SOVEREIGN IMMUNITY
AND
INTERLOCUTORY APPEALS
UPDATE 2008

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I. INTRODUCTION: This paper is meant to highlight some of the recent cases involving sovereign immunity and interlocutory appeals. It is not meant to be an exhaustive explanation of this area of law.

II. SOVEREIGN IMMUNITY

A. Common Law:

In Texas jurisprudence, sovereign immunity was first recognized by the Texas Supreme Court, not by operation of the Constitution or statute. "In 1847, this court held that 'no State can be sued in her own courts without her consent and then only in the manner indicated by that consent . . . .' The Court did not cite the origin of that declaration, but it appears to be rooted in an early understanding of sovereignty." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 (Tex. 2003) (quoting *Hosner v. De Young*, 1 Tex. 764, 769 (1847)); *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 863 (2002) (Enoch, J., dissenting). Thus, sovereign immunity in Texas jurisprudence came through recognition of the common law principle recognizing the inherent immunity of any governmental unit, not from statute or any particular provision of the constitution. *Taylor*, 106 S.W.3d. at 694-95.

This immunity applies when the State of Texas sues a city for money damages. *City of Galveston v. State*, 217 S.W.3d 466 (Tex. 2007). The State must show a waiver of immunity like any other plaintiff.

B. How is Immunity Waived?

Ordinarily, to waive immunity from suit, consent must be found in a constitutional provision or legislative enactment. *Taylor,* 106 S.W.3d at 695. Among the legislative waivers that affect the City's sovereign immunity are the Texas Tort Claims Act which is codified in the Texas Civil Practice and Remedies Code at § 101.001 et seq. In addition, a limited waiver of immunity exists for written contracts for goods and services under chapter 271 of the Local Government Code. The newest law passed has been HB 1473 that waives immunity for police and firefighters claims for benefits under the Local Government Code. This new public law has been codified at § 180.006 of the Local Government Code.

There are also times when sovereign immunity is abrogated by judicial decree. The supreme court has articulated a litigation waiver. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006) (op. on reh'g). A governmental entity that asserts affirmative claims for monetary recovery waives immunity from suit for claims against it that are germane to, connected with, and properly defensive to claims the governmental entity asserts to the extent of offset. *Id.* Additionally, in a plurality opinion the Texas Supreme Court articulated a very narrow waiver of immunity from suit for breach of a settlement agreement. *Tex. A&M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002). The exception requires that the settlement be for claims for which the governmental entity is not immune. *Id.*

III. PROCEDURAL TOOLS FOR DETERMINING SOVEREIGN IMMUNITY

A. Plea to the Jurisdiction:

The supreme court has established a procedure for contesting subject matter jurisdiction that involves the merits of the claim. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004). Evidence may be presented in the same manner as a summary judgment, except that evidence may be offered at the hearing. *Id.* at 228 n.6. The advantage to this procedure is that there are no time requirements of a summary judgment.

B. Mandamus:

Because of the right to an interlocutory appeal, a government entity is entitled to a ruling prior to trial. If the trial court refuses to rule, the government entity is entitled to mandamus. *In re Greenwell*, 160 S.W.3d 286 (Tex. App.—Texarkana 2005, orig. proceeding), *City of Galveston v. Gray*, 93 S.W.3d 587, 592-593 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

C. Interlocutory Appeal:

1. Appellant.

A person may appeal the grant or denial of a plea to the jurisdiction by a governmental entity. TEX. CIV. PRAC. & REM. CODE § 51.014 (8). If a government official is sued in his official capacity, the appellate court has jurisdiction to consider the official's appeal of a trial court's denial of a plea to the jurisdiction based on sovereign immunity. *Tex. A & M Univer. Sys. v. Koseoglu*, 233 S.W.3d 835, 845 (Tex. 2007).

In this same line of reasoning, the supreme court has also held that the appellate courts have jurisdiction to consider an interlocutory appeal of a jurisdictional plea brought by employees of a governmental unit sued in their official capacities. *Tex. Parks & Wildlife Dept. v. E.E. Lowrey Realty, Ltd.*, 235 S.W.3d 692, 693-94 (Tex. 2007).

2. Grounds.

An appellant must attack all independent bases or grounds that fully support a complained-of ruling or judgment. *Serv. Employment Redevelopment v. Fort Worth Indep. Sch. Dist.*, 163 S.W.3d 142, 146 (Tex. App.—Fort Worth 2005) *rev'd on other grounds*, 243 S.W.3d 609 (Tex. 2007) (per curiam); *Britton v. Tex. Dep't of Criminal Justice*, 95 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2002, no pet.). If an appellant does not, then under the *Britton* and *Service Employment Redevelopment* cases the court of appeals must affirm the ruling or judgment. This rule is based on the premise that an appellate court normally cannot alter an erroneous judgment in favor of an appellant in a civil case who does not challenge that error on appeal. *See Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993). If an independent ground fully supports the complained-of ruling or judgment, but the appellant assigns no error to that independent ground, then (1) the court must accept the validity of that unchallenged independent ground, and thus (2) any error in the grounds challenged on appeal is harmless because the unchallenged independent ground fully supports the complained-of ruling or judgment. *See Walling*, 863 S.W.2d at 58-59; *Britton*, 95 S.W.3d at 681. The same reasoning applies to a plea to the jurisdiction based on multiple grounds that the trial court sustains without specifying grounds.

In a similar manner in an interlocutory appeal, the City cannot bring new grounds in the court of appeals to challenge the jurisdiction of the trial court. *City of Dallas v. First Trade Union Sav. Bank*, 133 S.W.3d

680, 687 (Tex. App.—Dallas 2003, pet denied).

3. Automatic Stay.

An interlocutory appeal stays all proceedings in the trial court if it is filed and a hearing is requested within the time set in a court scheduling order, within 180 days of the defendant's answer or plaintiffs amended pleading with a cause of action for which defendant can assert a jurisdictional claim. TEX. CIV. PRAC. & REM. CODE § 51.014 9(c).

