PLEAS TO THE JURISDICTION

DARRELL G-M NOGA
ELIZABETH R. FLORA
Fee, Smith, Sharp & Vitullo, L.L.P.
Three Galleria Tower
13155 Noel Road, Suite 1000
Dallas, Texas 75240

State Bar of Texas
18TH ANNUAL SUING AND DEFENDING GOVERNMENTAL ENTITIES COURSE
July 13 – 14, 2006
San Antonio

CHAPTER 4

FSSV
Fee, Smith, Sharp & Vitullo LLP

Three Galleria Tower 13155 Noel Road Suite 1000 Dallas, Texas 75240
P 972-934-9100 F 972-934-9200 www.feesmith.com

dnoga@feesmith.com

ATTORNEY PROFILE

DARRELL G-M NOGA, born in Chicago, Illinois, 1957; Admitted to the State Bar of Texas, 1992; United States District Court in the Northern, Eastern, Southern and Western Districts of Texas; the State Bar of Illinois, 1984; and the United States District Court for the Northern District of Illinois; Preparatory Education; DePaul University (B.A. Summa Cum Laude 1979; M.S. Summa Cum Laude 1981 / selected convocation speaker). Legal Education: Georgetown University, Washington, D.C., 1984. Professional Affiliations: Member / State Bar of Texas, State Bar of Illinois; Dallas Bar Association; TADC, TCAA, Federal Bar Association, DRI.

With over twenty years of experience after obtaining his J.D. from Georgetown University in Washington, D.C. Mr. Noga has focused on the representation of diverse governmental and corporate entities, with a particular emphasis on defending Texas municipalities and other government agencies and departments in various civil rights, land use and planning, tort, employment and contract litigation, as well as in other municipal matters. Darrell has also served as a municipal prosecutor and has significant trial and appellate experience in both state and federal courts, including argument before the Texas Supreme Court.

Mr. Noga is a frequent seminar instructor and author of numerous publications.

FSSV
Fee, Smith, Sharp & Vitullo LLP

Three Galleria Tower 13155 Noel Road Suite 1000 Dallas, Texas 75240
P 972-934-9100 F 972-934-9200 www.feesmith.com

eflora@feesmith.com

ATTORNEY PROFILE

ELIZABETH R. FLORA, born in Royal Oak, Michigan, 1976; Admitted to the Texas Bar, 2002; United States District Court for the Northern District of Texas and the Eastern District of Texas, 2002; Preparatory Education: University of Texas at El Paso (B.A., English Literature, 1998); Legal Education: Arizona State College of Law (J.D., 2002); Internship, Arizona Attorney General, 2002; Internship, City of Phoenix Prosecutor's Office, 2001; Professional Affiliations: State Bar of Texas; American Bar Association; Texas Young Lawyers Association.

Elizabeth came to FEE, SMITH, SHARP & VITULLO, L.L.P. from El Paso, Texas, where she practiced for three years for an insurance defense firm. There she gained extensive experience in civil defense litigation with a focus in the area of medical malpractice and negligence.

Currently, Ms. Flora practices in the firm's Governmental Section where she maintains an extensive motion practice with an emphasis on defending Texas municipalities and other government agencies in various constitutional, civil rights, land use and planning, tort, employment and contract litigation.

TABLE OF CONTENTS

I. INTRODUCTION 1
A. Philosophical Battle in *Miranda* 3

II. "NUTS & BOLTS" 4

III. THE IMPORTANCE OF INTERLOCUTORY APPEAL: SECTION 51.014 (a)(8) OF THE TEXAS CIVIL PRACE AND REMEDIES CODE 7
A. Bringing an Interlocutory Appeal 7
B. Who May Bring an Appeal 8
C. Stay of Proceedings 9

IV. APPLICATION BY THE BENCH, OR LACK THEREOF 9
A. *Texas Department of Parks and Wildlife v. Miranda* 9
B. *Harris County, Texas and Carl Borchers v. Sykes* 11
C. *City of Houston and Harris County v. Tanya Lynn Degner* 12
D. *City of Amarillo v. Ron Dyer and Jo Dyer* 13

V. TACTICS 14
A. Stays 14
B. Impact of Request for Affirmative Relief 15
1. *Reata Construction Corp. v. City of Dallas* 15
2. "Sue and Be Sued" 16
3. *Dequire v. City of Dallas* 16
C. Section 101.106 of the Texas Tort Claims Act 17
D. Use of Evidence 18

VI. CONCLUSION 18

APPENDIX A 20

APPENDIX B 33

APPENDIX C 46

APPENDIX D 50

APPENDIX E 69

APPENDIX F 73

APPENDIX G 78

APPENDIX H 80

TABLE OF AUTHORITIES

Cases **Page(s)**

AB-Tex. Beverage v. Angelo State University,
96 S.W.3d 683, 686-688 (Tex. App. - Austin 2003, no pet.) 7

Baker v. Seaver,
567 S.W.2d 854, 856-857 (Tex. App. – Eastland 1978, no writ) 6

Barcroft v. State,
900 S.W.2d 370, 371 (Tex. App. – Texarkana 1995, no writ) 6

Baylor College of Med. v. Tate.,
77 S.W.3d 467, 472 (Tex. App. - Houston [1st Dist.] 2002, no pet.) 8

Bland Independent School District v. Blue,
34 S.W.3d 547, 554 (Tex. 2000) ..... 1, 2, 5, 9 , 10

Bernard Hanyard Enterprises v. McBeath,
663 S.W.2d 639, 642-643 (Tex. App. – Austin 1983, writ ref. n.r.e.) 5

Booth v. Texas Employer's Ins. Association,,
132 Tex. 237, 123 S.W.2d 322, 327 (1938) 5

Brenham Hous. Auth. v. Davies,
158 S.W.3d 53 (Tex. App. – Houston [14th Dist.] 2005) 8

Bridge v. Robinson,
20 S.W.3d 104, 118 at n.9 (Tex. App. – Houston [14th Dist.] 2000) 8

Cantu v. Parales .
97 S.W.3d 861, 963 (Tex. App. - Corpus Christi 2003, no pet.) 6

City of Amarillo v. Ron Dyer and Jo Dyer,
No. 07-05-00325-CV, 2006 Tex. App. LEXIS 3045 (Tex. App. - Amarillo, April 13, 2006) 13

City of Houston v. Clear Channel Outdoor,
2004 WL 63561 (Tex. App. – Houston [14th Dist.] 2004, pet. filed) 16

City of Houston and Harris County v. Tanya Lynn Degner,
No. 01-05-00133-CV, 2006 Tex. App. LEXIS 4304
(Tex. App. -- Houston [1st Dist.] May 18, 2006) 12

City of Houston v. Jones,
2004 Tex. App. LEXIS 7493 (Tex. App. Houston [1st Dist.] Aug. 19, 2004) 17

City of Mexia v. Tooke,
115 S.W. 3d 618 (Tex. App. – Waco 2003, pet. granted) 16

City of Pasadena v. Environmental Infrastructure Group, L.P. et al.,
No. 13-05-253-CV, 2006 Tex. App. LEXIS 1982 (Tex. App. – Corpus Christi, March 16, 2006, pet. filed) 16

Connor v. Collins,
378 S.W.2d 133, 134 (Tex. App. - San Antonio 1964, dism'd w.o.j.) 4

County of Cameron v. Brown,
80 S.W.3d 549, 556-557 (Tex. 2002) 2, 6

Crane County v. Saults,
101 S.W.3d 764 (Tex. App. - El Paso 2003) 8

Dequire v. City of Dallas
No. 05-04-01865-CV (Tex. App. - Dallas, April 18, 2006) 16, 17

Federal Sign v. Texas S. University
951 S.W.2d 401, 405 (Tex. 1997) 6

Greenstein, et al v. Burgess Marketing,
744 S.W.2d 170, 180 (Tex. App. - Waco 1987, writ den.) 5

Harris County and Carl Borchers v. Sykes
136 S.W.3d 635, 639 (Tex. 2004) 7, 8, 11, 12, 14, 18

Heart Hosp. IV, L.P. v. King
116 S.W.3d 831 (Tex. App. - Austin 2003) 8

Kashatrya v. Texas Work Force Commission
97 S.W.3d 825, 831 (Tex. App. - Dallas 2003, no pet.) 4

Kinnear v. Texas Commission on Human Rights,
14 S.W.3d 299 (Tex. 2000) 16

Lamar University v. Doe,
971 S.W.2d 191, 193 (Tex. App. – Beaumont 1998, no pet.) 5

Law v. Texas Delivery Service, Inc.,
335 S.W.2d 653, 655 (Tex. App. – Dallas 1960, ref. n.r.e.) 4

Lion Boulos v. Wilson,,
834 F.2d 504 (5th Cir. 1997) 15

Logan v. Armstrong,
694 S.W.2d 68, 71-72 (Tex. App. – Corpus Christi 1985, no writ) 6

Metropolitan Transit Authority v. MEB Engineering, Inc.,
2004 WL 1584958 (Tex. App. – Houston [1st Dist.] 2004, pet. filed) 16

Missouri Pac. R. Co. v. Brownsville Navigation Dist.,
453 S.W.2d 812, 13 Tex. Sup. Ct. J. 308 (Tex. 1970) 16

Mobil Oil Corp. v. Shores,
128 S.W.3d 718 (Tex. App. – Fort Worth 2004)..... 8

My-Tech, Inc. v. UNTHSC,
05-04-01150-CV, 2005 WL 1460662 (Tex. App. – Dallas [5th Dist.] June 22, 2005)..... 17

Pan Am Life Insurance Company v. Erbauer Construction Company, ,
805 S.W.2d 395-396 (Tex. 1991)..... 5

Paula Construction, Inc. v. City of Lytle,
No. 04-05-00317-CV, 2006 Tex. App. LEXIS 3678 at n.1 (Tex. App. – San Antonio,
May 3, 2006) 16

Perry v. Del Rio,
66 S.W.3d 239, 251 (Tex. 2001) 13

Prada de Portugal v. Prada,
2005 Tex. App. LEXIS 192 (Tex. App. – San Antonio, January 12, 2005)..... 8

Prairie View A&M University v. Mitchell,
27 S.W.3d 323, 327 (Tex. App. – Houston [1st Dist.] 2000, pet. den.) 13

Reata Construction Corp. v. City of Dallas,
47 Tex. Sup. J. 408, 2004 Tex. LEXIS 303 (Tex. April 12, 2004, pet. filed) 15, 16, 17

Redevelopment v. Fort Worth Independent School District,
2005 WL 503172 (Tex. App. – Fort Worth 2005, pet. filed) 16

Satterfield & Pontikes Const. v. Irving Independent School District,
123 S.W.3d 63 (Tex. App. – Dallas 2003, pet. filed)..... 16

Speer v. Stover,
685 S.W.2d 22, 23 (Tex. 1985) 5, 6

State v. Benavides,
772 S.W.2d 271, 273 (Tex. App. – Corpus Christi 1989, den.) 6

State v. Martin,
347 S.W.2d 809, 814 (Tex. Civ. App. – Austin 1961, writ ref'd n.r.e.)..... 17

Subaru of America v. David McDavid Nissan, Inc.
84 S.W.3d 212, 221 (Tex. 2002) 4

Telthorster v. Tennell,
92 S.W.3d 457, 464 (Tex. 2002) 7, 8

Texas Ass'n of Bus. v. Texas Air Control Board,
852 S.W.2d 440, 445 (Tex. 1993) 5

Texas Department of Parks and Wildlife v. Miranda,
133 S.W.3d 217 (Tex. 2004) 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 15, 18, 19

Texas Department of Transportation v. Jones,
8 S.W.3d 636, 638 (Tex. 1999) 6

Texas Dep't of Criminal Justice v. Miller,
51 S.W.3d 583, 587 (Tex. 2001) 2

Texas Dep't of Criminal Justice v. Simons,
140 S.W.3d 338, 349 (Tex. 2004) 8

Texas Natural Res. Conservation Comm'n v. I.T. – Davy,
74 S.W.3d 849, 855 (Tex. 2002) 2

Texas Natural Res. Conservation Comm'n v. White,
46 S.W.3d 864, 868 (Tex. 2001) 2

University of Texas Southwestern Medical Center at Dallas v. Loutzenhiser,
140 S.W.3d 351, 365 (Tex. 2004) 7, 8

W.D. Haden Co. v. Dogen,
308 S.W.3d 838, 839-40 (Tex. 1958) 6

Wicks v. Mississippi,
41 F.3d 991 (5th Cir. 1995) 15

Rules and Statutes **Page(s)**

Fed. R. Civ. P. 12(b)(6) 1

Section 101.057 of the Texas Tort Claims Act 4

Section 101.058 of the Texas Tort Claims Act 9

Section 101.101 of the Texas Tort Claims Act 7, 8

Section 101.106 of the Texas Tort Claims Act 7, 11, 12, 17, 18

Tex. Civ. Prac. & Rem. Code §101.001 7

Tex. Civ. Prac. & Rem. Code §75.001 9

Tex. Civ. Prac. & Rem. Code §51.014(a)(8) 5, 7, 8, 9

Tex. R. Civ. P. 85 1

Tex. R. Civ. P. 166a(b)-(c) 11

Tex. R. Civ. P. 166(a)(c) 10

Tex. R. Civ. P. 166(a)(i) 10

Tex. R. Civ. P. 198.2(c) 13

Tex. R. Civ. P. 198.3 13

Texas Local Government Code §51.075 16

5 William V. Dorsaneo III, Texas Litigation Guide, §70.03[1] (2000) 1

5 William V. Dorsaneo III, Texas Litigation Guide, §70.03[6] (2006) 6

PLEAS TO THE JURISDICTION

I. INTRODUCTION

For attorneys who defend governmental entities in the State of Texas, a plea to the jurisdiction is one of the most important and powerful tools in your arsenal. Texas courts, however, have not always viewed pleas to the jurisdiction in that same favorable light. Since the primary purpose of this paper is to update and freshen our perspective on this particular type of defense pleading, as well as to update recent case applications and make note of certain related tactical concerns, the authors will try not to stray too far down a philosophical path. However, some commentary in this vein really is mandatory to gain a foundation for understanding such pleas and the following discussion.

The first basic point is obvious, or soon should be after reviewing this paper. Pleas to the jurisdiction are a tactic loved by the defense bar and a bane to plaintiffs. No surprise in that assessment. The area in the middle, however, where our judiciary stands to referee the contest, is the area where philosophical doubt and conflict about the nature and application of pleas to the jurisdiction arise. Indeed, the dispute at the level of the Texas Supreme Court is now whether pleas to the jurisdiction are even necessary. If they are needed, there is a concurrent sentiment within some members of the Court that refining the Texas Rules of Civil Procedure to provide more specifics for use of pleas to the jurisdiction might well be a welcome development. In fact, given the power of pleas to the jurisdiction as a tactical device, particularly for lawyers who defend governmental entities, it is more than ironic that the only mention in the Texas Rules of Civil Procedure as to pleas to the jurisdiction is to be found in a minor cross-reference concerning permissible parts of an answer. Tex. R. Civ. P. 85.

But we get a bit ahead of our story. Before further discussing the foundational areas of dispute with regard to pleas to the jurisdiction, and then proceeding to note how they play out in actual practice, we should take a moment for a brief refresher course as to what constitutes a plea to the jurisdiction. By the way, although this paper is presented in conjunction with a seminar on suing and defending governmental entities, and although pleas to the jurisdiction are inextricably linked with suits against governmental entities, keep in mind that use of this tactic is not limited to governmental entities.

In general, pleas to the jurisdiction are one of a number of devices called "dilatory pleas." Since dilatory pleas are defined as those pleas intended to delay or defeat a cause of action without regard to whether the claims asserted have merit, pleas to the jurisdiction were lumped in with pleas such as special exceptions, special appearance motions, motions to transfer, motions to quash issuance or service of process, and pleas in abatement. *See Bland Indep. Sch. Dist. v. Blue,* 34 S.W.3d 547, 554 (Tex. 2000) (discussing a plea to the jurisdiction as a dilatory plea), citing, 5 William V. Dorsaneo III, Texas Litigation Guide, §70.03[1] (2000). Perhaps herein lies the root of the problem; i.e., a plea to the jurisdiction was conceptually lumped with categories of pleadings that supposedly did not pertain to the "merits" of a claim. One can easily see where an intellectual disconnect would then result when courts addressed pleas to the jurisdiction in cases where aspects of the merits did come into play of necessity. Part of the problem may also be that there is no real equivalent in the Texas Rules of Civil Procedure to a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss. Some might claim special exceptions serve such a function, but they are rarely dispositive in impact and typically only foster half-hearted amendment and delay.

After all, a plea to the jurisdiction is a mechanism essentially seeking dismissal of the case on the grounds that the court lacks subject matter jurisdiction. That analysis is all well and good when it can be made based on the face of the plaintiff's pleadings, but what happens when jurisdictional issues are constrained by a particular statute, such as the Texas Tort Claims Act, another area of no little interpretation? The analysis that then occurs can become more than a bit chaotic, as a court may well have to make inquiry into the substance of the claims presented to determine whether or not it has subject matter jurisdiction. For instance, the Texas Supreme Court's analysis of the legal issues presented in the case of *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004), which will be discussed in greater detail below, required a review of whether the Plaintiff had properly pled premises defect claims in battling a plea to the jurisdiction. By necessity, the Court's review then had to include a discussion of evidentiary issues related to gross negligence standards thereto and applicable recreational use statutes.

Historically, most courts seem more comfortable looking at this sort of analysis in a summary judgment setting and not as a dispositive threshold question of law, which a plea to the jurisdiction most emphatically is. Predictably, this has led to some inconsistent applications by the judiciary in addressing pleas to the jurisdiction, and this inconsistency is particularly encountered by attorneys involved in claims with governmental entities. Such varying results are further exacerbated when defense counsel is petitioning the court to determine whether a plaintiff's

claims come within the specific terms of a statutory waiver of sovereign immunity, such as is found in the Tort Claims Act, largely because of widely varying underlying facts. In a nutshell, pleas to the jurisdiction can be wonderful devices to promptly get rid of lawsuits lacking merit. However, when the plea to the jurisdiction is used improperly, i.e., in a case of obviously disputed material fact, or where summary judgment would be far more appropriate, then consternation and confusion ensue.

In the context of the foregoing, and wending our way back to the philosophical debate that sets the stage for further examination of the current status of pleas to the jurisdiction, it is not hard to see the derivation of the crux of the dispute regarding pleas to the jurisdiction. Namely, how far to go in factual inquiry of jurisdictional issues that overlap with the merits of a case, in determining what is supposedly a question of law. There is no dispute that whether a court has subject matter jurisdiction is a question of law, *Tex. Natural Res. Conservation Comm'n v. I.T.-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). Moreover, appellate courts have to review this question of law and the trial court's ruling thereon de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 at 226. But what happens when this question of law as to the court's jurisdiction involves questions of fact? The opinion in *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d at 554, held that a court may be required to make inquiry into the substance of the claims presented to determine subject matter jurisdiction. But, as is often the case with Texas Tort Claims Act claims, the jurisdictional issues inextricably become intertwined with the merits.

In the *Bland* case, the Texas Supreme Court had held that a trial court "may consider evidence and must do so when necessary to resolve the jurisdictional issues raised." 34 S.W.3d at 555 (emphasis supplied). The Texas Supreme Court also pointed out in *Bland* that where jurisdictional issues could be determined by plaintiff's pleadings, then such analysis would be the preferred route, unless the defense alleged the pleadings were advanced as a sham for the purpose of wrongfully obtaining jurisdiction (there as in the "amount in controversy" requirement). However, alleging "sham" pleadings was not essential. In the subsequent case of *Miranda*, 133 S.W.3d 217, the Texas Supreme Court had to rule that the court of appeals had misapplied the Supreme Court's holding in *Bland*. Apparently the court of appeals in the *Miranda* case thought that they could not inquire behind the factual allegations pled by plaintiffs to support subject matter jurisdiction, unless the defendant specifically alleged that those allegations were pled as a sham to wrongfully obtain jurisdiction.

The Supreme Court in *Miranda* held that this conflicted with its prior holding in *Bland* and the directive therein that a court must consider evidence when necessary to resolve jurisdictional issues raised. *See also, County of Cameron v. Brown*, 80 S.W.3d 549, 556-557 (Tex. 2002) (considering certain evidence in evaluating forseeability element of premises defect claim under the Tort Claims Act); *Texas Dep't Crim. Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001) (examining certain evidence to determine whether Plaintiff affirmatively demonstrated waiver of sovereign immunity); *Texas Natural Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 868 (Tex. 2001) (analyzing relevant evidence in considering whether claim was caused by "motor-driven equipment" under the Tort Claims Act).

So when do you consider facts in addressing a plea to the jurisdiction, which is supposed to be a clear question of law, and to what extent? The Texas Supreme Court in *Miranda* recognized that there are some cases where disputed evidence of jurisdictional facts that also implicate the merits of the case may require resolution by the finder of fact. *Miranda*, 133 S.W.3d at 226. Thus no definitive answer is presented. What is disturbing to some members of the bench and bar is the somewhat inconsistent analysis that follows, as well as the whole point of a plea to the jurisdiction being lost in a swamp of relativism. For instance, in the same section of the opinion in *Miranda*, the Supreme Court string cites some cases indicating that in certain situations predicate facts can be so inextricably linked to the controversy's merits that the District Court may "defer resolution of the jurisdictional issue until the time of trial." *Id.* That possibility seems to flatly conflict with the concurrent admonition by the Supreme Court that the trial court is supposed to rule on the plea to the jurisdiction as soon as possible, and we are reminded that this speed is a matter of policy. *Miranda*, 133 S.W.3d at 227; *Bland*, 34 S.W.3d at 554; "[B]ecause a court must not act without determining that it has subject-matter jurisdiction to do so, it should hear evidence as necessary to determine the issue before proceeding with the case."

Well, what kind of evidence can the court review in considering a plea to the jurisdiction? Essentially it appears to have wide discretion to allow review of whatever documents, affidavits or other evidence it requires, including conducting limited evidentiary hearings, to resolve disputed jurisdictional facts. *Miranda*, 133 S.W.3d at 227, n. 6. Furthermore, the Texas Supreme Court muddies the waters a bit more by confirming that the related hearing (and apparently the ruling) on a plea to the jurisdiction is left to the discretion of the trial court "which is in the best

position to evaluate the appropriate time frame for hearing a plea in any particular case." *Id.* at 229. But, the whole point of pleas to the jurisdiction is to have a procedural device to quickly weed out improper claims, particularly under a given statute. If pleas to the jurisdiction are converted into merely other forms of summary judgment, then their purpose as a matter of public policy and legal philosophy has been diminished if not entirely defeated. And make no mistake of the fact that pleas to the jurisdiction are intended to be entirely different animals, as evidenced by the fact that a governmental entity has a right of interlocutory appeal on a plea to the jurisdiction, as Section III of this paper will address in more detail. You do not see the same immediate avenue of appellate relief being afforded as to summary judgment motions, which is one problem ignored by theorists who would have summary judgment motions entirely replace pleas to the jurisdiction.

A. "Philosophical Differences" in *Texas Department of Parks and Wildlife v. Miranda*

Having taken this digression to set the stage as to the underlying tension between both sides of the bar and the bench in terms of pleas to the jurisdiction, let us return to that conflict as articulated by the Texas Supreme Court, and most clearly delineated in *Texas Dep't of Parks and Wildlife v. Miranda,* 133 S.W.3d 217 (Tex. 2004). In *Miranda*, note that Justice Jefferson issued a separate dissenting opinion, and Justice Brister issued another dissent, joined by Justice O'Neill and Justice Schneider.

The majority opinion in *Miranda* delivered by Justice Wainwright was, with respect to most of the majority opinion, joined by four Justices. However, a plurality opinion was issued with respect to Part III C. 1 of the opinion, as Justice Owen did not join in that portion of the majority opinion. That portion of the opinion deals with pleading standards for gross negligence and related claims under the recreational use statute.

As to the core of the opinion, the five Justice majority took issue with Justice Brister and his apparent disregard of the utility of pleas to the jurisdiction. Justice Wainwright pointed out that Justice Brister's approach "might be appropriate, if we were starting from scratch... pleas have been a useful procedural vehicle in Texas for over 150 years... the Court declines to abolish by written opinion such pleas to the jurisdiction." *Id.* at 232. Justice Wainwright found a case going as far back as 1893 to show that Texas courts had long allowed consideration of evidentiary challenges to subject matter jurisdiction and, with a little dig at Justice Brister, wonders why something that has been around for such a long time does not qualify as a "standard" or "established" motion. Justice Wainwright then asks rhetorically "perhaps a second mention in the Texas Rules of Civil Procedure would suffice," taking a nudge at Justice Brister's comments that there is only one mention of pleas to the jurisdiction in the TRCP. *Id.*

Interestingly, Justice Wainwright does consider that refining the rules for considering a plea supported by evidence may be a better approach than eliminating pleas to the jurisdiction entirely. Nonetheless, despite taking this approach, Justice Wainwright questions Justice Brister's claim that the authority of trial courts to consider evidence in a plea to the jurisdiction is somehow unfair to the parties. As Justice Wainwright notes, both parties in *Miranda* relied on extrinsic evidence, both filed such evidence with the court, and the court had allowed depositions to occur. In the *Miranda* case, the majority opinion acknowledged that certain factual issues relating to the plaintiff's premises defects theory were intertwined with the jurisdictional issue as to whether the department could be sued under the Texas Tort Claims Act, but felt the court resolved the evidentiary considerations appropriately.

As a side note, the authors emphasize that a careful review of the majority opinion and dissents in *Miranda* does an excellent job of providing both background and extensive case citations as to the issues of primary importance in this paper. For that reason, a complete copy of the case has been attached in the Appendix hereto, and it is strongly recommended reading for those practitioners faced with this issue.

As for the opposite side, in his dissent in *Miranda*, Justice Brister called pleas to the jurisdiction the "white elephant" of current Texas motion practice. 133 S.W.3d at 239. Justice Brister then provides a bit of amusement by citing the Oxford English Dictionary's definition of "white elephant" to include "a burdensome or costly possession…., an object, scheme, etc. considered to be without use or value." *Id.* at n.7. According to the dictionary the term derived from tactics developed by the Kings of Siam who made a habit of giving white elephants to particularly obnoxious members of the court. It appears that although the white elephant was rare and therefore supposedly revered, the Kings of Siam knew that the recipient of the gift could be ruined by the high cost of its maintenance. Without getting into further detail at this point of the paper, as we will further discuss *Miranda* below, suffice it to say that Justice Brister felt special exceptions or summary judgment motions are more than sufficient for addressing jurisdictional issues asserting governmental immunity. He essentially opined that pleas to the jurisdiction should be severely curtailed if

not thrown out the window altogether. Justice Brister seemed rather inordinately bothered with the fact that there are no rules to specify form, deadlines or evidentiary requirements for pleas to the jurisdiction, *id*. at 242, and concluded that we should return to "standard motions as the vehicles for asserting governmental immunity… by special exceptions or motions for summary judgment." *Id.* at 243. Rather chillingly for defense attorneys representing governmental entities, he sees no problem with thus "putting a stop to the resurgence of common-law pleadings in immunity cases." *Id.* at 241. Unsurprisingly, the authors vigorously disagree, and emphasize that the pleadings preferred by Justice Brister do not carry a right of interlocutory appeal.

Of course, Justice Brister does note that some difficulties may ensue for government as "governmental units may incur unnecessary discovery costs and delays unless judges agree to hear summary judgment motions on jurisdictional matters as early in the case as they might hear a plea to the jurisdiction…." *Miranda*, 133 S.W.3d at 244. Nonetheless, gutting the plea to the jurisdiction would appear preferable to Justice Brister and those who joined him in dissent. In contrast, the authors of this paper doubt such motions would be heard early in a case, and harbor strong suspicions that many state court judges in Texas would happily use Justice Brister's encouragement to ignore jurisdictional questions of law by transforming them into questions of fact that allegedly touch on the merits and must therefore be determined by the jury. Such determination would likely come long after a governmental entity that should never have been in a suit has spent taxpayers' money and resources on defending many claims without merit.

Before further examining how *Miranda* has served to crystallize the battleground between plaintiffs, defendants and the judiciary as to pleas to the jurisdiction in Section IV of this paper, the reader needs to preliminarily address some specifics as to pleas to the jurisdiction in Texas. Some of those specifics will be addressed in the following section on "Nuts & Bolts", to be followed by an analysis of the importance of interlocutory appeal in connection with pleas to the jurisdiction, further discussion of case law, analysis of certain tactical considerations, and some concluding remarks.

II. "NUTS & BOLTS"

As noted in the introductory portion of this paper, a plea to the jurisdiction is an attempt to dismiss the case on the grounds that the court lacks subject matter jurisdiction. There are broadly two ways in which plaintiff's pleadings can be attacked in this regard. One is that plaintiffs have failed to plead the necessary facts to establish jurisdiction as to certain causes of action. The second is that plaintiffs have indeed pled facts which affirmatively negate the existence of jurisdiction as to other causes of action. For a simple example, consider that plaintiffs advance only theories of intentional tort against a municipality in state court. A plea to the jurisdiction could immediately be filed based upon the fact that plaintiff's pleadings, if taken as true, effectively negate jurisdiction given Section 101.057 of the Texas Tort Claims Act which specifically provides that immunity is not waived as to intentional torts. In contrast, suppose plaintiffs advance some sort of contractual theory but fail to properly plead that a contract exists between them and a municipality. They have thus failed to advance facts to establish a claim for which jurisdiction would lie, or facts sufficient to bring these claims within exceptions to sovereign immunity created by the Texas Tort Claims Act.

As the Texas Supreme Court made clear in *Miranda*, 133 S.W.3d 217, whether the plaintiff has alleged facts that demonstrate subject matter jurisdiction is not only a question of law, but the burden is on the plaintiff to plead facts that affirmatively demonstrate subject matter jurisdiction. *See also, Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).

In the context of suing and defending governmental entities, pleas to the jurisdiction ordinarily arise in the context of asserting a governmental entity's sovereign immunity. Obviously without the state consenting to being sued, sovereign immunity defeats the court's subject matter jurisdiction, a remnant no doubt of the well-established principal that "It's good to be the King". However, to briefly digress, keep in mind that pleas to the jurisdiction are not necessarily restricted to such immunity issues. For instance, a plaintiff's failure to exhaust administrative remedies before filing suit may also be asserted by a plea to the jurisdiction. *See Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002); *see also Kashatrya v. Texas Work Force Comm'n*, 97 S.W.3d 825, 831 (Tex. App. – Dallas 2003, no pet.). Also, pleas to the jurisdiction have often been used in cases concerning standing issues or rights of the petitioner. For instance, a plea to the jurisdiction was used to assert that a trial court lacked jurisdiction to enjoin enforcement of a certain penal law when no vested property right of petitioner would be affected by enforcement, *Law v. Texas Delivery Service, Inc.*, 335 S.W.2d 653, 655 (Tex. App. – Dallas 1960, ref. n.r.e.), or that an amount in controversy was insufficient to confer jurisdiction. *See, e.g., Connor v. Collins*, 378 S.W. 2d 133, 134 (Tex. App. – San Antonio 1964, writ dism'd w.o.j.)

A challenge to the jurisdiction can be couched in other terms. Theoretically any such misnomer is not supposed to matter as courts are supposed to look to the substance of the plea rather than its title, and may consider an objection to jurisdiction even if incorrectly designated. Examples are found in the cases of *Speer v. Stover*, 685 S.W.2d 22, 23 (Tex. 1985), where a plea to the jurisdiction was mistakenly called a plea in abatement, and in *Greenstein, et al. v. Burgess Marketing*, 744 S.W.2d 170, 180 (Tex. App.— Waco 1987, writ denied), where a court sustained an objection to jurisdiction though it was brought as a special exception. The Texas Rules of Civil Procedure also require the court to look to substance and treat pleadings as if they had been properly designated. Nonetheless, be aware that courts sometimes refuse to do just that. Referring back to Justice Brister's dissent in *Miranda*, as discussed above, Justice Brister complains that some appellate courts have refused to consider any assertion of immunity that was not characterized as a "plea to the jurisdiction," and he continued to complain of a particular case where one governmental entity unsuccessfully asserted immunity by means of a summary judgment motion and special exceptions. However, after the 1997 legislative amendments to the Civil Practices & Remedies Code allowing interlocutory appeals of pleas to the jurisdiction by a government unit, "[t]he governmental entity filed the same objection now called a 'plea to the jurisdiction' and prevailed", *Miranda*, 133 S.W.3d at 241, discussing *Lamar Univ. v. Doe*, 971 S.W.2d 191, 193 (Tex. App. — Beaumont 1998, no pet.).

So why should we, particularly in the defense bar, care so much about preserving pleas to the jurisdiction, since according to Justice Brister you can raise the same immunity issues by summary judgment or, even by special exception (though using special exceptions would likely only result in allowing amendments to the pleadings). After all, objections to subject matter jurisdiction cannot be waived and can be raised for the first time after judgment and even on appeal. *Texas Ass'n of Business v. Texas Air Control Board*, 852 S.W.2d 440, 445 (Tex. 1993); *accord Pan Am Life Ins. Co. v. Erbauer Constr. Co.*, 805 S.W.2d 395-396 (Tex. 1991). These cases make it clear that even standing is an issue intertwined with subject matter jurisdiction that can be raised for the first time on appeal.

Well, the answer to that question, when you get right down to it, likely lies in the critical fact that the Texas Legislature has chosen specifically to allow interlocutory appeals from an order that grants or denies a plea to the jurisdiction by a governmental unit. Tex. Civ. P. & Rem. Code, §51.014(a)(8). That is one of the rare exceptions to the general rule that interlocutory orders are not appealable. Thus, it does not require too much intellectual exercise to understand the value of the plea to the jurisdiction as opposed to the motion for summary judgment. If, as defense counsel for a governmental entity, you lose your plea to the jurisdiction asserting governmental immunity, you have an immediate right to appeal. If the trial court got the issues wrong, or was simply attempting to push the responsibility for determining the case onto a jury, then you have a chance for a quick reversal by a court of appeals presumably well equipped to evaluate such issues, who will review the matter *de novo*. However, if you bring a motion for summary judgment and the trial court denies it, you have no right to interlocutory appeal in that regard and you must prepare for trial, perhaps in a case with traumatic injuries or exposure where your client should have statutory immunity.

