PLEAS TO THE JURISDICTION

Truth, Fibs and Outright Lies

Presented By

THE MESSER LAW FIRM
ATTORNEYS

6947 MAIN STREET
FRISCO, TEXAS 75034
469.633.1133 - TELEPHONE
469.633.1177 - TELECOPIER
www.messerlawfirm.com

Written By

WM. ANDREW MESSER
ATTORNEY & COUNSELOR
6947 MAIN STREET
FRISCO, TEXAS 75034
469.633.1133

KENNETH J. LAMBERT
FLETCHER & SPRINGER, LLP
8750 N. CENTRAL EXPWY., STE. 1600
DALLAS, TEXAS 75231
214.987.9600

State Bar of Texas
17TH ANNUAL SUING AND DEFENDING GOVERNMENTAL ENTITIES COURSE
July 28-29, 2005
San Antonio

CHAPTER 24

Wm. Andrew Messer
THE MESSER LAW FIRM

6947 MAIN STREET
FRISCO, TEXAS 75034
469.633.1133 - TELEPHONE
469.633.1177 - FACSIMILE
www.messerlawfirm.com

EDUCATION

B.B.A., Baylor University, 1983
J.D., Baylor University School of Law, 1985

PRACTICE EMPHASIS

Governmental law, defense litigation and appeals. Fifteen years experience in the field of governmental law representing various entities on claims of civil rights, discrimination, police liability, retaliatory discharge, competitive bidding, city ordinance defense, condemnation, and tort claims of personal injury, property damage and wrongful death.

PROFESSIONAL ACTIVITIES

Director and faculty member, *Suing and Defending Governmental Entities* course, State Bar of Texas (2000 – 2005)
District 14A Grievance Committee, State Bar of Texas (1995-1999)
College of the State Bar of Texas (1990-2005)
Texas City Attorneys Association (1995-2005)
NITA Trial Advocacy program, Southern Region (1991)
Unauthorized Practice of Law Committee (1992-1995)
Award from CLEAT (Combined Law Enforcement Associations of Texas) (1998)
Wichita County Bar Association Board of Directors (1995-1998)
Administrative Law Judge, City of Dallas (2002 – 2005)
Frisco Housing Authority, Chairman (2004-2005), Vice-Chairman (2000-2003)
City Attorney, Lavon, Caddo Mills and Lone Oak, Texas

LICENSURE

Texas Supreme Court
United States Supreme Court
United States Fifth Circuit Court of Appeals
United States District Courts, Northern and Eastern Districts of Texas

ARTICLES & PRESENTATIONS

A Bank's Right to Offset after Service of Writ of Garnishment - A Reconciliation of San Filepe National Bank v. Canton, 54 Tex. Bar Journal 368 (1991)

Dallas Bar Association Legal Ethics Opinion No. 1991-2, Dallas Bar Association Headnotes, Vol. 15, No. 5 pp. 12-13 (May 1991) (dealing with lawyers tape recording telephone conversations)

The Ability to Practice Law Pro Hac Vice in the State Courts of Texas, 56 Tex. Bar Journal 348 (1993)

When Plaintiffs Sue for Excessive Force - How to Get Out of Court Quickly, 36 Municipal Attorney 6 (1995); republished, 44 Texas Police Journal 14 (1996)

Interlocutory Appeals in State and Federal Court, Texas City Attorney's Association, Semi-Annual Conference, South Padre Island, June 12-13, 1998

Defending Federal Tort Claims, Texas Public Risk Managers Association, Grapevine, March 12, 1999

The A-B-C's of School Law, Reliance Insurance, Dallas, June 10, 1999

The Secrets to an Open Government: The Open Records and Open Meetings Acts, Federal Bar Association, Dallas, September 10, 1999

The Texas Tort Claims Act: from A to Z, Gallagher Bassett Insurance Services, Dallas, April 28, 2000; St. Paul Insurance, San Antonio, September 14, 2000; Federal Bar Association, Dallas, September 15, 2000; Hammerman & Gainer 34th Annual Insurance Claims Seminar, Las Colinas, January 18, 2001; Texas Association of School Boards Annual Conference, Austin, April 23 - 24, 2001

Personal Liability and Official Immunity, Texas Public Risk Managers Association, Mesquite, August 18, 2000; Texas Association of School Business Officials, Austin, March 1, 2001

Pleas to the Jurisdiction, Suing and Defending Governmental Entities, State Bar of Texas, July 13, 2000; Texas Municipal League Attorney Workshop, September 8, 2000

Whistleblowers, Texas Municipal League Employment Law Seminar, February 20, 2002

First Things First - Pleas to the Jurisdiction, 50 Texas Police Journal 15 (2002)

Suing & Defending Governmental Entities, State Bar of Texas Course Director, July 25-26, 2002 (Galveston), September 5-6, 2002 (Dallas), October 10-11, 2002 (Austin)

Joint Enterprise Liability, Double Your Pleasure, Double Your Fun, Suing and Defending Governmental Entities, State Bar of Texas, July 17, 2003 (San Antonio); Texas Municipal League Attorney Workshop, August 22, 2003

Law Enforcement Consulting Expert, Law Enforcement Television (2003); Faculty for The Center for American and International Law, Institute for Law Enforcement Administration, 40th Management College, March 1, 2004; Supervisors College, April 14, 2005

PERSONAL

Born November 16, 1960, in Tyler, Texas
Married Dreama Matsumoto in 1990 (also a Baylor Bear)
Two children - Will (age 10) and Kara (age 9) (future Baylor Bears)
Fifth generation Texan

TABLE OF CONTENTS

I. INTRODUCTION 1

II. PLEAS TO THE JURISDICTION 2
- A. Purpose 2
- B. Goal 2
- C. Sovereign Immunity 2
  - 1. Overview 2
  - 2. Immunity from Suit verses Immunity from Liability 3
- D. The Plea to the Jurisdiction 3
  - 1. Grounds – An Initial Facial Attack 3
  - 2. Clear and Explicit Waiver of Immunity 4
  - 3. The Rule 5
  - 4. The Form 5
  - 5. Waivable and Non-Waivable Grounds 6
- E. Who Can Assert a Plea to the Jurisdiction 6
  - 1. Governmental Entities 6
  - 2. Governmental Employees 6
  - 3. Private Entities 7
- F. Discovery 7
- G. Plaintiff's Response 7
- H. The Plea Hearing 8
  - 1. Presumptions 8
  - 2. Question of Law 8
  - 3. Burden of Proof 8
  - 4. Evidence 8
  - 5. Procedure 9
- I. Emerging Issues 10
  - 1. Partial Pleas 10
  - 2. Notice of Claim 10
  - 3. Special Exceptions 10
- J. Plea Examples 11
  - 1. Adequate Pleading 11

III. INTERLOCUTORY APPEALS 15
- A. Overview 15
  - 1. Introduction 15
  - 2. The Statute 16
  - 3. Venue 16
  - 4. Multiple Interlocutory Appeals 16
  - 5. Partial Pleas 16
  - 6. Summary Judgments 16
  - 7. The Appellate Rules 17
- B. Authority 18
- C. Notice of Appeal 18
  - 1. How to perfect the appeal 18
  - 2. Who can perfect the appeal 19
  - 3. **Effect of the appeal** 19
- D. Record 19

E. Docketing Statement 20
F. The Brief 21
1. Appellant's Brief 21
2. Appellee's Brief 22
3. Reply Brief 22
4. Length 22
5. Form 22
6. Due Dates 23
7. Number of Copies 23
8. Rebriefing 23
G. Oral Argument 23
H. Judgment and Mandate 23
I. Appeals to the Texas Supreme Court 24
1. Jurisdiction 24
2. Petition for Review 24

IV. CONCLUSION 26

APPENDIX A - TEXAS TORT CLAIMS ACT FLOWCHART 27

APPENDIX B - INTERLOCUTORY APPEAL STEPS 29

APPENDIX C - INTERLOCUTORY APPEALS STATISTICS 31

APPENDIX D - MOTION FOR REHEARING EN BANC (INVOLVING PARTIAL PLEAS) 33

PLEAS TO THE JURISDICTION
Truth, Fibs, and Outright Lies

The ability to raise a plea to the jurisdiction based upon a failure to plead a claim within the waiver provisions of the [Texas Tort Claims] Act is of vital importance to the State and all political subdivisions.

Chief Justice Tom Gray
Waco Court of Appeals
Brown v. City of Houston, 8 S.W.3d 331, 336
(Tex. App.—Waco 1999, pet. denied) (concurring op.)

A 'plea to the jurisdiction [is] the white elephant of current Texas motion practice ... [and] ha[s] enjoyed a recent resurgence in the field of governmental immunity. ... we should put a stop to [it]... .'

Justices Brister, O'Neil and Schreider
Texas Supreme Court
Tex. Dept. of Parks v. Miranda, 133 S.W.3d 217, 239-241
(Tex. 2004)(dissenting op.)

I. INTRODUCTION

In 1997, for the first time, the Texas Legislature granted governmental entities the right to file an interlocutory appeal from the trial court's denial of a plea to the jurisdiction. That single enactment, TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8), has sparked an avalanche of litigation concerning the standards for pleading a state tort claim against a governmental entity. Case law interpreting pleas to the jurisdiction is rapid and recent. The practical effect of this new law is that the plaintiffs' bar must be extraordinarily carefully to clearly and specifically plead their initial claims against governmental entities within the specific terms of a statutory waiver of sovereign immunity. Conversely, the defense bar has a new first line of defense (or attack) that can be potentially dispositive of the case. By taking full advantage of the plea to the jurisdiction procedure, backed by the substance of sovereign immunity, governmental entities may quickly dispose of the litigation. The issue of sovereign immunity, as raised by a plea to the jurisdiction, has now become the starting point of every state law claim against a governmental entity.

The focus of this article is thoroughly practical, though at first blush parts of it may appear to have greater interest for academics than for busy trial lawyers involved in governmental litigation. The article addresses pleas to the jurisdiction, and outlines the status and recent developments in both substantive law and procedural development. Because of the potential impact of the trial court's ruling on a plea to the jurisdiction, the article further addresses interlocutory appeals, both procedurally and substantively. Finally, practice pointers are interspersed at relevant points throughout the article. Many of the recommendations are gleaned from the recent case law. Others are based upon experience and discussions with other counsel who handle governmental litigation. It is hoped this paper will provide a practical analysis and a concise guide to a very confusing area of the law – pleas to the jurisdiction.

II. PLEAS TO THE JURISDICTION

A. PURPOSE

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject matter jurisdiction. *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex.2004). The purpose of a plea to the jurisdiction is to defeat a cause of action without regard to whether the claims asserted have merit. *Bland ISD v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). A plea to the jurisdiction contests the trial court's power to determine the subject matter of the controversy. *Texas Dept. of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 226 (Tex. 2004)*; Texas Highway Dep't v. Jarrell*, 418 S.W.2d 486, 488 (Tex. 1967). Subject matter jurisdiction is essential to the authority of the court to decide a case. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). Want of jurisdiction arrests a cause of action at any stage in the proceeding. *Liberty Mut. Ins. Co. v. Sharp*, 874 S.W.2d 736, 739 (Tex. App.—Austin 1994, writ denied). Without subject matter jurisdiction, a court cannot render a valid judgment. *Garcia-Marroquin v. Nueces County Bail Bd.*, 1 S.W.3d 366, 374 (Tex. App.—Corpus Christi 1999, no pet.). Subject matter jurisdiction is not presumed and cannot be waived. *Continental Coffee Products Co. v. Cazarez*, 937 S.W.2d 444, 448-49 n.2 (Tex. 1996). Hence, the trial court must determine at its earliest opportunity whether it has constitutional or statutory authority to decide the case before allowing the litigation to proceed. *Miranda*, 133 S.W.3d at 226.

B. GOAL

The goal of a plea to the jurisdiction by a governmental entity is to have the trial court dismiss a claim based on sovereign immunity from suit. *Speer v. Stover*, 685 S.W.2d 22, 23 (Tex. 1985). A dismissal on a plea to the jurisdiction is with prejudice. *Sykes*, 136 S.W.3d at 639.

C. SOVEREIGN IMMUNITY

1. Overview

Sovereign immunity bars suits against governmental entities unless there is a clear and explicit constitutional or statutory waiver of immunity. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003); *Dallas County MHMR v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998); *Federal Sign v. Texas Southern Univ.*, 951 S.W.2d 401, 405 (Tex. 1997); *University of Texas Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994). The doctrine of sovereign immunity has existed since Texas was it's own sovereign nation, and emanates from the English law that "the king can do no wrong." *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 234-235 (1765); *Alden v. Maine*, 119 S.Ct. 2240, 2248 (1999). It was not until 1970 that cities, counties, school districts and other local governmental entities were subjected to tort liability. With passage of the Texas Tort Claims Act (TEX. REV. CIV. STAT. ANN. art. 6252-19; recodified, now TEX. CIV. PRAC. & REM. CODE ch. 101) (the "TTCA"), governmental entities for the first time were confronted with civil liability for torts. *Brown v. City of Houston*, 8 S.W.3d 331, 334 (Tex. App.—Waco 1999, pet. denied). *See State v. Brannan*, 111 S.W.2d 347 (Tex. Civ. App.—Waco 1937, writ ref'd) (state is immune from suit in absence of waiver of sovereign immunity). Other subsequent legislation has waived immunity (*i.e.*, the whistleblower act, TEX. GOV'T CODE § 554.002(a), and the anti-retaliation act, TEX. LABOR CODE § 451.001), but no single statute comes close to approaching the significance of the Texas Tort Claims Act as a waiver of immunity. *See Texas Dep't of Health v. Doe*, 994 S.W.2d 890, 892-93 (Tex. App.—Austin 1999, pet. dism'd by agr.). Since it's passage, well over 1500 appellate cases have attempted to define the parameters of the Texas Tort Claims Act. The Texas Tort Claims Act is the focus of attention in state governmental law because it constitutes a limited waiver of immunity and vests the trial court with jurisdiction. *Vincent v. West Texas State Univ.*, 895 S.W.2d 469, 472 n.3 (Tex. App.—Amarillo 1995, no writ).

The Texas Tort Claims Act waives sovereign immunity in only three areas: (1) use of publically owned vehicles; (2) premise defects; and (3) conditions or use of tangible personal property. *Miranda*, 133 S.W.3d at 225; *Lamar Univ. v. Doe*, 971 S.W.2d 191, 195 (Tex. App.—Beaumont 1998, no pet.). If a claim does not fall within one of the three areas, the governmental entity remains immune both from suit and liability. *Duhart v. State*, 610 S.W.2d 740, 741-42 (Tex. 1980); *Wilkens v. State*, 716 S.W.2d 96, 98 (Tex. App.—Waco 1986, writ ref'd n.r.e.). If it is

questionable whether sovereign immunity has been waived, it has not. *Schaefer v. City of San Antonio*, 838 S.W.2d 688, 693 (Tex. App.—San Antonio 1992, no pet.), *overruled on other grnds, Texas Nat. Res. & Conserv. Com'n v. White*, 46 S.W.3d 864, 867 (Tex. 2001).

2. Immunity from Suit verses Immunity from Liability

The doctrine of sovereign immunity embraces two distinct principles: immunity from suit and immunity from liability. *Texas Dept. of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Immunity from suit bars a lawsuit against the state unless the legislature expressly consents to the suit. *Jones*, 8 S.W.3d at 638. Absent such consent, the trial court does not have subject matter jurisdiction to hear the case. *Jones*, 8 S.W.3d at 638. The legislature may consent to suit by statute, but such consent must be made by clear and unambiguous language. *Id.* The Texas legislature has granted a limited waiver of immunity from suit by enacting the Texas Tort Claims Act. *Federal Sign*, 951 S.W.2d at 405.

By contrast, immunity from liability protects the state from judgments even if the legislature has expressly given consent to the suit. *Jones*, 8 S.W.3d at 638. The legislature neither creates nor admits liability by granting permission to be sued. *Federal Sign*, 951 S.W.2d at 405. Immunity from liability is an affirmative defense, not a jurisdictional issue. *Jones*, 8 S.W.3d at 638. Like other affirmative defenses, the state must plead immunity from liability or else it is waived. *Jones*, 8 S.W.3d at 638.

Since immunity from liability is not jurisdictional, a plea to the jurisdiction would not be proper in such cases. *Taylor*, 106 S.W.3d at 696. However, where immunity from suit is raised, a plea to the jurisdiction is appropriate, since the courts do not have authority to hear cases where immunity from suit has not been waived. *Sykes*, 136 S.W.3d at 638; *Jones*, 8 S.W.3d at 638.

