

RECENT CASES INVOLVING SOVEREIGN IMMUNITY, GOVERNMENTAL
LIABILITY, AND APPEALS INVOLVING PUBLIC ENTITIES

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AND APPEALS INVOLVING PUBLIC ENTITIES

I. SOVEREIGN IMMUNITY CASES FINDING WAIVER OF SOVEREIGN IMMUNITY

A. DISPUTES BETWEEN POLITICAL SUBDIVISIONS

***STATE V. CITY OF GALVESTON*, 175 S.W.3D 1 (TEX. APP.-HOUSTON [1ST DIST.] 2004, PET. GRANTED). HOME-RULE MUNICIPALITIES NOT IMMUNE FROM SUIT BY STATE BECAUSE THEIR IMMUNITY IS DERIVED FROM STATE'S IMMUNITY.**

FACTS: The City and Galveston County asked the Department of Transportation to build a roadway in Galveston County. As part of the agreement, the City provided for the adjustment of all utilities, including a municipal water line that ran underneath a ramp approach and bridge deck of the roadway. The finished roadway was later designated as part of the State highway system. The City's waterline underlying the highway later ruptured, causing erosion and threatening the highway and its bridge structures. The State paid for the repairs and then sued the City for negligence in the installation and maintenance of the water line. The City asserted governmental immunity from suit and filed a plea to the jurisdiction. It argued that the State had not pleaded a cause of action for which the Texas Tort Claims Act waives municipal immunity. The State argued that the City did not enjoy governmental immunity from the State's claims against it because the City's immunity derives wholly from that of the State.

HOLDING: The trial court granted the City's jurisdictional plea and dismissed the case. The appellate court reversed and remanded the case back to the trial court. It held that the City does not enjoy immunity from the State's negligence suit. The court determined that municipalities derive their immunity from that of the State and, as such, possesses no immunity from a State tort claim. In reaching the decision, the majority relied on the opinion in *Texas Workers' Comp. Comm'n v. City of Eagle Pass/Texas Mun. League Workers' Comp. Joint Ins. Fund*, 14 S.W.3d 801, 806 (Tex.App.-Austin 2000, pet. denied), which stated that:

[m]unicipalities are created as political subdivisions of the State and "represent no sovereignty distinct from the state and possess only such powers and privileges as have been expressly or impliedly conferred upon them." A municipality's sovereignty is dependent upon that of the State . . . because political subdivisions of the State do not possess such independent sovereignty, they have no immunity as against the State. *Id.* at 810.

The court noted that *Eagle Pass* involved an administrative remedy rather than tort claim but held that the reasoning and logic in the case about derived immunity law encompassed the State's tort claims. Since the State brought the suit in its sovereign capacity, the Court held that it did not violate the separation-of-powers doctrine. The court also determined that home-rule

status, though it grants upon cities the power of self-determination, does not make a municipality its own sovereign for purposes of immunity.

***TEXAS WORKERS' COMP. COMM'N V. CITY OF EAGLE PASS/TEXAS MUN. LEAGUE WORKERS' COMP. JOINT INS. FUND*, 14 S.W.3D 801 (TEX. APP.-AUSTIN 2000, PET. DENIED).**

FACTS: The City of Eagle Pass and the Capital Metro Transportation Authority violated section 409.023 of the Labor Code by making late payments of benefits. The Texas Workers' Compensation Commission assessed administrative penalties against both organizations. At an administrative hearing, the City and Capital Metro stipulated to the violations and to the amount of the penalties imposed. They argued, however, that as political subdivisions, they were immune from the imposition of administrative penalties under the doctrine of sovereign immunity.

HOLDING: The Administrative Law Judge rejected appellees' argument and upheld the Commission's order assessing penalties. The groups subsequently filed suit in district court in Travis County for judicial review of the ALJ's decision. In the suit, appellees again argued that the Commission could not assess administrative penalties against political subdivisions because the Legislature had not expressly waived the subdivisions' sovereign immunity from such penalties. In reversing the ALJ's decision, the district court concluded that sovereign immunity prevented the State's imposition of penalties absent the Legislature's express waiver of the subdivision's immunity. The Commission appealed the district court's decision. The appellate court agreed with the Commission that "because municipalities and other political subdivisions of the State exist under the authority of the State and are subject to the State's regulatory authority, such entities do not enjoy sovereign immunity from state regulatory authority." *Id.* at 804. It held that as political subdivisions of the State do not possess independent sovereignty, they have no immunity as against the State. As a result of this, cases dealing with immunity between states and the federal government are inapplicable since in those cases there are two sovereigns instead of merely a political subdivision. The court reasoned that because "[a] political subdivision's immunity is a privilege afforded it based on its existence as a subdivision of the State," its "derivative immunity acts as a shield against actions brought by private parties but not as a shield against the State, from which it derives its immunity." *Id.*

***CITY OF TEXARKANA V. CITY OF NEW BOSTON*, 141 S.W.3D 778 (TEX. APP.-TEXARKANA 2004, PET. FILED). NO HORIZONTAL WAIVER OF IMMUNITY BETWEEN HOME-RULE MUNICIPALITIES. TEXAS TORT CLAIMS ACT LIMITS WAIVER OF IMMUNITY. TEX. LOC. GOV'T CODE § 51.075 WAIVES SOVEREIGN IMMUNITY.**

FACTS: Seven cities to which the City of Texarkana and Texarkana Water Utilities had been supplying water for decades sued Texarkana in both contract and tort, asserting various causes of action arising from that relationship. Texarkana responded to the suits by asserting that governmental immunity completely bars suit.

HOLDING: The trial court rejected the plea to jurisdiction and Texarkana appealed. The Sixth Court of Appeals held that governmental immunity bars the causes of action sounding in tort but not those sounding in contract. Accordingly, it affirmed as to the contract claims, leaving those pending for further action in the trial court, and reversed as to the tort claims, dismissing them. The court held that because the services Texarkana provided to the seven cities could not be distinguished from governmental functions, the Texas Tort Claims Act applied and barred the seven cities' tort claims. The decision in *Eagle Pass* was distinguishable since the claims were between two municipal districts rather than a regulatory agency that exerts authority over a municipal district. It held that "sovereign immunity principles are to be applied horizontally between governmental entities...[t]hat is, political subdivisions of government cannot assert immunity against the sovereign from which its immunity is derived, but can assert immunity against other governmental entities deriving their rights and privileges from the same source." *Id.* at 783. The appellate court concluded, however, that TEX. LOC. GOV'T CODE § 51.075 (1999) waives sovereign immunity for contract cases. It determined that in the context of the statute, there was no practical difference between the phrases "sue and be sued" and "plead and be impleaded," and so no issue was to the waiver of suit for the contract claims.

B. "SUE AND BE SUED" PROVISIONS

***MISSOURI PAC. R.R. CO. V. BROWNSVILLE NAVIGATION DIST.*, 453 S.W.2D 812 (TEX. 1970)**
"SUE AND BE SUED" LANGUAGE QUITE PLAIN AND WAIVES IMMUNITY.