An interesting side note in this tour of the basics concerning pleas to the jurisdiction revolves around an issue referenced in the Introduction, *infra*, and one which confused the lower court in *Miranda*: namely, whether or not a claim is pled in sham fashion so as to confirm jurisdiction. As far back as 1938, Texas courts have allowed a plea to the jurisdiction to be used to challenge whether a plaintiff's jurisdictional allegations have been intentionally fabricated to confer subject matter jurisdiction. *Booth v. Texas Employer's Ins. Ass'n*, 132 Tex. 237, 123 S.W.2d 322, 327 (1938). But, a careful practitioner will know the limits of this approach. To wit: you can use this type of plea to the jurisdiction to argue fraudulent creation of jurisdictional facts, such as the case in *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, where the court examined whether defendant could prove plaintiff's allegations of an amount in controversy were made fraudulently for the purpose of obtaining jurisdiction (otherwise the plaintiff's allegations as to the amount will control for jurisdictional purposes). But in contrast, any defendant who tries to use a plea to the jurisdiction merely alleging that plaintiff has falsely stated the claim would likely not have the plea to the jurisdiction sustained. This is because the question of whether the claim itself exists as a matter of fact goes to the merits of the case, and any attack arguing in effect "it never happened and plaintiff is making it up", strays too uncomfortably close to the merits to be a plea to the jurisdiction. *See, e.g., Bernard Hanyard Enterprises, Inc., v. McBeath*, 663 S.W.2d 639, 642-643 (Tex. App.— Austin 1983, writ ref'd n.r.e.).

Now we start straying back to the early battleground laid out in the introduction to this paper. How far into the facts can we go before those facts pertain solely to the merits of the case as opposed to the jurisdictional facts? Pleas to the jurisdiction arguing statutory restrictions often involve this

analysis. For instance, courts in Texas have used pleas to the jurisdiction to review if plaintiffs have included claims that by statute are supposed to be in the jurisdiction of another court. In his Texas Litigation Guide, Dorsaneo gives some examples of such cases: *Speer v. Stover*, 685 S.W.2d 22, 23 (Tex. 1985), where the issues related to an estate over which a certain county court should have had jurisdiction; *Logan v. Armstrong*, 694 S.W.2d 68, 71-72 (Tex. App.— Corpus Christi 1985, no writ), where a land commissioner was authorized by statute to decide a particular matter; *Baker v. Seaver*, 567 S.W.2d 854, 856-857 (Tex. App.— Eastland 1978, no writ), which involved a custody case and issues as to which court had continuing jurisdiction over the children in question; *State v. Benavides*, 772 S.W.2d 271, 273 (Tex. App.— Corpus Christi 1989, writ denied), which is one of many cases involving challenges to statutory requirements as to what county certain suits must be prosecuted in. 5 William V. Dorsaneo III, Texas Litigation Guide, §70.03[6] (2006).

In most cases the plaintiff has the burden of alleging facts that affirmatively show that the trial court has subject matter jurisdiction. Remember our discussion at the beginning of this Section II of this paper concerning the difference between failing to plead facts to support jurisdiction and facts that affirmatively negate jurisdiction. Although in the authors' experience courts will generally commingle the two strains of analysis in the interest of efficiency, Texas law generally prefers that if plaintiff fails to plead facts to establish jurisdiction, he should be afforded the opportunity to amend unless the petition affirmatively demonstrates incurable defects. Conversely, if a plaintiff's pleadings affirmatively negate the existence of jurisdiction, the court does not need to allow plaintiff leave to amend before granting the plea to the jurisdiction. *County of Cameron v. Brown* 80 S.W.3d 549, 555 (Tex. 2002); *Cantu v. Parales* 97 S.W.3d 861, 963 (Tex. App. – Corpus Christi 2003, no pet.). In this regard, a defense attorney urging a plea to the jurisdiction needs to be very clear to make this kind of bifurcated analysis when reviewing plaintiff's pleadings. If the plaintiff fails to plead facts sufficient to establish jurisdiction, defense counsel needs to consider whether the pleadings could be conceivably amended. If not, make sure to advise the court in the plea to the jurisdiction that not only does plaintiff fail to plead facts to establish jurisdiction, but that plaintiff can never plead such facts and therefore amendment would be futile. Likewise, if plaintiff has pled some facts which affirmatively negate jurisdiction, then not only should these be highlighted for the court but it should be made known to the court that such defects can be ruled upon without allowing plaintiff opportunity to amend. However, defense counsel do have an obligation to be somewhat precise in this regard, or as precise as can be depending on the clarity of the allegations of plaintiff's pleadings, and defense counsel need to resist the temptation to transform the plea to the jurisdiction into what may be a preliminary motion for summary judgment on the merits.

Another "nuts & bolts" issue to be considered is the distinction between immunity from suit and immunity from liability. The Texas Supreme Court in *Miranda*, 133 S.W.3d 217 at 224-225, outlined the distinction and pointed out that both of these concepts, immunity from suit and immunity from liability, are components of sovereign immunity. *See also Texas DOT v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999).

"[F]rom the earliest days of statehood, under the doctrine of governmental immunity, persons aggrieved by an action of the State or one of its agencies have been unable to sue the State without its permission." *Barcroft v. State*, 900 S.W.2d 370, 371 (Tex. App. – Texarkana 1995, no writ). The doctrine of sovereign immunity acts not only to provide a governmental unit with immunity from liability, but also acts to shield a governmental unit from suit as well. *Jones*, 8 S.W.3d at 636-637; *see W.D. Haden Co. v. Dogen*, 308 S.W.2d 838, 839-40 (Tex. 1958) (emphasis supplied). Looking at the Texas Tort Claims Act, the Supreme Court noted that this statute created a unique scheme in which those two immunities became co-extensive. Recall that that Tort Claims Act professes to waive and abolish sovereign immunity, but only to the extent of liability created in the Tort Claims Act itself. Hence, governmental entities are immune from suit unless the Tort Claims Act expressly waives immunity. In this regard, immunity from suit remains a jurisdictional defense that deprives the court of subject matter jurisdiction. *Jones, supra.* However, immunity from liability as a concept operates as an affirmative defense because the concept of immunity from liability protects the government from judgments even if the legislature has given consent to a lawsuit.

An example would be the comment in Texas cases that liability is not created or admitted simply by a legislative body granting permission to be sued. *Federal Sign v. Texas S. University*, 951 S.W.2d 401, 405 (Tex. 1997). Following that line of reasoning, affirmative defenses are not necessarily jurisdictional, and arguments of immunity from liability are therefore not appropriate to address in pleas to the jurisdiction. In contrast, immunity from suit is an entirely appropriate subject for a plea to the jurisdiction, as the trial court has no authority to hear any case where immunity from suit has not been waived. Obviously there is a certain overlap in the reality that if a governmental entity cannot be sued at

all it can certainly not be liable. The converse is not necessarily true; for instance, an entity may well be sued but its liability diminished or negated (as with statutory damage caps in the Tort Claims Act). After all, the Texas Supreme Court in *Miranda*, 133 S.W.3d 217, reaffirmed that the two immunities, from suit and from liability, are coextensive in the Tort Claims Act.

Miranda is instructive for analyzing application of the overlap of immunity from suit versus immunity from liability, because it involved even further limitations on a governmental unit's waiver of immunity by the limitations of liability articulated in the recreational use statute. The recreational use statute limited a governmental entity's duty to warn of premises defects to that duty owed a trespasser, and that duty in turn necessarily involved analysis as to whether gross negligence had occurred. Thus, under *Miranda*, even if a governmental unit had arguably waived its immunity from suit as to certain premises defects or conditions under the Tort Claims Act, the question of that governmental entity's immunity from suit as well as immunity from liability depended upon analysis of the recreational use statute and the gross negligence limitations thereto. The bottom line in that case is that a governmental unit would be held to have waived its sovereign immunity only if it was grossly negligent. As the Court made clear in *Miranda*, one can see how this kind of analysis became inextricably intertwined with the merits of the matter. Some of the Justices seemed to take a more simplistic approach to the analysis, for instance, claiming that a motion for summary judgment on lack of duty would have sufficed. Nonetheless, we know that such a motion, if denied, was not subject to interlocutory appeal.

In concluding our analysis of the basics of pleas to the jurisdiction, keep in mind that while private litigants can file pleas to the jurisdiction if appropriate, those private litigants have no right to an interlocutory appeal on a plea to the jurisdiction, whether or not that private litigant is trying to "piggyback" on some other party's alleged immunity. Indeed, private litigants that attempt such interlocutory appeals do so at their own peril as appellate courts have sanctioned litigants for same. *Telthorster v. Tennell* 92 S.W.3d 457, 464 (Tex. 2002). Individual government employees may not be as severely limited but there are some complications for individual defendants related to Section 101.106 of the Texas Tort Claims Act. Those issues will be discussed in Section V of this paper. Also, keep in mind that under recent case law the notice requirements in Section 101.101 of the Texas Tort Claims Act are not deemed jurisdictional. Thus, the Texas Supreme Court has held that although lack of such notice may bar actions under the Act it does not deprive the court of subject matter jurisdiction. *Univ. of Tex. Southwestern Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 365 (Tex. 2004).

Finally, be careful of whether or not jurisdictional arguments result in dismissal with or without prejudice and are therefore *res judicata* or not. For instance, there are some cases that suggest that a court dismissing a lawsuit for want of jurisdiction is not really *res judicata* on the merits, so it would not bar plaintiff from bringing the same suit again if the impediment to jurisdiction was removed (assuming it could be). *Ab-Tex. Beverage v. Angelo State University*, 96 S.W. 3d 683, 686-688 (Tex. App. – Austin 2003, no pet.). However, the Texas Supreme Court in *Harris County v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004), noted that while a dismissal with prejudice may be improper when plaintiff is capable of remedying the jurisdictional defect, there is a long line of cases under Texas law stating that dismissal with prejudice is appropriate if a trial court lacks subject matter jurisdiction because of the sovereign immunity bar. *Id.* at 639. The Texas Supreme Court went on to point out that if plaintiff cannot allege facts that would constitute a waiver of immunity then the dismissal of plaintiff's action should be with prejudice "because a plaintiff should not be permitted to re-litigate jurisdiction once that issue has been finally determined." *Id*. The Supreme Court held in that case that it was error by the appellate court to enter dismissal without prejudice, and the court reversed and rendered dismissal with prejudice. Thus, the obvious moral of the story for the defense practitioner is that you should quote *Sykes* to secure the dismissal with prejudice if appropriate.

III. THE IMPORTANCE OF INTERLOCUTORY APPEAL: SECTION 51.014(a)(8) OF THE TEXAS CIVIL PRACTICES & REMEDIES CODE

A. Bringing An Interlocutory Appeal

An interlocutory appeal is an exception to the rule that a judgment must be final in order for an appeal to proceed. When a court denies a governmental unit's plea to the jurisdiction the interlocutory order is subject to appeal: "[A] person may appeal from an interlocutory order of a district court, county court at law, or county court that . . . grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in §101.001." Tex. Civ. Prac. & Rem. Code §51.014(a)(8). The rationale of the interlocutory appeal is that certain rulings, including a ruling on a plea to the jurisdiction, are so fundamental to a case that they must be resolved before any additional issues can be considered. Therefore, it is advisable to address denial of a plea to the jurisdiction by interlocutory appeal, instead of litigating a case to its

final resolution, only to pursue a regular appeal and possibly have the entire matter overturned.

The purpose of an appeal under Tex. Civ. Prac. & Rem. Code §51.014(a)(8) centers on assertions of immunity from suit pled by a governmental entity. It does not apply to assertions of immunity from liability by a governmental entity. *Baylor College of Med. v. Tate*, 77 S.W.3d 467, 472 (Tex. App. – Houston [1st Dist.] 2002, no pet.). The nature of the claim is essential to the permissive appeal. It is a subtle but hard-line distinction. It is the nature of the claim that decides if it is appropriate for appeal under §51.014(a)(8): 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 of some other vehicle, such as a motion for summary judgment." *Texas Dep't of Crim. Justice v. Simons*, 140 S.W.3d 338, 349 (Tex. 2004); *accord Harris County v. Sykes*, 136 S.W.3d at 638. Only the jurisdictional argument of governmental immunity to suit, most often brought by a plea to the jurisdiction, is subject to interlocutory appeal under §51.014(a)(8). This applies even if the argument is presented in some other vehicle.

Conversely, an interlocutory appeal cannot be taken from a plea to the jurisdiction that does not properly raise a jurisdictional issue. The intention of the Legislature is for the germane jurisdictional issue to be addressed on appeal, and not other issues. For example, a "governmental unity could cloak its request for protection from discovery in the procedural guise of a plea to the jurisdiction when it was denied appeal." *TDCJ v. Simons*, 140 S.W.3d 338, 349. Such issues will not entitle an entity to an interlocutory appeal.

Specifically, this also applies to the notice requirement under Texas Tort Claims Act (TTCA) §101.101, which has been found not to be jurisdictional, therefore an interlocutory appeal will not be allowed for a denial of a plea to the jurisdiction based on a lack of notice under §101.101. *Id. See also Univ. of Tex. Southwestern Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351 (Tex. 2004), overruling, *Crane County v. Saults*, 101 S.W.3d 764 (Tex. App. – El Paso 2003). TTCA §101.101 requires the plaintiff to give written notice of the claim to the governmental entity within six months of the incident as a prerequisite to filing suit. Nonetheless, the Texas Supreme Court has ruled that though lack of notice bars any action under the TTCA, it does not deprive the court of subject matter jurisdiction. *Loutzenhiser* at 365; *Simons*, 140 S.W.3d at 339.

Since an interlocutory appeal is for the limited purpose of reviewing a trial court's interlocutory order on a plea to the jurisdiction, a governmental entity should include all jurisdictional arguments in its plea in order to have them considered on appeal. For example, in *Brenham Hous. Auth. v. Davies*, 158 S.W.3d 53 (Tex. App. Houston [14th Dist.] 2005), the appellate court would not consider whether the trial court had jurisdiction over the tenant's breach of contract, breach of warranty of habitability, and strict products liability claims against the housing authority because they were not addressed in the housing authority's plea to the jurisdiction. The *Brenham* opinion noted that jurisdiction cannot be waived and can be raised on appeal for the first time, however, they recognized that Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8) gives an appellate court jurisdiction over an interlocutory appeal for the limited purpose of reviewing the trial court's order on a plea to the jurisdiction. Therefore, the practitioner should ensure that the plea to the jurisdiction includes all grounds available to defendant at the time of the plea. *See Bridge v. Robinson*, 20 S.W.3d 104, 118 at n.9 (Tex. App. – Houston [14th Dist.] 2000)(stating that the court could find nothing in the statute which disallowed the City "two bites at the interlocutory apple" but that the practice should be discouraged in the interests of judicial economy).

B. Who May Bring An Appeal

Section 51.014(a)(8) is intended to make interlocutory appeal available only to challenge the granting or denial of a plea to the jurisdiction by a governmental unit. *Baylor College of Med. v. Tate*, 77 S.W.3d 467, 472 (Tex. App. – Houston [1st Dist.] 2002, no pet.). An appellate court should not entertain an interlocutory appeal from a court's denial of a plea to the jurisdiction unless it relates to a governmental unit. *See Prada de Portugal v. Prada*, 2005 Tex. App. LEXIS 192 (Tex. App. San Antonio, Jan. 12, 2005) (declining to consider company's appeal despite their insistence that it was an appeal of an injunction or special appearance ruling, when it was essentially an appeal of the trial court's denial of their plea to the jurisdiction); *Mobil Oil Corp. v. Shores*, 128 S.W.3d 718 (Tex. App. Fort Worth 2004) (finding that the court of appeals lacked jurisdiction to review a probate court's denial of carbon dioxide producers' plea to the jurisdiction in an action brought by overriding royalty interest owners, as an interlocutory appeal from a trial court's order denying a plead to the jurisdiction is available by statute only to government agencies); *see also Telthorster v. Tennell*¸ 92 S.W.3d 457, 464 (Tex. 2002) (sanctioning Dillard's Department Store for filing an interlocutory appeal on the derivative basis of the off-duty security's guard's official immunity); *see, e.g., Heart Hosp. IV, L.P. v. King*, 116 S.W.3d 831 (Tex. App. – Austin 2003).

C. Stay of Proceedings

It should be noted that an interlocutory appeal under §51.014(a) (8) will trigger a statutory stay of proceedings in the trial court:

> An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4), stays the commencement of a trial in the trial court pending resolution of the appeal. An interlocutory appeal under Subsection (a)(3), (5), or (8) also stays all other proceedings in the trial court pending resolution of that appeal.

Tex. Civ. Prac. & Rem. Code §51.014(b).

This stay of "all other proceedings" would appear to include discovery, and the tactical and cost-benefit advantage to the defense is obvious.

IV. APPLICATION BY THE BENCH OR LACK THEREOF

How are courts currently treating these issues? In this section of the paper we would like to closely focus on four cases, two at the Texas Supreme Court level, and two lower court decisions of very recent vintage, one upholding and one denying pleas to the jurisdiction, as exemplars of the battleground issues concerning pleas to the jurisdiction discussed at some length earlier in this paper. In an effort to be efficient we have also attached copies of each of these four opinions as exhibits in the Appendix to this paper. If the issue ever confronts you as a practitioner, please do not ignore these resources since each of the cases, the two Supreme Court opinions in particular, provide reference to exhaustive companion citations, numerous in nature, which address most critical aspects concerning pleas to the jurisdiction. Rather than rehash all of those cases herein, the practitioner can use the Appendix to pick and choose as necessary should the need arise. Further, the authors will make a conscious effort to avoid redundancy when appropriate, thus, for instance, avoiding a repeated dissection of the issues of *Miranda* already discussed in this paper, for instance. What is most important is to view these decisions as emblematic of the current conflict involving analysis of what can and should be considered in pleas to the jurisdiction.

A. *Texas Department of Parks and Wildlife v. Miranda,* 133 S.W. 3d 217 (Tex. 2004)

In April, 1998 the Mirandas and their family were camping as paying guests at Garner State Park, which is owned and operated by the Texas Parks and Wildlife Department. They claimed that they had requested a park ranger to recommend a camp site safe for children. While standing next to a picnic table at the camp site a falling tree branch some 15 feet long struck Ms. Miranda on the head, causing extensive injuries. The Mirandas sued under a theory of negligence and later amended to add gross negligence claims, alleging that the Department knew of the dangers of falling tree branches, failed to prune or inspect so as to remove the danger, and consciously and deliberately failed to warn of the dangerous conditions. Note that various discovery was conducted and it was more than a year until the Department filed a plea to the jurisdiction and motions to dismiss arguing that the allegations were insufficient to invoke a waiver of sovereign immunity under the Tort Claims Act and the recreational use statute.

The trial court denied the plea to the jurisdiction and the appellate court affirmed that denial, claiming that Plaintiffs had pled a premises defect cause of action based on gross negligence under the recreational use statute. The Department argued that no evidence was presented to support gross negligence. The appellate court also took the position that the trial court was not authorized to inquire into the substance of the claims, because the Department had not alleged that Plaintiffs pled these claims as a sham for the purpose of wrongfully obtaining jurisdiction. In doing so the appellate court relied heavily on the *Bland* case, 34 S.W.3d 547, discussed *infra*. The Department argued that gross negligence was a jurisdictional prerequisite to the claims of Plaintiffs and it had presented evidence affirmatively negating gross negligence. The Department also claimed that the Mirandas failed to plead specifics to alleged gross negligence or to controvert their evidence, therefore subject matter jurisdiction had not been established. The Texas Supreme Court originally dismissed the Department's petition for review for want of jurisdiction and then granted a motion for rehearing.

The first issue the Court dealt with was conflicts jurisdiction in which the Court decided that it did have jurisdiction because the court of appeals had inaccurately stated and misapplied the holding in *Bland*. The Court held that the Department did not need to claim sham to have related evidence considered to resolve the jurisdictional issues. The Supreme Court then proceeded to a substantive analysis noting that the Tort Claims Act expressly waives sovereign immunity in three areas: the use of publicly owned automobiles, premises defects, and injuries arising out of conditions or use of property. The recreational use statute, Tex. Civ. Prac. & Rem. Code §75.001 et seq., further modified the governmental waiver of immunity, and section 101.058 of the Tort Claims Act expressly noted that Chapter 75 would control. That limitation of liability

in chapter 75 indicated that the Department only had a limited duty not to injure a person willfully, wantonly or through gross negligence. In this regard the Court noted that there were two components involved, an objective one viewed from the actor's standpoint that the act or omission must involve an extreme danger of risk considering the probability and magnitude of potential harm to others, as well as a subjective component whereby the actor must have actual awareness of the risk involved but nevertheless proceeded with conscious indifference to the rights or safety of others.

In this case, the Court reviewed the evidence provided by the parties at the trial court level and noted that the Court was required to consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues. The majority opinion noted that the trial court had discretion in deciding when to make this jurisdictional determination and how fully the case and issues should be developed, as long as they were mindful "that this determination must be made as soon as practicable." *Miranda* at 227, *Bland* at 554. The Supreme Court further noted that the court was not supposed to proceed to the merits of the case until challenges to the jurisdiction have been decided. The Court agreed that the standard of review for related evidence generally paralleled that of summary judgment proceedings under TRCP 166a(c), but also noted that, different from summary judgment policy, the purpose of pleas to the jurisdiction was to defeat causes of action where sovereign immunity was not waived before the state incurred the full cost of litigation. The majority of the Court dismissed the complaints of the dissenting Justices as to the absence of specific rules and procedures for pleas to the jurisdiction involving evidentiary considerations, noting that nothing prevented a trial court from ordering continuances and allowing time for discovery if a plea to the jurisdiction involved evidentiary issues that required same. Importantly, Plaintiffs in *Miranda* never complained that they had an inadequate opportunity to conduct discovery nor did they request any continuance to do so.

The Court then concludes that the Plaintiffs' allegations of injury caused by the falling tree limb were allegations of a condition or use of real property and also allegations of a premises defect. The Court then examined the evidence carefully, and concluded that it failed to establish the elements of gross negligence. Interestingly, the opinion indicated that while the Court was not suggesting the Department had a duty to inspect every tree in each of the many parks in Texas it managed, if only allegations of the pleadings were at issue the Plaintiffs had alleged sufficient facts to survive a plea to the jurisdiction. Thus, discovery was needed to carry the day for the defense. The Court also disagreed with dissenting Justice Jefferson that Plaintiffs were entitled to re-plead, noting that they had already filed a Third Amended Petition and were not entitled to a further opportunity to re-plead.

As to the evidence, the testimony of the assistant park manager indicated that he had never heard of an injury from falling tree limbs though he was aware that limbs had fallen on occasion. He also pointed out that the tree limb that injured Maria Miranda fell from 50 feet and park employees would not have been able to see the limb in any event without climbing the tree to a ridiculous height. The Department also presented an affidavit of a maintenance specialist who described a phenomenon known as "Sudden Branch Drop Syndrome." Apparently this syndrome relates to branches which fall even when they are not dead, decaying or in need of pruning, and would not present any evidence of a hazardous condition in any event. Plaintiffs did not controvert this evidence but claim it merely supported their arguments that the Department knew about "Sudden Branch Drop Syndrome" and did nothing about it.

The Court noted that such evidence did not establish the subjective and objective components of gross negligence. There was also no evidence in the record that the Department could have taken any reasonable steps to minimize the dangers of an unforeseeable and unpredictable phenomenon. The Court held that the evidence established the Department was not grossly negligent and thus Plaintiffs had therefore not satisfied the requirements for the limited grant of a waiver of sovereign immunity from suit under the applicable statutes. Thus, the trial court lacked subject matter jurisdiction. As a side note, Plaintiffs also attempted to argue in the alternative that their pleadings stated a cause of action for injuries resulting from a condition or use of tangible property. The Supreme Court said that this was an attempt to simply re-cast the same alleged acts of the Department as a different theory, and thereby circumvent the heightened standards of a premises defect claim under applicable statutes. The Court cited other Texas decisions recognizing that to, allow a plaintiff to do so would render meaningless the legislature's heightened requirements for premises defect claims. In this regard the Court held that Plaintiffs had failed to raise a fact issue on gross negligence, reversed the court of appeals and dismissed the claim for lack of subject matter jurisdiction.

As noted in the Introduction of this paper, a dissent was filed by Justice Jefferson and an additional dissent filed by Justice Brister, joined by Justices O'Neill and Schneider. It is interesting that

Justice Jefferson spends much of his dissent apparently criticizing the deficiencies in Plaintiff's pleadings. However, he comes to the conclusion that the Plaintiffs were never appropriately placed on notice that they must cure such jurisdictional defect and thought the cause should be remanded to the trial court to give Plaintiffs yet another opportunity to amend the petition to plead facts establishing jurisdiction (apparently ignoring or minimizing the fact that significant discovery had already been done and no such facts uncovered). In doing so, Justice Jefferson cited his unhappiness with the lack of procedural precision or references in the Texas Rules of Civil Procedure to be followed in deciding pleas to the jurisdiction, particularly when they involve evidentiary considerations. The remaining aspects of Justice Jefferson's dissent seem to relate Plaintiffs' pleadings deficiencies to a lack of liability rather than to a lack of jurisdiction.

Justice Brister's dissent has been thoroughly discussed in Section I of this paper. To briefly reiterate, he appears dissatisfied with the whole concept of a plea to the jurisdiction and seems to want it abolished and replaced by summary judgment or special exceptions. Justice Brister also seemed to have significant issues concerning liability in the case, and indicated he had "grave doubts" about whether the facts could possibly constitute gross negligence or whether the Department had a duty to provide camp sites safely away from trees. However, despite seeming to agree that the claim lacked merit, he was bothered by the fact that the Department filed three separate motions apart from the plea, which included summary judgment motions under TRCP 166a(b)-(c) and 166a(i). Justice Brister said that use of the plea to the jurisdiction allowed the Department to force the trial judge (and ultimately the Supreme Court) to decide whether jurisdiction should be determined by reference to pleadings or evidence. He emphasized that pleas to the jurisdiction had "become the motion of choice for asserting immunity" because of the 1997 amendments to the Civil Practices and Remedies Code allowing interlocutory appeal. He also claimed that due to the broad ranges of issues in a plea to the jurisdiction, it was almost impossible to set firm guidelines for handling those pleas. He decried a lack of specificity as to when trial courts should consider evidence relating to the facts or not, even when jurisdictional facts were intertwined with the merits, and also complained that neither courts nor legislative bodies were specific about when pleas should be decided, leaving it to the trial court's discretion.

Justice Brister saw the result as a rather ad hoc system where none of these issues were clear until the plea was decided on appeal, which he called "drawing up the rules after the game has been played". Justice Brister felt that a simpler approach would be to restrict pleas to the jurisdiction only to the plaintiff's pleadings where plaintiff could be allowed an opportunity to amend unless the pleadings affirmatively negated jurisdiction, similar to rules involving special exceptions. If governmental entities wished to rely on evidence in defense, then he concluded any questions of fact affecting jurisdictional issues should be settled by the jury and the same standard applying to summary judgments be used. As noted earlier, he acknowledges that this may cause governmental entities to incur unnecessary discovery costs and delays, but appears to ultimately dismiss such problems. His solution in this case was to reverse and remand for the Department to specify whether its plea to the jurisdiction was a challenge to the pleadings (by special exception) or the evidence (by summary judgment), to allow the plaintiffs to respond in accord with rules of civil procedure, and to allow the lower court to address the governmental immunity issue in accord with usual rules governing review of "these motions."

B. *Harris County, Texas and Carl Borchers v. Sykes*, 136 S.W. 3d 635 (Tex. 2004).

A little more than a month after the delivery of the opinion in *Miranda*, the Supreme Court again confronted these issues in the *Sykes* case. Plaintiff George Sykes and his wife had brought suit for injuries Mr. Sykes allegedly sustained while a guest of the Harris County Jail. He apparently had been assigned to a bed next to an inmate who had tuberculosis and Mr. Sykes died several months after filing suit, allegedly as a result of such exposure. Plaintiffs claim that the County was negligent in failing to quarantine the infected inmate and failing to warn Mr. Sykes. The County filed a plea to the jurisdiction asserting sovereign immunity. Plaintiffs responded that the claims came within the Texas Tort Claims Act's waiver for injuries arising out of the condition or use of property. By amended pleadings, Plaintiffs also added Carl Borchers the "Major" of the Harris County Jail, in his individual and official capacity.

The trial court eventually granted Harris County's plea to the jurisdiction and dismissed the claims with prejudice. Mr. Borchers then moved for summary judgment claiming that he was entitled to derivative immunity under Section 101.106 of the Texas Tort Claims Act. His motion was also granted. Plaintiff appealed, arguing that granting the plea to the jurisdiction and granting Borchers' motion for summary judgment was error. The Borchers situation as an individual governmental employee will also be discussed in the next section of this paper, but note that Plaintiffs took the position that the dismissal of

the County on jurisdictional grounds was not a "judgment" that qualified to bar claims against individuals under Section 101.106 of the Tort Claims Act. On appeal, the court somehow decided that the trial court could only have dismissed the suit against the County without prejudice, and that sort of dismissal did not qualify as a judgment, therefore mandating the reversal of the summary judgment in Mr. Borcher's favor. The Supreme Court granted the Defendants' petition for review.

Chief Justice Phillips delivered the opinion of the Court joined by five other Justices. Justice Brister filed a separate concurring opinion joined by Justice O'Neill, while Justice Schneider did not participate in the decision. Affirming that sovereign immunity defeats subject matter jurisdiction, Chief Justice Phillips first acknowledged the legal wrinkle that while the government had a right to interlocutory appeal, a plaintiff aggrieved by a granted plea to the jurisdiction could only appeal once a judgment became final. Justice Phillips said that a trial court must grant a plea to the jurisdiction when the pleadings fail to state a cause of action over which the trial court has jurisdiction, after providing an appropriate opportunity to amend. The Court concluded that this was just such a case. Justice Phillips noted that the appellate court had agreed that any effect that the cell walls and Mr. Sykes' bed had on his alleged exposure to tuberculosis was too attenuated to constitute facts supporting a waiver of immunity as to the County. However, the Supreme Court emphatically pointed out that the appellate court was in error in holding that the claims against the County could only be dismissed without prejudice. The Court held that if a Plaintiff had been given an opportunity to amend and still could not allege facts sufficient to constitute a waiver of immunity, then the trial court should dismiss the action with prejudice because "a plaintiff should not be permitted to re-litigate jurisdiction once that issue has been finally determined." *Sykes,* at 639. Accordingly it was held the appellate court had erred and the judgment was modified to dismiss the claims against the County with prejudice.

As to Mr. Borchers, Chief Justice Phillips held that since there was a final adjudication that the legislature did not waive the County's immunity on the facts of this case, Borchers was indeed entitled to derivative immunity under section 101.106 under the Texas Tort Claims Act. The court of appeals was reversed and judgment was rendered in favor of Mr. Borchers. For the defense practitioner, note that this decision contains a discussion at page 640 of the *Sykes* opinion as to the many Texas cases interpreting a dismissal obtained pursuant to a plea to the jurisdiction as a judgment for purposes of section 101.106 of the Tort Claims Act.

Justice Brister, joined by Justice O'Neill, concurred, though he restated his arguments from *Miranda* as to why governmental immunity should not be raised in the motion called the plea to the jurisdiction. He again asserts his opinion that there would never have been this confusion if sovereign immunity had to be raised by summary judgment or special exceptions. He claims that the cases are unclear as to when plaintiff should be allowed to amend and when such amendment would be futile. Thus, he adheres to his notion that immunity should be raised by summary judgment or special exception and therefore agreed with the holding as to the County albeit on different grounds. He concurred fully with the holding as to the individual defendant, Mr. Borchers.

C. *City of Houston and Harris County v. Tanya Lynn Degner,* No. 01-05-00133-CV, 2006 Tex. App. LEXIS 4304 (Tex. App. -- Houston [1st Dist.] May 18, 2006)

Moving from the broader philosophical battleground of the Supreme Court in the cases discussed above, we now come to two very recent examples with very different holdings concerning appellate courts' treatment of pleas to the jurisdiction. It is noteworthy that each case considered jurisdictional facts that overlap with the merits, yet each came to radically different conclusions concerning jurisdiction. In the *Degner* case, No. 01-05-00133-CV, 2006 Tex. App. LEXIS 4304 (Tex. App. -- Houston [1st Dist.] May 18, 2006), Plaintiffs' decedent, Dr. Degner, crashed his automobile into a fixed object. Prior to the crash he had telephoned 911 and indicated that he had taken some unidentified pills and was having difficulty staying awake. As a result of his injuries he was placed on life support and remained on same for some two months until his wife decided to end life support measures. She claimed in her pleadings that she made this decision after being informed by the Harris County Sheriff's Department that her husband, in the 911 call he made, stated that he "wanted to end his life." The City issued a death certificate listing suicide as the cause. Some months later she obtained a transcript of the call and found that the doctor had not stated that he desired to end his life. She presented this information to the City and it issued an amended death certificate indicating that the cause of death was accident. Mrs. Degner sued, claiming various financial damages and mental anguish as a result of the initial inaccurate death certificate noting suicide. Both the City and County filed a Plea to the Jurisdiction based on sovereign

immunity, their claims were denied, and the City and County filed an interlocutory appeal.

In reviewing the matter, the appellate court considered that to show jurisdiction Plaintiffs had to show their injuries were proximately caused by the condition or use of tangible personal property by individuals employed by the governmental entities and acting within the scope of their employment. The court noted that the property in itself did not cause the injury if it did no more than furnish the condition that made the injury possible. The court also noted that use or misuse of information would not be sufficient to support a waiver of immunity, even if a government employee misinterprets information, citing *Prairie View A&M University v. Mitchell,* 27 S.W.3d 323, 327 (Tex. App.— Houston [1st Dist.] 2000, pet. den.). Other "condition or use" cases are referenced on page three of the attached *Degner* case and they are recommended to the practitioner for review.

