

**GOVERNMENTAL IMMUNITY:
HISTORICAL OBSERVATIONS AND RECENT DEVELOPMENTS**

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CHAPTER 27

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I. THE CURRENT STATE OF IMMUNITY LAW

The contours of sovereign immunity are simple. Absent a waiver of sovereign immunity, a state entity cannot be sued. See *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam); *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). That is, without the State's consent, a trial court has no subject-matter jurisdiction over a suit against the State. See *Jones*, 8 S.W.3d at 638.

Permission to sue the State can be manifested either by a constitutional provision, a legislative enactment or, in limited circumstances, by conduct. For the Legislature to waive sovereign immunity, it must do so by clear and unambiguous language. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694-96 (Tex. 2003). Conduct can be divided into substantive conduct and litigation conduct. Although the Supreme Court has suggested that there may be a waiver of immunity from suit based on a government entity's substantive actions regarding a contract, see *Fed. Sign*, 951 S.W.2d at 408 n.1, the Court has never found such a waiver. The theory appears to have been rejected by at least one majority opinion. *Gen. Servs. Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 597 (Tex. 2001), 39 S.W.3d at 595 ("there is but one route to the courthouse for breach-of-contract claims against the State, and that route is through the Legislature"). And it appears to have been rejected by the Court, at least implicitly, in *Tex. A&M Univ. v. Koseoglu*, 233 S.W.3d 835 (Tex. 2007), when the Court rejected the plaintiff's allegations that the university had waived its immunity by conduct and further held that the plaintiff's theory of waiver was so incurable that it did not warrant repleading. The Court has recently held that there is a limited waiver of immunity from suit for litigation conduct. That is, if a government entity seeks affirmative monetary relief, it waives immunity from suit for counterclaims that are properly defensive to the government's affirmative claim, but only to the extent that such a counterclaim would result in an offset, rather than affirmative recovery against the government. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006).

The usual mechanism for challenging jurisdiction is a plea to the jurisdiction. It is the plaintiff's burden to establish that jurisdiction exists in response to a State entity's plea, *Tex. Ass'n of Bus. v. Tex. Air Contr. Bd.*, 852 S.W.2d 440, 446 (Tex. 1993), and that burden is high, *Taylor*, 106 S.W.3d at 692. So long as there is no evidence attached to the plea or the response, or the facts are not contested, the plea tests the pleadings on

their face. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-28 (Tex. 2004). This involves a two-step inquiry. First, there must exist a cause of action for which immunity has been waived, which is a pure question of law. See *Taylor*, 106 S.W.3d at 692. Second, the facts alleged in the petition must demonstrate that their "real substance" states a claim that falls within that waiver of immunity. E.g., *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343-45 (Tex. 1998). If the plaintiff's pleadings do not support a claim that fits, as a matter of law within the waiver, the lawsuit must be dismissed. *Miranda*, 133 S.W.3d at 226-28. The same test is also applied after a jury verdict, to determine whether the facts fall within the category of facts that, as a matter of law, are sufficient to support a claim against the governmental entity. E.g., *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006) (addressing assertion of immunity after trial court entered judgment on jury verdict).

In some cases, the question of immunity may appear to turn on factual determinations, such as certain questions of tort or property law. To permit the Court to decide those immunity questions at an early stage, the parties may attach evidence to a plea to the jurisdiction or present evidence in response. The trial court has an obligation to address any fact issues raised. The standard is akin to the standard for traditional summary judgment. *Miranda*, 133 S.W.3d at 226-28. If the evidence demonstrates a disputed fact issue that goes to the merits of the case, then the plea is denied and the fact issue goes to the finder of fact in a trial. *Id.*

A plea to the jurisdiction acts as notice to the plaintiff that his petition is insufficient to support a cause of action and, therefore, acts as a special exception. *Harris County v. Sykes*, 136 S.W.3d 635, 638-39 (Tex. 2004); *Miranda*, 133 S.W.3d at 226-27. If the pleadings negate the jurisdiction, the case must be dismissed. If they do not, the plaintiff is entitled to a reasonable time to amend the petition to state a cause of action. *Sykes*, 136 S.W.3d at 639. However, because the plea acts as a special exception, if a reasonable time passes between the filing of the plea and the hearing and the plaintiff chooses to rest on the initial pleading, the court must grant the plea to the jurisdiction and dismiss the lawsuit. *Id.*

The perennial problem is explaining *why* immunity applies. That is best answered by addressing the underpinnings of the doctrine.

II. OLD HISTORY: THE SOURCES OF TEXAS IMMUNITY LAW.

This article will address the current state of the law governing sovereign and governmental immunity. Because the debate about immunity is, in effect, a debate about the scope of the courts' authority to issue mandatory orders to the other departments of government, the article will begin by briefly outlining the origin of the doctrine in common, American, and Texas law, before addressing the most recent developments in immunity jurisprudence.

A. The Common Law

Critics sometimes oppose immunity as being inconsistent with democratic principles because it is based on the proposition that “the King can do no wrong,” used by William Blackstone in his *Commentaries on the Laws of England*.

That understanding of immunity is a misreading of the common law and misapprehends the policy underpinnings of the immunity doctrine. Blackstone did not say that the King could not be corrected by the courts—indeed, he described the ability to force the sovereign to act within the confines of the law and with regard to the rights guaranteed to individuals by both acts of parliament and the unwritten English “constitution” to be “one of the principal bulwarks of civil liberty.” 1 W. Blackstone, *Commentaries on the Laws of England* 230 (1765) (emphasis added).

Rather, Blackstone drew upon several distinctions between the different aspects of the King's authority and prerogative under English law. His description of the doctrine we now know as “sovereign immunity” is made in the context of the sovereign's “political power and authority,” a concept he also referred to as the King's “dignity.” *Id.* at 233-34. Moreover, it was made in refutation to the argument—long put forward by German and Italian legal thinkers, that the German and Italian emperors held a superior sovereignty over the Kings of England such that England had no separate and independent political authority. Because the King embodied a separate sovereignty, there existed no higher political authority.

Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible,

unless that court had power to command the execution of it: but who, says Finch, shall command the king? Hence it is likewise, that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the pope, the independence of the kingdom would be no more: and, if such a power were vested in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.

Id. at 235-36. In other words, the King is not subject to the general jurisdiction of the courts because he holds independent legislative authority that cannot be countermanded by the courts charged with carrying out the legislative decisions made by parliament and instituted by the King.

Blackstone is saying—in an 18th Century way—that judges are not supposed to legislate from the bench because the legislative power is properly vested elsewhere in the government.

But Blackstone *does not* say that the King is above the law when he exercises his legislative and political powers. Rather, he lays out three exceptions to immunity: (1) the King or his chancellor may choose to submit to suit, or to pay a contract, as a matter of grace and good politics; (2) the King's ministers can be sued for acting outside of the authority granted to them by the King in his legislative authority; and (3) the King can be directly sued in court for violations of the constitution. *Id.* at 236-37. This third exception is the most important to our modern conception of constitutional litigation. As Blackstone wrote, “wherever the law expresses its distrust of abuse of power, it always vests of superior coercive authority in some other hand to correct it; the very notion of which destroys the idea of sovereignty.” *Id.* at 237.

Thus, Blackstone does not say that the government can “do no wrong.” Rather, he describes the doctrine of sovereign immunity as a recognition that the courts do not have superior powers to the king. Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies *superiority of power . . .*”

To Blackstone, sovereign immunity is about preserving the independence of government action. In modern terms, it is often about *which* political department is going to have power over a certain class of questions.

B. The United States Constitution

1. Sovereign Immunity of the Federal Government

The separation of powers between the branches of government was a fundamental tenet of the federal constitution. As the Framers recognized, the power of the judiciary had to be limited in scope so as to prevent it from exercising its own political will in place of the political decisions adopted by Congress in its legislative authority and properly implemented by the President, within the scope of his executive authority. *See* The Federalist no. 78, at 467. Thus, the judiciary had to be independent of the Legislature to the extent it was supposed to enforce the constitutional limitations against the Legislature. *Id.* at 469. “The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.” *Id.*

The prohibition on the courts’ exercise of legislative authority except as required by the text of the Constitution is manifested in the sovereign immunity of the United States government from suit. *E.g.*, *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (“Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.”). Just as in Texas law, sovereign immunity from suit is jurisdictional, which means that any legislative conditions placed on the waiver are also jurisdictional. *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

2. State Sovereign Immunity In the Constitutional Structure

The background assumption that there should be a limitation on the authority of the courts to decide what governmental policy should be—as opposed to impartially applying the law created by the other branches of government—was expressly recognized by the Framers with regard to the retained sovereignty of the States under the federal constitution.

It is inherent in the nature of sovereignty not to be amenable to suit of an individual without its consent. This is the general scheme and the general practice of mankind, and the

exception, of one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.

The Federalist No. 81, at 487 (Hamilton) (Clinton Rossitor, ed. 1961). With this principle in mind, the United States Supreme Court has interpreted the United States Constitution as recognizing the underlying principle that the States were not supposed to have their independent legislative authority subsumed by the powers of the federal judiciary.

“[T]he constitutional privilege of a State to assert its sovereign immunity in its own court” is recognized by the constitution’s structure. *Alden v. Maine*, 527 U.S. 706, 754 (1999). In the federal scheme, immunity serves to preserve the independence of the States from federal authority; “[t]he structure and history of the [federal] Constitution make clear that the immunity exists today by constitutional design.” *Id.* at 733. Thus, the federal government may not commingle the separate duties of the judicial and political branches of the state governments, displacing “state decisions that ‘go to the heart of representative government.’” *Id.* at 751 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991)). Each of the States, as sovereign, thus has the right to determine the scope of their own immunity in their own courts. *See Alden*, 527 U.S. at 749 (citing *Nevada v. Hall*, 440 U.S. 410, at 414-18 (1979) (“[T]he immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself.”)).

The important role of immunity in the federal structure was only underscored by the adoption of the Eleventh Amendment, which rejects the position—taken by the Supreme Court in *Chisholm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440 (1793)—that Article III of the constitution had abrogated State sovereign immunity in the federal courts. *Alden*, 527 U.S. at 720-28. Thus, a suit cannot be filed directly against the States in federal court.

C. The Doctrine in Texas

It is common to attribute the recognition of the doctrine in Texas to the 1847 case of *Hosner v. DeYoung*, where the court held that “no State can be sued in her own court without her consent and then only in the manner indicated by that consent.” 1 Tex. 764, 769 (1847); *see, e.g.*, *Taylor*, 106 S.W.3d at 694-96 (citing *Hosner*). Because *Hosner* did not articulate the reasons for recognizing the immunity doctrine, the courts have regularly discussed the United States Supreme Court’s framing of the doctrine in applying it in its own cases. *E.g.*, *Taylor*, 106 S.W.3d at 695

(immunity “is an established principle of jurisprudence in all civilized nations and in all states of the Union”) (quoting *Beers v. Arkansas*, 61 U.S. 527, 529 (1857)). Despite the common practice of referencing Blackstone’s formulation of the rule, the Texas Supreme Court has never relied on the principle that “the King can do no wrong” as the basis for its immunity decisions. *But see Bennett v. Brown County Water Improvement Dist. No. 1*, 272 S.W.2d 498, 614-15 (Tex. 1954) (Wilson, J., dissenting).