Simply stated, sovereign immunity from suit, as opposed to sovereign immunity from liability, is a jurisdictional defense. *White*, 13 S.W.3d at 822. Sovereign immunity from suit defeats a trial court's subject matter jurisdiction, and thus, is properly asserted in a plea to the jurisdiction. *Id.*; *Sykes*, 136 S.W.3d at 638; *Jones*, 8 S.W.3d at 638-39.

D. THE PLEA TO THE JURISDICTION

1. Grounds – An Initial Facial Attack

A plea to the jurisdiction initially challenges the trial court's jurisdiction by attacking the sufficiency of the plaintiff's pleadings. To invoke the trial court's jurisdiction, the plaintiff must plead a cause of action within the express terms of the Texas Tort Claims Act or other statutory waiver of immunity. *White*, 13 S.W.3d at 822 (*citing Texas Ass'n of Bus.*, 852 S.W.2d at 446); *City of El Paso v. W.E.B. Inv.*, 950 S.W.2d 166, 169 (Tex. App.—El Paso 1997, writ denied); *Wyse v. Dept. of Pub. Safety*, 733 S.W.2d 224, 228 (Tex. App.—Waco 1986, writ ref'd n.r.e.). Whether a governmental entity is immune depends entirely upon statute. *Bossley*, 968 S.W.2d at 341. Only when the legislature has clearly and explicitly waived sovereign immunity may a cause of action accrue. *Schaefer*, 838 S.W.2d at 693; *Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989). Thus, the plaintiff must make a specific reference to a statutory waiver of immunity in the petition. *Jones*, 8 S.W.3d at 638; *Satterfield & Pontikes Const. v. Irving ISD*, 123 S.W.3d 63, 65 (Tex. App.—Dallas 2003, pet. pending); *Denton County v. Howard*, 22 S.W.3d 113, 118 (Tex. App.—Fort Worth 2000, no pet.), *disapproved in part on other grnds., Miranda*, 133 S.W.3d at 224 n.4. A plea to the jurisdiction is proper to challenge a suit filed against a governmental entity when the plaintiff's petition shows on it's face that the court does not have jurisdiction based on sovereign immunity. *See Jones*, 8 S.W.3d at 639; *Bybee v. Fireman's Fund Ins. Co.*, 331 S.W.2d 910, 917 (Tex. 1960), *Hawkins v. Anderson*, 672 S.W.2d 293, 296 (Tex. App.—Dallas 1984, no writ).

If the plaintiff's pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Miranda*, 133 S.W.3d at 227. However, if the failure of pleading can be cured by amending the pleading, the plaintiff must be given an opportunity to amend. *County of Cameron v. Brown*, 80 S.W.3 549, 555 (Tex. 2002). A reasonable opportunity to amend usually involves the court telling the plaintiffs they may re-plead. *See Texas A&M Univ. System*

v. Koseoglu, 2005 WL 552736, *7 (Tex.App.–Waco 2005, pet. filed May 9, 2005) (holding plaintiff may stand on his pleadings in the face of a plea to the jurisdiction unless and until a court determines that the plea is meritorious). Only one case has directly held that if a plea to the jurisdiction remains pending for a sufficient length of time, an appellate court may deny a plaintiff additional time to amend. *O'Neal v. Tex. Bd. Of Chiropractic Examrs*., 2004 WL 2027787, *3 and n. 5 (Tex.App.–Austin 2004, no pet) (defendant's plea was on file three months before trial court heard it; court held plaintiff had three-month opportunity to amend his pleadings or to request an opportunity to do so). If the plaintiff has been given an opportunity to amend between the filing of the plea to the jurisdiction and the date of the hearing, and has failed to replead or failed to sufficiently plead a waiver of immunity, then the claim should be dismissed with prejudice. *Miranda*,133 S.W.3d at 231; *Sykes*, 136 S.W.3d at 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." *Sykes*, 136 S.W.3d at 639.

2. <u>Clear and Explicit Waiver of Immunity</u>

It is well-settled that a waiver of sovereign immunity must be made by clear and unambiguous language in a statute (or by legislative consent). *Travis County v. Pelzel & Assoc.*, 77 S.W.3d 246, 248 (Tex. 2002); *Duhart v. State*, 610 S.W.2d 740, 742 (Tex. 1980). The Texas Supreme Court has confirmed that courts of this state should defer to the Texas Legislature's delineation of the boundaries of sovereign immunity. *General Servs. Comm'n v. Little-Tex. Insulation Co.*, 39 S.W.3d 591 (Tex. 2001). In other words, establishing when and to what extent sovereign immunity from suit should be waived is solely within the realm of the legislature. *Id.*; *Federal Sign*, 951 S.W.3d at 409.

The application of this principal has, at times, proven difficult for trial and appellate courts. Take for example the patient's bill of rights adopted by the Texas Department of Mental Health and Mental Retardation under chapter 321 of the Health and Safety Code. Several courts of appeals addressed whether this statute clearly and unambiguously waives immunity from suit, coming up with diametrically opposing views. In *Texas Dept. of MHMR v. Lee*, 38 S.W.3d 862 (Tex. App.—Fort Worth 2001, pet. denied), the court held that the statute was not a clear and unambiguous waiver. Conversely, at least four courts of appeals rejected this approach and held the statute was a clear and unambiguous waiver. *See, e.g. Central Counties Ctr. for MHMR Servs. v. Rodriguez*, 45 S.W.3d 707 (Tex. App.—Austin 2001), *rev'd*, 106 S.W.3d 702 (Tex. 2003).[1] This split was finally resolved in favor of immunity from suit in *Taylor*, 106 S.W. 3d 692 where the Supreme Court discussed the factors that may be considered when there are no "magic words" in a statute (i.e. "immunity is waived").

This analysis was necessary since the Legislature routinely uses "magic words" when waiving sovereign immunity. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 63.007(b) (Vernon Supp. 2003) ("The state's sovereign immunity to suit is waived only to the extent necessary to authorize a garnishment action in accordance with this section."); TEX. CIV. PRAC. & REM. CODE ANN. § 81.010(d) (Vernon Supp. 2003) ("Governmental immunity to suit is waived and abolished only to the extent of the liability created by Subsection (b)."); TEX. CIV. PRAC. & REM. CODE ANN. § 101.025(a) (Vernon 1997) ("Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter."); TEX. CIV. PRAC. & REM. CODE ANN. § 103.101(a) (Vernon Supp. 2003) ("A person may bring suit against the state under this sub-chapter, and the state's immunity from suit is waived."); TEX. CIV. PRAC. & REM. CODE ANN. § 110.008(a) (Vernon Supp. 2003) ("Subject to Section 110.006, sovereign immunity to suit and from liability is waived ans abolished to the extent of liability created by Section 110.005 . . ."); TEX. EDUC. CODE ANN. § 51.901(b) (Vernon 1996) ("The defense of sovereign immunity shall not be available to or asserted by the insurer in any claim against it or in any cause of action arising or growing out of a nuclear incident."); TEX. FAM. CODE ANN. § 261.110(f) (Vernon 2002) ("Sovereign immunity is waived and abolished to the extent of liability

[1] This type of incongruity occurs in other areas of governmental law as well. *See Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1 (Tex. 2000); *Barfield v. City of LaPorte*, 898 S.W.2d 288 (Tex. 1995) (dealing with waiver of immunity in the Anti-Retaliation Law of the Labor Code).

created by this section."); TEX. GOV'T CODE ANN. § 404.103(b) (Vernon Supp. 2003) ("[T]he state expressly waives all defenses of governmental immunity by and on behalf of the trust company. . . ."); TEX. GOV'T CODE ANN. § 554.0035 (Vernon Supp. 2003) ("Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter. . . ."); TEX. GOV'T CODE ANN. § 2007.004(a) (Vernon 2000) ("Sovereign immunity to suit and liability is waived and abolished to the extent of liability created by this chapter . . . ."); TEX. GOV'T CODE ANN. § 2007.024(c) (Vernon 2000) ("Sovereign immunity to liability is waived to the extent the governmental entity elects to pay compensation under this subsection."); TEX. HUM. RES. CODE ANN. § 36.116 (Vernon 2002) ("Except as provided by Section 36.112, this subchapter does not waive sovereign immunity."); TEX. LOC. GOV'T CODE ANN. § 262.007(d) (Vernon Supp. 2004)("This section does not waive a defense or a limitation on damages available to a party to a contract, other than a bar against suit based on sovereign immunity."); TEX. NAT. RES. CODE ANN. § 52.035(c) (Vernon 2001) ("The state waives its right to claim sovereign immunity . . . ."); TEX. NAT. RES. CODE ANN. § 89.087(d) (Vernon 2001) ("Except to the extent permitted by this chapter . . . the State of Texas [is] immune from suit and liability . . ."); TEX. PROP. CODE ANN. § 74.506(c) (Vernon Supp. 2003) ("The state's immunity from suit without consent is abolished with respect to suits brought under this section . . ."); TEX. PROP. CODE ANN. § 76.505(c) (Vernon Supp. 2003) ("The holder's [school district, municipality, or county] immunity from suit without consent is waived with respect to a suit under this section."); TEX. CONST. Art. 3, § 49-k(j) (". . . the sovereign immunity of the state is waived for that purpose.")

Because this degree of clarity is usually employed by the Legislature, the Supreme Court has given four rules for determining whether a statute without "magic words" waives immunity:

Rule 1: The statute must waive immunity "beyond doubt", such as when the statute is utterly meaningless in the absence of a waiver.

Rule 2: All ambiguities must be resolved in favor of retaining immunity.

Rule 3: If the Legislature requires that the State be joined in a lawsuit, then immunity from suit has been intentionally waived.

Rule 4: It must be considered whether the statute also provides an objective limitation on the State's potential liability.

Taylor, 106 S.W.3d at 697-698.

Understanding that the legislature has repeatedly enacted many statutes with clear and unambiguous waivers of immunity, the analysis brings us back to where we started. The trial and appellate courts are only called to decide whether a specific statute clearly and unambiguously waives immunity. *See Wichita Falls State Hospital v. Taylor*, 48 S.W.3d 782, 788 (Tex. App.—(Waco 2001) (J. Gray, dissenting), *rev'd, on other grounds*, 106 S.W.3d 692 (Tex. 2003). If the statute is confusing or seems less than clear, then immunity should remain intact.

3. The Rule

There is no direct rule of civil procedure that addresses pleas to the jurisdiction. The most applicable rule is TEX. R. CIV. P. 85, which deals with contents of the defendant's answer including pleas to the jurisdiction. Because there are no rules of civil procedure specifically addressing pleas to the jurisdiction, there are no rules dealing with the procedural safeguards of pleas to the jurisdiction. The Texas Supreme Court has therefore indicated that the Texas Rules of Civil Procedure may, in the future, be amended to address plea to the jurisdiction procedures. *Miranda*, 133 S.W.3d at 232. Until then, the common law procedures adopted by the appellate courts may vary from county to county and court to court. *Miranda*, 133 S.W.3d at 235 (Jefferson, J., dissenting).

4. The Form

A plea to the jurisdiction may be included in the answer or filed as a separate pleading. TEX. R. CIV. P. 85. The lack of jurisdiction may be asserted in a plea to the jurisdiction, a motion for summary judgment "or otherwise." *Sykes*, 136 S.W.3d at 638. It is not necessary to verify a plea to the jurisdiction. *See, e.g., American Pawn*, 923 S.W.2d at 672.

5. Waivable and Non-Waivable Grounds

When the government is sued, the lack of jurisdiction can be raised at any time, even on appeal, by the parties or by the court itself *sua sponte*. *White*, 13 S.W.3d at 823; *See Brown*, 8 S.W.3d at 336 (Gray, J. concurring). For example, if the plaintiff files an amended petition adding another theory of recovery after the plea to the jurisdiction is filed, the new theory may nevertheless be attacked on appeal since subject matter jurisdiction is an issue that can be raised at any time. *City of Midland v. Sullivan*, 33 S.W.3d 1, 4 at n.4 (Tex. App. – El Paso 2000, pet. Dism. w.o.j.) If the plea to the jurisdiction is not timely appealed, however, the appellate court does not have jurisdiction to consider the trial court's ruling on the plea until a final judgment is entered. *Denton County v. Huther*, 43 S.W.3d 665, 667 (Tex.App. - Fort Worth 2001, no pet.).

Immunity from suit can also be affirmatively waived by certain acts of the government. The Supreme Court has held that immunity from suit is waived by the government filing suit, and by intervening in a suit. *Reata Construction Corp. v. City of Dallas*, 02-1031, 2004 WL 726906 (Tex. April 2, 2004, motion for rehearing granted Oct. 15, 2004). The Supreme Court is also considering whether immunity from suit is waived by the enacting language of "sue and be sued" and "plead and be impleaded" found in city charters and the Local Government Code, s*ee 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 Irving v. Inform Const., Inc.*, 143 S.W.3d 371 (Tex.App.–Dallas 2004, pet. pending); *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); *Goerlitz v. City of Midland*, 101 S.W.3d 573 (Tex. App.—El Paso 2003, pet. filed); *Alamo Community College Dist. v. Browning Const.*, 131 S.W.3 146 (Tex. App.—San Antonio 2004, pet. filed), and whether the filing of a counterclaim by the government waives immunity. *City of Irving v. Inform Const., Inc.*, 143 S.W.3d 371 (Tex.App.– Dallas 2004, pet. pending).

PRACTICE POINTER FOR DEFENDANT:
Upon receiving the plaintiff's petition, determine within the four corners of the petition whether it states a claim. Does the petition mention the Texas Tort Claims Act? Does it explain how the claim falls into one of the three areas where immunity is waived? Are the various claims for damages recoverable under TTCA §§ 101.021, .023 & .024? If not, the petition probably does not state a claim against a governmental entity. Immediately pursue a plea to the jurisdiction. Make this the very first defense of the lawsuit.

E. WHO CAN ASSERT A PLEA TO THE JURISDICTION

1. Governmental Entities

Only a governmental entity can assert a plea to the jurisdiction based on sovereign immunity. *Denton County*, 22 S.W.3d at 116. A government employee, in his individual capacity, cannot assert a plea based on official immunity or the bar of TTCA § 101.106. *Texas Dept. of MHMR v. Pearce*, 16 S.W. 3d 456 at *1 (Tex. App.—Waco 2000, pet. denied.). However, because a suit against a government employee in his official capacity is actually against the entity itself, a government employee sued in his official capacity can assert a plea to the jurisdiction. *Friona ISD v. King*, 15 S.W.3d 653, 657 n.3 (Tex. App. – Amarillo 2000, no pet..). Based on the recent amendments to the Texas Tort Claims Act, a government employee should be dismissed at the beginning of the suit. TEX. CIV. PRAC. & REM. CODE § 101.106 (amended eff. Sept. 1, 2003).

2. Governmental Employees

Under TTCA § 101.106, the filing of suit against a governmental entity constitutes an irrevocable election by the plaintiff which forever bars any suit or recovery by the plaintiff involving the same subject matter against a governmental employee. TEX. CIV. PRAC. & REM. CODE § 101.106 (Vernon

Supp. 2004). *See also Thomas v. Oldham*, 895 S.W.2d 352, 355 (Tex. 1995) (prior statute). Based on the 2003 amendments to the TTCA, the bar of TTCA § 101.106 likely gives the employee *both* immunity from suit and immunity from liability. Because the prior version of the statute did not provide for immunity from suit, only immunity from liability, this is a significant change in the law. *See Aquirre v. City of San Antonio*, 100 S.W.3d 247, 248 (Tex. App. - San Antonio 2001, pet. denied) (government employee not entitled to assert immunity in a plea to the jurisdiction).

> ***PRACTICE POINTER FOR DEFENDANT:*** If the plaintiff serves written discovery with the original petition or immediately thereafter, the defendant should consider filing a motion to quash the discovery until the question of the court's jurisdiction is resolved. Abating discovery is common practice by public officials sued in federal court upon the assertion of the defense of qualified immunity, which, like sovereign immunity, is an immunity from suit. *Jacquez v. Procunier*, 801 F. 2d 789 (5th Cir. 1986); *Lion Boulos v. Wilson*, 834 F.2d 504 (5th Cir. 1997).

3. Private Entities

A private litigant, such as a shopping center or night club that employs off-duty security, has no right to an interlocutory appeal of a plea to the jurisdiction. *See Bridges v. Robinson*, 20 S.W. 3d 104 (Tex. App.—Houston [14th Dist.] 2000, no pet.), *disapproved in part on other grnds., Telthorster v. Tennell*, 92 S.W.3d 457, 464 (Tex. 2002)(appellate court sanctioned Dillard's Department Stores for filing an interlocutory appeal on the derivative basis of their off-duty security guard's official immunity); *Washington Mortg. Corp. v. Wilson*, 2000 WL 350549 (Tex. App. – Houston [14th Dist.] 2000, no pet.).