FACTS: Uncie Wells, a brakeman for Missouri Pacific Railroad Company, lost his life as the result of an accident that occurred on December 22, 1967. His statutory beneficiaries sued MoPac and Lallier & Co. for damages, claiming that the death of Wells was proximately caused by defendants' negligence. According to the allegations of the petition, Wells was knocked from a ladder on the train by a crane that was owned by Lallier & Co. and that had been left too near the track over which the train was moving. MoPac filed a cross-action against Brownsville Navigation District of Cameron County, Texas, seeking indemnity for any sums it was adjudged to pay. As a basis for its claim of indemnity, MoPac alleged a written track agreement providing that the District "would not permit to be constructed, placed, or erected, over, under, or adjacent to any of the tracks on the lands of the District, any structure, object, or obstruction which would violate any statute, law, or regulation then in effect with respect to the subjects of clearances or safety margins in the vicinity of railroad tracks." MoPac further alleged that District placed, or permitted the placement of, a mobile dragline near the track and that this was the sole cause of Wells' death. The District filed a plea to jurisdiction arguing that it was immune from suit. MoPac claimed that immunity was waived by the act creating the district which stated, in part, that "All navigation districts established under this Act may, by and through the navigation and canal commissioners, *sue and be sued in all courts of this State* in the name of such navigation district, and all courts of this State shall take judicial notice of the establishment of all districts." Section 46 of Article 8263h.

HOLDING: The trial court granted the plea to the jurisdiction and dismissed the cross-action. The Court of Civil Appeals affirmed. The Texas Supreme Court reversed. It held that "Article

8263h is quite plain and gives general consent for District to be sued in the courts of Texas in the same manner as other defendants.” In response to the district’s argument that there are other statutes in which the Legislature’s intention to give consent to suits has been more clearly expressed, the court pointed out that “[o]n the other hand suits against counties have been held to be authorized by statutes that simply require the filing of a claim before institution of suit, provide for inhabitants of the county to serve as jurors or witnesses, and prohibit the issuance of an execution on a judgment against the county. The Supreme Court noted that MoPac never argued that the suit was authorized by general statute prior to oral argument, but found that MoPac had insisted at the appellate level that navigation districts are suable in the same manner as counties and school district. Since that argument eventually led the court to Article 8263h, it was sufficient.

UNITED WATER SERV. V. CITY OF HOUSTON, 137 S.W.3D 747 (TEX.APP.-HOUSTON [1ST DIST.] 2004, PET. FILED). “SUE AND BE SUED” LANGUAGE AN EFFECTIVE WAIVER BECAUSE OF MOPAC.

FACTS: The City of Houston contracted with United Water Services to operate and maintain a water purification plant. After the contract’s term expired, the City claimed that United Water had breached the contract and refused to pay United Water for the services that United Water had provided under the contract. United Water filed suit against the City, alleging breach of contract and seeking in excess of \$900,000 in damages. They also sought a declaratory judgment that it did not breach the contract. The City filed a *counterclaim* against United Water for breach of contract and also filed a separate suit against United Water’s surety, in federal court. The City then filed a plea to the jurisdiction, asserting immunity from suit. In response, United Water amended its petition, alleging that the Legislature waived the City’s immunity by enacting Local Government Code § 51.075. United Water further asserted that the language in the City’s Charter, which states that the City “may sue and be sued . . . implead and be impleaded in all courts and places and in all matters whatever . . .,” also waived the City’s immunity from suit. Additionally, United Water asserted that the City waived immunity from suit by filing its counter-claim in the instant suit and by filing suit against CNA in federal court.

HOLDING: The trial court granted the City’s appeal and dismissed the suit. United Water appealed. On appeal, the First Court of Appeals reversed, holding that the language in the City Charter waived immunity. It held that *MoPac* is still good law. The court declined to follow the decision in *Reata* which held that “sue and be sued” is not a waiver because *Reata* relied on *Jackson*, which the Fourteenth Court of Appeals had recently overturned. The appellate court disagreed with its sister courts that had held *Pelzel* and *Taylor* to implicitly overrule *MoPac*. In its analysis, *Pelzel* distinguishes the “sue and be sued” language in *MoPac* from the ambiguous language in TEX. LOC. GOV’T CODE § 89.004. Because it held that the City Charter waived immunity, the appellate court did not address whether the phrase “plead and be impleaded” in TEX. LOC. GOV’T CODE . § 51.075 also waives immunity.

CITY OF HOUSTON V. ALLCO, INC., 2004 TEX. APP. LEXIS 5934 (TEX. APP.-HOUSTON [1ST DIST.] 2004, PET. FILED) “SUE AND BE SUED” UNAMBIGUOUS AND EFFECTIVE WAIVER OF IMMUNITY FROM SUIT, JURISDICTION ISSUE MAY BE RAISED FOR FIRST TIME ON APPEAL.

FACTS: In 1994, Allco entered into a contract with the City of Houston to provide "sewer rehabilitation services." In several of its provisions, the contract specified that Allco would not be entitled to compensation for "extra work," *i.e.*, work that was not already approved under the contract, unless Allco notified the City that extra work was required and received prior, written approval for the extra work from the City's engineer. Based on litigation unrelated to the contract, Allco was ordered to cease working and to secure a work site. In relation to this order, Allco paid for new dirt and the excavation of old dirt. However, the city refused to pay for these expenses. Allco filed a breach of contract against the city. The city did *not* file a plea to jurisdiction.

HOLDING: The trial court entered judgment in favor of the contractor. On appeal, the city argued that it was immune from suit. In affirming, the appellate court held that while the city could raise the jurisdictional issue for the first time on appeal, the city had waived its immunity under Houston City Charter Art. II, § 1 (1905). The court cited the decision in *United Water Serv. v. City of Houston* where it held that the "sue and be sued" language in the City's charter waived its immunity from suit.

CITY OF HOUSTON V. JONES, 2004 TEX. APP. LEXIS 7493 (TEX.APP.-HOUSTON [1ST DIST.] 2004, PET. FILED). “SUE AND BE SUED” LANGUAGE IN HOUSTON CITY CHARTER WAIVES IMMUNITY.

FACTS: Jones filed suit against his neighbor and the City of Houston for damage that was done to his house by demolition work his neighbor performed under a city permit. He later added a breach of contract claim against the City, alleging that the City and Jones had entered into a settlement agreement relating to Jones's tort claims and that the City had breached that agreement, which in turn caused Jones to incur damages. After Jones filed his second amended petition, the City filed a plea to the jurisdiction, arguing that the City Charter's "sue or be sued" language does not waive its immunity from suit but, rather, speaks to the City's capacity to sue once immunity has been waived. Mr. Jones argued that it does, in fact, waive immunity.

HOLDING: The trial court denied the City's plea to jurisdiction. The appellate court held that the language of art. II, § 1 in the City Charter clearly and unambiguously waived the City's immunity from suit for breach of contract claims. It held that the decision in *United Water Services* is still good law and the trial court correctly denied the City's plea to the jurisdiction.

CITY OF HOUSTON V. BOYER, INC., 2004 TEX. APP. LEXIS 8785 (TEX. APP.-HOUSTON [1ST DIST.] 2004, PET. FILED). “SUE AND BE SUED” IN CITY CHARTER WAIVES IMMUNITY. NO TEXAS CASE HAS HELD THAT A CITY’S CHARTER COULD NOT SERVE TO WAIVE IMMUNITY FROM SUIT.

FACTS: The City of Houston and Boyer entered into a contract. Boyer later filed a breach of contract claim against the City. The City filed a plea to the jurisdiction on the grounds that it had not waived immunity from suit. Boyer disagreed, arguing that the City Charter waived immunity from suit through Article II, § 1, and TEX. LOC. GOV'T CODE . § 51.075 (1999).

