to a room itself, rather than a defect in a distinct piece of equipment, irrespective of whether or not that piece of equipment is classified as a fixture. As such, we are of the opinion that appellant's allegations come within §101.022. The condition of the alleged defective security screen and window are more closely analogous to a defect in a floor or in maintaining a floor in a slippery (defective) condition.

Billstrom, 598 S.W.2d at 646-47; see Tennison, 509 S.W.2d at 561-62 (plaintiff injured as a result of a slick floor was bringing premises liability claims under the TCA, regardless of her claims of how the floor became slick).

Following similar rationale, the Fourteenth Court of Appeals held that injuries caused by a defective elevator door also arose from a premises defect as opposed to the condition or use of property. As explained by the Davidson court:

> We find [Billstrom's] reasoning sound. Despite the fact that an elevator is a separate piece of equipment it is also undeniably an integral part of the building, like a stairwell, floor, or, as in Billstrom, a security screen permanently attached to a window. And, although an elevator can be removed, in truth, it is not a "temporary" installation in any sense; it is a permanent addition to the building. Furthermore, being attached to the building and an integral part of its construction, an elevator is clearly an appurtenance, in fact, more so than the security screen in Billstrom.

Davidson, 882 S.W.2d at 86.

More importantly, the Davidson case seems to imply that when a court is in doubt regarding the proper classification of the instrumentality causing the injury, it should find that the instrumentality was a premises defect. The Fourteenth Court of Appeals states that Billstrom found that the hospital security screen constituted both a piece of tangible property and a permanent part of the hospital premises. Id. at 86. The court goes on to explain that Billstrom implicitly holds that because section 101.022(a), the premises liability provision of the TCA, limits the state's general liability under §101.021(2), liability for the condition or use of property, the Legislature clearly intended the lesser standard of liability to apply when the item at issue can be characterized as a part of the premises. If the Legislature specifically establishes a lessor standard of care for governmental entities in premises cases, any doubt regarding whether something is a premises defect for condition or use of property should be resolved in favor of the former rather than the latter. Therefore, the court suggests that if the instrumentality causing the injury can be characterized both as a condition of the premises as well as a use of tangible property, the case should be treated as a premises defect claim. No other court has followed this analysis.

(1) The Instrumentality Causing the Injury Rather Than the Means by Which it Became Defective Determines Whether Plaintiff is Bringing a Premises Liability Claim.

Tennison arose from a slip and fall accident in a state building. Tennison, 509 S.W.2d at 560. The plaintiff argued that the negligence standard of liability was applicable because the injury arose out of the active use of the State's property. Specifically, plaintiff asserted that her cause of action was based upon the negligent use of floor wax, not upon an allegation that the slick floor was a premises defect. Further, she asserted that the premises liability limitation of liability in former § 18(b) (now §101.022) was not applicable because of the active negligence of the State's agent in creating the dangerous condition by the manner in which it maintained the floor (i.e., the premises). Id. at 561-62. The supreme court rejected this, saying that section 18(b) (now §101.022) provides an exception to negligence liability where the claim arises from premise defects. The court reversed and rendered judgment that Tennison take nothing because she failed to get jury findings necessary to support a premises liability claim. Id.; Billstrom, 598 S.W.2d at 647-48 (plaintiff injured by a building fixture had a premises liability, not a condition or use claim).

Under the Tennison rationale, a governmental entity, like a private landowner or occupant, may claim the limitations of liability provided by premises liability law. See Tennison, 509 S.W.2d at 561-62. A plaintiff injured by a premises defect on government property is limited to bringing a premises liability claim as provided for in the TCA. A plaintiff may not deprive the government of that limited liability by taking the position that a premises defect is a negligent "use of property" under the TCA.

> Once the claim is determined to be a premises defect, the claimant is limited to the provisions delineated by that section and has no right to assert a general "negligent use" theory based on the continued use of the alleged defective property ....

Hawley, 830 S.W.2d at 281. Accordingly, plaintiffs who have prevailed at trial upon a negligence standard have seen their judgments reversed on appeal because their claims arose from a premises defect. See Tennison, 509 S.W.2d at 561-62.

(i) Ordinary Premises Defects.

The TCA establishes a limited duty for governmental units with regard to ordinary premises defects. Payne, 838 S.W.2d at 237. Section 101.022 provides that "the governmental entity owes to the claimant only the duty that a private person owes to a licensee on private property...." TEX. TORT CLAIMS ACT § 101.022(a); Tex. Dep't of Transp. v. Fontenot, 151 S.W.3d 753, 760 (Tex. App.—Beaumont 2004, pet. filed).[11] The Supreme Court clearly laid out the licensee/licensor standard of care in Tennison.

> It is well settled in this state that if a person injured was on the premises as a licensee, the duty that the proprietor or licensor owed him was not to injure him by willful, wanton or gross negligence ... an exception to this general rule is when the licensor has knowledge of a dangerous condition, and the licensee does not, a duty is owed on the part of the licensor to either warn the licensee or make the condition reasonably safe .... [T]he duty to warn licensees of dangerous conditions arises only in those instances where the licensor knows of the condition likely to cause the injury .... Actual knowledge rather than constructive knowledge of the dangerous condition is required.

Tennison, 509 S.W.2d at 562.[12] See Prairie View A&M v. Brooks, 180 S.W.3d 694 (Tex. App.–Houston

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[11] An exception to this rule exists where the injured party has paid for the use of the premises. In that case, the governmental entity owes the same duty as that owed to an invitee. TCA § 101.022(a). Tex. Parks and Wildlife Dep't, 988 S.W.2d at 372-74; M.D. Anderson Hosp. v. Felter, 837 S.W.2d 245, 247-48 (Tex. App.—Houston [1st Dist.] 1992, no pet.). The mere payment of a fee related to the premises does not establish that the plaintiff has paid for the use of the premises. The "payment" must be "for the use" of the premises at issue in the litigation. Kitchen, 867 S.W.2d at 786-87. Thus, in Kitchen, the supreme court held that the payment of vehicle registration and licensing fees did not constitute payment for the use of a state highway. Id.; Garcia v. State, 817 S.W.2d 741 (Tex. App.—San Antonio 1991, writ denied). Garcia holds that the payment of fuel taxes was not a payment for the use of the roadway. Id. See Brazoria County v. Davenport, 780 S.W.2d 827, 828 (Tex. App.—Houston [1st Dist.] 1989, no writ) (plaintiff who did not pay for care at prenatal clinic was licensee on premises). Under Kitchen, only the payment of a toll for the use of toll roads could create a situation where the plaintiff will be considered as having paid for the use of the particular roadway. Additionally, the payment of state, county, or city taxes will not mean that a plaintiff has paid for the use of a particular government building or property. Only a fee charged for entry onto a particular premises, such as the purchase of a ticket to get into a zoo, museum, gallery, concert hall, or theater, will mean that the plaintiff must be considered as an invitee under §101.022(a). See id.; Tex. Parks and Wildlife Dep't, 988 S.W.2d at 372-74.

2005, no pet.) (No evidence the university knew of the dangerous condition); Thompson v. City of Dallas, 167 S.W.3d 571, 575 (Tex. App.–Dallas 2005, pet. filed) (constructive notice of premises defect does not give rise to a duty to warn a licensee).

Thus, in order to establish liability for an ordinary premises defect, a plaintiff must prove:

(a) The existence of a premises defect.

A premises defect has been held to be something other than a condition normally connected with the use of the premises which creates an unreasonable risk of harm. Payne, 838 S.W.2d at 237; State Dep't of Highways and Pub. Transp. v. Zachary, 824 S.W.2d 813, 820 (Tex. App.--Beaumont 1992, writ denied); State Dep't of Highways and Pub. Transp. v. Bacon, 754 S.W.2d 279, 282 (Tex. App.--Texarkana 1988, writ denied). See Izaguirre, 829 S.W.2d at 160 (holding that ordinary dirt did not represent a dangerous condition, and in the absence of a premises defect, the premises occupier could not be held liable); Seideneck, 451 S.W.2d at 754. See Cobb, 965 S.W.2d at 62 (defect means imperfection, shortcoming, or want of something necessary for completion). "Whether a particular set of circumstances creates a 'dangerous condition' has been held to present a fact question for the jury." Blankenship v. County of Galveston, 775 S.W.2d 439 (Tex. App.—Houston [1st Dist.] 1989, no writ).[13]

The Supreme Court's decision in County of Cameron v. Brown may have a significant effect on what courts have deemed to be premises defects. Part of the problem with the Brown decision is that the case came to the Supreme Court from the trial court's granting of the defendants' pleas to the jurisdiction. County of Cameron v. Brown, 80 S.W.3d 549, 552 (Tex. 2002). The suit arose from an accident on the Queen Isabella Causeway in a section of the causeway where the overhead lighting had gone out. Id. The court found that, under the allegations and evidence presented, a "malfunctioning block of artificial lighting that the defendants to maintain causing a sudden and unexpected change in driving conditions" could constitute a dangerous condition. Id. at 557. Those allegations and that evidence included the following: the plaintiff had alleged the accident was caused in part by the lights on the causeway going out, an agent for one defendant had found there was a problem with the lights going out and that this represented a risk to drivers on the causeway, the causeway had curves, the causeway's shoulders were narrow, and once a motorist entered the causeway they were prohibited from turning around. Thus, the court reversed the granting of the plea to the jurisdiction and remanded the case to the trial court. Id.

Without consideration of the fact that the court was examining the case to determine whether the plaintiff's pleadings and evidence were sufficient to survive a plea to the jurisdiction, some will argue that the Supreme Court has held that when artificial lights go out on roadways with narrow shoulders a dangerous condition has been created. Id. at 561 (Jefferson, J., concurring), id. at 563 (Hecht, J., dissenting). The holding in Brown should not be overstated. The issue before the court was merely whether the plaintiff's pleadings and evidence were sufficient to survive a plea to the jurisdiction. See also Perches, 388 S.W.3d at 656 (plaintiff's pleadings as a matter of law were insufficient to allege a claim for an ordinary premises defect).

(b) The licensor must have knowledge of the condition and that it is unreasonably dangerous at the time of the injury.

The Tennison decision clearly holds that before liability can attach, a governmental unit must have knowledge of the dangerous condition. Tennison, 509 S.W.2d at 562; York II, 284 S.W.3d at 847-48, ; Kitchen, 867 S.W.2d at 786; Payne, 838 S.W.2d at 237.

Actual knowledge "requires knowledge that the dangerous condition existed at the time of the accident, as opposed to constructive knowledge which can be established by facts or inferences that a dangerous condition could develop over time." City of Corsicana v. Stewart, 249 S.W.3d 412 (Tex. 2008); Reyes v. City of Laredo, 335 S.W.3d 605, 608-09 (Tex. 2010); Univ. of Tex. v. Hayes, 327 S.W.3d 113, 117 (Tex. 2010); City of Dallas v. Reed, 258 SW3d 620, 623 (Tex. 2003). The fact that the governmental entity did work on the premises does not mean it had knowledge of a condition that a premises defect would subsequently develops as a result of the work. City of Denton v. Paper, 376 S.W.3d 762, 766-67. (Tex. 2012). In Paper, City had done work on the street a week before the accident and at the conclusion of the work there was no pothole or depression in the street and the condition of the street "was no hazardous." Id. at 767. There was

[12] One court of appeals has held that governmental entities owe a lower standard of care to independent contractors. Durbin v. Culberson County, 132 S.W.3d 650 (Tex. App. –El Paso 2004, no pet. h.).

[13] The Texas Pattern Jury Charge ("TJC"), Volume 3, Section 66.05, states that the condition must create an unreasonable risk that results in physical harm, before liability can be imposed upon the occupier of the premises. The TJC does not indicate whether this issue should be presented to the jury in the form of an instruction or a separate question.

no evidence the city had received complaints of the pothole. Id. Accordingly, the city's knowledge that it had done work on the street and that a pothole might develop as a result of the work was insufficient to establish that the city has actual knowledge of the premises defect. Id.

Actual, rather than constructive, knowledge is required. Reyes v. City of Laredo, 335 S.W.3d at 608-09 (testimony that a man living near the flooded road called 911 four or five times about rising water stating there was going to be a problem with cars getting swept away proved that the City knew that, at some time, there was going to be a problem, but was insufficient to establish knowledge of the condition at the time of the accident that occurred several hours later); Fontenot, 151 S.W.3d at 764. (witness testimony that "everybody knew" insufficient to prove actual knowledge); Kitchen, 867 S.W.2d at 786; Payne, 838 S.W.2d at 237; Brooks, 180 S.W.3d at 696; Thompson, 167 S.W.3d at 575. But See Tex. Tech Med. Ctr. v. Garcia, 190 S.W.3d 774 (Tex.App.–El Paso 2006 no pet. hist.) (allegations defendant knew of dangerous condition and failed to warn of condition, plead sufficient facts to state premises claim). In determining in whether a premises owner has actual knowledge, "courts generally consider whether the premises owner has received reports of prior injuries or reports of the potential dander presented by the condition. City of Dallas v. Reed, 258 SW3d at 623, Univ. of Tex.-Pan Am. v. Aguilar, 251 S.W.3d 511 (Tex.2008).

However, the Supreme Court has set a very high standard for when circumstantial evidence can establish a government entity's actual knowledge of a dangerous condition. As explained by the Texas Supreme Court in City of Corsicana v. Stewart, 249 SW3d 412, 414 (Tex. 2008)(per curiam): "Here the Legislature required that the city actually know that the crossing was flooded at the time of the accident. … Circumstantial evidence establishes actual knowledge only when it 'either directly or by reasonable inference' supports that conclusion." Id.; State v. Gonzalez, 82 S.W.3d 322, 330 (Tex. 2002). The Stewart decision arose from two children drowning in a car that was swept away by flood waters after it stalled at a low-water crossing. Stewart, 249 SW3d at 414. In Stewart, in support of its plea to the jurisdiction, the city submitted the affidavit of its Director of Public Works in which he stated that the city first became aware of the flooded road crossing when the decedent's father called 911 asking for help. The Court noted that this testimony established that the city had actual knowledge of the flood waters at the crossing only after the car in which the children were left had become stuck in the flood waters. Id. at 415. The Supreme Court noted that the Plaintiffs offered substantial circumstantial evidence that the City had actual notice of the flood waters at the crossing.. Id. The plaintiffs offered testimony including: (1) testimony from the Public Works Director that the crossing had flooded in the past and the city had closed the crossing on several previous occasions due to flooding; (2) A study commissioned by the city identifying the crossing as vulnerable to future flooding; (3) Testimony from a former city council member that she told city personnel of dangerous conditions at the crossing during light and heavy rain; (4) Four severe weather warnings issued by the National Weather Service on the afternoon and evening proceeding the accident; (5) Evidence that TexDOT closed a road one mile upstream from the crossing, several hours before the accident due to flooding; and (6) Testimony from the responding officer that he had assisted another officer in the area and was aware of heavy rainfall in the proximity of the crossing. The Supreme Court found that the circumstantial evidence was not sufficient to establish actual knowledge in face of affidavit from the city public works director, stating that the city did not have actual knowledge. Id. See also Reyes v. City of Laredo, 335 S.W.3d at 608-09 (four or five calls to 911 in advance of the accident from a man living near the flooded intersection, stating that flood waters were rising and there was going to be a problem with cars getting swept away was not sufficient to establish the City's knowledge).

The Supreme Court contrasted the circumstantial evidence offered by the Stewart's with the circumstantial evidence offered in City of San Antonio v. Rodriguez, 931 SW 2d 535, 537 (Tex. 1996). Rodriguez involved a suit arising from injuries suffered as a result of a fall on a wet basement basketball court. The evidence in the case showed that the city knew that the rain dripped through and fell on the gym floor because of leaks in the roof of the recreation center. Id. In Rodriguez, a city employee also had contemporaneous knowledge of water on the floor elsewhere in the recreation center as a result of leaks. Id. The clear lesson of the Stewart decision, is that it will be very difficult to establish a governmental entity has actual knowledge of a dangerous condition through circumstantial evidence, especially where a governmental entity offers testimony that it did not have actual knowledge at the time of the accident. Stewart, 249 SW3d 412, 414. See also State v. Gonzalez, 82 S.W.3d 322, 330 (Tex. 2002)(evidence that defendant was aware of repeated vandalism/removal of a sign, did not establish that defendant knew sign was missing where there was no evidence someone had reported the sign missing on the day of the accident).

Thus, the Supreme Court has held that "actual knowledge requires the [governmental entity] to know

'that the dangerous condition existed at the time of the accident, not merely of the possibility that a dangerous condition could develop over time.'" Hayes, 327 S.W.3d at 117 (quoting City of Corsicana, 249 S.W.3d at 414-15). "Awareness of a potential problem is not actual knowledge of an existing danger. Had there been testimony that a 911 operator received a credible report at about the time of the accident that the crossing had actually flooded and was imperiling motorists, there would have been evidence the City had actual knowledge of a dangerous condition." Reyes, 335 S.W.3d at 609.

Furthermore, the licensor must not only prove the entity's actual knowledge of the existence of the condition at the time of the accident, but must also prove that the entity knew that the defect is likely to cause injury. Id.; City of Dallas v. Reed, 258 Sw3d at 622, (defendant must have actual knowledge of the danger presented by the condition); Keetch, 845 S.W.2d at 265, 267; Tennison, 509 S.W.2d at 561-62. See Barker v. City of Galveston, 907 S.W.2d 879, 885-87 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (where only one person was ever reported injured by the swing set, and swing sets were regularly inspected, knowledge of condition that caused injury was not knowledge defect was likely to cause injury; while plaintiff's evidence might raise jury issue on constructive knowledge, it failed as a matter of law on issue of actual notice); Hastings v. De Leon, 532 S.W.2d 147, 149 (Tex. Civ. App.--San Antonio 1975, writ ref'd n.r.e.) (licensee who slipped and fell on a throw rug inside host's home could not recover, absent proof the licensor knew, prior to the fall, that the rug created a "dangerous condition"). In Reyes, the Supreme Court held that the University of Texas did not know the alleged premised defect, a chain across a campus roadway that plaintiff ran into on his bicycle, was dangerous. Id. The court pointed out that the University "had no reason to know that the chain was dangerous to a user of the road … because it had closed the roadway to road users." Id. In the City of Dallas v. Reed, the plea to the jurisdiction was granted because, while the plaintiff established the city knew of the premises condition, he did not prove the city knew the condition presented a potential danger to motorists. But see Harris County v. Eaton, 573 S.W.2d 177, 178-79 (Tex. 1978) (when condition is a special defect county held liable because it should have discovered the pot holes and known they presented an unreasonable risk of harm to drivers).

(c) The plaintiff did not have knowledge of the dangerous condition.

If the licensee knows of the dangerous condition, the governmental occupier of the property owes no duty to him. Payne v. City of Galveston, 772 S.W.2d 473 (Tex. App.—Houston [14th Dist.] 1989, writ denied) ("Payne II"). See York II, 284 S.W.3d at 847-48. The plaintiff must not only prove, but also obtain a finding of lack of knowledge of the dangerous condition on his part in order to establish liability. Payne, 838 S.W.2d at 237. The courts of appeals are split on whether constructive knowledge of the dangerous condition will defeat the licensee's suit. "A licensee is imputed with knowledge of those conditions perceivable to him, or the existence of which can be inferred from the facts within his present or past knowledge." Weaver, 750 S.W.2d at 26. Weaver was walking across a Kentucky Fried Chicken parking lot when he slipped and fell on some cooking grease. The color of the grease was in stark contrast with the surface of the parking lot, making the grease "open and obvious." "While the evidence does not establish actual knowledge, it does establish that the hazard was easily perceivable. We hold that this is enough to relieve KFC of the duty to warn." Id. at 27. See Kitchen, 867 S.W.2d at 786; City of San Benito v. Cantu, 831 S.W.2d 416, 425 (Tex. App.—Corpus Christi 1992, no writ). But see McKinney, 886 S.W.2d at 303-04 (court presumed absence of knowledge by the licensee); Bacon, 754 S.W.2d at 281 (licensee must establish absence of actual knowledge of dangerous condition, not absence of constructive knowledge).

(d) The governmental unit failed to both warn of the dangerous condition and to make the condition reasonably safe.

When a governmental entity either warns of the dangerous condition or makes the dangerous condition reasonably safe, it has fully discharged its obligations to the licensee and cannot be held liable. Tex. Dep't of Transp. v. Guerra, 858 S.W.2d 44, 46-47 (Tex. App. — Houston [14th Dist.] 1993, writ denied); Smith v. State, 716 S.W.2d 177, 179 (Tex. App.--El Paso 1986, writ ref'd n.r.e.).[14]

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[14] The duty to warn of a dangerous condition is to adequately warn. The warning must provide adequate notice of the condition the licensee will encounter. State v. McBride, 601 S.W.2d 552, 557 (Tex. Civ. Ann.—Waco 1980, writ ref'd n.r.e.). The premises defect in McBride was a section of roadway under construction that was so slick that cars traveling at about 15 miles per hour would lose control as they drove through the construction area. The state had posted "Slow" and "35 MPH" signs. The Waco court held that these signs were insufficient to provide an adequate warning. Id. at 557.
On the other hand, a sign is not required to spell out the particular danger, but merely give sufficient information to put the plaintiff on notice of the danger she may encounter.

(e) The failure to warn was a proximate cause of the injury.

Payne, 838 S.W.2d at 237; Barron v. Tex. Dep't of Transp., 880 S.W.2d 300, 303-04 (Tex. App.—Waco 1994, writ denied). See Keetch, 845 S.W.2d at 264; Corbin, 648 S.W.2d at 296.

The majority of licensor/licensee cases are tried under the dangerous condition theory laid out above. A licensor, however, also has a duty not to injure a licensee willfully, wantonly, or through gross negligence. Therefore, liability of a governmental entity/licensor may be predicated upon gross negligence in allowing the condition to exist. Davenport, 780 S.W.2d at 827. In Davenport, the county's actions were held to constitute gross negligence where he allowed a slippery condition on a sidewalk at the entrance of a prenatal clinic to develop from an accumulation of water, mud, and slime coming from a water line where the county had been aware of the condition for some time. Id. See City of Houston v. Cavazos, 811 S.W.2d 231, 233 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd).

Due to the difficulty of establishing all of the elements of a licensee dangerous condition suit, more and more governmental premises liability cases are being tried under a gross negligence theory. See Graf v. Harris, 877 S.W.2d 82 (Tex. App.—Houston [1st Dist.] 1994, writ denied); Horrocks, 841 S.W.2d at 415.

(ii) Special Defects.

The TCA provides that under certain circumstances, a governmental defendant has a greater duty than a licensor owes to a licensee. One of the instances in which a greater duty is owed is when the premises defect involved constitutes a "special defect." TCA § 101.022.[15]

Most property defects are ordinary premises defects not special defects. Hayes, 327 S.W.3d at116; Payne, 838 S.W.2d at 238; Horrocks, 841 S.W.2d at 416. Thus, a special defect is the exception and not the rule. Payne, 838 S.W.2d at 238. "The class of special defects contemplated by the statute is narrow. It does not include common potholes or similar depressions in the roadway. … Such irregularities in the roadway unfortunately are to be expected." City of Denton v. Paper, 376 S.W.3d 762, 764 (Tex. 2012)(internal quotations and citations omitted).

A special defect need not have been created by the governmental unit itself. Eaton, 573 S.W.2d at 179 (a "special defect" need not have been created by the government itself, but could conceivably result from a natural occurrence such as an obstruction created by an avalanche or from the act of a third party); Horrocks, 841 S.W.2d at 416-17.

The Supreme Court's decisions establish five principles to consider in determining whether a condition on the premises constitutes a special defect. Hayes, 327 S.W.3d at 116. As the Supreme Court explained in Paper,

> [A]s we have said, "the central inquiry is whether the condition is of the same kind or falls within the same class as an excavation or obstruction." *York*, 284 S.W.3d at 847 (citing Cnty of Harris v. Eaton, 573 S.W.2d 177, 179 (Tex. 1978)). In determining whether a particular condition is like an excavation or obstruction and therefore a special defect, we have mentioned several helpful characteristics, such as: (1) the size of the condition; (2) whether the condition unexpectedly and physically impairs an ordinary user's ability to travel on the road; (3) whether the condition presents some unusual quality apart from the ordinary course of events; and (4) whether the condition presents an unexpected and unusual danger. The Univ. of Tex. at Austin v. Hayes, 327 S.W.3d 113,116 (Tex. 2010) (per curiam) (citing York, 327 S.W.3d at 847).

Paper, 376 S.W.3d at 765

A special defect must be a condition that can be categorized as similar to an excavation or obstruction.

> "The [Act] does not define 'special defect' but does give guidance by likening special defects to 'excavations or obstructions. Thus,… we are to construe 'special defect' to include those defects of the same kind or

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Shives v. State of Texas, 743 S.W.2d 714, 717 (Tex. App.—El Paso 1987, writ denied). For example, a stop sign has been held to constitute adequate warning of the danger of cross traffic on an intersecting road. Plaintiff "had a duty by statute to remain stopped at the stop sign until she could enter the intersection in question with safety." Whether the warning provides adequate notice of the dangerous condition should be a question of fact for the jury. See Guerra, 858 S.W.2d at 45-47. But see Maxwell v. Tex. Dep't of Transp., 880 S.W.2d 461, 465 (Tex. App.—Austin 1994, pet. denied) (holding that "type 2" marker consisting of post with three amber reflectors was sufficient warning of culvert adjacent to roadway).

[15] The duty and limitations on the obligation to install, maintain, and repair traffic control devices is discussed in section II(C)(4).

> class as excavations and obstructions. While these specific examples are not exclusive and do not exhaust the category, the central inquiry is whether the condition is of the same kind or falls within the same class as an excavation or obstruction. … A special defect, then, cannot be a condition that falls outside of this class. To the extent courts classify as 'special' a defect that is not like an excavation or obstruction on a roadway, we disapprove of them."

York II, 284 S.W.3d at 847 (internal citations and quotations omitted; City of Grapevine v. Roberts, 946 S.W.2d 841, 843 (Tex. 1997)(per curiam). Thus, loose gravel is not a special defect because it "does not form a hole in the road or physically block the road like an obstruction or excavation. York II, 284 S.W.3d at 847. Similarly, "construing a partially cracked and crumbling sidewalk step to be an excavation or obstruction grossly strains the definitions of those conditions. Roberts, 946 S.W.2d at 843. "A guardrail on a highway does impede travel or otherwise 'block' the road for an ordinary user in the normal course of travel, but rather, in accordance with its intended purpose, delineates the roadway's bounds", and thus was not a special defect. Perches, 388 S.W.3d at 656. Unless the condition constitutes an excavation or obstruction that impedes travel on the roadway, then it does not constitute a special defect under the Act. Denton County v. Beynon, 283 S.W.3d 329 (Tex. 2009), p. 4. Special defects unexpectedly and physically impede or impair a car's ability to travel on the road. Denton County, 283 S.W.3d 329, 331; State v. Rodriguez, 985 S.W.2d 83, 86 (Tex. 1999). See Eaton, 573 S.W.2d at 178-79 ("chughole" that varied from six to ten inches in depth and extended over ninety percent of the width of the highway was a special defect); Hindman v. State Dep't of Highways., 906 S.W.2d 43 (Tex. App.—Tyler 1994, pet. denied); Morse v. State, 905 S.W.2d 470, 475 (Tex. App.—Beaumont 1995, pet denied); Zachary, 824 S.W.2d at 819. Thus the condition must be one that cannot be avoided as the plaintiff's travels down the roadway. Paper, 376 S.W.3d at 766. For example the hole in the roadway in Eaton covered 90% of the roadway and varied from six to ten inches in depth and was four to nine-feet wide. Eaton, 573 S.W.2d at 178. The Supreme Court described the condition as reaching "the proportion s of a ditch across the highway." Id at 179. By stark contrast the pothole in Paper was two inches to several more inches deep, located near the center of the lane; but could have easily been avoided by the plaintiff bicyclist without entering into the other lane of traffic. Paper, 376 S.W.3d at 765-67.

The defect must "present an unexpected and unusual danger to ordinary users of roadways." Payne, 838 S.W.2d at 238-39. The Supreme Court uses an Objective Expectations test for determining if a premises condition represents an unexpected and unusual danger to ordinary users of roadways. Denton County, 283 S.W. 329, 331. Where the premises condition would be encountered only where the driver went careening uncontrollably off the road, then that is not a special defect. Perches, 388 S.W.3d at 656 ("A guardrail … does impede … the road for an ordinary user in the normal course of travel, but rather … delineates the roadway's bounds"); Denton County, 283 S.W.3d 329, 332 (a floodgate arm that was three feet from the travel lanes of the road but was only encountered because the driver left the road and was out of control was not a special defect); City of Dallas v. Reed, 258 SW3d at 522 (there is nothing usually dangerous about a slight (two inch) drop-off between traffic lanes on a road). See also Payne, 838 S.W.2d at 238-39 (end of culvert located 22 feet from the edge of the road surface did not represent danger to the ordinary users of the roadway); Kitchen, 867 S.W.2d at 786 ("[w]hen there is precipitation accompanied by near-freezing temperatures ... an icy bridge is neither unexpected nor unusual").