F. DISCOVERY

No discovery is necessary to pursue a plea to the jurisdiction, as the trial court's ruling, at least initially, is based on the face of the plaintiff's petition. Moreover, if the trial court does not have jurisdiction, it does not have the power to allow discovery, by either the plaintiff or the governmental defendant. Until the trial court's jurisdiction is invoked by the plaintiff, discovery is improper. *City of Galveston v. Gray*, 93 S.W.3d 587, 591-92 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). If the governmental defendant propounds discovery, an argument can be made that the government has waived immunity by its actions (similar to the waiver found in *Reatta Construction, supra*).[2]

> ***PRACTICE POINTER FOR GOVERNMENT EMPLOYEE DEFENDANT:*** An individual is not a "governmental unit" that can take an interlocutory appeal under CPRC § 51.014(8) for denial of a plea to the jurisdiction. An individual, however, can take an interlocutory appeal under CPRC § 51.014(5) that "denies a motion for summary judgment that is based on an assertion of immunity by an individual." The 2003 amendments to TTCA § 101.106 give a government employee immunity from suit. *Schauer v. Morgan*, 2005 WL 1415345 (Tex. App. - Houston [1st Dist.] 2005, n.p.h.). When a government employee is sued with the governmental entity, consider: (1) filing a motion for summary judgment seeking dismissal of the employee based on immunity from suit under TTCA § 101.106; and (2) if summary judgment is denied, the employee may file an interlocutory appeal under CPRC § 51.014(5). This strategy was successful in *Schauer v. Morgan, supra*.

G. PLAINTIFF'S RESPONSE

If the plaintiff's petition alleges sufficient facts to establish a waiver of immunity, dismissal for want of jurisdiction is inappropriate. *Lee*, 38 S.W.3d at n.3 (Livingston, J. concurring). On the other hand, if the defendant's plea to the jurisdiction is valid, the plaintiff has a choice. The plaintiff can

[2]This section (Discovery) is a source of dispute between the authors. One of the authors believes that no discovery should be allowed because the trial court has no jurisdiction on which discovery can be based. The other author believes discovery – limited to disputed fact issues on jurisdiction – is and should be allowed. Time will prove one of us right.

either (1) non-suit the governmental defendant without prejudice, or (2) file an amended petition under the fair notice standards of TRCP 45 and 47 alleging a claim under the Texas Tort Claims Act or other applicable statute, thereby making the claim viable. If the governmental defendant files evidence supporting its plea to the jurisdiction, to avoid the potential of dismissal the plaintiff should (in addition to filing an amended petition) file jurisdictional evidence supporting a waiver of immunity. *See Miranda*, 133 S.W.3d at 227.

> ***PRACTICE POINTER FOR PLAINTIFF:*** To adequately state a tort claim against most governmental entities, plead a specific statutory reference and facts sufficient to show (1) waiver of immunity under TTCA § 101.021; and (2) proper damages under TTCA §§ 101.021, .023 & .024. Timely notice under TTCA § 101.101 is no longer a jurisdictional requirement. *Univ. of Texas Southwestern Medical Center at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 365 (Tex.2004).

H. THE PLEA HEARING

1. Presumptions

At the plea to the jurisdiction hearing the trial court's power to hear the case is at issue. When deciding a plea to the jurisdiction, the trial court must initially base it's decision on the allegations in the plaintiff's live pleading and accept the factual allegations as true. *City of El Campo v. Rubio*, 980 S.W.2d 943, 945 (Tex. App.—Corpus Christi 1998, pet. dism'd w.o.j.). The court must construe them liberally in favor of the plaintiff, *Miranda*, 133 S.W.3d at 226; *White*, 13 S.W.3d at 822, but the court is bound neither by the legal conclusions nor by any illogical factual conclusions that the plaintiff draws from the facts plead. *See Salazar v. Morales*, 900 S.W.2d 929, 932 n.6 (Tex. App.—Austin 1995, no writ).

2. Question of Law

Determining subject matter jurisdiction is a question of law for the trial court. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). Appellate courts reviewing a challenge to a trial court's subject matter jurisdiction review the trial court's ruling *de novo*. *Miranda*, 133 S.W.3d at 228.

3. Burden of Proof

Although the defendant is usually the moving party on a plea to the jurisdiction, the plaintiff is the party seeking to invoke the court's jurisdiction. Accordingly, the plaintiff bears the burden of establishing jurisdiction. *White*, 13 S.W.3d at 822; *Texas Ass'n of Bus.*, 852 S.W.2d at 446. There are conflicting opinions, however, about the burden of establishing an exemption under TTCA §§ 101.051- .066. *Compare Texas Dep't of Trans. v. Ramirez*, 72 S.W.3d 376 (Tex. App.—Austin 2001) *re'v on other grnds.*, 74 S.W.3d 864 (Tex. 2002) (defendant has the burden of proof) *with City of Dallas v. Adams*, 2001 WL 253751 (Tex. App.—Dallas 2001, no pet.) (not designated for publication) (plaintiff has the burden of proof).

4. Evidence

When deciding a plea to the jurisdiction the trial court looks to the allegations in the petition and must further consider evidence "when necessary to resolve the jurisdictional issue." *Miranda*, 133 S.W.3d at 223; *Bland ISD v. Blue*, 34 S.W.3d 547 (Tex. 2000). This is a significant change. In the past few years, the vast majority of appellate decisions stated that no evidence could be considered in ruling on a plea to the jurisdiction. *See, e.g., Lira*, 17 S.W.3d 300 at n.7; *Pearce*, 16 S.W.3d 456. The trend was to consider evidence only if the party asserting the plea contended the allegations in the plaintiff's petition were false and made only to confer jurisdiction. *Denton County*, 22 S.W.3d at 119. This standard by the intermediate appellate courts has been discarded by the Texas Supreme Court.

In *Miranda* and other recent decisions, the Supreme Court opened the door to evidence in a plea to the jurisdiction hearing. *Miranda*, 133 S.W.3d at 223, *citing Brown*, 80 S.W.3d at 556 and *Tex. Dept. of Criminal Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001). Litigation will likely ensue regarding the amount and relevancy of evidence applicable to the jurisdictional issue. The Supreme Court has stated that "the issues raised by a plea to the jurisdiction are often such that they cannot be resolved without hearing

evidence," *Blue*, 34 S.W.3d at 554, and the trial court "*must consider evidence when necessary to resolve the jurisdictional issues*." *Miranda*, 133 S.W.3d at 223 (italics in original). Where is this line drawn? And when is evidence necessary to resolve a jurisdictional issue? The proper function of a plea to the jurisdiction 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. *Blue* 34 S.W.3d at 544. On the other hand, there are situations where a plaintiff is required to prove facts that are characterized as "primarily jurisdictional." *Id.*. While the evidence may touch on the merits of the case, it should focus on jurisdictional immunity issues. The trial court should, of course, confine itself to the evidence relevant to the jurisdictional issue. *Id.* at 555.

PRACTICE POINTER FOR DEFENDANT:
Consider filing a "speaking" plea to the jurisdiction. For example, an affidavit by a city employee may be used to show the claim is barred by a pre-1970 act or omission under TTCA § 101.061. *See Horton*, 4 S.W.3d at 55. Business record affidavits could also be used to offer government documents. All types of relevant evidence are permissible at the plea hearing. *Miranda*, *supra*. Strategically, it would seem preferable to use documentary evidence at the hearing, as opposed to offering testimony from a government client. This approach would limit cross-examination of your client (and the potential for admissions against interest).

5. Procedure

The Texas Supreme Court instituted new procedures in *Miranda* when adjudicating pleas to the jurisdiction. When evidence is submitted by the government supporting a plea to the jurisdiction, the summary judgment standards of TRCP 166a(c) have been engrafted onto plea to the jurisdiction procedures. "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 regarding jurisdictional facts to overcome the challenge to the trial court's subject matter jurisdiction." *Miranda*, 133 S.W.3d at 221. When evidence is involved at the plea to the jurisdiction hearing, the trial court reviews the evidence to determine if a fact issue exists. *Miranda*, 133 S.W.3d at 227-28. If the evidence is undisputed, whether the trial court has jurisdiction is a question of law. *Miranda*, 133 S.W.3d at 228. If the evidence of jurisdictional facts is conflicting, the trial court cannot grant the plea to the jurisdiction and the issue must be resolved by the finder of fact. *Miranda*, 133 S.W.3d at 227-28. Note, however, that the summary judgment timing issues (i.e. 21 day notice of hearing, etc.) do not apply to pleas to the jurisdiction. *See Miranda*, 133 S.W.3d at 235 (Jefferson, J., dissenting).

6. The Ruling

If the plea to the jurisdiction is granted, the proper remedy is dismissal with prejudice "because a plaintiff should not be permitted to relitigate jurisdiction once that issue has been finally determined." *Harris County v. Sykes*, 136 S.W.3d 635, 639. The plaintiff then has the usual appellate rights to appeal a final judgment against the governmental entity. If the plea to the jurisdiction is denied, the governmental entity has the right to pursue an accelerated interlocutory appeal of the decision. TEX. CIV. PRAC. & REM. CODE § 51.014(8). The governmental entity may waive this right, and reassert it's immunity defense at summary judgment, trial and, if necessary, on appeal following the judgment. *White*, 13 S.W.2d at 823.

PRACTICE POINTER FOR DEFENDANT:
Many trial judges are uncomfortable with this area of the law. Some trial judges are uncomfortable with dismissing a claim with prejudice. Take a copy of *Harris County v. Sykes* that shows dismissal with prejudice is the proper remedy. You may also offer to write a letter brief to the court to fully explain why the plea should be granted.

I. EMERGING ISSUES

1. Partial Pleas

The common law does not specifically authorize a plea to the jurisdiction directed to less than the entire petition. It also does not specifically prohibit such a plea, except, at times, in the Waco and several other intermediate courts of appeals. Taking the lead, the Waco court of appeals has sometimes taken the stance that a plea to the jurisdiction that addresses only part of the plaintiff's claims, without addressing every claim, is improper. *City of Cleburne v. Trussell*, 10 S.W.3d 407 (Tex. App—Waco 2000, no pet.); *Aledo Indep. Sch. Dist. v. Choctaw Prop., L.L.C.*, 17 S.W.3d 260, 262(Tex. App.—Waco 2000, no pet.); *see also Life Mgmt Center for MHMR v. Cruz*, 2003 WL 22923927 (Tex. App.—El Paso 2003, no pet.); *Texas Dept of Parks & Wildlife v. Steinhagen*, 2001 WL 47667 (Tex. App.—Beaumont 2001, no pet.); and *City of Edinburg v. Garles*, 2002 WL 91338 (Tex. App.—Corpus Christi 2002, no. pet.). A corollary of this rationale is also emerging - if the trial court has jurisdiction over one claim, the trial court has jurisdiction over every other claim. *City of Allen v. Ahmad*, 2005 WL 668228 (Tex. App - Dallas 2005, n.p.h.). This line of opinions (hereafter called the "*Trussell* line of cases") seems clearly contrary to the holdings of the Texas Supreme Court and most other intermediate appellate courts. *See Duhart*, 610 S.W.2d at 74 (court lacked jurisdiction over single claim of exemplary damages); *Texas Parks & Wildlife Dept. v. Callaway*, 971 S.W.2d 145 (Tex. App.—Austin 1998, no pet.) (inverse condemnation claim properly plead, but declaratory judgment and trespass to try title claims subject to plea to the jurisdiction); *City of Texarkana v. Cities of New Boston*, 141 S.W.3d 778 (Tex. App.-Texarkana 2004, no pet.); *Durbin v. City of Winnsboro*, 135 S.W.3d 317 (Tex. App. - Texarakana 2004, no pet.); *Salas v. Wilson Memorial Hosp. District*, 139 S.W.3d 398 (Tex. App. - San Antonio 2004, no pet); *Texas Southern Univ. v. Araserve Campus Dining Servs.*, 981 S.W.2d 929, 935 (Tex. App.—Houston [1st Dist.] 1998, pet. denied), *Nueces County v. Thorton*, 2004 WL 396608 (Tex. App.-Corpus Christi 2004, n.p.h.), and *City of Midland v. Sullivan*, 2000 WL 1035380 (Tex. App.—El Paso 2000, pet. dism'd w.o.j.) (plea to jurisdiction as to a portion of the claims was sustained). For example, if the plaintiff makes an improper demand for exemplary damages, a plea to the jurisdiction could be used to strike these claims for relief, because the damages are not recoverable as a matter of law. TEX. CIV. PRAC. & REM. CODE ANN. § 101.024. As another example, if the plaintiff alleged various claims, one of which sought property damages on a premise liability claim, a plea to the jurisdiction would seem quite proper, since property damages are not recoverable for premise liability claims under TTCA § 101.021(2). *City of San Antonio v. Winkenhower*, 875 S.W.2d 388, 390 (Tex. App.—San Antonio 1994, writ denied); *State Dep't of Highways & Pub. Transp. v. Pruitt*, 770 S.W.2d 638, 639 (Tex. App.—Houston [14th Dist.] 1989, no writ); *DeAnda v. County of El Paso*, 581 S.W.2d 795 (Tex. Civ. App.—El Paso 1979, no writ). Yet, under the partial plea analysis of the *Trussell* line of cases, these claims would not be subject to a plea to the jurisdiction because they do not encompass the entire case. Even the Waco court, itself, has contradicted the holding in the *Trussell* line of cases by sustaining a portion of a plea to the jurisdiction, and reversing and remanding as to other claims. *Padgett v. City of Madisonville*, 2004 WL 254014 (Tex. App.—Waco 2004, no pet.) (not designated for publication); *Cozby v. City of Waco*, 110 S.W.3d 32 (Tex. App.—Waco 2002, no pet.). Therefore, the *Trussell* line of cases, which has its genesis in the Waco court, seems dubious authority.

2. Notice of Claim

The 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. *Stanton v. University of Health Sciences Center at Dallas*, 997 S.W.2d 628, 629-30 (Tex. App.—Dallas 1998, pet. denied). However, the Supreme Court has ruled that, although lack of notice bars any action under the Act, it does not deprive the court of subject matter jurisdiction. *Univ. of Texas Southwestern Medical Center at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 365 (Tex.2004); *Texas Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 339 (Tex.2004)

3. Special Exceptions and an Appropriate Opportunity to Amend

The Waco court of appeals has held that, where the plaintiff's petition fails to establish the trial

court's jurisdiction but could "*conceivably*" be amended to establish jurisdiction, a government defendant must attack the petition by special exception before seeking to have the suit dismissed for want of jurisdiction. *Godley ISD v. Woods*, 21 S.W.3d 656, 657 (Tex. App.—Waco 2000, pet. denied). The failure of the government defendant to file special exceptions will apparently result in affirmance of the trial court's denial of the plea to the jurisdiction, at least before the Waco appellate court. *Id.* at 661. Note, however, a strong dissenting opinion was filed by Justice Tom Gray stating that this special exception procedure is not required by the Legislature and would frustrate the legislative purpose of allowing interlocutory appeals of pleas to the jurisdiction. *Woods*, 21 S. W.3d at 661-2 (J. Gray, dissenting). Further, if the special exception procedure is followed, the government defendant would be effectively denied the immediate ability to bring an interlocutory accelerated appeal as specifically authorized by the Legislature. *Id.* at 661-2. The San Antonio court of appeals has similarly held that special exceptions should be pursued before a plea to the jurisdiction is adjudicated. *Webb County v. Sandoval*, 88 S.W.3d 290, 295 (Tex. App.—San Antonio 2002, no pet.); *Alamo Community College Dist. v. Browning Const.*, 131 S.W.3d 146, 156 (Tex. App.—San Antonio 2004, pet. filed). These holdings may be questionable authority in the future.

The Supreme Court has held that a plaintiff should be given "an appropriate opportunity to amend" after a plea to the jurisdiction is filed. *Sykes*, 136 S.W.3d at 639. If the plaintiff thereafter files an amended petition, special exceptions are not required, since the plaintiff was given the opportunity to amend. *Miranda*, 133 S.W.3d at 231; *Sykes*, 136 S.W.3d at 639. If the plaintiff does not replead after the plea to the jurisdiction is filed, it is uncertain under the law whether special exceptions are required and whether the plaintiff has been given "an appropriate opportunity to amend" under *Miranda* and *Sykes*. Logically, the governmental entity cannot file special exceptions because the trial court has no jurisdiction over the government, and further, the trial court *only* has the jurisdiction to determine whether it has jurisdiction. *See Sykes*, 136 S.W.3d at 641 (J. Brister and O'Neill, concurring) ("courts have jurisdiction to determine their own subject matter jurisdiction"). Presumably, the plaintiff would be given the opportunity to amend by having sufficient time between the filing of the plea to the jurisdiction and the subsequent hearing on the plea. Thus, if a plea to the jurisdiction remains pending for a sufficient length of time, an appellate court may deny a plaintiff additional time to amend. *O'Neal v. Tex. Bd. Of Chiropractic Examrs.*, 2004 WL 2027787, *3 and n. 5 (Tex.App.–Austin 2004, no pet) (defendant's plea was on file three months before trial court heard it; court held plaintiff had three-month opportunity to amend his pleadings); *but see Texas A & M v. Koseoglu*, 2005 WL 552736 (Tex. App. - Waco 2005, pet. filed); *Somervell County Healthcare Authority v. Saunders*, 2005 WL 1480720 (Tex. App. - Waco 2005, n.p.h.)(filing of a plea to the jurisdiction with passage of time before hearing does not equal an appropriate opportunity to amend).