HOLDING: The trial court denied the City's plea to the jurisdiction. The appellate court affirmed. It held that the "sue and be sued" language found in the City of Houston's charter constituted a clear and unambiguous waiver of the city's immunity from suit. With little discussion, it cited the decision in *United Water Services* as controlling. The appellate court noted that no Texas case had held that a city's charter could not waive the city's immunity from suit but commented in *dicta* that whether a state entity waived immunity from suit by its conduct was a determination better made by the legislature than by the courts.

METRO. TRANSIT AUTH. v. MEB ENG'G, INC., 176 S.W.3D 300 (TEX. APP.-HOUSTON [1ST DIST.] 2004, PET. FILED) "SUE AND BE SUED" LANGUAGE IN TEX. TRANSP. CODE . § 451.054 WAIVES IMMUNITY.

FACTS: The Metropolitan Transit Authority (METRO) entered into a construction contract with MEB Engineering. After some time, MEB performed "extra work" for METRO and suffered delays due to METRO's failures to plan properly in advance of the construction projects. MEB sued METRO for breach of contract, *quantum meruit*, and fraud, seeking more than \$ 1.5 million in damages. METRO counterclaimed, alleging that it was contractually entitled to liquidated damages from MEB for the delay in completing the contracts. METRO alleged breach of contract and breach of warranty claims against MEB, seeking more than \$ 400,000 in damages, plus attorney's fees. METRO then filed a plea to the jurisdiction, asserting that it was immune from suit as a governmental unit. MEB responded that the "sue and be sued" language in the Transportation Code, §451.054 waives METRO's immunity from suit.

HOLDING: The trial court dismissed MEB's *quantum meruit* and fraud causes of action, but denied METRO's plea to the jurisdiction with respect to MEB's breach of contract claim. METRO Appealed arguing that the "sue and be sued" language in the Transportation Code does not waive its governmental immunity from suit and that MEB failed to allege any other express waiver of immunity. In affirming, the appellate court determined that the "sue and be sued" language in Tex. Transp. Code . § 451.054 (1999) waived METRO's immunity from suit. The language of § 451.054 was clear and unambiguous, as required by TEX. GOV'T CODE §311.034 (Supp. 2004). The court was bound by precedent established by the Texas Supreme Court in *MoPac* on the "sue and be sued" issue. A concurring opinion in the case would have reached the same decision based on the decision *Reata* and the fact that METRO had filed a counterclaim seeking damages against MEB.

SAN ANTONIO INDEP. SCH. DIST. v. CITY OF SAN ANTONIO, 2004 TEX. APP. LEXIS 11910 (TEX. APP.-SAN ANTONIO 2004, PET. FILED) "SUE AND BE SUED" LANGUAGE OF TEX. EDUC. CODE .

§ 11.151(A) (1996) CLEARLY AND UNAMBIGUOUSLY WAIVED IMMUNITY FOR INDEPENDENT SCHOOL DISTRICTS. *SATTERFIELD* IMPROPERLY OVERRULED *MoPac*.

FACTS: San Antonio Independent School District (“SAISD”) and the City of San Antonio, acting by and through San Antonio Water System (“SAWS”), entered into an Easement Agreement to grant SAWS the right to use a 55 x 70 foot section of SAISD's tract to construct, reconstruct, realign, inspect, patrol, maintain, operate, repair, add, remove and replace water and drain water facilities. SAWS later entered into a contract with Sunshine Cottage, a third party purchaser, to sell approximately 21.314 acres of the 25.142 acre tract. As one of the terms of the sale, Sunshine Cottage asked for assurances that it would be able to utilize the easement tract to travel from the 25.142 acre site to the public right-of-way portion of Old Hildebrand Avenue and Devine Road. In order to obtain the necessary assurances, SAWS brought an action for declaratory judgment and requested that the court declare that the easement would be transferable to a purchaser upon a sale of the land. SAWS filed a motion for summary judgment.

HOLDING: The trial court granted the motion for summary judgment. SAISD argued on appeal that it was immune from suit because that the "sue and be sued" language in TEX. EDUC. CODE §11.151(a) (Vernon 1996) was not a clear and unambiguous waiver of immunity. The appellate court held that the legislature clearly and unambiguously waived immunity for independent school districts, evidenced by the "sue and be sued" language of TEX. EDUC. CODE . § 11.151(a) (1996). The Court also relied primarily on the decision in *MoPac*. While noting that its sister court in *Satterfield* had reached a different conclusion, it held that the decision in *Satterfield* was incorrect because it improperly overruled *Mopac*.

***ALAMO CMTY. COLL. DIST. V. BROWNING CONSTR. CO.*, 131 S.W.3D 146 (TEX.APP.-SAN ANTONIO 2004, PET. DENIED) COURT HOLDS THAT “SUE AND BE SUED” LANGUAGE IN TEX. EDUC. CODE §130.084 AND §11.151(A) WAIVE SOVEREIGN IMMUNITY FOR COMMUNITY COLLEGE DISTRICTS.**

FACTS: Alamo College Community District and Browning Construction entered into a contract for the construction of a new campus for ACCD. Browning agreed to serve as the general contractor. After disagreements over delay, Browning sued ACCD for breach of contract and won damages of over \$ 3,000,000. ACCD argued that it was immune from suit. The jury disagreed and found that the contractor could collect damages.

HOLDING: The court determined that the “sue and be sued language” in Tex. EDUC. CODE . §§ 130.084, 11.151(a), waived sovereign immunity for community college districts. It concluded that the Legislature clearly and unambiguously waived immunity for community college districts and that it was bound by the Texas Supreme Court’s decision in *Missouri Pac. R.R. Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812 (Tex. 1970) which held that “sue and be sued” is an effective and clear waiver.

C. “PLEAD AND BE IMPEADED” PROVISIONS

CITY OF HOUSTON V. CLEAR CHANNEL OUTDOOR, INC., 161 S.W.3D 3 (TEX. APP.-HOUSTON [14TH DIST.] 2004, PET. FILED) EARLIER DECISION WRONG; “SUE AND BE SUED” AND “PLEAD AND BE IMPEADED” ARE EFFECTIVE WAIVERS OF IMMUNITY FROM SUIT.

FACTS: The City of Houston contracted with Clear Channel Outdoor, Inc. to purchase a billboard for a reconstruction project. Months later, Houston contacted Clear Channel and informed it that because the billboard was impermissible, and that it considered itself not obligated to compensate Clear Channel for illegal improvements. After Houston refused to pay, Clear Channel sued Houston for breach of contract. Houston then filed a plea to the jurisdiction, in which it claimed sovereign immunity under Texas Local Government Code §51.075.

Holding: The trial court denied the plea, and Houston filed an interlocutory appeal. The Fourteenth Court of Appeals had previously held in *Jackson v. Galveston*, 837 S.W.2d 868 (Tex. App.-Houston [14th Dist.] 1992, pet. denied) that "sue and be sued" did not waive sovereign immunity. The appellate court reversed its earlier decision. It held that *MoPac* was still good because the Supreme Court had declined to address the issue in *Fed. Sign v. Texas State Univ.*, 951 S.W.2d 401 (Tex. 1997). As such, it found no reason that it could hold ignore the Supreme Court's decision that "sue and be sued" language is an effective waiver. It noted that the language in the statute is "plead and be impleaded," rather than "sue and be sued," but held that there was no distinction between the two phrases. While acknowledging that some of its sister courts had held there to be a distinction between the two phrases, the appellate court held that in the context of the statute, there was no difference.

GOERLITZ V. CITY OF MIDLAND, 101 S.W.3D 573 (TEX. APP.-EL PASO 2003, PET. FILED). COURT HOLDS “IMPEAD AND BE IMPEADED” IN A CITY CHARTER AND “SUE AND BE SUED” IN TEX. LOC. GOV'T. CODE § 51.075 ARE WAIVERS OF IMMUNITY.