In order to be found to be a special defect the premises condition must be on or in very close proximity to a highway, road, or street. Payne, 838 S.W.2d at 238-39, n.3 ("conditions threatening normal users of a road may be special defects even though they do not occur on the surface of a road"); Barker, 907 S.W.2d at 885. "Our special-defect jurisprudence turns on the objective expectations of an 'ordinary user' who follows the 'normal course of travel.' In Beynon, the motorist struck a floodgate arm that was three feet off the roadway after the motorist lost control of his car. We held that an 'ordinary user' would not have left the roadway in this manner, and that the 'normal course of travel' would be on the actual road. Similarly, here, [plaintiff] did not take the normal course of travel. Road users in the normal course of travel should turn back or take an alternate route when a barricade is erected to alert them of a closed roadway." Hayes, 327 S.W.3d at 116 (quoting Denton County v. Beynon, 283 S.W.3d 329, 332 (Tex. 2009)). While many cases refer to conditions actually located on a roadway as special defects, some courts have held that a defect located close enough to road to present a threat to ordinary users of the roadway can be a special defect. See Taylor v. Wood County, 133 S.W.3d 811, 813 (Tex. App.–Texarkana 2004, no pet.); Harris County v. Ciccia , 125 S.W.3d, 749 (Tex. App. – Houston [1st Dist.] 2003, pet. denied)(a culvert yards beyond the road's end where a right turn only land directed traffic was held to be a special defect). As

reasoned by the dissenting Justices in the Denton County opinion, "'ordinary users' of roads sometimes stray outside the lines, where there would be no need for shoulders. … [I]t is certainly not inconceivable that a normal user of a road might pull off or leave the edge of a road onto the unimproved shoulder for one reason or another, either intentionally or accidently. In the ordinary course of driving, hazards like road debris, livestock and other drivers who don't respect their lanes are often encountered that require prudent drivers to take advantage of the shoulder, where improved or unimproved." Denton County, 283 S.W.3d 329, 335 (J. O'Neill, Dissenting).

While these rules may assist in determining whether something is a special defect, the ultimate decision is made on a case by case basis. Set forth below are lists of premises conditions that have been found to be special defects, and other examples that have been found not to be special defects.

Premises Conditions That Have Been Found to be Special Defects.

(a) An oval shaped hole varying from six to ten inches deep and extending over ninety percent of the width of the highway, four feet wide at some points and nine feet wide at others, with the deepest part astride the center stripe, so big that one could not stay on the pavement and miss it, which had reached the proportions of a ditch across the highway and so severe that it made a car going 35 miles per hour flip and turn upside down in a bar ditch is a special defect. Eaton, 573 S.W.2d at 178-79; Wood County, 133 S.W.3d at 813 (collapsed culvert which ran across a road and was 6-8 feet wide and 4-6 feet deep was a special defect); Durham v. Bowie County, 135 S.W.3d 294, 297-98 (Tex. App. – Texarkana 2004, pet. filed); Stambaugh v. City of White Oak, 894 S.W.2d 818 (Tex. App.—Tyler 1994, no writ) (holding that collapsed portion of roadway fifteen feet wide and ten feet long was special defect).

(b) In a paved highway, a slick, muddy excavation that was so severe that a car going over it at about 15 miles per hour would slide and a car traveling at less than 35 miles per hour went out of control, off the road and turned over, is a "special defect." McBride, 601 S.W.2d at 552; City of San Antonio v. Schneider, 787 S.W.2d 459, 466-68 (Tex. App.—San Antonio 1990, writ denied) (wet, slippery road).

(c) A roadway with right-turn-only markings leading into a short road that ended in a culvert where there was no warning or indication of the culvert in the absence of roadway lighting at night was a special defect. Harris County v. Estate of Ciccia, 125 S.W.3d 749 (Tex. App. –Houston [1st Dist.] 2003, pet. denied). There was no indication that the road simply ended, and no lighting by which to see this at night. While the sudden ending of the road onto which traffic was directed could simply have been a nuisance if a car had become mired in unpaved earth, the culvert located just beyond the end of road presented an unusual and unexpected danger to ordinary users of the designated right turn lane. ... Id.

(d) In the virtual absence of artificial lighting, a ditch four feet from the edge of road surface and adjacent to a street forming a "T" at which another street dead ended was a "special defect." City of Houston v. Jean, 517 S.W.2d 596, 599 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

(e) An opening in brush alongside a road, although appearing to be an intersecting road, was actually only an opening into a deep arroyo parallel to the road is a "special defect" according to dicta in Chappell v. Dwyer, 611 S.W.2d 158 (Tex. App.—El Paso 1981, no writ). The opening had been protected by a barrier in the past, but it had not been maintained and was not there at the time of the accident.

(f) A traffic signal base, which extended twenty-six inches above the travel portion of highway, was a special defect. Andres v. City of Dallas, 580 S.W.2d 908, 909-11 (Tex. Civ. App.—Eastland 1979, no writ).

(g) A large metal sign lying face down on lane of road is a special defect as a matter of law. State of Tex. v. Williams, 932 S.W.2d 546 (Tex. App.—Tyler 1995, writ denied) (with per curiam opinion).

(h) Ten-inch drop off along shoulder of road that prevented car's tire from re-entering the roadway was a special defect. State v. Rodriguez, 985 S.W.2d at 86; Morse, 905 S.W.2d at 475.

(i) An 11-inch opening in a sidewalk caused by a missing meter box cover that was 20 feet from the curb and 2 feet from a building was a special defect. City of Austin v. Rangel, 184 S.W.3d 377, 384 (Tex.App.–Austin 2006, no pet. hist.). See City of El Paso v. Chacon, 148 S.W.3d 417, 422-23 (Tex. App.– El Paso, pet. denied) (because pedestrians walking up the street had to walk on the sidewalk, a condition on sidewalk

could be a special defect.) But see City of El Paso v. Bernal , 986 S.W.2d 610 (Tex. 1999) (hole on sidewalk was an ordinary defect not a special defect).

(j) Two-inch difference between travel lanes was a special defect where the change in elevation was unexpected, the driver said he did not see the difference in the surface elevations, the accident report says the edge was vertically sharp at approximately 90 degrees, and the condition of the roadway was rated as poor or badly worn. City of Dallas v. Reed, 222 S.W.3d 903 (Tex.App.–Dallas 2007).

Premises Conditions That Have Been Found **Not** to be Special Defects.

(a) Storm flooded road was not a special defect because it was not unexpected or unusual in times of heavy rains. Reyes, 335 S.W.3d at 608. Flood water two feet deep across a highway is an obstruction constituting a "special defect." But see Miranda v. State, 591 S.W.2d 568 (Tex. App.—El Paso 1979, no writ)(wáter flooding roadway as a special defect); Zachary, 824 S.W.2d at 818 (likewise, standing water extending from the curb to the middle of the two eastbound lanes of traffic, when the right lane was completely covered with a large amount of water that was at least three inches deep and at least to the top of the curb and out just past the center lane of the left lane, was a special defect).

(b) Confusing striping caused by old stripes showing through the worn pavement surface of a detour are not anything like a roadway obstruction or excavation and are not a "special defect." Carson, 599 S.W.2d at 854-55.

(c) A defective screen that allowed a mental patient to escape from a hospital was not a "special defect." Billstrom, 598 S.W.2d at 646-47.

(d) The Galveston Seawall is not a "special defect," it is "a unique condition designed to protect the public from dangers of storm water." Payne II, 772 S.W.2d at 473. Even slippery wet algae growth on rocks at the base of stairs descending the Galveston Seawall, causing plaintiff to slip and fall, was not a special defect. Blankenship, 775 S.W.2d at 439.

(e) A median cut on a city street creating a dangerous and confusing condition allowing a driver to enter the exit ramp traveling in the wrong direction is not a "special defect," because it was a long standing condition. Villarreal v. State Dep't of Highways and Pub. Transp., 810 S.W.2d 419, 421 (Tex. App.—Dallas 1991, writ denied). A long standing condition cannot constitute an unexpected or unusual condition on the roadway. Id. During bad weather, the temporary presence of four inches of water on the highway was not a special defect as a matter of law. Fontenot, 151 S.W.3d at 753.

(f) Dicta in Zachary states that water on a roadway is not a special defect unless it covers more than half of all the lanes of traffic. The defendant argued that the water did not constitute a special defect as a matter of law. Specifically, the State's brief claimed: "The evidence showed that the water did not cover the entirety of one lane much less two" and "[t]he evidence in this case is that water either partially or totally covered only one lane of a two lane, single directional roadway." Zachary, 824 S.W.2d at 819. In response to these assertions, the Fourteenth Court of Appeals concluded:

> [I]f either of appellant's statements constituted the entirety of the evidence in this case, we would be tempted to agree with appellant that, as a matter of law, no evidence of 'special defect' existed. Id.

(g) The leaf spring from a truck, measuring three inches wide, nine inches long, and less than a quarter inch thick, located off the road surface on the shoulder is not a special defect. Horrocks, 841 S.W.2d at 417.

(h) When there is precipitation accompanied by near-freezing temperatures, an icy bridge is not a special defect. Kitchen, 867 S.W.2d at 786. Under the circumstances, ice on the bridge was not unexpected or unusual. Id.

(i) Cars legally parked on the street are not special defects. Palmer v. City of Benbrook, 607 S.W.2d 295, 300 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).

(j) Depression in a highway where asphalt sunk below abutting concrete bridge was not a special defect. Sutton v. State Highway Dep't, 549 S.W.2d 59, 60-61 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.).

(k) Reservoir located at the edge of a city park was not a special defect because "danger is open and obvious and observable to anyone." Cantu, 831 S.W.2d at 421.

(l) A fully operational motor vehicle making an illegal movement or momentarily stopped on a highway is neither a defect in the highway premises, nor an excavation or obstruction or similar condition. State v. Burris, 877 S.W.2d 298 (Tex. 1994). See Barron, 880 S.W.2d at 303 (stalled car on bridge did not constitute a special defect).

(m) A culvert located twenty-two feet from the edge of the highway was not a special defect because it would not be encountered by ordinary users of the highway. Payne, 838 S.W.2d at 238-39; Maxwell, 880 S.W.2d at 465 (in reaching their decision, the Austin Court of Appeals cited evidence that the culvert had been in place since the 1950's and that there had been no reported accidents at the site).

(n) An irregular oval shaped bump that was two-and-a-half-inches high and occupied the center of a shoulder ten feet wide with sufficient space for a bicycle to travel on either side of the bump was not a special defect, even for cyclists traveling on the shoulder of the road. Hindman, 906 S.W.2d at 45-46.

(o) Detour along frontage road that eventually led to a ninety degree turn was not a special defect as it was not an excavation or obstruction, it did not present unexpected or unusual danger to ordinary users of roadway and it did not impair a vehicle's ability to travel along the roadway. State v. Rodriguez, 985 S.W.2d at 86.

(p) The absence of a turn lane or safety devices is not a special defect–it is a "condition that is longstanding, routine, or permanent." Tex. Dep't of Transp. v. Phillips, 153 S.W.3d 121, 123 (Tex. App.—Beaumont 2004, no pet.).

(q) "Open and obvious" drainage block that plaintiff hit while riding her bicycle was not objectively unexpected and thus, not a special defect. City of Galveston v. Albright, 2004 WL 2439231 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

(r) Embankment at end of extension was not a special defect because it was not a condition encountered by normal users of the roadway. Tex. Dep't of Transp. v. Andrews, 155 S.W.3d 351 (Tex. App.—Fort Worth 2005, pet. denied).

(s) Assuming a hole or gap in curb could be a special defect, 12-18 inch hole or gap in the curb did not constitute a special defect. Porter v. Grayson County, Tex., 224 S.W.3d 855 (Tex.App.–Dallas 2007, no pet.).

(t) Two to three inch change in height between lanes of roadway is not a special defect. City of Dallas v. Reed, 258 SW3d at 622. A pothole that was two inches to four inches in depth that could be easily avoided by the plaintiff bicyclist without going into the opposing land of traffic was not a special defect. Paper, 376 S.W.3d at 765-67.

(u) Half to three-quarters of an inch of gravel was not a special defect because it was not similar to an excavation or obstruction and did not present an unexpected or unusual danger to ordinary users of a roadway. York II, 284 S.W.3d at 847-48. "[W]e hold today… loose gravel… does not form a hole in the road or physically block the road like an obstruction or excavation." Tex. Dep't of Transp. v. Gutierrez, 284 S.W.3d 848 (Tex. 2009). However, the York II decision does suggest, in dicta, that "a sizeable mound of gravel left on a roadway could constitute a special defect. York II, 284 S.W.3d at 847-48.

(v) A seventeen-foot floodgate arm located approximately three feet off a two-lane road that was not properly secured and was pointing toward on-coming traffic was not a special defect where the driver struck the arm only because he lost control of his car and went off the road. Denton County, 283 S.W.3d 329, 332.

(w) A ninety-degree turn in a detour from a road construction project was not a special defect. Rodriguez, 985 S.W.2d at 86. See York II, 284 S.W.3d at 847-48.

(x) A bulldozer parked eight to ten feet off the edge of the road was not a special defect because it was not comparable to an excavation or obstruction and did not pose a threat to ordinary users of the roadway. City of Dallas v. Giraldo, 262 S.W.3d 864, 871 (Tex.App.—Dallas 2008, no pet).

(y) A guardrail is intended to mark the bounds of a roadway and thus as matter of law does not present a risk to the ordinary users of the roadway and does not constitute a special defect. Perches, 388 S.W.3d at 655-56. The Supreme Court's ruling was predicated upon that fact that driver in Perches ran into the guardrail only because he failed to make a turn in accordance with the roadway's design. Id.

(iii) Whether the Condition is a Special Defect is Determined by the Court Not the Jury.

Whether a condition is a premise defect or a special defect is a question of duty involving statutory interpretation and thus an issue of law for the court to decide.

York II, 284 S.W.3d at 847-48.; Payne, 838 S.W.2d at 238; State v. Rodriguez, 985 S.W.2d at 86; Burris, 877 S.W.2d at 298. Accordingly, the question of whether or not a premises condition is a special defect is not submitted to the jury. Payne, 838 S.W.2d at 238.

(iv) Duty Owed in Case of a Special Defect.

A special defect eliminates the requirement of actual knowledge before the government occupant is obligated to act. In the case of a special defect, the plaintiff obtains the status of an invitee. Consequently, the governmental occupant has the duty to use ordinary care to reduce or eliminate an unreasonable risk of harm of which the defendant knew or reasonably should have known. City of Dallas v Reed. 258 SW3d at 622; Eaton, 573 S.W.2d at 179; York II, 284 S.W.3d at 847. (duty to warn of a condition the governmental entity should have known or a condition that created an unreasonable risk of harm). Therefore, the first question the jury must decide is whether the defendant knew or in the exercise of ordinary care should have discovered the existence of the premises defect that represented an unreasonable risk of harm. Id.; Horrocks , 841 S.W.2d at 417; Eaton 573, S.W.2d 179. See also Taylor, 133 S.W.3d at 814-15 (county had no notice of washout as would give rise to the duty to work).

While there is agreement that a special defect requires the occupant to act based upon constructive knowledge, there is a disagreement regarding the governmental occupant's duty of care in the case of a special defect. Payne describes the duty owed in a special defect case as follows:

> If the culvert was a special defect, the State owed Payne the same duty to warn that a private landowner owes an invitee .... That duty requires an owner to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition of which the owner is or reasonably should be aware.

Payne, 838 S.W.2d at 237. Eaton, however, held that a governmental defendant discharges its duty in the case of a special defect by warning of the condition. Eaton, 573 S.W.2d at 180.

Eaton's view of duty is supported by the language of the TCA. Subsection (b) of 101.022 states that the limitation of liability to that of a licensee "does not apply to the duty to warn of special defects." TEX. TORT CLAIMS ACT § 101.022. As explained by the supreme court:

> [T]his proviso of section 18(b) [now section 101.022(b)] was meant to enlarge the liability in some instances by imposing the duty to warn when there was a special defect. Accordingly, we hold that ... the County had the duty to warn as in the case of the duty one owes to an invitee.

Id. (emphasis added). See Horrocks , 841 S.W.2d at 417 (the presence of a special defect imposes the duty of an invitor to warn of or make reasonably safe dangerous conditions when it knows of them or could have discovered them with reasonable diligence). See also Maxwell, 880 S.W.2d at 464-65 (motorist was warned of culvert by amber reflectors). See Durham, 135 S.W.3d at 297-98 (county discharged its duty by putting up a warning sign, even though that sign was removed by third parties).

Again, the nature of the premises controlled and activities that governmental entities must conduct requires that they be able to discharge their duty by warning of the defect. The supreme court in Eaton held that a "special defect" could result from an avalanche, some other natural disaster, or from the acts of third persons. Eaton, 573 S.W.2d at 179. If a rock slide blocks a roadway, or if an earthquake destroys a bridge, the government must be able to discharge its duty by warning of the dangerous condition until it can be repaired. Furthermore, in repairing the damage done by such a natural disaster it may be impossible to make the premises reasonably safe while construction is ongoing. Unless the governmental occupant discharges obligations by warning of the condition, it would face absolute strict liability because it would be impossible to discharge its duty.

(v) The other exclusions from liability set forth in the TCA apply to special defect claims.

In Perches the court of appeals had found that the guardrail in question was a special defect because the roadway abruptly ended, there was a lack of signage showing the drivers could only turn one direction, and the possibility that lighting was insufficient at the time of the accident. Perches, 388 S.W.3d at 655. The Supreme Court rejected the court of appeal's analysis holding that the design of the roadway is discretionary and the TCA provides that governmental entities cannot be held liable for discretionary decisions. Id. at 655-56.

(2) The Standards of Liability in Special Defects Versus Ordinary Premises Defects Cases.

The central difference between liability in ordinary premises cases and special defect cases is the knowledge of the plaintiff and defendant. As explained by the Texas Supreme Court:

> There are two differences between these theories. The first is that a licensee must prove that the premises owner actually knew of the dangerous condition, while an invitee need only prove that the owner knew or reasonably should have known. The second difference is that a licensee must prove that he did not know of the dangerous condition, while an invitee need not do so.

Payne, 838 S.W.2d at 237.

The second difference is critical to a plaintiff. For a licensee, knowledge of the condition is a complete bar to his recovery and a licensee must prove and obtain a jury finding that he was without knowledge of the dangerous condition in order to recover damages. Id. An invitee's knowledge goes only to his comparative negligence. Id.

9. Section 101.022(a): Liability for Premises Defects When the Plaintiff Pays for the Use of the Premises.

a. When Has the Plaintiff Paid for the Use of the Premises?

The mere payment of a fee related to the premises does not establish that the plaintiff has paid for the use of the premises. Section 101.022(a) provides that the licensor/licensee standard of care does not apply when the plaintiff pays for the use of the premises. TEX. TORT CLAIMS ACT § 101.022(a). The "payment" must be "for the use" of the premises at issue in the litigation. Kitchen, 867 S.W.2d at 786-87. See Tex. Parks & Wildlife Dep't, 988 S.W.2d at 372-374. Thus, in Kitchen, the Texas Supreme Court held that the payment of vehicle registration and licensing fees did not constitute payment for the use of a state highway. Id.; Garcia, 817 S.W.2d at 741. Garcia further holds that the payment of fuel taxes was not a payment for the use of the roadway. Id. In Daniels v. Univ. of Tex. Health Sci. Ctr., the First District Court of Appeals in Houston refused to extend Kitchen to cover a bus driver at the medical center injured when she stepped in a hole. 2004 WL 2613282 (Tex. App.—Houston [1st Dist.] 2004, no pet. h.). The court rejected Daniels's argument that a property owner should not receive more protection when one he pays for services is injured than when someone who pays for entry onto the property is injured. Id.

However, the payment of fees for services provided at the premises may mean that the plaintiff is an invitee. For example, the First Court of Appeals held that the payment of medical charges at a government owned hospital constituted payment for the use of the hospital premises. Felter, 837 S.W.2d at 247-48. Thus, a couple's payment of hospital charges meant that a wife injured while visiting her husband was an invitee rather than a licensee. Similarly, the Austin court found the fee to enter a state park was a payment for the use of that premises and granted the plaintiff status as an invitee in the park. Tex. Parks & Wildlife Dep't , 988 S.W.2d at 372-74.

Following Kitchen, section 101.022(a) will have very limited applications in the case of defects on roadways. Clearly, the payment of vehicle registration and licensing fees, as well as fuel taxes, will be insufficient to establish that the plaintiff has paid for the use of any road on the state highway system. Kitchen, 867 S.W.2d at 786-87. Similarly, the payment of supplemental county vehicle registration fees should not constitute payment for the use of county or city roads. Under Kitchen, only the payment of a toll for the use of toll roads could create a situation where the plaintiff will be considered as having paid for the use of the particular roadway. See id.; Tex. Parks & Wildlife Dep't, 988 S.W.2d 372-74.

Kitchen also has long reaching implications when the plaintiff will be considered to have paid for the use of other types of governmental premises. Under Kitchen, the payment of state, county, or city taxes will not mean that a plaintiff has paid for the use of a particular government building or property. Only a fee charged for entry onto a particular premises, such as the purchase of a ticket to get into a zoo, museum, gallery, concert hall, or theater, will mean that the plaintiff must be considered as an invitee under § 101.022(a).

(1) Section 101.022(a) does not apply to recreational facilities. As set forth in section VIII c below, Chapter 75 of the Civil Practice and Remedies Code establishes the standard of care that landowners, including governmental entities, owe to persons who use recreational facilities (such as parks).

Chapter 75 provides that the duty owed to users of recreational facilities is that owned to a trespasser, namely not injuring willfully, wantonly or through gross negligence. See TEX. CIV. PRAC. & REM. CODE § 75.002. Chapter 75 sets the standard of care for recreational facilities even when the plaintiff pays an admission fee to get into the park or other recreational facility. State v. Shumake, 131 S.W.3d 66, 81 (Tex. App.—Austin 2003, pet. filed).

b. Duty Owed to Plaintiff That Has Paid for the Use of the Premises.

If the injured person paid for the use of the premises, then the government owes the person a duty

owed to an invitee on private property. Tex. Parks & Wildlife Dep't, 988 S.W.2d 372-74. Therefore, the governmental entity's duty arises when it has actual or constructive knowledge of a dangerous condition. Id.; Rawlings v. Angelo State Univ., 648 S.W.2d 430, 433 (Tex. App.—Austin 1983, writ ref'd n.r.e.). However, the extent of the governmental defendant's duty is the same as if the plaintiff were a licensee.

> As to invitees, an occupier of property owes a duty to maintain the premises in a reasonably safe condition; a duty of reasonable care to inspect and discover a condition involving an unreasonable risk of harm; and a duty to protect against the danger and make safe any defects or to give an adequate warning thereof. Id.

Once again, the governmental occupant discharges its duty if it warns of the premises defect. Id.

10. Sections 101.022(a) and 101.060: Liability for Signs, Signals and Traffic Control Devices.

Claims involving signs, signals and traffic control devices are special categories of premises liability cases to which additional liability limitations apply under the TCA. Section 101.022 provides two exceptions to the basic premises liability licensor duty of care. One exception for special defects and another for cases involving the "... absence, condition, or malfunction of traffic signs, signals, or warning devices as is required by section 101.060." Section 101.060 states:

> Traffic and Road Control Devices
>
> (a) This chapter does not apply to a claim arising from:
>
> (1) the failure of a governmental unit initially to place a traffic or road sign, signal, or warning device if the failure is the result of discretionary action of the governmental unit;
> (2) the absence, condition, or malfunction of a traffic, or road sign, signal, or warning device unless the absence, condition, or malfunction is not corrected by the responsible governmental unit within a reasonable time after notice; or
> (3) the removal or destruction of a traffic or road sign, signal, or warning device by a third person unless the governmental unit fails to correct the removal or destruction within a reasonable time after actual notice.
>
> (b) The signs, signals, and warning devices referred to in this section are those used in connection with hazards normally connected with the use of the roadway.[16]

TEX. CIV. PRAC. & REM. CODE ANN. § 101.060 (West 2005).

Section 101.060 does more than simply define the government's duty in connection with the absence, condition, or malfunction of a traffic or road sign, signal, or warning device. A claimant's failure to establish that the government has breached this duty results in the claim's being barred because there is no waiver of sovereign immunity.

The term "condition" as used in subsection (2) "refers to either an intentional or an inadvertent state of being." For example, a city could be liable for not fixing a red arrow stop signal that it knew caused problems for drivers deciding what to do when confronted with the red arrow. Sparkman v. Maxwell, 519 S.W.2d 852 (Tex. 1975). Similarly, the failure to replace a stop sign within a reasonable time of learning that it had been stolen could be the basis of liability. City of Dallas v. Donovan, 768 S.W.2d 905, 908-909 (Tex. App.—Dallas 1989, no writ). On the other hand, the fact that a stop sign could be stolen easily by vandals could not form the basis of suit under section 101.060. Lawson v. Estate of McDonald, 524 S.W.2d 351, 356 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

> [T]he term ["condition" as used in the Act] refers to the maintenance of a sign or signal in a condition sufficient to properly perform the function of traffic control for which it is relied upon by the traveling public. This must be so, inasmuch as there are other provisions in the statute expressly relieving the State from liability for claims growing out of the removal of signs, signals and devices by third parties without a reasonable time for replacement after actual notice to the State of the removal.

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[16] Section 101.060(c) further provides that: "This section does not apply to the duty to warn of special defects such as excavations or roadway obstructions."

Id. "[T]he Texas Tort Claims Act will hold the state is liable only if it has knowledge that a sign is not performing its function." Creek v. Tex. State Dep't of Highways, 826 S.W.2d 797, 802 (Tex. App. — Houston [14th Dist.] 1992, writ denied) (emphasis added).

In Tex. Dep't of Transp. v. Garza, 70 S.W.3d 802 (Tex. 2002), the Supreme Court had to determine what constituted a "condition" that would give rise to liability for a road sign under §101.060(a)(2). As noted above, TCA §101.060(a)(2) provides that a governmental entity can be held liable for the condition or malfunction of a traffic sign or traffic control device if it fails to correct the problem within a reasonable time after learning that the device or signal is not functioning properly. Garza, 70 S.W.3d at 807-08.

The Supreme Court noted that a governmental entity can be held liable under (a)(2) where the view of a traffic sign or signal is obstructed, the sign or signal has fallen down or is not functioning, or the sign or signal conveyed the wrong traffic control information. *Id*. at 887-08. The Garzas, however, were complaining about a speed limit sign that was in place and showed the proper speed limit. The Garzas contended that the speed limit sign was not functioning properly because its location did not cause cars to slow down far enough in advance of the school zone it marked. The Supreme Court rejected this argument and found that the Department of Transportation cannot be liable because the sign correctly displayed the speed limit.

> Accordingly, under sections 101.021(2) and 101.060(a)(2), no 'condition' was present requiring corrective action by TxDOT. At most, the Garzas have alleged that TxDOT improperly set the speed limit in the area of 45 miles per hour ... 'the source of the alleged problem ... is the setting of the legal speed limit, not the sign displaying that limit.'

Id. at 808 (quoting Bellnoa v. City of Austin, 894 S.W.2d 821, 825 (Tex. App.–Austin 1995, no writ)).

However, even if the Department of Transportation knows that a sign is being stolen frequently, the Supreme Court held that it is not liable unless it failed to replace the sign within a reasonable time of its "actual" notice that it was stolen. State v. Gonzalez, 82 S.W.3d 322 (Tex. 2002). In Gonzalez, the issue was whether liability for a stop sign that had been repeatedly stolen by vandals was covered by TCA §101.060(a)(2) or (a)(3). The accident in *Gonzalez* resulted from a stop sign being stolen at the intersection of two farm-to-market roads. It was uncontested that TxDOT regularly had to replace the stop sign at issue because it was being stolen or vandalized so frequently. Because of the frequency with which the stop sign was being stolen, the plaintiffs contended that §101.060(a)(2) controlled the determination of liability. The plaintiffs argued that because TxDOT knew the sign was being stolen and vandalized frequently, it had actual notice that the sign was not serving its intended purpose and had not made efforts to cure the malfunction within a reasonable time after having such notice. Id. at 327-28. The plaintiffs contended that the highway department was liable for failing to put up additional signs or signals indicating that traffic on one of the farm-to-market roads should stop or for failure to prevent vandals from being able to remove the stop signs.

The Supreme Court rejected the plaintiffs' arguments, stating that §101.060(a)(3) controls liability in all cases where third persons remove a traffic control device or cause that device not to work. Id. at 321-30. "The removal or destruction of a traffic or road sign ... by a third person [cannot be the basis of liability] unless the governmental unit fails to correct the removal or destruction within a reasonable time [of having] actual notice [of removal or destruction]." TEX. CIV. PRAC. & REM. CODE § 101.060(a)(3). Consequently, because the stop sign had been removed by vandals, TxDOT could not be held liable unless it failed to replace the stop sign within a reasonable time of when it had "actual" notice of the stop sign being stolen. Id. at 329-30. There was no evidence that TxDOT had notice that the stop sign had been stolen at the time of the auto accident. Id. Therefore, judgment was rendered that the plaintiffs take nothing. Gonzalez is in accord with earlier courts of appeals cases on similar issues.