J. PLEA EXAMPLES

1. Adequate Pleading and Evidence

- **Defective or inadequate equipment** [TTCA § 101.021(2)]: Allegation: inmate filed suit for damages resulting from a work-related injury when he was struck in the neck by a 7 foot long lever of a machine. Holding: the plaintiff adequately alleged that the TDCJ furnished personal tangible property that was inadequate, defective or lacking an integral safety component, which caused his injury. *Jenkins v. Texas Department of Criminal Justice*, 2004 WL 1117171 (Tex. App.–Corpus Christi 2004, no pet.), *citing Lowe v. Texas Tech Univ.*, 540 S.W.2d 297 (Tex. 1976)(cause of action stated where university provided football player with inadequate protective equipment).

- **Failure to identify government employee under TTCA § 101.021(1)**: the trial court is within its discretion in refusing to dismiss this claim in the early stage of a case. *City of Paris v. Floyd*, 150 S.W.3d 224 (Tex.App.–Texarkana 2004, no pet.).

- **Inverse condemnation**.

  Allegation: while road-maintenance crew was repairing a County road which crossed the Railroad's tracks, the crew spread road-base material over the railroad tracks,

burying the tracks and causing a train to derail. Holding: Railroad pleaded that County placed road-base material on its tracks, and that such act was intentional and within the authority of the road-maintenance crew carrying out the governmental function of performing road maintenance, so plea could not be granted as to inverse condemnation claim. Plea was granted as to Railroad's causes of action for nuisance and negligent nuisance. *Hunt County v. Dallas, Garland and Northeastern Railroad*, 2004 WL 1178609, (Tex.App.–Dallas 2004, no pet.).

Allegation: claim for taking of plaintiff's property under TEX. CONST. art. I § 19, declaratory judgment, trespass to try title and attorneys fees. Holding: inverse condemnation claim properly plead because plaintiff had a property interest entitled to due process, but declaratory judgment, trespass to try title and attorneys fees claims improperly plead, and thus subject to a plea to the jurisdiction, because a suit against the State for title to land cannot be maintained without legislative consent. *Callaway*, 971 S.W.2d 145; *Compare Kerr v. TxDOT*, 45 S.W.3d 248 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (360 downstream residents properly plead claims for constitutional taking).

- **Non-negligent nuisance.** Allegation: plaintiff alleged a drainage nuisance, of which the county knew or should have know, and failed to correct the drainage causing damage and depreciation to real property. The county voluntarily and intentionally or negligently interfered with the use and enjoyment of the plaintiff's property. Holding: non-negligent nuisance claim was properly stated. *Montgomery County v. Fuqua*, 22 S.W.3d 662 (Tex. App.—Beaumont 2000, pet. denied).

- **Use of motor-driven equipment/vehicle** [TTCA § 101.021(1)] Allegation: negligence in failing to utilize motor-driven equipment, sump pumps, to evacuate water from a construction project caused damage. Holding: Petition stated a claim. *DAR v. Reunion Hotel*, 1998 WL 312942 (Tex. App.—Dallas 1998, no pet.) (not designated for publication); *Compare DART v. Willis*, 2005 WL 1091376 (Tex. App. - Dallas 2005, n.p.h.)(plaintiff's allegations of falling off a stationary parked bus when exiting is the use or operation of a motor-driven vehicle stating a claim).

- **Premise Liability** [TTCA §§ 101.021(2),101.022. Allegation: premise liability claim where clumps of grass and debris from city mowing caused motorcycle accident. Holding: although the petition was not well-plead, it was sufficient as the court construed the allegations in favor of the plaintiff. *City of Houston v. Camp*, 1999 WL 213097 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (not designated for publication); *Compare Thompson v. City of Dallas*, 2005 WL 1460667 (Tex. App. - Dallas 2005, n.p.h.)(city's admission that its employees knew of prior reports of tripping on a metal cover-plate at city airport raised a fact issue on the city's knowledge, precluding dismissal).

- **Premise liability; Traffic devices** [TTCA §§ 101.021(2), .022, .056, .060]: Allegation: premise liability claim where plaintiff alleged he was injured due to the unusually slippery condition of the road maintained by the city. Plaintiff also alleged city was negligent in failing to have proper warning signs erected. Holding: As to the premise liability claim, plaintiff alleged a cause of action in which immunity has been waived. As to failing to erect warning signs, initial sign placement can be a discretionary or non-discretionary function under §§ 101.056, .060, and because the court is to evaluate the pleadings in favor of the plaintiff, the pleadings do not necessarily implicate a discretionary function. *City of Mesquite v. Crawford*, 2000 WL 1033067 (Tex. App.—Dallas 2000, no pet.) (not designated for publication).

- **Whistleblower**. Allegation: plaintiff alleged suit was a whistleblower claim brought pursuant to Chapter 554 of the Government Code, and that he was a public employee of a county and was terminated because he reported illegal computer activity by county chaplain. Holding: plaintiff referenced a statue that specifically

waives sovereign immunity and alleged facts stating a whistleblower claim. *Denton County*, 22 S.W.3d 113.

- **Breach of contract, interventions, counterclaims (and beyond?)**. The Supreme Court is considering whether a governmental entity waives immunity from suit (for breach of contract and perhaps all claims) by the enacting language of "sue and be sued" and "plead and be impleaded" found in city charters and the Local Government Code. *See 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); *Goerlitz v. City of Midland*, 101 S.W.3d 573 (Tex. App.—El Paso 2003, pet. filed); *Alamo Community College Dist. v. Browning Const*., 131 S.W.3 146 (Tex. App.—San Antonio 2004, pet. filed); *City of Houston v. Clear Channel Outdoor*, 2004 WL 63561(Tex. App.—Houston [14th Dist.] 2004, pet. filed). The Supreme Court is also reconsidering whether the government intervening in a lawsuit waives immunity from suit. *Reata Construction Corp v. City of Dallas*, 02-1031, 2004 WL 726906 (Tex. April 2, 2004, motion for rehearing granted Oct. 15, 2004). Further, the Supreme Court is considering whether the government filing a counterclaim waives immunity from suit. *City of Irving v. Inform Construction*, 143 S.W.3d 371 (Tex. App. - Dallas 2004, pet. pending). Intermediate appellate courts have recently held that the government filing a counterclaim waives immunity from suit, *Utility Contractors of America v. City of Canyon*, 2005 WL 1225981 (Tex. App. - Amarillo 2005, n.p.h.); *Ferguson Interests v. Harris County Sports & Convention Corp.*, 2004 WL 2250930 (Tex. App. - Houston [1st Dist] 2004, n.p.h.); *Neches-Grove ISD v. Pyramid Contractors*, 140 S.W.3d 440 (Tex. App. - Beaumont, pet. filed), and the subsequent dismissal of the counterclaim does not cure the waiver. *City of Canyon*, 2005 WL 1225981, *3.

2. Inadequate Pleading and Evidence

- **Premise liability-furnishing a background condition** [TTCA § 101.021(2)]**:** Allegation: personal injuries arose from use and condition of the lake in hit and run boating accident. Holding: Use of the lake did not cause injury. "Property does not cause injury if it does nothing more than furnish the condition that makes the injury possible." *Garrett Place, Inc.*, 972 S.W.2d at 140.

- **Use of tangible property; government employee** [TTCA § 101.021(2)]:

  Allegation: Motorist brought action against county, seeking to recover for injuries sustained in collision with temporary berm that was constructed by private property owner at instruction of county sheriff across road to contain drivers involved in illegal drag racing. Holding: Plaintiffs, in part, generically plead and did not identify the personal property at issue in their pleadings. They thus did not demonstrate that their injuries resulted from the use or misuse of tangible personal property. A county employee also did not use or operate motor driven equipment to build the berm, thus the plaintiffs failed to state a claim. *Sepulveda v. County of El Paso*, 2005 WL 850416 (Tex.App.–El Paso 2005, no pet.).

  Allegation: State hospital allowed involuntary committed patient to keep his suspenders and walker which he used to commit suicide. Holding: TTCA 101.021(2) waives immunity for use of personal property only when a government employee, not the plaintiff or third party, is the user of the property. Merely allowing an injured party to use his own property is not a "use" of property waiving immunity. *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244 (Tex. 2004).

- **Use of motor-driven equipment; Proximate cause** [TTCA § 101.021(1)]: Allegation: Plaintiff plead that a stationary electric pump is motor driven equipment that caused plaintiff's property damages. The pump was installed to remove gasoline fumes which were migrating onto the

plaintiff's property from adjacent property which held underground gasoline storage tanks. The TNRCC removed the pumps and six days later, the fumes ignited on plaintiff's property. Holding: While the pump is considered motor driven equipment, its use did not cause the plaintiff's damages. *TNRCC v. White*, 46 S.W.3d 864 (Tex. 2000).

- **Premise Liability.** [TTCA § 101.021(2)]. Traffic congestion and a stalled commercial vehicle on a roadway are not a premise defect. *City of Laredo v. Velasco*, 40 S.W.3d 717 (Tex. App.—San Antonio 2001, no pet.)

- **Use of property; Proximate cause** [TTCA § 101.021(2)] Allegation: plaintiff sexually assaulted by HIV patient in state mental hospital claimed injuries due to leaving door to patient's room unlocked and providing no lock on door separating men's and women's wings, as a use and condition of tangible personal property. Holding: Property does not cause injury if it does no more than furnish the condition that makes the injury possible. The alleged property was too attenuated from the plaintiff's injuries to be said to have caused them. *Texas Dep't. MHMR v. Lee*, 38 S.W.3d 862 (Tex. App.—Fort Worth 2001, pet. denied).

- **Use or misuse of property; Proximate cause** [TTCA § 101.021(2)]. Allegation: Wife of deceased husband sued medical school for mishandling remains of husband, commingling husband's remains with remains of up to 100 other people, and misusing cremation equipment, storage barrels, and common graves. Holding: Petition does not state a claim because mishandling of the body, not use of property, caused the injury. *Clark v. U.T. Southwestern Med. Ctr. at Dallas*, 2001 WL 128593 (Tex. App.—Dallas 2001, no pet.).

- **Use or misuse of information; Non-use of property** [TTCA § 101.021(2)]**:** Allegation: The alleged use and misuse of tangible property, radio equipment, in failing to timely contact and dispatch emergency personnel in response to 911 emergency calls contributed to plaintiff's death. Holding: The use or misuse of information does not amount to the use or misuse of tangible property so as to waive immunity under Section 101.021(2). Also, the non-use of property does not support a claim under the TTCA. *Lira*, 17 S.W. 3d 300 at n.4.

- **Same result obtained with or without use of property; Proximate cause** [TTCA § 101.021(2)]. Allegation: Bus struck plaintiff while crossing the street, after police signaled bus through a red light with a whistle and arm movement. Holding: Arm movement did not involve use of tangible property, and same result (death) would have obtained without use of whistle. Use of whistle therefore was not the proximate cause of the accident. *Aquirre v. City of San Antonio*, 100 S.W.3d 247 (Tex. App.—San Antonio 2001, pet. denied).

- **Intentional torts.** [TTCA § 101.057(2)]**:** Allegation: nurses sued for defamation, conspiracy, intentional infliction of emotional distress and invasion of privacy arising out of their constructive dismissal after complaining of hospital procedures. Holding: Immunity is not waived for intentional torts. *University of Tex. Med. Branch at Galveston v. Hohman*, 6 S.W.3d 767, 777 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). *Compare Tarrant County Hosp. Dist. v. Henry*, 52 S.W.3d 434 (Tex. App.—Fort Worth 2001, no pet.) (assault, battery, and intentional infliction of emotional distress are intentional torts which fail to state a claim); *Harris County v. Cypress Forest Utility Dist. of Harris County*, 50 S.W.3d 551 (Tex. App.—Houston [14th Dist] 2001, no pet.) (trespass in dumping hazardous material on plaintiff's property is an intentional tort which fails to state a claim)

- **Negligent supervision and implementation of policy**: Claims do not state a claim without a supporting waiver of immunity under TTCA § 101.021. *City of Laredo v. New Yorkers Apparel*, 2005 WL 1458248 (Tex. App. - San Antonio 200, n.p.h.); *City of Garland v. Rivera*, 146 S.W.3d 334, 338 (Tex. App. - Dallas 2004, no pet.).

- **Fraud, breach of fiduciary duty, and misrepresentation**: Claims do not state a claim under TTCA § 101.021. *City of Fort Worth v. Pastusek Indus.,* 48 S.W.3d 366 (Tex. App.—Fort Worth 2001, no pet.).

- **Declaratory Judgment for money damages**: claims are immune from suit as a matter of law. *My-Tech v. University of North Texas Health Science Center at Fort Worth,* 2005 WL 1460662 (Tex. App. - Dallas 2005, n.p.h.).

- **Non-Use of property** [TTCA § 101.021(1) and (2)]. Allegation: personal injuries arose when officer failed to use his vehicle to direct traffic around hazardous road condition. Holding: Although plaintiff couched his petition in terms of use of a motor-driven vehicle and tangible personal property, in reality, the claim was based on a non-use of property. Non-use of property does not state a claim. *Texas Dept. of Public Safety v. Seraette,* 2000 WL 816053 (Tex. App.—Dallas 2000, no pet.) (not designated for publication).

- **Exemplary damages. [TTCA § 101.024]:** Allegation: wrongful death suit where plaintiffs sued for exemplary damages. Holding: Based on special exceptions and a plea in abatement, the Texas Supreme Court upheld the trial court's dismissal for want to jurisdiction because governmental entities are immune from exemplary damages. *Duhart,* 610 S.W.2d at 742 (Tex. 1980). *Contra Henry,* 52 S.W.3d 434 (request for exemplary damages not a jurisdictional issue, but an affirmative defense).

- **Proprietary Act**: Allegation: contractor sued city for excavation charges from wrong location of water pipe as indicated on city drawing, claiming activity was proprietary function. Holding: waterworks is a governmental function under § 101.0215, and plaintiff failed to plead a waiver of immunity for a governmental function under § 101.021. *City of Garland v. Jezari,* 2000 WL 707289 (Tex. App.—Dallas 2000, no pet.) (not designated for publication).

PRACTICE POINTER FOR PLAINTIFF: Keep in mind your TRCP 13 obligations. The plaintiff is not free to make unsubstantiated claims against governmental entities in the petition. Rule 13 sanctions may be imposed where allegations against a governmental entity are factually or legally without merit. It is your responsibility to conduct reasonable investigations and research *before* commencing the action. *See Falk & Mayfield, L.L.P. v. Molzan,* 974 S.W.2d 821, 827 (Tex. App.—Houston [14th Dist.] 1998, pet. denied); *Tarrant County v. Chancey,* 942 S.W.2d 151, 155 (Tex. App.—Fort Worth 1997, no pet.); *Home Owners Funding Corp. v. Scheppler,* 815 S.W.2d 884, 889 (Tex. App.—Corpus Christi 1991, no writ).

III. INTERLOCUTORY APPEALS

A. Overview

1. Introduction

A judge's ruling on a motion in the course of a lawsuit may generally be appealed only after a judgment has become final. However, under certain limited circumstances, a judge's ruling may be appealed immediately in an interlocutory appeal.

The rationale for an interlocutory appeal is simple. Some rulings are so important and fundamental that they should be resolved before a trial can proceed. If the judge does not make the correct ruling, the entire proceeding will be tainted and must be retried. This drains judicial resources and forces the parties to endure another full-blown trial of the same matter.

For decades, Texas law did not allow interlocutory appeals when trial courts incorrectly decided their authority to exercise jurisdiction over a party. All too often, governmental defendants incurred the time and expense of a trial in a district court only to have the appellate court rule that the court

below did not have proper jurisdiction over the defendant. The courts and litigants would waste their resources because the trial court's initial ruling on jurisdiction could not be reviewed immediately through an interlocutory appeal. *Brown*, 8 S.W.3d at 336.