But the cryptic *Hosner* decision was not the only immunity case of 1847. The Texas Supreme Court issued two others: *Borden v. Houston*, 2 Tex. 594, 611 (1847), and *Bates v. Republic of Texas*, 2 Tex. 616, 618 (1847). Read together, these opinions show that the purpose of immunity under Texas law is to ensure that the courts do not exercise authority that would undermine the independence and discretion of the Legislative and Executive departments of government, a separation of powers that was expressly mandated by the adoption of Texas’s current constitution. *See* TEX. CONST. art. II, §1. All three decisions make clear that the Court continued the immunity principle as practiced under the Republic in order to maintain democratic accountability and to ensure that each branch of government restricted its actions to its own scope of authority. *Hosner*, 1 Tex. at 770 (immunity protects the Legislature’s discretion to dispose of state property); *Borden*, 2 Tex. at 611 (the purpose of immunity is to prevent the government from being subject to private coercion); *Bates*, 2 Tex. at 619 (immunity prevents the judiciary from controlling other governmental entities).

Bates discusses the issue in particular detail, effectively reciting the Court’s contemporary policy justification for immunity—*i.e.*, the courts are not empowered to direct other branches of government to exercise their discretion in a certain manner:

The courts cannot adopt coercive measures to enforce, by direct action, payment for such services; nor can they suffer it to be done indirectly by permitting the claimant to retain public money in satisfaction of such claims, *unless the subject has been placed by law within judicial cognizance and control*. For it is a well established principle that courts have no authority to enforce claims against the government, in whatever form of action they may be urged, unless the institution of such action, or the recognition of such claim, has been expressly sanctioned by law. In fact, the proposition that the government is above the

reach of judicial authority by direct action, but within its control and coercive power by indirect suit, is a solecism and absurdity in its very terms.

Bates, 2 Tex. at 619 (emphasis added).

D. Why Understanding the Theory Behind Immunity Law Is Necessary to Successful Litigation of Immunity Issues

The history and theory of the immunity doctrine are essential to litigation when a government entity is a defendant. Regardless of whether the relief sought is money damages or some type of injunction, any judgment against a state entity comprises an order by the court requiring an elected or appointed state official to perform a particular task. The immunity analysis informs the relationship between the courts and the other branches of government by keeping the courts from exercising plenary authority over any and all policy determinations.

Why does the history matter? It turns out that the policy justifications for immunity have little changed since the common law—immunity has always addressed the propriety of judicial interference with the authority granted to other parts of the government. Indeed, the three categories of waiver laid out by Blackstone still describe Texas law today. And understanding those types of waiver in the context of the underlying policy concern—*i.e.*, that the courts will extend their decision-making power beyond its appropriate scope—can help both plaintiffs and governmental defendants better articulate their positions.

The three historical categories of waiver:

First, there is the category of claims that the Legislature has chosen to make the government amenable to, as a matter of grace. Because such waivers are limited by the Legislature’s intent, they are strictly construed and there is a presumption against finding a waiver of immunity. *Taylor*, 106 S.W.3d at 696. For example, the Tort Claims Act enumerates a limited set of claims for which a plaintiff can recover money damages. The waiver is limited based on a series of narrow categories because that was the political result reached by the Legislature. *E.g.*, *Bossley*, 968 S.W.2d at 341-42. The Legislature’s decision to so limit the scope of the Act’s waiver was within its political discretion and its categorizations serve as a limitation on the scope of the act’s potential reach. *Id.*

Second, there are procedural mechanisms to bring suits against government officials. Properly brought, two of those mechanisms do not implicate immunity: mandamus claims and claims asserting that a defendant official has acted *ultra vires*. Mandamus will not issue against a State official unless he has a *non-discretionary* obligation to take a particular action, because the courts will not direct the officials of the other Departments in the exercise of their discretion. *E.g.*, *Terrazas v. Ramirez*, 829 S.W.2d 712, 725 (Tex. 1991) (orig. proceeding) (mandamus not available against the Attorney General or the State Treasurer because they acted within their respective discretions). And a suit to prevent a state official from taking a particular action will only issue if the official is prohibited from taking the action in question. *E.g.*, *McLane Co. v. Strayhorn*, 148 S.W.3d 644, 649 (Tex. App.—Austin 2004, pet. denied) (no suit could be brought against Comptroller to force her to make a particular decision that fell within her statutory discretion). Any other result would allow the courts to pass judgment not on the scope of the official's authority, but directly on the official's decisions. *See SW Bell Tel. Co. v. Pub. Util. Comm'n*, 735 S.W.2d 663, 667 (Tex. App.—Austin 1987, no writ).

Third, there are actions brought directly under the Constitution. The Constitution serves as a check on governmental authority, and some of its provisions go into effect even without further legislative authorization. That said, not every provision of the Constitution allows suit to be brought directly by a citizen to enforce it—the provision must be “self executing,” which has come to mean that it provides meaningful standards by which the defendant's conduct can be measured. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 783 (Tex. 2005). A good example of a self-executing provision of the Constitution is Article I, §17, which requires monetary compensation when a government entity uses property pursuant to its eminent-domain authority. TEX. CONST. art. I, §17. This waiver is not a general waiver of immunity for cases based on property damage—rather, it applies only when the government acts with the requisite intent to exercise its eminent domain authority. *E.g.*, *City of Dallas v. Jennings*, 142 S.W.3d 310, 315-16 (Tex. 2004). The scope of the legal remedy is narrow and is, therefore, narrowly tailored to government action taken in a specific capacity. It does not extend beyond the specific type of governmental decision to which it applies by its own text—and thus does not apply when the government acts pursuant to a contract or negligently. *E.g.*, *Little-Tex*, 39 S.W.3d at 597. Thus, Article I, §17 is meant to provide for judicial

intervention in one narrow type of government endeavor—but not to give the courts general authority to second-guess governmental decisions taken in other capacities.

III. PRESENT DEVELOPMENTS

When presented with complex questions of immunity doctrine, it can be very helpful to rephrase them in terms of whether it is appropriate for the courts to interfere in a particular type of governmental decision. Doing so is truer to history, as explained above. And the same kind of analysis can help explain and tie together the Texas Supreme Court's resolution of what seem like disparate immunity questions.