FACTS: Contractor Goerlitz entered into a contract with the City of Midland for wood chipping. The contractor was unable to complete the job because a fire broke out at the job site. Each party blamed the other for the fire. Goerlitz subsequently billed the City for services rendered and later sued when the City refused to pay. The trial court granted the City's plea to the jurisdiction based on sovereign immunity. On appeal Goerlitz argued that the City had waived its immunity from suit based on a provision in the Midland City Charter as well as TEX. LOC. GOV'T. CODE § 51.075. Article III, sec. 1(a) of the Midland City Charter provides in part:

The City of Midland, made a body politic and corporate by the adoption of this Charter, shall have perpetual succession; may use a common seal; may sue and be sued; may contract and be contracted with; *implead and be impleaded in all courts and places and in all matters whatever . . .*

TEX. LOCAL GOV'T CODE §51.075 provides that “the municipality may *plead and be impleaded* in any court.”

HOLDING: The appellate court reversed holding that the when the city entered into a contract with a private citizen, it waives immunity from liability; the City Charter and Local Government

Code provision waived its immunity from suit. The appellate court noted that the phrase “plead and be impleaded” has been found to mean the same as “sue and be sued.” Here the court held that the phrase constitutes a waiver of immunity.

D) AFFIRMATIVE CONDUCT BY GOVERNMENTAL ENTITY WAIVES IMMUNITY

REATA CONSTR. CORP. V. CITY OF DALLAS, 2004 TEX. LEXIS 303 (TEX. 2004, REH’G GRANTED). BY FILING A SUIT FOR DAMAGES, A GOVERNMENTAL ENTITY WAIVES IMMUNITY FROM SUIT FOR ANY CLAIM THAT IS INCIDENT TO, CONNECTED WITH, ARISES OUT OF, OR IS GERMANE TO THE SUIT OR CONTROVERSY BROUGHT BY THE STATE.

FACTS: The City of Dallas issued Dynamic Cable Construction Company a license to install fiber optic cable in downtown Dallas. Dynamic subcontracted with Reata Construction Company ("Reata") to do the drilling for the conduit. During construction, Reata inadvertently drilled into a thirty-inch water main, flooding a nearby residential area. Soon after, Southwest sued Dynamic and Reata for negligence. The building's tenants intervened in the suit seeking damages. Reata filed a third-party claim against the City of Dallas alleging that the plaintiffs' damages were caused by the City's misidentification of the water main's location when it was originally installed and again in response to Reata's request in 2000. The City filed special exceptions asserting that Reata's claims were not within the Texas Tort Claims Act's waiver of immunity. The City also intervened asserting claims against Dynamic. The City filed a second amended plea in intervention asserting a claim of negligence against Reata related to the flooding, and seeking actual damages, pre-and post-judgment interest, costs, and "any other relief at law and equity to which it may be entitled." The next day, the City filed a plea to the jurisdiction asserting governmental immunity from suit with regard to Reata's claims against it. Reata filed a response to the plea, arguing that governmental immunity did not apply because the City subjected itself to jurisdiction by intervening in the lawsuit and seeking affirmative relief and that the Dallas City charter and § 51.075 of the Texas Local Government Code contain express waivers of sovereign immunity because they provide that the City may "sue or be sued" and "plead and be impleaded"

HOLDING: The trial court denied the City's plea to the jurisdiction, and the City took an interlocutory appeal. Rejecting each of Reata's asserted bases for a waiver of governmental immunity, the court of appeals reversed and dismissed Reata's claims against the City. The court of appeals, relying on *Anderson, Clayton & Co. v. State ex rel. Allred*, 122 Tex. 530, 62 S.W.2d 107, 110 (Tex. 1939), held that even though the City intervened in the suit against Reata, the City did not waive any right to object to a lack of subject matter jurisdiction. By intervening, the court of appeals reasoned, the City asserted its right and capacity to sue but did not waive its governmental immunity from suit. It held that the phrase had its origins in corporate law and referred merely to capacity rather than waiver. The Texas Supreme Court disagreed and reversed, holding that the City waived its immunity from suit by intervening and asserting claims for damages against Reata. It held that by filing a suit for damages, a governmental entity waives immunity from suit for any claim that is incident to, connected with, arises out of, or is

germane to the suit or controversy brought by the State. The Supreme Court resolved the case by focusing on its decision in *Kinnear v. Tex. Comm'n on Human Rights ex rel. Hale*, 14 S.W.3d 299, 43 Tex. Sup. Ct. J. 654 (Tex. 2000). In *Kinnear*, the Texas Commission on Human Rights filed suit against Kinnear, alleging that he had violated the Texas Fair Housing Act. Kinnear counterclaimed for attorney's fees as provided by the Act, and when he prevailed the trial court awarded them. In response to the Commission's assertion of immunity, the Supreme Court held that "because the Commission initiated the proceeding under the Texas Fair Housing Act and Kinnear claimed attorney fees as a consequence of that suit, the jurisdictional question in the case was answered when the Commission filed suit . . ." *Id.* at 300. Following that decision, the court held that when a governmental entity files suit against a party, that entity waives, at a minimum, immunity from suit for counterclaims filed as a consequence of the suit. Since the City did not file the plea to jurisdiction before asserting its claims, it waived immunity. The Supreme Court granted a rehearing of this case and a decision on the issue of waiver is still pending.

***PORT NECHES-GROVES INDEP. SCH. DIST. V. PYRAMID CONSTRUCTORS, L.L.P.*, 140 S.W.3D 440 (TEX. APP.-BEAUMONT 2004, PET. FILED) AFFIRMATIVE ACTION SEEKING DAMAGES BY SCHOOL DISTRICT WAIVES IMMUNITY FROM SUIT.**

FACTS: Port Neches-Groves Independent School District ("PNGISD") and Pyramid Constructors ("Pyramid") entered into a contract to build a new school. After disputes arose over payments, Pyramid sued PNGISD for breach of contract. PNGISD counterclaimed for breach of contract. PNGISD and Pyramid ultimately settled part of their dispute and executed an agreement providing, in part, for Pyramid to pay PNGISD \$ 900,000 and for Pyramid and PNGISD to dismiss certain claims against each other with prejudice. PNGISD agreed to release all of its claims against Pyramid and Pyramid agreed to release its claims against PNGISD, except those causes of action for retainage withheld under the contract. The parties specifically agreed Pyramid would "retain all causes of action for retainage withheld under the contract, including attorney fees and statutory interest claims." On the remaining claims, PNGISD filed a plea to the jurisdiction contending the trial court lacked subject matter jurisdiction to hear the case as PNGISD is a political subdivision and is immune from suit. Pyramid argued that PNGISD had waived its immunity when it filed a counterclaim against it.

HOLDING: The trial court denied PNGISD's plea to the jurisdiction. The appellate court held that the school district waived immunity when it filed a counterclaim against Pyramid. Relying on *Reata*, the court concluded that the district waived its immunity from suit when it counterclaimed against the contractor and asserted its affirmative claims for damages. It noted that the contractor was first to file suit, not the district, and the district could have asserted its immunity without counterclaiming against the contractor and seeking affirmative relief from the trial court. The appellate court declined to address the "sue and be sued" issue since it disposed of the case on other issues.