Creek demonstrates the extent of liability under this section of the TCA. Creek arose out of an intersection collision allegedly caused by a missing stop sign. There was no allegation or evidence that the state had actual knowledge the stop sign was down. Plaintiff alleged, and the jury found, that the stop sign had been installed without enough concrete around the base, thus creating a dangerous condition likely to result in its being knocked down, and that the state had actual knowledge of this. Following the reasoning of Estate of McDonald, the Creek court rejected plaintiff's theory that liability under §101.060 could be predicated upon the failure to install a stop sign with sufficient concrete to hold the sign upright. The Fourteenth Court of Appeals held that "'condition' ... of ... property contained in Section 101.021 of the Act does not refer to the original installation of a stop sign insofar as whether it was imbedded in a sufficient amount of concrete or in a hole of sufficient depth." Id. The court went on to hold that the plaintiff could establish liability in the case of a missing stop sign

only by showing that the government had actual knowledge that the sign was absent. Id.

Plaintiff's theory that the dangerous condition was the negligently installed stop sign, and not the downed stop sign, is a variation on the negligent activity theory rejected in Keetch, which was decided by the supreme court after Creek. In a premises liability case, an owner/occupier has potential liability only for a dangerous condition that actually causes the accident. Creek's accident was caused by the stop sign's being down, not by the way the sign had been installed in the first place. See id.

In City of Grapevine v. Sipes, the Texas Supreme Court addressed a governmental entity's liability under section 101.060(a)(2) when the entity decides to put a traffic control device in place but does not do so in a timely manner. City of Grapevine v. Sipes, 195 S.W.3d 689 (Tex. 2006). In Sipes, a series of accidents at the intersection of two highways near construction of a large mall led the city to decide to install a traffic signal. Id. The city set a target date for installing the signal, but the signal was not actually installed until over a month later. Id. Between the time the signal was to be installed and the date it was actually installed, Sipes and her daughter were injured in an accident at the intersection. Id. Sipes brought suit alleging the city was liable under Section 101.060(a)(2). Sipes argued that the delay in installing the signal created liability because the city failed to act within a "reasonable time after notice" of the need for the light. Id. The Supreme Court held that the city could not be liable because liability under Section 101.060(a)(2) requires the preexistence of the signal. The court pointed out that while an entity may decide to install a traffic signal at a given location, intervening events may lead to a decision to delay or cancel installation because there are other more important priorities. Id.

The obstruction of a stop sign from view by trees or branches is a "condition" that can form the basis of liability.

> Accordingly if a city has prior notice of such a condition and fails to remedy such condition within a reasonable time, it may be liable under the Texas Tort Claims Act.

Lorig v. City of Mission, 629 S.W.2d 699, 701 (Tex. 1982). See Tex. Dep't. Transp. v. Pate, 170 S.W.3d 840 (Tex App.–Texarkana 2005, pet. filed); Parker County v. Shankles, 2003 WL 22026592 (Tex. App. – Fort Worth 2003, pet. filed) (vegetation off of county property was a condition affecting stop sign).

a. Liability Based Upon "Notice" or "Actual Notice."

(1) "Actual Notice" Defined.

Actual notice is "information concerning a fact actually communicated to or obtained by a city employee responsible for acting on the information so received or obtained." Donovan, 768 S.W.2d at 905, 908.

(2) "Notice" Defined.

Notice may be defined as information concerning a fact actually communicated to a person by an authorized person, as information actually derived by him from a proper source, or else as information presumed by the law to have been acquired. Presumed information is considered the equivalent, in legal effect, of full knowledge. It has also been determined that "imputed actual notice carries with it the same legal consequences as conscious knowledge." State v. Norris, 550 S.W.2d 386, 389 (Tex. Civ. App.–Corpus Christi 1977, writ ref'd n.r.e.).

b. Section 101.060 Applies Only if the Defendant's Employees Did Not Cause the Malfunction or Absence.

The standard of liability established by §101.060 applies only if an employee of the defendant did not cause or contribute to the absence or malfunction of the traffic control device. Ramming, 861 S.W.2d at 465-66. The Ramming court held that this section of the TCA is applicable only when the absence or malfunction of a traffic sign or signal is the result of an act of God, or the result of some third party not under the control of the defendant. When a traffic signal is disconnected through the actions of the defendant's agent, however, the plaintiff does not need to establish that the defendant failed to fix or repair the device within a reasonable time of learning that the device was absent or malfunctioning. Id. Following the Ramming decision, if a traffic sign or signal is removed, non-functioning, or otherwise not operating properly as a result of the actions of defendant's employees, defendant will be held liable under a negligence standard for any injuries resulting from the employee's removal of the traffic control device. Id.

c. Traffic Control Devices Covered by Section 101.060.

The signs, signals, and traffic control devices to which section 101.060 applies are those used in connection with hazards normally connected with the use of the roadway, and not to special defects. Palmer made this distinction and held that legally parked cars are not special defects:

> We hold that, as a matter of law, a legally parked car and the consequences of a narrowed passageway, is a "hazard[s]

> normally connected with the use of the roadway" under Sec. 101.060 of the Act and therefore the City cannot be held liable for failing to warn of the "condition" because its failure to warn was the result of discretionary actions of said governmental unit.

Palmer, 607 S.W.2d at 300; Burris, 877 S.W.2d at 299 (motor vehicle momentarily stopped on the highway was not a special defect).

d. Discretionary Signal Placement and the Texas Manual on Uniform Traffic Control Devices.

For a period of time the significance of the Texas Manual on Uniform Traffic Control Devices (the "Manual") in signage cases was uncertain. The Manual was adopted by the State Highway and Public Transportation Commission under authority conferred by TRANSPORTATION CODE § 544.001 (West 1999). Section 544.002 authorizes the State Department of Highways and Public Transportation to place signs conforming to the Manual on state highways. Id. Transportation Code §544.002 also authorizes local governmental units to place signs conforming to the Manual on highways under their jurisdiction. Id.

Sign applications are either mandatory, advisory or permissive under the Manual. The Supreme Court has held that even the placement of signs that the Manual provides as "mandatory," is discretionary and subject to the exemption from liability provided in section 101.060(a) of the Act. State Dep't of Highways v. King, 808 S.W.2d 465 (Tex. 1991); see Tex. Dep't of Transp. v. Andrews, 155 S.W.3d 351 (Tex. App.–Fort Worth 2005, pet. denied) (neither state nor federal manual waives immunity). The Court noted that the Manual itself declares that it is no substitute for engineering judgment, and that the statute authorizing adoption of the Manual affords the State discretion in placing traffic control devices. Id. at 466. TEX. TRANSP. CODE §§ 544.001-544.002 (Vernon 1999), provided for discretion in the initial placement of signs. TEX. CIV. PRAC. & REM. CODE ANN. § 101.060(a)(1) exempts from liability the initial failure to place signs, signals, or warning devices, assuming the failure is a result of discretionary action. Villarreal, 810 S.W.2d at 420-21. Additionally, other traffic sign and signal manuals containing language similar to the Manual do not override the exemption from liability created by section 101.060. Bellnoa, 894 S.W.2d at 827 (provisions of the City of Austin School Safety Manual that was similar to the Manual "does not impose a non-discretionary duty on the City"). However, a local governmental entity can be held liable for failure to install traffic control devices in accordance with the local governmental entity's ordinance or law. Sullivan, 33 S.W.3d at 13-15 (city could be held liable for failing to operate school zone cross-walk signals in manner consistent with city ordinance.)

The protection afforded by TCA §101.060 does not extend to a governmental entity's duty to warn of special defects or repair traffic control devices it chooses to install. Section 101.060(c) requires governmental entities to warn of special defects. Moreover, it requires governmental entities to warn of special defects even if the decision to place signs, signals or traffic control warnings would otherwise be considered discretionary. Maxwell, 880 S.W.2d at 463-64. Following this rationale, the Austin court concluded that a governmental entity could not rely upon the discretionary act defense established by §101.060(a) when the premises condition at issue is a special defect. Id. The court concluded that when a special defect exists, there is a "mandatory duty" to warn of that defect. Id.

Additionally, while the initial installation of signs and signals may be discretionary, once installed the governmental entity has the duty to maintain them under TCA §101.060(a)(2). Sullivan, 33 S.W.3d at 11-12.

11. Section 101.023: Limitations on the Amount of a Governmental Unit's Liability.

Section 101.023 establishes four liability caps based upon the governmental entity's being sued. State government liability for money damages is limited to $250,000.00 for each person, $500,000.00 for each single occurrence of bodily injury or death, and $100,000.00 for a single occurrence of damage to or destruction of property. For local governmental entities other than cities, their liability for money damages is limited to $100,000.00 for each person, $300,000.00 for each single occurrence of bodily injury or death, and $100,000.00 for each single occurrence of injury or destruction of property. A municipality's liability under the TCA is limited to a maximum amount of $250,000.00 for each person, $500,000.00 for each single occurrence of bodily injury or death, and $100,000.00 for each single occurrence of damage or destruction to property.[17] Finally, the liability that may be incurred by an emergency service organization is limited to money damages in a maximum amount of $100,000.00 for

[17] Of the various types of local governmental entities, only municipalities have the higher liability cap. Edinburg Hosp. Auth. v. Trevino, 941 S.W.2d 76, 82-83 (Tex. 1997) (J. Hecht, concurring). Thus, a hospital district's liability is limited to a $100,000/$300,000 cap. Id.

each person, $300,000.00 for each single occurrence for bodily injury or death, and $100,000.00 for injury to or destruction of property.

Texas courts have upheld the constitutionality of liability limits established by the Act. At common law, plaintiffs could not bring a tort claim against governmental entities, therefore, the liability cap does not violate the due process and equal protection clauses of the United States and Texas Constitutions. Ray, 712 S.W.2d at 273; Tarrant County Water Control & Improvement Dist. No. 1 v. Crossland, 781 S.W.2d 427, 439 (Tex. App.–Fort Worth 1989, writ denied). See Univ. of Tex. Med. Branch v. York, 808 S.W.2d 106, 111 (Tex. App.–Houston [1st Dist.] 1991), *rev'd on other grounds*, 871 S.W.2d 175 (Tex. 1994). Additionally, the liability cap has withstood challenges that it deprives plaintiffs of the right to trial by jury. Ray, 712 S.W.2d at 273. In upholding the constitutionality of the liability limitations, the courts point out that before the enactment of the TCA, governmental units, except for municipalities, were immune from tort liability. City of Austin v. Cooksey, 570 S.W.2d 386, 387 (Tex. 1978). Accordingly, if plaintiffs are going to enjoy the benefits of the TCA, they must also accept the liability limits established therein. Id.

The courts have also interpreted section 101.023 so as to further limit the liability of governmental units. In Cooksey, the supreme court held that a governmental unit's maximum liability is determined by the number of persons actually involved in the accident, as opposed to the number of plaintiffs and an intervenor. Only one individual was involved in the accident that gave rise to the suit. At that time, a county's maximum liability was limited to $100,000.00 per person and $300,000.00 per single occurrence. The court held that:

> When one person is injured or killed, and one plaintiff brings suit, the applicable limit of liability is $100,000.00. That limit should not change simply because the deceased is survived by two or more statutory beneficiaries under the wrongful death statute.
>
> The controversy here centers around whether the term "per person" in the statute refers to the person injured or those persons who suffered a loss as a result of the injury to someone else. We think the clear meaning of the statute is that it refers to the person or persons who sustain injury.

Id. at 387-88; Whipple v. Deltscheff, 731 S.W.2d 700, 705 (Tex. App.–Houston [14th Dist.] 1987, writ ref'd n.r.e.). Furthermore, the plaintiff's total recovery, including prejudgment interest, cannot exceed the liability cap. Weller v. State, 682 S.W.2d 234 (Tex. 1984); York II, 808 S.W.2d at 111-12. The statutory cap on award of damages applies to and limits the recovery of prejudgment interest even when the plaintiff makes an offer to settle for the maximum statutory amount and the offer is rejected. Id. The statutory maximum amount of recovery under the TCA, however, does not apply to recovery of post-judgment interest. Id.

On the other hand, a governmental entity's offsets for contribution, indemnity, or reductions for the percentage of negligence attributable to another party are calculated from the plaintiff's total damages rather than the defendant's liability cap. Trevino, 941 S.W.2d at 81-82; Univ. of Tex. v. Nava, 701 S.W.2d 71, 72-73 (Tex. App.–El Paso 1985, no writ). In Nava, the plaintiff's total damages were $160,000.00 and responsibility for these damages were assigned 50% to the plaintiff and 50% to the defendant. The trial court reduced the plaintiff's recovery to $80,000.00. The State argued that the 50% reduction should be made from its maximum liability, $100,000.00, limiting plaintiff's recovery to $50,000.00. The El Paso court found that there was no justification for calculating the offset from the defendant's liability cap. Id. Similarly, any adjustments for contribution for payments made by settling defendants is applied to the plaintiff's total recovery, not from the governmental entity's liability cap. Trevino, 941 S.W.2d at 81-82. Accordingly, any reduction for settlements, or comparative negligence should be calculated from the plaintiff's total damages. Id.; Nava, 701 S.W.2d at 72-73.

Finally, the TCA's prohibition on the recovery of exemplary damages does not extend to proprietary activities claims against municipalities. Section 101.024 states that the Act does not authorize the recovery of exemplary damages for suits brought thereunder. The TCA does not control suits against municipalities involved in proprietary activities. Turvey, 602 S.W.2d at 519. Thus, the TCA preserves a plaintiff's common law right to seek "unlimited damages" for negligent acts of municipalities engaged in proprietary functions. Id.

In Pike, 727 S.W.2d at 518-24, the supreme court held that unlimited common law liability extended to claims for punitive damages and established a standard for their recovery. Municipalities can be held liable for punitive damages as a result of proprietary activities when the plaintiff proves: (1) the active tort feasor "engaged in willful, wanton, malicious, or grossly negligent conduct ... [demonstrating] that the acts giving rise to the claim were committed with such malice or evil intent, or such gross negligence as to be equivalent to such intent;" and (2) the acts were

attributable to the municipality through a showing that they "were expressly authorized by the municipal government or that they were done 'bona fide in pursuance of general authority to act for the municipality on the subject which they relate' ... [l]iability must rest on official policy, meaning the city government's policy and not the policy of an individual officer." Id. at 523.

VI. LIMITATIONS ON WAIVER OF SOVEREIGN IMMUNITY UNDER THE TCA

This section of the paper addresses particular defenses to governmental liability aside and apart of establishing that the defendant was not negligent or defeating one element of a premises liability claim. Generally speaking, the defenses break down into two different categories: (1) those defenses that carry over from common law; and (2) the special defenses (or exclusions from liability) created by the TCA

A. Common Law Defenses.

1. Sovereign Immunity.

As set out in Section III A above, sovereign immunity remains a defense to both suit and liability. Governmental entities continue to enjoy sovereign immunity from suit and liability. York, 871 S.W.2d at 445-46; Horrocks, 841 S.W.2d at 416. A plaintiff has permission to sue and assert a waiver of immunity only if liability arises under the TCA or other statute. Id. TEX. CIV. PRAC. & REM. CODE § 101.025. As explained by the Eastland Court of Appeals, "[w]hen the [Tort Claims Act] does not apply, immunity is still the rule." General Elec. Co., 795 S.W.2d at 313; Maxwell, 880 S.W.2d at 463. Thus, a plaintiff must be able to point to a clear waiver of immunity, or his suit is barred. Ramming, 861 S.W.2d at 486-87; Valdez, 869 S.W.2d at 447; Schaefer v. City of San Antonio, 838 S.W.2d 688, 691, 693 (Tex. App.–San Antonio 1992, no writ).

The defense of sovereign immunity is often applied in cases where the TCA recognizes a cause of action, but the plaintiff seeks to hold the defendant liable under the wrong standard of liability. In the premises liability context, this arises typically in two very similar types of cases. The first instance occurs in cases such as Tennison, in which the defect is a "dangerous condition," and liability is predicated upon a negligence standard of liability. Tennison, 509 S.W.2d at 560. The plaintiff's failure to establish that the defendant had actual knowledge of the condition precludes liability. The second instance also involves the application of the wrong standard of liability. In these cases, such as Payne III and Kitchen, the plaintiff alleges that the premises defect constitutes a "special defect," but in fact it is merely a "dangerous condition." Dep't of Highways. and Pub. Transp. v. Payne, 781 S.W.2d 318 (Tex. App.–Houston [1st Dist.] 1989) *rev'd on other grounds* , 838 S.W.2d 235 (Tex. 1992) ("Payne III"); Kitchen, 867 S.W.2d at 784. Again, the failure to obtain a finding of actual knowledge means the defendant cannot be held liable.

These cases hold lessons of critical importance for both plaintiffs and defendants. A plaintiff must make certain there is a waiver of immunity. Furthermore, a plaintiff must also insure that he obtains from the jury all of the findings necessary to support a judgment against the governmental defendant based upon the type of defect at issue. If there is any doubt as to the applicable standards of liability, both standards should be submitted to the jury. See Tex. Dep't of Transp. v. Cotner, 877 S.W.2d 64, 66-67 (Tex. App.–Waco 1994, writ denied) (whether ice on bridge was not a special defect was immaterial where jury found for plaintiff licensor/licensee liability issues). See also Zachary, 824 S.W.2d at 813. Defense attorneys, on the other hand, must make sure to take the procedural steps necessary to assert the standard of limited liability created by the TCA in premises liability cases. Pleading sovereign immunity, however, is not sufficient to perfect a record for appeal. Defense counsel must make sure that her objections and exceptions are sufficient to obtain a reversal on appeal. See Payne, 838 S.W.2d at 239-41; Koblizek, 752 S.W.2d at 660.

2. Exhaustion of Administrative Remedies

Generally, a plaintiff must exhaust his administrative remedies prior to filing suit. For example, a plaintiff cannot bring suit under the Whistleblower statute unless he exhausts any available grievance process in accordance with that statute. Harris County, 122 SW3d at 277 ("that statutory prerequisite that a plaintiff in a Whistleblower action timely initiate a grievance is a jurisdictional requirement, the failure of which may be challenges by way of a plea to the jurisdiction"); Texas S. Univ., 84 SW3d at 792; Leatherwood, 2004 WL 253275, at *3. In fact, a plaintiff cannot bring suit under the Whistleblower statute, until he exhausts his administrative remedies before the Human Rights Commission, if his claim also falls within the exclusive jurisdiction of the Texas Commission, City of Waco, 259 SW3d 156. See also Texas Commission on Human Rights Act. Prairie View A&M Univ. v. Chatha, 381 S.W.3d 510-514 (a plaintiff must file a timely charge of discrimination with the THC in order to bring a discrimination suit under the TCHRA).

There are a few, rare exceptions to the requirement of exhausting administrative remedies. The Supreme Court began its opinion in State v. Fid. & Deposit Co. of Maryland, 223, S.W.3d 309, 310 (Tex., 2007), by stating that a party must exhaust any

administrative remedies before filing suit. While the court did not hold that exhaustion of administrative remedies was a prerequisite to filing suit, the holding was based solely on the fast that the contract at issue was not subject to mandatory administrative resolution of the statute. However, the lesson from City of Waco v. Lopez, is that a plaintiff who fails to exhaust all available administrative remedies proceeds at the risk of having viable claims dismissed with prejudice. See City of Waco, 259 SW3d at 156.

3. In Premises Case; Lack of Ownership or Control of the Premises.

Premises liability under the TCA is subject to the principles of common law premises liability cases. Accordingly, a governmental entity is entitled to the defenses a premises occupant enjoys at common law.

The principle common law defense that carries over to governmental premises liability is the defense of lack of ownership or control of the premises. The first requirement in premises liability is proof of the defendant's possession or control of the premises. After all, a defendant cannot be held liable for the condition of real property if he lacks the authority to inspect and improve the premises. See Gunn, 887 S.W.2d at 251-52. Accordingly, a governmental entity must own, occupy, or control the premises, or create the dangerous condition before it can be held liable for a premise defect. Cantu, 831 S.W.2d at 425. See also Vela, 703 S.W.2d at 721 (plaintiff's decedent drowned in water beyond state beach park). But see Nichols, 609 S.W.2d at 573-74 (DPS held liable for failure to report to the Highway Department or to remain at the scene of a washed out section of roadway three to five feet wide and three to four feet deep, extending across the entire highway discovered by two of its officers).

Cantu exemplifies the requirement that the defendant must control the premises on which the defect is located. In Cantu, a child drowned when he fell into a reservoir. The plaintiffs sued the City based upon the City's lease of the park adjacent to the reservoir. The park came to the edge of the reservoir. Cantu, 831 S.W.2d at 419-20. The court focused on the fact that the child drowned in the reservoir that was not controlled by the City. Id. at 424-25. The San Antonio Court of Appeals held that because the child drowned in the reservoir, not the park, the premises containing the dangerous condition was not controlled by the defendant. Id.; see Gunn, 887 S.W.2d at 251-52.

Recently, the Fort Worth Court of Appeals held that "control" over the premises is the threshold issue in a premises liability case. In Gunn, the defendant hospital moved for, and was granted, summary judgment based upon an affidavit which stated that it "did not own, operate or maintain the premises where Gunn was injured." Id. at 251. In affirming summary judgment for the hospital, the Fort Worth court stated "[o]ur review of the case law reveals that the critical inquiry in a premise liability case does not focus on occupancy, but on 'control' over the premises." Id. (emphasis added). The Fort Worth court then turned to the Restatement (Second) of Torts, § 328E which establishes the test of whether the defendant is an owner or occupier of land based upon whether or not he is a "possessor."

> A possessor of land is:
>
> (a) a person who is in occupation of the land with intent to control it; or
> (b) a person who is or has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it; or
> (c) a person who is entitled to immediate occupancy of the land if no other person is in possession under Clauses (a) and (b).

Id. (quoting Restatement (Second) of Torts, § 328E (1965)). The Fort Worth court held that a defendant's duty to warn of a defect in the premises arises only if he is "an occupier with control of the premises." Id. (citations omitted, emphasis in original). The Fort Worth court went on to explain:

> We recognize that the phrase "occupier of premises" has been interpreted in Texas to mean the party in control of the premises. However, a party may occupy a premises, in whole or in part, without actually controlling it. Therefore, instead of focusing on the term "occupy" as [the plaintiff] argues we must review the [defendant's] summary judgment evidence to determine if ... it proves that the hospital did not exercise control over the premises.
>
> . . .
>
> The term "control" is defined as the power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. Further, the meaning of words "operate" and "own" are generally understood to indicate an ability to manage and control.

Id. (emphasis in original, citations omitted). Thus, the court concluded that in the absence of controverting evidence, the hospital's affidavit stating that it did not own, operate, or maintain the premises where the plaintiff was injured, established its entitlement to summary judgment based upon lack of control. Id.

But see Couch v. Ector County, 860 S.W.2d 659 (Tex. App.--El Paso 1993, no writ) (reversing summary judgment where defendant did not prove lack of control over off-road premise).

B. Special Statutory Exclusions to the Act's Waiver of Sovereign Immunity.

As well as common law defenses, the liability of a governmental entity is subject to the exceptions provided elsewhere in the TCA. Therefore, governmental entities can also avail themselves of defenses or exclusions from liability created by the TCA.

1. Section 101.061, Liability for Actions and Omissions Before and After 1970.

The TCA exempts from liability actions taken before January 1, 1970. The TCA expressly provides that it does not apply to, and nor can a governmental entity be held liable for, acts or omissions that occurred before January 1, 1970. TEX. CIV. PRAC. & REM. CODE § 101.061 (Vernon 1997). Section 101.061 bars suits in which the plaintiff's premises liability cause of action is based upon the design and construction of a road completed prior to January 1970. Shives, 743 S.W.2d at 716; Burnett v. State Dep't of Highways and Pub. Transp., 694 S.W.2d 210, 211 (Tex. App.--Eastland 1985, writ ref'd n.r.e.). See Crossland, 781 S.W.2d at 431-32 (defendants could not be held liable where bridge and reservoir, that allegedly caused the accident, were designed and construction completed prior to the effective date of the TCA). But see Tex. Parks & Wildlife Dep't, 988 S.W.2d at 372 (state cannot be held liable if structure was completed before 1970 and remains in the same condition; but 1970 exclusion does not protect entity from liability for failure to maintain); City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex. 1997) (while city's pre-1970 decision on whether to construct public improvements are exercises of governmental power for which it cannot be held liable, however construction and maintenance of a storm sewer before 1970 was a proprietary for which the City could be held liable); City of Fort Worth v. Adams, 888 S.W.2d 607 (Tex. App.--Fort Worth 1994, writ denied) (city could be liable for pre-1970 drainage design, because until 1987 the design of public works was a proprietary function for which cities could be held liable). As explained by the Austin Court of Appeals:

> If the [governmental defendant] proves that the culvert was completed before 1970 and has remained in the same condition since that time, then, as a matter of law, the [governmental defendant] is entitled to immunity under section 101.061.

Maxwell, 880 S.W.2d at 465. Thus, section 101.061 bars suits based solely upon acts and omissions that occurred before the effective date of the Act or upon the failure to maintain (i.e., preserve as was originally constructed) thereafter. Tex. Parks & Wildlife Dep't, 988 S.W.2d at 372; Barron, 880 S.W.2d at 302; Maxwell, 880 S.W.2d at 465.

a. Is There a Duty to Improve or Warn of Premises Constructed Before 1970?

Pre-1970 immunity extends to the failure to improve roadways, buildings, and other structures built before 1970. Courts of appeals have held that governmental entities cannot be held liable for failing to add warning signs or signals to roads, bridges, and other public works completed before 1970. Id. at 465-66; Valdez, 869 S.W.2d at 446-47; Crossland, 781 S.W.2d at 431-33; Burnett, 694 S.W.2d at 211 (the Highway Department could not be held liable for failing to modify a median guard fence on a roadway which was built before 1970). Thus, section 101.061 bars suits based solely upon acts and omissions that occurred before the effective date of the TCA or upon the failure to make improvements thereafter. Id. "The act or omission is the actual building of the structure.... Failure to provide additional safety features and devices after 1970 does not constitute an act or omission within the meaning of section 101.061." Maxwell, 880 S.W.2d at 466.

Reviewing the Crossland opinion is helpful in understanding the extent of the pre-1970 defense to liability. This case arose out of an accident involving a boat striking a bridge across a lake, killing the driver and passenger. Crossland, 781 S.W.2d at 430. The bridge was designed and built prior to January 1, 1970. Plaintiffs argued that their cause of action was based on an act or omission that occurred after the effective date of the TCA, namely the defendant 's failure to take some action on the night of the accident. The court rejected this contention by first reiterating that a claimant "may not state a claim under the Tort Claims Act for any defect in the bridge or reservoir because any such defect would be due to an act or omission that occurred before 1970...." Id. at 431. The Fort Worth court then went on to deal with the more difficult question of whether there is a duty to warn or make safe a dangerous condition resulting from a pre-1970 design. The court found that the failure to take action after 1970 could not form the basis of a claim under the TCA.

> When the bridge and reservoir were completed the State did not provide instructions, lights, warnings, signs or barriers, so these omissions occurred before 1970. After 1970, the State continued to

> leave undone the installation of warnings, so the omissions continued to exist, but appellees have not identified any new act or omission that occurred after 1970.

Id. at 432; Valdez, 869 S.W.2d at 446-47 (rejecting the argument that the date of the injury is the date of the act or omission).

Requiring a governmental occupant to improve and/or warn of defects on premises constructed before the effective date of the TCA, would render section 101.061 meaningless.

> The Texas Supreme Court has not settled the question as to whether an "act or omission" means the actual building of a structure in dispute, including any warning signs or lighting. Nevertheless, the appellate courts that have addressed this question have stated that where claims concern a structure constructed prior to the Texas Tort Claims Act, the state has governmental immunity.... Clearly article 101.061 intended to provide for abolishment of governmental immunity without causing havoc. Subjecting the state to liability for structures built prior to the act places the state in an unfair position of trying to analyze every structure under its control and then rebuild, redesign and make safe all of those structures quick enough in order to protect the state from liability.

Chapman v. City of Houston, 839 S.W.2d 95, 99 (Tex. App.--Houston [14th Dist] 1992, writ denied); Valdez, 869 S.W.2d at 446-47. See also Payne II, 772 S.W.2d at 475-78 (while there is a duty to maintain a structure as it was built, there is no duty under the TCA to redesign and add new features to update the old design). In short, requiring post-1970 modifications or other actions would obviate the purpose for section 101.061. Id. After all, what would be served by a provision that precludes liability for structures built before 1970 when the defendant can be held liable for failing to improve the pre-1970 design? See id.

The courts of appeals have consistently followed this rationale in refusing to predicate liability based upon the failure to improve premises completed before 1970. The following is a list of cases in which the plaintiff's claims were held to be barred based upon the pre-1970 defense:

(a) Defendant is not liable for failing to add lights and warning devices to bridges constructed before effective date of the TCA. Crossland, 781 S.W.2d at 431-33.

(b) Suit could not be based upon a university's failure to add a warning track in the outfield of a baseball field constructed before 1970. Valdez, 869 S.W.2d at 446-47.

(c) Defendant could not be required to add guardrail to roadway completed before 1970. Stanford v. State Dep't of Highways and Pub. Transp., 635 S.W.2d 581 (Tex. App.--Dallas 1982, writ ref'd n.r.e.).