The court affirmed that it was Plaintiffs' burden to allege facts affirmatively demonstrating subject matter jurisdiction and concluded Plaintiffs had not done so. The court noted that it had reviewed pleadings "and evidence" pertinent to the jurisdictional inquiry, which convinced them that Plaintiffs' injuries resulted from the use or misuse of information and not tangible property. Interestingly, the appellate court also noted that because the proximate cause of Plaintiffs' injuries was "reducible to the information on the recordings…, there would be no purpose in allowing discovery." Thus, they found that sovereign immunity was not waived and the trial court was reversed and judgment rendered dismissing claims against both government appellants for want of jurisdiction.

D. *City of Amarillo v. Ron Dyer and Jo Dyer,* No. 07-05-00325-CV, 2006 Tex. App. LEXIS 3045 (Tex. App. – Amarillo, April 13, 2006)

In a radically different result, the Plaintiffs in the Dyer case were residents who lived near a wastewater treatment facility operated by the City. They sued alleging that the City's facility had contaminated the groundwater they used for household and agricultural purposes and asserted such contamination constituted a taking. The City filed a plea to the jurisdiction which, in hindsight and erroneous focus, asserted that the claims of Plaintiffs were not ripe because they "can prove no damages that are ripe for adjudication…."

As we have noted throughout discussion of this issue, evidentiary concerns are paramount. At a hearing on the plea to the jurisdiction, Mr. Dyer testified over the City's objection that the level of chlorides in his water had been increasing, which affected his water and reduced his property value. Plaintiffs also presented testimony from a real estate appraiser over the City's objection that their property value would be reduced by 50 percent. The trial court made findings of fact and conclusions of law in support of its order denying the plea to the jurisdiction. The City took its interlocutory appeal.

The Amarillo Court of Appeals noted that subject matter jurisdiction could be challenged in certain claims that depended on contingent or uncertain future events. Unfortunately for the City, the court also pointed out that the issue of ripeness, raised by the City, required analysis of whether the facts were sufficiently developed so that the injury had occurred or was likely to occur rather than being contingent or remote. The court correctly noted that it could consider evidence, and must do so, when necessary to resolve such jurisdictional issues.

The City also argued that the trial court had erred in admitting testimony from Plaintiff Ron Dyer and his appraiser at the hearing, arguing that the evidence contradicted prior deemed admissions of Plaintiffs. Under TRCP 198.2(c) and 198.3, matters admitted pursuant to request for admission were conclusively established. Interestingly for our purposes, the appellate court distinguished the City's position as relying on cases that involved appeals after trial on the merits rather than denial of a plea to the jurisdiction. The court said it would not decide the question as to whether such rules were equally applicable to evidence introduced on pleas to the court's jurisdiction (likely causing Justice Brister to say "I told you so"), and concluded that it did not need to reach that question because the City's arguments were otherwise unsupported by the record. Apparently the City tried to argue that the Dyers admitted they had no scientific evidence of groundwater contamination but the Court pointed out that the Dyers neither admitted nor denied same, but merely stated that they could not admit or deny at this time as discovery and testing continued.

The City also argued that the appraiser should not have been allowed to testify although the City did not argue the testimony should have been excluded due to the Plaintiff's failure to supplement discovery responses. Again important for our purposes in this paper, the appellate court noted that a trial court was not limited to "facts frozen at the moment the petition is filed" when determining its jurisdiction, citing *Perry v. Del Rio,* 66 S.W.3d 239, 251 (Tex. 2001).

The City's second issue argued error in denying its plea to the jurisdiction because Plaintiffs failed to establish their claim was ripe. The court pointed out that the Dyers' pleadings blatantly alleged that the City's wastewater treatment had caused contamination of their water supply and there was thus nothing contingent about the injuries they claimed. Whether

or not they may have ultimately been able to prove those allegations was immaterial, as their pleadings alleged a concrete injury. Thus the City lost on the second issue

The City's third issue argued that denial of its plea was error because the Dyers failed to present evidence of damages. The court overruled this issue as delving into the merits of this case, which was beyond the issue of whether jurisdiction was established. The Court (correctly) called this issue by the City "misplaced at this stage of the proceeding." The court therefore affirmed the trial court's order and remanded for further proceedings.

In essence then, the foregoing four decisions present a wonderful tableau of the issues now paramount to those on both sides of the bar who deal with pleas to the jurisdiction. The message of the cases appears clear, namely that those urging pleas to the jurisdiction on the defense side need to be very careful to assess the viability of amended pleadings, to assess whether discovery is or should be conducted, and to assess whether the defense arguments are improperly encroaching on the "merits" of the case that do not directly relate to jurisdictional concerns. Thus, what may appear to some commentators and members of the judiciary to be unacceptably random or "piecemeal" treatments of pleas to the jurisdiction, are in fact totally natural and acceptable outgrowths of the fact that each case, of necessity, presents different facts pertaining to jurisdictional issues. Moreover, in reviewing these and other numerous decisions involving pleas to the jurisdiction, the authors have seen no widespread evidence that trial courts are madly abusing their discretion as to when discovery and/or amended pleadings would be appropriate. What must be kept in mind though, is that the ability to take an interlocutory appeal of a denial of a plea to the jurisdiction is a rare privilege and an immense tactical benefit that defense attorneys should not abuse. In that context, the occasional hostility from the bench as to pleas to the jurisdiction often appears to relate to use of that tactic when it is not really warranted, as in situations that will require far too much intrusion into factual inquiries that cannot properly be confined to jurisdictional issues.

V. TACTICS

While tactical issues and considerations have already been referenced throughout this paper in connection with the discussion of pleas to the jurisdiction, and while this paper makes no effort or representation to be all-inclusive in addressing same, it appears that there are four particular areas of tactical emphasis that need to be considered with pleas to the jurisdiction. Each of these areas are considered below.

A. Stays

As noted in the foregoing sections of this paper, it is no small benefit to defense counsel that pleas to the jurisdiction are intended to save the government from becoming embroiled in costly litigation, with the expenditure of money and resources that such entails, if it is otherwise immune from suit. Moreover, it seems inarguable that pleas to the jurisdiction are intended to promote efficient disposition of claims that should not have been filed against governmental entities in the first place, and the right to interlocutory appeal for governmental entities seems to magnify that intent. However, as we have seen in the preceding sections of this paper, discovery may well be left to the discretion of the trial court in matters of pleas to the jurisdiction, particularly if certain facts are critical to jurisdictional issues but remain unclear. In this context, the defense practitioner should always analyze whether a plea to the jurisdiction can be successful based on the pleadings alone. You will want to argue to the court that further amendment would likewise be futile, and discovery would be futile since no set of circumstances could be discovered which would create liability or a waiver of sovereign immunity.

Nonetheless, defense counsel needs to be honest in his or her analysis when considering whether to file a related motion to stay discovery. A simple rule of thumb is that counsel should revert to the Supreme Court's analysis as to whether Plaintiff's claims negate the existence of jurisdiction, or whether facts are simply omitted that would conceivably allow jurisdiction. If the former, then defense counsel should do everything in their power to stop discovery and demand dismissal with prejudice as mandated by the Supreme Court in *Sykes,* 136 S.W. 3d 635. If plaintiff simply omits allegations from his pleadings sufficient to confirm jurisdiction, then the analysis should be whether plaintiff omits those facts because they can never be asserted, or whether such facts are out there and unresolved but simply not articulated.

If the plaintiff jumps the gun and serves written discovery, either with or soon after initial pleadings, then defense counsel should move to quash such discovery until the plea to the jurisdiction is addressed or, in the alternative, move to limit discovery to jurisdictional issues until ruling is obtained on a plea to the jurisdiction. This situation is analogous to cases in federal courts where qualified immunity is asserted as a defense and counsel for defendants often seek to

preclude, abate or at least limit discovery to issues affecting the immunity arguments. *See Lion Boulos v. Wilson*, 834 F.2d 504 (5th Cir. 1997); *Wicks v. Mississippi*, 41 F.3d 991 (5th Cir. 1995).

In further considering how far to push or forestall any discovery, defense counsel should also keep in mind the admonition of the Texas Supreme Court that trial courts must consider evidence if such has bearing on determining the jurisdictional issues. If those jurisdictional issues are clear from the pleadings, or it is clear that Plaintiff can never amend to properly plead claims over which the Court could arguably have jurisdiction, then discovery is wasteful and inefficient. Also, to the extent a governmental defendant chooses to submit evidence of its own such as affidavits or City records in support of a plea to the jurisdiction, the consequences then should be considered in that the chances of a court allowing a plaintiff's discovery concerning same is increased. Last, if discovery is legitimately needed concerning jurisdictional issues of fact, such as in the *Miranda* case discussed above, then defense counsel should be smart enough not to fight a battle to preclude discovery but rather seek to limit discovery appropriately.

B. Impact of Requests for Affirmative Relief or Intervention

Although this topic might well justify a paper on its own merits, it needs to be emphasized to defense counsel that any attempts at asserting governmental immunity via a plea to the jurisdiction will be dramatically undercut, indeed gutted, if the governmental entity has presented any pleadings that can be construed as seeking affirmative relief from the court. Even if a city filed an answer denying the material allegations and putting in a standard clause at the end requesting dismissal and any and other further relief including attorneys' fees and costs, this may well be sufficient to subvert any later claims of governmental immunity. The logic is obvious, if the City claims it is not subject to the court's jurisdiction, then why is it asking the court for such relief?

In this regard, we wish to briefly mention two recent cases addressing the erosion of governmental claims of immunity by perhaps ill-advised government pleadings.

1. *Reata Constr. Corp. v. City of Dallas*, 47 Tex. Sup. J. 408, 2004 Tex. LEXIS 303 (Tex. April 2, 2004, pet. filed)

In the Supreme Court decision of *Reata Constr. Corp. v. City of Dallas*, 47 Tex. Sup. J. 408, 2004 Tex. LEXIS 303 (Tex. April 2, 2004), the trial court held that the City of Dallas had waived its claim of governmental immunity by intervening in a lawsuit between a corporation and a respondent subcontractor. The subcontractor had filed a third-party claim against the City of Dallas and the City asserted a claim in response. The City had filed special exceptions asserting that the subcontractor's claims were not within the Tort Claims Act's waiver of immunity, but also unfortunately intervened in the suit by asserting its own claims against the construction company and the subcontractor. The trial court held that such intervention constituted waiver of any claim of governmental immunity. The appellate court reversed, but the Texas Supreme Court held error by the appellate court and reversed and remanded to the trial court for further proceedings. A copy of that case is included in the appendix of this paper and we strongly suggest that every governmental attorney firmly commit its holding to memory.

The Supreme Court in a per curiam opinion put the issue succinctly as to whether a City waives governmental immunity from suit by intervening in a lawsuit where it asserted claims for affirmative relief. The court of appeals held it did not (83 S.W. 3d 392), and the Supreme Court disagreed and reversed.

In this case, Reata was a subcontractor hired to do drilling for a fiber optic cable conduit. On September 4, 2000, Reata inadvertently drilled into a water main and flooded a nearby residential building. The property owners sued the general contractor and Reata, individual tenants intervened seeking damages, and Reata filed a third-party claim against the City of Dallas claiming the City had misidentified the location of the water main. With its answer the City filed special exceptions asserting that the claims were not within the Texas Tort Claims Act's waiver of immunity, but the City also intervened asserting claims against the general contractor. Eight months later, the City filed a Second Amended Plea in Intervention asserting a claim of negligence against subcontractor Reata and seeking actual damages, costs and other relief. The very next day the City filed a plea to the jurisdiction asserting governmental immunity. Reata understandably responded arguing that immunity did not apply because the City had subjected itself to jurisdiction voluntarily by intervening and seeking affirmative relief. Reata also cited the "sue or be sued" language in the Dallas City Charter.

While the court of appeals acknowledged the City's intervention, it held that doing so did not waive any right to object to lack of subject matter jurisdiction. The Supreme Court disagreed and held that the City waived immunity by intervening and asserting claims for damages, thereby creating subject matter jurisdiction in the trial court. Note that the decision expressly concerned only waiver as to immunity from suit, and the Supreme Court declined

to decide whether the City also waived immunity from liability. In so holding the Supreme Court referenced its decision in *Kinnear v. Texas Comm'n on Human Rights*, 14 S.W.3d 299 (Tex. 2000). The Court noted that under *Kinnear* a governmental entity filing suit against a party waived, at minimum, immunity from suit given counterclaims filed. Even more threatening for defense counsel, the Supreme Court broadened the risk by noting that a governmental entity filing a suit for damages 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." (citations omitted). *Reata* at *7 (page 3 of attachment). The Supreme Court also said that it saw no reason to differentiate between a governmental entity acting as a plaintiff and as an intervenor. Note that the Court did not reach the issues of whether liability was created by a "sue or be sued" phrase in the City Charter.

2. "Sue And Be Sued"

Does a governmental entity waive immunity by contracting with a private entity or by including a "sue and be sued" clause in its Charter? The case of *City of Pasadena v. Envtl. Infrastructure Group, L.P. et al.*, No. 13-05-253-CV, 2006 Tex. App. LEXIS 1982 (Tex. App. – Corpus Christi, March 16, 2006, pet. filed) highlights the fact that this issue is still far from decided. The City of Pasadena brought an interlocutory appeal arguing that the trial court lacked subject matter jurisdiction because of sovereign immunity. The appeals court recognized that Texas courts are still split on the issue, but decided to uphold the trial court's claim of jurisdiction over the matter. The court based its ruling on Texas Supreme Court precedent, as well as the City's charter language allowing the city to "sue and be sued," and Texas Local Government Code §51.075, which provides: "The municipality may plead and be impleaded in any court." The court believed that the statute and charter waived sovereign immunity (at least as to suit) under the "legislative permission" requirement.

The issue of whether language such as "sue and be sued" is indeed a clear and unambiguous waiver of governmental immunity (at least as to suit) has yet to be decided. The Texas Supreme Court has previously held in *Missouri Pac. R. Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812, 13 Tex. Sup. Ct. J. 308 (Tex. 1970), that a statute containing the language "sue and be sued" did indeed constitute a waiver of governmental immunity, however, the Court has not visited the issue since that time. Now, there is a clear division on that issue among the Texas appellate courts, with certain courts, such as Dallas and Waco, refusing to apply the holding of *Missouri Pacific*, and others such as San Antonio choosing to apply *Missouri Pacific* until directed otherwise. *See Paula Construction, Inc. v. City of Lytle*, No. 04-05-00317-CV, 2006 Tex. App. LEXIS 3678 at n.1(Tex. App. – San Antonio, May 3, 2006).

A string of cases regarding this issue is currently pending before the Supreme Court, but a definitive opinion has yet to issue. *See Service Employment Redevelopment v. Fort Worth Indep. Sch. Dist.* 2005 WL 503172 (Tex. App. – Fort Worth 2005, pet. filed); *Metropolitan Transit Authority v. MEB Engineering, Inc.*, 2004 WL 1584958 (Tex. App. – Houston [1st Dist.] 2004, pet. filed); *City of Houston v. Clear Channel Outdoor*, 2004 WL 63561 (Tex. App. – Houston [14th Dist.] 2004, pet. filed; *City of Mexia v. Tooke*, 115 S.W.3d 618 (Tex. App. – Waco 2003, pet. granted); *Satterfield & Pontikes Const. v. Irving ISD*, 123 S.W.3d 63 (Tex. App. – Dallas 2003, pet. filed); *see also Reata Constr. Corp. v. City of Dallas*, 2004 Tex. LEXIS 303 (Tex. April 2, 2004).

Until that time, it seems each appellate court will follow its own precedent, and counsel are forewarned accordingly.

3. *Dequire v. City of Dallas*, No. 05-04-01865-CV, 2006 Tex. App. LEXIS 3059 (Tex. App. – Dallas, April 18, 2006)

Recently, on April 18, 2006, the Court of Appeals for the 5th District of Texas in Dallas issued a supporting opinion following *Reata* in the case of *Dequire v. City of Dallas*, No. 05-04-01865-CV, 2006 Tex. App. LEXIS 3059 (Tex. App. – Dallas, April 18, 2006). In that case, the trial court considered a suit filed by various plaintiffs against the City of Dallas for breach of contract and declaratory judgment. The City filed its plea to the jurisdiction and the trial court granted the plea. The court of appeals reversed, finding that the City had invoked the trial court's jurisdiction by making a claim for affirmative relief found in the prayer to its First Amended Answer; i.e., standard language that requested the City "recover all costs of suit and attorneys' fees; and further relief… to which it is justly entitled." Plaintiffs argued that such request for costs of suit and fees waived immunity from suit, and relied on the holding in *Reata*, discussed above. The court of appeals said it would expressly follow *Reata* and agreed that immunity had been waived. The court noted that the City would have sought the very same recovery whether it called its claim for fees a counterclaim, or merely prayed for recovery of the fees. Once again the court of appeals decided it did not need to reach the issue of whether immunity was waived by code or charter language or legislative enactment, *i.e.*, whether the contract at issue with the police department operated as a further waiver of immunity since such contract was allowed by Civil Service Board Rules and Regulations.

Obviously the problem with *Reata* and its progeny such as *Dequire* arises when a governmental entity wishes to protect its interests without asserting a claim for any damages or monetary relief. That issue has yet to be decided. In the previously discussed case of *Reata Constr. Corp. v. City of Dallas*, 47 Tex. Sup. J. 408, 2004 Tex. LEXIS 303 (Tex. April 2, 2004), the Supreme Court held that a governmental entity can waive its right to immunity from suit by asserting a claim for damages through a plea in intervention. The *Reata* Court observed that when a governmental entity files suit for damages they waive immunity from suit (not liability) for any claim that is germane to the suit originally brought by the entity. This is an equitable concept long held in Texas jurisprudence. *See State v. Martin*, 347 S.W.2d 809, 814 (Tex. Civ. App. – Austin 1961, writ ref'd n.r.e.).

In that context, the defense practitioner may attempt to distinguish its argument from *Reata* if money damages are not being sought, though this is still a risky endeavor. For example, in *My-Tech, Inc. v. UNTHSC,* No. 05-04-01150-CV, 2005 WL 1460662 (Tex. App. – Dallas [5th Dist.] June 22, 2005) interpreting *Reata,* the court of appeals affirmed the decision of the trial court which held that governmental immunity applied and was not waived. Appellant therein had argued that UNTHSC waived its immunity to suit by seeking affirmative relief from My-Tech. The court rejected their argument stating "although UNTHSC could have brought a claim seeking damages for the alleged unpaid amount, it did not make a claim for that money in its answer." This distinction preserved the governmental unit's immunity. *But see City of Houston v. Jones,* 2004 Tex. App. LEXIS 7493 (Tex. App. Houston [1st Dist.] Aug. 19, 2004) (upholding trial court's denial of city's plea to the jurisdiction as to injured party's contract claim because Houston's city charter clearly waived the city's immunity from breach of contract claims, and the injured party was not recasting his tort claims as a breach of contract claim because the factual bases supporting his contract claim were distinct from those supporting his earlier tort claims, as were the damages sought in his breach of contract action.)

However, carrying the analysis further, what happens if the City would seek declaratory relief or interpretation of an ordinance? Would that constitute "affirmative relief"? Since the issue remains unsettled in the courts, it seems best to err on the side of caution and realize that any request to the court by a governmental entity risks waiver of immunity. Should intervention be significant to the governmental entity, then counsel, in conjunction with their governmental client, needs to make a decision as to whether the benefits of intervention outweigh the potential loss of immunity, particularly considering that the waiver applies to immunity from suit, not immunity from liability.

C. Section 101.106 of the Texas Tort Claims Act

Section 101.106 of the Texas Tort Claims Act bars suit or liability as to future claims against an individual governmental and provides as follows:

> (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. Civ. Prac. & Rem. Code* §101.106

Please refer to the discussion of the *Sykes* Supreme Court case discussed previously in this paper for detailed analysis. However, it appears clear that the Supreme Court has ruled that under Section 101.106 pleas to the jurisdiction are considered to be "judgments" that would protect governmental employees when the governmental entity has been dismissed pursuant to a plea to the jurisdiction. *Harris County v. Sykes*, 136 S.W.3d 635 (Tex. 2004); *E.g., Fiske v. Heller*, 2004 Tex. App. LEXIS 5521 (Tex. App. – Austin June 24, 2004).

D. Use of Evidence

Although this issue was alluded to in reference to the discussion of whether or not to seek a discovery stay above, it is obviously of paramount importance in handling pleas to the jurisdiction. Before the defense counsel files a plea to the jurisdiction on behalf of a governmental entity an analysis needs to be done as to whether the pleadings will suffice for the attack. If additional evidence is needed, such as an affidavit from a City employee or authenticated records, then defense counsel needs to consider how much introducing these documents will open the door to discovery and intrude on the efficient resolution of the case that a plea to the jurisdiction is designed to provide. As we have seen from the foregoing discussions of the opinions referenced in this paper, there is no doubt that a trial court has discretion to consider evidence related to pleas to the jurisdiction, at least as to facts that pertain to jurisdictional issues and are necessary to determining same. The *Miranda* case attached to this paper in the Appendix is a prime example of the more expansive use of evidence given the allegations at issue. Obviously if somewhat extensive discovery is required to support a plea to the jurisdiction, then counsel may wonder why not just pursue a motion for summary judgment? However, recall that a plea to the jurisdiction provides for an interlocutory appeal if denied, while a motion for summary judgment does not.

In contrast, consider the situation in the *Dyer* case discussed in Section IV of this paper. In that case a proper evidentiary analysis might have resulted in a more favorable outcome for the City and might also have resulted in the City having decided to forego a plea to the jurisdiction in favor of a motion for summary judgment at a later time in the proceedings. Of course, from the plaintiff's perspective, it would seem that plaintiff's counsel would try to get as much discovery as they could if, for no other reason, than to delay proceedings and raise cost-benefit issues for defendants. In response, defense counsel needs to be realistic as to how directly such discovery requests would pertain to the anticipated plea to the jurisdiction. If they are broader than jurisdictional issues, then counsel should seek a limiting order from the court and reference the authority discussed herein. Defense counsel will be assisted by the fact that according to the Supreme Court, trial courts should know that they are not to start delving into the "merits" of a case prior to deciding jurisdiction. *Miranda, infra.* Thus, to the extent defense counsel can tie overly expansive discovery requests to improper intrusion into the merits of a case, defense counsel should be successful in limiting same given the authority provided herein.

In the authors' experience, the more a plea to the jurisdiction can be based on the allegations or omissions of the pleadings, the better its chance of success and a prompt resolution. Obviously each case is factually unique, but certain fundamental requirements lend themselves more readily to a plea to the jurisdiction than others. For example, the Texas Tort Claim Act's ban on intentional torts is explicit, and would be less likely to require discovery, especially if plaintiff's pleadings clearly allege only intentional torts. In contrast, the standard for premises liability under the Tort Claims Act and related statutes discussed in *Miranda*, and related considerations of gross negligence, obviously opens the door to more potential discovery. Counsel being honest as to the nature of any facts involved, and as to whether those facts are "jurisdictional" or "merit-directed" in nature, goes a long way toward being more efficient in the long run and in building credibility with the court and other counsel.

VI. CONCLUSION

Pleas to the jurisdiction are a valuable tool to the defense counsel and we have been given an additional privilege in being allowed to take an interlocutory appeal upon denial of same. That privilege should not be abused, and pleas to the jurisdiction that are more properly summary judgment motions should be carefully considered before filing lest we create even more frustration within the judiciary as to these pleas. Consider that the plea to the jurisdiction, as a preliminary question of law, forces many state courts to be even more of a "gatekeeper" than they would prefer. It is undeniable that certain members of the judiciary, for various reasons, are more comfortable looking for questions of fact that can be deposited in the laps of the jury. Since the plea to the jurisdiction is a question of law, that option is denied them, at least theoretically. However, as we have seen throughout this paper, the plea to the jurisdiction may

also mandate examination of certain "facts". In that regard the courts have a bit of an additional headache in making sure that these facts at issue are, in truth, jurisdictionally related, and not thinly veiled preliminary shots at the merits by the defense. Thus, defense counsel needs to be very supportive and make the issue simple for trial courts when presenting a plea to the jurisdiction. One way is by clearly delineating the theory and issues regarding pleas as addressed by the Texas Supreme Court, thereby giving the trial court a comfort level not only that it is proper to consider facts on occasion in ruling on such pleas, indeed mandatory, but that these facts are jurisdictional in essence and not merely attempts at quick resolution of the merits. Obviously "jurisdictional" facts and "merit" facts may overlap and often unavoidably so. That needs to be explained to the court. As in the *Miranda* case where issues of gross negligence and factual inquiries concerning same were clearly jurisdictionally connected to Tort Claims Act requirements, it is defense counsel's job to make it very clear to the courts that while those facts may also arguably impact the merits of the case, the court must yet consider them in relation to a question of law. By the same token, it is incumbent upon plaintiffs' counsel to recognize the same distinctions and make sure they are properly applied. Also, the defense counsel for governmental entities always has interlocutory appeal as an option.

Pleas to the jurisdiction have obviously become somewhat controversial, but they really shouldn't be. Used properly they do a very good job of weeding out improperly filed lawsuits. The majority of our society is well served by cutting out such wasteful expenditure of money and resources on lawsuits that should not be brought. Cases of sovereign immunity provide a perfect example of such, as there are also sound policy reasons for the long held application of sovereign immunity. After all, we are a government of the people, by the people and for the people.

The authors modestly hope that the foregoing will be of some interest and will provoke additional consideration by readers of this paper. Sample forms and a recent appellate decision out of the Fort Worth Court of Appeals are also included in the Appendix for the convenient reference of the reader. We thank the reader for their consideration of an even more increasingly complex tactical issue which is of even higher importance to those who sue and defend governmental entities.

APPENDIX A

CAUSE NO. GC-2005-00122

MICHAEL MILLER dba ALL ECONOMY FOREIGN & DISMANTELING, and ABC LATE MODEL TRUCK & AUTO PARTS, INC.	§	**IN THIS COUNTY COURT**
V.	§	**AT LAW NO. 2**
CITY OF LEWISVILLE, TEXAS	§	**DENTON COUNTY, TEXAS**

DEFENDANT'S SPECIAL AND LIMITED APPEARANCE, PLEA TO THE JURISDICTION AND MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant herein, THE CITY OF LEWISVILLE, TEXAS, and files this its Special and Limited Appearance, Plea to the Jurisdiction, and incorporated Motion to Dismiss (the "Motion"), and in support thereof, this Defendant respectfully states and shows this Honorable Court the following:

INTRODUCTION

During or around February of 2002, the owner of a carnival trailer, Bob West, reported his trailer stolen to the Grand Prairie Police Department. The details of the alleged theft and investigation are unknown to the City of Lewisville at this time, were not communicated to the City, and are irrelevant to the various bases of this motion.

On information and belief, Pro-Tow, a Lewisville towing company, performed a "non consent" tow of the apparently abandoned trailer at issue from the Budget Inn Suites located at 2175 Hwy 121 on June 9, 2003. At the time that Pro-Tow acquired the vehicle, there were no vehicle identification numbers or license plates that could be observed by Pro-Tow employees

and agents. After taking possession of the trailer, Pro-Tow stored the trailer at their lot, and reported the vehicle to the Lewisville Police Department as an "abandoned" trailer. Accordingly, Pro-Tow sought its statutory right to auction the vehicle and published the impending sale in the local publication known as the Denton County Morning News on June 18, 2003.

Pursuant to both state and local law, the City of Lewisville oversaw the auction of the trailer and, on November 13, 2003, the trailer was ultimately sold to the Plaintiffs for $7,100 plus storage and other fees owed to Pro-Tow that accrued during the period of June of 2003 to November of 2003. It must be emphasized that Plaintiffs were not only buying abandoned property at a public auction, so as to benefit at another party's expense, but they also accepted an "as is" contract as part of the sale. It is worth noting that by law the City of Lewisville obtained only $142 as a result of the sale (i.e. 2% of $7,100), and the auctioneer received a mere $284 (i.e. 4% of $7,100).

In April of 2004, and subsequent to the lawful auction that was conducted pursuant to state and local laws, an acquaintance of the original owner recognized the subject trailer parked in a Grand Prairie used car lot, and ultimately notified Mr. West of same. Mr. West promptly notified the original investigator, investigator Hicks from the Grand Prairie Police Department, of the location of the truck. After seizing the property from a local used car lot, which was apparently owned or operated by the Plaintiffs and/or various affiliated entities, investigator Hicks sought a property hearing at the local Justice Court in Grand Prairie, without notice to this Defendant.

Unfortunately for Plaintiffs, after such hearing the Justice of the Peace in Grand Prairie ordered the vehicle to be returned to H&W Risk Management Inc. of Shawnee, Kansas, who

apparently had already paid the claim to Mr. West for his property that was allegedly stolen. As evidenced below, only Mr. West, Michael Miller, and H&W were notified of the Justice Court hearing. (Exhibit A: Attached hereto as Exhibit A which is incorporated herein by referenced)[1] At no point in time was the City of Lewisville put on notice of said hearing. Moreover, Plaintiffs never appealed said judgment.

On January 19, 2005, Plaintiffs filed this lawsuit alleging that the City of Lewisville either negligently or intentionally auctioned the trailer that belonged to Mr. West to Michael Miller or his owned entities, and arguing that the Justice Court's ultimate "repossession" of the trailer from Mr. Miller was unjust, such that the City of Lewisville is now somehow responsible and owes damages. The legal theories alleged in Plaintiff's Original Petition are apparently founded upon allegations of negligence for the wrongful sale; and supposed fraud (sic) with regard to title conveyance to Plaintiffs.

Plaintiffs' Original Petition fails to allege any wrongdoing by the City, and it also fails to plead any legally cognizable cause of action. To the extent they plead facts sufficient to support any cause against the City, which is denied, and to the extent that Plaintiffs have avoided the effects of waiving their right to appeal the judgment of the Justice Court pursuant to Chapter 47 of the Texas Code of Criminal Procedure[2], which avoidance is also denied, Plaintiffs' claims are otherwise barred as a matter of law under the Texas Tort Claims Act ("TTCA"), Section 101.001, *et seq.*, of the Texas Civil Practice and Remedies Code, and Lewisville, Tex., Ordinances, art. 11.06(a). Not only is the City statutorily immune from the various claims made in Plaintiffs' Original Petition, but the requisite notice required by Plaintiffs pursuant to both the

[1] Court can take Judicial notice of other court documents.
[2] Chapter 47.12(c) states that "Only an interested person who appears at a hearing under this article may appeal, and such person must give an oral notice of appeal at the conclusion of the hearing and must post an appeal bond by the end of the next business day, exclusive of Saturdays, Sundays, and legal holidays."

Texas Tort Claims Act and the City of Lewisville's Ordinances was not made, and jurisdiction therefore does not attach.

GROUNDS FOR DISMISSAL

Even if this Court takes as true all of Plaintiffs' allegations against this Defendant, as it must for purposes of this Plea, this Court must grant Defendant's Plea for the following reasons:

1. Plaintiffs' claims do not come within the limited waiver of immunity afforded under TTCA §101.021;
2. Plaintiff's claims for fraud, an intentional tort, are barred by TTCA §101.057;
3. Plaintiffs' claims do not come within the limited waiver of immunity afforded by Lewisville, Tex., Ordinances art. 11.06(c);
4. Proper notice was not given under either TTCA §101.101 and/or Lewisville, Tex., Ordinances, art. 11.06(a).
5. No representations were made and all warranties were waived as evidenced by City of Lewisville not being notified or named as interested party in the Grand Prairie J.P. court case.

ARGUMENTS AND AUTHORITIES

A. PLAINTIFFS' CLAIMS ARE BARRED BY THE TEXAS TORT CLAIMS ACT AND SUBJECT MATTER JURISDICTION DOES NOT ATTACH

Plaintiffs' "claims" do not meet the statutory requirements as pled, are not actionable under Texas law, and are not related to a matter for which immunity has been waived for governmental entities by the Texas Legislature. Therefore, Plaintiffs' pleadings show that this Court does not have subject matter jurisdiction. *See Bybee v. Fireman's Fund Ins. Co., 160 331 S.W.2d 910, 917 (Tex. 1960); Fountain Parkway, Ltd. v. Tarrant Appr. Dist.*, 920 S.W.2d 799, 802 (Tex. App.—Fort Worth 1996, writ denied). Hence, no subject matter jurisdiction attaches.

APPENDIX A

By statutory definition, the City is a governmental unit covered by the TTCA. TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(3)(B) (Vernon 1997). As such, the City is entitled to immunity from both suit and liability, in the absence of a constitutional or statutory provision waiving the same. *See, e.g., City of LaPorte v. Barfield,* 898 S.W.2d 288, 291 (Tex.1995); *Duhart v. State*, 610 S.W.2d 740, 741 (Tex. 1980).

Immunity from suit ensures that the State and its political subdivisions or officers may not be sued in their own courts, absent their consent. *See Texas' Dept. of Transp. v. Jones.* 8 S.W.3d 636, 637 (Tex. 1999) (per curiam); *Barfield,* 898 S.W.2d at 291. "[F]rom the earliest days of statehood, under the doctrine of governmental immunity, persons aggrieved by an action of the State or one of its agencies have been unable to sue the State without its permission." *Barcroft v. State*, 900 S W.2d 370, 371 (Tex. App. Texarkana 1995, no writ). Thus, the doctrine of sovereign immunity clearly acts not only to provide a governmental unit with immunity from liability, but also acts to shield a governmental unit from suit as well. *See Jones,* S.W.3d at 636-637; *W.D. Haden Co. v. Dogen*, 308 S.W.2d 838 839-40 (1958).

i. The Texas Tort Claims Act does not waive immunity for the claims alleged by Plaintiffs.