***STATE V. FID. & DEPOSIT CO. OF MD.*, 127 S.W.3D 339 (TEX.APP.-AUSTIN 2004, PET. FILED)
COURT HOLDS THAT GOVERNMENT WAIVES IMMUNITY FROM SUIT WHEN IT INITIATES SUIT.**

FACTS: A construction company agreed to build a research and technology center for the Texas Department of Transportation. Fidelity furnished a performance bond for the project, acting as surety on the contract. The construction company was plagued by problems and eventually defaulted on the contract. As a result, the Department terminated the construction company on the project and made demand on Fidelity to perform under its bond. Fidelity entered into a "Takeover Agreement" with the Department under which Fidelity agreed to undertake the completion of the original contract. Pursuant to the agreement, Fidelity subcontracted the work to Faulkner Construction. In April 2001, Fidelity notified the Department that it intended to file a claim for an increase of the contract price based upon "excessive costs and expenses" it had incurred after Sedona's default on the construction contract. The Department responded by providing Fidelity information about its administrative dispute-resolution procedures. Specifically, the Department directed Fidelity to file any claim with the Department's Contract Claim Committee. In January 2003, the Committee offered Fidelity \$ 200,000 over the contract price. Fidelity requested further discussion of its claim and a twenty-day extension of its appeal period. The Committee denied Fidelity's request for further consideration but granted its request for the twenty-day extension. Fidelity did not request a formal administrative hearing. Meanwhile, in July 2001, *the State filed suit* against Fidelity in district court claiming that it had failed to fully perform under its performance bond, causing the State to incur damages. Fidelity counterclaimed against the State in November, asserting that the Department had caused it to incur damages by failing to meet its obligations under the original construction contract and the subsequent takeover agreement, the same claims it had asserted before the Contract Claim Committee. The State filed a plea to the jurisdiction seeking dismissal of Fidelity's counterclaims. The State asserted that it was protected from Fidelity's counterclaims by sovereign immunity and Fidelity's failure to exhaust its administrative remedies. Fidelity argued that the State waived sovereign immunity by initiating the litigation. The trial court denied the State's plea to the jurisdiction.

HOLDING: The appellate court determined that the State waived its right to immunity in the case by initiating litigation. When the State initiated an action for money against the it waived immunity since the counterclaim asserted was germane to the controversy. The court noted that the same issues arose in the original case and the counterclaim. Further, the court determined that the sureties did not fail to exhaust their administrative remedies. There were no mandatory administrative remedies to exhaust because the contract to build a research and technology center was not covered by TEX. TRANSP. CODE §201.112 (Supp. 2004), which only included structures related to bridges and culverts. As such, the structure built was not a highway project within the meaning of § 201.112.

CITY OF IRVING V. INFORM CONSTR., INC., 143 S.W.3D 371 (TEX. APP.-DALLAS 2004, PET. FILED) BECAUSE THE CITY SOUGHT AFFIRMATIVE RELIEF, IT WAIVED ITS IMMUNITY. EVEN THOUGH THE COUNTERCLAIMS WERE COMPULSORY, REATA REQUIRES A CITY TO DECIDE BETWEEN EITHER FILING A PLEA TO THE JURISDICTION OR PURSUING AFFIRMATIVE COUNTERCLAIMS.

FACTS: The City of Irving and Inform Construction, Inc. entered into a contract on June 21, 2000. to construct a recreation center. Inform later filed suit, alleging the City failed to meet its payment obligations. The City answered the petition and filed a counterclaim for damages and attorneys' fees arising out of Inform's alleged breach of the June 21, 2000 contract. The City then filed a plea to the jurisdiction. The City now stated that it "did not pursue its earlier request for affirmative relief," when it filed its plea to the jurisdiction. However, it did not amend its answer or withdraw the counterclaim. Inform argued that §51.075 of the Local Government Code and the City Charter waived the City's immunity.

HOLDING: The trial court denied the City's plea, holding that it had waived its immunity by seeking affirmative relief. The appellate court found the fact scenario analogous to *Reata* and that the decision there was binding. It held that when the City filed its counterclaim, it waived immunity from claims incident to, connected with, arising out of, or germane to that affirmative claim. The court recognized that the City's counterclaim was compulsory and would be lost if not asserted before the running of limitations, but found that *Reata* requires that choice: a party may either invoke the jurisdiction of the court by seeking affirmative relief or challenge the court's subject matter jurisdiction over the dispute.

II. SOVEREIGN IMMUNITY CASES FINDING NO WAIVER OF SOVEREIGN IMMUNITY

A) "SUE AND BE SUED" PROVISIONS

SATTERFIELD & PONTIKES CONSTR., INC. V. IRVING INDEP. SCH. DIST., 123 S.W.3D 63 (TEX. APP.-DALLAS 2003, PET. FILED). COURT HOLDS "SUE AND BE SUED" IN THE TEXAS EDUCATION CODE IS NOT A WAIVER OF IMMUNITY FOR SCHOOL DISTRICTS.

FACTS: Irving Independent School District contracted for the construction of a new middle school. During construction, the project experienced certain delays. The contractor filed a lawsuit against the school district for delay damages. The trial court dismissed the contractor's claims for want of jurisdiction. The contractor appealed the decision, arguing that TEX. EDUC. CODE § 11.151 which contains a "sue and be sued" provision was a waiver of immunity from suit.

HOLDING: The appellate court held that TEX. EDUC. CODE § 11.151 was not a clear and unambiguous waiver of the school district's immunity from suit. It held that when determining whether the Legislature has clearly and unambiguously waived immunity from suit, ambiguities should be resolved in favor of retaining immunity. The court interpreted the "sue and be sued"

provision in the Texas Education Code as referring to the School District's "capacity to sue and its capacity to be sued when immunity *has* been waived," rather than a waiver itself. It focused on the origin of the phrase "sue and be sued" in the corporate context and stated that these provisions can be read as a "designation to give a particular entity a legal existence in the courts." *Id.* at 66. As such, it viewed 11.151 as "acknowledging the District's capacity to sue and its capacity to be sued once immunity has been waived." The court held that the decision in *MoPac* has been called into question after the decisions in *Taylor, Pelzel*. In *Pelzel* the statute in question provided "a person may not sue on a claim against a county unless the person has presented the claim to the commissioners court and the commissioners court has neglected or refused to pay all or part of the claim." *Travis County v. Pelzel & Assocs.*, 77 S.W.3d 246, 251 (Tex. 2002). The *Pelzel* court acknowledged Missouri Pacific's holding by stating that "sue and be sued" language "*arguably* shows intent to waive sovereign immunity" *Id.* (emphasis added). But *Pelzel* also noted there were no cases to support Missouri Pacific's assertion that a county's immunity from suit had been held to be waived by statutes requiring the filing of a claim before institution of suit. *Id.* The appellate court distinguished its analysis from its sister courts by pointing out that they did not "addresses or even acknowledges the changes that have taken place in the law relating to waiver of immunity from suit issues since Missouri Pacific." *Satterfield* at 68.

DALLAS FIRE FIGHTERS ASS'N V. CITY OF DALLAS, 2004 TEX. APP. LEXIS 6774 (TEX. APP.-DALLAS 2004, PET. FILED). "SUE AND BE SUED" LANGUAGE IN CITY CHARTER AND 51.075 OF THE TEXAS LOCAL GOVERNMENT CODE DO NOT WAIVE IMMUNITY FROM SUIT.