Although many pleas to the jurisdiction are addressed on a regular appeal (when, for example a plea is granted), approximately 60% of all appeals of a trial court's ruling on a plea to the jurisdiction are interlocutory appeals. Hence, this section (unless otherwise specified) will deal with issues relating only to interlocutory appeals. The tables supporting these statistics are contained in the appendices to this paper.

2. The Statute

In 1997, the Texas legislature resolved the problem by amending the interlocutory appeal statute to state: "[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).

Since enactment of section 51.014(a)(8), interlocutory appeals involving pleas to the jurisdiction have exploded. This area is fertile ground for exploring and developing the law of sovereign immunity.

3. Venue

Statistically speaking, venue of a case could be important in the outcome of the appeal – whether it be interlocutory or standard. In the Dallas court of appeals, the governmental entity has only a 37% chance of winning an interlocutory appeal of the denial of a plea to the jurisdiction, but a 46% chance when regular appeals are factored in. The Austin, Dallas and Waco courts are all below 40% for the governmental entity on interlocutory appeal, but all rise significantly when regular appeals are factored in. Fort Worth, San Antonio, Amarillo, El Paso, and Eastland are all at or above 60% in favor of the governmental unit on interlocutory appeal, and when you factor in regular appeals, Beaumont and Tyler join them in the stratosphere. Interestingly, in the Supreme Court, the governmental entities prevail in more than 85% of the interlocutory appeals and nearly 80% of all plea to the jurisdiction appeals (assuming the Supreme Court decides to hear the case). Overall, on interlocutory appeal the governmental entity prevails approximately 51% of the time. When regular appeals are added, the governmental entity prevails nearly 58% of the time. [As a caveat, please note these statistics do not account for cases dismissed or denied without an appeal. These statistics simply reflect appeals involving governmental entity pleas to the jurisdiction reported on Westlaw.]

4. Multiple Interlocutory Appeals

The Texas legislature has granted the right to an interlocutory appeal for both (1) the denial of official immunity (by governmental employees) and (2) the denial of pleas to the jurisdiction (by governmental entities). TEX. CIV. PRAC. & REM. CODE §§ 51.014(a)(5) & (8). Counting the ability to appeal the final judgment, a governmental entity and it's employee may have three possible appeals of the trial court's decisions.

5. Partial Pleas

A plea to the jurisdiction should include all grounds available to the defendant at the time of the plea. The Houston court of appeals, 14th District, suggested that the legislature review the state of the law to perhaps restrict the ability to take interlocutory appeals from two different pleas to the jurisdiction in the same case. *Bridges*, 20 S.W.3d at 118 n.9. ("While we find nothing in the statute to disallow the City two bites at the interlocutory apple, the practice should be discouraged in the interests of judicial economy.")

6. Summary Judgments

The interlocutory appeal statute grants interlocutory appellate jurisdiction to the grant or denial of pleas to the jurisdiction. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). The statute does not mention motions for summary judgment based on sovereign immunity. However, three courts of appeals have held that the substance of the pleading determines whether it is actually a jurisdictional plea and have concluded that a summary judgment that challenges a court's jurisdiction to hear the case may be appealed immediately. *See Baylor College of Medicine v. Tate*, 77 S.W.3d 467, 472 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (summary judgment on

immunity from liability is not a plea to jurisdiction); *City of Houston v. King*, 2002 WL 1041174 *4 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (not designated for publication) (same); *Bexar County v. Gant*, 70 S.W.3d 289, 291-292 (Tex. App.—San Antonio 2000, pet. denied) (summary judgment challenging jurisdiction to hear case was plea to jurisdiction); *Bexar County v. Bloom*, 2001 WL 540348 *2 (Tex. App.—San Antonio 2001, pet. denied) (not designated for publication) (same); *Phifer v. Nacogdoches County Central Appraisal Dist.*, 45 S.W.3d 159, 170 (Tex. App.—Tyler 2001, pet denied) (holding that a plea in abatement was actually a plea to jurisdiction). *See also* Alan Wright, LaDawn H. Conway, Debra J. McComas & Heather D. Bailey, *Annual Survey of Texas Law Articles*, 56 SMU L. REV. 1061, 1077 n.142 (2003) ("Notably, however, a motion for summary judgment based upon an assertion of immunity from suit, as opposed to immunity from liability, may be properly construed as a plea to the jurisdiction, the denial of which would provide a basis for interlocutory appeal under [TEX. CIV. PRAC. & REM. CODE ANN. § 51.014] section (8)").

Conversely, four courts of appeal have simply looked at the title of the motion and declined jurisdiction to hear an interlocutory appeal on that sole basis. *See Parker County v. Shankles*, 2003 WL 22026592 (Tex.App.—Fort Worth, Aug. 26, 2003, pet. denied); *Willco Prod. Co. v. Texas Dep't of Crim. Justice*, 2000 WL 34234566 *2 (Tex. App.—Eastland 2000, no pet.) (not designated for publication) (assertion of immunity from suit in summary judgment motion cannot be considered as a plea to jurisdiction); *Brazos Transit Dist. v. Lozano*, 72 S.W.3d 442, 445 (Tex. App.—Beaumont 2002, no pet.) (title of the document is determinative); *Cozby v. City of Waco*, 110 S.W.3d 32, 35-36 (Tex. App.—Waco 2002, no pet.) (same).

The Fourteenth Court has actually ruled both ways. *See Vernagallo v. Freeman*, 2000 WL 1357206 *2 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (not designated for publication) (look to substance of motion, not title); *Thomas v. Long*, 97 S.W.3d 300, 302 (Tex. App.—Houston [14th Dist.] 2003, pet granted) (title of pleading is determinative).

The Texas Supreme Court has granted petition in *Thomas*. However, in *Sykes*, the Supreme Court made a clear statement that substance still rules over form:

> 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.

Harris County v. Sykes, 136 S.W.3d 635, 638 (Tex. 2004); *see also Texas Department of Criminal Justice v. Simons*, 140 S.W.3d 338, 349 (Tex.2004)("[A]n interlocutory appeal may be taken from a refusal to dismiss for want of jurisdiction whether the jurisdictional argument is presented by plea to the jurisdiction or some other vehicle, such as a motion for summary judgment."). Hence, it appears that a summary judgment, special exception or other pleading may also be subject to interlocutory appeal – assuming, of course, that it is directed to sovereign immunity from suit.

7. The Appellate Rules

The following sections contain a chronology of the steps to be taken to file an interlocutory appeal before an intermediate state appellate court and, if unsuccessful, a petition for review in the Texas Supreme Court.

> ***PRACTICE POINTER:*** The rules were designed to eliminate some of the old traps inherent in appellate practice. Despite this trend toward more "user friendly" appellate rules, counsel need to be familiar with the rules and procedures, since some rules, if not followed, could sound the death knell for an appeal.

> ***PRACTICE POINTER:*** Several courts of appeals have local rules which may substantially modify the requirements in the new TRAPs. **Always** check the local rules for the court of appeals in your district before you appeal.

B. Authority

As noted above, Texas appellate courts generally do not have jurisdiction over appeals from interlocutory orders. But TEXAS CIVIL PRACTICE & REMEDIES CODE § 51.014(a)(8) expressly allows an appeal from an order that "grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001." Section 51.014(a)(8) has been interpreted to allow interlocutory appeals when a governmental unit asserts that a court does not have subject matter jurisdiction – to assert the unit's immunity from suit, not immunity from liability. *Jones*, 8 S.W.3d at 638-639.

Due date. The appeal of an interlocutory order denying the assertion of immunity under TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) is automatically accelerated. TRAP 28.1. A party must perfect an accelerated appeal within 20 days after the judgment or order of which the party is complaining. TRAP 26.1(b). If the notice of appeal is not timely filed, the court of appeals lacks jurisdiction to address the merits of the appeal. *Kinnard v. Carnahan*, 25 S.W.3d 266 (Tex. App.—San Antonio 2000, no pet.). To illustrate, if the trial court denies a plea to the jurisdiction and the governmental entity later renews the plea with subsequent authority and then tries to appeal, it is too late. A timely appeal must be taken from the original plea to the jurisdiction, a "motion to reconsider" a plea to the jurisdiction which is not substantively different from the original motion does not change the time line. *Denton County v. Huther*, 43 S.W.3d 665, 667 (Tex. App.—Fort Worth 2001, no pet.).

Extension. The appellate court can extend the deadline to perfect if appellant files a motion for extension and the notice of appeal within 15 days after the notice was first due. TRAP 26.3. The Supreme Court has held that a party who perfects an appeal late, but within 15 days after the deadline, impliedly files a motion for extension of time, even if one is not actually filed. *Verburgt v. Dorner*, 959 S.W.2d 615 (Tex. 1997). This rule has also been applied to interlocutory appeals. *Ace Ins. Co. v. Zurich American Ins. Co.*, 59 S.W.3d 424 (Tex.App.—Houston [1st Dist.] 2001 pet. denied).

FOFCOL. The trial court need not, but may - within 30 days after the plea to the jurisdiction order is signed - file findings of fact and conclusions of law ("FOFCOL"). TRAP 28.1. It is uncertain whether the request for FOFCOL extends the appellate deadlines. *Compare Gene Duke Builders v. Abilene Housing Authority*, 2004 WL 422592 (Tex. 2004) (because an evidentiary hearing was conducted under TRAP 26.1(a) dealing with motions for new trial, the request for FOFCOL extended deadlines); *Chavez v. Houston Authority of El Paso*, 897 S.W.3d 523 (Tex. App.—El Paso 1995, pet. denied); *Hernandez v. Tex. Dept. of Ins.*, 923 S.W.2d 192 (Tex. App.—Austin 1996, no pet.)(request for FOFCOL extended deadlines) *with Vaughn v. Sawyer*, 2003 WL 21338615 (Tex. App.—San Antonio 2003, no pet.) (not designated for publication); *Ford v. City of Lubbock*, 76 S.W.3d 795 (Tex. App.—Amarillo 2002 no pet.)(request for FOFCOL did not extend deadlines).

> ***PRACTICE POINTER FOR DEFENDANT:*** If FOFCOL are requested by the plaintiff after a plea to the jurisdiction is granted, the trial court does not have to prepare FOFCOL. TRAP 28. If requested by the plaintiff and the trial court does not file FOFCOL, it is presumed harmful error unless the appellate record affirmatively shows that the plaintiff suffered no harm. *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996). Out of abundance of caution, governmental entities should prepare the FOFCOL for approval and entry by the trial court.

Suspension of rules. TRAP 2 permits the court of appeals to suspend any rule in order to expedite the appeal or for other "good cause." However, the court of appeals cannot extend the deadlines for perfecting the appeal except as provided in TRAP 26.3.

C. Notice of Appeal

1. How to perfect the appeal

Perfecting instrument. A notice of appeal is filed with the trial clerk. TRAP 25.1(a). A copy must

also be filed with the appellate court clerk. If, however the original notice is mistakenly filed in the appellate court, the notice is deemed to have been filed that same day with the trial court clerk, and the appellate court clerk must send a copy of the notice to the trial court clerk. TRAP 25.1(a).

Applies to everyone. All parties who seek to alter the trial court's judgment or order must perfect their own notice of appeal. TRAP 25.1(c). The appellee can no longer "piggy back" on the appellant's perfection of an appeal.

Contents: The notice of appeal in an accelerated appeal must:

- identify the trial court, cause number, and style of the case.
- state the date of judgment or order appealed from
- state that the party desires to appeal
- state the court to which the appeal is taken (except for Houston courts of appeals – then, state the appeal is taken to either 1st or 14th court of appeals)
- state the name of each party filing the notice
- **state that the appeal is accelerated.**

TRAP 25.1(d).

> ***PRACTICE POINTER:*** Remember that all interlocutory appeals are accelerated by law. TRAP 28.1. Since the time tables in accelerated appeals are shorter, keep a careful calender so you don't miss any important dates. Although the rules generally allow for fairly liberal extensions of time, don't count on the court waiting on you. *See Texas Dept. of Crim. Justice v. Watt*, 949 S.W.2d 561 (Tex. App.—Waco 1997, no writ) (since old TRAP 42 did not specifically provide for extensions to file brief or record, none could be granted, although court could consider late-filed materials).

Service. The notice must be served on all parties in the trial court. TRAP 25.1(e).

Amendment. The notice can be amended freely until the time the appellant's brief is filed. After appellant's brief is filed, the notice can be amended only upon leave of court, and on terms prescribed by the court. TRAP 25.1(f).

Errors in the notice of appeal. If the clerk of the appellate court determines that the notice of appeal is defective, the clerk must notify the parties and the trial court clerk so that the defect can be remedied if possible. TRAP 37.1. If no curative action is taken within 30 days after notice, the matter is referred to the appellate court for disposition. TRAP 37.1.

2. Who can perfect the appeal

Section 51.014(a)(8) states that 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 section 101.001. Since individuals are not "governmental units" under section 101.001, they would have no interlocutory appellate rights under this section for pleas to the jurisdiction filed by them. However, if a governmental unit's plea to the jurisdiction is granted, the claimant, as a "person" would have a right to an interlocutory appeal.

3. Effect of the appeal

An interlocutory appeal under section 51.014(a) "stays the commencement of the 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).

D. Record

Clerk's Record. Once counsel files the notice of appeal, the clerk's office must prepare the record, which is required to include certain items. TRAP 34.5(a)(1)-(12). It is the clerk's duty to prepare and file the clerk's record if (1) a notice of appeal has been filed and (2) the party responsible for paying for the clerk's record has paid the clerk's fee, or made satisfactory arrangements to pay the fee, or is entitled to appeal without paying the fee. TRAP 35.3(a). Governmental entities are exempted from having to post security for costs.

See TEX. CIV. PRAC. & REM. CODE § 6.001 *et seq.* This exemption has been extended to city officials sued in their official capacities. *Greanias v. City of Houston,* 841 S.W.2d 411, 413 (Tex. App.—Houston [1st Dist.] 1992, no writ). While most clerks and reporters assume that this statute also extends to filing fees and record preparation, this statute does not appear to actually extend so far.

> ***PRACTICE POINTER:*** **Do not count on the clerk!** They cannot read your mind, and if the file is complicated (or a mess), they may have to "guess" at what should be included. Do not make them guess as to the items needed for your appeal. When requesting items, be specific. Do not request an "Original Answer" when four such original answers by various parties are in the record. Do not assume that separately bound exhibits will be included with your "Motion for Summary Judgment" – specify them. In general, it is best to specifically request every necessary item for the appeal, including those the clerk is supposed to include. TRAP 34.5(b). This request must be made at or before the clerk's record is prepared. TRAP 34.5(b). When possible, identify the title of the item to be included, the party that filed the item, and the date of its filing. Be careful what you ask for, however, because the court may impose costs on a party, regardless of the appeal's outcome, for requesting unnecessary items. TRAP 34.5(b)(3).

Reporter's Record. Appellant must request in writing the specific portions to be included, and the request must designate the exhibits to be included. TRAP 34.6(b). Also, counsel must file a copy of the request with the trial court clerk. TRAP 34.69(b)(2).

Deadlines. In an accelerated appeal, the record is due within 10 days after the notice of appeal is filed. TRAP 35.1(b). If the clerk's record is not filed by the deadline, the appellate court clerk must notify the responsible official, with a copy to the parties and to the trial court, advising of the missed deadline and requesting that the record be filed within 10 days. If that deadline is not met, then the appellate court clerk must refer the matter to the appellate court to make whatever order is appropriate to avoid further delay and protect the parties' rights. TRAP 37.3. If the delay in filing the record is not appellant's fault, the appellate court must permit late filing of the record; if it is the appellant's fault, it may allow late filing. TRAP 35.3(c). If the reason for the missed deadline is appellant's failure to pay for the clerk's record, the appeal can be dismissed for want of prosecution, but only after giving the appellant a reasonable opportunity to cure. TRAP 37.3(b).

Filing responsibilities. The trial court clerk and court reporter are obligated to timely file their respective records. TRAP 35.3. If either record is not timely filed, the appellate clerk must notify the trial court clerk or the court reporter of the late filing. TRAP 37.3(a). The appellate clerk must check to see that the clerk's and reporter's records are complete according to the rules. TRAP 37.2. However, the clerk will not ensure that every additional document requested also in the record. As a result, appellate counsel should review both records to make sure that they contain every item requested.