The waiver of sovereign immunity is a matter to be addressed by the Legislature, and the Legislature can only waive sovereign immunity by clear and unambiguous language. *See Barfield,* 898 S.W.2d at 291; *Duhart*, 610 S.W.2d at 742. In Texas, the Legislature has provided a limited waiver of a governmental unit's sovereign immunity through the TTCA. However, where the TTCA does not apply, or does not expressly waive immunity, immunity from suit is still the rule. *See* TEX. CIV. PRAC. & REM. CODE ANN.§ 101.025(a) (Vernon 1997): *see also Townsend v. Memorial Med. Ctr.*, 529 S.W.2d 264, 267 (Tex. Civ. App—Corpus Christi 1975, writ ref'd n.r.e.) (emphasis added). Such immunity applies herein and, and it is clear that

Plaintiffs can show no waiver of immunity from their "claims" as to this Defendant.

In Texas, pursuant to TTCA §101.021, waiver of immunity only applies if a claimant alleges personal injury, death or property damage caused by the acts or omissions of an employee if: a) the claim arises from the operation or use of a motor-driven vehicle; and/or b) the claim arises from the operation or use of motor-driven equipment. Section 101.021 also waives immunity if a claimant alleges personal injury or death (not property damage) caused by: a) condition of tangible personal property; b) use of tangible personal property; and c) condition of real property (premises liability).

In this case, the Plaintiffs have not alleged any causes that fall within any of the limited waivers afforded by the TTCA under §101.021. Specifically, Plaintiffs complain that they were deprived of property rights to a carnival trailer acquired through auction. In no way were Plaintiffs injured as a result of a government employee's operation or use of a motor-driven vehicle or motor-driven equipment. Further, since Plaintiffs claim, at best, property damage only, the two other areas of waiver in §101.021 regarding tangible personal property or real property also do not apply, as a matter of law.

ii. Plaintiffs' allegations of intentional torts are barred by the TTCA

Plaintiffs' "negligence" and "fraud" claims likewise do not withstand the statutory immunity afforded to the City. Section 101.057 of the TTCA specifically states that immunity is not waived as to a claim "arising out of an assault, battery, false imprisonment, **or any other intentional tort**..." (emphasis added). Plaintiffs' Original Petition alleges fraud, which is an intentional tort. As such, Plaintiffs' allegations of fraud fail as a matter of law, as the Texas Tort Claims Act has indisputably not waived immunity related to intentional torts. *See, Tarrant County Hosp. District v. Henry,* 52 S.W. 3d 434, 441 (Tex.App.-Fort Worth 2001, no pet.). *See,*

e.g. Insurance Co. of N. Am. v. Morris, 981 S.W.2d 667, 674 (Tex. 1998); *Hendrix v. Bexar County Hosp. District,* 31 S.W. 3d, 661,663 (Tex.App-San Antonio 2000, pet.denied). Even apart from the fact that Plaintiffs present no allegations of related communications or representations by the City, since intentional torts cannot be asserted against the City by statute, subject matter jurisdiction does not attach to Plaintiffs' causes of action for fraud in this matter.

Moreover, the City of Lewisville made no representations as to title whatsoever. As evidence of this fact, Plaintiffs were provided with an "as is" contract which indicates that no representations at all were being made. In Texas, when an "as is" contract is exchanged between parties, the clause will be given effect and negate causation of fraud absent some other evidence of explicit fraud. *See e.g. Prudential Ins. Co. v. Jefferson Assoc., Ltd.,* 896 S.W.2d 156, 161 (Tex. 1995) (addressing the enforceability of an "as is" clause in a DTPA context; however, fraud and/or misrepresentation is one prerequisite of recovery under DTPA). As illustrated above, Plaintiffs cannot recover for intentional torts of fraud and, further, there were no outward manifestations or representations made to Plaintiffs by the City of any nature which would impose liability upon the City.

iii. *Plaintiffs failed to notify the City of Lewisville as required under TTCA §101.101*

The TTCA specifically provides that a governmental unit, the City of Lewisville in this case, is entitled to receive notice of a claim against it not later than six months after the day the incident giving rise to the alleged injury occurred, and such notice must specifically describe the damage or injury, the time and place of the injury, and the incident. *See TTCA* §101.101. Suit is precluded if such notice provisions are not complied with, and under Texas law they are held akin to statutes of limitations, *Smith v. City of Houston*, 960 S.W.2d 326,328 (Tex.App.- Houston [14th Dist.] 1997, no pet.).

APPENDIX A

In this case, the alleged negligent sale where Plaintiff acquired the carnival trailer occurred in November of 2003, and the revocation by the Grand Prairie Justice of the Peace Court occurred in April of 2004. Given that the Original Petition at issue is the first notice of any claim that Plaintiffs have given to the City, and that the Original Petition was filed on January 19, 2005, this notice is insufficient as a matter of law under the TTCA. Thus, even assuming that the City was not immune for the claims that Plaintiffs assert, and it is, Plaintiffs failed to follow the procedural requisites necessary to invoke subject matter jurisdiction over the City.

Not only did Plaintiffs fail to notify the City of Lewisville through written means as provided in TTCA 101.101, Plaintiffs did not even provide the City notice of the property hearing held in Grand Prairie. Specifically, the Justice Court required that the parties list those other parties who may have an interest in the resolution and disposition of the property dispute. It can certainly be inferred from the Plaintiffs' allegations herein that the City of Lewisville had an interest in the outcome of this hearing. Instead, the only parties put on notice of such hearing were Plaintiffs, Mr. West, and Mr. West's insurance carrier, who ultimately obtained possession of the carnival trailer in light of the prior payment to Mr. West. **Exhibit A**. Had Plaintiffs had evidence that a related false representation had been made by the City, they should have put the City on notice of such hearing, and were required to do so under both the TTCA and City Ordinance. While this notice would have nonetheless been legally insufficient under TTCA 101.101, it yet illustrates that Plaintiffs utterly failed to notify the City of any of their potential claims despite multiple opportunities to do so.

B. THE CITY OF LEWISVILLE'S ORDINANCES ALSO PRECLUDE PLAINTIFFS' CLAIMS AND SUBJECT MATTER JURISDICTION DOES NOT ATTACH

i. Plaintiffs' claims are barred by Lewisville, Tex, Ordinances, art. 11.06(c)

With regard to claims for damages, Lewisville's City Ordinances, pursuant to Lewisville's Home Rule Charter, specifically provide that the City's Ordinances do not expand the scope of immunity which is already provided pursuant to the TTCA. Specifically, Section 11.06(c) states:

> No provision of this section shall ever be so construed as to expand the ordinary liability of the city; and provided, that nothing herein contained shall be construed to mean that the City of Lewisville, Texas waives any rights, privileges, defenses or **immunities** in tort actions which are provided under the common law, the constitution, and general laws of the State of Texas.

See Lewisville, Tex, Ordinances art. 11.06(c) (emphasis added).

Therefore, the City of Lewisville has never waived immunity from the negligence and fraud claims asserted by Plaintiffs. As such, subject matter jurisdiction does not attach.

ii. Plaintiffs failed to notify the City of Lewisville in accordance with Lewisville, Tex., Ordinances, art. 11.06(a).

Further, the City of Lewisville has specifically enacted laws similar to the TTCA provisions discussed *supra* that establish Special Provisions covering damage suits. In fact, Ordinance art. 11.06(a) states that

> "The City of Lewisville, Texas shall never be liable for claim for damage or injury to personal property unless the person whose personal property has been injured or damaged, or someone in his behalf, shall file a claim in writing with the city manager or the city secretary within one hundred eighty (180) days after said damage or injury has occurred, stating specifically when, where, and how the injury or damage occurred and the full extent thereof and the amount of damage sustained." *Id.*

APPENDIX A

Assuming Plaintiffs allege causes of action relating to previously owned personal property, a carnival trailer, their damages have not been properly alleged as required by said ordinance. More importantly, Plaintiff failed to notify the City in writing at all as needed to comply with said Lewisville Ordinances.

In this case, the alleged negligent sale where Plaintiff acquired the carnival trailer occurred in November of 2003, and the revocation by the Grand Prairie Justice Court occurred in April of 2004. Given that the Original Petition is the first notice of claim that Plaintiffs have given to the City, and that the Original Petition was filed on January 19, 2005, this notice is insufficient as a matter of law as per Lewisville Ordinances and the TTCA. As such, assuming that the City waived immunity for the claims that Plaintiffs assert, which it has not, Plaintiffs failed to follow the procedural requisites to invoke subject matter jurisdiction over the City.

CONCLUSION

In light of the foregoing legal authority and the statutory mandates of Section 101.001, et seq. of the Texas Tort Claims Act, and the City of Lewisville Ordinances, Plaintiffs fail, and cannot ever, plead a cause of action against this Defendant herein for which jurisdiction lies in this Court. Plaintiffs' pleadings fail as a matter of law to state any legally cognizable cause of action against this Defendant, and no subject matter jurisdiction attaches. Accordingly, Defendant's Plea to the Jurisdiction and attendant Motion to Dismiss must be granted.

APPENDIX A

WHEREFORE, PREMISES CONSIDERED, the City of Lewisville, Texas prays that Plaintiff take nothing by way of this action and respectfully requests that this Court grant Defendant's Plea to the Jurisdiction and dismiss any and all of Plaintiffs' claims against it, with prejudice. Defendant further prays for an award of its attorney fees and costs pursuant to Texas law, and for such other and further relief, at law or in equity, to which it may be justly entitled.

Respectfully submitted,

_____

By: Darrell G-M Noga
State Bar No. 00785326
Theodore J. Messina III
State Bar No. 24041475

FEE, SMITH, SHARP & VITULLO, LLP
Three Galleria Tower
13155 Noel Road, Suite 1000
Dallas, Texas 752440
972-934-9100 phone
972-934-9200 fax
Attorneys for Defendant, City of Lewisville

APPENDIX A

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been forwarded to all counsel of record, *via* facsimile and U.S. Mail, pursuant to the Texas Rules of Civil Procedure on this 23rd day of February, 2005.

J.B. Peacock, Jr.
D.G. Gagnon
Gagnon & Peacock, P.C.
4245 N. Central Expressway
Suite 250 Lock Box 104
Dallas, TX 75205
(214) 824-1414 ph.
(214) 824-5490 fax.

Darrell G-M Noga

APPENDIX A

FIAT

A hearing on Defendant's Special and Limited Appearance, Plea to the Jurisdiction and Motion to Dismiss is scheduled for the _____ day of _____, 2005, at _____ o'clock ____.m.

SIGNED this _____ day of _____, 2005.

_____

JUDGE PRESIDING

APPENDIX B

CAUSE NO. C200500389

DANIEL L. SCHINZING,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
v.	§	**JOHNSON COUNTY, TEXAS**
	§	
CITY OF CLEBURNE, TEXAS,	§	
JUDGE F. STEVEN MCCLURE ,	§	
CITY ATTORNEY LANE REGELEY, and	§	
POLICE OFFICER ROBERT SIGLER, [1]	§	
	§	
Defendant.	§	**249TH JUDICIAL DISTRICT**

ALL DEFENDANTS' PLEA TO THE JURISDICTION AND MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW all Defendants herein, THE CITY OF CLEBURNE, JUDGE F. STEVEN MCCLURE, CITY ATTORNEY LANE REGELEY, and POLICE OFFICER ROBERT SIGLER, in whatever capacity sued, and file this their Plea to the Jurisdiction and incorporated Motion to Dismiss (hereinafter collectively referred to as their "Plea"), and in support thereof would respectfully state and show this Court as follows:

I.

INTRODUCTION

Pro se Plaintiff Schinzing is a frequent litigant. [2] Most of his disputes seem to involve governmental entities and his rather singular views on what laws apply to him as opposed to the

---

[1] Pro se Plaintiff did not refer to Mr. Regeley or Officer Sigler by name in the caption of this suit, but did so repeatedly in the Original Petition; e.g., pp. 2-7.

[2] Daniel Lee Schinzing v. The City of Cleburne, et al., Cause No. C2000000333, County Court at Law of Johnson County, Texas *removed to* Cause No. 3-00CV2670-G, United States District Court, N.D. of Texas, Dallas Division; Daniel Lee Schinzing v. The City of Cleburne, et al., Cause No. C2000000334, County Court at Law of Johnson, Texas *removed to* Cause No. 3-00CV2669-D, United States District Court, N.D. of Texas, Dallas Division; Daniel Lee Schinzing v. The City of Cleburne, et al., Cause No. C2000000350, County Court at Law of Johnson County, Texas *removed to* Cause No. 3-00CV2668-P, United States District Court, N.D. of Texas, Dallas Division. This listing is not exhaustive.

rest of society, as, for instance, the cases cited in note 2, *infra*, all three of which were summarily disposed of adverse to Mr. Schinzing's position.[3]

This case follows the familiar patterns evidenced in the cases in note 2, *infra*. Mr. Schinzing received traffic citations from Defendant Officer Sigler for registration and drivers' license violations. The court may take judicial notice of these records which Defendants will supplement in the record. Mr. Schinzing was found guilty in a trial presided over by Defendant Judge McClure and prosecuted by Defendant Regeley. As the numerous "allegations" of the Original Petition make clear, Mr. Schinzing deems the whole process fraudulent and all the individuals involved guilty of "fraud". Mr. Schinzing refers to his "alleged" trial (sic) and the "alleged" City Attorney, par. 53 of the Original Petition, but both the event and Mr. Regeley are quite real. Likewise, in Section IV of the Petition, Mr. Schinzing deems Officer Sigler's request to see a driver's license, identification, registration and proof of financial responsibility all acts of "fraud" (sic). Plaintiff also claims that the Municipal Court of Cleburne "does not have jurisdiction to hear violations of state laws", par. 65 of the Original Petition. Although Plaintiff once uses the term "gross negligence" (for which the Defendants are also immune in this case), he characterizes each of his fifteen counts as sounding in allegations of "fraud".

Based upon multiple grants of immunity, all Defendants are immune from Plaintiff's claims and no subject matter jurisdiction attaches herein. Simply put, Plaintiff's Original Petition fails to allege any legally cognizable cause of action against any Defendant herein. To the extent Plaintiff pleads facts sufficient to support any affirmative cause against the City or its agents or employees, which is denied, Plaintiff's claims are barred as a matter of law under the Texas Tort Claims Act ("TTCA"), Section 101.001, *et seq.*, of the Texas Civil Practice and

[3] Mr. Schinzing's views on government, marriage and numerous other matters are discussed in more detail in his over 600 page self-published book titled: "The State of Texas is a Liar", available on his website

Remedies Code, particularly as Section 101.057 of the TTCA bars any claim of intentional tort ("fraud" in this case). Similarly, Defendant Judge McClure has judicial immunity from this suit, City Attorney Regeley has prosecutorial immunity, and Officer Sigler has qualified immunity. Plaintiff's arguments are thus completely without merit, and Plaintiff does not, and cannot, adduce any authority to suggest any of these immunities have been waived. Moreover, not only are each of the Defendants immune from the various claims made in Plaintiff's Petition, but the requisite notice required of Plaintiff pursuant to the Texas Tort Claims Act was not made, and jurisdiction therefore never attached for this reason as well.

II.

GROUNDS FOR DISMISSAL

Even if this Court takes as true all of Plaintiff's "factual" allegations against these Defendants, as it must for purposes of this Plea, this Court must grant Defendants' Plea for any or all of the following reasons:

1. Plaintiff's claims do not come within the limited waiver of immunity afforded under TTCA §101.021;

2. Plaintiff's claims for fraud are intentional torts, and as such, are barred by TTCA §101.057;

3. Defendant McClure has judicial immunity

4. Defendant Sigler is protected by TTCA § 101.106 and the legal doctrine of qualified immunity

5. Defendant Regeley has prosecutorial immunity

6. Proper notice was not given under TTCA §101.101 as is mandatory to confer jurisdiction.

APPENDIX B

III.

ARGUMENTS AND AUTHORITIES

A. PLAINTIFF'S CLAIMS ARE BARRED BY THE TEXAS TORT CLAIMS ACT AND SUBJECT MATTER JURISDICTION DOES NOT ATTACH

Plaintiff's "claims" do not meet the statutory requirements as pled, are not actionable under Texas law, and are not related to a matter for which immunity has been waived for governmental entities by the Texas Legislature. Hence, no subject matter jurisdiction attaches. On their face, Plaintiff's pleadings alleging "fraud" demonstrate that this Court does not have subject matter jurisdiction. *See Bybee v. Fireman's Fund Ins. Co., 331 S.W.2d 910, 917 (Tex. 1960); Fountain Parkway, Ltd. v. Tarrant Appr. Dist.*, 920 S.W.2d 799, 802 (Tex. App.—Fort Worth 1996, writ denied); TTCA Section 101.057.

By statutory definition, the City is a governmental unit covered by the TTCA. TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(3)(B) (Vernon 1997). As such, the City is entitled to immunity from both suit and liability, in the absence of a constitutional or statutory provision waiving the same. *See, e.g., Town of LaPorte v. Barfield,* 898 S.W.2d 288, 291 (Tex.1995); *Duhart v. State*, 610 S.W.2d 740, 741 (Tex. 1980).

Immunity from suit ensures that the State and its political subdivisions or officers may not be sued in their own courts, absent their consent. *See Texas Dept. of Transp. v. Jones.* 8 S.W.3d 636, 637 (Tex. 1999) (per curiam); *Barfield,* 898 S.W.2d at 291. "[F]rom the earliest days of statehood, under the doctrine of governmental immunity, persons aggrieved by an action of the State or one of its agencies have been unable to sue the State without its permission." *Barcroft v. State*, 900 S W.2d 370, 371 (Tex. App.--Texarkana 1995, no writ). Thus, the doctrine of sovereign immunity clearly acts not only to provide a governmental unit with immunity from liability, but also acts to shield a governmental unit from suit as well. *See Jones,*

8 S.W.3d at 636-637; *W.D. Haden Co. v. Dogen*, 308 S.W.2d 838, 839-40 (1958) (emphasis added).

i. The Texas Tort Claims Act does not waive immunity for the claims alleged by Plaintiff.

The waiver of sovereign immunity is a matter to be addressed by the Legislature, and only the Legislature can only waive sovereign immunity by clear and unambiguous language. *See Barfield,* 898 S.W.2d at 291; *Duhart*, 610 S.W.2d at 742. In Texas, the Legislature has provided a limited waiver of a governmental unit's sovereign immunity through the TTCA. However, where the TTCA does not apply, or does not expressly waive immunity, immunity from suit is still the rule. *See* TEX. CIV. PRAC. & REM. CODE ANN.§ 101.025(a) (Vernon 1997); *see also Townsend v. Memorial Med. Ctr.*, 529 S.W.2d 264, 267 (Tex. Civ. App—Corpus Christi 1975, writ ref'd n.r.e.) (emphasis added). Such immunity applies herein, and it is clear that Plaintiff can show no legislative waiver of immunity for his "claims" of intentional tort (fraud) as to Defendant, the City of Cleburne, or any other Defendants.

In Texas, pursuant to TTCA §101.021, waiver of immunity only applies if a claimant alleges personal injury, death or property damage caused by the acts or omissions of an employee acting within their scope of employment if: a) the claim arises from the government's operation or use of a motor-driven vehicle; and/or b) the claim arises from the operation or use of motor-driven equipment. Section 101.021 also waives immunity if a claimant alleges personal injury or death (not property damage and therefore not applicable herein) caused by: a) condition of tangible personal property; b) use of tangible personal property; and c) condition of real property (premises liability).

APPENDIX B

In this case, Plaintiff alleges "fraud" (sic) theories[4] against the City and other Defendants, and no known exception to the statutory immunities referenced for that theory exists. *See, e.g., City of Hempstead v. KMIEC,* 902 S.W.2d 118, 122 (Tex. App. – Houston [1st Dist.] 1995, writ ref'd) (Tort Claims Act does not waive immunity for intentional torts); *City of LaPorte v Barfield,* 898 S.W.2d 288, 291 (Tex. 1995) (sovereign immunity not waived for workers compensation retaliation claims). In an analogous context, even most negligence claims would be precluded by said immunity; *Mayes v. City of Wichita Falls,* 403 S.W.2d 852, 854 (Tex. Civ. App. – Fort Worth 1966, writ ref'd n.r.e.) (municipality is immune from claim for negligent retention).

Plaintiff has not alleged any causes of action that fall within any of the limited waivers afforded by the TTCA under §101.021. Specifically, Plaintiff only complains that the City and Defendants participated in "fraud" in each of the fifteen "Counts" of the Original Petition.

Taking Plaintiff's allegations as true for the purpose of this Plea, in no way was Plaintiff alleged to be injured as a result of a government employee's operation or use of a motor-driven vehicle or motor-driven equipment, nor has he experienced any personal injury caused by a condition or use of tangible personal, or real property. In fact, Plaintiff's Original Petition fails to identify any cognizable legal theory when the allegations are given even cursory review.

ii. Plaintiff's allegations of intentional tort are barred by the TTCA under Section 101.057

Plaintiff's allegations of "fraud" (sic) likewise do not withstand the statutory immunity afforded to the Town. Section 101.057 of the TTCA specifically states that immunity is not waived as to a claim "arising out of an assault, battery, false imprisonment, **or any other intentional tort**..." (emphasis added). Plaintiff's Petition alleges fraud, which is an intentional

[4] When scrutinized, all of Plaintiff's repeated "fraud" claims are nothing more than "philosophical" (sic) issues of disagreement which Plaintiff has with the legal system. *See*, e.g., pars. 25-27, 33 and 53, Original Petition.

tort. As such, Plaintiff's allegations fail as a matter of law, as the Texas Tort Claims Act has indisputably not waived immunity related to intentional torts. *See, Tarrant County Hosp. District v. Henry,* 52 S.W. 3d 434, 441 (Tex.App.--Fort Worth 2001, no pet.). *See, e.g. Insurance Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998); *Hendrix v. Bexar County Hosp. District,* 31 S.W. 3d, 661,663 (Tex.App-San Antonio 2000, pet.denied). Plaintiff has therefore presented no claims for which this Court has jurisdiction, since intentional tort claims cannot be asserted against governmental entities under the TTCA, and, subject matter jurisdiction does not attach to any of Plaintiff's causes of action.

iii. *Plaintiff failed to notify the City of Cleburne as required under TTCA §101.101*

The TTCA also specifically provides that a governmental unit, the City of Cleburne in this case, is entitled to receive notice of a claim against it not later than six months after the day the incident giving rise to the alleged injury occurred, and such notice must specifically describe the damage or injury, the time and place of the injury, and the incident. *See TTCA* §101.101. Suit is precluded if such notice provisions are not complied with, and under Texas law they are held akin to statutes of limitations, *Smith v. Town of Houston*, 960 S.W.2d 326, 328 (Tex.App.-Houston [14th Dist.] 1997, no pet.).

In this case, the actions of which Plaintiff complains span a period from April 29, 2005. Plaintiff has still not given proper notice compliant with TTCA §101.101. Thus, even assuming that the City and other Defendants were not immune for the claims that Plaintiff asserts, which they are, Plaintiff failed to follow the procedural requisites necessary to invoke subject matter jurisdiction over Defendants.

APPENDIX B

B. JUDICIAL IMMUNITY – JUDGE MCCLURE

As Texas courts have held: "Judges enjoy absolute immunity from liability for judicial acts, no matter how erroneous the act or how evil the motive, unless the act is performed in the clear absence of all jurisdiction." *City of Houston v. Swindall*, 960 S.W.2d 413, 417 (Tex.App. – Houston, 1998, no pet.); see also *Bradt v.* West, 892 S.W.2d 56, 66-67 (Tex. App. – Houston 1994, writ den.) ("The judges of Texas courts have absolute immunity for their judicial acts 'unless such acts clearly fall outside the judge's subject-matter jurisdiction.'"). Even if true, every single allegation Plaintiff makes against Judge McClure involves acts or omissions by Judge McClure while he was serving in his official capacity as a Municipal Court Judge for the City of Cleburne. *See* Original Petition.

Furthermore, it is clear that Judge McClure's actions fell squarely within his subject matter jurisdiction. Plaintiff's claims are based solely on the fact that Judge McClure was the presiding Judge over Plaintiff's trial on the traffic offenses described herein – traffic violations that were clearly within Judge McClure's subject matter jurisdiction as Municipal Judge for the City.

C. QUALIFIED IMMUNITY AND §101.106 – OFFICER SIGLER

As the Texas Supreme Court has held: "Governmental employees are entitled to official immunity from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority." *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex.1994).

Here, any claim Plaintiff has purported to allege against Officer Sigler stems solely from the fact that Officer Sigler issued City of Cleburne citations for the violations described herein.

APPENDIX B

It is undisputed that the issuance of citations for traffic violations is a discretionary duty of police officers for the City of Cleburne, or elsewhere, and the Court may take judicial notice of this fact. Nothing in Plaintiff's pleadings suggests anything other than that Officer Sigler was acting within his discretion and within the scope of his authority as a police officer. Furthermore, nothing in Plaintiff's pleading suggests that Officer Sigler took any action that violates any law – or that he had any contact whatsoever with the Plaintiff beyond issuing citations – and it is clear that "[q]ualified immunity cloaks a police officer from personal liability for discretionary acts which do not violate well-established laws." *Id., quoting Streetman v. Jordan*, 918 F.2d 555,556 (5th Cir.1990). Accordingly, Officer Sigler is entitled to qualified immunity from liability for all claims alleged in Plaintiff's pleadings.

Moreover, Section 101.106 of the TTCA also bars claims against Officer Sigler, and the other Defendants for that matter. Section 101.106(a) of the TTCA provides as follows:

> (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. (Emphasis added).

Further, Section 101.106 (e) provides:

> (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. (Emphasis added).

Thus, Plaintiff's election of suit against the City bars his claims against the individual Defendants even apart from their immunity and they must immediately be dismissed. *See generally, Bell v. Love*, 923 S.W.2d 229, 233 (Tex. App. – Houston [14th District] 1996, no writ).

APPENDIX B

D. PROSECUTORIAL IMMUNITY – DEFENDANT REGELEY

City Attorney Lane Regeley is also entitled to immunity in this matter. It is well-established that when prosecutors are acting in their prosecutorial functions they are entitled to absolute immunity. Common-law immunity for a prosecutor is determined by the nature of the function performed and it is available for conduct of prosecutors that is "intimately associated with the judicial phase of the criminal process." *Buckley v. Fitzsimmons*, 509 U.S. 259 at 269-270 (1993). Prosecutors are cloaked with absolute immunity for actions taken in initiating a prosecution and in presenting the state's case. *Imbler v. Pachtman*, 424 U.S. 409 (1976):

> "The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.*, at 422-423.

Plaintiff Schinzing makes the following allegation as to Mr. Regeley: "At the alleged trial of the Plaintiff in the Cleburne Municipal Court on August 4, 2005, Lane Regeley, the alleged City Attorney, stated that a COMPLAINT is the lawful charging instrument according to the constitution; this is fraud since the Texas Constitution does not allow that type of charging instrument in a criminal case." *See* (Plaintiff's Original Petition, paragraph 53). It is clear from the pleadings that Lane Regeley was acting at all times in his official capacity as prosecutor, and as such he is entitled to absolute immunity. *Imbler*, 424 U.S. at 430-431 (holding that when a prosecutor initiates or presents a case, the prosecutor is entitled to absolute immunity). The public policy concerns referenced above are even more starkly justified when one looks at the Original Petition herein and imagines the havoc that would ensue if prosecutors were vulnerable

to these sort of diatribes very thinly disguised as a legal pleading.

CONCLUSION

In light of each or any of the foregoing legal authorities and the statutory mandates of Section 101.001, et seq. of the Texas Tort Claims Act, Plaintiff fails to plead, and cannot ever plead, a cause of action against these Defendants herein for which jurisdiction lies in this Court. Plaintiff's pleadings fail as a matter of law to state any legally cognizable cause of action against the City of Cleburne or any Defendant herein, therefore subject matter jurisdiction does not attach. Accordingly, Defendants' Plea to the Jurisdiction and attendant Motion to Dismiss must be granted.

WHEREFORE, PREMISES CONSIDERED, Defendants herein each pray that Plaintiff take nothing by way of this action and respectfully request that this Court grant their Plea to the Jurisdiction and dismiss any and all of Plaintiff's claims against each or any of these Defendants with prejudice to the refiling of same in whole or in any part. These Defendants further pray for such other and further relief to which this Court may deem them justly entitled herein.

APPENDIX B

Respectfully submitted,

_____

By: **Darrell G-M Noga**
State Bar No. 00785326
Elizabeth R. Flora
State Bar No. 24036572

FEE, SMITH, SHARP & VITULLO, LLP
Three Galleria Tower
13155 Noel Road, Suite 1000
Dallas, Texas 752440
972-934-9100 phone
972-934-9200 fax
Attorneys for Defendant,
City of Cleburne

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been forwarded to all counsel of record, *via* facsimile and U.S. Mail, pursuant to the Texas Rules of Civil Procedure on this _____ day of September, 2005.

Daniel L. Schinzing, *pro se*
208 D Val Verde
Keene, Texas 76059

_____
Darrell G-M Noga

APPENDIX B

FIAT

A hearing on Defendants' Plea to the Jurisdiction and Motion to Dismiss is scheduled for the _____ day of _____, 2005, at _____ o'clock ____.m.

SIGNED this _____ day of _____, 2005.

_____

JUDGE PRESIDING

APPENDIX C

COURT OF APPEALS

SECOND DISTRICT OF TEXAS
FORT WORTH

RECEIVED
MAY 26 2006

NO. 2-06-018-CV

MICHAEL MILLER D/B/A ALL ECONOMY FOREIGN & DISMANTELING, AND ABC LATE MODEL TRUCK & AUTO PARTS, INC. — APPELLANTS

V.

THE CITY OF LEWISVILLE, TEXAS — APPELLEE

FROM COUNTY COURT AT LAW NO. 2 OF DENTON COUNTY

MEMORANDUM OPINION[1]

Appellants Michael Miller d/b/a All Economy Foreign & Dismanteling, and ABC Late Model Truck & Auto Parts, Inc. appeal from the trial court's order granting the City of Lewisville's plea to the jurisdiction. In a single issue, Appellants claim that the trial court erred by granting the City's plea. We will affirm.

---

[1]*See* TEX. R. APP. P. 47.4.

Appellants purchased a carnival trailer from Pro-Tow, a Lewisville towing company, at an auction that the City of Lewisville oversaw. Eventually, the trailer was seized from Appellants and ordered returned to the registered owner, Bob West, from whom it had been stolen. Apparently, Pro-Tow had taken possession of the stolen trailer and exercised its right to auction the trailer after the trailer had been abandoned at a Budget Inn Suites in Lewisville.[2]

Appellants brought suit against the City, alleging causes of action for a "taking," negligence, breach of contract, breach of warranty of title, fraud, joint enterprise, and in the alternative, joint venture. The City filed a plea to the jurisdiction. After a hearing, the trial court granted the City's plea and dismissed all of Appellants' claims against the City.

The burden is on the plaintiff to plead facts that affirmatively demonstrate subject-matter jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). Whether the plaintiff has alleged facts that demonstrate subject-matter jurisdiction is a question of law. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-29 (Tex. 2004). Therefore, we review the trial court's granting or denying the plea de novo. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998), *cert. denied*, 526 U.S.

---

[2]*See* TEX. CODE CRIM. PROC. ANN. art. 18.17 (Vernon 2005).

1144 (1999). We construe the pleadings liberally in favor of conferring jurisdiction. *Tex. Dep't of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex. 2002).

We have reviewed Appellants' original petition and their first amended original petition, filed after the City filed its plea to the jurisdiction. Appellants have failed to plead facts establishing jurisdiction as to some of their causes of action, and they have pleaded facts affirmatively negating the existence of jurisdiction as to other causes of action. Concerning Appellants' taking claim, Appellants' pleadings affirmatively demonstrate that even if the City's oversight of the auction could be construed as a "taking," the "public use" element of this claim is affirmatively negated. *See, e.g., Dahl ex rel. Dahl v. State*, 92 S.W.3d 856, 861 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (citing *City of Abilene v. Burk Royalty Co.*, 470 S.W.2d 643, 646 (Tex. 1971)) (recognizing that "[a]n action for inverse condemnation is the appropriate avenue of relief for a property owner whose property has been taken for public use without due process or without institution of proper condemnation proceedings, and who wishes to recover compensation for that loss"). Concerning Appellants' breach of contract claim, Appellants have not pleaded the existence of any contract between themselves and the City. A warranty of title is implied in connection with a contract for sale. *See* TEX. BUS. & COM. CODE ANN. § 2.312(a) (Vernon

1994). Because Appellants have not pleaded that any contract exists between them and the City, they have not pleaded facts establishing a claim for breach of contract or breach of warranty of title. Concerning Appellants' negligence, fraud, joint enterprise, and joint venture claims, Appellants have not alleged or pleaded any facts attempting to bring these claims within the exceptions to sovereign immunity created by the Texas Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 2005); *see also City of Fort Worth v. Pastusek Indus., Inc.*, 48 S.W.3d 366, 372 (Tex. App.—Fort Worth 2001, no pet.) (holding trial court properly granted City's plea to the jurisdiction on Pastusek's claims for actual and constructive fraud, breach of fiduciary duty, negligence, and misrepresentation).

We hold that the trial court did not err by granting the City's plea to the jurisdiction. Accordingly, we overrule Appellants' sole issue and affirm the trial court's judgment.

PER CURIAM

PANEL F: WALKER, LIVINGSTON, and DAUPHINOT, JJ.

DELIVERED: May 25, 2006

APPENDIX D

LEXSEE 133 S.W.3D 217

TEXAS DEPARTMENT OF PARKS AND WILDLIFE, PETITIONER, v. MARIA MIRANDA AND RAY MIRANDA, RESPONDENTS

NO. 01-0619

SUPREME COURT OF TEXAS

133 S.W.3d 217; 2004 Tex. LEXIS 304; 47 Tex. Sup. J. 386

October 30, 2002, Argued
April 2, 2004, Delivered

PRIOR HISTORY: [**1] ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS. *Tex. Dep't of Parks & Wildlife v. Miranda, 55 S.W.3d 648, 2001 Tex. App. LEXIS 2801 (Tex. App. San Antonio, 2001)*

DISPOSITION: Reversed and rendered.