IV. THE LITIGATION WAIVER OF IMMUNITY FROM SUIT

A. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006) (op. on reh'g). The City filed an intervention against Reata after being served with a third party negligence action. The City asked for actual damages, pre- and post- judgment interest and costs. In 2004 the supreme court framed the issue as "whether a city waives its governmental immunity from suit by intervening in a lawsuit to assert claims for affirmative relief." The supreme court held that "[t]o the extent the City enjoyed governmental immunity from suit with regard to Reata's claims, the City waived that immunity by intervening in the lawsuit and asserting claims for damages against Reata." The court held that by filing 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 City filed a motion for rehearing that was granted. On rehearing the supreme court modified its approach.

Now, the supreme court holds that once the City files suit for damages, the City waives immunity from suit for claims against it that are germane to, connected with and properly defensive to claims the City asserts to the extent not to exceed an offset to the City's claims.

Another important holding was that the Dallas City Charter does not waive immunity from suit. The court applied *Tooke* denying a waiver under the Local Government Code.

B. *City of Irving v. Inform Constr., Inc.*, 201 S.W.3d 693 (Tex. 2006) (per curiam). Contractor brought action against City for breach of contract for failure to meet payment obligations. City filed an answer and a counterclaim for damages and attorney's fees arising from Inform's alleged breach of contract. City filed a plea to the jurisdiction. The trial court denied the plea. The Dallas court held City waives immunity from suit because it filed the counterclaim. On appeal to the supreme court City argued that the litigation waiver should not apply to a compulsory counterclaim and a counterclaim. The supreme court explained that as in *Reata*, the City retained immunity from suit as to Inform's action for monetary damages arising from claims not germane to, connected with, and properly defensive to City's counterclaim and also retained immunity from suit to the extent Inform's damages exceed amounts offsetting City's monetary recovery, absent legislative waiver of that immunity. No distinction was recognized between a compulsory and any other counterclaim. Remanded to trial court.

C. *City of Dallas v. Saucedo-Falls*, 218 S.W.3d 79 (Tex. 2007) (per curiam). Police officers and firefighters sued the City alleging they were entitled to a pay raise and for declaratory relief. The City had filed a counterclaim for declaratory relief and attorney's fees but had dismissed that claim before the hearing on the plea to the jurisdiction. The trial court denied the plea. The court of appeals affirmed relying on *Reata* I. The supreme court reversed the

court of appeals. The court remanded to allow claimants to assert waivers of immunity other than the litigation waiver.

D. *City of Angleton v. USFilter Oper. Servs., Inc.*, 201 S.W.3d 677 (Tex. 2006) (per curiam). Contractors sued the city for breach of contract, and city counterclaimed for breach of contract, but the city later non-suited the counterclaim and filed a plea to the jurisdiction. The trial court denied the plea.

The supreme court does not address the dismissal of the counterclaim. It states that "a governmental entity may retain immunity from suit as to the other party's claim for monetary damages arising from claims that are not germane to, connected with, and properly defensive to the governmental entity's claims, and to the extent the other party's damages exceed amounts offsetting the governmental entity's monetary recovery." The case was remanded to allow pleading under current law.

E. *State v. Precision Solar Controls Inc.*, 220 S.W.3d 494 (Tex. 2007). The State sued Precision Solar Controls, Inc. for breach of contract, breach of warranty and quantum meruit, alleging that traffic signals displays made by Precision were defective. Precision denied the allegations and counterclaimed for damages for business disparagement. The trial court denied the State's plea to the jurisdiction. The court of appeals affirmed based on the first *Reata* opinion. In the supreme court the State argued that the litigation waiver does not waive immunity for an intentional tort like the one filed. The Supreme Court of Texas vacated the court of appeals' judgment and remanded the case to the trial court for further proceedings. The court instructed the trial court to consider the State's arguments about waiver by conduct in light of *Reata*.

F. *State v. Fidelity and Deposit Co. of Maryland*, 223 S.W.3d 309 (Tex. 2007). The court remanded to required the trial court to determine whether Fidelity's claims were "germane to, connected with, and properly defensive to" TxDOT's claims.

G. *Powell v. Tex. Dept. of Criminal Justice*, No. 13-06-192-CV, 2008 WL 330722 (Tex. App.—Corpus Christi, Feb. 7, 2008). Powell, and inmate, sued TDCJ for First and Fourteenth Amendment violations of the U.S. Constitution. TDCJ responded claiming sovereign immunity and requesting attorney's fees. The Texas Court of Appeals in Corpus Christi held that the request for attorney's fees was a claim for affirmative relief, and as such, sovereign immunity has been waived.

H. *Lamesa Indep. Sch. Dist. v. Booe*, No. 11-03-00394-CV, 2008 WL 802239 (Tex. App.—Eastland, Mar. 27, 2008). Booe, claiming monetary damages for breach of an implied contract or in the alternative quantum meirut, sued LISD for money allegedly owed to him. LISD responded claiming sovereign immunity and requesting attorney fees. The Texas Court of Appeals in Eastland interpreted *Reata* to mean that attorney fees are not a claim for affirmative relief and therefore sovereign immunity has not been waived.

I. *City of Dallas v. Albert*, 214 S.W.3d 631 (Tex. App.—Dallas 2006, pet. filed) (op. on reh'g) and *City of Dallas v. Martin*, 214 S.W.3d 638 (Tex. App.—Dallas 2006, pet. filed) (op. on reh'g). In the original opinions, the appellate court held that the City invoked the trial court's jurisdiction when it filed counterclaims and the dismissal of those claims did not deprive the court of subject matter jurisdiction. On rehearing after the *Reata II*, the court held that the trial court's jurisdiction was

dependent upon the continued existence of the City's counterclaim. The court stated that [o]nce the City dismissed its affirmative claims, appellees' claims were no longer 'germane to,' 'connected with,' or 'properly defensive of' any claims made by the City." The officers' claims were no longer an offset to the City's claims. Accordingly, there was no litigation waiver.