FACTS: Thirty-five firefighters and the Dallas Fire Fighters Association sued the City of Dallas after their promotions were either delayed or denied. The sued for breach of contract, alleging that the City's promotion examination violated the City Charter, the Civil Service Rules, and the City's implied employment contract with its workers. In addition to their breach of contract claims, appellants also sought declaratory and injunctive relief. Appellants sought back pay, future pay, lost retirement and other benefits, past and future damages for mental anguish and emotional distress, and damages for adverse impact to appellants' development and hiring potential. They also asked for the court to fashion new promotion lists for lieutenant and captain. The City filed a plea to the jurisdiction to the lawsuit, asserting it had not waived immunity for any of appellants' claims. In response to the plea, the firefighters asserted that the language in the City Charter and section 51.075 of the Texas Local Government Code waived immunity.

HOLDING: The trial court proceeded granted the City's plea and dismissed the lawsuit. The appellate court affirmed holding that the language in § 51.075 and the City Charter, that a city "could plead and be impleaded in any court," were not waivers of immunity. The court declined to revisit its decisions in *Satterfield & Pontikes Constr., Inc. v. Irving Indep. Sch. Dist.*, 123 S.W.3d 63, 66-67 (Tex. App.-Dallas 2003, pet. filed) (concluding "sue and be sued" language found in section 11.151(a) of the Texas Education Code is not waiver of immunity) and *City of Carrollton v. McMahon Contracting, L.P.*, 134 S.W.3d 925, 927-28 (Tex. App.-Dallas 2004, pet. filed) (concluding language in section 51.075 that city "may plead and be impleaded in any court" not waiver of immunity). The appellate court held the relief requested, the very

promotions denied or delayed and the accompanying pay increase, was also not subject to resolution by a declaratory judgment.

***TAUB V. HARRIS COUNTY FLOOD CONTROL DIST.*, 76 S.W.3D 406 (TEX. APP.-HOUSTON [1ST DIST.] 2001, PET. FILED). COURT RULES THAT TEX. LOC. GOV'T CODE . § 89.004 IS NOT A WAIVER OF IMMUNITY FROM SUIT.**

FACTS: Plaintiff Taub was a property owner who appealed the district court's grant of immunity to Harris County in this condemnation action. Taub argued that the legislature waived immunity under TEX. LOC. GOV'T CODE §89.004 and the grant of immunity was therefore inappropriate. The code states:

- (a) A person may not sue on a claim against a county unless the person has presented the claim to the commissioners court and the commissioners court has neglected or refused to pay all or part of the claim.
- (b) If the plaintiff in a suit against a county does not recover more than the commissioners court offered to pay on presentation of the claim, the plaintiff shall pay the costs of the suit.

HOLDING: The appellate court in Houston ruled that because § 89.004 made no reference specifically to a waiver of sovereign immunity, it should be read as a notice statute and not a waiver of sovereign immunity. It held that in § 89.004, the legislature did not state that it waives county immunity from suit; it merely provides that a party must present the commissioners court with its claim and the commissioners court must neglect or refuse to pay all or part of the claim before the party can file suit. The appellate court saw the section not as a waiver of immunity, but instead establishing a condition precedent to filing suit.

B) “PLEAD AND BE IMPEADED” PROVISIONS HELD TO BE DIFFERENT FROM “SUE AND BE SUED” PROVISIONS.

***CITY OF MEXIA V. TOOKE*, 115 S.W.3D 618 (TEX. APP.-WACO 2003, PET. GRANTED) “PLEAD AND BE IMPEADED” NOT AN EFFECTIVE WAIVER OF IMMUNITY FROM SUIT.**

FACTS: The City of Mexia contracted with J. E. Tooke and Sons for curbside collection of brush and leaves within the city. The contract was automatically renewable each year unless either party gave written notice of intent to terminate at least sixty days before the anniversary date of the contract. A city employee verbally notified Tooke in December that it would no longer require Tooke's services under the contract because of budgetary limitations. The city manager sent Tooke a letter in March confirming the prior verbal notification. Tooke sued the City for breach of contract. The city filed a plea to the jurisdiction. Tooke responded that the city had waived its immunity from suit in contract cases through Section 51.075.

HOLDING: The trial court denied the plea to the jurisdiction. The appellate court reversed and dismissed the claims against the city. In analyzing the “plead and be impleaded” language in TEX. LOC. GOV'T CODE §51.075, the court discussed the current split among the appellate courts. It held that it could not hold the language to be a clear waiver of immunity from suit because the Supreme Court had never held the “plead and be impleaded” language to be a sufficient waiver. In response to the courts that have held the terms “plead and be impleaded” and “sue and be sued” to mean the same thing in the context of the statute, the appellate court pointed out that such an interpretation violates principles of statutory interpretation, since that the Legislature presumably used every word in a statute for a particular purpose. There was more than enough doubt in the court’s view for the waiver to not be “beyond doubt” and satisfy the *Taylor* factors. *See infra*.

CITY OF CARROLLTON V. MCMAHON CONTR., L.P., 134 S.W.3D 925 (TEX. APP.-DALLAS 2004, PET. FILED). “PLEAD AND BE IMPEADED” IS NOT WAIVER OF IMMUNITY BECAUSE IT IS DIFFERENT FROM “SUE AND BE SUED.”

FACTS: McMahon Contracting, L.P. entered into a contract with the City of Carrollton to perform street repairs. When a dispute arose over payment, McMahon sued the City for breach of contract, or in the alternative, for recovery in quantum meruit. The City filed a plea to the jurisdiction on the ground that its immunity from suit had not been waived. McMahon argued that TEX. LOC. GOV'T CODE § 51.075 waived the City’s immunity.

HOLDING: The trial court denied the plea, and the City appealed. The appellate court reversed and dismissed the case, holding that § 51.075 of the Texas Local Government Code is not a clear and unambiguous waiver of the City's immunity from suit. TEX. LOC. GOV'T CODE § 51.075 (1999) provided that a home-rule municipality could “plead and be impleaded” in any court. The appellate court noted that § 51.075 was, at a minimum, ambiguous as to whether it addressed a home-rule municipality's capacity to plead and be impleaded as an entity or was an expression of the legislature's intent to waive a city's immunity from suit. The appellate court held that § 51.075 did not effect a waiver of the City's immunity "by clear and unambiguous language." *Id.* at 927. It followed the approach taken in *Tooke* in analyzing the factors set forth in *Taylor*:

- (i) the statute waives immunity beyond doubt; for example, whether the provision in question would be meaningless unless immunity were waived; (ii) ambiguities are resolved in favor of retaining immunity; (iii) if the Legislature requires the State be joined in a lawsuit in which immunity would otherwise attach, the Legislature has intentionally waived the State's sovereign immunity; and (iv) whether the statute also provides an objective limitation on the State's potential liability. *Id.*

The appellate court noted that the Texas Supreme Court had never held that the language "plead and implead" was a clear and unambiguous waiver of immunity from suit. Accordingly, it disagreed with the conclusion of its sister courts that had held otherwise.