Supplementing the record. An item is missing from the record, a party may supplement the record by sending a letter to the trial court clerk and requesting the clerk to prepare, certify and file in the appellate court a supplement containing the omitted item. TRAP 34.5(c); 34.6(d). Motions to supplement the record, which required the court's leave, are no longer required. *Id.*

E. Docketing Statement

The appellant must file a docketing statement with the appellate clerk when perfecting the appeal. TRAP 32.1. It must include:

- information about appellant's counsel (if represented) or appellant (if not)
- the date the notice of appeal was filed or mailed
- information on the trial court
- date of the judgment or order appealed from
- post-judgment activities that affect time to file the record

- information on all other parties to the trial court's judgment
- general nature of the case
- whether the appeal should be given priority or is accelerated
- whether a reporter's record has or will be requested
- the name of the court reporter
- whether temporary or ancillary relief will be sought
- information relating to any affidavit of indigency
- whether a supersedeas bond has or will be filed
- any other information required by the appellate court.

TRAP 32.1.

The docketing statement is for administrative purposes only, and is *not* jurisdictional. TRAP 32.4. However, the appellant's failure to file it could cause the appellate court to dismiss the appeal. TRAP 42.3(c); *Adkins v. Roberts*, 2004 WL 1416175 (Tex. App.—Tyler 2004, no pet.) (not designated for publication). Any party can file a supplemental docketing statement. TRAP 32.3.

F. The Brief

1. Appellant's Brief

Contents. There are a number of required components of a brief.

1. *Identify of Parties and Counsel.* TRAP 38.1(a) requires that the brief give a complete list of parties to the trial court's judgment or appealable order, and the names and addresses of all trial and appellate counsel.

2. *Table of Contents.* TRAP 38.1(b) requires that the brief contain a table of contents with page references. The table of contents must indicate the subject matter of each issue or point, or each group of issues or points.

3. *Index of Authorities.* TRAP 38.1(c) requires that the brief to have an index of authorities, arranged alphabetically with page references.

4. *Statement of the Case.* TRAP 38.1(d) requires that the brief state concisely the nature of the case (i.e., tort claim against a municipality, suit under the Tort Claims Act against the State, premise defect case under the Tort Claims Act), the course of the proceedings, and the trial court's disposition of the case. Record references are required. The statement of the case should seldom exceed one-half page, and should not discuss the facts.

5. *Issues Presented.* TRAP 38.1(e) introduces the concept of "issues presented," in lieu of points of error. The appellate brief can state either issues presented or points presented for review. Justices strongly recommend the use of issues, not points of error. TRAP 38.1(e) indicates that the statement of an issue or point will be treated as covering every subsidiary question that is fairly included. This new approach is closer to the federal approach, and should avoid appellate courts declaring that complaints were waived by the failure to craft a sufficiently accurate point of error.

6. *Statement of Facts.* TRAP 38.1(f) requires that the brief state concisely and without argument the facts pertinent to the appeal. TRAP 38.1(f) further provides that in a civil case the court may take as true assertions of fact unless the other party contradicts them. The statement of facts must be supported by record references.

7. *Summary of the Argument.* TRAP 38.1(g) requires that the brief contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. The summary must not merely repeat the issues or points presented.

8. *Argument.* TRAP 38.1(h) requires that the brief contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.

9. *Prayer*. TRAP 38.1(i) requires that the brief contain a short conclusion that clearly states the nature of the relief sought.

10. *Signature*. TRAP 9.1 requires that the brief be signed by counsel, and for each attorney

who represents a party on appeal, the brief must contain the attorney's Texas Bar number, mailing address, telephone number, and fax number, if any.

11. *Certificate of Service.* TRAP 9.5(d) and (e) require either an acknowledgment of service by the person served, or a certificate of service signed by the person who made the service, stating the date and manner of service, the name and address of each person served, and if the person served is a party's attorney, the name of the party represented by that attorney.

12. *Appendix.* TRAP 38.1(j) requires an appendix containing (unless voluminous or impractical): (a) the judgment or other appealable order from which relief is sought, (b) the jury charge and verdict or findings of fact and conclusions of law, if any, (c) the text of any rule, regulation, ordinance, etc. (excluding case law) on which the argument is based and the text of any contract or other document central to the argument. The appendix may also contain any other item pertinent to the issues or points on appeal, but must not include items in an attempt to avoid the page limits for the brief.

Amended/Supplemental Briefs. A brief can be amended or supplemented "whenever justice requires" on whatever reasonable terms the appellate court may prescribe. TRAP 38.7.

> ***CAUTION:*** Know the law and, as required by the rules of ethics, argue the law in good faith within it's bounds. Sanctions on appeal may be awarded if you misquote the law or are consciously indifferent to established law under the Texas Tort Claims Act. *See Bridges*, 20 S.W.3d at 115-120 (sanctioning parties and attorneys for frivolous appeal).

2. Appellee's Brief

All of the contents and other rule requirements of the appellant's brief apply to the appellee's brief, except that (1) the list of parties and counsel is not required unless necessary to supplement or correct the appellant's list, (2) the appellee's brief need not include a statement of the case, a statement of the issues presented, or a statement of facts, unless the appellee is dissatisfied with that portion of the appellant's brief, and (3) the appendix need not contain any item already contained in the appellant's appendix. When practicable, the appellee's brief should respond to the appellant's issues in the order presented in appellant's brief. TRAP 38.2.

3. Reply Brief

The appellant may file a reply brief to address any issue contained in the appellee's brief. TRAP 38.3.

4. Length

The appellant's brief and appellee's brief are limited to 50 pages each. The 50-page count excludes pages containing the identities of parties and their counsel, the table of contents, the index of authorities, statement of the case, the issues or points presented, and the appendix. TRAP 38.4. A reply brief is limited to 25 pages, excluding the pages set out above. However, the aggregate number of all pages filed by a party must not exceed 90 pages, excluding the items stated above.

5. Form

Under TRAP 9.4(b), all briefs must be typewritten or printed on 8-1/2 x 11 inch opaque white or near-white paper. Text must be double-spaced, except for footnotes, block quotations, short lists and issues or points of error. TRAP 9.4(d). Briefs must be bound so that they will not fall apart or lose their covers in regular use. TRAP 9.4(f). Briefs should be stapled once in the top left-hand corner or be bound so that they will lie flat when open. TRAP 9.4(f). Front and back covers must be durable, and cannot be plastic, red, black or dark blue. TRAP 9.4(f). The front of the brief must contain the case style and number, the name of the party filing the brief, and the identity and address, etc., of lead counsel for the party. TRAP 9.4(g). Briefs can be printed on both side of the page. TRAP 9.4(a). All margins must be at least one inch. TRAP 9.4(c). TRAP 9.4(e) requires that all documents must be printed in either (i) standard 10-character-per-inch non-proportionally spaced Courier typeface, or (ii) 13-

point or larger proportionally spaced typeface, with footnotes in at least 10 point type.

6. Due Dates

In an accelerated appeal, the appellant's brief is due 20 days after the later of the clerk's record or the reporter's record is *filed* (not due, as the record may be filed early). TRAP 38.6(a). Appellee's brief is due 20 days after appellant's brief is filed. TRAP 38.6(b). Appellant's reply brief is due 20 days after appellant's brief is filed. TRAP 38.6(c).

Computation of time. If the last day of a period for filing a document ends on a Saturday, Sunday, or legal holiday, the filing deadline is extended to the next business day whish is not legal a holiday. TRAP 4.1(a). The deadline is also extended when the court clerk's office is closed or inaccessible during regular business houses on the last day for filing. Inaccessibility can be proved by a certificate of the clerk or counsel, by a parties' affidavit, or other satisfactory proof, and can be contested in like manner. TRAP 4.1(b).

Mail. A document can be filed with an appellate court by mailing it on or before the date it is due, and if received within 10 days of the deadline it is deemed timely filed. TRAP 9.2(b). Conclusive proof of the date of mail consists of (i) a legible postmark; (ii) a United States Postal Service receipt for registered or certified mail; or (iii) a United States Postal Service certificate of mailing. Other proof may also be considered.

> ***PRACTICE POINTER:*** Unlike the rules of civil procedure, the rules of appellate procedure allow for mailing by first-class and express mail. *Compare* TRAP 9.2(b)(1)(A) *with* TRCP 21a.

7. Number of Copies

An original and 5 copies must be filed. TRAP 9.3(a). A court of appeals may require the filing of more or less copies by local rule. TRAP 9.3(a)(2).

8. Rebriefing

TRAP 38.9(a) provides that where the briefing rule has been flagrantly violated, the court can require the brief to be amended, supplemented or redrawn. If another brief is filed that does not comply, the court can prohibit the filing of a brief and proceed as if the party failed to file a brief.

If the court of appeals determines that the case has not been properly presented in the briefs, the court can postpone submission, require additional briefing, or make other orders necessary to secure a more satisfactory submission of the case. TRAP 38.9(b).

G. Oral Argument

Purpose. TRAP 39.2 states the purpose of oral argument. Oral argument should emphasize and clarify the written arguments in the briefs. Counsel should not read from prepared text.

Counsel should assume that all members of the court have read the briefs, and should be prepared to answer questions. Counsel should not refer to matters not in the record.

Requesting. TRAPs 9.4(g) and 39.7 provide that a party desiring oral argument in the court of appeals must request it on the front cover of the party's first brief.

Postponing. Under TRAP 10.5(c), a motion to postpone oral argument must be supported by sufficient cause.

Submission Without Oral Argument. Under TRAP 39.8, a court of appeals can decide a case without oral argument if argument would not significantly aid the court in determining the legal and factual issues presented in the appeal.

> ***PRACTICE POINTER:*** Note that several courts of appeal have begun denying oral argument on a fairly routine basis. It may be a good idea to put a statement in the brief explaining why oral argument would be helpful to the court. This has been specifically suggested by some of the justices sitting on the Dallas court of appeals.

H. Judgment and Mandate

Judgment. TRAP 43.2 states the types of judgment the courts of appeals can issue. The list

of options includes: (1) affirm; (2) modify and affirm (3) reverse and render, (4) reverse and remand; (5) vacate and dismiss; or (6) dismiss. TRAP 43.3 allows the court of appeals, when reversing the trial court, to remand for a new trial in the interest of justice instead of rendering judgment.

Mandate. TRAP 18.1 requires the mandate to be issued 10 days after the date when the time to file a petition for review has expired, or if a petition was filed, 10 days from the last possible day of filing a motion for rehearing on the rejection of the petition for review.

I. Appeals to the Texas Supreme Court

Petitioners seeking Supreme Court review have only 15 pages in which to convince the Court to hear their case. As a result, a premium is placed on succinct appellate advocacy.

1. Jurisdiction

Supreme Court jurisdiction over interlocutory appeals is very limited. By statute, the Supreme Court may only entertain interlocutory appeals in three instances: (1) when the justices of the court of appeals disagree on a material issue of law (dissent), (2) when the court of appeals' decision conflicts with a prior decision of the Supreme Court or another court of appeals (conflict) [*See* Miranda, 133 S.W.3d at 222-223; *White*, 46 S.W.3d at 867], or (3) in certain appeals involving class certification or relating to the free speech/free press clause of the First Amendment. TEX. GOV'T CODE § 22.225.

However, the Supreme Court has also held that it always has jurisdiction to determine whether the court of appeals correctly decided the issue of its own jurisdiction over an interlocutory appeal. *Quest Comm. Corp. v. AT&T Corp.*, 24 S.W.3d 334 (Tex. 2000).

2. Petition for Review

Petitioners seeking relief from the Texas Supreme Court must file a 15 page petition for review with an appendix of necessary documents. The 15 pages do not include the pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, the proof of service and the appendix. TRAP 53.6.

Contents. There are 10 elements of a petition for review, plus a required appendix:

1. *Identity of Parties and Counsel.* TRAP 53.2(a) requires that the petition give a complete list of parties to the trial court's judgment or appealable order, and the names and addresses of all trial and appellate counsel.

2. *Table of Contents.* TRAP 53.2(b) requires that the petition contain a table of contents with page references. The table of contents must indicate the subject matter of each issue or point or each group of issues or points.

3. *Index of Authorities.* TRAP 53.2(c) requires the petition to have an index of authorities, arranged alphabetically with page references.

4. *Statement of the Case.* TRAP 53.2(d) requires that the petition contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following: (1) a concise description of the nature of the case; (2) the name of the judge who signed the judgment or order appealed from; (3) the designation of the trial court and the county; (4) the disposition of the case by the trial court; (5) parties in the court of appeals; (6) the district of the court of appeals; (7) the name of the judges who participated, including the author of the opinion and the author of any separate opinion; (8) the citation for the court of appeals' opinion, if available, or a statement that the opinion was not published; and (9) the disposition of the case by the court of appeals.

5. *Statement of Jurisdiction.* TRAP 53.2(e) requires that the petition state the basis of the Supreme Court's jurisdiction without any argument. Note that jurisdiction is very limited in interlocutory appeals and generally must be based on a dissent in the opinion of the court of appeals or a conflict

in the courts of appeals. TEX. GOV'T CODE § 22.225(c), 22.001(a)(1), (2).

6. *Issues Presented.* TRAP 53.2(f) substitutes the concept of "issues presented" for points of error. The petition can state either issues presented or points presented for review. TRAP 53.2(f) indicates that the statement of an issue or point will be treated as covering every subsidiary question that is fairly included. This new approach is closer to the federal approach, and should avoid appellate courts declaring that complaints were waived by the failure to craft a sufficiently accurate point of error.

7. *Statement of Facts.* TRAP 53.2(g) requires that the petition state concisely and without argument the facts pertinent to the issues or points presented. The statement of facts must be supported by record references.

8. *Summary of the Argument.* TRAP 53.2(h) requires that the petition contain a succinct, clear, and accurate statement of the arguments made in the body of the petition. The summary must not merely repeat the issues or points presented.

9. Argument. TRAP 53.2(i) requires that the petition contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. The argument should include the reasons why the Supreme Court should exercise jurisdiction to hear the case with reference to factors listed in TRAP 56.1(a). The argument need not address all issues or points presented; those not addressed may be covered in the brief on the merits if one is requested by the Court. Statements made in the court of appeals' opinion need not be repeated, since the Court will consider that opinion along with the petition.

10. *Prayer.* TRAP 53.2(j) requires that the petition contain a short conclusion that clearly states the nature of the relief sought.

11. *Appendix.* Since the record is not immediately forwarded to the Supreme Court, TRAP 53.2(k) requires petitioner to attach an appendix which must include (unless voluminous or impractical):

- the judgment/order appealed from
- the jury charge and verdict or findings of fact/conclusions of law
- the court of appeals' judgment and opinion
- the text of rule, regulation, ordinance, etc. on which the argument is based, and the text of any contract or document central to the argument.

Other items "pertinent" to the issues may be included in the appendix, but must not be included in an attempt to avoid the page limitations. TRAP 53.2(k)(2).

The Supreme Court may thereafter request that the record be filed, with or without granting the petition for review. TRAP 54.1.

Where to file. The petition for review is filed with the Supreme Court clerk. TRAP 53.7(a). If the petition is mistakenly filed in the court of appeals, it is deemed to have been filed that day with the Supreme Court clerk, and the court of appeals clerk must immediately send it to the Supreme Court clerk. TRAP 53.7(g).

When to file. The petition for review must be filed within 45 days of the last action in the court of appeals (this is the date of the court of appeal's judgment, unless a motion for rehearing was filed). TRAP 53.7(a).

If a timely petition for review is filed, any other party may also file a petition for review within 45 days after the last timely motion for rehearing is overruled, or within 30 days after the preceding petition is filed, whichever is later. TRAP 53.7(c).

Number of copies. An original and 11 copies must be filed. TRAP 9.3(b).

Response. Any party may file a response, but it not mandatory. If no response is filed, or if a waiver of response if filed, the Court will consider the petition without a response. Any response to a petition for review must be filed within 30 days after the petition is filed, and is limited to 15 pages (exclusive of the sections noted above). TRAP 53.6, 53.7(d). If no response is going to be filed, the Supreme Court strongly prefers that a letter stating that no response will be filed be sent to the clerk.

Reply. Any reply must be filed within 15 days after the response is filed, and is limited to 8 pages. TRAP 53.5; 53.6; 53.7(e).

Length. The petition and any response is limited to 15 pages. TRAP 53.6. The reply brief may be 8 pages. TRAP 53.6.

Briefs to the Supreme Court must follow the same form and requirements of other briefs. TRAP 9.4. Briefs of the merits, if requested by the Supreme Court, must be no longer than 50 pages each, except petitioner's reply brief, which may be 25 pages. TRAP 55.6.

Brief on the merits must be filed with the Supreme Court. TRAP 55.7. The petitioner's brief is due 30 days after receipt of notice from the Supreme Court, when specified by the Court. Respondent's brief is due within 20 days after receiving the petitioner's brief. TRAP 55.7. The petitioner may file a reply brief within 15 days after receiving the respondent's brief. Note that currently the Supreme Court requires briefs on the merits to be filed by 3:00 p.m. on the due date, and the mailbox rule does not apply. In other words, the briefs must be physically filed in the clerk's office by 3:00 on the due date.