The court remanded for consideration under the new contract waiver statute and allowed a declaratory judgment without damages to proceed in the trial court.

J. *City of Dallas v. Bargman*, 207 S.W.3d 926 (Tex. App.—Dallas 2006, no pet.) (op. on reh'g). Bargman brought action against the City and purchaser asserting that the City had abandoned a street easement and seeking reformation of deed to exclude the property from the easement. The City filed counterclaims to quiet title and for breach of warranty. City brought a plea to the jurisdiction. The trial court denied the plea. The appellate court remanded holding a counterclaim waives immunity from suit.

On remand to the trial court, the City dismissed its counterclaims and filed a second plea to the jurisdiction. The plea was granted and Bargman's claim was dismissed with prejudice.

K. *Harris County Toll Rd. Auth. v. Southwestern Bell Tel.*, No. 01-06-00668-CV, 2006 WL 2641204 (Tex. App.—Houston [1st Dist.] Sept. 14, 2006, pet. granted). Harris County asked for its attorney's fees in defending the suit, and for a declaratory judgment stating that it is not liable to SBC. Under these circumstances, the court could not characterize SBC's claim for reimbursement of its relocation expenses as an offset to Harris County's derivative claim for attorney's fees, within the meaning of *Reata II*. Accordingly, the Houston court held that the prayer for attorney's fees even in conjunction with a claim for declaratory relief is not a waiver of immunity from suit for a damages claim.

L. *Sweeny Cmty. Hosp. v. Mendez*, 226 S.W.3d 584 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Hospital brought breach of contract action against Mendez to recover unreimbursed income subsidy that it had advanced under the terms of the contract. The doctor counterclaimed for breach of contract, fraud, tortuous interference, defamation and retaliation. The Hospital filed a plea to the jurisdiction, alleging immunity from suit for the tortuous interference, defamation and retaliation claims. The trial court denied the plea and the hospital appealed.

The Hospital argues that the tort claims are not within any statutory waiver of immunity. It argues that the claims are not germane to, connected with, and properly defensive to the breach of contract claim.

The court describes germane as a claim that arises out of the same transaction or occurrence, significantly related, closely akin. It examines connected to. It means "united, joined or linked" and "having parts or elements logically linked together." The court recognized that each party's claims arose from the same transaction. The court held that the core facts were the same. Then the court looked at the use of *Reata II*'s final restriction that the claim be properly defensive. The court held that in using the phrase "the supreme court did not intend the term 'properly defensive' to restrict jurisdiction for the type of claim raised, but, rather, to restrict jurisdiction over the amount of damages against the governmental entity or the amount that the government actually recovers." The court held in this situation immunity from suit has been waived.

M. *Bexar Metro. Water Dist. v. Educ. & Econ. Dev. Joint Venture*, 220 S.W.3d 25 (Tex. App.—San Antonio 2006, pet. filed). Water District entered into a contract to sell real property. When the Water District refused to close, the prospective purchaser sued for specific performance. The trial court denied the District's plea to the jurisdiction. The appellate court reversed and dismissed the case because, according to the court, a provision of the Texas Water Code stating that a water district may "sue and be sued" did not waive the District's governmental immunity. Rather the provision reflected the Water District's capacity to be involved in litigation. Additionally, the District did not waive immunity by its conduct when it prayed for judgment and costs in the suit and filed a plea for abatement. The court also rejected the argument that equitable estoppel applied to prevent immunity because (1) forcing the Water District to follow through with the property sale that it does not believe to be in it's constituents' best interests directly interferes with the District's governmental functions, and (2) the District did not unfairly accept or retain any contractual benefits at purchaser's expense.

N. *Muenster Hosp. Dist. v. Carter*, 216 S.W.3d 500 (Tex. App.—Fort Worth 2007, no pet.). Doctors brought action against hospital district, seeking a declaratory judgment, and alleging retaliatory discharges and breach of contract. The district counterclaimed, alleging that the doctors failed to maintain full time practice in breach of contract, and filed a plea to the jurisdiction. The trial court denied the district's plea. The appellate court affirmed, holding that the district's counter-claim resulted in a waiver of its immunity from suit for retaliatory discharge claims because if the hospital had, in fact, engaged in retaliatory discharges, the facts were "germane to, connected with and properly defensive to" the district's counter-claim. However, the appellate court modified the lower court's order, holding that the waiver extended only so far as the retaliatory discharge claims acted as offsets to the district's breach of contract claims.

V. Waiver of Immunity from Suit by Contracting Conduct

***Tex. S. Univ. v. State Street Bank & Trust Co.*, 212 S.W.3d 893, (Tex. App.—Houston [1st Dist.] 2007, pet. filed).** As part of this case contractor alleged the University waived its immunity from suit by its conduct. The University notified the contractor that the contract was authorized. The University notified the contractor to begin work. The contractor performed the work and provided $13 million worth of equipment, the University then stopped making payments and said the contract was not valid. The court looked at *Federal Sign* and *Catalina*. The appellate court thought these circumstances were extraordinary enough to waive immunity from suit.

***See also Lamesa Indep. Sch. Dist. v. Booe*, No. 11-03-00394-CV, 2008 WL 802239 (Tex. App.—Eastland, Mar. 27, 2008) and *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d at 857 (Tex. 2002)** holding that to create a "waiver-by conduct exception would force the State to expend resources to litigate that issue and thus frustrate the policy underlying sovereign immunity."

VI. DECISIONS INVOLVING THE STATUTORY WAIVER OF IMMUNITY FROM SUIT IN CONTRACT CASES:

A. Waiver under TEX. LOCAL GOV'T CODE § 51.075.

1. *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006). A contractor who had provided curbside collection of brush and leaves was notified that the city budgetary condition required the cancellation of the contract. Contractor sued for breach of contract alleging a waiver of immunity under the section 51.075 of the Local Government Code. The supreme court held that the statute was not a waiver of immunity from suit. While the case was pending the Legislature enacted a limited waiver of immunity from suit for certain contracts. The court examined the statute and determined it did not apply to the type of damages that the contractor requested. The court affirmed the dismissal.