The remainder of this paper will highlight eleven significant developments in government immunity law in the recent past.

A. Waiver By Litigation Conduct:

***Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006)**

A government entity that brings a claim for affirmative monetary relief forgoes immunity from suit for any claims that are “germane to, connected to, and properly defensive to” those claims, but only to the extent that any recovery on those counterclaims will offset the governmental entity's recovery. Under no circumstances can the defendant itself obtain an award of money damages.

The Case:

Reata arose from an, interrelated set of lawsuits involving the flooding of an area of downtown Dallas during a construction project. During the litigation, the city of Dallas chose to intervene in the lawsuit in order to seek damages against one of the contractors.

The Court originally issued a per curiam opinion stating that a government entity waives its immunity from suit entirely whenever it seeks affirmative relief in the courts.

The City filed a motion for rehearing and the State, through the Office of the Solicitor General, filed an amicus curiae brief in support, arguing that the Court had misconstrued Texas precedent, which had never recognized a waiver of immunity when the State brings suit, and arguing that the Court should at most allow counterclaims as an offset to the State's request for affirmative relief when the subject-matter of such

counterclaims was sufficiently related to the government's claims that they constituted a defense.

On rehearing, the Court withdrew its earlier opinion's conclusion that waiver was dictated by its precedents. Instead, the Court elected to abrogate immunity to the extent a government entity seeks affirmative monetary relief. However, the Court limited this abrogation to counterclaims that are both "germane" and "properly defensive", and held that a defendant could only recover in offset. Thus, a defendant sued by the State can introduce counterclaims that would wipe out its obligation to pay a governmental entity money pursuant to a judgment, but it cannot obtain an award of money damages itself.

***State v. Fidelity & Deposit Co. of Md.*, 223 S.W.3d 309 (Tex. 2007).**

The State brought suit against sureties on a construction bond. The court of appeals concluded that, by initiating the lawsuit, the State had opened itself to any potential counterclaims. The Supreme Court reversed in part and affirmed in part, holding that the State's lawsuit had at most opened it up to counterclaims offsetting its own claims, if those claims were sufficiently related to the State's claim.

The Court affirmed the court of appeals in rejecting the State's argument that there was exclusive administrative jurisdiction over the claim until TxDOT's internal dispute-resolution process was complete. The question was whether the construction contracts for a TxDOT research facility fell within a statutory dispute-resolution process applicable to contracts for roads and similar structures. The Court agreed with the court of appeals that the statute did not, holding that Fidelity need not have completed the administrative process before filing this suit.

While the appeal was pending, the Legislature amended the relevant statutory language, making clear that similar future disputes would fall within TxDOT's statutory contract-resolution process as a prerequisite to suit.

B. Sue-and-Be-Sued Clauses:

***Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006)**

In *Tooke*, the Supreme Court held that

(1) statutes stating that entities may "sue and be sued" "implead or be impleaded" do not, by themselves,

indicate legislative intent to waive an entity's immunity from suit. It expressly overruled *Missouri Pacific Railroad Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812 (1970).

(2) Waste disposal is a governmental function for which a municipality enjoys immunity from suit, even for claims involving contract, absent a waiver of immunity by the Legislature.

The Case:

Tooke involved a contract dispute regarding an agreement to provide brush-removal services to a municipality. The City asserted immunity from suit denied the plea to the jurisdiction on the ground that the "plead and be impleaded" language of the City's charter and §51.075 of the Local Government Code constituted a waiver of immunity. The court of appeals reversed, reasoning that *MoPac* stood only for the proposition that the phrase "sue and be sued" waives immunity and that, therefore, the Legislature must have meant something different when it used the phrase "plead and be impleaded."

In the Texas Supreme Court, the State, through the Office of the Solicitor General, asked the Court to overrule *MoPac* to the extent it had been interpreted as a per se waiver of immunity when included in agency enabling statutes.

The Court accepted that argument and reversed *MoPac*. Relying on the long history of the use of the phrases "sue and be sued" and "plead and be impleaded" in legislative enactments, the Court recognized that those two phrases are usually used to confer corporate capacity on both private and public entities. Because the two phrases can mean something else, they do not constitute the necessary clear-and-unambiguous statement of the Legislature's intent required to effect a statutory waiver of immunity. "The words can mean that immunity is waived, but they can also mean only that a governmental entity, like others, has the capacity to sue and be sued in its own name." Accordingly, the Court found that neither §51.075 of the Local Government Code nor the City of Mexia's charter constituted a valid waiver of sovereign immunity.

The Court recognized that the Legislature had, while the case was pending, adopted a limited waiver of immunity from suit for contract claims against municipal defendants and characterized its opinion as furthering the implementation of the Legislature's decision.

Justice Johnson concurred in part and dissented in part, explaining that he would have concluded that sue-and-be-sued language waives immunity in the absence of additional language preventing the provision from being read as a waiver of immunity. He would not have overruled *MoPac*.

Justice O’Neill dissented, arguing that *MoPac* had been relied upon by the Legislature and could not now be changed without doing violence to the principle of *stare decisis*.

C. The Recreational-Use Statute:

Texas v. Shumake, 199 S.W.3d 279 (Tex. 2006)

The relevant provision of the Texas Recreational Use Statute, TEX. CIV. PRAC. & REM. CODE §75.002(d), allows a premises-defect claim based on gross negligence.

The case:

This case arose from the death of a nine-year old girl who was sucked underwater and trapped in a man-made culvert at the Blanco State Park.

The Tort Claims Act includes a waiver of immunity for premises defect claims. However, the Legislature has adopted a separate statute establishing a different standard for premises-defect claims arising from the condition of property that is opened to the public for recreational use. *See* TEX. CIV. PRAC. & REM. CODE §§75.001-.004. While the Tort Claims Act limits a governmental unit’s obligation to the duty owed to a licensee on private property, *id.* §101.022(a), when the death results on recreational land, the recreational-use statute limits the duty even further, to that owed by a landowner to a trespasser, *id.* §75.003(g).