JUDGES: JUSTICE WAINWRIGHT delivered the opinion of the Court with respect to parts I., II., III.A., III.B., III.C.2., III.C.3., III.D., and IV., in which CHIEF JUSTICE PHILLIPS, JUSTICE HECHT, JUSTICE OWEN, and JUSTICE SMITH joined, and a plurality opinion with respect to Part III.C.1., in which CHIEF JUSTICE PHILLIPS, JUSTICE HECHT, and JUSTICE SMITH joined. JUSTICE JEFFERSON filed a dissenting opinion. JUSTICE BRISTER filed a dissenting opinion, in which JUSTICE O'NEILL and JUSTICE SCHNEIDER joined.

OPINIONBY: J. Dale Wainwright

OPINION:

[*220] Maria Miranda sustained injuries after a tree limb fell on her at Garner State Park in Uvalde County. Maria and her husband Ray sued the Texas Parks and Wildlife Department, n1 alleging negligence and [*221] gross negligence. The Department filed a plea to the jurisdiction, to which it attached supporting evidence, and argued that sovereign immunity barred the Mirandas' claims. The trial court denied the plea to the jurisdiction and a unanimous court of appeals affirmed, holding that the trial court could [**2] not consider evidence in support of the plea because the Department did not allege that the Mirandas' pleadings were a sham for the purpose of wrongfully obtaining jurisdiction. *55 S.W.3d 648, 652.*

n1 The Mirandas originally named the "Texas Department of Parks and Wildlife" as defendant but corrected the name to the "Texas Parks and Wildlife Department" in their third amended petition. Because the parties and lower courts retained the original style of the case, we retain that style but in our opinion refer to the Department by its correct name.

In accord with our decision in *Bland Independent School District v. Blue, 34 S.W.3d 547, 44 Tex. Sup. Ct. J. 125 (Tex. 2000)*, we hold that the trial court in this case was required to examine the evidence on which the parties relied to determine if a fact issue existed regarding the alleged gross negligence of the Department. Due to the unusual confluence of standards erected by the Legislature for waiver of sovereign immunity in the *Texas Tort Claims Act* and the [**3] recreational use statute, plaintiffs must plead gross negligence to establish subject matter jurisdiction. Further, if the plaintiffs' factual allegations are challenged with supporting evidence necessary to consideration of the plea to the jurisdiction, to avoid dismissal plaintiffs must raise at least a genuine issue of material fact to overcome the challenge to the trial court's subject matter jurisdiction. Because the Mirandas failed to raise a genuine issue of material fact regarding the alleged gross negligence of the Department, we conclude that the trial court lacked subject matter jurisdiction over this lawsuit. Therefore, we reverse the judgment of the court of appeals and render judgment dismissing the case.

I. Factual and Procedural Background

The Mirandas' third amended petition contains the following allegations: In April 1998, the Mirandas and their family were camping and picnicking as paying guests at Garner State Park, owned and operated by the Texas Parks and Wildlife Department. The Mirandas asked a park ranger to recommend a campsite that would be safe for children. While standing next to a picnic table at the recommended campsite, a falling tree branch [**4] ap-

proximately twelve inches in diameter and fifteen feet long struck Maria on the head. As a result of the incident, Maria suffered extensive injuries to her head, neck, and spine. Ray suffered mental anguish and other damages related to his wife's injuries.

On May 7, 1999, the Mirandas filed suit against the Department, alleging negligence and later amended their suit to add gross negligence claims. With respect to the gross negligence claims, the Mirandas alleged that the Department "knew of the dangers of its falling tree branches, failed to inspect, failed to prune, failed to alleviate or remove the danger, and consciously and deliberately failed to warn Plaintiffs of the extremely dangerous condition," "knew that its property contained hidden, dangerous defect [sic] in that its tree branches which have not been inspected or pruned regularly fall," failed "to make safe the dangerous condition of its campsite trees," and "failed to warn or make reasonably safe the dangerous condition of which it was aware." In addition, the Mirandas alleged that the Department's conduct was "willful, wanton, or grossly negligent."

Over a year after the Mirandas filed suit and after the parties [**5] conducted discovery, the Department filed a plea to the jurisdiction [*222] and motion to dismiss, arguing that the Mirandas' allegations were insufficient to invoke a waiver of the Department's sovereign immunity under the standard established in the Tort Claims Act and the recreational use statute. n2 *TEX. CIV. PRAC. & REM. CODE §§ 101.001-.109*; *id.* §§ *75.001-.004*. The Department attached evidence in support of its plea. The Mirandas filed a response to the Department's plea and their third amended original petition. In their response, the Mirandas stated that they relied on evidence attached to the Department's plea, including written discovery responses from the Department and the deposition the Mirandas took of assistant park manager Craig VanBaarle. At the trial court's hearing on the Department's plea, the parties addressed the allegations in the Mirandas' third amended original petition. The next day, the trial court denied the plea. The Department filed this interlocutory appeal claiming that the trial court erroneously denied its plea to the jurisdiction and motion to dismiss. *Id. § 51.014(a)(8)*. The court of appeals affirmed the trial [**6] court's denial of the plea, stating that the Mirandas pled a premises defect cause of action based on gross negligence under the recreational use statute. *55 S.W.3d at 652*. The court of appeals rejected the Department's argument that there was no evidence to support gross negligence, holding that "the trial court was not authorized to inquire into the substance of the claims because the Department did not specifically allege that the Mirandas' allegations were pled merely as a sham for the purpose of wrongfully obtaining jurisdiction." *Id.* (citing *Bland, 34 S.W.3d at 554* and *Rylander v. Caldwell, 23 S.W.3d 132, 135 (Tex. App.-Austin 2000, no pet.)*).

n2 The Department also moved for summary judgment under *Texas Rule of Civil Procedure 166a(b)-(c) and 166a(i)*. The trial court denied both motions, but the Department does not appeal the trial court's denial of either motion.

The Department contends that the court of appeals erred in relying solely upon the conclusory [**7] allegations found in the Mirandas' petition to affirm the trial court's denial of the Department's plea to the jurisdiction and in disregarding the Department's evidence submitted with its plea. Specifically, the Department contends that gross negligence is a jurisdictional prerequisite to the Mirandas' claims and that its evidence affirmatively negates gross negligence. The Department further argues that because the Mirandas failed to plead specific facts alleging gross negligence in their petition or introduce evidence to controvert the evidence in the Department's plea, they failed to establish subject matter jurisdiction to proceed with the litigation.

After originally dismissing the petition for want of jurisdiction, we granted the Department's petition on motion for rehearing. Before we consider the substantive issues presented, we first determine whether we have jurisdiction over this interlocutory appeal.

II. Conflicts Jurisdiction

When there is no dissent in the court of appeals, this Court has jurisdiction over interlocutory appeals only if the court of appeals' decision "holds differently" or conflicts with "a prior decision of another court of appeals or of the [**8] supreme court on a question of law material to a decision of the case." *TEX. GOV'T CODE § 22.001(a)(2)*; n3 *Schein v. Stromboe,* [*223] *102 S.W.3d 675, 687, 46 Tex. Sup. Ct. J. 103 (Tex. 2002)*; *Tex. Natural Res. Conservation Comm'n v. White, 46 S.W.3d 864, 867, 44 Tex. Sup. Ct. J. 667 (Tex. 2001)*. Two decisions conflict for purposes of establishing our jurisdiction under *section 22.001(a)(2)* when the two cases are so similar that the decision in one case is necessarily conclusive of the decision in the other. *Schein, 102 S.W.3d at 687-88*; *White, 46 S.W.3d at 867*. "The conflict must be on the very question of law actually involved and determined, in respect of an issue in both cases, the test being whether one would operate to overrule the other in case they were both rendered by the same court." *Christy v. Williams, 156 Tex. 555, 298 S.W.2d 565, 568-69 (Tex. 1957)* (citation omitted).

n3 The Legislature amended *section 22.001 of the Government Code*, effective September 1, 2003.

Act of June 11, 2003, 78th Leg., R.S., Ch. 204 (codified as *section 22.001(e) of the Texas Government Code*). The amendment, which applies to actions filed on or after September 1, 2003 and does not govern our jurisdiction in this case, provides that "one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants."

[**9]

The Department contends that this Court has jurisdiction over its interlocutory appeal because the court of appeals' decision here conflicts with our opinion in *Bland*. In *Bland*, we held that a trial court "may consider evidence *and must do so when necessary to resolve the jurisdictional issues raised.*" *34 S.W.3d at 555* (emphasis added). While recognizing that "a dilatory plea does not authorize an inquiry so far into the substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction," we explained that "because a court must not act without determining that it has subject-matter jurisdiction to do so, it should hear evidence as necessary to determine the issue before proceeding with the case." *Id. at 554*. "The court should, of course, confine itself to the evidence relevant to the jurisdictional issue." *Id. at 555*.

In *Bland*, we included examples of when relevant evidence may be considered in determining whether jurisdiction has been established. *See id. at 554*. We also observed that when the defendant contends that the amount in controversy falls below [**10] the trial court's jurisdictional limit, the trial court should limit its inquiry to the pleadings. *Id.* In that situation, we concluded, "the plaintiff's pleadings are determinative unless the defendant specifically alleges that the amount was pleaded merely as a sham for the purpose of wrongfully obtaining jurisdiction." *Id.*

In this case, the court of appeals inaccurately stated and then misapplied *Bland*'s holding. *55 S.W.3d at 650-52*. The court of appeals held that an inquiry behind the factual allegations pled in support of subject matter jurisdiction was improper unless the Department specifically alleged that the Mirandas' allegations were pled merely as a sham to wrongfully obtain jurisdiction. *Id. at 652*. This conflicts with our holding in *Bland* that a court *must* consider evidence when necessary to resolve the jurisdictional issues raised. *34 S.W.3d at 555*; *see also County of Cameron v. Brown, 80 S.W.3d 549, 556-57, 45 Tex. Sup. Ct. J. 680 (Tex. 2002)* (considering pleadings and limited jurisdictional evidence in evaluating forseeability element of premises defect claim under the Tort Claims Act); *Tex. Dep't of Criminal Justice v. Miller, 51 S.W.3d 583, 587, 44 Tex. Sup. Ct. J. 963 (Tex. 2001)* [**11] (examining pleadings and limited jurisdictional evidence to determine whether plaintiff affirmatively demonstrated waiver of sovereign immunity); *White, 46 S.W.3d at 868* (analyzing the facts alleged by the plaintiff and to the extent relevant, evidence submitted by the parties, in considering whether plaintiff stated a claim for injuries caused by "motor-driven equipment" under the Tort Claims Act). [*224] In *Bland*, our preclusion of a trial court's inquiry behind the facts pled in determining subject matter jurisdiction was limited to the jurisdictional amount. *34 S.W.3d at 554*. Even this bar could be lifted, and evidence of the jurisdictional amount considered, in circumstances in which an adverse party asserts that the amount in controversy was pled as a sham to obtain jurisdiction. n4 *Id.* That circumstance is not at issue here. Thus, the court of appeals' holding conflicts with the same question of law that we decided in *Bland*, and the opinions cannot stand together. *Schein, 102 S.W.3d at 689*. This conflict provides the basis for our jurisdiction to consider the merits of the plea. *See TEX. GOV'T CODE § 22.001(a)(2)* [**12] .

n4 The plaintiff's allegations in the petition of the amount in controversy control for jurisdictional purposes unless the party challenging jurisdiction pleads and proves that the plaintiff's allegations of the amount in controversy were made fraudulently for the purpose of obtaining jurisdiction. *See Bland, 34 S.W.3d at 554*; *Cont'l Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444, 449, 40 Tex. Sup. Ct. J. 172 (Tex. 1996)*; *Tidball v. Eichoff, 66 Tex. 58, 17 S.W. 263, 263 (Tex. 1886)*. We disapprove of courts of appeals' holdings that require a party to allege that pleadings, other than the jurisdictional amount, are fraudulent in order for the trial court to consider evidence, when otherwise necessary, of whether it has jurisdiction over a case. *See, e.g., Sullivan v. Wilmer Hutchins Indep. Sch. Dist., 47 S.W.3d 529, 531 (Tex. App.-Dallas 2000), rev'd on other grounds, 51 S.W.3d 293, 44 Tex. Sup. Ct. J. 978 (Tex. 2001)*; *Denton County v. Howard, 22 S.W.3d 113, 117-18 (Tex. App.-Fort Worth 2000, no pet.)*; *Tex. Dep't of Mental Health & Mental Retardation v. Pearce, 16 S.W.3d 456, 460 (Tex. App.-Waco 2000, pet. dism'd w.o.j.)*; *Tex. State Employees Union/CWA Local 6184 v. Tex. Workforce Comm'n, 16 S.W.3d 61, 65, 66 (Tex. App.-Austin 2000, no pet.)*; *Dalmac Constr. Co. v. Tex. A & M Univ., 35 S.W.3d 654, 655 n.1 (Tex. App.-Austin 1999), rev'd on other grounds, sub nom. Gen. Servs. Comm'n v. Little-Tex Insulation Co., Inc., 39 S.W.3d 591, 44 Tex. Sup. Ct. J. 397 (Tex. 2001)*; *Univ. of Houston v. Elthon, 9 S.W.3d 351, 356 (Tex. App.-Houston*

[14th Dist.] 1999, pet. dism'd w.o.j.); *Curbo v. State, Office of the Governor, 998 S.W.2d 337, 341-42 (Tex. App.-Austin 1999, no pet.)*; *City of Saginaw v. Carter, 996 S.W.2d 1, 3 (Tex. App.-Fort Worth 1999, pet. dism'd w.o.j.)*; *Bland Indep. Sch. Dist. v. Blue, 989 S.W.2d 441, 447 (Tex. App.-Dallas 1999), rev'd, 34 S.W.3d 547, 44 Tex. Sup. Ct. J. 125 (Tex. 2000).*

[**13]

III. The Department's Plea to the Jurisdiction

A. Sovereign Immunity

In Texas, sovereign immunity deprives a trial court of subject matter jurisdiction for lawsuits in which the state or certain governmental units have been sued unless the state consents to suit. *Tex. Dep't of Transp. v. Jones, 8 S.W.3d 636, 638, 43 Tex. Sup. Ct. J. 143 (Tex. 1999)*; *Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 405, 40 Tex. Sup. Ct. J. 676 (Tex. 1997), superseded by statute on other grounds as stated in Little-Tex Insulation Co., 39 S.W.3d at 593*; *Duhart v. State, 610 S.W.2d 740, 741, 24 Tex. Sup. Ct. J. 157 (Tex. 1980)*; *Hosner v. DeYoung, 1 Tex. 764, 769 (1847)*. The Texas Tort Claims Act provides a limited waiver of sovereign immunity. *TEX.CIV.PRAC.& REM.CODE §§ 101.001-.109*. Sovereign immunity includes two distinct principles, immunity from suit and immunity from liablity. *Jones, 8 S.W.3d at 638*; *Fed. Sign, 951 S.W.2d at 405*. Immunity from liability is an affirmative defense, while immunity from suit deprives a court of subject matter jurisdiction. *Jones, 8 S.W.3d at 638*; *Fed. Sign, 951 S.W.2d at 405*. [**14] The Tort Claims Act creates a unique statutory scheme in which the two immunities are co-extensive: "Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter." *TEX. CIV. PRAC. & REM. CODE § 101.025(a)*; *State ex rel. State Dep't of Highways & Pub. Transp. v. Gonzalez, 82 S.W.3d 322, 326, 45 Tex. Sup. Ct. J. 925 (Tex. 2002)*; *Miller, 51 S.W.3d at 587*. Thus, the Department is immune from suit unless the Tort Claims [*225] Act expressly waives immunity. *See TEX. CIV. PRAC. & REM. CODE §§ 101.001(3)(A)* (defining a governmental unit to include "all departments" of the state), *101.021, 101.025*; *White, 46 S.W.3d at 868*.

The Tort Claims Act expressly waives sovereign immunity in three areas: "'use of publicly owned automobiles, premises defects, and injuries arising out of conditions or use of property.'" *Brown, 80 S.W.3d at 554* (quoting *Tex. Dep't of Transp. v. Able, 35 S.W.3d 608, 611, 43 Tex. Sup. Ct. J. 1055 (Tex. 2000)*); *see TEX. CIV. PRAC. & REM CODE § 101.021. Section 101.058 of the Tort Claims Act* further [**15] modifies a governmental unit's waiver of immunity from suit by imposing the limitations of liability articulated in the recreational use statute. *TEX. CIV. PRAC. & REM. CODE § 101.058* ("To the extent that Chapter 75 limits the liability of a governmental unit under circumstances in which the governmental unit would be liable under [the Tort Claims Act], Chapter 75 controls.").

The recreational use statute provides:

> If an owner, lessee, or occupant of real property other than agricultural land gives permission to another to enter the premises for recreation, the owner, lessee, or occupant, by giving the permission, does not:
>
> (1) assure that the premises are safe for that purpose;
>
> (2) owe to the person to whom permission is granted a greater degree of care than is owed to a trespasser on the premises; or
>
> (3) assume responsibility or incur liability for any injury to any individual or property caused by any act of the person to whom permission is granted.

Id. § 75.002(c)(1)-(3). Recreational use includes camping and picknicking, the activities in which the Mirandas were engaged at the state park when Maria was injured. *Id.* [**16] *§ 75.001(3)*. As applied to a governmental unit, the recreational use statute limits liability even if the person pays to enter the premises. *Id. § 75.003(c)* (excepting governmental units from the chapter's exclusion of landowners who charge a fee for recreational use of land).

The recreational use statute limits the Department's duty for premises defects to that which is owed a trespasser. n5 *Id.* The limited duty owed a trespasser is not to injure that person willfully, wantonly, or through gross negligence. *Tex. Utils. Elec. Co. v. Timmons, 947 S.W.2d 191, 193, 40 Tex. Sup. Ct. J. 721 (Tex. 1997)*. Therefore, a governmental unit waives sovereign immunity under the recreational use statute and the Tort Claims Act only if it is grossly negligent. *TEX. CIV. PRAC. & REM. CODE § 75.002 (c)-(d)*; *City of Bellmead v. Torres, 89 S.W.3d 611, 613, 46 Tex. Sup. Ct. J. 124 (Tex. 2002)*; *Timmons, 947 S.W.2d at 193*. "Gross negligence involves two components: (1) viewed objectively from the actor's standpoint, the act or omission complained of must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others; [**17] and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others." *Louisiana-Pacific Corp. v. Andrade, 19 S.W.3d 245, 246,*

43 Tex. Sup. Ct. J. 56 (Tex. 1999) (citing *Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 23, 37 Tex. Sup. Ct. J. 883 (Tex. 1994)).*

n5 The recreational use statute does not limit the liability of an owner, lessee, or occupant "who has been grossly negligent or has acted with malicious intent or in bad faith." *TEX. CIV. PRAC. & REM. CODE § 75.002(d).*

B. Standard of Review

Sovereign immunity from suit defeats a trial court's subject matter jurisdiction [*226] and thus is properly asserted in a plea to the jurisdiction. *Jones, 8 S.W.3d at 637; see also Hosner, 1 Tex. at 769* (recognizing as appropriate procedure the challenge of a court's subject matter jurisdiction through a plea to the jurisdiction). The trial court must determine at [**18] its earliest opportunity whether it has the constitutional or statutory authority to decide the case before allowing the litigation to proceed. *Austin & N.W.R. Co. v. Cluck, 97 Tex. 172, 77 S.W. 403, 405 (Tex. 1903)* ("There can be no doubt that the courts of Texas must look to the Constitution of this state, the enactments of the Legislature, and the common law for their authority to proceed . . . ."); *see also State Bar of Tex. v. Gomez, 891 S.W.2d 243, 245, 38 Tex. Sup. Ct. J. 140 (Tex. 1994)* ("As a general proposition, before a court may address the merits of any case, the court must have jurisdiction over the party or the property subject to the suit, jurisdiction over the subject matter, jurisdiction to enter the particular judgment, and capacity to act as a court."); *Gentry v. Bowser & Lemmon, 2 Tex. Civ. App. 388, 21 S.W. 569, 570 (Tex. Civ. App.-Fort Worth 1893, no writ)* ("Certainly the court has the right to hear the necessary evidence to enable it to decide as to whether or not it has power to try the case it is sought to have it adjudicate, whether the allegations disclosing such want of jurisdiction appear in the petition of the plaintiff, or in [**19] the plea to the jurisdiction by the defendant.").

Whether a court has subject matter jurisdiction is a question of law. *Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 855, 45 Tex. Sup. Ct. J. 558 (Tex. 2002).* Whether a pleader has alleged facts that affirmatively demonstrate a trial court's subject matter jurisdiction is a question of law reviewed *de novo*. Likewise, whether undisputed evidence of jurisdictional facts establishes a trial court's jurisdiction is also a question of law. However, in some cases, disputed evidence of jurisdictional facts that also implicate the merits of the case may require resolution by the finder of fact. *See Gates v. Pitts, 291 S.W. 948, 949 (Tex. Civ. App.-Amarillo 1927, no writ); Gentry, 21 S.W. at 570; see also Valentin v. Hosp. Bella Vista, 254 F.3d 358, 363 n.3 (1st Cir. 2001)* (observing that in certain situations, the predicate facts can be so inextricably linked to the merits of the controversy that the district court may "defer resolution of the jurisdictional issue until the time of trial"); *Cameron v. Children's Hosp. Med. Ctr., 131 F.3d 1167, 1170 (6th Cir. 1997)* [**20] ("Whether a district court has subject matter jurisdiction is a question for the court, not a jury, to decide, even if the determination requires making factual findings, unless the jurisdictional issue is inextricably bound to the merits of the case."); *Williamson v. Tucker, 645 F.2d 404, 413 n.6, 416 n.10 (5th Cir. 1981)* (suggesting that a federal district court's role in determining jurisdictional facts may be more limited in cases in which the jurisdictional attack implicates the merits of plaintiff's cause of action). In this case, we address a plea to the jurisdiction in which undisputed evidence implicates both the subject matter jurisdiction of the court and the merits of the case.

When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446, 36 Tex. Sup. Ct. J. 607 (Tex. 1993).* We construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent. *Id.* If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction [**21] but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs [*227] should be afforded the opportunity to amend. *Brown, 80 S.W.3d at 555.* If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend. *Id.*

However, if a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do. *See Bland, 34 S.W.3d at 555* (confining the evidentiary review to evidence that is relevant to the jurisdictional issue). When the consideration of a trial court's subject matter jurisdiction requires the examination of evidence, the trial court exercises its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case, mindful that this determination must be made as soon as practicable. *Id. at 554.* Then, in a case in which the jurisdictional [**22] challenge implicates the merits of the plaintiffs' cause of action and the plea to the jurisdiction includes evidence, the trial court reviews the relevant evidence to determine if a fact issue exists. The United States Supreme Court and all of the federal circuits have

authorized federal district courts to consider evidence in deciding motions to dismiss for lack of subject matter jurisdiction. *See FED. R. CIV. P. 12(b)(1)*; *Land v. Dollar, 330 U.S. 731, 735, 91 L. Ed. 1209, 67 S. Ct. 1009* & n.4, *330 U.S. 731, 91 L. Ed. 1209, 67 S. Ct. 1009, (1947), overruled by implication on other grounds by Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 93 L. Ed. 1628, 69 S. Ct. 1457 (1949)* (observing that as a general rule, district courts have authority to inquire "into the facts as they exist" "by affidavits or otherwise" as well as the pleadings when determining whether the court has subject matter jurisdiction).6 If the evidence [*228] creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder. However, if the relevant evidence is undisputed or fails to raise a fact question [**23] on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law.

n6 *See, e.g., Harris v. P.A.M. Transp., Inc., 339 F.3d 635, 637 n.4 (8th Cir. 2003)* (acknowledging district court's authority to consider matters outside the pleadings when subject matter jurisdiction is challenged under *Rule 12(b)(1)*); *Johnson v. Apna Ghar, Inc., 330 F.3d 999, 1001 (7th Cir. 2003)* (observing that when considering a motion for dismissal for lack of subject matter jurisdiction, "'the district court may properly . . . view whatever evidence has been submitted on the issue'" (quoting *Long v. Shorebank Dev. Corp., 182 F.3d 548, 554 (7th Cir. 1997)*)); *Sizova v. Nat'l Inst. of Standards & Tech., 282 F.3d 1320, 1324 (10th Cir. 2002)* (noting district court's "'wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under *Rule 12(b)(1)*'" (quoting *Holt v. United States, 46 F.3d 1000, 1003 (10th Cir. 1995)*)); *Valentin, 254 F.3d at 363* (district court has "broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction"); *Ass'n of Am. Med. Colls. v. United States, 217 F.3d 770, 778 (9th Cir. 2000)* ("'district court obviously does not abuse its discretion by looking to . . . extra-pleading material'" in deciding a *Rule 12(b)(1)* motion to dismiss for lack of subject matter jurisdiction (quoting *St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989)*)); *Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)* (allowing district court to "refer to evidence outside the pleadings" to resolve a *Rule 12(b)(1)* motion); *Williams v. United States, 50 F.3d 299, 304 (4th Cir. 1995)* ("In ruling on a *Rule 12(b)(1)* motion, the court may consider exhibits outside the pleadings."); *Moran v. Kingdom of Saudi Arabia, 27 F.3d 169, 172 (5th Cir. 1994)* (acknowledging a trial court's "authority to consider evidence presented beyond the pleadings . . . which may include considering affidavits, allowing further discovery, hearing oral testimony, conducting an evidentiary hearing"); *Herbert v. Nat'l Acad. of Sci., 297 U.S. App. D.C. 406, 974 F.2d 192, 197 (D.C. Cir. 1992)* ("Where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."); *Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir.1990)* (noting that "substantial authority" acknowledges the trial court's freedom to consider disputed evidence when deciding a *Rule 12(b)(1)* motion) (citations omitted); *Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 451 (6th Cir. 1988)* ("The district court may consider affidavits, allow discovery, hear oral testimony, order an evidentiary hearing, or even postpone its determination if the question of jurisdiction is intertwined with the merits."); *Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)* (acknowledging that "substantial authority" allows trial courts to weigh the evidence of disputed facts when considering a *Rule 12(b)(1)* motion); *see also* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1364, at 468–469 (2d ed. 1990).

[**24]

We acknowledge that this standard generally mirrors that of a summary judgment under *Texas Rule of Civil Procedure 166a(c)*. We adhere to the fundamental precept that a court must not proceed on the merits of a case until legitimate challenges to its jurisdiction have been decided. This standard accomplishes this goal and more. It also protects the interests of the state and the injured claimants in cases like this one, in which the determination of the subject matter jurisdiction of the court implicates the merits of the parties' cause of action. The standard allows the state in a timely manner to extricate itself from litigation if it is truly immune. However, by reserving for the fact finder the resolution of disputed jurisdictional facts that implicate the merits of the claim or defense, we preserve the parties' right to present the merits of their case at trial. Similar to the purpose of a plea to the jurisdiction, which is to defeat a cause of action for which the state has not waived sovereign immunity (usually before the state has incurred the full costs of litigation), the purpose of summary judgments in Texas is

"'to eliminate patently unmeritorious claims and untenable defenses. [**25] '" *Casso v. Brand, 776 S.W.2d 551, 556, 32 Tex. Sup. Ct. J. 366 (Tex. 1989)* (quoting *City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 n.5, 23 Tex. Sup. Ct. J. 7 (Tex. 1979))*. By requiring the state to meet the summary judgment standard of proof in cases like this one, we protect the plaintiffs from having to "put on their case simply to establish jurisdiction." *Bland, 34 S.W.3d at 554*. Instead, after the state asserts and supports with evidence that the trial court lacks subject matter jurisdiction, we simply require the plaintiffs, when the facts underlying the merits and subject matter jurisdiction are intertwined, to show that there is a disputed material fact regarding the jurisdictional issue. *See Huckabee v. Time Warner Entm't Co. L.P., 19 S.W.3d 413, 420, 43 Tex. Sup. Ct. J. 674 (Tex. 2000)*; *Phan Son Van v. Pena, 990 S.W.2d 751, 753, 42 Tex. Sup. Ct. J. 453 (Tex. 1999)*.

Appellate courts reviewing a challenge to a trial court's subject matter jurisdiction review the trial court's ruling *de novo*. *IT-Davy, 74 S.W.3d at 855*. When reviewing a plea to the jurisdiction in which the pleading requirement has been met and evidence has been submitted to support the [**26] plea that implicates the merits of the case, we take as true all evidence favorable to the nonmovant. *See Sci. Spectrum, Inc. v. Martinez, 941 S.W.2d 910, 911, 40 Tex. Sup. Ct. J. 438 (Tex. 1997)*. We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Id.*

In his dissent JUSTICE JEFFERSON criticizes this standard of review as depriving plaintiffs responding to a plea of the procedural protections of a motion for summary judgment, including a twenty-one [*229] day notice period or an adequate time to conduct discovery. *TEX. R. CIV. P. 166a(c), 166a(i)*. However, the scheduling of a hearing of a plea to the jurisdiction is left to the discretion of the trial court, which is in the best position to evaluate the appropriate time frame for hearing a plea in any particular case. This procedure does not dramatically differ from that outlined in *Texas Rule of Civil Procedure 120a* governing special appearances. Although *Rule 120a* requires any affidavits to be used at a hearing on a special appearance to be served at least seven days before the hearing, it does not specify the length of a notice period and is therefore presumably subject to the three-day notice period of [**27] *Rule 21. TEX. R. CIV. P. 21. Rule 120a* allows the trial court to order a continuance and allow time for discovery if the development of the case requires it. Nothing prevents a trial court from doing the same with a plea to the jurisdiction where evidence is necessary.

Many other procedures in Texas practice - ranging from a trial court's rulings on motions to strike intervention to the timing of a class certification decision to even the alteration of the summary judgment notice periods - also "depend[] . . . upon the wise exercise of discretion by the trial court." *Union Carbide Corp. v. B.D. Moye, 798 S.W.2d 792, 794, 34 Tex. Sup. Ct. J. 111 (Tex. 1990)* (Hecht, J., concurring); *see, e.g.*, TEX. R. CIV. P. 42(c)(1)(A) (directing a trial court to determine whether a suit may be maintained as a class action "at an early practicable time"); *TEX. R. CIV. P. 166a(c)* ("*Except on leave of court*, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing.") (emphasis added); *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co., 793 S.W.2d 652, 657, 33 Tex. Sup. Ct. J. 465 (Tex. 1990)* (observing [**28] that the trial court has broad discretion in ruling on a motion to strike intervention, even though *Rule 60* does not provide explicit guidelines for the scheduling of a hearing or the evaluation of evidence). Thus, the Texas civil procedural scheme entrusts many scheduling and procedural issues to the sound discretion of the trial court, subject to appellate review. Of course, Texas practice and rules also allow the parties to request additional time to prepare for certain hearings or to conduct discovery upon a showing of sufficient cause, and the court's ruling on such a motion is reviewed for an abuse of discretion. *See, e.g., TEX.R.CIV.P.166a(g), 247, 251, 252*. We note, also, that federal practice does not prescribe a procedure for the consideration of jurisdictional evidence but instead allows the district courts to tailor a method to suit the requirements of the cases before them. *Land, 330 U.S. at 735 n.4*; *Moran, 27 F.3d at 172*. In any event, the Mirandas do not complain that they had an inadequate opportunity to conduct sufficient discovery, nor did they request a continuance to do so.

C. Waiver of Immunity Based on Premises Defects [**29]

1. The Mirandas' Pleadings

The Mirandas contend that their pleadings fall within the Tort Claims Act's waiver of immunity for both premises defects and injuries arising out of conditions or use of property. The Act provides that a state agency is liable for injury and death caused by "a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." *TEX. CIV. PRAC. & REM. CODE § 101.021(2)*. The Mirandas' pleadings allege injuries caused by a falling tree limb, which falls under the definition of real property - *i.e.*, "'land, and generally whatever is erected or growing upon or affixed [*230] to land.'" *San Antonio Area Found. v. Lang, 35 S.W.3d 636, 640, 44 Tex. Sup. Ct. J. 57 (Tex. 2000)* (quot-

ing *Chastain v. Koonce, 700 S.W.2d 579, 584, 29 Tex. Sup. Ct. J. 79 (Tex. 1985)* (Gonzalez, J., concurring)). The Mirandas' allegation of an injury caused by a tree limb falling on Maria Miranda constitutes an allegation of a condition or use of real property and is an allegation of a premises defect.

To state a claim under the recreational use statute, the Mirandas must [**30] allege sufficient facts to establish that the Department was grossly negligent. *See TEX. CIV. PRAC. & REM. CODE §§ 75.002 (c)-(d), 101.021, 101.025, 101.058.* The Mirandas contend that both their allegations and the evidence presented on the plea establish claims of gross negligence. Looking first to the relevant factual allegations in the third amended petition, the Mirandas claim that (1) they specifically asked the Department's employee for a recommendation of a safe camping location; (2) at the campsite, Maria was struck by a falling tree branch that severely injured her; (3) the unpruned, uninspected tree branches created a dangerous, defective condition on the premises of which the Department was aware; (4) the Department knew of the dangers of its falling tree branches but failed to inspect, prune, alleviate the dangers, or otherwise make safe the dangerous conditions of its trees; (5) the Department consciously and deliberately failed to warn the Mirandas of the extremely dangerous condition; and (6) the Department's conduct was willful, wanton, or grossly negligent. A liberal construction of these allegations, as required, demonstrates [**31] that the Mirandas stated a claim against the Department for gross negligence. This conclusion should not be read as a suggestion that the Department has a duty to inspect every tree in each of the many parks that the Department manages. Instead, in this case, the Mirandas alleged sufficient facts to survive a plea to the jurisdiction based solely on the pleadings.