2. *City of Houston v. Jones*, 197 S.W.3d 391 (Tex. 2006). Jones brought suit for breach of settlement agreement. He claimed the city said he would be in home repair program and would be in subsidized housing until in the program. The appellate court did not consider the *Lawson* waiver by entering a settlement agreement because the court held that the City waived its immunity by the sue and be sued provisions of its city charter. The supreme court held that city charter did not waive immunity from suit. The supreme court instructed that the trial court should consider whether the City lacks immunity under *Lawson* and the new contract provisions.

3. *PKG Contracting, Inc v. City of Mesquite*, 197 S.W.3d 388 (Tex. 2006). Construction company sued City over contract for construction of storm drainage system. The trial court denied its plea to the jurisdiction. In its interlocutory appeal, the City contended that it was engaged in a governmental activity and did not waive immunity from suit for contract, quantum meruit, negligence and estoppel. The appellate court found that there was no waiver under the Tort Claims Act. The other actions sounded in contract and there was no waiver under the Local Government Code or charter. The court held that contracting concerning a government function is a governmental function.

On petition for review, the supreme court applied the *Tooke* case that found no waiver under section 51.075. It also concluded that because the Legislature has statutorily included "sanitary and storm sewers" among a municipality's governmental functions for purposes of tort liability, TEX. CIV. PRAC. & REM. CODE § 101.0215(a)(9), and seeing no reason for the classification to have been different under the common law, the court concluded that the City was acting in its governmental capacity when it contracted with PKG to construct a storm drainage system. Nevertheless the court remanded for a determination of whether there was a waiver under TEX. LOC. GOV'T CODE.

4. *City of San Antonio v. Polanco & Co., L.L.C.*, No. 04-07-00258-CV, 2007 WL 3171360 (Tex. App.—San Antonio, Oct. 31, 2007). In this case, Polanco entered into a contractual agreement with the City of San Antonio to sell concessions at several city-owned golf courses. In exchange, Polanco would pay the city a commission off of the sales. When Polanco failed to pay the City's commission, the City terminated his contract and evicted him from the property. Polanco sued based on tort claims and contract claims, among others.

In response, to refute Polanco's tort claims, the city argued that the operation of

a golf course and the selling of concession thereon is a governmental function, rather than a proprietary function, and as such, the city is immune from suit. The Texas Court of Appeals in San Antonio agreed with the City and reversed the trial court's judgment.

As for the contract claims, the court held that because Polanco did not claim the proper damages allowed by Chapter 271 of the Local Government Code, he was not entitled to recover anything.

5. Other cases where the supreme court has remanded involving contract claims.

Dallas Firefighters Ass'n v. City of Dallas, 231 S.W.3d 388 (Tex. 2007).

Abilene Housing Auth. v. Gene Duke Builders, 226 S.W.3d 415 (Tex. 2007).

City of Arlington v. Mathews, 226 S.W.3d 417 (Tex. 2007).

City of Pasadena v. Kinsel Indus., Inc., 227 S.W.3d 651 (Tex. 2007).

B. Waiver under sections 271.151-217.160 of the Local Government Code.

1. *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Texas Political Subdivs. Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320 (Tex. 2006). Ninety-two governmental entities formed the insurance Fund by entering into an agreement under the Texas Interlocal Cooperation Act which allows political subdivisions to contract with one another to more efficiently share resources and responsibilities. The Fund pooled funds to provide casualty insurance to members. A small school district purchased an insurance policy from the Fund. When the District suffered extensive water and mold damage to one of its school facilities, it submitted a claim to the Fund. The Fund denied the claim alleging that the loss was not covered under the District's policy. The District filed a declaratory judgment action seeking a determination that the loss was a covered occurrence under the terms of the insurance agreement. In response, the Fund asserted immunity in a plea to the jurisdiction which the trial court denied. A divided court of appeals concluded that the Fund was immune from suit. After the court of appeals rendered its judgment, the Legislature enacted a limited immunity waiver for breach of contract claims against government entities in § 271.152 of the Local Government Code. The Texas Supreme Court concluded that the limited statutory waiver applied to the insurance coverage dispute, and reversed the judgment of the court of appeals and remanded for further proceedings. The supreme court reasoned that the Fund was a discrete governmental unit separate and apart from its members, and its immunity derives from the performance of governmental functions and not from the immunities of the members that combined to form it. Because the Fund is a local government entity as defined by section 271.52(3), and was authorized by section 271.52(2) to enter and did in fact enter into a written contract stating the essential terms of the agreement for providing insurance services to a local government entity, which agreement was properly executed, the statutory waiver applied to the insurance services dispute.

2. *Olympic Waste Servs., Inc. v. City of Grand Saline*, 204 S.W.3d 496 (Tex. App.—Tyler 2006, no pet.). Olympic waste service company contracted with the City to provide solid waste material services for an initial term of 5 years which would renew automatically for successive 5-year terms. Either party could terminate with

notice at least 60 days before the end of each 5-year term. Fifteen years after entering into contract with Olympic and after the expiration of the termination period, the City awarded a 'garbage contract' to Easley Sanitation and sent Olympic a letter stating that Olympic's failure to provide certificates of insurance and surety bonds had breached and terminated its contract with the City. Olympic filed suit to declare the contract between Easley and the City void because it was in violation of the Texas Open Meetings Act. The City filed a plea to the jurisdiction and a motion for summary judgment, and Olympic filed a partial motion for summary judgment alleging violations of the Open Meetings Act. The trial court granted the City's plea to the jurisdiction and its motion for summary judgment, and denied Olympic's motion. On appeal, the court held that provision of the Local Government Code waiving city's immunity from breach of contract claims did not apply because section 271.152 only applied to breach of contract claims for damages that included balance due or owed under a contract, the amount owed for change orders in connection with a contract, and interest. Olympic in this case was seeking consequential damages and declaratory relief. The court, therefore, affirmed the grant of the City's plea to the jurisdiction.