The State argued that, because the Tort Claims Act only waives immunity when a private defendant would likewise be subjected to tort liability, the Recreational Use Statute extends the State’s immunity for any tort that could be brought by a licensee, but not by a trespasser. The court concluded that the recreational use statute did not change the scope of the duty owed in recreational-use cases both because the Legislature specified the duty imposed—rather than expressly adopting the common-law standard—and because the language of §75.002(d) did not track the language used in the common-law cases defining the duty owed by landowners to trespassers. Accordingly, the Court concluded, the Legislature’s choice to allow claims

against recreational-use landowners for claims of “gross negligence” imposed a greater duty than that required by the common-law trespasser standard, namely, that the landowner can be liable for an “act or omission involving subjective awareness of an extreme degree of risk, indicating conscious indifference to the rights, safety, or welfare of others.”

Justice Wainwright concurred, stating that he would have held that the Tort Claims Act and Recreational-Use Statute together waive immunity from suit for common-law gross negligence rather than the statutory standard articulated by the majority.

Justice Brister dissented, arguing that the purpose of the Recreational Use statute was to prevent the owners of recreational property from being required to warn users of the obvious dangers of natural conditions.

Stephen F. Austin State Univ. v. Flynn, 228 S.W.3d 653 (Tex. 2007)

Even where Tort Claims Act would have waived State’s immunity from suit for cyclist’s claim that a sprinkler placed on University property knocked her off her bicycle, the Recreational Use Statute nonetheless barred the plaintiff’s claims.

The Case:

This case arose from an incident involving a bicyclist and a large water sprinkler. Flynn was struck by water coming from the sprinkler and sued for her resulting injuries. The court of appeals held that the sprinkler constituted a premises defect and that the recreational use statute did not apply.

The Supreme Court agreed that the sprinkler constituted a premises defect and that the State’s decisions about where to place the sprinkler and how hard to turn the water on were not “discretionary” and did not fall within the exception to immunity for discretionary acts.

Nonetheless, the Court held that the Recreational Use Statute applied, regardless of Flynn’s argument that the track on which she had been writing was subject to an easement to the city of Nacogdoches for recreational purposes excepted the area from the statute. The Court held that the placement of the sprinkler did not meet the heightened burden to allege gross negligence to bring a claim under the Recreational Use Statute.

D. Exceptions to the Waiver of Immunity Provided by the Tort Claims Act

City of Grapevine v. Sipes, 195 S.W.3d 689 (Tex. 2006).

The waiver of immunity effected by the Tort Claims Act does not apply to the initial installation of a traffic signal, but only applies when a traffic signal has been installed but then becomes absent. 195 S.W.3d at 694; see TEX. GOV'T CODE §101.060.

The Case:

The City of Grapevine planned to, but did not, install a temporary traffic signal at a construction site. The Trial Court held that the City had immunity under §101.060 of the Government Code. The court of appeals reversed and remanded on this issue, holding that, while the City exercised discretion in deciding to install a temporary traffic signal at the intersection, “a question of material fact exists concerning whether the City properly implemented its decision by installing the temporary traffic signal within a reasonable time thereafter.”

In the Supreme Court, the Office of the Solicitor General filed an amicus brief on the State’s behalf.

Recognizing that the waiver of immunity effected by §101.021 of the Tort Claims Act is an exception to the general rule of governmental immunity, certain provisions of the Act constitute an “exception to the exception.” The Court held that §101.060(a)(2)’s reference to “the absence” of a sign or traffic signal indicated that immunity would only be waived when a governmental defendant had previously installed a traffic signal or sign at that location. Moreover, holding a government defendant subject to suit would frustrate the Legislature’s intent to ensure that government entities retain immunity regarding the discretionary decision to place traffic signals and signs. Because the timing of the installation can be affected by the various government obligations that immunity is generally intended to prevent the courts from interfering with—such as the balancing of funding priorities, scheduling, or traffic patterns—judicial intervention regarding the timing of the initial installation of a sign or signal would unduly interfere with the governmental defendant’s discretion.

City of San Antonio v. Hartman, 201 S.W.3d 667 (Tex. 2006)

A situation in which city employees are placing signs

around a flood crossing qualifies for the emergency provision of the Tort Claims Act.

The Case:

A driver drove into a flooded street in San Antonio, the car was washed away, and four people died. The City asserted immunity. The court of appeals concluded that the plaintiffs had adequately alleged a premises-defect claim despite the fact that a warning sign had been placed on the road and the flooded road was an open and obvious danger. The court also concluded that fact issues existed on the questions of duty and whether the flooding constituted an emergency condition under Texas Civil Practice and Remedies Code §101.055(2), and it rejected the City’s argument for entitlement to judgment as a matter of law based on the alleged presence of barricades on the flooded roadway. Finally, the court of appeals rejected the City’s argument that its decisions about the placement of barriers on the roadway were discretionary acts from which it was immune under Texas Civil Practice and Remedies Code §101.056.

The Hartmans’ lawsuit was framed in terms of conscious indifference, as it is used in §101.056. The Supreme Court held that this standard did not apply because the flood constituted an emergency. The Court accepted as conclusive the recitation in the declaration of emergency issued by the city before the incident.

E. Procedural Issues and Interlocutory Appeals:

Tex. A&M Univ. Sys. v. Koseoglu, 233 S.W.3d 835 (Tex. 2007)

When a lawsuit is brought against both an entity and a governmental official, both are entitled to take an interlocutory appeal under Texas Government Code §51.014(a)(8) if the claim against the official, in substance, seeks relief against the entity.

When an appellate court determines that a petition does not state a claim that falls within a waiver of sovereign immunity, the appellate court should render a judgment of dismissal if it concludes that the jurisdictional defect in the petition cannot be cured.