JUSTICE JEFFERSON's dissent contends that the Mirandas' third amended petition does not state a claim for gross negligence because the allegations are conclusory and do not assert enough specific facts alleging that the Department had actual subjective awareness of the risk involved and proceeded, nevertheless, with conscious indifference. He suggests that to state a claim the Mirandas should have pled that the Department had "actual knowledge that the branch would fall yet nevertheless instructed Maria to camp beneath it." __ S.W.3d at __. The pleading hurdle he seeks to erect would be groundbreaking, indeed, extending beyond current requirements under our rules of civil procedure and case law. *Rules 45 and 47* require that the original pleadings give a short statement of the cause of action sufficient to give the opposing [**32] party fair notice of the claim involved. *TEX. R. CIV. P. 45, 47*; *Paramount Pipe & Supply Co., Inc. v. Muhr, 749 S.W.2d 491, 494, 31 Tex. Sup. Ct. J. 417 (Tex. 1988)*; *Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665, 666, 24 Tex. Sup. Ct. J. 367 (Tex. 1981). Rule 45* does not require that the plaintiff set out in his pleadings the evidence upon which he relies to establish his asserted cause of action. *Muhr, 749 S.W.2d 491, 494-95, 31 Tex. Sup. Ct. J. 417.* While it is clear that "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," *Jones, 8 S.W.3d at 638*, and that "mere reference to the Tort Claims Act does not establish the state's consent to be sued and thus is not enough to confer jurisdiction on the trial court," *Miller, 51 S.W.3d at 587*, the Mirandas' pleadings allege sufficient facts to bring their claims under the recreational use statute and the Tort Claims Act.

[*231] Although facts alleged in a petition should not be improperly stretched to state a claim for gross negligence, JUSTICE JEFFERSON's pleading standard for gross negligence would be virtually impossible [**33] to meet, even when grossly negligent conduct occurred, absent an admission of liability. His standard requires specific factual allegations in an original petition of what the defendant knew and thought - *i.e.*, its state of mind. His pleading hurdle would require discovery into the very extrinsic facts which he bemoans consideration of in the plea to the jurisdiction. The Mirandas' third amended petition provided sufficient notice to ascertain the nature and basic issues of the controversy and the evidence that probably would be relevant.

JUSTICE JEFFERSON also contends that the Mirandas are entitled to replead. As a practical matter, the Mirandas have already repled to try to cure the "defects" that JUSTICE JEFFERSON raises. The Mirandas no doubt filed their third amended petition, in which allegations of gross negligence were raised for the first time in this lawsuit, in response to the Department's plea to the jurisdiction. However, because the Mirandas' third amended petition satisfies the notice pleading requirements of our procedural rules, the Mirandas do not need, nor are they entitled to, an opportunity to replead. *See TEX. R. CIV. P. 47.*

2. The Department's Evidence [**34]

The Department challenged the Mirandas' pleadings and also submitted evidence to controvert the factual allegations supporting jurisdiction. We consider the relevant evidence submitted to decide this jurisdictional challenge. *See Bland, 34 S.W.3d at 555.* The Department attached the deposition testimony of Craig VanBaarle, the assistant park manager for Garner State Park, to its plea to the jurisdiction. VanBaarle testified that while the park normally inspects and maintains its trees, tree limbs are only pruned or trimmed if they appear to be dead. According to

VanBaarle, the tree limb that fell on Maria was living. He testified that both dead and living tree limbs have fallen at various locations in the park. He testified that the park knows that tree limbs can fall and have fallen on approximately twenty occasions. However, no one had ever been injured by falling tree limbs. He also testified that the tree limb that injured Maria Miranda fell from fifty feet above the campsite and that the park employees would not have been able to see the limb clearly without climbing the tree even if the limb had been dead.

In addition, the Department attached the affidavit of [**35] Roy B. Inks, operations and maintenance specialist at Garner State Park. Inks' responsibilities included supervision of park maintenance including preservation and maintenance of trees at campsites. According to his affidavit, Inks inspected the campsite after the accident. His examination of the tree and the fallen branch failed to reveal any indication that the branch was dead, decaying, or in need of pruning. Inks opined that there was no reason to conclude that the tree presented a dangerous or hazardous condition. Inks further opined that the branch that struck Maria "broke away from the tree as a result of an unpredictable and unforeseeable phenomenon known as 'sudden branch drop syndrome.'" Inks explained that "it would be rare for anyone to be able to predict which branches will fall and which ones will not" as a result of this phenomenon. The Mirandas cite the Department's evidence as proof that the Department knew about sudden branch drop syndrome and did nothing about it, thus establishing gross negligence. The Mirandas did not cite any controverting evidence in their response to the Department's plea.

[*232] We first examine this evidence to determine whether it establishes that [**36] the Department was grossly negligent. We have observed that with regard to the subjective component of gross negligence, it is the defendant's state of mind - whether the defendant knew about a peril but nevertheless acted in a way that demonstrated that he did not care about the consequences - that separates ordinary negligence from gross negligence. *Louisiana-Pacific, 19 S.W.3d at 246-47.* We search the record for evidence that the Department's acts or omissions demonstrate that it did not care about the consequences to the Mirandas of a known extreme risk of danger. The Mirandas fail to point to any evidence, and the record contains no evidence, that shows that sudden branch drop syndrome constitutes an extreme risk of danger or that the Department had actual, subjective knowledge of that risk but nevertheless proceeded in conscious disregard for the safety of others. Nor is there any evidence that the Department could have taken any reasonable steps to minimize the dangers of an "unforeseeable" and "unpredictable" phenomenon. We conclude that the evidence in the record establishes that the Department was not grossly negligent and that the Mirandas have failed to [**37] raise a fact question regarding the Department's alleged gross negligence. The Mirandas fall short of satisfying the requirements for the Legislature's limited grant of a waiver of sovereign immunity from suit under the applicable statutes. Therefore, the trial court lacked subject matter jurisdiction.

3. Dissent

In his dissent, JUSTICE BRISTER takes the view that all pleas to jurisdiction based on immunity must take the form of two "standard" or "established" motions - either special exceptions or motions for summary judgment. __ S.W.3d at __. This approach might be appropriate, if we were starting from scratch. Given that we are not writing on a blank slate, that pleas have been a useful procedural vehicle in Texas for over 150 years, and that use of its counterpart (*Federal Rule of Civil Procedure 12(b)(1)*) to challenge subject matter jurisdiction in the federal judicial system when evidence is involved has been authorized by every federal circuit court, the Court declines to abolish by written opinion such pleas to the jurisdiction.

The plea to the jurisdiction was included in procedural rules promulgated by this Court in 1877 and [**38] has been used as a procedural vehicle to challenge subject matter jurisdiction in trial courts for over a century and a half. *See TEX. R. CIV. P. 85*; TEX. DIST. CT. R. 7, *47 Tex. 597, 617 (1877)*; *Hosner, 1 Tex. at 769.* In fact, as early as 1893, Texas courts indicated that evidentiary challenges to subject matter jurisdiction raised in pleas to the jurisdiction should be considered by trial courts. *See, e.g., Gates, 291 S.W. at 949*; *Gentry, 21 S.W. at 570.* With such a long lineage, one wonders why a plea to jurisdiction does not qualify as a "standard" or "established" motion. Perhaps a second mention in the Texas Rules of Civil Procedure would suffice.

We decide that refining the rules for considering a plea supported by evidence is a better approach than eliminating the motion. This approach is consistent with precedent, is not disruptive to civil practice going back more than a century, and furthers the legislative purpose of timely adjudicating subject matter jurisdiction when the immunity and liability facts are the same.

There is a suggestion in the dissents that confirming in this opinion the authority of [**39] trial courts to consider evidence in a plea to the jurisdiction is unfair to the [*233] parties in this case. The facts undercut this assertion. At the trial court, both parties relied on extrinsic evidence in briefing the plea, and both parties had extrinsic evidence on file with the court. Furthermore, plaintiffs expressly stated in their response to the plea that they were rely-

ing on "Defendants' responses to discovery requests, and upon the deposition of Craig VanBaarle [the Department's assistant park manager]." In fact, the Mirandas deposed VanBaarle months before the Department filed its plea. There is good reason why Plaintiffs have not argued unfair surprise. Given Texas precedents and the actions of the parties, there was none.

D. Waiver of Immunity Based on Condition or Use of Tangible Property

The Mirandas assert that their pleadings also state a cause of action for injuries resulting from a condition or use of tangible property. The allegations in the Mirandas' third amended petition concern only the Department's failure to act to reduce risks of falling tree limbs and failure to warn the Mirandas of the risk of falling tree limbs. These allegations comprise the elements [**40] of their premises defect claim. The Tort Claims Act's scheme of a limited waiver of immunity from suit does not allow plaintiffs to circumvent the heightened standards of a premises defect claim contained in *section 101.022* by re-casting the same acts as a claim relating to the negligent condition or use of tangible property. *See State v. Tennison, 509 S.W.2d 560, 562, 17 Tex. Sup. Ct. J. 291 (Tex. 1974)* (rejecting the argument that the Tort Claims Act "creates two entirely separate grounds of liability" for negligent use or condition of real property and premise defect, but instead interpreting the premises defect provision to further limit the waiver of immunity for negligent use or condition of real property). Other Texas courts have recognized that to allow plaintiffs to characterize premises defect claims as claims caused by the negligent condition or use of personal or real property would render the Legislature's heightened requirements for premises defect claims meaningless. *See, e.g., State v. Estate of Horton, 4 S.W.3d 53, 54 (Tex. App.-Tyler 1999, no pet.)* (stating that once a claim is determined to be a premises defect, the claimant is limited to the provisions [**41] delineated by the section on premises defects and may not assert a general negligence theory); *accord Laman v. Big Spring State Hosp., 970 S.W.2d 670, 671-72 (Tex. App.-Eastland 1998, pet. denied)*; *Univ. of Texas-Pan Am. v. Valdez, 869 S.W.2d 446, 450 (Tex. App.-Corpus Christi 1993, writ denied)*; *Hawley v. State Dep't of Highways and Pub. Transp., 830 S.W.2d 278, 281 (Tex. App.-Amarillo 1992, no writ)*. Accordingly, we conclude that the Mirandas have not established a cause of action under the Tort Claims Act for condition or use of tangible property separate from their premises defect claim.

IV. Conclusion

Trial courts should decide dilatory pleas early - at the pleading stage of litigation if possible. Here, the Legislature's mandate is not so simple. By statute, waiver of sovereign immunity for recreational use of the Department's premises can only be effected by a showing that it acted with gross negligence. Due to the standard erected (gross negligence), the determination of whether immunity was waived may require consideration of extrinsic facts after reasonable opportunity for targeted discovery. To preclude consideration [**42] of extrinsic facts when necessary to decide a plea to the jurisdiction would require a trial on the merits for many cases that do not need it, waste the resources of the courts and the parties in the case, and [*234] involve state courts in rulings on the merits in cases over which they have no jurisdiction.

For the reasons explained, we conclude that the Department established that it was not grossly negligent and that the Mirandas failed to raise a fact issue on that point. Thus, the trial court lacked subject matter jurisdiction over the action. The judgment of the court of appeals is reversed and the Mirandas' action dismissed for lack of subject matter jurisdiction.

J. Dale Wainwright

Justice

DISSENTBY: Wallace B. Jefferson; Scott Brister

DISSENT:

JUSTICE JEFFERSON, dissenting.

I dissent on two grounds. First, I do not agree that our precedent requires the Mirandas to produce evidence on all essential elements of their cause of action to establish the trial court's jurisdiction. The Court's holding is inconsistent with the distinction *Bland* draws between requiring the plaintiff to prove preliminary facts as a predicate to the trial court's power to entertain the merits, and requiring [**43] her to present the merits themselves on pain of dismissal. *Bland Indep. School Dist. v. Blue, 34 S.W.3d 547, 44 Tex. Sup. Ct. J. 125 (Tex. 2000)*. n1

> n1 I agree that the court of appeals' holding conflicts with *Bland* to the extent it holds that the trial court was prohibited from inquiring into the merits *because* "... the Department did not specifically allege that the Mirandas' allegations were pled merely as a sham for the purpose of wrongfully obtaining jurisdiction." *55 S.W.3d 648, 652. Bland* does not require that form of defensive pleading as the sole gateway through which the trial court may consider evidence. If that were so, we could not have held that there are limited circumstances in which, even in the absence of a defendant's pleading that the plaintiff's pleadings were a sham, the trial court

is required to consider evidence. I depart from the Court's holding, however, that this is such a case.

Second, I cannot agree that the Mirandas' pleading has alleged sufficient facts to confer [**44] jurisdiction on the trial court. The Mirandas assert that the Department was aware that branches fall from trees, but consciously chose not to post warnings. Is that gross negligence? *No. Texas law does not impose on landowners a duty to warn trespassers about all conceivable dangers inherent in nature.* What if you add the allegation that the Department did not inspect or prune trees in Garner State Park? *The Court today makes clear that the Department has no duty to inspect trees in state parks.* ___ S.W.3d ___. *If there is no duty, a complaint about the failure to inspect or prune cannot possibly constitute a gross negligence pleading sufficient to invoke the court's jurisdiction.* But the Mirandas used the words "gross negligence." *Not enough. The Mirandas pleaded no facts even remotely suggesting the Department was aware the limb was about to fall, much less that it would injure Maria.*

I

***Bland*, in Proper Context**

In deciding a plea to the jurisdiction, the trial court must consider evidence "when necessary to resolve the jurisdictional issues raised." *Bland, 34 S.W.3d at 555.* That quote must be read in context. We noted [**45] that when a defendant challenges an organization's standing to sue, the organization must present evidence of its nature and purpose before it can pursue its claims - a burden that "does not involve a significant inquiry into the substance of the claims." *Id. at 554.* Similarly, we [*235] observed that a challenge to personal jurisdiction may "touch on the merits of the case," but is not aimed at "whether the defendant may be liable as alleged." *Id. at 555.* That theme — that a plaintiff is not required to litigate the merits to establish jurisdiction — was emphasized throughout our opinion. *Id. at 554.* We cautioned that "the proper function of a dilatory plea does not authorize an inquiry so far into the substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction." *Id.*

I interpret *Bland* to mean that if a plea to the jurisdiction requires the trial court to wade deeply into the lawsuit's merits, it is not a valid plea. Yet today the Court immerses itself in the merits by reaching and deciding the ultimate issue in the case: ". . . *the evidence in the record establishes* [**46] *that the Department was not grossly negligent and that the Mirandas have failed to raise a fact question regarding the Department's alleged gross negligence.*" ___ S.W.3d at ___ (emphasis added). This holding misapplies *Bland* because it permits a defendant, on painfully short notice and before evidence has been developed, to force the plaintiff either to present evidence on the ultimate issue in the lawsuit, or lose the right to a jury trial on the merits.

The Court asserts that its standard "mirrors that of a summary judgment. . . ." ___ S.W.3d ___. It is a poor reflection. Our summary judgment rule, unlike the Court's standard, contains procedural safeguards to ensure that the merits are not determined before the nonmovant has had an adequate time for discovery and an opportunity to respond. *TEX. R. CIV. P. 166a(c)* ("Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response."); *166a(i)* [**47] ("After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense. . . ."). As a uniform rule of procedure, the summary judgment rule leaves little to the imagination. A party whose claim is subject to adjudication on the merits is entitled to advance notice that it must present evidence and has an adequate opportunity to respond. n2 The procedure the Court adopts today, in contrast, will vary from county to county and from judge to judge.

n2 The prevailing view appears to be that the timeline is strictly enforced. *See Luna v. Estate of Rodriguez, 906 S.W.2d 576, 582 (Tex. App.-Austin 1995, no writ)* ("Because summary judgment is a harsh remedy, we strictly construe the twenty-one day time limit."). *Accord Burns Motors, Inc. v. Gulf Ins. Co., 975 S.W.2d 810, 812 (Tex. App.-Corpus Christi 1998) rev'd on other grounds, 22 S.W.3d 417, 43 Tex. Sup. Ct. J. 647 (Tex. 2000)*; *Martin v. Martin, Martin & Richards, Inc., 991 S.W.2d 1, 11 (Tex. App.-Fort Worth 1997) rev'd on other grounds, 989 S.W.2d 357, 42 Tex. Sup. Ct. J. 21 (Tex. 1998)*; *Bell v. Showa Denko K.K., 899 S.W.2d 749, 759 (Tex. App.-Amarillo 1995,writ denied)*; *Stephens v. Turtle Creek Apartments, Ltd., 875 S.W.2d 25, 27 (Tex. App.-Houston [14th Dist.] 1994, no writ)*; *Wavell v. Caller-Times Pub. Co., 809 S.W.2d 633, 637 (Tex. App.-Corpus Christi 1991, writ denied)*; *Williams v. City of Angleton, 724 S.W.2d 414, 417 (Tex. App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.) disapproved of on other grounds, 876 S.W.2d 314, 37 Tex. Sup. Ct. J. 797 (Tex. 1994).*

[**48]

The Court cites a number of federal decisions holding that when jurisdictional facts are intertwined with the merits, the trial court, in considering evidence, should either employ the standard applicable to a summary judgment or leave the jurisdictional [*236] determination to trial. ___ S.W.3d ___; *see also* 2 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE § 12.30[3]*, at 12-37 to 12-38 (3d ed. 2003). I do not disagree with that proposition, but it does not answer a fundamental question. This Court must decide what procedure governs *in Texas* when a plea to the jurisdiction is treated like a motion for summary judgment.

As JUSTICE BRISTER observes, no procedural rule currently requires a trial court to advise the plaintiff that evidence may or must be presented in opposition to a plea to the jurisdiction, and no rule requires an adequate time for discovery before the court dismisses a case on the merits. ___ S.W.3d at ___. By default, then, trial courts will turn to *Rule 21. TEX. R. CIV. P.* 21. Presumably, if a trial court's ruling comports with *Rule 21*'s minimum procedural requirements, a dismissal on the merits will survive any challenge based on an abuse of discretion standard. [**49] We should ask ourselves, then, whether the Rule's minimum requirements are adequate when the stakes are no less than a party's ability to present its case on the merits.

Under *Rule 21*, a plea to the jurisdiction may be served "three days before the time specified for the hearing unless otherwise provided by these rules or shortened by the court." *Id.* The rule does not mention an adverse party's right to present opposing evidence, which may explain why the Mirandas did not controvert the Department's plea with their own evidence. Compiling evidence of simple negligence on three days' notice - evidence that typically requires months of discovery - would be daunting in itself; but where, as here, a plaintiff must prove *gross negligence*, her ability to contest the Department's jurisdictional plea could be essentially non-existent.

The Mirandas had no reason to suspect that a summary judgment standard applied, requiring them to controvert the Department's evidence, because the Department's plea to the jurisdiction was subject to *Bland. 34 S.W.3d at 554-55* (trial court not authorized to inquire so far into the substance of the claims presented that plaintiffs are [**50] required to put on their case simply to establish jurisdiction). At a minimum, I would hold that if a summary judgment standard applies, the trial court must so advise the parties and employ *Rule 166a* procedures.

II

Pleading Requirements Under Recreational Use Statute

Rather than dismiss the case on the merits under a summary judgment standard, I would examine the pleadings to determine whether the Mirandas alleged facts sufficient to invoke the trial court's jurisdiction. *See Tex. Ass'n Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446, 36 Tex. Sup. Ct. J. 607 (Tex. 1993)* (plaintiff has burden to allege facts affirmatively demonstrating that the trial court has subject matter jurisdiction). In my view, the Mirandas' pleading falls short. Just as the Department owes no duty to warn trespassers that rattlesnakes may strike, it owes no duty to advise statutory trespassers that tree limbs fall in state parks. The Mirandas did not allege that the Department had so much as an inkling that the branch in question would fall. *See TEX. CIV. PRAC. & REM CODE § 41.001(7)*; *see also Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 21-22, 37 Tex. Sup. Ct. J. 883 (Tex. 1994)* [**51] (explaining that gross negligence requires at a minimum that the defendant subjectively "have actual awareness of the extreme risk created by his or her conduct"). Rather, she alleges that the Department is generally aware that tree limbs fall, just as it must know of countless other natural [*237] perils in state parks. Because the Department owes no duty to warn trespassers that forces of nature may cause random harm, I would hold, contrary to the Court's conclusion, that the Mirandas' pleading does not invoke the trial court's jurisdiction.

The Mirandas did not allege that the Department was subjectively aware of any specific risk of injury. *See id.* Instead, they alleged:

> Defendant knew of the dangers of its falling tree branches, failed to inspect, failed to prune, failed to alleviate or remove the danger, and consciously and deliberately failed to warn Plaintiffs of the extremely dangerous condition. Plaintiffs paid a campsite rental fee and specifically asked defendant to assign them a safe campsite. Defendant knew that its property contained hidden, dangerous defect (sic) in that its tree branches which have not been inspected or pruned regularly fall. Defendant did not [**52] warn Plaintiffs of the hidden danger.
>
> * * *
>
> Plaintiffs would show the court that the occurrence made the basis of this suit and the resulting damages set out below were a direct and proximate result of Defendant's neg-

> ligence and its agents, servants, and officers, both of commission or omission, or both separately and collectively, in failing to properly maintain and inspect the campsite where Plaintiffs were injured, in failing to properly maintain the campsite in a safe condition and/or in failing to exercise ordinary care to protect Plaintiffs from the danger.

The Mirandas' gross negligence allegations stated:

> Plaintiffs would show the court that the occurrences made the basis of this suit and the resulting injuries and damages set out below were a direct and proximate result of Defendant's negligence in failing to make safe the dangerous condition of its campsite trees. Defendant's conduct was willful, wanton, or grossly negligent. Defendant failed to warn or make reasonably safe the dangerous condition of which it was aware and which Plaintiffs were unaware.

We can accept as true the Mirandas' allegation that the Department knew "its tree branches which [**53] have not been inspected or pruned regularly fall" and did not warn them about that contingency. That pleading, however, is of neutral value in a suit against the Department, which would owe no duty to warn unless it had actual knowledge that the branch would fall yet nevertheless instructed Maria to camp beneath it. *See id.*; *see also Lee Lewis Constr., Inc. v. Harrison, 70 S.W.3d 778, 785, 45 Tex. Sup. Ct. J. 232 (Tex. 2001)* (reiterating that gross negligence requires that "the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others."). Indeed, nowhere in their pleadings do the Mirandas assert that the Department was aware of any risk associated with either the tree or the campsite below. Instead, they simply recast allegations of simple negligence into a claim for gross negligence.

We are bound, however, to analyze their claims in light of the policies underlying the recreational use statute. The statute exists to encourage landowners to allow the public to enjoy outdoor recreation on their property by limiting their liability for personal injury. *City of Bellmead v. Torres, 89 S.W.3d 611, 617, 46 Tex. Sup. Ct. J. 124 (Tex. 2002)* [**54] (Hankinson, J. dissenting). To accomplish that objective, the Legislature has placed stringent parameters around the duty landowners owe "trespassers." *See TEX. CIV. PRAC. & REM CODE § 75.002.* The duty implicit in the Mirandas' pleading, however, would require [*238] the Department to warn all visitors of all perils commonly confronted by human interaction with nature. The scope of that proposed duty - obligating the Department to post warnings about all naturally occurring dangers - would create such an insurmountable practical and economic burden as to frustrate the legislature's intent to encourage landowners to make property available for recreational use.

Without allegations that the Department was aware that the limb would fall and nevertheless instructed Maria to camp below it, the Mirandas have not pleaded facts sufficient to proceed on their claim under the recreational use statute. I do not mean to suggest that merely because the injury is alleged to have resulted from a natural condition, the trial court is *thereby* deprived of jurisdiction. For example, the trial court's jurisdiction would be properly invoked by a pleading that the Department [**55] told the plaintiff it was safe to dive into waters the Department knew were so shallow that the dive posed a likelihood of serious injury, and that the plaintiff was severely injured diving in reliance on that assurance. Here, by contrast, the Mirandas did not plead that the Department directed Maria to a campsite knowing that an overhanging tree branch would likely fall on her and cause serious injury.

I understand fully the Court's holding that the Mirandas gave "fair notice" that they were pursuing a gross negligence claim. Fair-notice pleadings, however, must be viewed in this case through the prism of sovereign immunity, which deprives a court of jurisdiction unless the State has expressly waived immunity. *Tex. Dep't of Transp. v. Jones, 8 S.W.3d 636, 638, 43 Tex. Sup. Ct. J. 143 (Tex. 1999).* The plaintiffs' pleadings against the State must affirmatively establish jurisdiction to overcome the contrary presumption. *Tex. Dep't of Crim. Justice v. Miller, 51 S.W.3d 583, 587, 44 Tex. Sup. Ct. J. 963 (Tex. 2001)*(quoting *Tex. Ass'n Bus., 852 S.W.2d at 446*). The plaintiff must plead facts that, if true, would establish that the claims come within an express waiver of sovereign immunity [**56] before the trial court has jurisdiction to proceed. Just as mere reference to the Texas Tort Claims Act is insufficient to confer jurisdiction, *Miller, 51 S.W.3d at 587*, the trial court's jurisdiction is not satisfied by mere notice that the plaintiff is pursuing a gross negligence claim. The Mirandas have failed to affirmatively establish the court's jurisdiction because, even if all of the facts alleged in their pleading were true, those facts would not amount to gross negligence and therefore would not establish a waiver of sovereign immunity under the recreational use statute.

When a plaintiff fails to plead facts establishing jurisdiction, the issue is ordinarily one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. *County of Cameron v. Brown, 80 S.W.3d 549, 555, 45 Tex. Sup. Ct. J. 680 (Tex. 2002).* A court may grant a

plea to the jurisdiction without affording an opportunity to amend only when the pleadings "affirmatively negate" the existence of jurisdiction, a circumstance not presented here. *Id.* In this case, however, the trial court overruled the Department's plea to the jurisdiction, concluding implicitly that the Mirandas' [**57] pleadings were sufficient to confer jurisdiction, and the court of appeals affirmed. Consequently, the Mirandas have never been placed on notice that they must cure the jurisdictional defect. It may well be that the facts will not lend themselves to a pleading that would confer jurisdiction, but we are not equipped to make that determination at this stage of the proceedings.

III Conclusion

We need and should not inquire into the ultimate merits of this case. I would [*239] remand the cause to the trial court to give the Mirandas an opportunity to amend their petition to plead facts establishing jurisdiction.

Wallace B. Jefferson

Justice

JUSTICE BRISTER, joined by JUSTICE O'NEILL and JUSTICE SCHNEIDER, dissenting.

The Legislature has provided that state park visitors are owed the same duty of care as trespassers; n1 thus, the plaintiffs in this case had to prove the Parks and Wildlife Department caused deliberate, wilful, or malicious injury. n2 All members of the Court agree that either their petition or their summary judgment evidence fails to do so, though we disagree which.

n1 *TEX. CIV. PRAC. & REM. CODE §§ 75.002(c)(2), 75.003(g).*

[**58]

n2 *Id. §§ 75.002(a)(2), 75.003, 101.022, 101.058.*

The Mirandas alleged Maria suffered severe injuries caused by the Department's gross negligence; specifically, they alleged the Department knew tree limbs could fall, and failed to warn them of that fact or assign them a campsite where none would. I have grave doubts whether such facts could possibly constitute gross negligence — natural conditions usually cannot be unreasonably dangerous (much less wanton), n3 and trespassers do not have to be warned of what everyone should know. n4 Nor does the Parks Department appear to have a duty to provide campsites safely away from trees; n5 indeed, one has to ask whether anyone would want to use such "parks" if it did. n6

n3 *See Johnson County Sheriff's Posse, Inc. v. Endsley, 926 S.W.2d 284, 287, 39 Tex. Sup. Ct. J. 872 (Tex. 1996)* (holding rock in dirt arena did not create unreasonably dangerous condition).

n4 *Cf. County of Cameron v. Brown, 80 S.W.3d 549, 558, 45 Tex. Sup. Ct. J. 680 (Tex. 2002)* (holding darkness caused by failed streetlights was not open and obvious hazard precluding recovery by licensee because it could not be seen fromentrance to causeway).

[**59]

n5 *See TEX.CIV.PRAC.&REM.CODE § 75.002(c)(1)* (providing landowners who grant permission for recreational use do not assure that the premises are safe for that purpose).

n6 *See Tex. Home Mgmt., Inc. v. Peavy, 89 S.W.3d 30, 33, 46 Tex. Sup. Ct. J. 71 (Tex. 2002)* (holding question of legal duty is question of law requiring balance of factors such as risk, utility, consequences of the duty, and other relevant individual and social interests).

Faced with what appears to be an insupportable allegation like the gross-negligence pleading here, litigants normally have two options: (1) demand more specific facts by special exception, or (2) demand more specific facts by motion for summary judgment. Instead, the Department filed three motions, including a "plea to the jurisdiction" — the white elephant n7 of current Texas motion practice. By use of this plea, the Department was able to force the trial judge (and ultimately this Court) to make an ad hoc decision whether our jurisdiction should be determined by reference to pleadings or evidence. Because it should be [**60] litigants rather than judges making that choice, I respectfully dissent.

n7 The OXFORD ENGLISH DICTIONARY (1989) defines "white elephant" as:

> a. A rare albino variety of elephant which is highly venerated in some Asian countries. b. *fig.* A burdensome or costly possession (from the story that the kings of Siam were accustomed to make a present of one of these animals to courtiers who had rendered themselves obnoxious, in order to ruin the recipient by the cost of its maintenance). Also, an object, scheme, etc., considered to be without use or value.

Pleas to the jurisdiction are nothing new. In his *Commentaries on the Laws of England*, Blackstone lists them as a category of dilatory pleas that (along with pleas of disability and abatement) deny the [*240] propriety of the remedy rather than the injury. n8 One hundred years ago, this Court addressed a variety of matters as pleas to the jurisdiction, including objections based on personal jurisdiction, n9 subject-matter jurisdiction, n10 dominant jurisdiction, [**61] n11 venue, n12 capacity, n13 and conflict of laws. n14

n8 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 301-03 (1768).

n9 *See, e.g., Rice v. Peteet, 66 Tex. 568, 1 S.W. 657, 657 (Tex. 1886).*

n10 *See, e.g., McIlhenny Co. v. Todd, 71 Tex. 400, 9 S.W. 445, 446 (Tex. 1888)* (objecting that amount at issue fell below court's jurisdictional limits); *Juneman v. Franklin, 67 Tex. 411, 3 S.W. 562, 562 (Tex. 1887)* (objecting that forcible entry and detainer action was not filed in justice court).

n11 *See, e.g., Cleveland v. Ward, 116 Tex. 1, 285 S.W. 1063, 1072 (Tex. 1926), disapproved on other grounds, Walker v. Packer, 827 S.W.2d 833, 842, 35 Tex. Sup. Ct. J. 468 (Tex. 1992); Grathaus v. Witte, 72 Tex. 124, 11 S.W. 1032, 1032 (Tex. 1888).*

n12 *See, e.g., Pecos & N.T. Ry. Co. v. Thompson, 106 Tex. 456, 167 S.W. 801, 801 (Tex. 1914); Baines v. Jemison, 86 Tex. 118, 23 S.W. 639, 640 (Tex. 1893); Watson v. Baker, 67 Tex. 48, 2 S.W. 375, 375-76 (Tex. 1886).*

[**62]

n13 *See, e.g., Brown v. Gay, 76 Tex. 444, 13 S.W. 472, 472-73 (Tex. 1890).*

n14 *See, e.g., Tex. & P. Ry. Co. v. Richards, 68 Tex. 375, 4 S.W. 627, 629 (Tex. 1887).*

Since then, there has been a steady shift away from the common-law forms of pleading to the more specific motion practice set out in the rules of civil procedure. For example, a defendant objecting to venue today must file a motion to transfer that complies with the form requirements of *Rule 86* and the deadlines of *Rule 87*. n15 Similarly, a nonresident objecting to personal jurisdiction must file a special appearance that meets the requirements of *Rule 120a*. n16 In substance, these motions could still be categorized as "pleas to the jurisdiction;" but in form, they must comply with the current rules of civil procedure.

n15 *TEX. R. CIV. PROC. 86* (requiring unverified motion that is filed first and states counties of improper, proper, or mandatory venue); *TEX. R. CIV. PROC. 87* (requiring 45-days' notice of hearing, 30-days' notice of respondent's affidavits, and 7-days' notice of movant's affidavits).

[**63]

n16 *TEX. R. CIV. PROC. 120a* (requiring sworn motion that is filed and heard before any other matter, with affidavits served seven days before the hearing).

Case law as well as rule amendments have contributed to the trend away from the common-law plea to the jurisdiction. For example, we have held that a complaint based on dominant jurisdiction in another court must be raised by plea in abatement in the second court, or it is waived. n17 Again, though this complaint could be characterized as a plea to the jurisdiction, a more specific motion and procedure has rendered the common-law term obsolete.