Disposition. TRAP 60.2 specifies the types of judgment the Supreme Court can issue. The list of options includes: (1) affirm the judgment of the court of appeals in whole or in part; (2) modify and affirm the court of appeals; (3) reverse and render the judgment that the court of appeals should have rendered; (4) reverse and remand to the court of appeals or trial court; (5) vacate both lower court judgments and dismiss; or (6) vacate and remand in light of changes in the law.

TRAP 60.3 states that when the Supreme Court reverses the court of appeals, it may, in the interests of justice, remand for a new trial even where rendition is otherwise appropriate. The Supreme Court can also make any other appropriate order as the law and the nature of the case may require. TRAP 60.6.

IV. CONCLUSION

Blitzkrieg (n.): *Any swift, sudden, overwhelming attack; lightning war.* WEBSTER'S UNABRIDGED DICT. 196 (2nd ed. 1983).

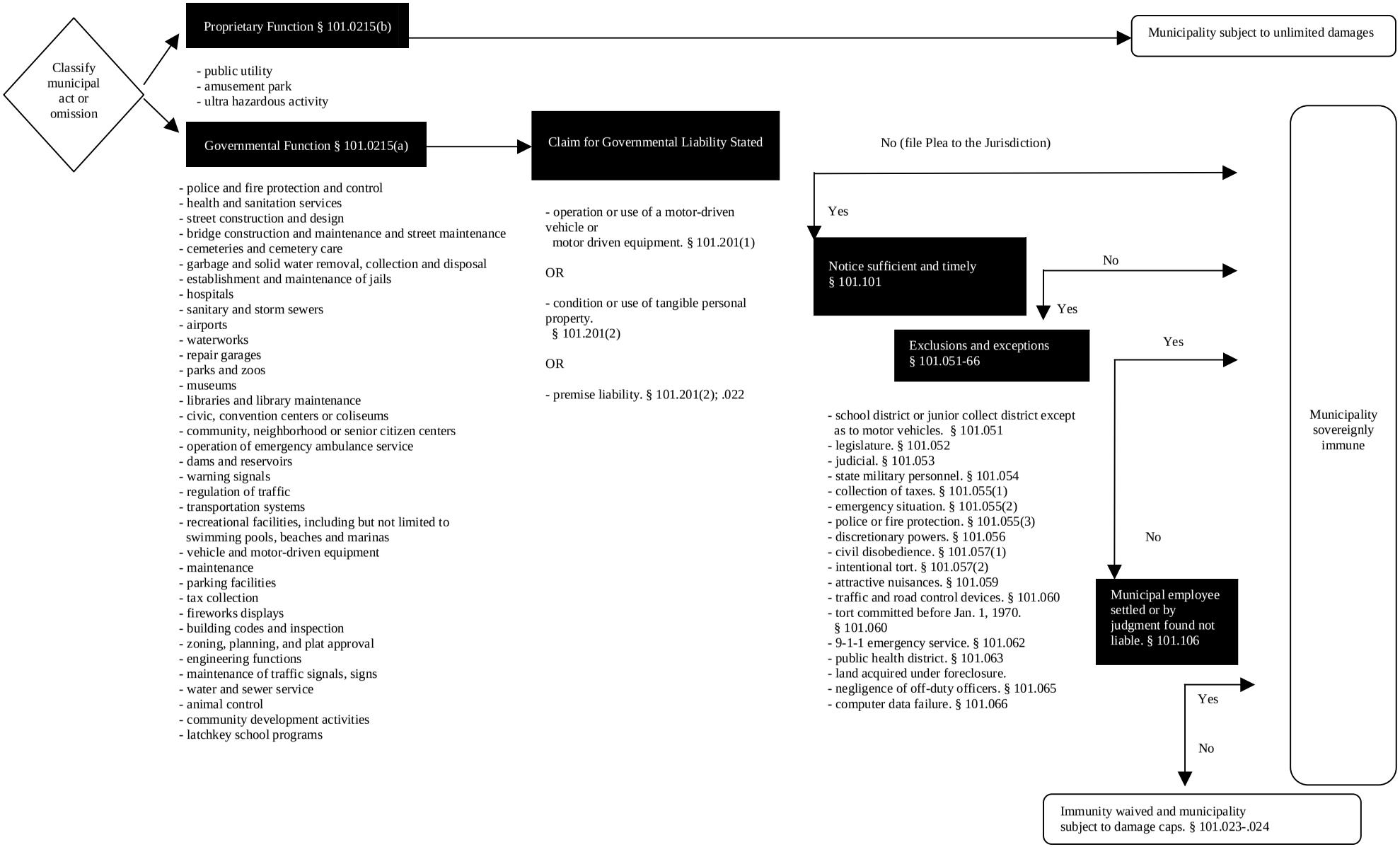
The term *blitzkrieg* best describes the procedure encompassed by the filing of a plea to the jurisdiction. Governmental entities no longer have to wait (sometimes until the end of the discovery period, *see* TRCP 166a(i)) to seek dismissal via summary judgment. Compared to the usual defensive tactics of thrust, parry and engage, governmental entities have a new, potentially lethal weapon in their arsenal, allowing a potentially devastating first-strike capacity, cutting right to the heart of the plaintiff's claims at the very onset of litigation.

There is a single, simple solution to this dilemma, however. Plaintiffs can render a plea to the jurisdiction impotent by carefully analyzing their claims and clearly pleading them within the specific language of the Texas Tort Claims Act (or other waiver of sovereign immunity).

APPENDIX A

TEXAS TORT CLAIMS ACT FLOWCHART

ANDY MESSER
ATTORNEY & COUNSELOR
©2000 - All Rights Reserved



APPENDIX "B"

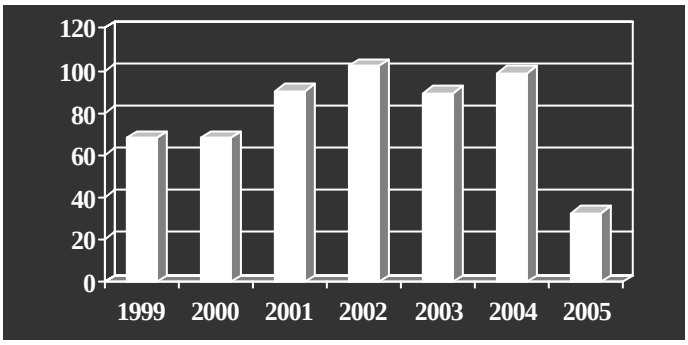
INTERLOCUTORY APPEAL STEPS

STEP	ACTION	RULES	DEADLINE	COMMENT
1	**ORDER** granting or denying plea to the jurisdiction.			**ALWAYS, CHECK THE LOCAL RULES FOR YOUR COURT OF APPEALS.** Some of the courts significantly change the requirements
2	**NOTICE OF APPEAL** filed by appellant in the trial court. Serve copy on appellate court and all parties to the trial court proceeding.	TRAP 25.1, 26.1(b)	20 days from Step 1	The grant or denial of a plea to the jurisdiction by a governmental unit is allowed under CPRC § 51.014(a)(8).
3	**DOCKETING STATEMENT** filed by appellant in court of appeals.	TRAP 32.1	Step 2	Due "upon perfecting."
4	**PAYMENT.** Appellant normally must pay a $125 filing fee, arrange to pay trial court clerk for clerk's record, and arrange to pay the court reporter for the reporter's record, if any. Most federal and State agencies, cities and water districts are exempt from pre-payment. Tex. Civ. Prac. & Rem. Code chap. 6.	TRAP 5, TRAP 35.3(a)(2) TRAP 35.3(b)(3)	Upon filing appeal Before clerk's record is prepared Before reporter's record is prepared	The notice of appeal acts as a request to the trial court clerk to prepare the record, but appellant must pay or "arrange to pay" fees for record before clerk or reporter has a duty to prepare the record. Talk to trial court clerk and reporter to confirm there are no fees due.
5	**SUPPLEMENTATION**. Parties may file request with trial court clerk to include in clerk's record matters additional to those in TRAP 34.5(a)	TRAP 34.5(b)	Before clerk's record is prepared	Review the clerk's record to insure that all important pleadings and documents are included.
6	**APPELLATE RECORD** is filed by trial court clerk or reporter in the appellate court. Appellate clerk notifies parties of dates the clerk's & reporter's records are filed.	TRAP 35.1(b); 37.2	10 days from Step 2	Timely filing of record is the responsibility of the trial clerk or reporter, but appellant may still lose if at fault for late filing. TRAP 37.3(b), (c). Since this is for non-payment for the record, it should not apply to interlocutory appeals by governmental units exempt from pre-payment.
7	**APPELLANT'S BRIEF** filed in appellate court (50 pages; original + 5 copies; can be any color except red, black or dark blue). An **APPENDIX** must also be filed. It may be bound with the brief, or separately. It should be tabbed and indexed.	TRAP 9.3(a)(1)(C), 9.4, 38.4, 38.6(a) TRAP 9.4(h)	20 days after Step 6	Appellant may file motion to extend time to file briefs in appellate court (original + 2 copies). TRAP 9.3(a)(1)(B), 10.5(b), 38.6(d). Oral argument request must be on cover or it is waived. TRAP

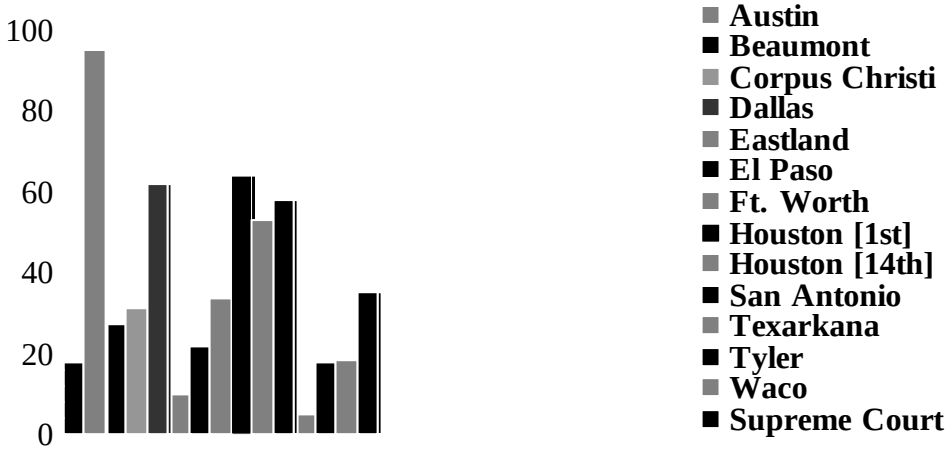
				39.7.
8	**APPELLEE'S BRIEF** filed in appellate court (50 pages; original + 5 copies; prohibited colors same as appellant's brief).	TRAP 9.3(a)(1)(C), 38.4, 38.6(b)	20 days after Step 7	Runs from filing date of appellant's brief. Oral argument request must be on cover or it is waived. TRAP 39.7.
9	**APPELLANT'S REPLY BRIEF** filed in appellate court (25 pages, original + 5 copies; prohibited colors same as appellant's brief) (optional)	TRAP 9.3(a)(1)(C), 38.4, 38.6(c)	20 days from Step 8	Pinpoint only a few, salient issues in which to reply.
10	**NOTICE TO PARTIES RE: ORAL ARGUMENT OR SUBMISSION** sent by appellate clerk	TRAP 39.9	21 days before Step 11	Oral argument will usually be allowed if requested.
11	**ORAL ARGUMENT** or written submission in appellate court.	TRAP 39.9 TRAP 40.1(b)	As set by appellate court	Interlocutory appeals are always accelerated by law. TRAP 28.1.
12	**JUDGMENT** issued by appellate court	TRAP 43.1, 47.1	"Promptly"	
13	**MANDATE** issues. It is effective when issued.	TRAP 18.1, 18.6	At Step 12 or final disposition	
14	Consider filing a **PETITION FOR REVIEW** in the Texas Supreme Court.	TRAP 53	45 days of the last action in the court of appeals (the judgment date, unless a motion for rehearing is filed)	The Texas Supreme Court has **very** limited jurisdiction to hear petitions in interlocutory appeals.

APPENDIX "C"
PLEA TO THE JURISDICTION STATISTICS

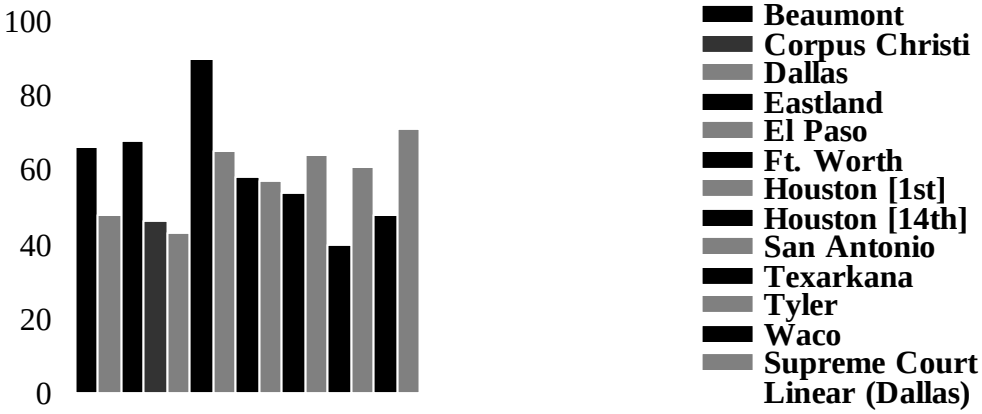
Number of Appeals Per Year



Number of Appeals, Per Court
1999 - 2005



Government's Chance of Success, Per Court
1999 - 2005



APPENDIX "D"

NO. 05-04-00265-CV

Court of Appeals
Fifth Appellate District of Texas
at Dallas

City of Allen and	§	From the 416th District Court
North Texas Municipal Water District,	§	
	§	
vs.	§	Collin County (No. 416-2384-02)
	§	
Jamil Ahmed, et al.	§	

APPELLANT CITY OF ALLEN'S MOTION FOR REHEARING EN BANC

TO THE COURT OF APPEALS:

Appellant City of Allen submits this motion for rehearing en banc of the judgment this Court rendered on March 23, 2005.

The question presented to the Court is whether jurisdiction of the trial court over one non-immune claim grants jurisdiction over other immune claims. The question is of exceptional importance to the immunity law of this state, for which the en banc procedure is reserved. *See* TRCP 41.2(c). This case also involves precedent setting error of exceptional public importance, which directly conflicts with prior precedent of the Dallas Court of Appeals and many other appellate courts.

I.
ISSUES

Issue No. 1. This Court's ruling conflicts with prior rulings from the Dallas Court of Appeals.

Issue No. 2 This Court's ruling conflicts with prior rulings from the majority of other courts of appeals.

Issue No. 3 This Court's ruling conflicts with governmental entities' rights to immunity from suit and an interlocutory appeal.

II.
ARGUMENT & AUTHORITIES

A plaintiff's claims against a governmental entity are not inter-dependent. Each claim should be reviewed separately to determine whether that specific claim waives immunity from suit. Jurisdiction over one non-immune claim does not, and as a matter of law cannot, confer jurisdiction over immune claims.

The opinion in *City of Allen v. Ahmed*, 2005 WL 668228 (Tex. App. – Dallas 2005) asserts that, if the trial court has jurisdiction over one claim, the trial court has jurisdiction over every other claim. Op. at p. 6. This is the first time the Dallas Court of Appeals has announced this principle involving a governmental entity. This all-or-nothing jurisdictional approach is contrary to the opinions of most appellate courts, contrary to two recent opinions of this Court, and contrary to the fundamental principles and law of sovereign immunity.