The Case:

This was a breach-of-settlement agreement case in an employment dispute. Koseoglu, who worked at a Texas A&M research institute, ended up in a dispute

with his university and his supervisor over whether his outside business activities presented a conflict of interest. When the university terminated him, Koseoglu told the university that it had violated his rights and sought relief through the university's dispute-resolution process. Ultimately, Koseoglu, the university, and Koseoglu's former supervisor resolved those claims in a settlement agreement.

Koseoglu later argued that the university did not live up to its promises, bringing suit against both the university and his former supervisor for breach of that settlement agreement. Koseoglu argued that the university had waived its immunity from suit by accepting the benefits of the contract and, in any event, that settlement agreements were outside of the State's immunity under *Texas A&M University—Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002).

The Waco Court decided for the university on the key substantive questions of immunity law but reached two decisions for Koseoglu on procedural issues. On the substance, the court of appeals rejected Koseoglu's waiver-by-conduct theory and also rejected his argument that *Lawson* stood for a general waiver for settlement contracts. But the Waco Court held that it was required to remand the case rather than dismiss outright because Koseoglu had not yet chosen to amend his petition. For that reason, the court of appeals concluded, he needed an opportunity to cure. And, with regard to the government official defendant (the former supervisor), the Waco Court held that it lacked jurisdiction to even reach the immunity questions because its appellate jurisdiction, it reasoned, extended only to "governmental entities" named as defendants. The Waco Court's ruling preserved the claims against the government official and would have permitted repleading of the claims against the university.

The defendants filed a petition for review, which was granted. The Texas Supreme Court ultimately held that the interlocutory appeal provisions of Section 51.014(a)(8) of the Government Code granted appellate jurisdiction to review claims made against government officials when those claims implicated the governmental entity's sovereign immunity. The Court recognized that plaintiffs sometimes make a governmental official the named defendant when the real goal is to control government conduct or get other relief from the government. The Court concluded that permitting interlocutory appeals in this situation better served the goals of the statute.

The Texas Supreme Court also held that the court of

appeals should have dismissed the cause rather than remanding. Analyzing Koseoglu's claims, the Court concluded that the jurisdictional defects were incurable; no amount of rewriting would have solved the problem that there was no waiver of immunity for his claims. Accordingly, the Court dismissed.

***Thomas v. Long*, 207 S.W.3d 334 (Tex. 2006)**

Thomas has three important holdings:

- (1) under §51.014(a)(8) of the Government Code, a document titled a "motion for summary judgment" is subject to interlocutory appeal so long as its substance is a challenge to the trial court's jurisdiction, brought by a governmental entity;
- (2) it is appropriate for a court to dismiss some, but not all, live claims in a lawsuit pursuant to a plea to the jurisdiction;
- (3) the Civil Service Commission of the Harris County Sheriff's Department had exclusive jurisdiction over an employment dispute, and the Uniform Declaratory Judgments Act cannot provide an alternative basis for jurisdiction because the UDJA does not create a cause of action or confer jurisdiction on the courts.

The Case:

Thomas involved an employment dispute resulting in the termination and subsequent reinstatement of a Harris County Sheriff's Department employee. The Department's Civil Service Commission ordered reinstatement but denied the employee's request for payment of her lost wages. The plaintiff did not appeal the Commission's decision. Additionally, the Department added an additional requirement to her reinstatement, asking the employee to complete a physical-ability test before returning to work.

The employee brought suit against the sheriff for declaratory judgment, mandamus relief, and a retaliation claim under §21.055 of the Labor Code, seeking immediate reinstatement and reimbursement of lost wages. The sheriff asserted a "plea in bar" on the ground that the Civil Service Commission had exclusive jurisdiction.

The parties filed cross-motions for summary judgment on this issue, and the sheriff challenged the court's subject matter jurisdiction and asked for judgment as a matter of law even assuming the court had jurisdiction. The court entered judgment in the plaintiff's favor,

requiring reinstatement without the physical-ability test. It also granted the sheriff's motion on the mandamus claim, leaving only the retaliation claim.

The sheriff sought interlocutory appeal of the order, and the court of appeals dismissed on the ground that the record did not include a "plea to the jurisdiction" and, as a result, did not comply with the requirements of §51.014(a)(8) of the Civil Practice and Remedies Code.

At oral argument, the plaintiff raised an additional argument, asserting that it was inappropriate to grant a plea to the jurisdiction that dismisses only part of the live pleadings.

The State, represented by the Office of the Solicitor General, filed an amicus brief on the jurisdictional issues.

The Court rejected the court of appeals's position on both practical and precedential grounds. Holding that an interlocutory appeal can be taken from the grant or denial of any order pertaining to subject-matter jurisdiction, the Court stated that the Legislature had provided an interlocutory appeal on the issue of jurisdiction, "irrespective of the procedural vehicle used." The Court also held that when a trial court rules on the merits of an issue without expressly ruling on the jurisdictional issue, it implicitly rules on the jurisdictional issue. (citing *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993)).

The Court rejected the proposition that a plea cannot be granted if the court retains jurisdiction over any remaining claims, citing *American Motorists Insurance Co. v. Fodge*, 63 S.W.3d 801, 805 (Tex. 2001).

Finally, the Court held that the plaintiff's failure to exhaust her administrative remedies deprived the trial court of any jurisdiction, because she had forfeited her opportunity to obtain judicial review of the Commission's determination. Because the plaintiff's status as a "for cause" rather than an "at will" employee was based exclusively on the administrative rules governing the Civil Service Commission, those rights were completely circumscribed by the procedural requirement of those rules.

F. Statutory Prerequisites to Suit: Section 311.034 of the Government Code

The newly added last sentence of §311.034 of the Government Code provides:

Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.

TEX. GOV'T CODE §311.034.