(d) Failure to improve median fence divider between oncoming lanes of traffic could not be the basis of liability for highway constructed before 1970. Burnett, 694 S.W.2d at 211-12. See Maxwell, 880 S.W.2d at 466.

b. Post-1970 Actions Must Have Caused the Premises Defect.

When a governmental unit does work after the effective date of the TCA, courts look to whether the post-1970 actions contributed to the premise defect in order to determine if liability can be attached. The fact that some work was done after January 1970 does not automatically waive the defense created by section 101.061. When construction is completed prior to January 1, 1970, and where there have not been structural changes that affected the condition that caused the injury, the state retains sovereign immunity. Valdez, 869 S.W.2d at 446-47. For example, in Shives, the Highway Department did maintenance work and made some slight design changes to the street where the accident occurred after 1970. Shives, 743 S.W.2d at 716. The court found the post-1970 work did not cause or contribute to the accident. Id. The El Paso Court of Appeals held that the actions of which plaintiffs complained all occurred before the effective date of the TCA and could not be the basis of governmental liability. Id.; Maxwell, 880 S.W.2d at 466 (failure to upgrade or improve the safety features of a culvert during a highway renovation in 1979 did not constitute an act or omission occurring after 1970). See Barron, 880 S.W.2d at 302 (plaintiff could not point to any maintenance after the effective date of the TCA which contributed to the collision); Crossland, 781 S.W.2d at 431-34 (plaintiffs could not identify any actions taken after 1970, thus their suit was predicated upon acts or omissions which predated the TCA and were excluded from liability). Similarly, renovations or work on one part of a premises did not obligate a governmental entity to add warning devices and safety features to another portion of the premises. Maxwell, 880 S.W.2d at 463 (renovations to the roadway did not obligate the Highway Department to make improvements in the safety features or warning devices for an adjacent culvert).

On the other hand, a governmental entity can be held liable if, after January 1970, it did work that contributed to the accident. See Villarreal, 810 S.W.2d at 421. Furthermore, actions taken after 1970, may give rise to a continuing obligation to act. The Dallas Court of Appeals has held that once a governmental entity erects signs or warning devices after 1970, it can be liable for the negligent construction or maintenance of those items, regardless of the age of the roadway where they were installed. Id.

c. The Age of the Premises, However, Does Not Excuse a Lack of Maintenance.

Finally, the pre-1970 defense does not create a shield from liability for failing to "maintain" the premises. Tex. Parks & Wildlife Dep't, 988 S.W.2d at 372. All governmental units have an obligation to maintain property and to warn of dangerous conditions such as pot holes, regardless of the age of the structure involved. Smith v. State, 716 S.W.2d at 179-80; McBride, 601 S.W.2d at 556-58. See Davis, 988 S.W.2d at 372.

The Davis decision demonstrates how a governmental entity can be held liable for failing to maintain a structure built before 1970. 988 S.W.2d at 372. The plaintiff was injured when a concrete park bench collapsed under him. It was uncontested that the bench had been built before 1970. However, in December 1991, the Department's legal counsel recommended an inspection of all concrete benches in the park system and removal of unsafe benches. The bench in question was identified as a bench needing replacement, yet was never replaced. The Austin court held that the "failure to reduce or eliminate the dangerous condition posed by the cracks [in the bench] constitutes acts" after 1970 for which the Department could be held liable under the TCA. Id. at 373.

At the same time, the duty to maintain is limited to the work necessary to preserve the original design. Barron, 880 S.W.2d at 302; Villarreal, 810 S.W.2d at 421; Shives, 743 S.W.2d at 716; Burnett, 694 S.W.2d at 212. Thus, maintaining property does not require making improvements to the original design. Villarreal, 810 S.W.2d at 421; Payne II, 772 S.W.2d at 475-78. See Burnett, 694 S.W.2d at 212.

2. Section 101.055: Immunity For Tax Collection and Provision of Police and Fire Protection.

The TCA recognizes that there are certain governmental functions that should not be subject to scrutiny and second guessing by the courts. See Terrell, 588 S.W.2d at 787; Ross v. City of Houston, 807 S.W.2d 336, 337-38 (Tex. App.--Houston [1st Dist.] 1990, writ denied). Therefore, the Legislature has provided that suits cannot be premised upon the assessment or collection of taxes, or the method of providing police and fire protection. See Driskill v. State, 787 S.W.2d 369 (Tex. 1990); Terrell, 588 S.W.2d at 787. This section retains immunity only for the formulation of policy, but not for the negligent implementation of a policy. Petta v. Rivera, 985 S.W.2d 199, 206 (Tex. App.–Corpus Christi 1998) rev'd on other grounds, 44 S.W.3d 575 (Tex. 2001); Driskill, 787 S.W.2d at 370; Terrell, 588 S.W.2d at 787; Orozco v. Dallas Morning News, Inc., 975 S.W.2d 392, 397 (Tex. App.–Dallas 1998, no pet.); Riggs, 177 F.R.D. at 405; Ross, 807 S.W.2d at 337-38; Poncar v. City of Mission, 797 S.W.2d 236 (Tex. App.–Corpus Christi 1990, no writ); City of Dallas v. Cox, 793 S.W.2d 701 (Tex. App.–Dallas 1990, no writ); Robinson v. City of San Antonio, 727 S.W.2d at 40. If the negligence that is the basis of suit lies in the formulation of policy, the complaint is with how police protection is provided, and the City remains immune from liability. Orozco, 975 S.W.2d at 397; Riggs, 177 F.R.D. at 406. Accordingly, a governmental body cannot be held liable for deciding to utilize radar to pursue speeders, its policy regarding monitoring extinguished fires, or its policy of inspecting fire hydrants. Terrell, 588 S.W.2d at 787; Poncar, 797 S.W.2d at 237; Ross, 807 S.W.2d at 337-38.

This section also retains sovereign immunity for actions of employees who are responding to emergency calls or emergency situations, so long as they comply with all applicable laws, or in the absence thereof, do not act with conscious indifference or reckless disregard for the safety of others. Borrego, 964 S.W.2d at 958; City of Arlington v. Whitaker, 977 S.W.2d 742, 744-745 (Tex. App.–Fort Worth 1998, pet. denied); TEX. TORT CLAIMS ACT § 101.055(2). This provision also seeks to insure that employees and agents providing emergency care are not second guessed. On the other hand, when the provision of emergency service does not meet the standards established by a municipal procedures manual or relevant state rules and statutes, a governmental unit can be held liable for the actions of its agents and employees. Mejia v. City of San Antonio, 759 S.W.2d 198, 190-200 (Tex. App.–San Antonio 1988, no pet.). Thus, the provision of emergency, medical, or other services must meet established standards. Id.

At the same time, the mere fact that governmental employees began responding to an emergency does not mean all of their actions are automatically exempt from liability. See Borrego, 964 S.W.2d at 958. (EMS immobilized Borrego by strapping him to backboard; Borrego, was later hit by car because he could not get out of the car's way.) The El Paso court held that the emergency technicians were not responding to an emergency when they tied Borrego to the backboard and left him in the street. Thus, the City could be held

liable for the negligence of the emergency medical technicians. Id.

Governmental entities, however, do not enjoy immunity from claims arising from tax collection, or the police and fire protection, if the Act or other statute creates liability. To illustrate, a premises liability claim can be brought against a county for injuries sustained while in a tax assessor/collector office. Dowlearn, 489 S.W.2d at 146-47. Likewise, a governmental entity can be held liable for the negligent operation of a motor vehicle by a police officer. County of Brazoria v. Radtke, 566 S.W.2d 326, 328-29 (Tex. Civ. App.–Beaumont 1978, writ ref'd n.r.e.); Guzman, 766 S.W.2d at 860. More importantly though, governmental entities can be subject to claims brought under other statutes waiving sovereign immunity. See Cox, 793 S.W.2d at 726-28. The Cox plaintiffs brought suit under both the TCA and Section 1983 of the United States Code. They were able to maintain suit under §1983 without regard to any provisions of the TCA or defendants being on duty police officers. See id.

3. Section 101.056: Exclusions for Exercising Discretionary Powers.

Section 101.056 of the Act entitled "Discretionary Powers," provides:

> [The TCA] does not apply to a claim based on:
>
> (1) the failure of a governmental unit to perform an act that the unit is not required by law to perform; or
> (2) a governmental unit's decision not to perform an act or on its failure to make a decision on the performance or nonperformance of an act if the law leaves the performance or nonperformance of the act to the discretion of the governmental unit.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (West 2005). The discretionary powers exemptions, embodied in §101.056, extend policymaking immunity beyond the assessment of taxes and method of providing policy and fire protection contained in section 101.055. The purpose of this exception is to avoid judicial review of governmental policy decisions. Loyd, 956 S.W.2d at 123; Golden Harvest, 942 S.W.2d at 686-87; Bennett v. Tarrant County Water Control and Improvement Dist. No. 1, 894 S.W.2d at 452. A governmental entity cannot be held liable for policy decisions, regardless of the activity involved. TEX. TORT CLAIMS ACT § 101.056. The exclusion applies to failure to act and omissions, as well as positive acts of governments. Bellnoa, 894 S.W.2d at n.3. However, "once a government has decided to perform a discretionary act, the act must be performed in a nonnegligent manner." Cortez, 925 S.W.2d at 149-50.

Unfortunately, there is no bright line test for when an activity is a discretionary decision made at the policymaking level as opposed to decisions regarding the implementation of policies that are made at the operational level. City of Fort Worth v. Gay, 977 S.W.2d 814, 817 (Tex. App.–Fort Worth 1998, no pet.). The courts use different tests for determining if a decision is a discretionary act and thereby excluded from the TCA's waiver of immunity. Stephen F. Austin v. Flynn, 228 S.W.3d 653 (Tex. 2007). The courts seek to determine whether the plaintiff's complaints are with policy level decision as opposed to the implementation of policy decisions. Id.; Bennett, 894 S.W.2d at 452. Some courts attempt to focus on whether the matter requires exercising judgment that is discretionary, as opposed to carrying out an obligation mandated by law in which nothing is left to the discretion of the officer. State v. Rodriguez, 985 S.W.2d at 85; City of Lancaster v. Chambers, 883 S.W.2d 650, 654 (Tex. 1994); Loyd, 956 S.W.2d at 124. At the same time, the exercise of professional judgment does not fall within the ambient of the discretionary act protection. Davis, 988 S.W.2d at 374 (park manager's decision not to remove bench was implementation of policy level decision for which Department could be held liable).

Cases addressing the discretionary exemption from liability break down into two categories. The first set of cases addresses general governmental functions, while the second focuses on discretion in the design, construction, maintenance of roadways, bridges, and highways.

a. Discretionary Governmental Decisions.

Governmental entities cannot be held liable for policymaking decisions or decisions made at a policymaking level. They are liable only for the negligent implementation of policy, sometimes referred to as operational level decisions. Flynn, 228 S.W.3d 653; Tex. Dep't of Transp. v. Andrews, 155 S.W.3d 351 (Tex. App.–Fort Worth 2005, pet. denied) (citing Mogayzel v. Tex. Dep't of Transp., 66 S.W.3d 459, 465 (Tex. App.–Fort Worth 2001, pet. denied)). The courts have held that the following decisions are a reflection of governmental policy and, therefore, cannot form the basis of liability:

(a) A university's decision to hold classes in inclement weather. Univ. of Tex. v. Akers, 607 S.W.2d 283 (Tex. Civ. App.–Fort Worth 1980, writ ref'd n.r.e.);
(b) The decision of whether or not to purchase insurance for a city. Westbrook v. City of

Edna, 552 S.W.2d 608 (Tex. Civ. App.–Corpus Christi 1977, writ ref'd n.r.e.);

(c) Decision regarding the training and supervision of personnel. Radtke, 566 S.W.2d at 330;
(d) The decision to have a kitchen in a county jail. Norton v. Brazos, 640 S.W.2d 690, 693 (Tex. App.–Houston [14th Dist.] 1982, no writ);
(e) The decision to raise a speed limit. Bellnoa, 894 S.W.2d at 827;
(f) Decisions regarding the placement of a stop sign, subject to the provisions of §101.060. Miller v. City of Fort Worth, 893 S.W.2d 27, 32-32 (Tex. App.–Fort Worth 1994, pet. dism'd by agr.) (citing Shives, 743 S.W.2d at 714);
(g) Decision regarding performing an inquest. Tarrant County v. Dobbins, 919 S.W.2d at 877;
(h) Decision whether to retrofit school buses with "Stop Sign" arms, even if new buses are required to have them. Cortez, 925 S.W.2d at 149-150; and
(i) Decision to have an "open door" policy at mental health facility. Marroquin, 927 S.W.2d at 232.
(j) Decision on whether or not to add corrosion inhibitors to a water supply. Loyd, 956 S.W.2d at 124; and
(k) Decisions on timing and quantity of release of water from dam or reservoir. Golden Harvest., 942 S.W.2d at 686; Bennett, 894 S.W.2d at 452.
(l) Decisions regarding design of a stage and theater. Gates, 2004 WL 2559937 at *3.
(m) Auditing city records. City of Roman Forest v. Stockman, 141 S.W.3d 805, 811 (Tex. App.–Beaumont 2004, no pet.).

Decisions in carrying out policy, however, are not exempt from liability. Therefore, governmental units have been held liable for negligent implementation of policy as illustrated by:

(a) A police officer's negligent operation of his patrol car while pursuing a speeder causing plaintiff's injuries. Terrell, 588 S.W.2d at 790;
(b) A director's decision to use a glass as a prop in a school play. Christilles v. Sw. Tex. State Univ., 639 S.W.2d 38, 43 (Tex. App.–Austin 1982, writ ref'd n.r.e.);
(c) Operation, use, and maintenance of kitchen equipment in county jail. Norton, 640 S.W.2d at 63;
(d) The manner in which a public work is constructed. Mitchell v. City of Dallas, 855 S.W.2d 741 (Tex. App.–Dallas 1993), aff'd, 870 S.W.2d 21 (Tex. 1994);
(e) Decision not to remove cracked park bench. Davis, 988 S.W.2d at 374;
(f) Failure to maintain public works. Gay, 977 S.W.2d at 817; and
(g) Unreasonable delay in making improvements to traffic signals or warning devices approved by city council. Zambory v. City of Dallas, 838 S.W.2d 580, 582-83 (Tex. App. –Dallas 1992, writ denied).
(h) Decisions regarding when and where to run sprinklers on campus. Flynn, 228 S.W.3d 653.

Thus, whether something constitutes a discretionary matter is determined by whether it is a policy level decision or a decision regarding the implementation of policy made at an operational level. Terrell, 588 S.W.2d at 790.

b. Discretion in the Design and Construction of Roadways and Other Public Works.

Twice in 1999 the Texas Supreme Court made it clear that the design of roads, bridges, and highways, and decisions regarding improvement of public works are policy level decisions under §101.056. "Decisions about highway design and about the type of safety features to install are discretionary policy decisions." State v. Miguel, 2 S.W.3d 249, 251 (Tex. 1999); see Tex. Dep't of Transp. v. Arzate, 159 S.W.3d 188 (Tex. App.–El Paso 2004, no pet.). "Design of any public work, such as a roadway, is a discretionary function involving many policy decisions, and the governmental entity responsible may not be sued for such decisions." State v. Rodriguez, 985 S.W.2d at 85; see Andrews, 155 S.W.3d at 358; Harris County v. Demny, 886 S.W.2d 330, 335-36 (Tex. App.–Houston [1st Dist.] 1994, pet. denied); Maxwell, 880 S.W.2d at 463 ("[a] governmental entity's discretion in the design of roads and bridges, which includes the installation of safety features such as guardrails and barricades, is protected from liability by section 101.056(2) of the Tort Claims Act"); Shives, 743 S.W.2d at 717; Burnett, 694 S.W.2d at 212; Stanford, 635 S.W.2d at 582. But see Likes, 962 S.W.2d at 501 (while city's pre-1970 decision on whether to construct public improvements are exercises of governmental powers for which it cannot be held liable, construction and maintenance of a storm sewer before 1970 was a proprietary for which the City could be held liable); Adams, 888 S.W.2d at 614 (city could be liable for pre-1987 design of public works, because before the 1987 amendments, design was a

proprietary function for which cities could be held liable). Specifically, suit cannot be based upon:

(a) Dangerous condition arising from the design of a highway. Tex. Dep't of Transp. v. Ramsey, 74 S.W.3d 864, 867 (Tex. 2002).
(b) Dangerous condition that arises from the government's regulation of traffic and parking, and the width of traffic lanes or the width of streets. Palmer, 607 S.W.2d at 300;
(c) The design of an overpass. City of El Paso v. Ayoub, 787 S.W.2d 553 (Tex. App.–El Paso 1990, writ denied);
(d) Decision regarding whether or not to install guardrails, erect barricade, warning sign, or similar warning devices. Barron, 880 S.W.2d at 302; Wenzel v. City of New Braunfels, 852 S.W.2d 97, 98 (Tex. App.–Austin 1993, no writ); Stanford, 635 S.W.2d at 582; and
(e) Decision on whether to improve or upgrade a roadway, or change median barrier. Crossland, 781 S.W.2d at 432-33; Burnett, 694 S.W.2d at 212. But see Zambory v. City of Dallas, 838 S.W.2d 580 (Tex. App.–Dallas 1992, writ denied) (area of potential liability for negligent implementation of a design).
(f) Decision on whether to add safety devices or warning signals to a culvert located off a roadway is discretionary. Maxwell, 880 S.W.2d at 463-64.
(g) Decision on whether to raise or lower the speed limit is discretionary. Tex. Dep't of Transp. v. Phillips, 153 S.W.3d 121, 123 (Tex. App.–Beaumont 2004, no pet.); Bellnoa**,** 894 S.W.2d at 827; Shives, 743 S.W.2d at 715. But see Garza v. State, 878 S.W.2d 671 (Tex. App.–Corpus Christi 1994, no writ) (45 mile-per-hour speed limit sign misled the public into believing that it was reasonable and safe to drive 45 miles-per-hour when the speed was actually excessive for that portion of the roadway).
(h) Design of roadway detours. State v. Rodriguez, 985 S.W.2d at 85-86.
(i) Decisions regarding materials to use to warn of premises defects. Miguel, 2 S.W.3d at 250-51.
(j) Preliminary approval of changes to roadway was not a final decision and entity was exercising discretion in determining whether to go forward with changes and/or the types of changes to make. Tex. Dep't of Transp. v. Garrison, 121 S.W.3d 808 (Tex. App. – Beaumont 2003, no pet.).
(k) Decision to widen only a portion of bridge was discretionary. Sanchez v. Matagorda County, 124 S.W.3d 350 Tex. App. –Corpus Christi 2003, no pet.).
(l) Failure to create left turn lane. Phillips, 153 S.W.3d at 123.

Allegations that the governmental entity should be interested in building a "safe" premises does not get around the discretionary act exemption. Crossland, 781 S.W.2d at 433.

> Appellees do not identify any law which required appellants to warn boaters of the bridge. Instead, they argue each appellant made a policy decision to warn of danger because each appellant has posted other warnings, e.g., clearance signs on highway bridges. Therefore, appellees argue the policy decision was to warn of danger and the decision not to light the bridge was an operational one. Doubtless, the state desires to make Texas a safer place, but this general policy goal does not make the state liable for all possible failures to warn. The State will make the civic policy decisions about the design of State projects such as whether to include lights in the design. Id.

Finally, the Supreme Court's ruling in Ramirez makes it clear that even if the design of a roadway creates a dangerous condition, there is no duty to warn of the condition because to do so would allow a governmental entity to be held liable for a discretionary act. Ramirez, 74 S.W.3d at 867.

c. Decisions Involving the Design of Roadways Constitute Policy Level Decisions.

In interpreting section 101.056(2) of the TCA, the courts have distinguished between policy level decisions and professional or occupational discretion involved in the implementation of policy level decisions. Maxwell, 880 S.W.2d at 464; Eakle v. Tex. Dep't of Human Serv., 815 S.W.2d 869, 874 (Tex. App.–Austin 1991, writ denied). Only policy level decisions are protected from liability by section 101.056(2). Maxwell, 880 S.W.2d at 464. Professional or occupational discretion applied in the implementation of policy level decisions is not protected from liability by the "discretionary act" exemption created by section 101.056(2). Christilles, 639 S.W.2d at 42. In the Maxwell opinion, however, the Austin Court of Appeals found that roadway design decisions inherently involved policy level decisions that are exempt from liability under the TCA.

> In her first point of error [appellant] insists that the trial court erred in granting summary judgment based on immunity for discretionary acts because the Department's decisions regarding the placement of the culvert and its safety features involve professional or occupational discretion not protected by section 101.056(2) [of the Texas Tort Claims Act]. ... We disagree.
>
> Actions involving occupational or professional discretion are devoid of policy implications. Examples include decisions made in driving a mail truck, ... or the decisions by drama instructor to use a glass rather than a plastic prop in a university production.
>
> Decisions regarding the design of a highway and the installation of safety features, however, do not fall in this category. It is not proper for a court to second-guess the agency's decisions that some other type of marker or safety device would have been more appropriate ..., or that the culvert was placed too close to the highway. To do so would displace the authority of the agency responsible for making such decisions.
>
> Contrary to [appellant's] argument a "professional," such as an engineer may use his or her skills in designing adequate safety features for a highway without subjecting the process to judicial review as an occupational or professional class of agency action. Thus, even though the Department may have used engineering expertise and discretion in the planning and design of the culvert, the action remains in the informed discretion of the agency and exempt from liability under section 101.056(2) [of the TCA].

Maxwell, 880 S.W.2d at 464.

d. The Duty to Maintain is not Discretionary.

Again, the discretionary act defense does not excuse a defendant's failure to maintain the premises. Maintenance of roadways and other premises is a ministerial and non-discretionary duty. Tex. Parks & Wildlife Dep't, 988 S.W.2d at 374; Gay, 977 S.W.2d at 817; Sutton, 549 S.W.2d at 62. Governmental units will be held liable for the failure to properly maintain public roadways. Davis, 988 S.W.2d at 374; Gay, 977 S.W.2d at 817; Sutton, 549 S.W.2d at 62. Therefore, a governmental defendant can be held liable for potholes on a roadway, even if the original decision regarding the design of the premises are exempt from liability. See id .;see also Sullivan, 33 S.W.3d at 13-15; Sutton, 549 S.W.2d at 62. The non-discretionary obligation of maintenance, however, does not include a duty to redesign, improve, or add safety features to the roadway. Crossland, 781 S.W.2d at 433-34; Burnett, 694 S.W.2d at 211-12. Thus, the ministerial duty of maintenance requires only the preservation of the premises as originally designed and constructed. Arzate, 159 S.W.3d at 192; Stanford, 635 S.W.2d at 582.

e. Is There an Obligation to Warn of or Make Design Defects Safe?

Although there are no cases that address this issue, governmental premises occupants should not be obligated to warn of or make safe dangerous conditions resulting from discretionary acts. It could be argued that governmental entities should be obligated to warn of dangerous conditions even if they result from a discretionary act that is exempt from liability. Allowing such a claim, however, would void the purpose of the defense established by §101.056. Clearly, the purpose of the discretionary act defense was to allow governmental entities to carry out certain actions and conditions without concern for liability. Allowing liability to be predicated upon the failure to warn of a condition resulting from a discretionary act would void the very purpose of this section of the TCA. See also Demny, 886 S.W.2d at 335-36 (O'Connor, J., dissenting). Section 101.056 would be meaningless if a governmental entity could not be held liable for the design of a roadway, but could be sued based upon the failure to warn of the width of traffic lanes, or the absence of guardrails.

f. Determining Whether a Decision Falls Within the Discretionary Act Exclusion From Liability is a Question of Law.

The question of whether an act or omission is discretionary is a question of law for the court to decide. Sullivan, 33 S.W.3d at 13-14; Miguel, 2 S.W.3d at 251; State v. Rodriguez, 985 S.W.2d at 85. Accordingly, many cases involving discretionary governmental decisions are resolved through summary judgment. See Bellnoa, 894 S.W.2d at 827; Maxwell, 880 S.W.2d 463-64; Barron, 880 S.W.2d at 302; Stanford, 635 S.W.2d at 582; Burnett, 694 S.W.2d at 212.

4. Section 101.021: Exclusion From Liability for Property Damage Resulting From Premises Defects.

Property damage cannot be recovered in a premises liability case under the TCA. A governmental entity is not liable under the TCA for property damage

caused by a premise defect. Winkenhower, 875 S.W.2d at 388; DeAnda v. County of El Paso, 581 S.W.2d 795 (Tex. Civ. App.–El Paso 1979, no writ). A plaintiff is not allowed to recover property damage in a premises liability case regardless of whether the dangerous condition that caused the damage is characterized as an ordinary premise defect or a "special defect." Pruitt, 770 S.W.2d at 638. Winkenhower, 875 S.W.2d at 388 (no liability where property damage was caused by a pothole in the roadway). Under the TCA, recovery for property damage is available only when the property damage is caused by the negligence of a governmental employee in the operation of motor driven equipment or a motor vehicle. Id. (vehicle must be operated by governmental employee or agent, not the plaintiff); Pruitt, 770 S.W.2d at 639; TEX. TORT CLAIMS ACT § 101.021(1). But see Morgan, 882 S.W.2d at 490 (governmental entity need not own the motor driven vehicle, it need only be controlled or directed by a governmental employee).

5. Section 101.057: Exclusion for Civil Disobedience and Certain Intentional Torts.

Governmental units cannot be held liable for actions taken in response to large scale civil disobedience. TEX. TORT CLAIMS ACT §101.057(a). The Act's exclusions of claims connected with civil disobedience or riots was intended to preclude liability for injuries resulting from efforts to control riots, as well as to exclude liability for governmental decisions on how to control a riot or whether to control it at all. Terrell, S.W.2d at 786-87. Thus, actions taken in response to a fire started in a jail by a prisoner were actions in response to civil disobedience and injuries resulting therefrom could not form the basis of suit. Forbes v. City of Denton, 595 S.W.2d 621, 623 (Tex. Civ. App.–Fort Worth 1980, writ ref'd n.r.e.). The civil disobedience exclusion was intended to encompass public commotions involving large numbers of persons acting unlawfully in concert. Id.; see City of Amarillo v. Langley, 651 S.W.2d 906 (Tex. App.–Amarillo 1983, no writ). Consequently, the actions of two motorcyclists did not constitute large scale civil disobedience and the City could be held liable for its handling of that matter. Id.

a. Section 101.057(a)'s Exclusion for Intentional Torts Does Not Refer to Intentional Torts Committed by Third-Parties.

The scope of §101.057's exclusion from the waiver of immunity for intentional torts has been the subject of considerable debate and litigation for the last decade. The debate was brought to a head when the Fourteenth Court of Appeals rendered its decision in Delaney, holding that the University of Houston could not be held liable because the plaintiff's claim involved an intentional tort (plaintiff was raped by an intruder in her dormitory room), and the Waco Court of Appeals' holding in City of Waco v. Hester, that the City could be held liable because the employees' negligence that involved the use of personal property allowed the intentional tort (an inmate on inmate sexual assault) to occur. Compare Delaney v. Univ. of Houston, 792 S.W.2d 733 (Tex. App.–Houston [14th Dist.] 1990) *rev'd* 835 S.W.2d 56 (Tex. 1992) with City of Waco v. Hester, 805 S.W.2d 807, 810 (Tex. App.–Waco 1990, writ denied).

In the Rusk State Hospital decision, the Texas Supreme Court addressed whether a §101.057(2) precluded a governmental entity to be held liable if one of its employees assisted an in-patient in a psychiatric hospital to commit suicide. Rusk State Hospital, 392 S.W.3d at 99-100. The Supreme Court noted that a person commits a crime if they act, "with intent to promote or assist the commission of suicide by another…" Id. The court also pointed out that a person commits a crime if they take actions with specific intent to inflict harm, such as would be the case with an intentional tort. Id. Based on the fact that intent was a required element of the crime of assisted suicide and that acting with intent to harm would constitute an intentional tort, the court rejected the plaintiffs' argument that the hospital could be liable for the actions of an intern who committed murder or in assisted a psychiatric patient to commit suicide. Id. at 100.

The supreme court's decision in Delaney dramatically limited the scope of §101.057(2) exclusion from the Act's waiver of sovereign immunity. During her second semester at the University, Ms. Delaney noticed that an outside door to her dormitory was broken and that the door was often propped open to allow entry into the building. Concerned that the broken door lock and the practice of propping the door open would allow intruders easy access to the dormitory, Delaney and other students repeatedly complained to the University. The University disregarded the complaints and never repaired the lock. One night, an intruder entered the dormitory through the door with the broken lock and while holding Delaney and her boyfriend at gunpoint, raped Delaney in her room. Id.

Delaney brought various claims against the University, including claims that it failed to provide her a secure residence because it failed to repair the broken dormitory door lock. The trial court granted the University' s motion for summary judgment finding that Delaney's claim was barred by the §101.057(2) exclusion from waiver of sovereign immunity for intentional torts. Id. at 58.

The Supreme Court began its analysis by focusing on the language of §101.057(2) of the Act to determine its intended scope. "[T]he Act's waiver of immunity [does not extend] to claims 'arising out of assault, battery, false imprisonment, or any other intentional tort.'" Id. at 59; see City of Dallas v. Rivera, 146 S.W.3d 334, 338 (Tex. App.–Dallas 2004, no pet.) (no waiver for use of pepper spray, handcuffs, K-9 police service dog). The University contended that any claim involving an intentional tort was precluded by §101.057(2). Id. The supreme court rejected this construction, saying that it was far too expansive.