3. ***Tex. Ass'n of Sch. Bds. Risk Mgmt. Fund v. Benavides Indep. Sch. Dist.,*** **No. 04-06-00349-CV, 2007 WL 274068, (Tex. App.—San Antonio Jan. 31, 2007, no pet.).** Under the Interlocal Cooperation Act, local governments, primarily school districts, joined in common purpose to form an administrative agency ("the Fund") to self-insure against certain property and casualty claims. When a school district suffered extensive water damage, the Fund denied its claim, alleging that the loss was not covered under the agreement. The School District sued the Fund for breach of contract, negligence and other claims. The trial court denied the Fund's plea to the jurisdiction. The appellate court affirmed in part; and reversed and rendered in part. The Fund had governmental immunity from the School District's tort claims. But the Fund's immunity concerning the self-insurance contract had been waived by section 271.152 of the Local Government Code which waives governmental immunity for claims of breach of certain contracts.

4. ***City of Garden Ridge v. Ray*****, No. 03-0600197-CV, 2007 WL 486395 (Tex. App.—Austin Feb. 15, 2007, no pet.).** Property owner sued city for damages resulting from the flooding of a drainage culvert that the city maintained on his property. The city had been granted an easement for that culvert by a subdivision plat. The owner alleged that the damages had been caused by the construction and maintenance of the culvert. The city filed a plea to the jurisdiction. The trial court denied the plea and the denial was reversed on appeal. The appellate court held that the owner could not maintain his action for breach of contract because no evidence in the record demonstrated that the owner had received legislative permission to sue the city or that sovereign immunity had been waived in any way. The court noted that section 271.152 did not apply to the terms of a drainage easement.

The court also held that the owner's request for declaratory and injunctive relief was barred by sovereign immunity because the owner sought the declaration of his contractual rights under the subdivision plat and the enforcement of those rights. A suit to enforce contractual rights is a suit against the state and cannot be maintained without legislative permission. The court further held that UDJA may have been used to determine the validity of the easement but

the declaratory relief asked for by the owner did not concern the validity of the easement.

5. ***Gordon v. San Antonio Water Sys.*, Nos. 04-06-00699-CV; 04-06-00700-CV; 04-06-00701-CV & 04-06-00702-CV, 2007 WL 748692 (Tex. App.—San Antonio March 14, 2007, pet. filed).** The Water System sold four tracts of surplus property to plaintiffs. The surplus properties each contained a well previously used by the System as a pump station to pump water from an aquifer pursuant to a permit granted by the Aquifer Authority. The appellate court, in affirming the trial court's order, held that (1) the sale of surplus property by the System was a governmental function and therefore it was entitled to sovereign immunity; (2) statutory waiver did not apply because the deeds at issue were not a written contract under section 271.152 because the provisions are not for goods or services; (3) the System did not waive its immunity by conduct when it continued to withdraw water from the aquifer; and (4) the suit sought to enforce contractual rights and was, therefore, a suit against the government needing legislative permission to be maintained.

6. ***City of Houston v. Swinerton Builders, Inc.*, 233 S.W.3d 4, 13 (Tex. App.—Houston [1st Dist.] 2007, no pet.).** Claims in quantum meruit are not included in the statutory waiver of immunity contained in section 271.152.

VII. Declaratory Judgments

1. ***City of Houston v. Williams*, 216 S.W.3d 827 (Tex. 2007) (per curiam).** Retired firefighters brought action alleging the city improperly deducted previously-paid overtime amounts from their termination pay and that termination pay should have included premium salary. The cause was brought as a declaratory action. The trial court had reserved the issue of damages. Trial court denied the city's plea to the jurisdiction. The court of appeals affirmed. The supreme court observed that every suit against a government entity requires a determination of party's contract or statutory rights. The determining factor is if the sole purpose of the declaration is to obtain a monetary judgment, immunity is not waived. The case was reversed and remanded to allow the firefighters to attempt pleading under the new waiver statutes.

2. ***City of Dallas v. Albert*, 214 S.W.3d 631 (Tex. App.—Dallas 2006, pet. filed) (op. on reh'g), and *City of Dallas v. Martin*, 214 S.W.3d 638 (Tex. App.—Dallas 2006, pet filed) (op. on reh'g).** The plaintiffs had a claim for declaratory relief seeking an interpretation of a 1979 pay referendum ordinance. They sought to have the ordinance interpreted to require a set pay differential. They asked that that differential be enforced. In affirming the trial court's denial of the City's plea to the jurisdiction, the court of appeals observed that governmental units must be joined for the interpretation of their ordinance and sovereign immunity cannot be circumvented by characterizing a suit for damages as a declaratory judgment. The court held that immunity protected the City from damages but not a declaratory judgment construing the ordinance. The court concluded that "the trial court was correct in denying the city's plea to the jurisdiction to the extent appellees' claims for declaratory judgment are limited to declaring the rights, status, and legal relations of the parties under the ordinance." The cases were remanded.

3. *Cassidy v. City of Balch Springs*, No. 05-05-01350-CV, 2007 WL 882484, (Tex. App.—Dallas March 26, 2007, n.p.h.). Police officers filed suit stating the City failed to pay them in compliance with statutorily required and enacted pay plans. The City filed a plea to the jurisdiction. The trial court granted the plea. The sole issue was whether the officers could enforce a statutory right to compensation. The statute they were attempting to enforce was sections 143.001-.363 of the Local Government Code. The court held there was no unambiguous waiver of immunity for those sections.

The officers requested the opportunity to amend to request declaratory relief. The court denied that request because they failed to point out what legitimate question of statutory interpretation is at issue in their suit. The court distinguished this case from *Albert* and *Martin*. The appellate court affirmed the trial court's order dismissing the cause for want of jurisdiction.

4. *Anderson v. City of McKinney*, 236 S.W.3d 481 (Tex. App.—Dallas 2007, no pet.). In *Anderson*, the court determined that McKinney was immune from suit to the extent that the plaintiff firefighters asserted a statutory claim for back pay but that McKinney was not immune from the firefighters' suit to the extent it sought prospective relief in the form of declaratory, mandamus, and injunctive claims.