***CITY OF DALLAS V. FIRST TRADE UNION SAV. BANK*, 133 S.W.3D 680 (TEX. APP.-DALLAS 2003, PET. FILED). IMMUNITY FROM SUIT NOT PROPER FOR CLAIMS SEEKING PURELY ECONOMIC DAMAGES. PLAINTIFF MUST ALSO HAVE OPPORTUNITY TO BRIEF JURISDICTIONAL ISSUE.**

FACTS: The City of Dallas contracted with Computer Engineering Associates, Inc. ("CEA") for the installation of an access control security system at Love Field airport. Pursuant to a contract with CEA, Amwest Surety Insurance Company ("Amwest") agreed to provide a payment and performance bond for the project. In 1994, the City declared CEA in default and made a claim on the performance bond against Amwest for completion of the project. Amwest performed under the terms of the bond and arranged to complete the installation project. In 1995, CEA entered into a lending agreement with the Bank. As part of the agreement, the Bank acquired a security interest in CEA's accounts receivables, consisting, in part, of contractual agreements with private and governmental entities. Within a year, CEA defaulted on the Bank's loan and filed for bankruptcy. The bankruptcy court granted the Bank's motion to lift the automatic stay, allowing the Bank to liquidate its security interests and to exercise all its rights and remedies in connection with CEA's contracts. The Bank then sued the City, alleging that: (1) the Bank had a security interest in CEA's contract with the City, and that the bankruptcy court's order lifting the automatic stay caused an assignment to take place to the Bank; and (2) the City had breached its contract with CEA by wrongfully declaring CEA in default on the Love Field project. The City responded to the Bank's suit and moved for summary judgment, which was denied. Thereafter, the City filed a plea to the jurisdiction. It asserted that the Bank's claims were tort claims, and thus were barred by governmental immunity.

HOLDING: The trial court denied the City's plea, and the City filed an interlocutory appeal. Due to the nature of the city's challenges to the bank's standing, the appellate court decided the trial court would have to consider evidence before determining the city's contentions that the bank lacked standing. It affirmed the trial court's denial of the appeal to jurisdiction. It also held that a trial court may not grant a plea to the jurisdiction where a plaintiff fails to plead facts establishing jurisdiction without first allowing the plaintiff an opportunity to amend. Because the City failed to raise this argument in the trial court, the Bank had never been given an opportunity to amend its petition to meet the City's challenge. Regarding the Bank's claims for breach of contract, breach of warranty, and unjust enrichment, the court concluded that they all arose out of the contracts and alleged obligations of the parties under the contracts. Since the Bank sought to recover economic damages or the benefit of its bargain, the court determined that the trial court did not err in rejecting the City's argument that the claims were tort claims which did not fall within the limited waiver of immunity from suit and liability contained in the TTCA.

III) TEXAS TORT CLAIMS ACT IMMUNITY CASES

***CITY OF SAN ANTONIO V. BUTLER*, 131 S.W.3D 170 (TEX. APP.-SAN ANTONIO 2004, PET. FILED) TEXAS TORT CLAIMS ACT LIMITS "SUE AND BE SUED" AND "PLEAD AND BE IMPEADED" WAIVER OF IMMUNITY.**

FACTS: Appellees Keith and Debbie Butler were attending a KISS concert in the Alamodome (owned and operated by the City of San Antonio) when a drunken patron seated in the level above the Butlers jumped or fell over the rail and landed on Keith Butler, causing serious injuries. The Butlers sued four defendants: (1) Gilbert Garza, the individual who fell, (2) Beaver Productions, Inc., the company that produced the concert, (3) Aramark Sports & Entertainment Services, Inc., the concession company that allegedly sold alcohol to Garza at the concert, and (4) the City of San Antonio. The City filed a plea to the jurisdiction asserting governmental immunity. On appeal, the Butlers argue: (1) the City's immunity from suit has been waived by §51.075 of the Local Government Code and the City Charter; (2) the City was performing a proprietary rather than governmental function by selling alcohol; and (3) the Butler's alternate claims, *i.e.*, the City's misuse of alcohol, failure to correct a dangerous condition on the property (by removing Garza), and improper configuration of the Alamodome, fall within the exceptions to the Texas Tort Claims Act.

HOLDING: The district court denied the City's plea to jurisdiction. The appellate court reversed holding that the city's governmental immunity from tort lawsuits was not waived by Tex. Loc. Gov't Code . § 51.075 or by San Antonio City Charter, art. I, § 3, para. 1, providing that the city could plead and be impleaded in all courts. Under the Texas Tort Claims, a city's immunity from suit is waived only by a showing that the tort claims in question are those specific types of claims for which the TTCA waives the city's immunity from liability. The court held that statutory rules of construction give precedence to the TTCA as the later-enacted, more specific statute controlling waiver of sovereign immunity from both suit and liability in tort cases. In this case, the tort claims were not the type for which the TTCA waived the city's immunity from liability.

***CITY OF MESQUITE V. PKG CONSTR., INC.*, 148 S.W.3D 209 (TEX. APP.-DALLAS 2004, PET. FILED) IMMUNITY FOR ACTIONS IN TORT NOT WAIVED FOR GOVERNMENTAL FUNCTIONS. 51.075 DOES NOT WAIVE IMMUNITY FROM SUIT.**

FACTS: PKG and the City of Mesquite entered into a contract for a construction of a storm drainage system. Disputes arose over which party was responsible for moving certain utilities from the construction right-of-way. PKG filed suit against the City, alleging breach of contract, *quantum meruit*, negligence, and estoppel. The City filed a plea to the jurisdiction, asserting it had not waived immunity for any of PKG's claims. In response to the plea, PKG amended its petition and alleged the City had no immunity when it engaged in a proprietary function and had waived any immunity from suit and liability, citing the City's charter and Local Government code §51.075.

HOLDING: The trial court denied the City's plea. The appellate court vacated the trial court's order and held for the City. It stated that, pursuant to TEX. CIV. PRAC. & REM. CODE §101.0215(a)(9) (2004), governmental functions include "sanitary and storm sewers." Therefore, the city was engaging in a governmental function, so immunity was not waived for actions in tort under the Texas Tort Claims Act. Further, it followed the *Satterfield* line of cases that held the

language in TEX. LOC. GOV'T CODE §51.075 did not clearly and unambiguously waive immunity from suit.

IV) IMMUNITY CASES INVOLVING OTHER STATUTES

A) PATIENT'S BILL OF RIGHTS

WICHITA FALLS STATE HOSP. v. TAYLOR, 106 S.W.3D 692 (TEX. 2003) TEX. HEALTH & SAFETY CODE ANN. §§571.003 AND 321.003 (PATIENT BILL OF RIGHTS) DOES NOT WAIVE IMMUNITY.

FACTS: Terry Lynn Taylor was involuntarily committed to Wichita Falls State Hospital for severe mental illness. Taylor was discharged four days later, after being treated by Dr. Peter Fadow, a psychiatrist at the Hospital. Taylor returned home and committed suicide that same day. Taylor's wife, Deborah Taylor, sued the Hospital and Dr. Fadow under the Texas Health and Safety Code §321.003, asserting claims for wrongful death and survival. She alleged that Taylor's death was proximately caused by the negligence of the doctor and Hospital in failing to properly diagnose and treat his mental illness, and that the defendants' acts and omissions violated the patient's bill of rights. The Hospital moved to dismiss for want of jurisdiction based on sovereign immunity. In response, Mrs. Taylor argued that the Legislature unambiguously waived the Hospital's immunity by enacting TEX. HEALTH AND SAFETY CODE ANN. §§321.003 and 571.003, which provide that a person who has been harmed by a violation of the patient's bill of rights "may sue" for damages.

HOLDING: The trial court denied the Hospital's jurisdictional plea and the Hospital appealed. A divided court of appeals affirmed, holding that the Legislature clearly and unambiguously waived immunity from suit against state mental health facilities for violations of the patient's bill of rights. 48 S.W.3d 782. The Supreme Court reversed. It held the language in question did not clearly and unambiguously waive immunity. Section 321.003 provides in part:

A treatment facility or mental health facility that violates a provision of, or a rule adopted under, this chapter . . . is liable to a person receiving care or treatment in or from the facility who is harmed as a result of the violation.