> We think that "arising out of" in [section 101.057(2)] ... requires a certain nexus for the provision to apply. In section 101.057(2), the nexus is between the claim and an intentional tort. In essence, section 101.057(2) excludes from the Act's waiver of immunity claims *for* intentional torts. That section ... does not state whether the tortfeasor must be the governmental employee or a third party. ... [W]e think that the more plausible reading of the provision is that the tortfeasor must be that the governmental employee whose conduct is the subject of the complaint.

Id. at 59 (emphasis in original). The supreme court was persuaded to following this interpretation and to reject the University's argument for two reasons.

First, the court turned to the United States Supreme Court's interpretation of a similar provision of the Federal Tort Claims Act that excludes from the waiver of federal immunity "any claim arising out of" assault, battery, or false imprisonment. In Sheridan v. U.S., 487 U.S. 392 (1988), the United States Supreme Court held that the intentional torts exclusion did not bar claims that arose from the negligence of federal employees in allowing the intentional tort to be committed. Id. The Texas Supreme Court quoted a portion of the Sheridan decision:

> The words "any claim arising out of" an assault or battery [as contained in the Federal Tort Claims Act] are unquestionably broad enough to bar all claims based *entirely* on an assault or battery. The import of these words is less clear, however, when they are applied to a claim arising out of two tortious acts, one of which is an assault or battery and the other which is the mere act of negligence. Id. (emphasis in original).

The Texas Supreme Court then focused on the second basis for rejecting the University's argument regarding the scope of 101.057(2)'s application.

> The other reason we reach the conclusion we do is because it is more consistent with the legal principal that intentional conduct intervening between a negligent act and the result does not always vitiate liability for the negligence.

Id. at 60. The court noted that the Restatement (Second) of Torts, § 448 (1965) provides:

> The act of a third person in committing an intentional tort is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third party to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Id. Thus the court concluded that to apply section 101.057(2) so broadly as to except from the Act's waiver of immunity any claim for injuries resulting from an intentional tort, "is to ignore a distinction which the law recognizes when negligent and intentional acts both contribute to the occasion of injury. The better view, we believe, is a construction of section 101.057(2) which accommodates this distinction." Id. Thus, the Texas Supreme Court reversed the take nothing judgment that had been entered based upon the University's motion for summary judgment, because it found that Delaney's claims were distinct and separate from the rape that she suffered. "The University's alleged failure to repair the dormitory door lock and the alleged breach of contract to provide a secure residence for Delaney are readily distinguishable from the intruder's conduct. ... Had an intruder gained entrance to Delaney's dormitory through the broken door and injured her negligently rather than intentionally, the University could not invoke section 101.057(2) to avoid liability. We hold that it cannot do so in these circumstances either." Id.

Following the supreme court's decision in Delaney, it appeared that 101.057(2) applied only to intentional torts committed by governmental employees. In the eighth year since the issuance of the Delaney decision, the rationale of the court regarding whether the gravamen of the plaintiff's complaint is

the intentional tort, has been used to allow suits to be brought against governmental entities even when the intentional tort was committed by a governmental employee. Dillard v. Austin Indep. Sch. Dist., 806 S.W.2d 589, 592 (Tex. App.—Austin 1991, writ denied) v. Denton County, 119 F.3d 381, 389-90 (5th Cir. 1997). But see Petta, 44 S.W.3d 575, at 4; Henry, 52 S.W.3d 434, p. 4.

The Downey case arose from the rape of a jail inmate by an employee of the Denton County Sheriff's Department. While in custody at the Denton County jail, Downey was ordered from her cell to repair a tear in the pants of a Denton County Sheriff's Department employee, Adorphus Bell. Bell had asked that his pants be repaired by Ms. Downey. It was the policy of the Sheriff's Department that repair of guard uniforms was done by trustees. The female officer on duty, Sadler, explained to Bell that Downey was not a trustee. Despite these circumstances, Sadler decided not to call her supervisor, and instead awoke Downey to repair Bell's uniform. Downey told Sadler to ask one of the trustees, but Sadler responded that the trustees were asleep. Sadler then escorted Downey and Bell to a multipurpose room that contained sewing machines. Id.

The multipurpose room was a room with access controlled by a door that could be closed and locked. The room contained a surveillance camera and was equipped with a voice activated security devise. There was a blind spot in the room that could not be viewed from the observation window, but could be monitored only via the video camera at the matron's station. Once the door to the multipurpose room was closed, the voice activated security device was the only means for someone outside the multipurpose room to listen to what was happening in the room. On the day of the rape, the voice activated security device had been disconnected and was not functioning. Id. at 384.

Initially, Sadler remained in the multipurpose room, but then left locking Bell and Downey alone in the room. Sadler checked on Downey and Bell approximately fifteen minutes later. Sadler did not check on Downey and Bell again for an hour and forty-five minutes. It was during this time that Bell sexually assaulted Downey. Id.

Denton County sought summary judgment under §101.057(2) alleging that Downey was complaining of an intentional tort committed by a governmental employee. After reviewing the Supreme Court's opinion in Delaney and the Waco court decision in Hester, the Fifth Circuit rejected this argument. Id. at 388. The Fifth Circuit held that Downey's claim was not barred by section 101.057(2) because her claim did not arise out of the assault, but instead out of Sadler's negligence. The court specifically pointed out that Sadler violated the customary practice of having a trustee repair a guard's pants, that Sadler acknowledged that it was unusual for a guard to request a specific inmate to do repairs, that Sadler left Bell and Downey alone in the multipurpose room for almost two hours without monitoring them in any fashion, and that this action was taken at the time when the voice activated security device for the room had been disconnected. Id. at 389. The supreme court found that as in the Hester case, Downey's claim arose from the antecedent negligence of Sadler that was a proximate cause of Bell raping Downey. Id. The Fifth Circuit found Downey could pursue her claim regardless of whether the person who raped her was or was not a governmental employee.

At the same time, courts have found claims barred where the gravamen of the plaintiff's suit is an intentional tort. See Gonzales v. City of El Paso, 978 S.W.2d 619, 622-23 (Tex. App.–El Paso 1998, no pet.); Holder, 954 S.W.2d at 806-08. Holder was raped by Potter, an on-duty City of Houston police officer. Potter had pulled Holder over in the early morning hours for a supposed traffic violation and ordered Holder to follow him. Holder followed Potter as he drove his patrol car to a downtown parking garage. Once there, Potter sexually assaulted Holder. Id. at 786.

Holder contended that she was not bringing suit based upon her having been sexually assaulted, but rather upon the City's negligence in failing to properly supervise or monitor Potter's use of his patrol car. Holder contended that the car constituted tangible personal property, negligent use of which could subject the City to liability under the Act. Id. at 805. Specifically, Holder linked her injury to the car by alleging that the City was negligent in its supervision and monitoring of Potter and the use of his patrol car. Holder relied heavily on the fact that the patrol car was the instrument that Potter used to stop her and in which he later assaulted her. Id.

The Fourteenth Court of Appeals rejected Holder's argument, finding that there was no nexus between the City's actions with regard to the patrol car and the sexual assault. Id. at 807. "In this case, the use of the patrol car was not the 'direct device' causing Holder's injury, and the 'required causal nexus' for liability [Act] is missing." Id.; see also Henry, 52 S.W. 434, p. 4-5 (condition or use of property did not proximately cause sexual assault on plaintiff); Ryan, 889 S.W.2d at 344-45.

Moreover, even where the plaintiff can allege some antecedent negligence that proximately caused the intentional tort, mere allegations alone will not be sufficient to avoid entry of a take nothing judgment. See Medrano, 989 S.W.2d at 144. The Medrano case arises from alleged assaults upon the plaintiffs by on duty police officers. Id. at 143. The plaintiffs asserted

that they were bringing suit based not upon the intentional torts, but rather upon the City's negligent hiring, negligent training, and negligent failure to train the officers who committed the assault. The City moved for and was granted summary judgment based upon sovereign immunity because the TCA did not waive immunity for suits based upon intentional torts. Id. The San Antonio Court of Appeals affirmed the summary judgment holding that the plaintiff's global allegations without specific factual evidence to support negligent hiring, negligent training, and negligent failure to train was insufficient to defeat the City's motion for summary judgment based upon sovereign immunity. Id. at 144-45. See Delaney, 835 S.W.2d at 60 ("although the [U.S. Supreme] Court added that the intentional tort exception could not be circumvented merely by alleging that the government was negligent in supervising the employee-tort feasor, the claim in that case went beyond such allegations."); see Harris County v. Cabazos,177 S.W.3d 105 (Tex. App.–Houston [1st Dist.] 2005, no pet. h.) (plaintiff cannot circumvent intentional tort exception by couching claim in terms of negligence). Thus, a plaintiff must be able to **both plead and prove** acts of negligence that proximately caused their injury in order to avoid having their suits dismissed or a take nothing judgment entered based upon sovereign immunity as retained by §101.057(2) of the Act.

b. To be an Intentional Tort, the Active Tortfeasor Must Intend the Injury Not the Act That Caused the Injury.

Courts of appeal have had to distinguish between intent to cause injury, as opposed to the cause of a particular event, in determining the scope of §101.057(2)'s exclusion from liability. Durbin v. City of Winnsboro, 135 S.W.3d 317, 321-25 (Tex.App–Texarkana 2004, pet filed); Pineda v. City of Houston, 175 S.W.3d 276 (Tex. App. –Houston [1st Dist.] 2004, no pet.). Durbin arose out of a high speed chase in which the plaintiffs' son was killed after his motorcycle was intentionally bumped by a police car. Durbin, 135 S.W.3d at 321. The Durbins brought suit predicating liability upon the officer's intentionally bumping the motorcycle. The city filed a plea to the jurisdiction on the grounds that the act of bumping the motorcycle was an intentional act. The city offered plaintiffs' pleadings and deposition testimony to establish that having the police car hit the motorcycle was an intentional act. The plaintiffs opposed the plea to the jurisdiction on the grounds that the officer intended to end the chase by hitting the motorcycle with his car, his actions did not constitute an intentional tort. Id.

The Texarkana Court of Appeals explained that §101.057(2) excludes from liability under the TCA those actions by a governmental employee or officer that would constitute an intentional tort. Id. The court went on to note that intending to cause a particular action was not sufficient to be liable for an intentional tort. The difference between negligence and an intentional tort is not whether the defendant intended the act that caused the injury, but whether the defendant intended to injure the other person. Id. at 321. The court noted that, in some instances, such as rape or a physical beating, the intent to cause injury can be established by the defendant's actions. Because the testimony before the court established that there was a dispute as to whether the officer intended to cause injury to the motorcycle rider or not, the court could not find, as a matter of law, that plaintiffs' claims were barred by section 101.057(2) and it was error to grant the defendant's plea to the jurisdiction. Id. at 325. But see Pineda, 175 S.W.3d 276, 283 (although the officers' may not have intended their initial actions, they did intend the ultimate injury and because the focus of appellants' claims is on the officers' intentional tortious conduct, the city's immunity is not waived).

6. Section 101.060: Placement and Repair of Traffic Control Devices.

As discussed in section IVB8 above, the Act addresses liability based on the failure to erect road signs, the failure to replace road signs, and damages resulting from the absence, condition or malfunction of traffic or road signs and signal devices. The first provision of section 101.060, together with section 101.022(b), establish that a governmental entity can be held liable only for the failure to erect and place signs and signals required by law. TEX. TORT CLAIMS ACT §§ 101.060, 101.022(b); see State v. Rodriguez, 985 S.W.2d at 85; Villarreal, 810 S.W.2d at 421. Subsection (a)(1) of section 101.060 specifically states that liability cannot be based upon the failure to erect and use discretionary signs and signals.[18]

The supreme court has determined that all signs, signals, and warning devices provided for in the Manual are discretionary and cannot form the basis of liability. The Manual was adopted by the highway department under Transportation Code section 544.001. The Manual purports to obligate all governmental units in the state to act in compliance with its terms. The Manual identifies certain signs and signals as discretionary, while appearing to mandate

[18] The provisions of this chapter do not apply, however, to special defects. TEX. CIV. PRAC. & REM. CODE § 101.060(c); Adams, 888 S.W.2d at 612.

the use of other signs. King, 808 S.W.2d at 466. The supreme court held that other provisions of the Manual establish that its terms are not mandatory, in a legal sense. Id. at 466; Villarreal, 610 S.W.2d at 420-21. Therefore, while the Manual may appear to require the use or erection of certain signs, it does not establish a legal standard under which a governmental entity can be held liable. King, 808 S.W.2d at 466; Villarreal, 810 S.W.2d at 421 (holding that the Manual merely establishes construction standards for signs which an entity chooses to erect, but does not require the erection of any signs, signals or warning devices).

Once a governmental entity chooses to erect signs or warning devices, it can be held liable for the malfunction, removal, or destruction of those items. The erection of signs, signals, or warning devices, whether required by law or out of the exercise of discretion, creates an obligation to maintain them and insure they are working properly. See Sullivan, 33 S.W.3d at 13-14; Reyes v. City of Houston, 4 S.W.3d 459, 462 (Tex. App.--Houston [1st Dist.] 1999, pet. denied); Norris, 550 S.W.2d at 386; Lawson, 524 S.W.2d at 351. See Donovan, 768 S.W.2d at 908-909. Thus, the placement of a traffic control device creates a duty to replace or repair that device within a reasonable time of learning that it is absent or malfunctioning. See Sullivan, 33 S.W.3d 13-14; Sparkman, 519 S.W.2d at 852; Donovan, 768 S.W.2d at 908-909; TEX. TORT CLAIMS ACT § 101.060.

The issue of whether or not a governmental entity failed to repair or replace absent or malfunctioning signs/signals in a reasonable time, typically comes down to a question of whether the governmental body had notice of the problem. Miller, 893 S.W.2d at 27, 33. See, e.g., Garza, 878 S.W.2d at 675; Zambory, 838 S.W.2d at 582. The Donovan case has some significant consequences regarding how a plaintiff can establish liability for a downed sign or malfunctioning traffic signal. The Donovans presented testimony of an "excited utterance" made by a passerby after the accident. Id. at 906-08. This person, who was never identified, volunteered that days prior to the accident she had reported to the City that the stop sign was down. Id. at 906. The Donovans also presented testimony of four other witnesses who estimated the stop sign was down for a period of time ranging from several days to two or three weeks. Id. at 909. To refute this testimony, the City called police officers, sanitation workers and an engineer to testify regarding: (1) how often the City employees would be in or through the intersection; and (2) city employees' training to report any problem with traffic control devices.

The engineer also testified that the City keeps a log of telephone calls regarding missing traffic signs and that the log contained no calls concerning the downed stop sign for the six weeks prior to the accident. Id. The City apparently argued at trial that if the stop sign was down, the City would have received immediate notice of that fact, and that the absence of any notation to that effect established the City' s lack of notice. See id.

The Dallas Court of Appeals, however, concluded that the City's employee proved that it had notice. The court found that the plaintiff's witnesses established the absence of the sign for at least several days. The City meanwhile established that its employees, who have an obligation to check on and report missing signs, would have gone through the intersection within the days preceding the accident. Id. Consequently, the court of appeals found the City's attempts to defend suits by establishing procedures for checking on and reporting down stop signs, helped establish notice once the plaintiff puts on proof of the absence, destruction, or malfunction of traffic control devices. Id. The Austin Court of Appeals has held that §101.060(a)(2) does not require actual notice. City of Austin v. Lamas, 160 S.W.3d 97 (Tex. App.–Austin 2004, no pet.). In Lamas, a passenger on a city bus was injured after the bus failed to observe a stop sign and ran over a dip in the road. There was evidence that the City had actual notice that the sign was obscured by foliage. Distinguishing the language in §101.060(a)(2) from §101.060(a)(3), the court held that actual notice was not required.

A governmental unit is given a reasonable time to replace a missing sign or to repair a malfunctioning signal only if the malfunction or absence was the result of component failure, act of God, or act of a third-party. Ramming, 861 S.W.2d at 465. A governmental entity may be held strictly liable for injuries and deaths if the absence or malfunction of a traffic control device was caused by its employee. Id.

A governmental entity cannot defeat a suit based on the failure to maintain traffic control devises based the discretionary act defense. As noted above, section 101.056 of the Act precludes a governmental entity from being held liable for discretionary acts. TEX. TORT CLAIMS ACT § 101.056. The discretionary act exclusion to liability is carried over to subsection (a)(1) of section 101.060 of the TCA. Sullivan, 33 S.W.3d at 14-15. In fact, section 101.060(a)(1) expressly provides that liability for traffic control devices cannot be predicated upon the initial placement of signs, signals and warning devices if the failure to have that device in place was the result of a discretionary decision of the governmental entity. Id. (however a governmental entity can be liable for failure to have control devices in place that are consistent with municipal ordinance). The discretionary exclusion to liability is not included in subsections (a)(2) and (a)(3) of section 101.060 that provide a governmental entity

can be held liable for the absence, condition, malfunction, or removal of traffic control devices if it fails to fix the problem within a reasonable time after having notice of the problem. Id. at 14; TEX. TORT CLAIMS ACT § 101.060(a). Thus, a governmental entity cannot defend its failure to maintain a traffic control device based upon the discretionary act defense set forth in section 101.056 of the TCA. Id. at 14-15 ("[the plaintiffs] are permitted to maintain their allegation that the city negligently installed and maintained [the school] crosswalk"); Reyes, 4 S.W.3d at 462. Moreover, there is no immunity when the entity exercises its discretion in making the decision to install safety devices, but does not actually install the device within a reasonable time. Sipes, 146 S.W.3d at 280; City of Fort Worth v. Robles, 51 S.W.3d 436, 442 (Tex. App.–Fort Worth 2001, pet. denied). Reasonableness is a question of fact precluding summary judgment. Sipes, 146 S.W.3d at 280.

7. Section 101.101: Exclusion From Liability Unless the Governmental Entity Has Notice Within Six Months After the Incident Occurred.

Subchapter D of the TCA provides the procedures for bringing suit. Under the Code Construction Act, compliance with the statutory prerequisites to any statutory cause of action is a jurisdictional prerequisite to suit, at least against the State. TEX. GOV'T CODE § 311.034. The most important of these procedures is the requirement that a governmental entity receive prompt notice of the plaintiff's claim. In the absence of notice, the governmental entity maintains all of its common law immunities. Putthoff, 934 S.W.2d at 173 .

In 2004, the Texas Supreme Court held that the notice of claim was not a jurisdictional pre-requisite for bringing suit under the TCA. Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser, 140 S.W.3d 351, 365-66 (Tex. 2004). In 2005, the Legislature amended section 101.101 of the TCA making the giving of notice a requirement to establishing the court's jurisdiction to hear the case. Univ. of Tex. Sw. Med Ctr., v. Arancibia, 324 S.W.3d 544, 546 (Tex. 2010). While the amended version of section 101.101 does not state that it is retroactive, the Supreme Court has held that the requirement to give notice in order to establish jurisdiction is retroactive to suits filed before the amendments came into effect. Id. at 548.

A governmental unit must have actual or formal notice of the accident giving rise to the suit within six months of its occurrence. TEX. TORT CLAIMS ACT § 101.101. Notice is a jurisdictional prerequisite to the bringing of suit under the TCA. Arancibia, 324 S.W.3d at 46. However, suit can be filed within six months of the incident without the plaintiff having given notice. Colquitt v. Brazoria County, 324 S.W.3d 539, 544, (Tex. 2010). If suit is filed within six months of the incident without having given formal notice, then the pleading must give the entity all of the information it would have received had it been given formal notice. Id.

Notification is intended to insure governmental entities an opportunity to investigate while the facts are fresh, thereby guaranteeing them a meaningful opportunity to prepare a defense. Colquitt v. Brazoria County, 324 S.W.3d at 544; City of Houston v. Torres, 621 S.W.2d 588, 591 (Tex. 1981); McDonald v. State, 936 S.W.2d 734, 738 (Tex. App.–Waco 1997, no pet.); Putthoff, 934 S.W.2d at 163; Bell v. Dallas-Fort Worth Reg'l Airport Bd., 427 F. Supp. 927, 929 (N.D. Tex. 1977). Notice also aids governmental entities in managing and controlling their finances. Colquitt, 324 S.W.3d at 543. Accordingly, formal notice must apprise the defendant of the injury, and the time, manner, and place of the incident. Id. In the absence of notice within six months, plaintiff is precluded from bringing suit. State v. McAllister, 2004 WL 2434347 (Tex. App.–Amarillo 2004, pet. denied); Rath v. State, 788 S.W.2d 48 (Tex. App.–Corpus Christi 1990, writ denied).

While actual notice will substitute for formal notice, actual notice is effective only if the governmental entity has knowledge of its probable fault in causing the accident. Section 101.101 provides that formal notice is not required if the governmental unit has actual knowledge of the incident giving rise to the suit. TEX. TORT CLAIMS ACT § 101.010(c). Actual notice must provide information comparable to what the governmental entity would have if it received formal notice. Bell, 427 F. Supp. at 927. Actual notice must also apprise the defendant of the need to investigate the claim. See Rosales v. Brazoria County, 764 S.W.2d 342, 344 (Tex. App.– Texarkana 1989, no writ); Bourne, 749 S.W.2d at 632; Ray, 712 S.W.2d at 274. A governmental entity is held to have actual notice only when it has knowledge of the name and address of those injured, the damage or injuries sustained, the time and place of the incident, and its probable fault in causing the accident or injuries. Cathey v. Booth, 900 S.W.2d 339, 341 (Tex. 1995); Rosales, 764 S.W.2d at 344; Bourne, 749 S.W.2d at 633; Ray, 712 S.W.2d at 274. If the governmental unit does not have knowledge of all of this information, the plaintiff's failure to provide formal notice will preclude suit. Huffine v. Tomball Hosp. Auth., 979 S.W.2d 795, 800 (Tex. App.–Houston [14th Dist.] 1998, no pet.); Gonzalez, 940 S.W.2d at 795; Ray, 712 S.W.2d at 274; Vela, 703 S.W.2d at 725-26.

Consequently, a governmental entity is held to have actual notice only when it has "knowledge of the information [the entity] is entitled to be given under section 101.101(a) and a subjective awareness that its

fault produced or contributed to the claimed injury." City of San Antonio v. Johnson, 140 S.W.3d 350, 351 (Tex. 2004); Tex. Dep't of Criminal Justice v. Simons, 140 S.W.3d 338 (Tex. 2004); see Blevins v. Tex. Dep't of Transp., 140 S.W.3d 337 (Tex. 2004); Thus, actual notice MUST put the entity on notice of the need to investigate the incident, including the entity's subjective awareness of its fault in the matter. City of Dallas v. Carbajal, 324 S.W.3d 537 (Tex. 2010). See also Rivera, 985 S.W.2d at 206 (actual notice requires knowledge of probable fault in causing the accident or injuries; Rosales, 764 S.W.2d at 344; Bourne, 749 S.W.2d at 633; Ray, 712 S.W.2d at 274.[19]

The time for giving notice runs from the date of the incident and not the plaintiff's discovery of injury. Putthoff, 934 S.W.2d at 174; Sanford v. Tex. A&M Univ., 680 S.W.2d 650 (Tex. App.–Beaumont 1984, writ ref'd n.r.e.). Sanford was a telephone repair man working at Texas A&M University's agricultural research and extension center in 1975. Id. at 651. While working at the research and extension center, Sanford was exposed to strong pesticides. Over the next five years, Sanford suffered fainting spells, dizziness, and kidney problems. It was not until 1980 that a doctor told Sanford that his symptoms were consistent with exposure to pesticides. Sanford claimed that he did not and could not have discovered the defendant's wrongful conduct prior to 1980. He argued that the discovery rule excused him from failing to file suit within the statute of limitations and giving notice within six months of the incident. The Beaumont Court of Appeals rejected this argument and held that while the discovery rule extends the statute of limitations, it does not affect the time period for giving notice. Id. at 651-652. The Beaumont court, therefore, affirmed the entry of summary judgment in favor of the defendant because Sanford failed to provide notice in a timely manner. Id. See Univ. of Tex. Med. Branch v. Greenhouse, 889 S.W.2d 427, 432 (Tex. App.--Houston [1st Dist.] 1994, writ denied) (medical malpractice plaintiff's time for giving notice under the TCA ran from event giving rise to suit even if she did not discover injury until years later). In Greenhouse, the First Court of Appeals reasoned:

> The Texas Supreme Court has said of the Act, "Once a plaintiff invokes the procedural devices of the Texas Tort Claims Act, to bring a cause of action against the State, then he is also bound by the limitations and remedies provided in the statute"...
>
> While we believe it is remarkably unfair to deprive Greenhouse of her right of recourse against UTMB because she was unable, through no fault of her own, to comply with the notice requirements, we must agree with UTMB that the trial court erred in applying the discovery rule.

Greenhouse, 889 S.W.2d at 431-32 (citation omitted).

A year later, the same Houston court found that the notice requirement is not tolled by the mental incapacity of a claimant. Dinh v. Harris County Hosp. Dist., 896 S.W.2d 248 (Tex. App.–Houston [1st Dist.] 1995, writ dism'd w.o.j.). In 1997, the San Antonio court adopted the Greenhouse reasoning and found that the discovery rule did not apply when two years had passed since an alleged misdiagnosis of cancer. Streetman v. Univ. of Tex. Health Science Ctr. at San Antonio, 952 S.W.2d 53 (Tex. App.--San Antonio 1997, no writ).

Assuming that the majority rule is that an incapacity tolls the notice requirement, a plaintiff is no longer excused from giving notice, once that incapacity has been removed. Id.; see McCrary, 642 S.W.2d at 154. However, in 2004, the supreme court held that the six month notice period is not tolled by the claimant's minority. Martinez v. Val Verde County Hosp. Dist., 140 S.W.3d 370, 372 (Tex. 2004). The Court reasoned that the Act does not toll the period by its express terms. Id.; see TEX. CIV. PRAC. & REM. CODE ANN. § 16.001 (tolling period limited to chapter 16).

Prior to the Dinh and Streetman decisions, it was generally accepted that minors and incompetents were excused from giving notice under section 101.101 until such time as their incapacity was removed. Torres, 621 S.W.2d at 591; McCrary v. Odessa, 482 S.W.2d 151, 154-55 (Tex. 1972); Rath, 788 S.W.2d at 48. The Corpus Christi court has held that, "[o]nce a guardian is appointed, the disability is removed; a guardian of the estate is empowered to initiate a lawsuit." Rath, 788 S.W.2d at 51. The guardian's failure to give notice within six months of his appointment barred Rath's suit. Id . It could be argued that a parent's hiring of an attorney to represent a minor also removes any disability, obligating someone acting on the minor's behalf to give notice within six months. See id.

The Supreme Court has also held that the time for giving notice for an injury to a fetus runs from birth. Univ. of Tex. v. Loutzenhiser, 140 S.W.3d 351 (Tex. 2004). Thus, while actual or formal notice was not

[19] The Rivera decision suggests that an answer denying a governmental defendant had actual or constructive notice must be verified. Rivera, 2001 WL 35962, 44 Tex. Sup. Ct. J. 597.

received within six months after the procedure alleged to have caused the injury, suit under TCA was not barred as notice was received within six months of injured child's birth. See id.

A governmental entity can be charged with actual notice based upon the knowledge of their agents and employees. City of Texarkana v. Nard, 575 S.W.2d 648, 651-52 (Tex. Civ. App.–Tyler 1978, writ ref'd n.r.e.); Ray, 712 S.W.2d at 274. Actual notice is imputed to the entity when an official, or employee charged with a duty to investigate or report the incident has knowledge of all three elements of actual/forward notice. Gonzalez, 940 S.W.2d at 795-96; McDonald, 936 S.W.2d at 738. In Nard, the City was held to have actual notice as a consequence of an investigation of the traffic accident by its police department. Nard, 575 S.W.2d at 651-52. The court held that the City had actual notice not only because it had the names and addresses of the plaintiffs, but also because its employees investigated the accident, made a report reflecting plaintiff's injuries and noted the malfunctioning traffic light that caused the accident. Id. Ray involved injuries to a child while in the defendant hospital. The Fort Worth Court of Appeals held that because the plaintiff was in the hospital at the time of her injuries, the county had knowledge through its agents and employees of both the incident and its probable fault. Ray, 712 S.W.2d at 274.

However, the mere fact that an employee of an entity or agency prepared a report related to the event will not constitute actual notice for purposes of the TCA. Carbajal, 324 S.W.3d at 538. As the Supreme Court explained:

It is not enough that a governmental unit should have investigated an incident ..., or that it did investigate, perhaps as part of routine safety procedures, or that it should have known from the investigation it conducted that it might have been at fault. If a governmental unit is not subjectively aware of its fault, it does not have the same incentive to gather information that the statute is designed to provide, even when it would not be unreasonable to believe that the governmental unit was at fault.

[M]erely investigating an accident is insufficient to provide actual notice. See, e.g., Id. at 347 ("Cathey cannot fairly be read to suggest that a governmental unit has actual notice of a claim if it could or even should have learned of its possible fault by investigating the incident."); Id. at 347 ("[A] governmental unit cannot acquire actual notice merely by conducting an investigation, or even by obtaining information that would reasonably suggest its culpability. The governmental unit must have actual, subjective awareness of its fault in the matter.").