5. *Texas Dep't of Ins., Div. of Workers' Comp. v. Lumbermen's Mut. Cas. Co.*, 212 S.W.3d. 870 (Tex. App.—Austin 2006, pet. denied). Workers compensation insurers brought a declaratory judgment action against Worker's Compensation Division of the Department of Insurance. The insurers sought to invalidate the Division's advisories on impairment ratings for certain injuries. The trial court invalidated the advisories and the appellate court affirmed because the method of assigning impairment ratings to the injuries had exceeded the Division's scope of statutory authority. The advisories were inconsistent with the only permissible source for determining impairment ratings within the workers' compensation system ("Guides to the evaluation of Permanent Impairment" published by the American Medical Association), incorrectly allowing doctors to use their medical judgment or experience to take surgery or its effect into account when assigning impairment ratings. Additionally, since the insurers had challenged the issuance of the advisories as exceeding the Division's scope of authority and inconsistent with the only permissible source of evaluating impairment ratings, sovereign immunity did not bar the insurer's suit and therefore the trial court had subject matter jurisdiction under the Uniform Declaratory Judgments Act.

6. *Hawkins v. El Paso First Health Plans, Inc.*, 214 S.W.3d 709 (Tex. App.—Austin 2007, no pet.). Managed care organizations (MCOs) brought action against Health and Human Services Commission seeking declaratory and injunctive relief. The declaratory relief was granted and affirmed on appeal. The declaratory action was not precluded by sovereign immunity because the declaratory relief requested by the MCOs was based on their claim that the commission acted without statutory authority and in violation of federal and state law when it refused to disenroll Medicaid and Children's Health Insurance Program beneficiaries who became eligible for supplemental security income benefits. The suit, thus, sought action to compel official state actors, who allegedly acted without legal authority, to act within their official capacity.

7. *Comptroller of Pub. Accounts v. Waites*, No. 01-06-00536-CV, 2006 WL 3751565 (Tex. App.—Houston [1st Dist.] Dec. 21, 2006, no pet.). After a student had been sexually violated by a police officer, she filed suit against the university, the police chief, and the police officer in federal court for violation of her civil rights. The Attorney General appeared and answered on behalf of the university and the police chief. The police officer failed to appear and the federal court rendered a default judgment against him. The student requested the state to pay her the maximum amount as required by the indemnification statute but the state refused. Later she filed suit against the comptroller of public accounts, the attorney general and the city seeking a declaratory judgment concerning the police officer's entitlement to indemnification under chapter 104 of the Texas Civil Practices and Remedies Code.

The defendants filed a plea to the jurisdiction claiming that the declaratory judgment was an impermissible attempt to circumvent sovereign immunity. The trial court denied the plea and the appellate court affirmed. Since the student had expressly limited her suit to a determination of whether the police officer was entitled to indemnification and expressly excluded the issue of whether she, herself, was entitled to damages, the suit was not a suit for money damages and therefore did not implicate sovereign immunity.

8. *OHBA Corp. v. City of Carrollton*, 203 S.W.3d 1 (Tex. App.—Dallas 2006, pet. denied). Landlord filed suit against city after the city cited the landlord's manager for housing code violations on landlord's property. The landlord sought declaratory judgment and injunctive relief, claiming that the ordinances required the city to give the landlord notice and an administrative appeal regarding any code violations. The trial court granted the city's plea to the jurisdiction. The appellate court affirmed, holding that in the absence of standing to sue as well as the absence of a real and substantial controversy involving a genuine conflict of tangible interests, the trial court lacked subject matter jurisdiction over the landlord's declaratory judgment claim. The allegations indicated that the landlord had received some notice of violations from its agent, the property manager. However, the landlord did not allege that it attempted to file an administrative appeal and was denied. The case, therefore, merely presented a theoretical dispute and any existing dispute would not be resolved by the declaration the landlord sought. Since the injunctive relief was based on the declaratory relief sought by the landlord, the injunctive relief was barred for the same reasons.

VIII. TAKING CLAIMS

1. *State v. Holland*, 221 S.W.3d 639 (Tex. 2007). Holder of patent brought inverse condemnation action against State after it refused to pay for use of patented technology. Trial court denied the State's plea to the jurisdiction and the State appealed. The State argued that the petition does not assert it had the requisite intent for an inverse condemnation claim as set forth in *Jennings*. Citing *Jennings*, the court of appeals noted that "taking," "damaging," and "destruction" of one's property are three distinct claims arising under article I, section 17, although the term "taking" has become used as a shorthand to refer to all three types of claims. The court of appeals held that the allegations were sufficient to plead an inverse condemnation claim. The supreme court reversed and dismissed because State did not have requisite intent for takings claim because it acted under color of contract with patent holder's companies.

2. *Reunion Hotel/Tower Joint Venture v. Dallas Area Rapid Transit*, No. 05-06-00484-CV, 2008 WL 1735404, at *2 (Tex. App.—Dallas Apr. 16, 2008, no pet. h.). To recover under the theory that property has been "taken" under article I, section 17, a plaintiff must establish that (1) the State intentionally performed certain acts, (2) which acts resulted in a "taking" of the plaintiff's property, (3) for public use. The property damage must not be attributable to negligent acts of the governmental unit in order to maintain an inverse condemnation action.

IX. TEXAS TORT CLAIMS ACT CASES

A. Premise Defect Cases

1. *City of San Antonio v. Hartman*, 201 S.W.3d 667 (Tex. 2006). Wrongful death action brought after decedents drowned when floodwaters swept their vehicle off the roadway. Court of appeals upheld trial court's denial of plea to the jurisdiction because Hartman successfully pleaded a premise defect claim under the TTCA and because fact issues on the City's challenge to the existence of jurisdictional facts precluded the court from granting the plea.