This amendment overruled *University of Texas Southwestern Medical Center at Dallas v. Loutzenhiser*, 140 S.W.3d 351 (Tex. 2004), which had previously held that the elements of claims against governmental defendants are not necessarily jurisdictional and that the notice requirement of the Tort Claims Act was not jurisdictional. By contrast, the elements of a statutory cause of action against a private defendant are not automatically jurisdictional, even when a governmental entity is the plaintiff. See *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 180 (Tex. 2004).

G. Article VII of the Constitution:

***Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005)**

The decision made two holdings regarding the scope of direct actions brought against the State under the Constitution. Although the Court rejected the State's specific arguments and held that it could exercise jurisdiction over the case, it declined the plaintiffs' invitation to abandon any of the doctrines limiting jurisdiction over constitutional claims.

Specifically, the Court held that:

- (1) both the adequacy and efficiency requirements of Article VII are self-executing, to the extent that they describe an outside limit on the Legislature's discretion to create and maintain the public education system, *id.* at 783; and
- (2) because the adequacy and efficiency requirements incorporate two judicially-manageable standards for evaluating the school-finance system, those standards do not present a political question, *id.* at 776-77.

The Case:

Before resolving the merits of the school-finance case, which involved both a challenge to the "efficiency" of the state's public-education system—*i.e.*, the state-wide funding system—and the "adequacy" of the system—*i.e.*, the quality of the education provided—

the Court addressed several jurisdictional issues. Along with a challenge to the plaintiff school districts' standing to bring the suit, the State argued that Article VII was not self-executing and presented a political question outside of the courts' jurisdiction.

The Court held that Article VII is not a political question because the constitution does not vest exclusive jurisdiction in the Legislature to evaluate the school system; "rather, the language of article VII, §1 imposes on the legislature an affirmative duty to establish and provide for the public free schools. This duty is not committed unconditionally to the legislature's discretion, but instead is accompanied by standards." *Id.* at 776. The court concluded that it was these standards that gave the courts judicial review over school-finance determinations. *Id.* Nonetheless, the Court recognized that it had no role in specifying the content of a new school-finance plan. "[T]he Legislature has the sole right to decide *how* to meet the standards set by the people in article VII, §1, and the Judiciary has the final authority to determine *whether* they have been met." *Id.*

The Court further concluded that the standards were judicially manageable—and therefore did not present a political question—because the ultimate goal of any inquiry under Article VII, §1 is "reasonableness." The judiciary's role in such cases is, therefore, "to decide the legal issues properly before it without dictating policy matters." *Id.* at 779.

The Court also held that Article VII, §1 is self-executing. The Court reemphasized that its role was not to dictate a particular structure for public education, but rather to establish the outer boundaries of that system and to determine when the constitutional minimum had not been met. The court partially agreed with the State's position, stating that Article VII, §1 does "not provide the courts a basis for declaring what education or finance systems will alone satisfy its standards. But the provision is self-executing insofar as it prohibits any system that fails to meet those standards." *Id.* at 783.

H. Intergovernmental Immunity:

***City of Galveston v. State*, 217 S.W.3d 466 (2007)**

A home-rule city has sovereign immunity from a tort lawsuit instituted by the State.

The Case:

The court of appeals held that, because a city's

governmental immunity derives from the State's sovereign immunity, the city was not immune from the State's suit against it. The case arises from a highway-construction project in which the City of Galveston's municipal water line ruptured, causing soil erosion that destabilized a highway and bridge that the Texas Department of Transportation (TxDOT) had constructed. TxDOT sued the city for negligence, and the city filed a plea to the jurisdiction based on governmental immunity.

The Supreme Court reversed, holding that home-rule cities have a separate grant of autonomous governmental authority that is preserved by the immunity doctrine. While the Legislature can waive that immunity, the State cannot avoid immunity by itself bringing a common-law tort claim.

***Nueces County v. San Patricio County*, 246 S.W.3d 651 (Tex. 2008)**

In this case, the Court held that one governmental entity cannot sue another to obtain a transfer of collected taxes, because the resulting award would require a transfer of public money between the two entities.

***Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320 (Tex. 2006)**

The Case:

The court of appeals affirmed the trial court's grant of a plea to the jurisdiction filed by the Texas Political Subdivisions Property/Casualty Joint Self-Insurance Fund ("TPS"), a group of counties, municipalities, special districts, and other political subdivisions that joined together to form a self-insurance pool. Through an interlocal participation agreement, Ben Bolt-Palito Blanco Consolidated Independent School District participated in TPS's self-insurance pool. It sued TPS for failing to pay on a mold and water-damage insurance claim.

The court of appeals based its conclusion on the absence of a clear indication in the Interlocal Cooperation Act of legislative intent to permit suit against TPS. The court of appeals noted that the Act contains (1) no clear "sue and be sued" language, (2) no requirement that a contracting governmental entity be joined in a lawsuit for which immunity would otherwise attach, and (3) no provision establishing a cap on the governmental entity's contractual liability.

The Supreme Court concluded that the insurance pool itself is a governmental entity that has sovereign immunity. However, the Court also found that it was a kind of governmental entity subject to the statutory waiver of immunity under §271.152 of the Local Government Code, which provides a waiver of immunity for contract claims against local government entities.

I. Eleventh Amendment Immunity:

Meyers v. Texas, 454 F.3d 503 (5th Cir. 2006)

[W]hen a State removes to federal court a private state court suit based on a federal-law claim, it invokes federal jurisdiction and thus waives its unqualified right to object peremptorily to the federal district court's jurisdiction on the ground of state sovereign immunity. However, that waiver does not affect or limit the State's ability to assert whatever rights, immunities or defenses are provided for by its own sovereign immunity law to defeat the claims against the State finally and on their merits in the federal courts.

Meyers, 2006 WL 1766751, at *1.

The Case:

Meyers stems from a class action brought against the State of Texas regarding the fees paid by handicapped persons for handicap parking permits under Title II of the Americans With Disabilities Act. The State removed the suit to federal court.