Although both parties agree that the road was not properly blocked, the report here did not provide the City with subjective awareness of fault because it did not even imply, let alone expressly state, that the City was at fault. The report only describes what apparently caused the accident (missing barricades). It does not say who failed to erect or maintain the barricades. [Plaintiff] ignores the possibility that a private contractor or another governmental entity (such as the county or state) could have been responsible for the road's condition. Indeed, after investigating the accident, the City determined that the Texas Department of Transportation was at fault. Simply put, the police report here is no more than a routine safety investigation, which is insufficient to provide actual notice.

By holding that the officer's "perception of the cause of the accident" sufficed to provide actual notice, the court of appeals overlooked the policy underlying actual notice: " 'to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial,' " Simons, 140 S.W.3d at 347 (quoting Cathey, 900 S.W.2d at 341). When a police report does not indicate that the governmental unit was at fault, the governmental unit has little, if any, incentive to investigate its potential liability because it is unaware that liability is even at issue. See Id. But one must note that, in reaching this holding, the Supreme Court expressly stated that it was not deciding whether the City would have had actual notice if the report had expressly stated that the City was at fault. Id. at fn 1.

At the same time, the knowledge of or notice given to one agency or unit of state government is not sufficient to satisfy section 101.101 if suit is to be brought against another agency or unit of state government. Reese v. Tex. State Dep't of Highways and Pub. Transp., 831 S.W.2d 529, 530 (Tex. App.–Tyler 1992, writ denied).

Again, keep in mind that lack of timely notice will bar suit because giving timely notice is jurisdictional. In 2004, the Texas Supreme Court held that while lack of notice may bar suit, it does not deny the trial court jurisdiction. Simons, 140 S.W.3d 338 (Tex. 2004); Loutzenhiser, 140 S.W.3d 351. "While compliance [with the notice provision of the TCA] is no less mandatory, and a governmental unit is entitled to dismissal of the action for lack of notice, that right cannot properly be asserted in a plea to the jurisdiction from which an interlocutory appeal is allowed." Simons, 140 S.W.3d at 347-48. In response to Simons, the legislature amended section 311.034 of the Government Code to provide that giving timely notice was a statutory prerequisite to the trial court having jurisdiction.

While a city's charter can shorten the period of time required for giving notice, the restrictions must be reasonable. The Act ratified and approved city charters

and ordinance provisions requiring notice in less than six months of the date of the accident. TEX. TORT CLAIMS ACT § 101.101(b). Claims against cities, therefore, must be supported by evidence of actual or formal notice within the time period provided in the charter. Torres, 621 S.W.2d at 590-91. Texas courts will enforce and uphold charter provisions establishing shorter time periods for providing notice, as long as they are reasonable. Id. at 591. Consequently, a claimant may have less than six months in which to give notice of his claim if a city charter so provides. Id.

VII. ASSERTING SOVEREIGN IMMUNITY AND SUBMISSION OF A GOVERNMENTAL PREMISES LIABILITY CASE TO THE JURY

Both the assertion of sovereign immunity and the submission to jury in cases where sovereign immunity is at issue raises particular issues the practitioner must consider.

A. Asserting Immunity from Suit in a Plea to the Jurisdiction.

Because immunity from suit deprives a trial court of jurisdiction, it can properly be raised through a plea to the jurisdiction. Jones, 8 S.W.3d 637. By contrast, immunity from liability does not affect a trial court's jurisdiction and, thus, cannot be asserted through a plea to the jurisdiction. Id. at 638-39; Lueck, 290 S.W.3d at 882. A plea to the jurisdiction contests the trial court's authority to determine the subject matter of a pending suit or cause of action. Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 554 (Tex. 2000).

Plaintiffs must be very careful to ensure that the facts alleged in their pleadings and any evidence they offer at a hearing on a plea to the jurisdiction are sufficient to establish a waiver of immunity from suit. An order granting a plea to the jurisdiction constitutes a final judgment. Harris County v. Sykes, 136 S.W.3d 635 (Tex. 2004). That final judgment will not only conclude that litigation, but will likely bar claims against any other defendants (the governmental entity or other governmental employees). Id.; TEX. CIV. PRAC. & REM. CODE § 101.106. Therefore, a plaintiff must make certain that the pleadings on file at the time of the hearing and the evidence offered at the hearing establish that their claims and causes of action fall within a waiver of immunity. Tex. Dep't of Criminal Justice v. Miller, 51 S.W.3d 583, 587 (Tex. 2001).

In a suit against a governmental defendant, the plaintiff has the burden of affirmatively pleading a valid waiver of immunity from suit that vests the trial court with jurisdiction. Dallas Area Rapid Transit v. Whitley, 104 S.W.3d 540 (Tex. 2003). While plaintiff's allegations are liberally construed, plaintiff's live pleading must demonstrate, by the facts alleged and reference to statute or other provision of law, that immunity from suit had been waived. Leatherwood v. Prairie View A&M Univ., 2004 WL 253275 (Tex. App.–Houston [1st Dist.], 2004, no pet. h.); City of Weslaco v. Cantu, 2004 WL 210790 (Tex. App.–Corpus Christi, 2004, no pet.); City of Canyon v. McBroom, 121 S.W.3d 410 (Tex. App.–Amarillo 2003, no pet. h.); Hardin Cty. Community Supervision and Corrections Dep't v. Sullivan, 106 S.W.3d 186, 189 (Tex. App.–Austin 2003, pet. denied). Conclusory allegations, such as statements that a plaintiff's constitutional rights have been violated or that a person or agency exceeded its authority, are insufficient to establish a waiver of immunity from suit. Creedmoor-Maha Water Supply Corp., 307 S.W.3d at 516. Thus, a plaintiff must plead specific facts, not just conclusory allegations or legal conclusions. See Texans Uniting for Reform and Freedom v. Saenz, 319 S.W.3d 914, 920 (Tex. App.—Austin 2010); Creedmoor, 307 S.W.3d at 516; Good Shepard Med. Ctr., Inc. v. State, 306 S.W.3d 825, 836 (Tex. App.—Austin 2010). Furthermore, the court does not have to accept a plaintiff's allegations if its pleadings relate to issues of law rather than issues of fact. Hearts Bluff Game Ranch, Inc., 381 S.W.3d at 487 (plaintiff's pleading must not negate the cause of action by asserting a taking claim against the state when the actions in question were taken by the federal government). In Hearts Bluff the plaintiff alleged a taking claim but the court found that alleged action of the governmental entity could not as a matter of law constitute a taking.

(a). The Basis of the Plea to the Jurisdiction—the Plaintiff's Pleadings or the Factual Basis of the Plaintiff's Claims

If the plea to the jurisdiction challenges the facts alleged in plaintiff's live pleading, then the court must consider the evidence offered by both sides as necessary to resolve the question of jurisdiction. Lueck, 290 S.W.3d at 884 (to allow the plaintiff to stand on allegations alone, would eliminate the use of pleas to challenge a court's jurisdiction); Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217 (Tex. 2004).

At the same time, "to determine if the plaintiff has met [the burden of pleading immunity from suit], 'we consider the facts alleged by the plaintiff and, to the extent it is relevant to the jurisdictional issue, the evidence submitted by the parties'." Dallas Area Rapid Transit, 104 S.W.3d at 542. In some instances, establishing a waiver of immunity requires establishing liability. Lueck, 290 S.W.3d at 883; Creedmoor, 307 S.W.3d at 516, fn.8; Combs v. City of Webster, 311 S.W.3d at 94-95 (in some instances, courts must construe statutes in connection with a plea to the

jurisdiction in order to determine whether a defendant acted within her statutory authority). See also Leach, 335 S.W.3d at 396-97. See Tex. Dep't. of Transp. v. Perches, 388 S.W.3d 652, 656 (Tex. 2012)(plaintiff's pleading was insufficient as a matter of law to assert an ordinary defect claim); Hearts Bluff Game Ranch, Inc., 381 S.W.3d at 487 (plaintiff's pleading must not negate the cause of action by asserting a taking claim against the state when the actions in question were taken by the federal government). When determining if the court has jurisdiction that implicates the merits of the plaintiff's claims, the relevant evidence must be reviewed to determine if there are fact questions as to the elements of plaintiff's claims. Leach, 335 S.W.3d at 396-97.; Miranda, 133 S.W.3d at 217. However, when the waiver of immunity from suit and waiver of immunity from liability are not co-extensive, then the court must only consider pleadings and evidence related to whether there is a waiver of immunity from suit. See Lueck, 290 S.W.3d at 883.

In deciding a plea to the jurisdiction, the court cannot weigh the merits of the plaintiff's claims, but must consider only the pleadings and evidence pertinent to the jurisdictional inquiry. Lueck, 290 S.W.3d at 884; Miranda, 133 S.W.3d 217 (Tex. 2004). While the court cannot rule based upon its opinion of the merits of plaintiff's claim when immunity from liability and damages are "co-extensive" under a statute, the court must determine whether the plaintiff has plead and all of the offered evidence raise a fact question as to the elements of liability that are necessary to establish jurisdiction. Lueck, 290 S.W.3d at 880-81. "[W]hen the facts underlying the merits and subject-matter jurisdiction are intertwined, the State may assert sovereign immunity from suit by a plea to the jurisdiction, even when the trial court must consider evidence 'necessary to resolve the jurisdictional issues raised'." Id. at 880. Thus, in order to defeat a plea to the jurisdiction a plaintiff must plead all of the elements of the cause of action they are brining. See Tex. Dep't. of Transp. v. Perches, 388 S.W.3d 652, 656 (Tex. 2012)(plaintiff's pleading was insufficient as a matter of law to assert an ordinary defect claim). Similarly, the plaintiff must allege facts that will support the elements of the plaintiff's claims. Hearts Bluff Game Ranch, Inc., 381 S.W.3d at 482-84. Hearts Bluff brought a takings claims against the state based on the designating their property as a potential location for a reservoir and responding to request for comment from a federal agency and stated the state opposed designation of plaintiff's property as federal mitigation bank. Id. The Texas Supreme Court held that as a matter of law the actions upon which plaintiff predicated the taking claim could not constitute a the proximate cause of the taking of the property at issue, and therefore held there was no waive of immunity for plaintiff's taking claim. Id. Thus, the plaintiff needs to: 1. plead the elements of the claim, and make sure that its pleadings don't negate the elements of a claim; and 2. may be required to offer evidence regarding liability that is relevant to establishing the court's jurisdiction. Id.; Lueck, 290 S.W.3d at 880-81.

When a defendant challenges the allegations in a petition that would establish jurisdiction, the standard for reviewing the plea changes. The Garcia II court noted that where a defendant challenges the existence of facts that establish jurisdiction, the standard for reviewing the defendant's motion mirrors that of a traditional motion for summary judgment. Mission Consol. Ind. School Dist. v. Garcia, 372 S.W.3d 629 (Tex. 2012); Miranda, 133 S.W.3d at 228. Under this standard of review, the defendant carries the burden of proof by its assertion that the trial court lacks jurisdiction. Garcia II at 635; Miranda, 133 S.W.3d at 228. Once the defendant meets the initial burden to challenge jurisdictional facts, then the plaintiff is required to offer evidence that a disputed material fact exists regarding the challenged jurisdictional issue. Garcia II at 635; Miranda, 133 S.W.3d at 228. If a fact issue exists, the trial court should deny the plea to the jurisdiction, but if the relevant evidence is undisputed or the plaintiff fails to raise a fact question on the jurisdictional issues, the trial court must grant the plea to the jurisdiction. Garcia II at 635; Miranda, 133 S.W.3d at 229-231.

Furthermore, when immunity from suit and jurisdiction are co-extensive , then submission of evidence regarding the merits of plaintiff's claims will determine whether claims are dismissed. See Univ. of N. Tex. v. Harvey, 124 S.W.3d 216 (Tex.App.–Fort Worth 2003, pet. denied) (finding jurisdiction as to claims where evidence at hearing established a strong causal connection to plaintiff's injuries); Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440 (Tex. 1993). Similarly, the Whistleblower suit in Lueck was dismissed when the plaintiff could not show that he had reported a violation of law to an appropriate law enforcement authority. Lueck, 290 S.W.3d at 886. When suit is brought under a statute where immunity from suit and liability are "co-existent, then the plaintiff must offer evidence sufficient to raise fact questions as to each element of liability in order to defeat the plea to the jurisdiction. Lueck, 290 S.W.3d at 880-81. See also Tex. Dep't. of Transp. v. Perches, 388 S.W.3d 652, 656 (Tex. 2012)(plaintiff's pleading was insufficient as a matter of law to assert an ordinary defect claim); Hearts Bluff Game Ranch, Inc., 381 S.W.3d at 482-84 (plaintiff's pleading must not negate the cause of action).

For example, in Miranda, the Texas Supreme Court held the department's plea to the jurisdiction should have been granted because evidence

established, as a matter of law, that the defendant was not guilty of gross negligence. Miranda, 133 S.W.3d at 230; County of Cameron v. Brown, 80 S.W.3d 549, 555. Tex. Natural Res. Conservation Comm'n v. White, 46 S.W.3d 864, 868 (Tex. 2001).

The plaintiff in Miranda was bringing suit under the recreation liability provision of the Tort Claims Act and, as such, she had to establish gross negligence in order to prevail in the suit. Miranda, 133 S.W.3d at 229-231. The Parks & Wildlife Department filed a plea to the jurisdiction and specifically denied that there was evidence that it acted with gross negligence. The Texas Supreme Court held that granting the plea was proper because the plaintiff did not offer evidence sufficient to establish a fact issue on whether the department's conduct constituted gross negligence. Id. In ruling on pleas to the jurisdiction and in reviewing rulings on such pleas, the trial courts and appellate courts are required to examine the evidence as to all jurisdictional facts. Id.; Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 555 (Tex. 2000). Thus, where immunity from suit and liability are co-existent, to defeat a plea to the jurisdiction, the plaintiff must plead and offer evidence at least creating a fact issue for each element of liability for the claims and causes of action she is bringing. Miranda, 133 S.W.3d at 229-31. See Tex. Dep't. of Transp. v. Perches, 388 S.W.3d 652, 656 (Tex. 2012)(plaintiff's pleading was insufficient as a matter of law to assert an ordinary defect claim); Hearts Bluff Game Ranch, Inc., 381 S.W.3d at 482-84 (plaintiff's pleading must not negate the cause of action).. As previously noted some statutes, such as the TCA and the Whistleblower Act, make the waiver of immunity from suit and immunity from liability co-existent. Miranda, 133. S.W.3d at 229-31.; See Combs v. City of Webster, 311 S.W.3d 85 (Tex.App—Austin, 2009) (holding that plaintiff has to offer evidence sufficient to establish each element of a breach of contract claim to defeat a motion for summary judgment). Therefore, to establish a waiver of immunity from suit in a Whistleblower claim, the plaintiff must plead and offer evidence sufficient to create a fact issue as to each challenged element of proving liability under the statute at issue. Id. In these instances, the trial court must look at whether the plaintiff has plead and, if the plead facts are challenged, offered evidence establishing a waiver of immunity from liability in ruling on a plea to the jurisdiction. Id.

However, a court cannot consider pleadings and evidence related to liability where it does not relate to the determination of jurisdiction. "We have limited the use of a plea to the jurisdiction in these circumstances by holding that such a plea may only be used to address jurisdictional facts." Id. at 880-81.

Like Miranda, the plaintiff in Garcia II was required to offer evidence raising a question of liability in order to survive a plea to the jurisdiction. See Mission Consol. Indep. Sch. Dist. v. Garcia, 372 S.W.3d 629 (Tex. 2012). Ms. Garcia was fired after working for the Mission Consolidated Independent School District for more than 27 years. Garcia filed an employment discrimination suit alleging she was discriminated against based upon her race, national origin, gender, and age. The school district filed a plea to the jurisdiction asserting the Garcia's pleadings failed to establish a prima facie case for discrimination. In particular, the District attached evidence in support of its plea to the jurisdiction that Garcia was replaced by another Mexican-American woman who was three years older than Garcia. Id.

The Court pointed out that where a defendant challenges the existence of facts that establish jurisdiction, the standard for reviewing the defendant's motion mirrors that of a traditional motion for summary judgment. Garcia II at 635; Miranda, 133 S.W.3d at 228. Under this standard of review, the defendant carries the burden of proof by its assertion that the trial court lacks jurisdiction. Garcia II at 635; Miranda, 133 S.W.3d at 228. Once the defendant meets the initial burden to challenge jurisdictional facts, then the plaintiff is required to offer evidence that a disputed material fact exists regarding the challenged jurisdictional issue. Garcia II at 635; Miranda, 133 S.W.3d at 228. If a fact issue exists, the trial court should deny the plea to the jurisdiction, but if the relevant evidence is undisputed or the plaintiff fails to raise a fact question on the jurisdictional issues, the trial court must grant the plea to the jurisdiction. Garcia II at 635; Miranda, 133 S.W.3d at 228.

Ms. Garcia did not submit any evidence in opposition to the plea to the jurisdiction. Furthermore, Ms. Garcia did not seek to continue the hearing on the plea to the jurisdiction or seek discovery in order to gather evidence from which she could submit evidence in opposition to the plea to the jurisdiction. Garcia II at 633.

In considering whether the District's plea to the jurisdiction should be granted, the Supreme Court first evaluated the elements of a prima facie employment case and the shifting burden of proof followed by federal courts evaluating employment discrimination claims. Garcia II at 635. The Supreme Court pointed out that discrimination, including age discrimination, can be established either by direct evidence or by inference through proof of a prima facie case of discrimination. Id. In order to prove a prima facie case of age discrimination, plaintiff must proof that: (1) at termination her age, sex and/or race placed her within the protected class; (2) she was qualified for her employment position; (3) she was terminated by the

employer; and (4) she was replaced by someone who was not within the protected class. The Court pointed out that if a plaintiff, such as Ms. Garcia, cannot establish a prima facie case of discrimination, then she "will simply be limited to the traditional method of proof requiring direct evidence of discriminatory animus." Garcia II, 372 S.W.3d 629, 635. Because the school district offered evidence which negated the prima facie case of age discrimination (namely that she was not replaced by someone outside of the protected class), Ms. Garcia was obligated to either offer evidence that created a fact issue as to the challenge aspects of proving a prima facie case or offering direct evidence of discriminatory animus in her termination. See id. The Court noted that Garcia did not offer any evidence to contest the elements of the prima facia case of discrimination and/or evidence of discriminatory intent in her termination and/or sought a continuance or seek specific discovery, and thus held that the plea to the jurisdiction was proper and should have been granted.

The Supreme Court noted that "trial courts considering a plea to the jurisdiction have broad discretion to allow 'reasonable opportunity for targeted discovery' and to grant parties more time to gather evidence and prepare for such a hearing." Garcia II, 372 S.W.3d 629, 642-643 (quoting Miranda, 133 S.W.3d at 235-36.)

Both the trial court and the court of appeals must construe the pleadings in plaintiff's favor and look to plaintiff's intent in determining if plaintiff sought to plead an immunity from suit. Brown, 80 S.W.3d at 555; Tex. Ass'n of Bus. v. Tex. Air Control, 852 S.W.2d 440, 446 (Tex. 1993). In other words, the courts are obligated to construe the pleadings liberally in the plaintiff's favor in determining whether, as plead, there is a waiver of immunity from suit. Tex. Dep't of Transp. v. Ramirez, 74 S.W.3d 864, 867 (Tex 2002). If evidence is submitted, the trial court must take as true all evidence favorable to the plaintiff and indulge every inference and resolve any doubts in the plaintiff's favor. Miranda, 133 S.W.3d at 225-26. But see Creedmoor-Maha Water Supply Corp., 307 S.W.3d at 513, fn.4 ("[a] somewhat different standard applies when a challenge to a jurisdictional fact's existence does not implicate the merits [of plaintiff's claims]").

The deferential standard of reviewing a plaintiff's pleadings and evidence does not extend to the construction of the underlying statute that is alleged to have waived immunity—that is construed in favor of finding no waiver of immunity from suit and, thus, in favor of the governmental defendant. Taylor, at 701.

The trial court has discretion on whether to resolve jurisdiction at a preliminary hearing or await a fuller development of the merits. Bland v. Blue, 34 S.W.3d 557, 554 (Tex. 2000). The trial court has a duty to determine whether it has jurisdiction at its earliest opportunity considering the circumstances of the particular case, before allowing the litigation to proceed. Id. at 226. Miranda, 133 S.W.3d at 226. When the determination of jurisdiction requires the trial court to hear evidence, the court should allow time for development of the case, but mindful that the jurisdictional issue should be resolved as quickly as possible. Id. at 228. However a trial court should not delay a ruling on a please to the jurisdiction when discovery is not necessary. In re Hays County Sheriff's Department, 2012 WL 6554815 (Tex.App.—Austin 2012)(Pemberton, J, concurring)(trial court abused its discretion when it chose to withhold a ruling on a plea to the jurisdiction until after some discovery was completed, where discovery was not necessary for ruling on plea). See also City of Galveston v. Gray, 93 S.W.3d 587, 590 (Tex. App.—Houston [14th Dist.] 2002, pet denied)(trial court abused discretion in ordering mediation and not ruling on plea to the jurisdiction).

When the evidence presented by the parties in connection with the plea to the jurisdiction creates fact questions regarding the jurisdictional issues, then the trial court must deny the plea and allow the fact issues to be resolved by the fact finder at trial. Id. at 226-27. But see Creedmoor, 307 S.W.3d at 513, fn.4, (if the question of fact does not implicate juris, then Court and not jury resolves the issue). If the relevant evidence is undisputed or fails to create a fact issue on the jurisdictional question, the trial court rules on the plea as a matter of law. Miranda, 133 S.W.3d at 228.

Because the courts will look at both the pleadings and the evidence offered at the hearing, plaintiffs and defendants must carefully analyze the evidence that they will offer at a plea to the jurisdiction hearing. In many cases, plea to the jurisdiction hearings are becoming mini trials, similar to the old plea of privilege hearings. For example, in Durbin v. City of Winnsboro, 135 S.W.3d 317, 321-25 (Tex. App. – Texarkana 2004, pet. filed), the court of appeals found the trial court had jurisdiction only after reviewing extensive deposition testimony offered by the plaintiffs and defendants at the plea hearing. This case exemplifies the importance the evidence offered at the plea hearing will have in determining whether the plaintiff's claims are forever barred based on immunity from suit. Id. See Harris County v. Sykes, 136 S.W.3d 635 (Tex. 2004). But see Lueck, 2009 WL 1817240 at p. 5-6 ("if a plea to the jurisdiction requires the trial court to wade deeply into the lawsuit's merits, it is not a valid plea.").

The court's ruling on the plea to the jurisdiction is not limited to the question of whether the plaintiff has plead a viable basis for waiver from immunity from suit. If the court determines that the plaintiff's

pleadings are insufficient to allege a waiver of immunity from suit, the court must then decide whether to allow the plaintiff to re-plead. The Supreme Court has repeatedly restated the standard: if the pleadings cannot be repleaded because, on their face, the facts alleged preclude or negate the existence of jurisdiction, then the plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. Lueck, 290 S.W.3d at 884-85. (plaintiff's allegations in petition negated his ability to prove a Whistleblower Act claim and therefore no reason to give him an opportunity to replead); See Texas Dep't of Crim. Justice v. Campos, 384 S.W.3d 810, 815-16 (where plaintiffs have amended their pleadings three times over 9 years after the first plea to the jurisdiction was filed, then they have had adequate opportunity to amend their pleadings to assert claims for which immunity has been waived and the case should be dismissed); Tex. A&M Univ. Sys. v. Koseoglu, 233 S.W.3d 835 (Tex. 2007); . Miranda, 133 S.W.3d at 227. Even where it appears the plaintiff could amend pleadings to state a claim for injunctive relief, a majority of the Texas Supreme Court held dismissal was appropriate where the plaintiff had sought monetary relief in its pleadings. Tomball Reg'l Hosp., 283 S.W.3d at 849.

B. Methods and means plaintiffs are using to avoid put-off rulings on immunity.

Over the last 10 years, the most significant changes in litigation against governmental entities and their employees/officials has been governmental entities' use of the plea to the jurisdiction as a means of raising immunity from suit early in litigation. As noted elsewhere in this paper, whenever a plea to the jurisdiction is based upon the plaintiff's pleadings, then no evidence is presented at the hearing and as a result, no discovery is needed before the court rules upon the plea to the jurisdiction. Creedmoor-Maha Water Supply Corp v. Texas Comm'n on Environmental Quality, 307 S.W.3d 217, 226 (Tex.App.—Austin 2010, no pet); City of Galveston v. Gray, 93 S.W.3d 587, 590 (Tex. App.—Houston [14th Dist.] 2002, pet denied); In re Hays County Sheriff's Department, 2012 WL 6554815 (Tex.App.—Austin 2012)(Pemberton, J, concurring).

Plaintiffs are now using three means to get discovery for their claims prior to a defendant obtaining a ruling on a plea to the jurisdiction. First, some plaintiffs are using the Public Information Act, formerly known as the Open Records Act, which is codified in Chapter 552 of the Texas Gov't Code, to get discovery in the form of documents from a governmental entity. The PIA can be a very effective means of getting pre-suit discovery, but it is limited to obtaining copies of documents currently in existence. The Public Information Act cannot be used to require a governmental entity to create documents or answer questions. A&T Consultants, Inc. v. Sharp, 904 S.W.2d 668, 676 (Tex. 1995); Dallas Indep. Sch. Dist., 31 S.W.3d 678, 681 (Tex.App.—Eastland 2000, pet. denied); Open Records Decision No. 563 at 8 (1990). The Public Information Act includes a provision which prohibits the use of the Act for the purpose of gathering information related to a matter in litigation or for which litigation is reasonably anticipated. Tex. Gov't. Code section 552.103(a). In order to assert this exception to disclosure under the Public Information Act, a governmental entity must establish that it subjectively believes litigation is likely, and there are objective facts which establish litigation is reasonably anticipated. Tex.Gov't Code section 552.103(a).

The second means that plaintiffs have used to obtain discovery prior to a governmental entity's filing a plea to the jurisdiction based on immunity, is Texas Rule of Civil Procedure 202 which authorizes pre-suit discovery in certain limited circumstances. Texas Rule of Civil Procedure 202 authorizes the taking of depositions prior to filing suit for one of two reasons: (1) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (2) to investigate a potential claim or suit. Tex.R.Civ.P 202.1 The first justification for using Rule 202 arises when the death of a witness, or another event making the deponent unavailable in the future, is anticipated. The second justification for discovery under Rule 202 is used to develop information about potential defendants or to obtain information about the proper party to serve. Id. Under Rule 202, to authorize a pre-suit deposition, the trial court must find that: (1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or (2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure. In re Hochheim Prairie Farm Mut. Ins. Assoc, et al., 115 S.W.3d 793 (Tex. App—Beaumont 2003, no pet.).

Two courts of appeals have held that immunity from suit will not prohibit a governmental entity giving discovery pursuant to Rule 202 if the discovery relates to claims that the plaintiff may have against a third party. See University of Texas M.D. Anderson Cancer Center v. Tcholakia, 2012 WL 4465349 (Tex. App.-Houston [1st Dist.] 2012). See also City of Houston v. U.S. Filter Wastewater Group, Inc, 190 S.W.3d 242 (Tex. App. –Houston [1st Dist.] 2006, no pet.) and City of Willow Park v. Squaw Creek Downs, L.P., 166 S.W.3d 336, 340 (Tex. App.-Fort Worth 2005, no pet).

Finally, plaintiffs have either sought to continue hearings on pleas to the jurisdiction or ask courts to delay rulings on pleas to the jurisdiction so they can

conduct necessary discovery. Where discovery is appropriate and needed for court to rule on jurisdiction, allowing discovery is proper. However, where a governmental entity's plea to the jurisdiction is based upon the plaintiff's pleadings, delaying a ruling on the plea and/or allowing time to conduct discovery constitutes an abuse of the trial court's discretion for which mandamus is an appropriate remedy. In the City of Galveston decision, the Fourteenth Court of Appeals ruled that a trial court abuses its discretion if it orders mediation be conducted prior to a ruling on a plea to the jurisdiction based upon the plaintiff's pleadings. City of Galveston v. Gray, 93 S.W.3d 587, 592 (Tex.App.-Houston [14th Dist.] 2002, orig. proc The Austin Court of Appeals has similarly held that the trial court abuses its discretion by ordering discovery to go forward and unreasonably delaying a ruling on a plea to the jurisdiction. See In re Hays County Sheriff's Department, 2012 WL 6554815. Again, the plea to the jurisdiction in that case was predicated upon inadequacies in the plaintiff's pleadings as opposed to challenging whether the plaintiff could prove facts sufficient to establish a waiver of immunity from suit.

C. Trial Courts Are Obligated to Promptly Rule on Pleas to the Jurisdiction Based on Immunity.

A trial court's failure to rule on a pending matter within a reasonable amount of time constitutes an abuse of discretion. See In re Shredder Co., 225 S.W.3d 676, 679 (Tex.App.-El Paso 2006, orig. proceeding). When a motion is properly filed and pending before the trial court, the act of considering and ruling on that motion is a ministerial act, and mandamus may issue to compel the trial court to act. In re Chavez, 62, S.W.3d 225, 228 (Tex.App.-Amarillo 2001, orig. proceeding); Safety-Kleen Corp. v. Garcia, 945 S.W.2d 268, 269 (Tex.App.-San Antonio 1997, orig. proceeding).