N17 *Mower v. Boyer, 811 S.W.2d 560, 563 n.2, 34 Tex. Sup. Ct. J. 736 (Tex 1991); Wyatt v. Shaw Plumbing Co., 760 S.W.2d 245, 247, 32 Tex. Sup. Ct. J. 42 (Tex. 1988).*

But pleas to the jurisdiction have enjoyed a recent resurgence in the field of governmental immunity. For many years, governmental units were not very particular about the vehicle [**64] for asserting immunity, raising it sometimes by —

. general demurrer; n18

. special demurrer; n19

[*241] . special exception; n20

. plea to the jurisdiction; n21

. plea in abatement; n22 or

. summary judgment. n23

In 1997, the Legislature amended the Civil Practices and Remedies Code to allow interlocutory appeals "from an interlocutory order . . . [that] grants or denies a plea to the jurisdiction by a governmental unit." n24 We have held this section must be strictly construed, as it is an exception to the general rule that interlocutory orders are not appealable. n25

n18 *See, e.g., State v. Hale, 136 Tex. 29, 146 S.W.2d 731, 735 (Tex. 1941); Herring v. Houston*

Nat'l Exch. Bank, 113 Tex. 264, 253 S.W. 813, 814 (Tex. 1923); *Stephens v. Tex. & P. Ry. Co., 100 Tex. 177, 97 S.W. 309, 310 (Tex. 1906)*; *Thomson v. Baker, 90 Tex. 163, 38 S.W. 21, 22 (Tex. 1896).*

n19 *See, e.g., Thomson, 38 S.W. at 22.*

n20 *See, e.g., Duhart v. State, 610 S.W.2d 740, 741, 24 Tex. Sup. Ct. J. 157 (Tex. 1980)*; *Dir. of Dep't of Agric. & Env't v. Printing Indus. Ass'n of Tex., 600 S.W.2d 264, 265, 23 Tex. Sup. Ct. J. 397 (Tex. 1980)*; *Stephens, 97 S.W. at 310.*

[**65]

n21 *See, e.g., Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 403, 40 Tex. Sup. Ct. J. 676 (Tex. 1997), superseded by statute on other grounds as stated in Gen. Servs. Comm'n v. Little-Tex Insulation Co., Inc., 39 S.W.3d 591, 593, 44 Tex. Sup. Ct. J. 397 (Tex. 2001)*; *Lowe v. Tex. Tech Univ., 540 S.W.2d 297, 298, 19 Tex. Sup. Ct. J. 398 (Tex. 1976)*; *State v. Lain, 162 Tex. 549, 349 S.W.2d 579, 580, 4 Tex. Sup. Ct. J. 594 (Tex. 1961)*; *Griffin v. Hawn, 161 Tex. 422, 341 S.W.2d 151, 152, 4 Tex. Sup. Ct. J. 127 (Tex. 1960)*; *Short v. W. T. Carter & Bro., 133 Tex. 202, 126 S.W.2d 953, 955 (Tex. 1938).*

n22 *See, e.g., Duhart v. State, 610 S.W.2d 740, 741, 24 Tex. Sup. Ct. J. 157 (Tex. 1980)*; *Lowe, 540 S.W.2d at 298*; *Griffin v. Hawn, 161 Tex. 422, 341 S.W.2d 151, 152, 4 Tex. Sup. Ct. J. 127 (Tex. 1960)*; *W. D. Haden Co. v. Dodgen, 158 Tex. 74, 308 S.W.2d 838, 838, 1 Tex. Sup. Ct. J. 191 (Tex. 1958)*; *Cobb v. Harrington, 144 Tex. 360, 190 S.W.2d 709, 710 (Tex. 1945)*; *Short v. W. T. Carter & Bro., 133 Tex. 202, 126 S.W.2d 953, 955 (Tex. 1938).*

n23 *See, e.g., Overton Mem'l Hosp. v. McGuire, 518 S.W.2d 528, 528, 18 Tex. Sup. Ct. J. 195 (Tex. 1975)* (per curiam); *Tex. Dept. of Corr. v. Herring, 513 S.W.2d 6, 7, 17 Tex. Sup. Ct. J. 403 (Tex. 1974).*

[**66]

n24 *TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8).*

n25 *Bally Total Fitness Corp. v. Jackson, 53 S.W.3d 352, 355, 44 Tex. Sup. Ct. J. 621 (Tex. 2001).*

As a result, almost overnight a "plea to the jurisdiction" became the motion of choice for asserting immunity; n26 indeed, some appellate courts have refused to consider any other. n27 This development exalts form over substance. For example, before the Legislature's amendment, one governmental entity unsuccessfully asserted immunity by means of a summary judgment and special exceptions; immediately after the effective date, the entity filed the same objection as a "plea to jurisdiction" - and prevailed. n28

n26 *See, e.g., Texas Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 852, 45 Tex. Sup. Ct. J. 558 (Tex. 2002)*; *Little-Tex Insulation Co., Inc., 39 S.W.3d at 594*; *McClain v. Univ. of Tex. Health Ctr. at Tyler, 119 S.W.3d 4, 5 (Tex. App.—Tyler 2000, pet. denied)*; *Dallas County Cmty. Coll. Dist. v. Bolton, 990 S.W.2d 465, 466 (Tex. App.—Dallas 1999, no pet.)*; *Alamo Cmty. Coll. Dist. v. Obayashi Corp., 980 S.W.2d 745, 746 (Tex. App.—San Antonio 1998, pet. denied)*; *Tex. Parks & Wildlife Dep't v. Garrett Place, Inc., 972 S.W.2d 140, 142 (Tex. App.—Dallas 1998, no pet.)*; *Tex. Parks & Wildlife Dep't v. Callaway, 971 S.W.2d 145, 147 (Tex. App.—Austin 1998, no pet.).*

[**67]

n27 *See, e.g., Thomas v. Long, 97 S.W.3d 300, 302-03 (Tex. App.—Houston [14th Dist.] 2003, pet. granted)* (refusing interlocutory appeal of denial of summary judgment based on lack of subject matter jurisdiction as no order granted or denied a plea to the jurisdiction); *Baylor Coll. of Med. v. Tate, 77 S.W.3d 467, 472 (Tex. App.—Houston [1st Dist.] 2002, no pet.)* (refusing interlocutory appeal because trial court's order was summary judgment based on immunity from liability rather than plea to the jurisdiction based on immunity from suit).

n28 *Lamar Univ. v. Doe, 971 S.W.2d 191, 193 (Tex. App.—Beaumont 1998, no pet.).*

For several reasons, we should put a stop to this resurgence of common-law pleadings in immunity cases. First, it is fraught with uncertainty. Despite hundreds of haphazardly-numbered rules, only once do the Texas Rules of Civil Procedure mention pleas to the jurisdiction, and then only in a rule regarding permissible parts of an *answer* rather than permissible motions. [*242] n29 There is *no* rule — no case and [**68] no code — that specifies the form, deadlines, or evidentiary requirements for pleas to the jurisdiction generally.

n29 *TEX. R. CIV. PROC. 85*:

The original answer may consist of motions to transfer venue, *pleas to the jurisdiction*, in abatement, or any other dilatory pleas; of special excep-

> tions, of general denial, and any defense by way of avoidance or estoppel, and it may present a cross-action, which to that extent will place defendant in the attitude of a plaintiff. Matters in avoidance and estoppel may be stated together, or in several special pleas, each presenting a distinct defense, and numbered so as to admit of separate issues to be formed on them.
>
> (Emphasis added).

In *Bland Independent School District v. Blue*, n30 we attempted to bring some order to this resurgence by setting guidelines for handling such pleas. But due to the broad range of issues a plea to the jurisdiction might address, that was not easy to do. As we pointed out in several examples, consideration of some pleas should not [**69] go beyond the pleadings, but consideration of others must. n31 When necessary, trial courts must consider evidence relating to the jurisdictional facts, but should not consider evidence relating to the merits, n32 even though the two are sometimes the same. Nor could we be specific about when pleas should be decided, leaving it to the trial court's discretion whether to address the issue at a preliminary hearing or after fuller development of the merits. n33

> n30 *34 S.W.3d 547, 44 Tex. Sup. Ct. J. 125 (Tex. 2000).*
>
> n31 *Id. at 555.*
>
> n32 *Id.*
>
> n33 *Id. at 554.*

The examples given in *Bland* certainly provided more procedural guidance than existed before. But without considering all possible pleas to the jurisdiction, we could not prescribe more definitive rules; until all those disputes come before us, we should probably not try. In the meantime, it will often be unclear *what* the trial court should consider, or *when* it should do so, until the plea is decided (or perhaps even later [**70] on appeal). To some observers, this may appear to be drawing up the rules after the game has been played. n34

> n34 *See id. at 555* (rejecting plaintiffs' demand for remand for full evidentiary hearing because they did not contest evidence at original plea to the jurisdiction hearing).

From almost any vantage point, the resurgence of pleas to the jurisdiction creates problems in immunity cases. For governmental entities, it results in unnecessary repetition. In this case, the Parks and Wildlife Department could not be sure whether the trial court would consider evidence necessary, so it filed three motions — a no-evidence motion for summary judgment, a traditional motion for summary judgment, and a plea to the jurisdiction. But as counsel for the Department admitted at the hearing, "all three relate to the same set of issues."

Such repetition is unnecessary for interlocutory review. Nothing in the Civil Practice and Remedies Code suggests the Legislature intended to specify a *form* motions [**71] had to take for that purpose, rather than their *substance*. Indeed, the opposite is suggested by the Legislature's selection of a common-law term applicable to a broad category of motions, rather than a term pointing to any particular motion in the current rules of civil procedure. It has long been our practice to consider the substance of motions rather than their form; n35 nothing in the legislative history [*243] suggests the interlocutory appeal statute was intended to be an exception to that rule.

> n35 *See, e.g., Speer v. Stover, 685 S.W.2d 22, 23, 28 Tex. Sup. Ct. J. 235 (Tex. 1985)* (per curiam) (considering plea to jurisdiction even though misnamed plea in abatement); *see also TEX. R. CIV. PROC. 71* (stating "when a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated"). Some courts themselves appear to use the possible terms for immunity motions interchangeably. *See, e.g., State v. Executive Condos., Inc., 673 S.W.2d 330, 331-32 (Tex. App.—Corpus Christi 1984, writ refused n.r.e.)* (referring to immunity motion as "plea to the jurisdiction" when it was filed, "plea in abatement" when it was denied, and "motion to dismiss" when it was reversed).

[**72]

For plaintiffs, the problems created by the resurgence of pleas to the jurisdiction are even more acute. Defendants uncertain about how to present an immunity defense can simply try a little of everything; plaintiffs, by contrast, may lose their case if they guess wrong. In this case, for example, the Mirandas did not attach any evidence to their responses to the various motions. The lower courts agreed they did not need to, but ifwe hold otherwise, then the Mirandas will learn three years too late that they should have presented evidence at the jurisdictional hearing.

From a trial judge's vantage point, pleas to the jurisdiction create uncertainty, not just about the rules to be applied but about the role of the judge. This case is one of many in which immunity from suit under the Texas Tort Claims Act is coextensive with immunity from liability. n36 As a result, deciding the jurisdictional question bears a strong resemblance to deciding the merits.

n36 *See TEX. CIV. PRAC. & REM. CODE § 101.025(a)* (waiving immunity to suit to the extent of liability under chapter 101), *§ 101.021* (creating governmental liability for specified acts resulting from negligence, premises conditions, and use of property to the extent private persons would be liable).

[**73]

In these circumstances, it is difficult for Texas judges to detect the line between jurisdictional questions they *must* decide before going further and liability questions they *cannot* decide without usurping the function of the jury. Here, the Mirandas convinced the lower courts that whether their pleadings were supported by any evidence was a question solely for the jury. But that is not true if they raised no material facts that could establish a waiver of immunity. n37

n37 *See TEX. R. CIV. PROC. 166a(c).*

By contrast, returning to standard motions as the vehicles for asserting governmental immunity would clarify what the jurisdictional hearing will be like and simplify many procedural questions. For decades, governmental units have asserted immunity by special exceptions n38 or motions for summary judgment. n39 In many cases (including this one), they still do so today. n40 Relying on standard procedural [*244] motions would eliminate many questions about deadlines, forms, and evidence. It would make government [**74] entities rather than trial judges decide whether the jurisdictional challenge is directed to the plaintiff's pleadings or the underlying facts. If a governmental unit chooses wrong, n41 it may always try again. But the plaintiff is not required to guess what rules or procedures the trial judge might apply.

n38 *See, e.g., John G. & Marie Stella Kenedy Mem'l Found. v. Mauro, 921 S.W.2d 278, 281 (Tex. App.—Corpus Christi 1995, writ denied); Tex. Dep't of Corr. v. Winters, 765 S.W.2d 531, 532 (Tex. App.—Beaumont 1989, writ denied); Martine v. Bd. of Regents, State Senior Colleges of Tex., 578 S.W.2d 465, 469 (Tex. Civ. App.—Tyler 1979, no writ); Harrison v. Bunnell, 420 S.W.2d 777, 778 (Tex. Civ. App.—Austin 1967, no writ); State v. McDonald, 220 S.W.2d 732, 732 (Tex. Civ. App.—Texarkana 1949, writ refused); Porter v. Langley, 155 S.W. 1042, 1043 (Tex. Civ. App.—Dallas 1913, writ refused).*

n39 *See, e.g., Ho v. Univ. of Tex. at Arlington, 984 S.W.2d 672, 681-83 (Tex. App.—Amarillo 1998, pet. denied); Russell v. Tex. Dep't of Human Res., 746 S.W.2d 510, 513 (Tex. App.—Texarkana 1988, writ denied); Gay v. State, 730 S.W.2d 154, 159 (Tex. App.—Amarillo 1987, no writ).*

[**75]

n40 *See, e.g., Dallas Area Rapid Transit v. Whitley, 104 S.W.3d 540, 542, 46 Tex. Sup. Ct. J. 595 (Tex. 2003)* (sovereign immunity asserted by plea to the jurisdiction and motion for summary judgment); *County of Cameron v. Brown, 80 S.W.3d 549, 553, 45 Tex. Sup. Ct. J. 680 (Tex. 2002)* (sovereign immunity asserted by plea to the jurisdiction and special exceptions).

n41 *See, e.g., Tex. Dep't of Corr. v. Herring, 513 S.W.2d 6, 9-10, 17 Tex. Sup. Ct. J. 403 (Tex. 1974)* (reversing summary judgment based on immunity as plaintiff was not allowed opportunity to replead).

Returning to pre-resurgence practice would not change the incidence of governmental immunity. As we recently held, if a plea to the jurisdiction is directed only to the plaintiff's pleadings, we construe them in the plaintiff's favor and allow an opportunity to amend unless they affirmatively negate jurisdiction. n42 This is, of course, identical to the rules governing special exceptions. n43 And when governmental entities wish to rely on evidence, any questions of fact that affect jurisdictional issues must be settled by the jury, n44 [**76] the same standard that applies to summary judgments.

n42 *Cameron, 80 S.W.3d at 555; Tex. Dep't of Transp. v. Ramirez, 74 S.W.3d 864, 867, 45 Tex. Sup. Ct. J. 594 (Tex. 2002).*

n43 *See Brown, 80 S.W.3d at 559; Herring, 513 S.W.2d at 9-10.*

n44 *See, e.g., Brown, 80 S.W.3d at 556* (holding foreseeability issue raised by plea to the jurisdiction presented fact question for jury).

Nor can it be argued that courts exceed their jurisdiction by requiring immunity pleas to be brought in stan-

dard motions according to settled rules of procedure. As we stated shortly after the rules of civil procedure were enacted:

> Since [the trial court] had the power to sustain the demurrers and grant the motions, it had the power to overrule them. The jurisdiction of a court must be determined, not upon the court's action in deciding the questions presented in a case, but upon the character of the case itself. Jurisdiction is the power to decide, and [**77] not merely the power to decide correctly. n45

n45 *Martin v. Sheppard, 145 Tex. 639, 201 S.W.2d 810, 812-13 (Tex. 1947).*

Of course, returning to established procedural motions will not remove all difficulties with issues of governmental immunity. Judges of goodwill and intellect will still disagree about whether a particular pleading is sufficiently specific, as JUSTICES JEFFERSON and WAINWRIGHT do here. Governmental units may incur unnecessary discovery costs and delays unless judges agree to hear summary judgment motions on jurisdictional matters as early in the case as they might hear a plea to the jurisdiction. And appellate courts must still distinguish between immunity from suit (as to which an interlocutory appeal will lie) and immunity from liability (as to which it will not). n46 But simplification of our procedures should not be rejected because we cannot simplify everything.

n46 *See Tex. Dep't of Transp. v. Jones, 8 S.W.3d 636, 638-39, 43 Tex. Sup. Ct. J. 143 (Tex. 1999).*

[**78]

If the Texas Legislature mandated interlocutory review of "pleas in bar asserting limitations" (a development devoutly to be wished against), few would suggest such review was available only for motions entitled "Plea in Bar" instead of the summary judgment or special exception forms that have long been used to raise such issues. n47 We should stop making the [*245] assumption that the Legislature intended something different for pleas of governmental immunity.

n47 *See Baker v. Monsanto Co., 111 S.W.3d 158, 159, 46 Tex. Sup. Ct. J. 1013 (Tex. 2003)* (per curiam) (asserting limitations by summary judgment); *City of Port Arthur v. Tillman, 398 S.W.2d 750, 751, 8 Tex. Sup. Ct. J. 535 (Tex. 1965)* (asserting limitations by special exception).

Accordingly, I would reverse and remand for (1) the Parks and Wildlife Department to specify whether its plea to the jurisdiction is a challenge to the pleadings (by special exception) or the evidence (by summary judgment), (2) the Mirandas to respond in compliance with the rules of civil procedure, [**79] and (3) the lower courts to address the governmental immunity issue in accordance with the usual rules governing disposition and review of those motions.

Scott Brister

Justice

APPENDIX E

LEXSEE 136 S.W.3D 635

HARRIS COUNTY, TEXAS AND CARL BORCHERS, PETITIONERS v. FAYE SYKES, INDIVIDUALLY AND A/N/F OF TRENARD BATTLE, RESPONDENTS

NO. 02-1014

SUPREME COURT OF TEXAS

136 S.W.3d 635; 2004 Tex. LEXIS 476; 47 Tex. Sup. J. 618

November 12, 2003, Argued
May 28, 2004, Delivered

PRIOR HISTORY: [**1] ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS. *Sykes v. Harris County, 89 S.W.3d 661, 2002 Tex. App. LEXIS 6663 (Tex. App. Houston 1st Dist., 2002)*

DISPOSITION: Judgment of the court of appeals modified and plaintiff's suit dismissed.

JUDGES: CHIEF JUSTICE PHILLIPS delivered the opinion of the Court, in which JUSTICE HECHT,JUSTICE OWEN, JUSTICE JEFFERSON, JUSTICE SMITH, and JUSTICE WAINWRIGHT joined. JUSTICE BRISTER filed a concurring opinion, in which JUSTICE O'NEILL joined. JUSTICE SCHNEIDER did not participate in the decision.

OPINIONBY: Thomas R. Phillips

OPINION:

[*636] This case raises two issues. First, we address whether an order granting a governmental [*637] unit's plea to the jurisdiction should be with or without prejudice when the claimant has failed to state a claim that is cognizable under the *Texas Tort Claims Act*. Regardless of the answer, we must then decide whether such a dismissal is a judgment for the purposes of *section 101.106 of the Texas Tort Claims Act*, that would bar a plaintiff from proceeding against governmental agents for claims arising from the same subject matter. *See TEX. CIV. PRAC. & REM. CODE § 101.106*. The court of appeals held that a dismissal pursuant to a plea to the jurisdiction is a dismissal without [**2] prejudice, and as such, not a judgment under the Texas Tort Claims Act. *89 S.W.3d 661, 670*. We hold that such a dismissal is with prejudice because it fully and finally adjudicates whether the claims that were asserted, or that could have been asserted, come within the Texas Tort Claims Act's waiver of sovereign immunity. We further hold that such a dismissal is a judgment under *section 101.106 of the Texas Tort Claims Act*. Accordingly, we modify the judgment of the court of appeals to render judgment dismissing the plaintiff's claims with prejudice and render judgment that the plaintiff take nothing.

I

George Sykes and his wife, Faye, brought this suit for injuries Mr. Sykes allegedly sustained in the Harris County jail. While incarcerated there, Mr. Sykes was assigned to a bed next to an inmate who was infected with tuberculosis. The Sykeses claimed that the county was negligent in failing to quarantine the infected inmate and in failing to warn Mr. Sykes of the inmate's infection. Several months after filing suit, Faye Sykes filed a suggestion informing the trial court of her husband's death. At the same time, she filed a motion, on which the trial court apparently [**3] never ruled, requesting that Trenard Battle, Mr. Sykes's minor son, be added as a plaintiff and that the estate of George Sykes be substituted in the place of her late husband.

Asserting governmental immunity from suit, Harris County filed a plea to the jurisdiction arguing that the Legislature has not waived immunity from suits like the Sykes's. Sykes responded that immunity was waived by the Texas Tort Claims Act because her husband's injuries arose out of the condition or use of property. *TEX. CIV. PRAC. & REM. CODE § 101.021*. Specifically, Sykes argued that the words "housed," "room," and "sleeping space" in their pleadings all connote use of the tangible personal or real property that caused Mr. Sykes's injury and eventual death.

By amended petition, Sykes added Carl Borchers, the major of the Harris County jail, as a defendant both individually and in his official capacity. The trial court subsequently granted Harris County's plea to the jurisdiction and dismissed Sykes's claims against Harris County with

prejudice. Borchers then moved for summary judgment, urging that the trial court's dismissal of Harris County entitled him to derivative [**4] immunity under *section 101.106 of the Texas Tort Claims Act. See id. § 101.106*; *Thomas v. Oldham, 895 S.W.2d 352, 357, 38 Tex. Sup. Ct. J. 375 (Tex. 1995)*. The trial court granted Borchers's motion and signed an order that Sykes take nothing.

Sykes appealed, arguing that the trial court erred in granting the plea to the jurisdiction and dismissing her claims against Harris County because the Texas Tort Claims Act waives immunity when a condition or use of tangible personal property causes injury. *See TEX. CIV. PRAC. & REM. CODE § 101.021*. Sykes also argued that the trial court further erred in granting Borchers's motion for summary judgment [*638] because Harris County's dismissal was not a judgment for purposes of *section 101.106. See id. § 101.106*. The court of appeals affirmed the trial court's dismissal of Harris County, holding that Sykes's amended petition did not affirmatively plead facts sufficient to confer jurisdiction on the trial court. *89 S.W.3d at 667*. But the court decided that, in granting the plea to the jurisdiction, the trial court could only dismiss the suit without prejudice, which did not qualify as a judgment under [**5] *section 101.106* of the Texas Tort Claims Act. *89 S.W.3d at 668*. Accordingly, the court of appeals reversed Carl Borchers's summary judgment and remanded the case to the trial court. We granted Carl Borchers and Harris County's petition for review.

II

Sovereign immunity from suit defeats a trial court's subject matter jurisdiction unless the state expressly consents to suit. *Tex. Dep't of Transp. v. Jones, 8 S.W.3d 636, 638, 43 Tex. Sup. Ct. J. 143 (Tex. 1999)*. Governmental immunity operates like sovereign immunity to afford similar protection to subdivisions of the State, including counties, cities, and school districts. *See Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 694 n.3, 46 Tex. Sup. Ct. J. 494 (Tex. 2003)* (recognizing that sovereign immunity and governmental immunity are distinct concepts although courts often use the terms interchangeably). The Texas Tort Claims Act provides a limited waiver of governmental immunity if certain conditions are met. *See TEX. CIV. PRAC. & REM. CODE §§ 101.021, 101.025*. n1

> n1 TheTexas Tort Claims Act states: A governmental unit in the state is liable for:
>
> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
>
> (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
>
> (B) the employee would be personally liable to the claimant according to Texas law; and
>
> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.
>
> *Id. § 101.021*.

[**6]

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject matter jurisdiction. *Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 554, 44 Tex. Sup. Ct. J. 125 (Tex. 2000)*. Because governmental immunity from suit defeats a trial court's jurisdiction, it may be raised by such a plea. *Tex. Dep't of Parks & Wildlife v. Miranda, 2004 Tex. LEXIS 304, 47 Tex. Sup. Ct. J. 386, 133 S.W.3d 217 (Tex. 2004)*; *Jones, 8 S.W.3d at 639*. Whether a court has subject matter jurisdiction is a legal question. *State ex rel. State Dep't of Highways & Pub. Transp. v. Gonzalez, 82 S.W.3d 322, 327, 45 Tex. Sup. Ct. J. 925 (Tex. 2002)*; *Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 928, 41 Tex. Sup. Ct. J. 517 (Tex. 1998)*. 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. *See TEX. CIV. PRAC. & REM. CODE § 51.014*; *San Antonio State Hosp. v. Cowan, 128 S.W.3d 244, 245 n.3, 47 Tex. Sup. Ct. J. 221 (Tex. 2004)*. However, if the court grants the plea to the jurisdiction, as the trial court did [**7] in this case, the plaintiff may take an appeal once that judgment becomes final. *See Cash Am. Int'l Inc. v. Bennett, 35 S.W.3d 12, 15, 43 Tex. Sup. Ct. J. 1047 (Tex. 2000)*.

[*639] A trial court must grant a plea to the jurisdiction, after providing an appropriate opportunity to amend, when the pleadings do not state a cause of action upon which the trial court has jurisdiction. *See Bybee v. Fireman's Fund Ins. Co., 160 Tex. 429, 331 S.W.2d 910, 917, 3 Tex. Sup. Ct. J. 157 (Tex. 1960)* (citing *Lone Star Fin. Corp. v. Davis, 77 S.W.2d 711, 715 (Tex. App.—Eastland 1934, no writ)*). This was such a case. After Harris County filed its plea to the jurisdiction, Sykes amended her petition to state with greater particularity the theory that Harris County waived governmental im-

munity by placing Mr. Sykes in the same room with, and assigning him a bed near, an inmate infected with tuberculosis. The trial court dismissed Sykes's claims, and the court of appeals agreed that "any effect that the room's walls and Sykes's bed had on Sykes's alleged exposure to tuberculosis is too attenuated to constitute a waiver of immunity under the [Texas Tort Claims Act]." *89 S.W.3d at 667* (citing *Dallas County Mental Health & Mental Retardation v. Bossley, 968 S.W.2d 339, 343, 41 Tex. Sup. Ct. J. 653 (Tex. 1998)).* [**8] n2

n2 Sykes did not petition this Court for review of the court of appeals' judgment.

The court of appeals disagreed with the trial court, however, on whether such a dismissal should be with or without prejudice. In general, a dismissal with prejudice is improper when the plaintiff is capable of remedying the jurisdictional defect. *See Dahl v. State, 92 S.W.3d 856, 862 (Tex. App.—Houston [14th Dist.] 2002, no pet.); Thomas v. Skinner, 54 S.W.3d 845, 847 (Tex. App.—Corpus Christi 2001, pet. denied); Bell v. State Dep't of Highways & Pub. Transp., 945 S.W.2d 292, 295 (Tex. App.—Houston [14th Dist.] 1997, writ denied).* The court of appeals in this case relied on *Bell* to hold that Sykes's claims should have been dismissed without prejudice. In so doing, the court ruled contrary to a line of decisions stating that dismissal with prejudice is appropriate when a trial court lacks subject matter jurisdiction because of the sovereign immunity bar. *See Martin v. Tex. Bd. of Criminal Justice, 60 S.W.3d 226, 231* [**9] *(Tex. App.—Corpus Christi 2001, no pet.); City of Midland v. Sullivan, 33 S.W.3d 1, 6 (Tex. App.—El Paso 2000, pet. dism'd w.o.j.); City of Cleburne v. Trussell, 10 S.W.3d 407, 409 (Tex. App.—Waco 2000, no pet.); Univ. of Tex. Med. Branch v. Hohman, 6 S.W.3d 767, 771 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd w.o.j.); Hampton v. Univ. of Tex.-M.D. Anderson Cancer Ctr., 6 S.W.3d 627, 629 (Tex. App.—Houston [1st Dist.] 1999, no pet.); Lamar Univ. v. Doe, 971 S.W.2d 191, 197 (Tex. App.—Beaumont 1998, no pet.); Jones v. City of Stephenville, 896 S.W.2d 574, 577 (Tex. App.—Eastland 1995, no writ); Liberty Mut. Ins. Co. v. Sharp, 874 S.W.2d 736, 740 (Tex. App.—Austin 1994, writ denied).* We granted Borchers and Harris County's petition to resolve this conflict.

If a plaintiff has been provided a reasonable opportunity to amend after a governmental entity files its plea to the jurisdiction, and the plaintiff's amended pleading still does not allege facts that would constitute a waiver of immunity, then the trial court should dismiss the plaintiff's action. [**10] Such a dismissal is with prejudice because a plaintiff should not be permitted to relitigate jurisdiction once that issue has been finally determined. Before dismissing this case, the trial court allowed Sykes to file an amended petition, after which the court made a final adjudication that the Legislature has not waived governmental immunity under the Texas Tort Claims Act with respect to any claim that Sykes brought against Harris County. Therefore, Sykes is foreclosed from relitigating whether the Texas Tort Claims Act [*640] waives immunity in this case. Accordingly, the court below erred in reversing the dismissal with prejudice, and we modify the court of appeals' judgment to dismiss Sykes's claims against Harris County with prejudice.

III

Next, we address the court of appeals' holding reversing the summary judgment granted by the trial court in favor of Carl Borchers. The Texas Tort Claims Act states: "A judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim." *TEX. CIV. PRAC. & REM. CODE § 101.106* [**11] . n3 The purpose of *section 101.106* is to protect employees of a governmental unit from liability when a judgment or settlement has been obtained from the government employer pursuant to a claimunder Chapter 101 of the Texas Tort Claims Act. *Thomas v. Oldham, 895 S.W.2d 352, 357, 38 Tex. Sup. Ct. J. 375 (Tex. 1995). Section 101.106* applies not only when there has been a judgment against a governmental entity prior to the suit against the employee, but also when the settlement or judgment against the governmental entity occurs at any time before or during the pendency of the action against the employee. *Id. at 355.* The bar applies regardless of whether the judgment is favorable or adverse to the governmental unit. *Dallas County Mental Health & Mental Retardation v. Bossley, 968 S.W.2d 339, 343, 41 Tex. Sup. Ct. J. 653 (Tex. 1998).*

n3 This section was amended by Act of June 11, 2003, 78th Leg., R.S., ch. 204 § 11.05. The amended section became effective on September 1, 2003 and applies to actions filed on or after the effective date.

[**12]

This Court has never addressed whether a dismissal on a plea to the jurisdiction is a judgment for purposes of *section 101.106 of the Texas Tort Claims Act.* Several courts of appeals, however, have considered this issue. In *Brown v. Prairie View A & M Univ.*, the Fourteenth Court of Appeals held that dismissing Prairie View A & M pursuant to a plea to the jurisdiction was not a judgment that triggered the bar of the Texas Tort Claims Act. *630 S.W.2d 405, 408 (Tex. App.—Houston [14th Dist.]*

1982, writ ref'd n.r.e.). Since *Brown*, however, that court, as well as two other courts of appeals, have held that a dismissal pursuant to a plea to the jurisdiction is a judgment for purposes of *section 101.106* of the Texas Tort Claims Act. *Liu v. City of San Antonio, 88 S.W.3d 737, 744 (Tex. App.--San Antonio 2002, pet. denied)*; *Dalehite v. Nauta, 79 S.W.3d 243, 244 (Tex. App.—Houston [14th Dist.] 2002, pet. denied)*; *Doyal v. Johnson County, 79 S.W.3d 139, 140 (Tex. App.—Waco 2002, no pet.)*; *Lowry v. Pearce, 72 S.W.3d 752, 755 (Tex. App.—Waco 2002, pet. denied)*.

Sykes argues that a granted plea to [**13] the jurisdiction does not qualify as a judgment because it does not dispose of the claims' merits. As we have already held, however, a dismissal constitutes a final determination on the merits of the matter actually decided. *See Ritchey v. Vasquez, 986 S.W.2d 611, 612, 42 Tex. Sup. Ct. J. 357 (Tex. 1999)* (per curiam); *Mossler v. Shields, 818 S.W.2d 752, 754, 35 Tex. Sup. Ct. J. 97 (Tex. 1991)* (per curiam). In this case, there is a final adjudication that the Legislature has not waived Harris County's immunity on the facts of this case. Since the trial court properly dismissed Sykes's claims against Harris County with prejudice, Carl Borchers is entitled to derivative immunity under *section 101.106 of the Texas Tort Claims Act*.

The court of appeals erred in holding that the claims against Harris County [*641] should be dismissed without prejudice and that such a dismissal is not a judgment under *section 101.106 of the Texas Tort Claims Act*. Accordingly, we modify the judgment of the court of appeals and render judgment that the plaintiff's suit is dismissed with prejudice. We also reverse the portion of the court of appeals' judgment reversing Carl Borchers's summary judgment and render judgment that the [**14] plaintiff take nothing.

Thomas R. Phillips

Chief Justice

CONCURBY: Scott Brister

CONCUR:

JUSTICE BRISTER, joined by JUSTICE O'NEILL, concurring.

For reasons stated elsewhere, governmental immunity should not be raised in a motion called a "plea to the jurisdiction." n1 This case shows another reason why.

n1 *See Tex. Dep't of Parks & Wildlife v. Miranda, 2004 Tex. LEXIS 304, 47 Tex. Sup. Ct. J. 386, 133 S.W.3d 217 (Tex. 2004)* (Brister, J., dissenting).

The Court holds dismissal by plea to the jurisdiction on immunity grounds must be with prejudice. n2 While many intermediate appellate court opinions are cited in support, just as many others can be cited to the contrary (and are now impliedly disapproved). n3 How could so many courts have been so confused?

n2 ___ S.W.3d ___.

n3 *See, e.g., Mullins v. Estelle High Sec. Unit, 111 S.W.3d 268, 274 (Tex. App.—Texarkana 2003, no pet.)* (holding dismissal of inmate's suit as frivolous due to defendant's immunity should have been without prejudice); *Ab-Tex Beverage Corp. v. Angelo State Univ., 96 S.W.3d 683, 686 (Tex. App.—Austin 2003, no pet.)*; *Prairie View A & M Univ. of Tex. v. Mitchell, 27 S.W.3d 323, 327 (Tex. App.—Houston [1st Dist.] 2000, pet. denied)*; *Li v. Univ. of Tex. Health Sci. Ctr. at Houston, 984 S.W.2d 647, 654 (Tex. App.—Houston [14th Dist.] 1998, pet. denied)*; *see also Cervantes v. Tyson Foods, Inc., 130 S.W.3d 152, 157-58 (Tex. App.—El Paso 2003, pet. filed)* (holding order granting plea to the jurisdiction for missing deadline for filing administrative appeal must be without prejudice); *Bell v. State Dep't of Highways & Pub. Transp., 945 S.W.2d 292, 295 (Tex. App.—Houston [1st Dist.] 1997, writ denied)* (holding sovereign immunity claim raised by special exception could not be dismissed with prejudice).