The court of appeals decided: (1) there was a question of fact as to control/duty owed. The maintenance agreement between TxDOT and City did not preclude finding that city was responsible for barricading or closing streets due to flooding; (2) An emergency condition did not exist under exception embodied in TEX. CIV. PRAC & REM. CODE § 101.055(2); and (3) the decision of whether to place barricades or other precautionary measures does not fall under discretionary acts exception in TEX. CIV. PRAC & REM. CODE § 101.056.

The supreme court held the evidence was conclusive that an emergency situation existed. The city had declared a flooding disaster. The court of appeals did not recognize this kind of emergency under the TCA. The supreme court interprets the emergency exclusion under the TCA to include this type of emergency. The court reversed the court of appeals' judgment and rendered judgment for the City.

2. *City of Dallas v. Thompson*, 210 S.W.3d 601 (Tex. 2006) (per curium). Thompson sued city for injury when she tripped over a lifted seam of a metal expansion joint. The trial court granted the city's plea to the jurisdiction. The appellate court reversed citing evidence that employees were near the location, that accidents had occurred years ago at the location, and that the City made periodic repairs establish a fact issue for the city's actual knowledge of the premise defect. Actual knowledge was required to establish a waiver of immunity under the TTCA. The supreme court held that the evidence did not establish the city's actual knowledge of a dangerous condition at the time of the alleged fall. The court reversed the court of appeals and affirmed the trial court.

3. *City of Corsicana v Stewart.*, No. 07-0058, 2008 WL 820645 (Tex. March 28, 2008) (per curiam). Parents filed a premises liability suit against city, for the death of their children in a car swept off road by floodwaters. Testimony indicated that the crossing had 'sometimes' flooded in the past during heavy rains. Additionally, the National Weather Service had issued at least four pertinent notices on the afternoon and night preceding the accident. A flood protection planning study also highlighted the crossing as one of the problem areas. Because the plaintiffs failed to raise a fact issue regarding the city's actual knowledge of a dangerous condition, the supreme court dismissed the claims for lack of jurisdiction.

The court stated that in order for a premise defect claim to be sustained under the Texas Tort Claims Act, "the plaintiff must show the governmental entity had actual knowledge of the dangerous condition at the time of the accident, not merely of the possibility that a dangerous condition could develop over time."

4. ***Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653 (Tex. 2007).** Plaintiff, a bicyclist, sued the state university for injuries she received after being knocked off her bicycle by the water pressure of an in-ground sprinkler system. The supreme court held that the decisions of when and where the sprinklers were to spray were maintenance decisions, and thus were not protected by the discretionary function exception of the Texas Tort Claims Act. In short, the state university was not immune from suit based on sovereign immunity. However, the court also held that the Recreational Use statute found in the Texas Civil Practice and Remedies Code, § 75.001 et seq., barred the plaintiff's cause of action.

5. ***City of Dallas v. Reed*, 222 S.W.3d 903 (Tex. App—Dallas 2007, pet. filed).** The court of appeals held that a two-inch elevation between lanes was a special defect based upon the testimony that it was dangerous and the testimony of the plaintiff that he did not expect the defect. The court of appeals departed from the test for a special defect.

B. Condition or Use of Motor-Driven Equipment/Vehicles

1. ***Banda v. City of Galveston*, No. 01-05-00331-CV, 2006 WL 2640959 (Tex. App.—Houston [1st Dist.] Sept. 14, 2006, pet. dism'd by agrmt). (mem. op.).** While cleaning a sewer line, city employees blew sewage into a home causing four inches of sewage and fecal matter to flood the house. The home-owners alleged that the city's negligent acts in allowing sewage to enter the house, and failure to adequately inspect and clean the house converted their house into an uninhabitable nuisance. The trial court granted the City's motion for summary judgment. On appeal, the home-owners asserted that because the city used motor-driven equipment during the pumping and clearing of the sewage lines, its immunity was waived under the Texas Tort Claims Act. The court disagreed with the home-owners and affirmed the trial court's grant of summary judgment because no evidence in the homeowner's response to the summary judgment motion asserted that the employees 'used' the motorized equipment negligently.

2. ***Breckenridge Indep. Sch. Dist. v. Valdez*, 211 S.W.3d 402 (Tex. App.—Eastland 2006, no pet.).** Disabled student was injured when a school-bus driver allegedly by-passed school, and parked bus in bus-barn while child was still in the bus. The child's mother sued the school district, alleging that the child's injuries arose from the "operation" or "use" of a motor vehicle. The appellate court reversed the trial court's denial of the school's plea to the jurisdiction because forgetting that the child was on the bus, and failing to unload her from the bus involved failure to supervise the child, and not "operation" or "use" of the school bus.

C. Section 101.057 Intentional Torts Exception and Official Immunity Cases

***City of Waco v. Williams*, 209 S.W.3d 216 (Tex. App.—Waco 2006, pet. denied).** Police officers repeatedly shot detainee with a stun gun resulting in his death. Detainee's children sued the city for negligent supervision and training of police officers, and negligent implementation of policy, all

concerning the appropriate use of tangible personal property. On appeal, the court reversed the trial court's denial of the city's plea to the jurisdiction because the officers' use of excessive force in repeatedly shooting the detainee with the stun gun amounted to the intentional tort of assault, even if the plaintiffs framed their claim as negligent supervision and training concerning use of tangible personal property.

D. Section 101.060 Traffic and Road Control Devices

1. *City of Grapevine v. Sipes*, 195 S.W.3d 689 (Tex. 2006). Motorist individually and as next friend of her daughter, sued the city for damages from injuries sustained in a vehicular accident at an intersection controlled by a temporary stop sign. The city created a street plan that required a permanent traffic signal. The city asked the state to install the signal. The state could not. The city decided to construct the signal in November but did not until December. The city placed a temporary stop sign at the location. The accident occurred before the signal was installed. The trial court granted the plea to the jurisdiction. The court of appeals held, 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." The supreme court granted petition to decide whether and under what conditions the absence of a traffic light may give rise to a governmental unit's liability under the TTCA. The TTCA exempts liability for failure to initially place a sign or signal and for the absence of a sign if not corrected within a reasonable time after notice. The supreme court decided that absence of a sign or signal required a prior presence of the sign or signal. The court of appeals was reversed and the court rendered a judgment dismissing for want of jurisdiction.