1. What most appellate courts do in cases involving governmental entities – they review each cause of action separately for immunity analysis

Most intermediate appellate courts in Texas, including the Dallas Court of Appeals, decide whether each specific claim against a government entity waives immunity. The Texarkana, San Antonio, Fort Worth, Waco, Corpus Christi, Austin, and Amarillo courts of appeals have found jurisdiction as to some claims (which are allowed to proceed in the trial court) and a lack of jurisdiction as to other claims (which are dismissed). *See City of Texarkana v. Cities of New*

Boston, 141 S.W.3d 778 (Tex. App. – Texarkana 2004, no pet.); *Durbin v. City of Winnsboro*, 135 S.W.3d 317 (Tex.App.—Texarkana 2004, pet. denied); *Salas v. Wilson Memorial Hospital District*, 139 S.W.3d 398 (Tex. App. – San Antonio 2004, no pet.); *University of North Texas v. Harvey*, 124 S.W.3d 216, 225 (Tex. App. – Fort Worth 2004, pet. filed); *Padgett v. City of Madisonville*, 2004 WL 254014 (Tex. App. – Waco 2004, no pet.); *Nueces County v. Thornton*, 2004 WL 396608 (Tex. App. – Corpus Christi 2004, no pet.); *Cozby v. City of Waco*, 110 S.W.3d 32 (Tex. App. – Waco 2002, no pet.); *State of Texas v. Shumake*, 131 S.W.3d 66, 82 (Tex. App. – Austin 2003, pet. filed); *Webb County v. Sandoval*, 88 S.W.3d 290 (Tex. App. – San Antonio 2002, no pet.); *State v. Riemer*, 94 S.W.3d 103 (Tex. App. – Amarillo 2002, no pet.); *City of San Antonio v. Cortes*, 5 S.W.3d 708 (Tex.App.—San Antonio 1999, no pet.). The appellate courts have also properly decided partial pleas to the jurisdiction, contrary to the principle found in *Ahmed*. *Bexar County Appraisal District v. Wackenhut Corrections Corporation*, 52 S.W.3d 795 (Tex. App. – San Antonio 2001, no pet); *Martinez v. City of Loredo*, 2001 WL 950704 at *1 (Tex. App. – San Antonio 2001, no pet.); *Nussbaum v. University of Texas Medical Branch at Galveston*, 2000 WL 1864048 at *2 (Tex. App. – Houston [1st Dist.] 2000, pet. denied).

2. What this court usually does in cases involving government entities – it reviews each cause of action separately for immunity analysis

This Court, itself, has twice joined the majority of appellate courts by reviewing whether each specific claim against a governmental entity waives immunity, finding that jurisdiction over one non-immune claim does not confer jurisdiction over immune claims. Two years ago in *Dallas Metrocare Services v. Pratt*, 2002 WL 31238640 (Tex. App. – Dallas 2002), *rev'd in part on other grounds, Dallas Metrocare Services v. Pratt*, 124 S.W.3d 147 (Tex.2003) the Court addressed a government employee's tort claims for defamation, abuse of process, malicious prosecution and

intentional infliction of emotional distress brought under the Tort Claims Act.[1] In the same suit the employee also alleged he had been targeted for retaliation for reporting violations of the Health and Safety Code. The government filed a plea to the jurisdiction, which was denied by the trial court. The government then filed an interlocutory appeal. This Court (Justices James, Wright, and Richter) found no waiver of immunity for the Tort Claims Act theories of recovery and dismissed those claims, but found a waiver of immunity as to the Health and Safety Code claim which was remanded to the trial court for further proceedings.

Last year the Court again found that jurisdiction over one a non-immune claim does not confer jurisdiction over immune claims. In *Hunt County v. Dallas, Garland and Northeastern Railroad*, 2004 WL 1178609 (Tex. App. – Dallas 2004, no pet.) this Court (Justices Morris, Whittington, and James) addressed each claim in the plaintiff's petition to determine whether each claim was subject to immunity from suit. Upon review, the Court dismissed claims of nuisance as barred by immunity, but found a waiver of immunity for claims of negligence and inverse condemnation which were remanded to the trial court for further proceedings.

The *Ahmed* opinion, which does not mention either *Dallas Metrocare Services* or *Hunt County*, broke away from these holdings (and from the holdings of the majority of appellate courts) to follow a completely different procedure – that jurisdiction over one non-immune claim creates jurisdiction over immune claims. There is, thus, a conflict of opinions in the Dallas Court of Appeals: *Ahmed* contradicts the holdings in *Dallas Metrocare Services* and *Hunt County.*

[1] Like the plaintiff in *Dallas Metrocare Services*, the plaintiffs in this case initially sued the City of Allen for various intentional torts. [Clerk's Record ("CR") 5-22]. The plaintiffs started pleading with a shotgun approach, suing the City for 7 causes of action, many of which could not be asserted *ab inititio* as a matter of law. The City, for example, was immune from suit for claims of intentional torts of trespass [CR 13], fraud [CR 15], misrepresentation [CR 15], and civil conspiracy [CR 14]. Tex. Civ. Prac. & Rem. Code § 101.057(2). The City was also sued for punitive damages [CR 21], from which the City was immune as a matter of law. Tex. Civ. Prac. & Rem. Code § 101.024; *City of LaPorte v. Barfield*, 898 S.W.2d 288, 299 (Tex. 1995)("The [Tort Claims Act] does not permit punitive damages… ."). Under the *Ahmed* opinion, the City would necessarily be subjected to discovery and depositions on these claims, and even have to bear the unnecessary burden of discovery regarding punitive damages. The *Ahmed* opinion cuts off the City's ability to contest the jurisdiction of these claims – the antithesis of immunity from suit.

Although it may sit in 3-justice panels, a court of appeals sits as a single, unitary body. *O'Connor v. First Court of Appeals*, 837 S.W.2d 94, 96 (Tex. 1992). The en banc procedure should be used here to maintain a uniformity of this Court's opinions. *See* TRAP 41.2(c).

3. The underlying cases supporting the Ahmed jurisdictional principle are distinguishable – they don't involve governmental entities

Ahmed references three cases that purportedly stand for the proposition that, if a court has jurisdiction over one claim it has jurisdiction over all claims. Op. at 6. The proposition, at its core, is erroneous. For this proposition, *Ahmed* references (but does not directly cite) *Harris County Flood Control v. PG&E Tex. Pipeline, L.P*., 35 S.W.3d 772 (Tex. App. – Houston [1st Dist.] 2000, pet. dism'd w.o.j.), *Aledo ISD v. Choctaw Properties*, L.L.C., 17 S.W.3d 260 (Tex. App. – Waco 2000, no pet.), and *Blum v. Restland, Inc*., 971 S.W.2d 546 (Tex. App. – Dallas 1997, pet. denied). The first cited case, *Harris County Flood Control*, does not stand on its own legal authority, but references (not as a direct cite) *Aledo ISD*, *Blum* and *Speer v. Stover*, 685 S.W.2d 22, 23 (Tex. 1985). The second cited case, *Aledo ISD*, does not stand on its own authority, but references *Blum*, *Speer*, and *City of Cleburne v. Trussell*, 10 S.W.3d 407, 409-410 (Tex. App. – Waco 2000, no pet.). *Trussell* in turn does not stand on its own legal authority, but references *American Pawn & Jewelry Inc. v. Kayal*, 923 S.W.2d 670, 672 (Tex. App. – Corpus Christi 1996, writ denied) and *Speer*. From this evolution of citations, the genesis of the argument are the cases of *American Pawn*, *Blum*, and *Speer*. Each case will be reviewed in depth to determine the accuracy of the referenced (but not directly cited) principle of law.

American Pawn analysis. *American Pawn* involved a breach of contract and conversion action against two private parties. It was not a case against the government and did not involve the government's immunity and interlocutory appeal rights. It is distinguishable on this basis alone.

American Pawn did involve a plea to the jurisdiction, which was upheld on appeal, and in its analysis the Corpus Christ court of appeals stated that "[a] plea to the jurisdiction seeks dismissal of *a cause of action* when a jurisdictional defect cannot be cured." *American Pawn & Jewelry Inc. v. Kayal*, 923 S.W.2d at 672 (emphasis added), *citing Speer v. Stover*, 685 S.W.2d at 23. This principle is exactly the point the City is making. Each *cause of action* must be judged on its own merits to determine whether immunity has been waived. *American Pawn* is not helpful to the principle cited in *Ahmed*.

Speer analysis. *Speer* addressed specific performance of a contract involving two private parties during an estate administration proceeding. It was not a case against the government and did not involve the government's immunity and interlocutory appeal rights. It is distinguishable on this basis alone.

Speer did involve a plea to the jurisdiction (misnamed a "plea in abatement"), and the Supreme Court stated that "[s]ustaining a plea to the jurisdiction requires dismissal." *Speer v. Stover*, 685 S.W.2d at 23. The court of appeals in the underlying case found the plea order was interlocutory and not appealable, but the Supreme Court found the order dismissed the entire case and was a final, appealable order. The Supreme Court did not address the contested principles involved in this case. The Supreme Court did not address multiple claims when immunity is at issue. The Supreme Court did not hold that jurisdiction over one claim provides jurisdiction over all claims. The Supreme Court has never written on the issue, and therefore, there is no binding precedent from the Supreme Court on the issue. *Speer* is silent as to the principle *Ahmed* espouses.

Blum analysis. *Blum* addressed tort and contract actions against two private parties involved in a bankruptcy proceeding. It was not a case against the government and did not involve the government's immunity and interlocutory appeal rights. It is distinguishable on this basis alone.

Blum did involve a plea to the jurisdiction, and the Dallas Court of Appeals did say that "[i]f a court lacks subject matter jurisdiction, it has no discretion but to dismiss the case" citing *Qwest Microwave Inc. v. Bedard*, 756 S.W.2d 426, 440 (Tex. App. – Dallas 1988, no pet.). Based on the citation to *Qwest Microwave*, and because the trial court had jurisdiction over at least part of the case, the Dallas Court of Appeals found the trial court did not err in denying the plea to the jurisdiction.

The foundation of *Blum* is the holding in *Quest Microwave*. Review of *Qwest Microwave* does not support the principle cited in *Ahmed*. *Qwest Microwave* was a probate case involving a writ of mandamus where the court reviewed jurisdictional issues. In *Qwest Microwave* the Dallas Court of Appeals held that "[a] court lacking jurisdiction over *a claim* has no alternative but to dismiss it." *Qwest Microwave Inc. v. Bedard*, 756 S.W.2d at 440 (italics added). Like the statement in *American Pawn*, this statement is again exactly the point the City is making. Each *claim* must be judged to determine whether immunity has been waived. While this Court held in *Blum* that jurisdiction as to one claim is good for all, the foundation of this holding from *Qwest Microwave* does not support the ruling. Moreover, this Court has not followed the holding in cases involving governmental entities. In *Dallas Metrocare Services* and *Hunt County*, both of which involved governmental entities, this Court ignored the all-or-nothing jurisdictional principle of *Ahmed* and split the various claims on jurisdictional grounds. This Court's rulings in *Dallas Metrocare Services* and *Hunt County*, supported by the proper application in *Qwest Microwave*, are the correct jurisdictional approach involving governmental entities.

Of the three foundational cases at the core of the *Ahmed* holding - *American Pawn*, *Speer* and *Blum* - none involve governmental entities. None involve immunity from suit. None involve the right to interlocutory appeal under TEX. CIV PRAC. & REM. CODE § 51.014(a)(8). Because

these foundational cases do not involve these important governmental rights, they are distinguishable.

4. The policy underlying sovereign immunity supports independent immunity analysis of each claim

The *Ahmed* opinion undermines the established principles of immunity from suit. The United States Supreme Court has stated immunity from suit "is an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)(dealing with qualified immunity from suit). "The privilege is an *immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Saucier v. Katz*, 533 U.S. 194, 200 (2001)(italics in original)(dealing with qualified immunity from suit). Immunity from suit protects government entities from discovery, *City of Galveston v. Gray*, 93 S.W.3d 587, 591-92 (Tex. App. – Houston [14th Dist.] 2002, pet. denied), and should be decided at the earliest possible stage in the lawsuit so that the costs and expenses of trial are avoided. *Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *see also Hunter v. Bryant*, 502 U.S. 224, 227 (1991)(dealing with qualified immunity from suit)("We repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation"). Governmental entities entitlement to be free from suit is effectively quashed if the trial court erroneously assumes jurisdiction and subjects the government to pre-trial discovery and the costs incident to litigation on immune claims. *See City of Galveston v. Gray*, 93 S.W.3d 587, 591 592 (Tex. App. – Houston [14th Dist.] 2002, pet. denied)(trial court abused its discretion by subjecting government to discovery while plea to the jurisdiction was pending).

Consonant with this principle, if the trial court denies a plea to the jurisdiction based on immunity from suit, the government has a right to an interlocutory appeal. TEX. CIV. PRAC. & REM. CODE § 51.014 (a)(8). The policy reason for providing an interlocutory appeal from an order

denying a plea to the jurisdiction is that the government should not have to expend resources in trying a case on the merits if it is immune from suit. *Harris County Food Control Dist. v. PG & E Tex. Pipeline*, 35 S.W.3d 772, 773-74 (Tex. App. – Houston [1st Dist] 2000, pet. dism'd w.o.j.). Consequently, the government has two interdependent, substantive rights: the right to be immune from suit from all claims unless there is a waiver, from which flows the right to an immediate, accelerated appeal if the trial court denies immunity from suit asserted in a plea to the jurisdiction.

If the all-or-nothing jurisdictional principle in *Ahmed* is correct, the government's rights will be seriously impaired. For example, if claimants assert one non-immune claim with seven immune claims, together with a claim for exemplary damages, the government would be forced to litigate every single claim, could not legally assert a plea to the jurisdiction as to the seven immune claims (including the immune claim of exemplary damages), and thereby, would stand to lose the substantial rights of immunity from suit and to an interlocutory appeal involving the immune claims. The public would ultimately bear this cost. *See City of Austin v. L.S. Ranch, Ltd*., 970 S.W.2d 750, 753 (Tex. App. – Austin 1998, no pet.)(noting high cost of defending suits against governmental entities is ultimately borne by the public, providing motivation for allowing any jurisdictional issue to be resolved before merits of suit are litigated).

There is also a recognized distinction between immunity from suit and immunity from liability. *Texas Dep't of Transp. v. Jones*, 8 S.W.3d at 638. Immunity from liability protects the government from judgment, even when the legislature has expressly consented to suit. *Gen. Serv. Comm'n v. Little-Tex Insulation Co*., 39 S.W.3d 591, 594 (Tex. 2001). Immunity from suit on the other hand bars a suit against the government absent express consent. *Id.* If the all-or-nothing jurisdictional principle in *Ahmed* is correct, immunity from suit at best would be relegated to being only an immunity from liability. If one claim was validly asserted and seven claims were subject to immunity in a single suit, the exclusions under the Tort Claims Act which can provide

immunity from suit [Tex. Civ. Prac. & Rem. Code §§101.051-.066], for example, could only be asserted as affirmative defenses under the principle in *Ahmed*. There would be no immunity from suit for the seven immune claims. In large part, the government's right to be free from suit would be effectively lost by subjecting the government to pre-trial discovery and the costs incident to litigation on immune claims. Only on appeal could the government demonstrate that the trial court never had jurisdiction over the immune claims. As a matter of policy, the all-or-nothing jurisdictional principle of *Ahmed* cannot stand. The public interest must be favored over any private interest. *City of Arlington v. Whitaker*, 977 S.W.2d 742, 745 (Tex. App. – Fort Worth 1998, no writ), *citing* TEX. GOV'T CODE § 311.021.

III.
PRAYER

The City asks the Court to grant this motion for rehearing en banc, withdraw its former opinion, examine each cause of action for immunity analysis, reverse the trial court's order and render judgment that the plaintiffs' claims against the City be dismissed, with prejudice, for want of jurisdiction. Alternatively, if this Court determines that jurisdiction exists as to some claims, but not all claims, the City requests that the Court dismiss the claims for which no jurisdiction exists.

Respectfully Submitted,

WM. ANDREW MESSER
State Bar No. 13472230
6947 Main Street
469.633.1133 – Telephone
469.633.1177 - Telecopier

COUNSEL FOR THE CITY OF ALLEN

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant City of Allen's motion for rehearing was served on April 6, 2005 via regular US mail to counsel for all parties to this appeal and also counsel for all other defendants in the case underlying this appeal as follows:

Mr. Chad M. Ruback
Godwin Grueber, P.C.
Renaissance Tower
1201 Elm St., Suite 1700
Dallas, Texas 75270
Counsel for Plaintiff/Appellee

Mr. John D. Sloan
Gardere & Wynne
3000 Thanksgiving Tower ,1601 Elm Street
Dallas, TX 75201-4761
Counsel for Defendants Legacy/Monterey Homes,
Meritage Corp; and Elmer Carino

Mr. David M. Kleiman
Kleiman, Lawrence, Baskind, Fitzgerald, LLP
4849 Greenville, Suite 1605
Dallas, Texas 75206
Counsel for Defendants D.R. Horton, Inc.;
DR Horton-Emerald Homes, Ltd.; and Dr. R. Horton-Texas, Ltd.

Mr. James T. Jeffrey, Jr
Law Office of Jim Jeffrey
2214 Park Springs Blvd
Arlington, Texas 76013
Counsel for Defenant/ Appellant
North Texas Municipal Water District

Craig P. Henderson
5949 Sherry Lane, Suite 550
Dallas, Texas 75225
Counsel for Defendants Goodman Family of Builders,
L.P.; K. Hovanian Developments of Texas, Inc.; and K. Hovanian, Inc.

_____
WM. ANDREW MESSER