"[N]o bright-line demarcates the boundaries of a reasonable time period." In re Chavez, 62 S.W.3d at 228. Whether a reasonable time for ruling has lapsed is dependent on the circumstances of each case. In re Blakeney, 254 S.W.3d 659, 662 (Tex.App.-Texarkana 2008, orig. proceeding); In re Chavez, 62 S.W.3d at 228. Reasonableness of the time taken to rule on a plea to the jurisdiction is dependent upon a various circumstances including whether the trial court had actual knowledge of the motion, its overt refusal to act, the state of its docket, and the existence of other judicial and administrative matters which must be addressed first. In re Chavez, 62 S.W.3d at 228-29.

The trial court in In Re Hays County withheld any ruling on the plea to the jurisdiction until discovery would show whether the defendants waived immunity from suit in a breach of contract case by their conduct. In re Hays County Sheriff's Department, 2012 WL 6554815. The Austin Court analyzed the history of waiver of immunity cases and concluded that it was impossible to find a set of facts under which a governmental entity can be held to have waived immunity from suit in a contract case by its conduct. Id. Therefore the court found that, "[b]ecause this Court does not recognize the waiver-by-conduct exception asserted by [plaintiff], there can be no factual dispute in need of resolution with respect to this theory. The trial court abused its discretion in deferring its ruling on the County's plea to the jurisdiction in order to allow discovery on this ground." Id.

Additionally, Austin Court held that the trial court's waiting more than thirteen-month to rule on the plea to the jurisdiction was unreasonable. Id. See City of Galveston v. Gray, 93 S.W.3d 587, 592 (Tex.App.-Houston [14th Dist.] 2002, orig. proceeding) (thirteen-month delay on ruling on plea to jurisdiction was abuse of discretion).

D. Interlocutory Appeals From Rulings on Immunity.

(d) Interlocutory Appeals from Rulings on Immunity.

An interlocutory appeal can be taken from a ruling on sovereign immunity regardless of the type of motion (plea to the jurisdiction, motion to dismiss or motion for summary judgment) through which immunity from suit is raised. Tex.Civ.Prac. & Rem.Code § 51.D14(a); Austin State Hosp. v. Graham, 347 S.W.3d 298 (Tex. 2011). Because section 51.014(a) gives appellate court's jurisdiction over interlocutory appeals from rulings on sovereign immunity from pleas to the jurisdiction, motions to dismiss and motions for summary judgment, if a valid interlocutory appeal is otherwise taken sovereign immunity can be raised for the first time on appeal.

Graham brought suit against Austin State Hospital and two of its doctors alleging medical malpractice claims. Id. at 299. Because Graham sued both the hospital and two employees, the hospital moved to dismiss the doctors pursuant to Texas Civil Practice and Remedies Code § 101.106(e). Id. The doctors also moved to dismiss under sections 101.106(a) and (e). Id. Graham then nonsuited the hospital and asserted that its motion to dismiss was thereby mooted. The trial court denied the doctors' motion and did not rule on the hospital's motion. Id. The hospital and the doctors appealed and the Court of Appeals held that it did not have jurisdiction over the doctors' appeal because section 51.041(a) of the Civil Practice and Remedies Code allowed the doctors to appeal only from a denial of a motion for summary judgment. Id. at 300.

The Supreme Court held that section 51.014 allows appeals by governmental entities or their employees where a motion in the trial court challenged that court's jurisdiction. Id.

> "[W]e have held under section 51.014(a) that an interlocutory appeal may be taken from a refusal to dismiss for want of jurisdiction whether the jurisdictional argument is presented by plea to the jurisdiction or some other vehicle such as a motion for summary judgment. . . . if the trial court denies the governmental entity's claim of no jurisdiction, whether it has been asserted by a plea to the jurisdiction, a motion for summary judgment, or otherwise, the Legislature has provided that an interlocutory appeal may be brought. The reference to plea to the jurisdiction is not a particular vehicle but the substance of the issue raised."

Id. (internal quotations and citations omitted). The Court explained that there is no reason for limiting appeals under section 51.014(a)(5) which references "motions for summary judgment", when section 51.014(a)(8) is not so limited. Id. The Texas Supreme Court concluded, "[t]he point of section 51.014(a)(5) . . . is to allow an interlocutory appeal from rulings on certain issues, not merely rulings in certain forms. Therefore, we hold that an appeal may be taken from orders denying an assertion of immunity . . . regardless of the procedural device used." Id. at 301.

Any appeal from the ruling on a plea to the jurisdiction is conducted under a de novo standard of review. Miranda, 133 S.W.3d at 225-26; Mayhem v. Town of Sunnyvale, 964 S.W.2d 922, 928 (Tex. 1998).

While courts are not to look to the merits of a claim unless immunity from suit and liability are co-extensive under the statute at issue, the courts frequently look to the existence of a dispute regarding a contractor's performance in ruling on a plea to the jurisdiction and breach of contract cases. In reviewing rulings on pleas to the jurisdiction in breach of contract cases, the Texas Supreme Court has consistently noted and based its ruling in part on the fact that the governmental entity alleges the contract or plaintiff has breached the terms of the contract to some extent or degree. See Pelzel, 77 S.W.3d 251, 252; IT-Davy, 74 S.W.3d at 852. Then in the Pelzel case, the Supreme Court pointed out that it would not find a waiver of immunity from suit where a governmental entity reduces the contract price under the express terms of the agreement, "even if the propriety of that adjustment is disputed." Pelzel, 77 S.W.3d at 252. While the court is not supposed to weigh the merits of the case in ruling on a plea to the jurisdiction, clearly allegations that a contractor has breached the contract or failed to perform on a contract are critical to defeating any claim of waiver by conduct in a breach of contract case. A lawyer bringing a plea to the jurisdiction in a case where waiver by conduct is alleged should plead and offer evidence that the contractor has breached and/or failed to perform its contractual obligations.

E. Is sovereign immunity jurisdictional and can it be raised for the first time on appeal?

In Rusk State Hospital, 392 S.W.3d 88 (Tex. 2012) the Texas Supreme Court addressed the issue of whether the defense of sovereign immunity, specifically immunity from suit, could be raised for the first time before an appellate court during an interlocutory appeal. The Court's decision in *Rusk*, that immunity from suit could be raised for the first time in an appellate court during an interlocutory appeal, will have significant implications for a very limited number of cases. However, the Court's decision, including a concurring opinion filed by Justice Hecht, as well as a concurring and dissenting opinion by Justice Lehrmann, joined by Chief Justice Jefferson and Justice Medina, focus on whether immunity from suit impacts a trial court's subject-matter jurisdiction or personal jurisdiction .

The Black family brought suit against the state hospital arising from the death of their son Travis Black, a psychiatric in-patient at the hospital. Black was found unconscious with a plastic bag over his head. Efforts to resuscitate Black failed and an autopsy revealed that he died of asphyxiation. Travis's parents brought a healthcare liability suit as well as claims under the TCA against the Rusk State Hospital as well as alleging three different bases for liability under the TCA. With respect to their claims under the TCA, the Blacks first asserted that the hospital was negligent for providing or allowing Travis Black to have access to a plastic bag. Second, the Blacks alleged that the hospital was negligent in training and supervising employees, which resulted in their son's death from assisted suicide or murder. Third, the Blacks alleged that the hospital was deliberately indifferent to their son's need by depriving him of sleep and refusing to prescribe appropriate medication.

In accordance with the provisions of Chapter 74 of the Civil Practice & Remedies Code, the Medical Liability Act, the Blacks served the hospital with an expert report at the commencement of suit. The hospital moved to dismiss the suit on the basis that the medical reports provided by the Blacks failed to satisfy the statutory requirements of Section 74.351 of the Tex.Civ.Prac. & Rem.Code. The trial court denied the hospital's motion to dismiss and the hospital took an interlocutory appeal under Section 51.014 of the Tex.Civ.Prac. & Rem.Code. Section 51.014 of the

Tex.Civ.Prac. & Rem.Code authorizes an interlocutory appeal to be taken from motions that deny or grant relief regarding the adequacy and sufficiency of an expert report filed in connection with a medical liability suit. See Tex.Civ.Prac. & Rem.Code § 51.014(9). However, Section 51.014 of the Civil Practice & Remedies Code also authorizes interlocutory appeals to be taken from the granting or denying of pleas to the jurisdiction filed by a governmental unit subject to the TCA. See Tex.Civ.Prac. & Rem.Code §51.014(8).

At the court of appeals, the hospital argued that the trial court erred in denying its motion to dismiss regarding the sufficiency of the plaintiff's expert's reports but also asserted sovereign immunity as a separate basis for reversing the trial court and rendering a judgment of dismissal. Specifically, the hospital argued that the Blacks' pleadings did not allege a cause of action for which the hospital's immunity had been waived and thus, they had failed to meet their burden of establishing that the trial court had jurisdiction. The Blacks responded that the court of appeals could not consider the hospital's immunity argument because that argument was neither raised at nor addressed by the trial court. The court of appeals did not address the immunity issue because it had not been presented to nor ruled on by the trial court. The court of appeals also denied the hospital's appeal with respect to its seeking dismissal for the inadequacy of the medical expert's reports. The hospital appealed to the Texas Supreme Court, asserting that because sovereign immunity deprived the trial court of subject-matter jurisdiction it could be raised for the first time at the court of appeals in an interlocutory appeal.

The majority began its analysis by noting that the Court had previously held that standing and ripeness could first be raised on appeal. Id. at 94. (citing Waco Independent School District v. Gibson, 22 S.W.3d 849, 851 (Tex. 2000)). The court noted that its holding in Gibson was based on its prior decision in Texas Association of Businesses v. Texas Air Control Board, 852 S.W.2d 440, 445 (Tex. 1993) holding, "that because subject-matter jurisdiction is essential to the authority of a court to decide a case it cannot be waived and may be raised for the first time on appeal." Id. The majority acknowledged that the issues in Gibson, standing and ripeness, as well as the issues raised in Texas Association of Businesses, subject-matter jurisdiction, were different than the issue first raised by Rusk State Hospital, namely sovereign immunity. Id. The court, however, found that these differences did not dictate a different outcome. Id.

The majority of the court then addressed the scope of jurisdiction for interlocutory appeals granted by Section 51.014 of the Civil Practice and Remedies Code. The supreme court noted that the court of appeals' holding found that Section 51.014 precluded a court of appeals' hearing an interlocutory appeal "from reviewing an immunity claim that was neither raised nor ruled upon in the trial court. Id. The supreme court rejected this reasoning holding that:

> The inquiry is not whether Section 51.014(a) *grants* appellate court authority to review immunity claims; rather it is whether Section 51.014(a) *divest* appellate courts of such authority. We conclude it does not.

Id.(italics in original).

The supreme court next noted that it had previously held in numerous other cases that sovereign immunity deprives courts of subject-matter jurisdiction:

> It has been suggested that while immunity *implicates* subject-matter jurisdiction, it does not necessarily *equate* to a lack of subject-matter jurisdiction….But regardless of whether immunity equates to a lack of subject-matter jurisdiction for all purposes, it implicates a court's subject- matter jurisdiction over pending claims. So if a governmental entity validly asserts that it is immune from a pending claim, any court decision regarding that claim is advisory to the extent it addresses issues other than immunity, and the Texas Constitution does not afford court's jurisdiction to make advisory decisions or issue advisory opinions.

Id at 95. (citing Valley Baptist Med. Ctr. v. Gonzalez, 33 S.W.3d 821, 822 (Tex. 2000)). Next the court notes that Section 51.014(a) of the Civil Practice & Remedies Code expands the jurisdiction of courts of appeals allowing a litigant to take an immediate appeal where a final judgment has not been rendered. *Id.* The court then points out that the court of appeals' holding would "affectively construe Section 51.014(a) to require appellate courts to address the merits of cases without regard to whether the court has jurisdiction. That construction violates constitutional principles." Id. Thus, the supreme court concludes:

> [I]f immunity is first asserted on interlocutory appeal, section 51.014(a) does not preclude the appellate court from having to consider the issue at the outset in order to determine whether it has jurisdiction to address the merits.

Id. As an additional justification for its holding, the court points out that upon remand to the trial court the governmental entity will immediately raise sovereign immunity which, "would work against the main purpose of the interlocutory appeal statute, which is to increase sufficiency of the judicial process." Id. at 96.

In his concurring opinion, Justice Hecht stated that he joined in the majority opinion because, "I agree that immunity from suit 'sufficiently partakes of the nature of a jurisdictional bar' that it must be considered on interlocutory appeal, even if not raised in the trial court." Id. at 101. (Hecht concurring). Like the majority, Hecht points out that if immunity were ultimately established by the governmental entity, then any decision on the merits of hospital's appeal regarding whether the Black's medical reports were adequate under the Texas Medical Liability Act would be advisory and would be outside the court of appeals' jurisdiction as established by the Texas Constitution. Id. He also agreed with the majority that remanding a case so that jurisdiction could be considered by the trial court only to result in another interlocutory appeal would be a waste of time, judicial resources, and cost litigant more in attorney fees. Id.

Hecht then offers his opinion on whether sovereign immunity deprives a court of subject, type and matter jurisdiction. Hecht acknowledged that the Texas Supreme Court's opinion in Texas Department of Transportation v. Jones has created confusion regarding the impact that sovereign immunity has on a trial court's jurisdiction. Hecht notes that the Court stated "'the law in Texas has been that absent the state's consent to suit, a trial court lacks subject matter jurisdiction.'" Id. at 102 citing Texas Department of Transportation v. Jones, 8 S.W.3d 636, 638 (Tex.1999) (per curiam). Hecht then explains that the issue in Jones was whether immunity from suit could be asserted in a plea to the jurisdiction and not the nature of whether immunity deprives the trial court or any court of subject-matter jurisdiction. Id. Thus, Hecht concludes, "Jones cannot fairly be read to equate immunity from suit with a lack of subject-matter jurisdiction." Id. (Hecht concurring).

Hecht points out that there are important differences between immunity from suit and lack of subject-matter jurisdiction. According to Hecht the most important difference is that a governmental entity can waive immunity from suit either for broad classes of claims or for a particular case, but no litigant can waive subject-matter jurisdiction. Id. Hecht then seeks to explain any inconsistencies in the court's prior rulings by concluding that, "Jurisdiction, it has been observed, is a word of many, too many, meanings. Not all of them have been or can be attributed to immunity from suit." Id. (Hecht concurring)(internal quotations omitted).

Justice Lehrmann, joined by Chief Justice Jefferson and Justice Medina, issued an opinion concurring in part and dissenting in part. Justice Lehrmann begins by stating that a trial court cannot exercise jurisdiction over a case unless it has both subject-matter jurisdiction and personal jurisdiction. Id. at 103. (Lehrmann concurring and dissenting). The Justice next points out that subject-matter jurisdiction involves the court's power to hear and resolve a matter and cannot be waived or granted by the parties. She further notes that all courts, trial courts as well as courts of appeals, are obligated to consider subject-matter jurisdiction *sua sponte*. Id. (Lehrmann concurring and dissenting).

Justice Lehrmann next compared the differences between subject-matter jurisdiction and personal jurisdiction.

> "In contrast, personal jurisdiction involves a court's power to bind a particular party. Unlike subject-matter jurisdiction, personal jurisdiction can be voluntarily waived by an appearance."

Id. (Lehrmann concurring and dissenting).

Lehrmann then explores the history of sovereign immunity back to the English kings and the formation of the United States. She notes that sovereign immunity was frequently referred to as impacting a court's ability to render a judgment against a king or sovereign. She also points out the sovereign immunity implicates a governmental entities "amenability" to suit. Id. at 105. (Lehrmann concurring and dissenting). "[A]menability" from suit is more properly referred to as an element of personal jurisdiction, which can be waived by a party." Id. (Lehrmann concurring and dissenting). Lehrmann then asserts that sovereign immunity cannot implicate subject-matter jurisdiction, because courts in Texas all have subject-matter jurisdiction over tort claims and breach of contract claims, which are the claims typically brought against governmental entities. Id. (Lehrmann concurring and dissenting). Lehrmann points out that if sovereign immunity implicates subject-matter jurisdiction, then a governmental entity could always attack any judgment properly rendered it against on appeal by arguing that the trial court lacked subject-matter jurisdiction. Id. at 108. (Lehrmann concurring and dissenting).

Ultimately, Lehrmann concludes that governmental entities should not be allowed to assert immunity for the first time on an appeal in the event of an interlocutory appeal. Id. (Lehrmann concurring and dissenting). She points out that one of the purposes of sovereign immunity is to reduce costs and expenses for governmental entities by allowing them to

avoid unnecessary litigation through asserting immunity early in the litigation. Id. at 109. (Lehrmann concurring and dissenting). She notes that this purpose is:

> …[I]ll-served by allowing immunity to be raised post-judgment, possibly even years after the litigation has ended….When attorneys for the State fail to raise sovereign immunity in the trial court, that failure might not be based on oversight. The State's attorneys often make tactical decisions in deciding which issues they choose to raise. By not requiring the State to raise the issue of sovereign immunity in the trial court, the Court is providing it with a strategic advantage that other parties lack. Moreover, such a lenient rule penalizes taxpayers by dissuading conscientious attorneys for the state from developing procedures to ensure that the matter is raised timely…resulting in unnecessary and costly litigation. Second, the doctrine should not result in one law for the sovereign and another for the subject, as such a rule would look less like sovereign immunity then sovereign inequity.

Id. (Lehrmann concurring and dissenting) (internal quotations and citations omitted).

(1) Potential resolutions of the immunity issue when it is first raised on appeal in an interlocutory appeal.

After determining that immunity could first be raised on appeal in an interlocutory appeal, the supreme court then had to address the Hospital's assertion that the Blacks' claims were barred by immunity from suit. The court held that a plaintiff must be given fair opportunity to address jurisdictional issues by amending its pleadings or developing the record when the assertion of immunity is not raised at the trial court. The court cited its decision in Gibson as holding that safeguards are necessary to protect a plaintiff when an appellate court considers an issue of subject, type and matter jurisdiction in the first instance because the plaintiff had not had the opportunity to amend their pleadings in response to the jurisdictional challenge. Id. "Under such circumstances, appellate courts must construe the pleadings in favor of the party asserting jurisdiction, and, if necessary, review the record for evidence supporting jurisdiction." Id. at 96

The Supreme Court holds that where immunity is raised for the first time in an interlocutory appeal, the appellate will reach one of four decisions. First, the appellate court may find that the pleadings or record conclusively negate the existence of jurisdiction in which case the suit should be dismissed. Id. Second,

> if the pleadings and record neither demonstrate jurisdiction nor conclusively negate it, then in order to obtain dismissal of the plaintiff's claim, the defendant entity has the burden to show either that the plaintiff failed to show jurisdiction despite having had a full opportunity in the trial court to develop the record and amend pleadings; or, if such opportunity was not given, that the plaintiff would be unable to show the existence of jurisdiction if the cause were remanded to the trial court and such opportunity afforded. If the governmental entity meets this burden, then the appellate court should dismiss the plaintiff's case.

Id. The third and final outcome is where the pleadings and record do not conclusively negate the existence of jurisdiction and the governmental entity does not meet the burden of showing the plaintiff was afforded the opportunity to amend pleadings and develop a record, or the plaintiff would be unable to show the existence of jurisdiction if afforded the opportunity; then the case should be remanded to the trial court for further proceedings. Id.

The Supreme Court concluded that the Black case would be remanded for further proceedings on jurisdictional issues because the hospital had not conclusively established by the record that the Blacks had had a full and fair opportunity to develop the record as to jurisdiction or amend their pleadings. Id.

(2) The Practical Effect of the Rusk State Hospital Decision.

The Supreme Court's decision in Rusk State Hospital will have a significant impact on a limited number of cases. As allowed in Rusk, in those instances where governmental entities take an interlocutory appeal, the issue of immunity can still be raised on appeal, either in the courts of appeal or the Texas Supreme Court, regardless of whether it was ever raised at the trial court or the court of appeals. Id. While this is a significant result, it will have an impact only in a limited number of instances, because there are only a limited number of cases where interlocutory appeals are authorized to be taken on an issue other than immunity. Indeed, based upon the reported decisions, the vast fast majority of interlocutory appeals are taken from the granting or denial of pleas to the jurisdiction or summary judgments based upon immunity from suit.

Interestingly, the Rusk State Hospital case may raise the question of whether immunity can be

addressed by an appellate court considering a petition for writ of mandamus. A governmental entity may argue that when an appellate court chooses to grant a petition for writ of mandamus to consider a case, it should then consider the issue of immunity in resolving the mandamus application. Indeed, the Austin Court of Appeals did just that in In Re Hays County Sheriff's Department, 2012 WL 6554815 (Tex.App.—Austin December 12, 2012). In In Re Hays County Sheriff's Department, the petitioner brought an application for writ of mandamus based upon the trial court's refusal to rule on its plea to the jurisdiction. Id. The trial court judge had withheld any ruling on the plea to the jurisdiction pending discovery in the case. The petitioner argued that the trial court was obligated to rule on the plea to the jurisdiction, grant or deny, because the plea was based upon the plaintiff's live pleading. Id. Ultimately, the court of appeals addressed the merits of the plaintiff's claim and whether he could establish a waiver-by-conduct that would give rise to a breach of contract action, in deciding to conditionally grant the writ of mandamus. Id. at 4. Interestingly, in his concurring opinion, Justice Bob Pemberton pointed out that because the county's plea to the jurisdiction challenged only the sufficiency of the plaintiff's pleadings, the question of whether there was a waiver of immunity constituted a question of law for which the existence of additional facts learned through discovery would have no bearing. Id. (Pemberton concurring). Pemberton went on to point out that it was unnecessary for the majority to analyze whether the plaintiff could articulate a waiver-by-conduct breach of contract claim in resolving whether to grant the writ of mandamus. Id. at 5. (Pemberton concurring). The practical effect of this decision, is that it evidences that courts of appeals may consider immunity issues in resolving interlocutory appeals and writs of mandamus. See Id.

F. Impact on Statute of Limitations Where the Court Lacks Jurisdiction.

In the event that the plea to the jurisdiction is granted, section 16.064 of the Texas Civil Practice and Remedies Code tolls the statute of limitations for cases dismissed for want of jurisdiction, provided the case is refiled in a court of proper jurisdiction within sixty days of dismissal. Tex.Civ.Prac. & Rem.Code § 16.064(a); In re United Serv. Auto. Ass'n., 307 S.W.3d at 304. However, the tolling provision does not apply to cases in which the first filing was made with "intentional disregard of proper jurisdiction." TEX. CIV. PRAC. & REM. CODE section 16.064(a); In re United Servs. Auto. Ass'n, 307 S.W.3d at 304. Once a party seeks relief asserting that a suit was filed with intentional disregard of proper jurisdiction, the non-movant bears the burden proving the filing was made in good faith. Id. at 312-13. The Supreme Court concluded that the burden of proof rests with the non-movant because he is in the better position of establishing the factors that lead to the decision as to in which court suit should be filed. Id. The standard of proof is similar to the standard of proof for setting aside a default judgment. Id. at 313. A plaintiff's mistake about the court's jurisdiction will "never" meet the test of intentional disregard. Id. As the Supreme Court observed, "[c]apable lawyers often made good faith mistakes about the jurisdiction of Texas courts." Id. (internal quotations omitted). However, a party is charged with intentional disregard when a lawyer or party makes a strategic decision to seek relief from a court without jurisdiction. Id. Dismissals resulting from an attorney's "tactical decisions" were not meant to be protected by the tolling provision of section 16.064(a). Id. (dismissal for want of jurisdiction was final and statute of limitations had run where plaintiff unquestionably sought damages in excess of the trial court's jurisdictional limits).

Governmental defendants are not required to raise lack of jurisdiction through special exceptions and/or summary judgment before seeking to have the case dismissed through a plea to the jurisdiction. Lueck, 290 S.W.3d at 884.

Because an order granting a plea to the jurisdiction may constitute a final judgment and may also bar litigation against other defendants arising from the same events, a plaintiff may want to dismiss the suit before the court rules on the plea.

While immunity from suit is properly raised through a plea to the jurisdiction, the proper procedural tool for obtaining a judgment for immunity from liability short of trial is summary judgment. See Maxwell, 880 S.W.2d at 464; Harris, 799 S.W.2d at 788. To prevail on a motion for summary judgment, the governmental entity must establish that there are no disputed issues of material fact and it is entitled to judgment as a matter of law. Id.

G. Submission of Cases to the Jury where jurisdictional issues remain unresolved.

When the issue of immunity remains unresolved because there is a fact question that precludes a determination of jurisdiction prior to trial, the plaintiff needs to make certain that she gets a jury finding on all factual disputes that affect whether the court had jurisdiction. See Creedmoor, 307 S.W.3d at 512-13; City of North Richland Hills, 340 S.W.3d 900, 906 (Tex. App. – Forth Worth 2011, no pet.). The plaintiff's failure to get jury findings sufficient to establish jurisdiction can result in the case being dismissed by the trial court or a court of appeals for lack of jurisdiction, even after a full jury trial.

Defense counsel must raise the defense of sovereign immunity and make appropriate objections to the charge. The affirmative defense of sovereign immunity from liability and the limits of liability are waived if not timely and properly raised. See also Pollock, 2004 WL 1054842; King, 2003 WL 22937252, p. 5. However, immunity from suit is jurisdictional and cannot be waived

H. Jury Charge in an Ordinary Premises Defect Case.

1. Dangerous Condition Premises Defect.

In an ordinary premises liability case in which the licensor/licensee standard of care is applicable and the case is being tried upon a dangerous condition theory of liability, the following fact issues exist:

(a) Was the condition that is alleged to have caused the injury a dangerous condition?
(b) Did the governmental entity have actual knowledge of the dangerous condition?
(c) Was the plaintiff without knowledge of the dangerous condition?
(d) Did the government fail to warn of the dangerous condition and fail to make the condition reasonably safe?
(e) Was such failure negligence?
(f) Was such negligence a proximate cause of the injuries?

See Adams, 888 S.W.2d at 612; Tennison, 509 S.W.2d at 561; Payne, 838 S.W.2d at 237. See also Thompson, 167 S.W.3d at 575 (constructive notice of premises defect does not give rise to duty to warn of premises defect).

Alternatively, the case could be submitted in broad form. In the case of broad form submission, the charge will ask only if the jury finds the defendant governmental entity was negligent, with accompanying instructions setting forth the defendant's duty. Specifically, the instruction should state that the governmental defendant was negligent only if:

(a) The condition complained of posed an unreasonable risk of harm to users of the premises;
(b) The governmental defendant had actual knowledge of the dangerous condition;
(c) The plaintiff did not have actual knowledge of the dangerous condition;
(d) The governmental defendant failed to warn of the dangerous condition; and/or
(e) The governmental defendant failed to make the dangerous condition reasonably safe.

See id.; Texas Pattern Jury Charge, Volume 3, § 66.05.

The Pattern Jury Charge, however, overstates the nature of licensor's duty in the case of a dangerous condition. Subchapter 66.05 contains an instruction for a licensee case that allows the jury to find the defendant to be negligent if it failed to warn, or make the condition reasonably safe. This would obligate governmental entities to both warn and make the condition safe. A licensor, however, discharges his obligation if he either warns of the condition or makes it safe. Guerra, 858 S.W.2d at 46-47; Smith v. State, 716 S.W.2d at 179. The defendant would have been held liable in both Smith v. State and Guerra had they not been able to discharge their duty to the plaintiffs by warning of the dangerous condition. Guerra, 858 S.W.2d at 46-47; Smith v. State, 716 S.W.2d at 179.

Regardless of the form of submission, adjustments will be made to the charge depending upon the judge's interpretation of the applicable standard of liability. For example, the charge may be modified in any combination of the ways set forth below:

(a) Dangerous condition can be defined as a condition that represents an unreasonable risk of injury to persons exercising ordinary care. Payne III, 781 S.W.2d at 321.
(b) Defendant can be charged with knowledge:
    (i) only if he knew that the condition represented an unreasonable risk of harm. Hastings, 532 S.W.2d at 149;
    (ii) if he created the condition. Henson, 843 S.W.2d at 149; or
    (iii) if from the facts known to defendant he should have discovered the dangerous condition. Cantu, 831 S.W.2d at 425.
(c) Plaintiff is charged with knowledge if she knew or in the exercise of ordinary care should have discovered the condition. Weaver, 750 S.W.2d at 26-27.

As with any litigation, the jury verdict will depend in large part upon the attorney's ability to convince the judge of the state of the law during the charge conference. In particular, defense counsel must be prepared to direct the court to Smith v. State, Guerra, and other decisions that note that, contrary to the Pattern Jury Charge, a governmental occupant's duty is to warn of the condition or make it reasonably safe, but it is not obligated to do both. Texas Pattern Jury Charge, Volume 3, § 66.05.