[**15]

We have recently held dismissal must be *without* prejudice when based on mootness, n4 forum non conveniens, n5 or exclusive jurisdiction. n6 Each of these dilatory matters could be raised in a "plea to the jurisdiction," and presumably changing the motion's name would not change the preclusive effect. Thus, the rule regarding pleas to the jurisdiction appears to be: dismissal is usually without prejudice, but sometimes with prejudice. When? Why?

n4 *Ritchey v. Vasquez, 986 S.W.2d 611, 612, 42 Tex. Sup. Ct. J. 357 (Tex. 1999)* (per curiam).

n5 *Owens Corning v. Carter, 997 S.W.2d 560, 580 n.13, 42 Tex. Sup. Ct. J. 883 (Tex. 1999)*.

n6 *Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 221, 45 Tex. Sup. Ct. J. 907 (Tex. 2002)*.

The conflicting opinions by the courts of appeals give no satisfactory explanation for either result. Of the "with

prejudice" courts, only one appears to have made any attempt to explain why dismissal based on sovereign immunity should be preclusive; the explanation in that case was that [**16] plaintiffs cannot amend their pleadings or present evidence on pleas to the jurisdiction n7 - both of which assertions are wrong. n8

n7 *Liberty Mut. Ins. Co. v. Sharp, 874 S.W.2d 736, 739 (Tex. App.—Austin 1994, writ denied).*

n8 *See County of Cameron v. Brown, 80 S.W.3d 549, 558-59, 45 Tex. Sup. Ct. J. 680 (Tex. 2002)* (holding plaintiff must be given opportunity to replead before plea to the jurisdiction based on pleadings is granted); *Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 555, 44 Tex. Sup. Ct. J. 125 (Tex. 2000)* (holding plea to the jurisdiction is not limited to consideration of pleadings).

The "without prejudice" courts have explained that dismissal based on lack of [*642] jurisdiction can never be on the merits, and is improper if the plaintiff can remedy the jurisdictional defect. n9 But courts always have jurisdiction to determine their own subject-matter jurisdiction, n10 and a determination on that matter should not be open to endless relitigation. Further, as plaintiffs must be given an opportunity [**17] to remedy defects regarding immunity before any plea to the jurisdiction is granted, n11 it is unclear why that opportunity should be extended in perpetuity.

n9 *See, e.g., Mullins, 111 S.W.3d at 274; Ab-Tex Beverage, 96 S.W.3d at 686.*

n10 *See Camacho v. Samaniego, 831 S.W.2d 804, 809, 35 Tex. Sup. Ct. J. 734 (Tex. 1992).*

n11 *Brown, 80 S.W.3d at 559.*

The Court adopts the "with prejudice" rule because "a plaintiff should not be permitted to relitigate jurisdiction once that issue has been finally determined." n12 This begs the question; when is jurisdiction finally determined? Nothing inherent in pleas to the jurisdiction suggests an answer.

n12 ___ S.W.3d ___.

Today's holding can only be explained as another ad hoc effort to modernize an obsolete common-law plea. Because a plea to the [**18] jurisdiction is not so much a motion as a category of complaints, it will always be hard to say with particularity or uniformity what rules ought to apply. Wisely, the Texas Rules of Civil Procedure do not even try; we should follow that lead.

There would never have been as much confusion if sovereign immunity had to be raised by summary judgment or special exceptions. The summary judgment rules make clear not only the deadlines and evidentiary rules, but also that any summary judgment granted is preclusive on the issues actually decided. n13 Similarly, if sovereign immunity is raised by special exceptions, claimants know they have one chance to replead and are thereafter barred. n14

n13 *See Hyundai Motor Co. v. Alvarado, 892 S.W.2d 853, 854, 38 Tex. Sup. Ct. J. 302 (Tex. 1995)* (per curiam) (holding that nonsuit without prejudice nevertheless operates as dismissal with prejudice as to issues decided in earlier partial summary judgment).

n14 *See Friesenhahn v. Ryan, 960 S.W.2d 656, 658, 41 Tex. Sup. Ct. J. 261 (Tex. 1998); Tex. Dep't of Corr. v. Herring, 513 S.W.2d 6, 10, 17 Tex. Sup. Ct. J. 403 (Tex. 1974).*

[**19]

The only valid explanation for today's holding is that changing the motion's name to a "plea to the jurisdiction" should not change the preclusive effect. But rather than holding that a plea to the jurisdiction based on immunity should be dismissed with prejudice because that would be the effect of a summary judgment or dismissal after special exceptions on the same grounds, I would simply hold immunity must be raised by the latter motions. Accordingly, I agree with today's holding in Part II, though on different grounds; I join fully in Part III.

Scott Brister

Justice

APPENDIX F

LEXSEE 2006 TEX. APP. LEXIS 4304

CITY OF HOUSTON & HARRIS COUNTY, TEXAS, APPELLANTS v. TANYA LYNN DEGNER, INDIVIDUALLY AND A/N/F OF B.D., A MINOR CHILD, AND FOR RYAN ALLEN DEGNER, APPELLEES

NO. 01-05-00133-CV

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

2006 Tex. App. LEXIS 4304

May 18, 2006, Opinion Issued

NOTICE: [*1] PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF MEMORANDUM OPINIONS AND UNPUBLISHED OPINIONS.

PRIOR HISTORY: On Appeal from the 113th District Court Harris County, Texas Trial Court Cause No. 2004-50705.

JUDGES: Panel consists of Justices Nuchia, Keyes, and Hanks.

OPINIONBY: Evelyn V. Keyes

OPINION:

MEMORANDUM OPINION

This is an interlocutory appeal of the trial court's denial of appellants'—the City of Houston ("the City") and Harris County ("the County")—pleas to the jurisdiction. Following the death of Dr. Ryan Allen Degner, appellees—Tanya Lynn Degner, individually and as next friend of B.D., a minor child, and for Ryan Allen Degner—sued the City for negligent misrepresentation and failure to make proper inquiry. Appellees sued the County for negligent supervision of its employees. In a single issue presented for review, appellants argue that appellees' suit is barred by sovereign immunity, and thus they contend the trial court erred in denying their respective pleas to the jurisdiction.

We reverse the cause and render judgment.

BACKGROUND

On July 3, 2003, an automobile driven by Dr. Degner crashed into a fixed object. Prior to the crash, Dr. Degner telephoned 9-1-1. A [*2] partial transcript of his call to 9-1-1 indicates that Dr. Degner had taken some unidentified pills and was having difficulty staying awake. Toward the end of the transcript, Dr. Degner states, "[T]he reason I . . . called you all is because I can't operate this vehicle anymore."

As a result of injuries he sustained in the crash, Dr. Degner was placed on life support. Dr. Degner remained on life support until September 2003 when his wife, appellee Tanya Lynn Degner, decided to end life support measures. Appellees' live pleading states that Tanya made this decision after being informed by the Harris County Sheriff's Department that Dr. Degner, in the 9-1-1 call made prior to his crash, stated that he "wanted to end his life." Thus, at the time she ordered an end to the provision of life support, Tanya believed that her actions were consistent with the wishes of her husband. On September 26, 2003, the City issued a death certificate listing suicide as the cause of Dr. Degner's death. Appellees allege that the City's decision to list suicide as the cause of death was "reached as a result of information supplied by the Harris County Sheriff's Department" indicating that Dr. Degner stated [*3] in the 9-1-1 call that he wished to end his life.

In March 2004, appellees obtained a transcript of the 9-1-1 call Dr. Degner placed moments before his automobile crash. In reviewing the transcript, appellees discovered that Dr. Degner did not state that he desired to end his life. Appellees presented this information to the City, which issued an amended death certificate on July 13, 2004 indicating that Dr. Degner had died as a result of an accident.

In their live pleading, appellees allege that they suffered various financial damages and mental anguish as a result of the initial death certificate stating that Dr. Degner had committed suicide. Appellees specifically contend that the City negligently represented that Dr. Degner had ended his own life and failed to properly inquire into the cause of his death. Appellees further contend that the County failed to properly supervise its employees, resulting in the gathering and release of information falsely alleging that Dr. Degner committed suicide. Both the City

and the County filed a plea to the jurisdiction, contending that appellees' claims were barred by sovereign immunity. The City's and the County's pleas were respectively [*4] denied on January 13, 2005 and February 22, 2005. This interlocutory appeal followed.

DISCUSSION

In their sole issue on appeal, appellants argue that appellees' suit is barred by sovereign immunity, and they thus contend that the trial court erred in denying their respective pleas to the jurisdiction.

Standard of Review

A plea to the jurisdiction challenges the trial court's subject matter jurisdiction to hear the case. *Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 554, 44 Tex. Sup. Ct. J. 125 (Tex. 2000)*. Subject matter jurisdiction is essential to the authority of a court to decide a case and is never presumed. *Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443-44, 36 Tex. Sup. Ct. J. 607 (Tex. 1993)*. The plaintiff has the burden to allege facts affirmatively demonstrating that the trial court has subject matter jurisdiction. *Id. at 446*.

The existence of subject matter jurisdiction is a question of law. *State Dep't of Highways & Pub. Transp. v. Gonzalez, 82 S.W.3d 322, 327, 45 Tex. Sup. Ct. J. 925 (Tex. 2002)*; *Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 928, 41 Tex. Sup. Ct. J. 517 (Tex. 1998)*. Therefore, we review the trial court's ruling on a plea to the [*5] jurisdiction de novo. *Gonzalez, 82 S.W.3d at 327*. In deciding a plea to the jurisdiction, a court may not consider the merits of the case, but only the plaintiff's pleadings and the evidence pertinent to the jurisdictional inquiry. *County of Cameron v. Brown, 80 S.W.3d 549, 555, 45 Tex. Sup. Ct. J. 680 (Tex. 2002)*.

Sovereign Immunity

Under the doctrine of sovereign immunity, a governmental entity cannot be held liable for exercising its governmental functions unless a constitutional or statutory provision waives its immunity. *See City of Amarillo v. Martin, 971 S.W.2d 426, 427, 41 Tex. Sup. Ct. J. 870 (Tex. 1998)*; *Dallas County Mental Health & Mental Retardation v. Bossley, 968 S.W.2d 339, 343, 41 Tex. Sup. Ct. J. 653 (Tex. 1998), cert. denied, 525 U.S. 1017, 119 S. Ct. 541, 142 L. Ed. 2d 450 (1998)*; *Univ. of Tex. Med. Branch v. York, 871 S.W.2d 175, 177, 37 Tex. Sup. Ct. J. 444 (Tex. 1994)*. Sovereign immunity can be waived only through the use of clear and unambiguous language. *Brown, 80 S.W.3d at 554*; *York, 871 S.W.2d at 177*.

Under the Texas Tort Claims Act ("TTCA"), sovereign immunity may be waived in certain limited circumstances. [*6] *See Bossley, 968 S.W.2d at 340, 343*. The TTCA provides:

> A governmental unit in the state is liable for:
>
> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
>
> (A) the property damage, personal injury, or death arises from the operation of use of a motor-driven vehicle or motor-driven equipment; and
>
> (B) the employee would be personally liable to the claimant according to Texas law; and
>
> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 2005). n1 Thus, for appellants to be held liable under the act, appellees' injuries must have been proximately caused by the operation or use of a motor-driven vehicle or equipment, or by a condition or use of tangible real or personal property. *See Bossley, 968 S.W.2d at 342-43*.

> n1 Cities and counties are political subdivisions of the State and thus are subject to the provisions of the TTCA. *See TEX. CIV. PRAC. & REM. CODE ANN. § 101.001*.

[*7]

The parties agree that appellants' use of a motor driven vehicle or real property did not cause appellees' alleged injuries. Therefore, to achieve a waiver of immunity under the TTCA, appellees' must show that their injuries were proximately caused by the condition or use of tangible personal property by individuals employed by appellants and acting within the scope of their employment. *See TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2)*. Causation is not satisfied merely because the property at issue was involved in the alleged injury. *See Bossley, 968 S.W.2d at 343* ("If only involvement were required, the waiver of immunity would be virtually unlimited, since few injuries do not involve tangible or real property."). Rather, "[P]roperty does not cause injury if it does no more than furnish the condition that makes injury possi-

ble." *Id.*

Tangible personal property has been defined as "something that has a corporeal, concrete, and palpable existence." *York, 871 S.W.2d at 178.* Significantly, information does not qualify as tangible property under the TTCA, as "information itself is an abstract concept, lacking [*8] corporeal, physical, or palpable qualities." *Id. at 179*; *Sawyer v. Tex. Dep't of Crim. Justice, 983 S.W.2d 310, 312 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)* ("Information is not tangible because it lacks corporeal, concrete, and palpable qualities. Although the paper on which the information is printed is tangible . . . the information itself has no such properties."). Thus, the use or misuse of information will not suffice to support a waiver of immunity even when a government employee misinterprets information or relies on it to reach an erroneous conclusion. *Prairie View A & M Univ. of Tex. v. Mitchell, 27 S.W.3d 323, 327 (Tex. App.—Houston [1st Dist.] 2000, pet. denied)* (holding that alleged misrepresentation by university that Mitchell had not graduated constituted information and that "[u]se, misuse or nonuse of information does not constitute use, misuse, or nonuse of tangible personal property under the [TTCA]."); *Sawyer, 983 S.W.2d at 312* ("[A] governmental entity does not waive its sovereign immunity by using or misusing information."); *see also Holland v. City of Houston, 41 F. Supp. 2d 678, 691 (S.D. Tex. 1999)*; [*9] *Riggs v. City of Pearland, 177 F.R.D. 395, 406 (S.D. Tex. 1997)* (noting that claims based on failure to properly identify patient's medical condition are barred by sovereign immunity because failure to properly diagnose involves information, not tangible property). The inability of information to qualify as tangible property for the purposes of the TTCA is not altered when information is recorded, either in writing or by computer. *See York, 871 S.W.2d at 179*; *Baston v. City of Port Isabel, 49 S.W.3d 425, 428 (Tex. App.—Corpus Christi 2001, pet. denied)*; *Sawyer, 983 S.W.2d at 312* ("Information or misinformation remains *information* whether it is transmitted by electronic equipment or by word of mouth."). Whether it exists simply in an oral state or is recorded by or onto tangible property, information itself remains an intangible entity, and thus it cannot provide the basis for a waiver of immunity under the TTCA, regardless of how it was used or misused by government employees. *See York, 871 S.W.2d at 179*; *Mitchell, 27 S.W.3d at 327*; *Sawyer, 983 S.W.2d at 312* ("The [*10] medium used to communicate information does not alter its intangible nature.").

Parties' Contentions

As noted, the plaintiff has the burden to allege facts affirmatively demonstrating that the trial court has subject matter jurisdiction. *Tex. Air Control Bd., 852 S.W.2d at 446.* A court has jurisdiction to hear a negligence claim against a governmental entity if the plaintiff has demonstrated that sovereign immunity has been waived pursuant to *section 101.021 of the Texas Civil Practice and Remedies Code. See TEX. CIV. PRAC. & REM. CODE ANN. § 101.021.* Appellees, plaintiffs below, contend that such a waiver has occurred by virtue of appellants' use of audio recordings containing Dr. Denger's 9-1-1 call. According to appellees: (1) the audio recordings are tangible property; (2) individuals employed by appellants misused the recordings; and (3) this misuse proximately caused appellees' injuries. We disagree.

Our review of the pleadings and evidence pertinent to the jurisdictional inquiry convinces us that appellees' alleged injuries resulted from the use or misuse of information, [*11] not tangible property. Assuming the pleadings are true, all of appellees' claims flow from the County's decision to inform the City that Dr. Degner indicated he wished to kill himself and the City's subsequent decision to act on this information by listing Dr. Degner's cause of death as suicide. Considering that the recording of information does not transform it into tangible property, we fail to see how the appellants' actions implicate the use of tangible property. *See York, 871 S.W.2d at 179*; *Sawyer, 983 S.W.2d at 312.* At most, tangible property—the paper the transcript was written on; the physical copy of the audio recording—furnished the conditions for appellees' alleged injuries, but it was the contents of the property, the information they contained, that proximately caused the injuries. Moreover, although it is possible that an employee of the City or the County misinterpreted the 9-1-1 call or relied on it to reach an erroneous conclusion, such an occurrence would not suffice to support a waiver of immunity. *See Mitchell, 27 S.W.3d at 327*; *Sawyer, 983 S.W.2d at 312*; *see also Holland, 41 F. Supp. 2d at 691.* [*12] Thus appellees' claim that the tangible audio recordings caused their injuries is misguided.

Appellees' alleged injuries flowed from the information on the recordings, not the physical recordings themselves. Appellees argue that discovery is needed to uncover precisely how the actual recordings were misused, and thus they attempt to avoid the conclusion that their injuries were caused by information on the recordings rather then recordings themselves. Because the proximate cause of appellees' injuries is reducible to the information on the recordings, however, discovery would serve no purpose.

Because we conclude that appellees' injuries were not proximately caused by a condition or the use of tangible property, we hold that appellants have not waived their sovereign immunity. Therefore, we need not consider the additional claims raised by appellants. *See TEX. R. APP. P. 47.1.*

CONCLUSION

Appellees fail to allege a cause of action that falls within any of the three categories in which the TTCA waives the sovereign immunity afforded to appellants. The trial court, therefore, erred in denying appellants' pleas to the jurisdiction. Accordingly, we [*13] reverse the judgment of the trial court and render judgment dismissing appellees' claims against appellants for want of jurisdiction.

Evelyn V. Keyes

Justice

APPENDIX G

LEXSEE 2006 TEX. APP. LEXIS 3045

CITY OF AMARILLO, APPELLANT v. RON DYER AND JO DYER, APPELLEES

NO. 07-05-0325-CV

COURT OF APPEALS OF TEXAS, SEVENTH DISTRICT, AMARILLO

2006 Tex. App. LEXIS 3045

April 13, 2006, Decided

NOTICE: [*1] PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF MEMORANDUM OPINIONS AND UNPUBLISHED OPINIONS.

PRIOR HISTORY: FROM THE 251ST DISTRICT COURT OF RANDALL COUNTY; NO. 55,785-C; HONORABLE PATRICK A. PIRTLE, JUDGE.

COUNSEL: Mike McMillen, ASSISTANT CITY ATTORNEY, Amarillo, TX.
Bill Cornett, ATTORNEY at LAW, Amarillo, TX.

JUDGES: PANEL D, Before QUINN, C.J., and REAVIS and CAMPBELL, JJ.

OPINIONBY: James T. Campbell

OPINION:

MEMORANDUM OPINION

The City of Amarillo brings this interlocutory appeal challenging the denial of its plea to the jurisdiction in a suit against it for inverse condemnation. We affirm the trial court's order.

The plaintiffs in the trial court are Ron and Jo Dyer. Their petition alleges they live on a tract of about 70 acres near a waste water treatment facility operated by the City. They filed suit against the City, alleging operation of the City's facility had contaminated the groundwater they use for household and agricultural purposes. Their petition asserts the contamination constituted a taking by the City and seeks recovery of damages. *See Tex. Const. Art. I, § 17.* The City's answer included a plea to the jurisdiction asserting the plaintiffs' claims were not ripe because they "can prove no damages that are ripe for adjudication . . . ." The answer also asserted [*2] alternative affirmative defenses, including limitations.

At a hearing on the City's plea to the jurisdiction, Ron Dyer testified over the City's objection that the level of chlorides in the water has been increasing, which affected the taste of the water and reduced the value of the property. He also asserted they would be required to disclose the water condition to any potential buyer. The Dyers presented the testimony, also over the City's objection, of a real estate appraiser that the level of chlorides would reduce the value of the property by fifty percent. The trial court overruled the challenge to its jurisdiction by written order. It made findings of fact and conclusions of law in support of its order. The City timely perfected appeal from that interlocutory order. *See Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8)* (Vernon Supp. 2005). The City now presents three issues challenging the trial court's order.

A plea to the jurisdiction seeks to defeat a cause of action without regard to whether the claims have merit. *Bland I.S.D. v. Blue, 34 S.W.3d 547, 554, 44 Tex. Sup. Ct. J. 125 (Tex. 2000).* A court lacks subject matter jurisdiction over a [*3] claim which depends on contingent or uncertain future events. *Patterson v. Planned Parenthood, 971 S.W.2d 439, 443, 41 Tex. Sup. Ct. J. 1001 (Tex. 1998).* The question of ripeness "asks whether the facts have developed sufficiently so that an injury has occurred or is likely to occur, rather than being contingent or remote." *Id. at 442.* If the facts are not so developed, a claim is not ripe and any judgment rendered on the claim would be an advisory opinion which Texas courts may not give. *Id.* Subject matter jurisdiction is ordinarily determined in the first instance by examining the allegations in the plaintiff's petition but a court is not limited to the allegations in the petition. It may consider evidence and must do so when necessary to resolve the jurisdictional issues raised. *Bland, 34 S.W.3d at 555.* Because subject matter jurisdiction is a question of law, we review the trial court's order *de novo. Texas Natural Resource Conservation Com'n v. IT-Davy, 74 S.W.3d 849, 855, 45 Tex. Sup. Ct. J. 558 (Tex. 2002).*

In its first issue, the City argues the trial court erred in admitting testimony from Ron Dyer and the appraiser at the hearing, in conflict with [*4] the Dyers' responses

to the City's requests for admissions. In support of its position the challenged evidence should have been excluded, the City cites *Marshall v. Vise, 767 S.W.2d 699, 32 Tex. Sup. Ct. J. 290 (Tex. 1989)*. *Marshall* applied the rule that a party may not, over objection, introduce testimony controverting an express or deemed admission. *See* Tex. R. Civ. P. 198.2(c), 198.3 (matter admitted pursuant to request for admission is conclusively established). We initially note that *Marshall* involved an appeal from a trial on the merits rather than denial of a plea to the jurisdiction. Assuming, *arguendo*, the rule applied in *Marshall* is equally applicable to evidence introduced at a hearing on a plea to the court's jurisdiction, a question we do not decide, the City's contention nonetheless lacks merit because it is not supported by the record. The City asserts that evidence to which it objected conflicted with the Dyers' admission they had no scientific evidence the groundwater was contaminated. But the record reflects no such admission by the Dyers. In response to the City's request, n1 the Dyers neither admitted nor [*5] denied the requested fact. *See* Tex. R. Civ. P. 198.2(b) (prescribing content of responses to requests for admissions).

> n1 The request cited by the City is its request no. 26, which states: "Plaintiffs do not have any scientific evidence that the groundwater on the property is contaminated at this time." The Dyers' response reads: "Plaintiffs cannot admit or deny at this time. Discovery and testing are not complete."

The City similarly asserts the trial court improperly allowed testimony conflicting with the Dyers' admissions that they had no evidence the City contaminated their groundwater and that their suit has not specified how their groundwater has been contaminated. Here again, the record reflects the Dyers neither admitted nor denied the requests the City cites. Admission of testimony concerning the subjects of those requests did not violate the rule applied in *Marshall*.

The City further contends the court should not have allowed the appraiser to testify because the Dyers [*6] had admitted they did not have a professional appraisal of their property made since November 2004. The Dyers' response admitting that fact did not have the effect of precluding them from obtaining an appraisal or from introducing evidence of the appraiser's opinion at the hearing. *See* Tex. R. Civ. P. 198.3 (prescribing effects of admissions). The City does not argue the testimony should have been excluded due to the Dyers' failure to supplement their discovery response. *See* Tex. R. Civ. P. 193.5. When determining its jurisdiction in the face of a ripeness contention, the court is not limited to facts frozen at the moment the petition is filed. *Perry v. Del Rio, 66 S.W.3d 239, 251, 44 Tex. Sup. Ct. J. 1147 (Tex. 2001)*. We overrule the City's first issue.

The City's second issue assigns error to the denial of its plea to the jurisdiction because the Dyers failed to establish that their claim is ripe. It argues the Dyers have presented insufficient evidence to "overcome [the City's] proof" that the claim is not ripe because they have suffered no injury.

The City relies primarily on *Patterson, 971 S.W.2d 439, 41 Tex. Sup. Ct. J. 1001*. The supreme [*7] court found in that case that Planned Parenthood was seeking adjudication of issues based on the effect of anticipated governmental actions when the evidence showed the agencies involved had not yet decided on a course of action. The court said, "We simply do not know what the federal government will do if the state carries out its plan to segregate the funds, and the record does not even demonstrate what exactly the state will do. Without knowing what the federal government will do, Planned Parenthood cannot show a conflict between federal and state demands or that the state's proposed action will cause it any injury." *971 S.W.2d at 444*. Concluding that Planned Parenthood's alleged injury therefore remained contingent, the court found its claim not yet ripe. *Id.* By contrast, the Dyers' pleadings allege that the City's operation of its waste treatment facility has caused contamination of their underground water supply. The Dyers may or may not be able to prove their allegations, but there is nothing contingent about the injuries they claim. Said another way, the determination whether the Dyers have a concrete injury for which the City is liable does not depend on "contingent [*8] or hypothetical facts, or upon events that have not yet come to pass." *Id. at 443*. We overrule the City's second issue.

The City's third and final issue recasts the same question by alleging denial of its plea to the jurisdiction was error because the Dyers failed to present evidence they have suffered any damages. We overrule the issue. As the supreme court instructed in *Bland*, a plea to the jurisdiction "should be decided without delving into the merits of the case." *34 S.W.3d at 554*. This is so because "the proper function of a dilatory plea does not authorize an inquiry so far into the substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction." *Id.* The City's challenge to the Dyers' evidence of their damages is misplaced at this stage of the proceeding.

Having overruled the City's issues, we affirm the trial court's order, and remand to that court for further proceedings.

James T. Campbell

Justice

APPENDIX H

1 of 2 DOCUMENTS

REATA CONSTRUCTION CORP., PETITIONER v. CITY OF DALLAS, RESPONDENT

NO. 02-1031

SUPREME COURT OF TEXAS

2004 Tex. LEXIS 303; 47 Tex. Sup. J. 408

April 2, 2004, Opinion Delivered

NOTICE: [*1] PUBLICATION STATUS PENDING. CONSULT STATE RULES REGARDING PRECEDENTIAL VALUE.

PRIOR HISTORY: ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS. *City of Dallas v. Reata Constr. Corp., 83 S.W.3d 392, 2002 Tex. App. LEXIS 5888 (Tex. App. Dallas, 2002)*

OPINION:

PER CURIAM

The issue in this case is whether a city waives its governmental immunity from suit by intervening in a lawsuit to assert claims for affirmative relief. The court of appeals held that it does not. *83 S.W.3d 392*. Because we disagree, we reverse the court of appeals' judgment and remand this case to the trial court.

The City of Dallas issued Dynamic Cable Construction Company, Inc. ("Dynamic") a temporary license to install fiber optic cable in downtown Dallas. Dynamic subcontracted with Reata Construction Company ("Reata") to do the drilling for the conduit. On September 4, 2000, Reata inadvertently drilled into a thirty-inch water main, flooding a nearby residential building owned by Southwest Properties Group, Inc. ("Southwest"). Soon after, Southwest sued Dynamic and Reata for negligence. The building's tenants intervened in the suit seeking damages.

On January 12, 2001, Reata filed a third-party claim against the City of Dallas alleging that the plaintiffs' damages were caused by [*2] the City's misidentification of the water main's location when it was installed in 1948 and again in response to Reata's request in 2000. With its answer to Reata's petition, the City filed special exceptions asserting that Reata's claims were not within the *Texas Tort Claims Act*'s waiver of immunity. The City also intervened asserting claims against Dynamic. Eight months later, on September 11, 2001, the City filed a second amended plea in intervention asserting a claim of negligence against Reata related to the flooding, and seeking actual damages, pre-and post-judgment interest, costs, and "any other relief at law and equity to which it may be entitled."

The next day, the City filed a plea to the jurisdiction asserting governmental immunity from suit with regard to Reata's claims against it. Reata filed a response to the plea, arguing that: (1) governmental immunity did not apply because the City subjected itself to jurisdiction by intervening in the lawsuit and seeking affirmative relief; (2) the Dallas City charter and *section 51.075 of the Texas Local Government Code* contain express waivers of sovereign immunity because they provide that the City [*3] may "sue or be sued" and "plead and be impleaded" n1; (3) under the common law, the City could not assert governmental immunity for its actions predating 1970 because water services were considered a proprietary function; and (4) even if the Texas Tort Claims Act applied, Reata's claim fell within the Act's waiver of sovereign immunity.

> n1 The Dallas City charter provides that the City has the power "to sue and be sued" and "to implead and be [[impleaded in all courts." DALLAS CITY CHARTER ch. II, § 1(2), (3) (Aug. 1999). *Section 51.075* provides that "the municipality may plead and be impleaded in any court." *TEX. LOC. GOV'T CODE § 51.075*.

The trial court denied the City's plea to the jurisdiction, and the City took an interlocutory appeal. *See TEX.CIV.PRAC.&REM.CODE § 51.014(a)(8)*. Rejecting each of Reata's asserted bases for a waiver of governmental immunity, the court of appeals reversed and dismissed Reata's claims against the *City. 83 S.W.3d 392*. [*4] The court of appeals held that even though the City intervened in the suit against Reata, the City did not waive any right to object to a lack of subject matter jurisdiction. *Id. at 398-99*. By intervening, the court of appeals reasoned, the City

asserted its right to sue but did not waive its governmental immunity from suit. *Id. at 400.* Because we agree with Reata that the City waived its immunity from suit by intervening and asserting claims for damages against Reata, we reverse.

The court of appeals' judgment provided: "In accordance with this Court's opinion of this date, the judgment of the trial court is REVERSED and [Reata's] claims against the City of Dallas are DISMISSED." The court of appeals' judgment constitutes a final judgment from which an appeal can be taken to this Court.

To the extent the City enjoyed governmental immunity from suit with regard to Reata's claims, the City waived that immunity by intervening in the lawsuit and asserting claims for damages against Reata. Therefore, the trial court had subject matter jurisdiction over Reata's claims against the City, and the court of appeals erred in dismissing them. Because this [*5] appeal concerns a plea to the jurisdiction, our review is necessarily limited to determining whether the City waived its immunity from suit, and we do not decide whether the City waived its immunity from liability.

The court of appeals recognized that our decision in *Anderson, Clayton & Co. v. State ex rel. Allred, 122 Tex. 530, 62 S.W.2d 107, 110 (Tex. 1939)*, states: "Where a state voluntarily files a suit and submits

its rights for judicial determination, it will be bound thereby, and the defense will be entitled to plead and prove all matters properly defensive. This includes the right to make any defense by answer or cross-complaint germane to the matter in controversy." But the court of appeals relied on other language in that decision providing that the State, having invoked the jurisdiction of the district court, was "subject to the same rules as other litigants, *except in so far as such rules may be modified in favor of the state by statute or may be inapplicable or unenforceable because of exemptions inherent in sovereignty.*" *Id.* (emphasis added). Relying on this language, the court of appeals concluded that, when a governmental entity intervenes [*6] in a lawsuit, "sovereign immunity still forecloses suit against that governmental entity." *83 S.W.3d at 399.*

Although there may have been some ambiguity after *Anderson* regarding whether immunity from suit is waived by the State's invoking a court's jurisdiction, this ambiguity was resolved by our decision in *Kinnear v. Tex. Comm'n on Human Rights ex rel. Hale, 14 S.W.3d 299, 43 Tex. Sup. Ct. J. 654 (Tex. 2000).* In *Kinnear*, the Texas Commission on Human Rights filed suit against Kinnear, alleging that he had violated the *Texas Fair Housing Act.* Kinnear counterclaimed for attorney's fees as provided by the Act, and when he prevailed the trial court awarded them. In response to the Commission's assertion of immunity, we held that "because the Commission initiated [the] proceeding under the Texas Fair Housing Act, and Kinnear claimed attorney fees as a consequence of that suit, the jurisdictional question in this case was answered when the Commission filed suit . . . ." *Id. at 300.* Thus, under *Kinnear*, when a governmental entity files suit against a party, that entity waives, at a minimum, immunity from suit for counterclaims filed as a consequence [*7] of the suit. *Id.*

Moreover, 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." *State v. Martin, 347 S.W.2d 809, 814 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.)*; *see alsoTex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 861, 45 Tex. Sup. Ct. J. 558 (Tex. 2002)* (Hecht, J., concurring) (citing *Kinnear* and *Anderson* for the proposition that "it has long been held that the State can waive immunity by filing suit"); *State v. Humble Oil & Ref. Co., 141 Tex. 40, 169 S.W.2d 707, 710 (Tex. 1943)* (rejecting a waiver of immunity from suit because the claim was not "dependent upon" or "connected with" and did not grow out of the subject matter of the suit brought by the State). Therefore, if the City had filed an original petition against Reata for damages, the filing of the suit would have waived the City's immunity from suit for Reata's claims against the City related to the flooding. *See Kinnear, 14 S.W.3d at 300*; *Anderson, 62 S.W.2d at 110.*Any [*8] "person or entity has the right to intervene if the intervenor could have brought the same action, or any part thereof, in his own name, or, if the action had been brought against him, he would be able to defeat recovery, or some part thereof." *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co., 793 S.W.2d 652, 657, 33 Tex. Sup. Ct. J. 465 (Tex. 1990)*; *TEX. R. CIV. P. 60.* To be voluntarily joined as a plaintiff, a party must assert claims for relief that arise "out of the same transaction, occurrence, or series of transactions or occurrences . . . ." *TEX. R. CIV. P. 40.* The City, therefore, had the option to file its own suit, or in the interest of judicial economy, intervene in Southwest's suit. For purposes of waiver of governmental immunity from suit, we see no reason to differentiate between a governmental entity as a plaintiff and as a plaintiff-intervenor. When the City filed its plea in intervention against Reata, it subjected itself to the jurisdiction of the trial court and waived its governmental immunity from suit with regard to Reata's claims "germane to the matter in controversy." *Martin, 347 S.W.2d at 814.* Accordingly, pursuant to *Texas Rule of Appellate Procedure* [*9] *59.1* and without hearing oral argument, we reverse the court of appeals' judgment and remand the case to the trial court for further proceedings. *TEX. R. APP. P. 59.1.*