The United States Supreme court has held that “removal is a form of voluntary invocation of a federal court’s jurisdiction sufficient to waive the State’s otherwise valid objection to litigation of a matter (here of state law) in a federal forum” under the Eleventh Amendment. *Lapides v. Bd. of Regents*, 535 U.S. 615, 623-24 (2002). But the Court expressly reserved the question of whether removal alone waives a State’s underlying immunity from being sued at all, even if the State would otherwise be immune if the action was in state court or was originally brought in federal court. *Id.* at 617-18. In *Meyers*, Texas argued that removal does not waive this underlying immunity from suit. The Fifth Circuit disagreed, holding that *Lapides*’s waiver-by-removal rule applies to all federal- and state-law claims, regardless of whether the State would otherwise be immune from those claims in the absence of removal. The Fifth circuit added,

however, that the state could continue to assert any defense based on immunity from *liability* that it might have under state law.

J. State-Court Claims Under §1983

County of Dallas v. Sempe, No. 05-0022

Issues Presented:

(1) Whether individual plaintiffs’ 42 U.S.C. §1983 claim against a county based on Texas’s wrongful-death and survival statutes failed to state a claim under §1983;

(2) Whether plaintiffs’ claims are barred by the applicable statute of limitations and whether the plaintiffs have standing to sue.

In this case, plaintiffs brought a state-court 42 U.S.C. §1983 claim for civil-rights violations arising from their father’s injuries and death following a fight in county jail. The §1983 claim, however, was based on the substance of two *Texas* statutes—namely, the Texas Survival Statute and the Texas Wrongful Death Act—that the district court found could be “borrowed” through 42 U.S.C. §1988.

After concluding that the plaintiffs had filed the survival-statute portion of their §1983 claim within the applicable limitations period and that, as heirs, they had standing to sue on that claim, the court of appeals addressed the county’s argument that it was immune from suit because it was not a “person” against whom a Texas Wrongful Death Act claim could be brought. After noting that the County would be immune if the plaintiffs had simply brought a state-law wrongful-death claim against the county, the court of appeals explained that, by bringing their action under §1983, the plaintiffs could avail themselves of the United States Supreme Court’s holding that a county is a “person” within the meaning of §1983, even though the basis for the plaintiffs’ §1983 claim was Texas law.

K. Inverse Condemnation and Condemnation

State v. Holland, 221 S.W.3d 639 (Tex. 2007)

The State successfully asserted its immunity by introducing evidence establishing the existence of a contract, which as a matter of law negated any intent to commit a taking of the plaintiff’s intellectual property.

The Case:

The court of appeals denied the State's plea to the jurisdiction, concluding that the plaintiff's allegation that the State had intentionally taken his patent rights fell within the waiver of immunity created by Article I, §17 of the Texas Constitution. It also rejected the State's argument that there could be no taking because the patent rights at issue were addressed in an implied contract between the State and the plaintiff's companies.

The Supreme Court reversed, holding that the State had successfully established the existence of a contract by introducing evidence that the plaintiffs' companies had been paid for the use of the intellectual property in question. Accordingly, the Court concluded, there could be no taking because when the State acts pursuant to a contract, it cannot by definition commit a taking.

City of San Antonio v. Pollock, No. 04-1118*Issues Presented:*

- (1) Whether personal-injury damages are recoverable in an action based on the Takings Clause of the Texas Constitution;
- (2) Whether legally sufficient evidence supported the jury's finding that benzene exposure caused one of the plaintiffs' cancer;
- (3) Whether the city waived its legal-sufficiency challenge to expert testimony on causation by failing to object to the testimony's admissibility at trial;
- (4) Whether there is legally sufficient evidence of nonnegligent acts giving rise to a nuisance;
- (5) Whether the court of appeals erred in holding that "migration of gasses from a landfill to neighboring property is inherent in the nature of the landfill rather than a result of a failure to properly monitor and control migration of gasses" (quotation from petition for review);
- (6) Whether, in an inverse-condemnation action, sovereign immunity is an affirmative defense that may be waived;
- (7) Whether sovereign immunity is waived when a municipality pleads that it is a home-rule city subject to the limitations of liability under the Tort Claims Act (or, alternatively, whether the trial court should have

permitted a post-verdict amendment to add the defense of sovereign immunity when the issue has been tried by consent);

(8) Whether a plaintiff may establish liability and a waiver of immunity by submitting only a general negligence jury question; and

(9) Whether recovery under the Tort Claims Act is capped at \$250,000.

In this case in which a family sued the city for damages arising from its maintenance of a landfill that allegedly leaked benzene gas that caused a child's cancer, the court of appeals found that: (1) there was legally sufficient evidence that the City knew of the gas-migration problem and intentionally failed to correct it; (2) damages for personal injuries may be recovered in a nuisance action; (3) because the plaintiffs pled and proved that migration of benzene and other toxic gases damaged their particular property, they could recover damages for loss of use and enjoyment of property and reduction in their property's market value; (4) there was legally sufficient evidence that migration of benzene gas caused the plaintiffs' injuries; (5) the city waived its argument that the causation evidence was legally insufficient because it was unreliable under *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 718 (Tex. 1997); (6) because there was some evidence of causation and because the city failed to object to the omission of a causation question from the jury charge, the court would deem that the jury found causation; (7) because it affirmed the jury's award of actual damages for nuisance, it did not need to address the city's arguments that an award of negligence damages was improper; (8) the Texas Tort Claims Act could not preclude an award of exemplary damages because the plaintiffs recovered for a nuisance, rather than for negligence; (9) a property owner may not recover exemplary damages in an inverse-condemnation case; (10) because of the previous conclusion, the court did not need to reach the city's other exemplary-damages issues.

The Solicitor General's Office, participating as an amicus, has taken the position that the plaintiffs claims do not state an appropriate inverse-condemnation claim because the facts alleged preclude a finding that the City acted with the requisite intent to commit a taking and that, in any case, Article I, §17 does not extend to claims for personal injury.