2. Gross Negligence Case.

In addition to the duty to warn of dangerous conditions in certain circumstances, the occupier also

owes to a licensee the duty not to injure him by willful, wanton, or gross negligence. If there is evidence of gross negligence, then a licensor/licensee case may be tried on that basis with appropriate jury questions and instructions. Davenport, 780 S.W.2d at 828-30.

Gross negligence for the purpose of establishing liability of a licensor is defined as:

> That entire want of care which would raise the belief that the act or omission complained of was the result of conscious indifference to the rights or welfare of the person or persons to be affected by it, or that shows maliciousness or evil intent by a policy making official of the Defendant.

Cavazos, 811 S.W.2d at 233.

I. Jury Charge in a Special Defect Case.

In case of a special defect, the fact issues are as follows:

(a) Did the occupier have actual or constructive knowledge of the [insert defined name of the special defect]?
(b) Did the [insert defined name or the special defect] pose an unreasonable risk of harm to the claimant?
(c) Did the occupier fail to exercise reasonable care to warn of the risk?[20]
(d) Did the failure to use ordinary care to warn of a special defect a proximate cause of the claimant's injuries?

Payne, 838 S.W.2d at 237; Corbin, 648 S.W.2d at 295; Adams, 888 S.W.2d at 612-13.

Again, the case can be submitted in broad form with the accompanying definition of the governmental entities' duty in the case of a special defect. The instruction should state that the governmental entity is negligent only if:

(a) Defendant had actual knowledge or in the exercise of ordinary care should have discovered the [insert the defined name of the special defect];
(b) The [insert defined name of the special defect] posed an unreasonable risk of harm to the plaintiff;
(c) Defendant failed to exercise ordinary care to warn of the risk of the [insert the defined name of the special defect]; and
(d) The failure to use ordinary care to warn of the [insert the defined name of the special defect] was the proximate cause of plaintiff's injuries.

J. Jury Submission in a Traffic Signal Case.

In the case of a traffic control device malfunction, the jury questions must inquire as to whether the defendant acted within a reasonable time of having actual knowledge of the malfunction or absence. Specifically, the jury should be asked:

(a) Did the defendant fail to repair the malfunction within a reasonable time of obtaining actual knowledge that it was malfunctioning?
(b) Was the defendant's failure to repair the malfunction within a reasonable time of obtaining actual knowledge of the malfunction negligence?
(c) Was the defendant's failure to act within a reasonable time a proximate cause of plaintiff's injuries?

TEX. TORT CLAIMS ACT § 101.060(a) (2-3). In the event of broad form submission the applicable definition of negligence must explain that the defendant was negligent only if it failed to act within a reasonable time of learning of the malfunction.

VIII. MISCELLANEOUS

A. Municipalities' Liability for Proprietary Activities.

1. Municipalities Remain Liable For Proprietary Functions.

The TCA is applicable to a municipality only in connection with its governmental functions. Vela v. City of McAllen, 894 S.W.2d 836 (Tex. App.–Corpus Christi 1995, no writ). The TCA does not displace municipal liability in the case of proprietary functions. Likes, 962 S.W.2d at 501; Adams, 888 S.W.2d at 611-12. Thus, in the event that the City's activity constitutes a proprietary function, it has the same

[20] The actual wording of the factual question in Corbin was, "3) that Safeway did not exercise reasonable care to reduce or to eliminate the risk ...." The modification of the issue is based upon the wording of TCA § 101.022(b) which limits the government's liability for premises defects except that the limitation "... does not apply to the duty to warn of special defects...." As discussed herein, this suggests the government's duty is less than to "reduce or eliminate the risk...." The distinction may be of questionable importance, however, since a warning is the only way to reduce the risk.

liability as existed at common law. Id. Therefore, with proprietary functions, the City's standard of care is established by common law, and there is no cap on total liability. Id.

The Courts have struggled with creating a clear test of what constitutes a proprietary versus a governmental activity. The state's sovereign immunity extends to municipalities to the extent their actions serve the interests of the general public, rather than just the interests of their citizens. City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex. 1997); TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a). When a city performs functions that are assigned to it by the state or which serve the interests of all citizens, then it is performing a governmental function and enjoys full sovereign immunity, except to the extent it has been waived. Likes, 962 S.W.2d at 501. Accordingly, providing police and fire protection promotes the health, safety and general welfare of all citizens of the state and are, thus, governmental functions. City of LaPorte , 898 S.W.2d at 291 (Tex.1995). Conversely, a city acts in its proprietary capacity when, in the exercise of its discretion, it takes actions primarily for the benefit of those within its corporate limits. Truong v. City of Houston, 99 S.W.3d 204, 209 (Tex.App.–Houston [1st Dist.] 2002, no pet.). Drawing the line between where proprietary functions begin and proprietary functions end can create liability for a city that is completely unexpected. For example, while providing police protection is a governmental function, providing insurance benefits to policemen is a governmental function. Temple v. City of Houston, 189 S.W.3d 816, 818-21 (Tex. App.–Houston [1st Dist.] 2006, no pet.). Thus, the City of Houston was performing a proprietary function and had no immunity related to its providing insurance benefits to members of its police department. Id.

Section 101.0215 of the TCA provides an incomplete list of functions that are and are not governmental municipal activities that are proprietary or governmental. TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215. However, when an activity falls outside these parameters, then the courts must determine whether the city is acting as an agency of the state for the benefit of all citizens, or is acting principally for the benefits of its own citizens in determining whether the city enjoys immunity.

a. Counties And State Have No Proprietary Functions.

The distinction between proprietary and governmental functions developed from, and is associated only with, municipal law. It is not applicable to the state or to counties. Neither the state nor counties have proprietary functions. Adams v. Harris County, 530 S.W.2d 606 (Tex.App—Houston [14th Dist.] 1975); Atchison, Topeka, 783 S.W.2d at 646 (construction and maintenance of state highways is a governmental function). Jezek, 605 S.W.2d at 547 (counties in Texas have no proprietary functions); Daniels v. Univ. of Tex. Health Sci. Ctr., 2004 WL 2613282 (Tex. App.–Houston [1st Dist.] 2004, no pet.) (mem. op.).

2. Roadway Maintenance, However, Is Now a Governmental, Not a Proprietary, Function.

As part of the "Tort Reform" initiative in 1987, the status of street maintenance was changed; it is now a governmental function. TEX. TORT CLAIMS ACT § 101.0215(4). This means that premises liability cases involving city street maintenance now come under the TCA with its limitations and exceptions on liability. City of Galveston v. Albright, 2004 WL 2439231 (Tex. App.–Houston 2004, no pet. h.) (claim that city had duty to maintain drainage block in safe manner); Bell v. City of Dallas, 146 S.W.3d 819, 824 (Tex. App.–Dallas 2004, no pet.) (municipality activities regarding sanitary and storm sewers are governmental functions); Winkenhower, 875 S.W.2d at 390-91.

One needs to read municipal premises liability cases decided prior to "tort reform" with the understanding that the law has changed. For example, Jezek noted that the maintenance of streets in a safe condition was a proprietary function, and a city was liable for its negligence in the performance on this function.

3. Pre-1970 Design, Construction and Maintenance of Municipal Public Works May be Deemed Proprietary.

Prior to the TCA, the construction of municipal public works was considered a proprietary function. There was also some authority for the proposition that the design of public works by a city were also proprietary functions. See Hamilton, 714 S.W.2d at 374-75 (holding city liable for design of low water crossing). But see Likes, 962 S.W.2d at 501(citing earlier Texas Supreme Court decisions holding that when a city exercises its discretion regarding public works it enjoys governmental immunity).

The effective date of the TCA is January 1, 1970 and from that time forward suits against cities for the performance of governmental functions were controlled by the TCA. However, it was not until the 1987 amendments to the TCA that the Act provided that the "street construction and design, bridge construction and maintenance and street maintenance, sanitary and storm sewers, warning signals, engineering functions, maintenance of traffic signals, signs and hazards" were governmental functions. Adams, 888 S.W.2d at 611. The timing of the

enactment of the TCA and whether design of public works are proprietary functions has created a morass in which cities may be found to be held liable for the design, construction and maintenance of public works based on these activities' being proprietary functions not covered by the TCA. See Likes, 962 S.W.2d at 501; Adams, 888 S.W.2d at 611.

The first case to address this problem was the Adams decision from the Fort Worth Court of Appeals. Adams complained that the design of a roadway underpass (the City's failure to provide adequate drainage and failure to provide a gauge showing the depth of flood waters) and the failure to erect barricades caused the death of a mother and her son. Adams, 888 S.W.2d at 610. The Fort Worth court pointed out that until the 1987 amendments to the TCA the design of public structures were proprietary functions. The court went on to point out that for all suits filed after September 1987, the amended version of the TCA, (that makes design, construction and maintenance governmental functions) controlled. Id. However, the court noted that the TCA has no application for acts or omissions occurring before January 1970. Id. For suits complaining of acts and omissions before the TCA's effective date, a city's liability was determined by common law. Id. Moreover, it was common law that would determine whether the acts or omissions at issue were proprietary or governmental functions of a city. See id . at 614.

Based on this reasoning, the Fort Worth court went on to hold that the plaintiff's causes of action based on failure to provide adequate drainage and a flood gauge related back to the date of construction of the underpass. Id. Since the underpass was constructed before 1970, the TCA did not apply to those claims. The court held that these causes of action could be tried under common law. Interestingly, the court did not address whether the claims related to the design of the underpass would constitute proprietary or governmental functions for the City. The court's acknowledgment that claims against cities for performance of governmental functions and the fact that the case was remanded for new trial offered some suggestion that the court concluded or at least would not rule out a finding that the design of the underpass was a proprietary function. See id.

The Fort Worth court did note plaintiff's complaints regarding the failure to erect barricades and failure to warn of the flood water on the road were acts or omissions that occurred on the date of the accident. Id. As such, the court held that these claims would have to be remanded for a new trial under the amended version of the Act. Id.

The supreme court took up this issue in the Likes case. Likes complained that the construction operation and maintenance of storm sewers caused flood waters to damage their home. Likes, 962 S.W.2d at 492-93. The culverts in question were built in 1925 and 1938 and modifications were made to the culverts after the construction was complete. Id. at 500.

The supreme court held that both the initial design of the culverts and the decision of whether or not to improve the culverts after construction were governmental functions immune from liability. Id. With respect to the initial design of the culverts the court held:

> Governmental immunity protects a city when it exercises discretionary powers of a public nature involving judicial or legislative functions. The City's design and planning of its culvert system are quasi-judicial functions subject to governmental immunity.

Id. at 501. Turning to the issue of liability based on the failure to improve the culverts after construction, the supreme court notes that part of the transcript includes deposition testimony from the plaintiff's expert criticizing the design of the culverts and the City's failure to make improvements to the culverts. Id. at 501. In apparent response to this evidence, the court states:

> Because a municipality's decision about whether to order public improvements is discretionary, its decision to initiate or not initiate such an undertaking is an exercise of governmental power for which it may not be held liable.

Id. This passage clearly indicates that a city cannot be held liable for failing to improve or upgrade an existing public work is a governmental function for which it cannot be held liable.

The court, following the Adams' rationale, held that the City could be liable for the construction and maintenance of the culverts because these acts occurred before the effective date of the TCA and under common law they were proprietary functions.

> However, the acts of constructing and maintaining a storm sewer are proprietary at common law, both because they are performed in a city's private capacity for the benefit of those within its corporate limits and because they are ministerial functions. The City could be liable for the negligent performance of these acts if they proximately caused Likes' damages.

Id. (citations omitted).

B. Do Contractors Working For Governmental Entities Enjoy Sovereign Immunity?

A general contractor who is in control of premises is charged with the same duty as an owner or occupier. Barham v. Turner Const. Co., 803 S.W.2d 731 (Tex. App.--Dallas 1990, writ denied). The limitation of liability for premises defects provided for in the TCA has been held to apply to a general contractor in control of government premises. Marshbank v. Austin Bridge Co., 669 S.W.2d 129, 134 (Tex. App.–Corpus Christi 1984, writ ref'd n.r.e.).

> [A]n independent contractor, who acts in creating a condition upon land on behalf of the possessor, is subject to the same liability and enjoys the same freedom from liability for physical harm caused thereby to others upon the land as though he were the possessor of the land. Any duty owed by ... [the contractor] to appellant based upon a premises liability theory would be limited to the duty owed by [the government].

Id. at 134. But see K.D.F. v. Rex, 878 S.W.2d 589, 597 (Tex. 1994) (a contractor enjoys governmental immunity to the extent he acts solely at the direction of the entity; however, a contractor who exercises discretion and is not subject to the direction and control of the entity is not entitled to sovereign immunity). In 2003, the Legislature codified the holding in the Marshbank case for companies who contract with the Texas Department of Transportation. For accidents occurring after September 1, 2003, a company that is building or repairing roads for the Texas Department of Transportation cannot be held liable for injury death, or property damage arising from its construction work if it is in compliance with the contract documents. TEX. CIV. PRAC. & REM. CODE § 97.002.

On the other hand, a governmental premises owner may find itself liable for a contractor's negligence if the government exercises more control than just a general right to start, stop, and inspect the work. Cf. Hoechst-Celanese Corp. v. Mendez, 967 S.W.2d 354, 355 (Tex. 1998) ("[a]n employer's duty of reasonable care is commensurate with the control it retains over the independent contractor"). In the case of a private person occupier, liability arises from the law of agency as set forth in Restatement (Second) of Torts, § 414 (1977). Redinger v. Living, Inc., 689 S.W.2d 415 (Tex. 1985). However, it may be that a governmental entity would not be liable under this theory unless such negligence involves "some condition or some use of tangible property ...." Id.

At the same time, if the danger causing the injury resulted from the performance of work the contractor was employed to do, rather than from any condition of the premises where the work was done; there is no liability on the part of the owner. Moore v. Tex. Co., 299 S.W.2d 401 (Tex. Civ. App.–El Paso 1956, pet. ref'd n.r.e.).

Moreover, the mere fact that a company is doing work pursuant to a contract or at the request with a governmental entity does not vest it with sovereign immunity. *See* Critical Care Medicine Inc., v. Sheppard, 2005 WL 3533130 (Tex. App.–San Antonio, December 28, 2005, no pet.)(mem. op.).

C. Chapter 75 of the Texas Civil Practice and Remedies Code, Regarding Landowners Who Permit Use of Property for Recreational Use and its Application to Governmental Entities.

Section 75.002 provides limited liability to landowners who permit others to use their property for recreational purposes. Under section 75.002, when the premises occupant gives permission to enter for recreational purposes, the person to whom permission is given has the status of a trespasser on the premises. See Crossland, 781 S.W.2d at 437. A premises occupant owes a lesser duty to a trespasser than to a licensee. Consequently, in the case of injuries that took place at a park, zoo, or other recreational facility, governmental defendants argued that they were obligated only to refrain from injuring the plaintiff willfully, wantonly, or through gross negligence. See Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217 (Tex. 2004); City of Dallas v. Mitchell, 870 S.W.2d 21 (Tex. 1994).

For a period of time there was a split among the courts of appeals regarding the application of section 75.002 of the Texas Civil Practice and Remedies Code to governmental recreational facilities. Compare Mitchell, 855 S.W.2d at 741.

The supreme court appeared to have resolved the issue in City of Dallas v. Mitchell, 870 S.W.2d at 21 when it held: "Section 75.002 does not apply to governmental entities because the standard of care owed to recreational users on governmental property is specified in Section 101.022 of the Texas Tort Claims Act." Id. at 22.

In 1995, the Texas Legislature amended both Chapter 75 of the Civil Practice and Remedies Code as well as the TCA to overrule Mitchell and make 75.002 applicable to governmental entities. See Act of May 26, 1995, 74th Leg., R.S. Ch. 520, 1995 Tex. Gen. Laws 3276, 3276-77 (amending TEX. CIV. PRAC. & REM. CODE ANN. §§ 75.003, 101.058 (Vernon 1997)). Section 75.003(c) of the Texas Civil Practice and Remedies Code was amended to provide:

> Except for a governmental unit, this chapter applies only to an owner, lessee, or occupant of real property who:
>
> (1) does not charge for entry to the premises;
> (2) charges for entry to the premises, but whose total charges collected in the previous calendar year for all recreational use of the entire premises of the owner, lessee, or occupant are not more than twice the total amount of ad valorem taxes imposed on the premises for the previous calendar year; or
> (3) has liability insurance coverage in effect on an act or omission described by Section 75.004(a) and in the amounts equal to or greater than those provided by that section.
>
> (e) Except as otherwise provided, this chapter applies to a governmental unit.
> (f) This chapter does not waive sovereign immunity.
> (g) To the extent that this chapter limits the liability of a governmental unit under circumstances in which the governmental unit would be liable under Chapter 101, this chapter controls.

TEX. CIV. PRAC. & REM. CODE ANN. § 75.003 (Vernon 1997).

Section 101.058 of the TCA was amended to state:

> LANDOWNER'S LIABILITY. To the extent that Chapter 75 limits the liability of a governmental unit under circumstances in which the governmental unit would be liable under this chapter, Chapter 75 controls.

TEX. TORT CLAIMS ACT § 101.058 (West 2005).

While the Legislature's intentions may have been clear, the amendments did not make it clear how the statutes were intended to interact. The First Court of Appeals seems to have resolved the uncertainly in City of Houston v. Morua, 982 S.W.2d 126, 129 (Tex. App.--Houston [1st Dist.] 1998, no pet.). In Morua, parents brought suit on behalf of their child who was bitten by a wolf at the Houston zoo. Clearly the zoo was a recreational facility within the meaning of Chapter 75 of the Civil Practice and Remedies Code. The City argued that:

> [The amendments were] an attempt by the legislature to alter the result in Mitchell and ensure that the recreational use statute did apply to governmental entities. The City further argues that, because the recreational use statue controls in such situation, section 75.003(f) bars any liability for the City in light of that section's express language that, "This chapter does not waive sovereign immunity."

The First Court of Appeals rejected this analysis, ruling that the plain language of the statutes made it clear that governmental entities could be held liable under Chapter 75.

> The express wording of both section 101.058 of the Act and section 75.003(g) of the recreational use statute undermine the City's argument. Both sections clearly state that, to the extent the recreational use statute *limits* the liability of a governmental unit under circumstances in which the governmental unit *would be liable* under the Act, the recreational use statute, and its diminished standard of care, controls. A plain reading of both sections reveals that, once it is determined that a governmental entity is liable under the Act, the recreational use statute may then operate to limit, not abolish, that liability if the facts of a particular case support its application. ... [B]ased on the plain meaning of sections 75.003(g) and 101.058 outlined above, an analysis of a governmental unit landowner's liability does not reach the recreational use statute *unless* it is first determined that the litigant's claims fall under the waiver of immunity created by the Act. Therefore, section 75.003(f) merely emphasizes that the recreational use statute limits *preexisting* liability, and does not, in and of itself, waive sovereign immunity or abolish the waiver of liability found in the Act.

Morua, 982 S.W.2d at 129 (citations omitted, emphasis in original).

Thus, when the premises are a recreational facility within Chapter 75 of the Texas Civil Practice and Remedies Code, the duty owed is reduced from a licensor/licensee standard to the trespasser standard. Id.; City of Fort Worth v. Crockett, 142 S.W.3d 550, 552 (Tex. App.–Fort Worth 2004, pet. denied); West v. City of Crandall, 139 S.W.3d 784, 787 (Tex. App.–Dallas 2004, no pet.).

The Supreme Court has determined that the scope of Chapter 75's application extends to all activities and facilities of a recreational nature. City of Bellmead v.

Torres, 89 S.W.3d 611, 614-15 (Tex. 2002). Ms. Torres was injured when a swing she sat on at a park broke. Id. at 611. In 1996, at the time of Ms. Torres' injury, Chapter 75 contained an itemized list of activities that were covered by the chapter's limitations of liability. Id. at 613. In 1996, Chapter 75 did not include playgrounds and swing sets as being an enumerated recreational activity. Id. The Legislature subsequently amended Chapter 75 to include "any other activity associated with enjoying nature or the outdoors." Id. Thus, the issue before the court was whether Ms. Torres' claims should be evaluated under Chapter 75 of the Civil Practice and Remedies Code or under the Tort Claims Act. Id. The court held that swinging on a swing was the type of activity that the Legislature intended to be covered by the limitation of liability established by Chapter 75. Id. at 615. The court affirmed the trial court's granting of summary judgment because Torres did not plead that her injuries were as a result of the city's willful, wonton or gross and negligent conduct, the standard of liability under Chapter 75. Id.; see Miranda, 133 S.W.3d at 225 ([t]he recreational use statute limits the Department's duty for premises defects to that which is owed a trespasser).

In her dissenting opinion in Torres, Justice Hankenson pointed out that the court's ruling "has the effect of removing parks from the list of governmental functions for which a municipality's sovereign immunity is waived under the Tort Claims Act, simply because parks are usually located outdoors and the court has decided that any activity occurring outdoors is within the scope of the recreational use statute." Id. at 618 (Hankenson, J., dissenting). In fact, the Torres decision has the effect of removing all parks owned or operated by governmental entities from potential liability under the Tort Claims Act and makes the recreational use statute the only source of potential liability. See id. Justice Hankenson concludes by opining that this result is contrary to the Legislature's intent as expressed in the wording of the recreational use statute. See id.

The Miranda decision indicates that a majority of the Texas Supreme Court continues to see Chapter 75 as pre-empting section 101.058 of the TCA. A plaintiff cannot avoid the heightened liability standard established by the Recreational use statute by alleging liability under the TCA for the condition or use of property. Miranda, 133 S.W.3d at 233. See State of Tex. Parks & Wildlife Dep't v. Morris, 129 S.W.3d 804, 809-10 (Tex. App.–Corpus Christi 2004, no pet.) ("[t]he Tort Claims Act ... does not allow plaintiffs to circumvent the heightened standards of a premises defect claim contained in section 101.022 by recasting the same acts as a claim relating to the negligent condition or use of tangible property."). Therefore, merely alleging injuries were caused by the use of personal property or nuisance/attractive nuisance does not allow a party to get around the standard of care set forth in the recreational use statute. State v. Shumake, 131 S.W.3d 66, 81 (Tex. App.–Austin, 2003, pet. filed).

In State of Tex. v. Shumake, 199 S.W.3d 279 (Tex. 2006), the Texas Supreme Court rejected the State's argument that liability under the Recreation Use statute was limited to injuries resulting from negligent activities being conducted on the property. The case arose from the death of nine-year old Kayla Shumake at the Blanco State Park, which is owned and operated by the State Parks and Wildlife Department. Kayla and her parents were at the park when she drowned while swimming in the Blanco River. The Shumakes alleged that Kayla's drowning was caused by a strong undertow created by a man-made culvert that diverted water under a nearby park road. Id. The Shumakes offered evidence that only days before Kayla's death, three other park patrons reported to Parks and Wildlife's Austin office that they almost drowned as a result of the undertow adjacent to the culvert. Id.

The State argued that liability under Chapter 75 of the Civil Practice and Remedies Code was limited to injuries caused in connection with negligent activities being conducted on the premises. Id. In order to prevail on negligent activity claim, a plaintiff must establish that she was injured as a result of a contemporaneous activity being held on the property and not by a premises defect. Id. The State contended that under Chapter 75 land owners had no duty to warn of premises defects but only of potential danger from activities being held on the premises. Id.

The Supreme Court rejected the State's argument and held that, under the plain language of Chapter 75, land owners had the duty to warn of certain premises defects. The Court noted that it was not requiring land owners to warn of "the inherent dangers of nature."

> A landowner has no duty to warn or protect trespassers from obvious defects or conditions. Thus, the owner may assume that the recreational user needs no warning to appreciate the dangers of natural conditions, such as a sheer cliff, a rushing river, or even a concealed rattlesnake. But a landowner can be liable for gross negligence in creating a condition that a recreational user would not reasonably expect to encounter on the property in the course of the permitted use.

Id. (citations omitted). The court also pointed out that the standard for liability was whether the governmental land owner had committed "an act or omission involving subjective awareness of an extreme degree of

risk, indicating conscious indifference to the rights, safety, or welfare of others." Id.

In order to establish liability under the Recreational Use Statute, the plaintiff must prove gross negligence or intent to injure. Stephen F. Austin Univ. v. Flynn, 228 S.W.3d 653 (Tex. 2007). Flynn failed to show the sprinklers represented an extreme risk, or that the university was consciously indifferent to the risk of the sprinklers causing serious injury. Id. The Recreational Use Statute does not require the land owner to make the premises safe for recreational purposes or to warn users of the property of defects that are open or obvious. Id.; Morris v. Tex. Parks & Wildlife Dep't, 226 S.W.3d 720 (Tex.App–Corpus Christi 2007, no pet.) (there was no duty to warn of possibility of hot ash or coals in campfire ring). Flynn could not establish jurisdiction where she and her husband both saw the sprinklers before they rode through them. Stephen F. Austin Univ. v. Flynn, 228 S.W.3d 653 (Tex. 2007). Mere general allegations of gross negligence related to running sprinklers at times of high traffic on the trail were insufficient to establish jurisdiction under the Recreational Use Statute. Id.

The Texas Supreme Court also distinguishes between the duties owed by a governmental entity, depending on the condition that caused the plaintiff's injury. See City of Waco v. Kirwan, 298 S.W.3d 618 (Tex. 2009). Kirwan arose from a death in a city park caused by the collapse of rocks on a cliff on which the decedent was sitting. Id. at 620. The city had put up a wall back from the cliff, and the wall included the warning that visitors should not go past the wall for their safety. Id. The decedent went past the wall and the warning to sit on the cliff. Id. The Supreme Court held that: "We must … apply the statute to his case in a manner that furthers that policy [of encouraging governmental and private entities to open up their land for public use]. Thus, we hold that a landowner … under the recreational use statute, does not generally owe a duty to others to protect or warn against the dangers of natural conditions on the land, and therefore may not ordinarily be held to have been grossly negligent for failing to have done so." Id. at 626.

Chapter 75 establishes the standard of care even when the plaintiff had to pay for admission to the recreational facility. Shumake, 131 S.W.3d at 81.

The amendments to Chapter 75 of the Texas Civil Practice and Remedies Code require municipalities or counties that own, operate, or maintain recreation facilities at which hockey, in-line hockey, skating, in-line skating, roller-skating, skateboarding, and/or roller-blading are conducted must post a specified notice. TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(g). However, the statute does not specify the consequence of failing to post the notice. TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(g) (Vernon Supp. 2000).

The fact that the governmental entity did not build or maintain the recreational facility does not remove it from the protection of the Recreational Use Statute. Stephen F. Austin Univ. v. Flynn, 228 S.W.3d 653 (Tex. 2007). In Flynn, Stephen F. Austin gave an easement to the City of Nacogdoches for a part of its campus for inclusion in a hike and bike trail. Id. The trail was built and maintained by the city. While the university did not maintain the trail, it did not lose its protection under the Recreational Use Statute. Id. The purpose of the Recreational Use Statute is to encourage landowners to open their property to the public for recreational use. Id. Thus, the Supreme Court held that it would be wrong for the university to lose the protection of the act when the only reason for giving the easement was for the inclusion of a part of the campus in the city's hike and bike trail. Id.

Additionally, the plaintiff does not need express permission from the land owner to use the land in order for their claim to fall under the Recreational Use Statute. Stephen F. Austin Univ. v. Flynn, 228 S.W.3d 653(Tex. 2007). The statute does not specify how permission is to be given. Id. Permission can be implied from the landowner's knowledge of and acquiescence to the public's use of the land for recreational purposes. Id. Flynn was deemed to have the university's permission to go on the property by the fact that the university gave an easement to the city authorizing the city to include part of its campus in a hike and bike trail. Id.

D. Criminal Activities by Third Parties.

Under limited circumstances, liability may exist for an owner/occupier of premises when an invitee is injured by the intentional or criminal act of another. Such liability may the owner/occupier knows or has reason to know that criminal acts are likely to occur. When such activity is foreseeable, the landowner may have a duty to take steps to offer reasonable protection against attacks. Kendrick v. Allright Parking, 846 S.W.2d 453 (Tex. App.–San Antonio 1992, pet. denied).

A governmental entity may also be liable for the intentional or criminal acts of a third person. Section 101.057(2) of the TCA provides that the TCA's waiver of sovereign immunity does not extend to claims arising out of assault, battery, false imprisonment, or any other intentional tort. TEX. TORT CLAIMS ACT § 101.057(2). This section has been construed to apply only to the conduct of government employees. Delaney, 835 S.W.2d at 56. Therefore, a government premises owner/occupier may have liability for the criminal or intentional acts of a third party in the same

manner as a private owner/occupier. Id. But see Univ. of Tex. El Paso v. Moreno, 172 S.W.2d 281 (Tex. App.–El Paso 2005, no pet.) (University was not liable where plaintiff was injured from criminal actions of others - tearing down goal posts at a football game - not as a result of any defect in the property at issue, that is, the goal posts).

IX. CONCLUSION

Three issues must be addressed before bringing or defending suit against a governmental entity under the TCA. The first issue that must be considered in any claim or potential claim involving a governmental entity is whether there is a waiver of immunity from suit and a waiver of immunity from liability by statute. Unless the claim is authorized by statute the suit should be dismissed under the doctrine of sovereign immunity.

Last, considerable thought must be given to how the case should be submitted to the jury, and what objections and exceptions need to be made in order to preserve for appeal any complaints regarding the jury charge.