X. Jurisdictional Prerequisites to Suit

A. *Tellez v. City of Socorro*, 226 S.W.3d 413 (Tex. 2007). Tellez sought to appeal the decision of a zoning board. The Local Government Code requires such challenges to be filed within 10 days after the board's decision with a verified petition stating that the decision of the board of adjustment is illegal . . . and specifying the grounds of illegality, and to be initiated by writ of certiorari directed to the board. The court of appeals dismissed the suit *sua sponte* because Tellez sued the City instead of the board and the petition did not state how the Board's decision was illegal. The City did not object to either defect. The supreme court held that these procedural defects can be waived. The failure to join the board was prudential not jurisdictional.

B. *City of Colo. City v. Ponko*, 216 S.W.3d 924 (Tex. App.—Eastland 2007, no pet.). Former employee sued the city for wrongful termination under the Whistleblower Act. After Ponko was terminated she asked for the procedure to appeal. She filed in the trial court the next day. The response to her request stated that the policy that had not been adopted. Because she timely filed within 90 days and the city had no grievance procedure, the trial court did not err in denying the plea to the jurisdiction.

C. *City of McAllen v. Zellers*, 216 S.W.3d 913 (Tex. App.—Corpus Christi 2007, pet. denied). Police officers filed suit against city claiming that the city did not pay for "standby" duty. The city filed a plea to the jurisdiction stating that the officers

did not comply with the grievance procedures before filing suit. The officers claimed that the city waived the complaint because the city said the complaint was "not grievable." The trial court denied the plea. In affirming, the appellate court said it could find no applicable statute that allows a municipal authority to create a grievance procedure for its police officers and require compliance as a prerequisite to suit. The appeal was dismissed.

D. *Med. Arts Hosp. v. Robison*, 216 S.W.3d 38 (Tex. App.—Eastland 2006, no pet.). The court of appeals held that failure to initiate grievance procedure was jurisdictional in a whistleblower suit even though the procedure lacked clarity.

XI. Injunctive Relief

***City of Elsa v. M.A.L.*, 226 S.W.3d 390 (Tex. 2007).** This case arose after three officers resigned from the police force. The local news revealed they had failed a drug test. The officers alleged information was improperly disclosed under various statutes. They sought money damages and equitable and injunctive relief for the alleged constitutional violations. The City filed a plea to the jurisdiction, which the trial court denied. The court of appeals granted it in part because they sued the City instead of an official and denied it in part on the basis of the section 51.075 of the Local Government Code. The supreme court held the plea should be granted as to the money damage claims. The court reversed as to the injunctive relief. The supreme court holds that injunctive relief may be maintained against a governmental entity to remedy violations of the Texas Constitution.

XII. Petition Granted Cases Pending in the Supreme Court of Texas

A. *City of El Paso v. Heinrich*, 198 S.W.3d 400 (Tex. App.—El Paso 2006, pet. granted). Police officer's widow sued city, public employee's pension fund, and board of trustees, alleging that the board breached its fiduciary duty by reducing her pension benefits in violation of Title 109 of the Texas Civil Statutes. She also sought to determine whether she was entitled to receive benefits that vested upon the officer's death. Defendants argued that, as governmental entities, they were immune from suit because the widow's claim was for money damages. The trial court denied the defendants' plea to the jurisdiction. The appellate court affirmed holding that the widow's action was not barred by governmental immunity because it was an action for declaratory relief and not monetary relief. The underlying nature of the suit was to determine whether she was entitled to the vested benefits. If the widow was correct on the merits of the suit, she would be entitled to reimbursement of past and future pension benefits. Such an award would reflect widow's entitlement to the vested benefits and not merely a money damage. Additionally the named defendants did not have official immunity because they allegedly acted without legal or statutorily authority and therefore exceeded the scope of their authority.

B. *City of Lubbock v. Nunez*, No. 07-07-0007-CV, 2007 WL 1557119 (Tex. App.—Amarillo May 30, 2007, pet. granted). Estate of homeowner, who died from electrical shock of taser used by police officer after homeowner failed to comply with officer's commands in responding to 911 hang-up call at the residence, brought suit against the city for wrongful death and for survival damages. The court of appeals

held that the plaintiff had a negligence cause of action and the intentional tort exclusion under the Tort Claims Act did not apply. The supreme court has granted petition for review to decide whether the claims arise out of an intentional tort to preclude jurisdiction under the Texas Tort Claims Act.

C. *Harris County Toll Rd. Auth. v. Southwestern Bell Tel.*, No. 01-06-00668-CV, 2006 WL 2641204 (Tex. App.—Houston [1st Dist.] Sept. 14, 2006, pet. granted). Telecommunications company brought action against county after county refused to pay utility relocation costs necessitated by county road construction. Harris County asked for its attorney's fees in defending the suit, and for a declaratory judgment stating that it is not liable to SBC. The court held that the Transportation Code did not waive immunity from suit. It did not create a private right of action. The court also held that under the circumstances of this case, the court could not characterize SBC's claim for reimbursement of its relocation expenses as an offset to Harris County's derivative claim for attorney's fees, within the meaning of *Reata II*. Accordingly, the Houston court held that the prayer for attorney's fees even in conjunction with a claim for declaratory relief is not a waiver of immunity from suit for a damages claim.

D. *Franka v. Velasquez*, 216 S.W.3d 409 (Tex. App.—San Antonio 2006, pet. granted). Parents brought medical negligence and malpractice action against doctors, seeking damages for injuries sustained by their minor son during his delivery. Doctors filed motion to substitute state university health science center as the defendant and dismiss the lawsuit against them individually under the Tort Claims Act. The trial court denied the motion. The appellate court held that the claim could not have been brought against the health science center. Petition has been granted to decide whether they should be dismissed from the suit because it "could have been brought" against the Health Sciences Center.