(b) A person who has been harmed by a violation may sue for injunctive relief, damages, or both.

In its analysis the Court held that the statute allows for suit only against a private mental health facility, not a public one. The fact that the act remained viable despite the retention of immunity indicated to the Supreme Court that the Legislature did not intend to waive immunity by implication. In addition, from a policy perspective, the act would subject the State to indeterminate damages awards if it waived immunity; the Supreme Court had previously upheld waivers of immunity only when such a holding would leave "undisturbed the Legislature's interest in protecting the State's financial resources." Other factors that it considered were : whether ambiguities were resolved in favor of retaining immunity; if the Legislature required the

State be joined in a lawsuit in which immunity would otherwise attach, the Legislature has intentionally waived the State's sovereign immunity; whether the statute also provides an objective limitation on the State's potential liability. In its determination, immunity had not been waived based on these factors.

B) INTERLOCAL COOPERATION ACT

TEX. POLITICAL SUBDIVISIONS PROP./CAS. JOINT SELF-INS. FUND V. BEN BOLT-PALITO BLANCO CONSOL. INDEP. SCH. DIST., 163 S.W.3D 172 (TEX. APP.- SAN ANTONIO 2005, PET. GRANTED) LANGUAGE IN THE INTERLOCAL COOPERATION ACT NOT A CLEAR AND UNAMBIGUOUS WAIVER OF IMMUNITY.

FACTS: TPS is a local government entity comprised of various counties, municipalities, special districts, and other political subdivisions which performs certain governmental functions and services, one of which is the creation of a self-insurance pool. Ben Bolt, a small school district in Jim Wells County, is a member of TPS's self-insurance pool. In December 2002, Ben Bolt sustained a loss at one of its school facilities giving rise to a claim for mold and water damage. TPS denied Ben Bolt's claim on the basis that the alleged loss was not covered under the parties' insurance contract. Ben Bolt then filed a declaratory judgment action seeking a determination that the loss was covered by the agreement. TPS filed a plea to the jurisdiction and motion to dismiss claiming immunity from suit.

HOLDING: The trial court denied TPS's plea to the jurisdiction and TPS filed an interlocutory appeal. The appellate court reversed and Ben Bolt's claims were dismissed. The court held that the language in the Interlocal Cooperation Act was not a clear and unambiguous waiver of immunity. The language in question stated that "[l]ocal governments that are parties to an interlocal contract for the performance of a service may, in performing the service, apply the law applicable to a party as agreed by the parties." The San Antonio court did not see the language as reflecting a clear intent by the legislature to waive immunity. In its analysis, the court compared the language with the "sue and be sued" language that has been held to be an effective waiver. In responding to Ben Bolt's argument that sovereign immunity was inapplicable because TPS was engaged in a proprietary function by providing insurance benefits on a contractual basis, the appellate court noted that the proprietary/governmental function distinction only applies to municipal corporations and was thus inapplicable to TPS. The court relied heavily on the decision in *Wichita Falls* throughout its analysis.

V) INTERLOCUTORY APPEALS

THOMAS V. LONG, 2006 TEX. LEXIS 280 (TEX. 2006) AN IMPLICIT DENIAL OF A PLEA TO JURISDICTION IS SUFFICIENT TO GRANT APPELLATE COURT JURISDICTION OVER AN INTERLOCUTORY APPEAL.

FACTS: Plaintiff Long filed a retaliation claim against Harris County Sheriff Tommy Thomas and the Harris County Sheriff's Department seeking a declaration that she was entitled to immediately return to work with no loss of seniority or benefits, without taking any tests, without re-applying for employment, and with back pay dating from the Civil Service Commission's order. Thomas asserted a partial plea in bar, contending that the trial court "should not exercise jurisdiction over any of Plaintiff's reinstatement claims because exclusive or primary jurisdiction over this matter has been given to the Harris County Sheriff's Department Civil Service Commission."

HOLDING: The trial court entered a partial judgment in favor of Long. On the same day, the trial court granted Thomas's motion for partial summary judgment in part and dismissed Long's request for mandamus relief. The court also entered an order identifying Long's claims for retaliation, attorney's fees, and back pay, as the only remaining claims before the court. The trial court never explicitly ruled on Thomas's partial plea to jurisdiction. Thomas filed an interlocutory appeal to challenge the court's denial of his Plea to the Jurisdiction. The court of appeals dismissed the appeal for lack of jurisdiction, explaining that "because our record does not contain an order granting or denying a plea to the jurisdiction, and because §51.014(a) does not include an appeal of the denial of a summary judgment based on lack of subject matter jurisdiction, that statute does not explicitly provide that we have jurisdiction over this interlocutory appeal." The Texas Supreme Court reversed, holding that an implicit denial of a plea to jurisdiction is sufficient to grant the court of appeals jurisdiction under §51.014(a).

BRAZOS TRANSIT DIST. v. LOZANO, 72 S.W.3D 442 (TEX. APP.-BEAUMONT 2002, NO PET.)
INTERLOCUTORY APPEAL NOT PERMITTED AFTER DENIAL OF A SUMMARY JUDGMENT MOTION.

FACTS: Arturo Lozano sued Brazos Transit District and several others for injuries sustained by Lozano as a bus passenger. Brazos filed a motion for summary judgment, which the trial court denied. Brazos then filed an interlocutory appeal. Lozano filed a motion to dismiss the appeal on the grounds interlocutory appeal is not permitted in this case. Brazos contends the appeal is authorized pursuant to sections 54.014(a)(5) and (8) of the Texas Civil Practices and Remedies Code.

HOLDING: The appellate court dismissed the appeal. It held that it did not have jurisdiction because neither the district nor the employee sought summary judgment based on the doctrine of official immunity. It determined that TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (2004) permits an interlocutory appeal from any procedural vehicle, so long as it is based on sovereign immunity. Since there was no plea to the jurisdiction, it could not grant the appeal. The distinction between a motion for summary judgment and a plea to the jurisdiction, it said, is not merely semantics: "The pleadings and legal effect of these motions are readily distinguishable as to purpose and effect." *Id.* at 194. In the appellate court's analysis, the plain language of section (8) grants no right for an interlocutory order from the denial of a motion for summary judgment.

***BEXAR COUNTY V. GANT*, 70 S.W.3D 289 (TEX. APP.-SAN ANTONIO 2002, PET. DENIED)
INTERLOCUTORY APPEAL PERMITTED AFTER DENIAL OF A SUMMARY JUDGMENT MOTION
BECAUSE THE SUBSTANCE OF THE PROCEDURAL VEHICLE CONFERS JURISDICTION, NOT THE
FORMAT.**

FACTS: Plaintiff, Elvin J. Gant, Jr., filed a charge of discrimination with the Texas commission on Human rights. After receiving the right to sue letter, Gant filed a lawsuit against the County. The County filed a motion for summary judgment, asserting that Gant failed to exhaust his administrative remedies and, therefore, the trial court was without subject matter jurisdiction.

HOLDING: The trial court denied the motion for the summary judgment. On appeal, Grant argued that the appellate court lacks jurisdiction to consider the case because it is the denial of a motion for summary judgment, not the denial of a plea to the jurisdiction. The court of appeals reversed, holding that it had jurisdiction over the case. While noting that a governmental unit may appeal an interlocutory order that grants or denies a plea to the jurisdiction, the court held, however, that “it is the substance of the procedural vehicle that confers jurisdiction, not the format.” *Id.* at 290. Since the substance of the summary judgment motion is a plea to the jurisdiction, the court determined that it had jurisdiction.