IN THE SUPREME COURT OF TEXAS

NO. 01-0619

TEXAS DEPARTMENT OF PARKS AND WILDLIFE, PETITIONER,

v.

MARIA MIRANDA AND RAY MIRANDA, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued October 30, 2002

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

The Legislature has provided that state park visitors are owed the same duty of care as trespassers;[1] thus, the plaintiffs in this case had to prove the Parks and Wildlife Department caused deliberate, wilful, or malicious injury.[2] All members of the Court agree that either their petition or their summary judgment evidence fails to do so, though we disagree which.

The Mirandas alleged Maria suffered severe injuries caused by the Department's gross negligence; specifically, they alleged the Department knew tree limbs could fall, and failed to warn them of that fact or assign them a campsite where none would. I have grave doubts whether such

[1] TEX. CIV. PRAC. & REM. CODE §§ 75.002(c)(2), 75.003(g).

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

facts could possibly constitute gross negligence — natural conditions usually cannot be unreasonably dangerous (much less wanton),[3] and trespassers do not have to be warned of what everyone should know.[4] Nor does the Parks Department appear to have a duty to provide campsites safely away from trees;[5] indeed, one has to ask whether anyone would want to use such "parks" if it did.[6]

Faced with what appears to be an insupportable allegation like the gross-negligence pleading here, litigants normally have two options: (1) demand more specific facts by special exception, or (2) demand more specific facts by motion for summary judgment. Instead, the Department filed three motions, including a "plea to the jurisdiction" — the white elephant[7] of current Texas motion practice. By use of this plea, the Department was able to force the trial judge (and ultimately this Court) to make an ad hoc decision whether our jurisdiction should be determined by reference to

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[3] *See Johnson County Sheriff's Posse, Inc. v. Endsley*, 926 S.W.2d 284, 287 (Tex. 1996) (holding rock in dirt arena did not create unreasonably dangerous condition).

[4] *Cf. County of Cameron v. Brown*, 80 S.W.3d 549, 558 (Tex. 2002) (holding darkness caused by failed streetlights was not open and obvious hazard precluding recovery by licensee because it could not be seen from entrance to causeway).

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

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

[7] The OXFORD ENGLISH DICTIONARY (1989) defines "white elephant" as:

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

pleadings or evidence. Because it should be litigants rather than judges making that choice, I respectfully dissent.

Pleas to the jurisdiction are nothing new. In his *Commentaries on the Laws of England*, Blackstone lists them as a category of dilatory pleas that (along with pleas of disability and abatement) deny the propriety of the remedy rather than the injury.[8] One hundred years ago, this Court addressed a variety of matters as pleas to the jurisdiction, including objections based on personal jurisdiction,[9] subject-matter jurisdiction,[10] dominant jurisdiction,[11] venue,[12] capacity,[13] and conflict of laws.[14]

Since then, there has been a steady shift away from the common-law forms of pleading to the more specific motion practice set out in the rules of civil procedure. For example, a defendant

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[8] 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 301-03 (1768).

[9] *See*, *e.g.*, *Rice v. Peteet*, 1 S.W. 657, 657 (Tex. 1886).

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

[11] *See*, *e.g.*, *Cleveland v. Ward*, 285 S.W. 1063, 1072 (Tex. 1926), *disapproved on other grounds*, *Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992); *Grathaus v. Witte*, 11 S.W. 1032, 1032 (Tex. 1888).

[12] *See*, *e.g.*, *Pecos & N.T. Ry. Co. v. Thompson*, 167 S.W. 801, 801 (Tex. 1914); *Baines v. Jemison*, 23 S.W. 639, 640 (Tex. 1893); *Watson v. Baker*, 2 S.W. 375, 375-76 (Tex. 1886).

[13] *See*, *e.g.*, *Brown v. Gay*, 13 S.W. 472, 472-73 (Tex. 1890).

[14] *See*, *e.g.*, *Tex. & P. Ry. Co. v. Richards*, 4 S.W. 627, 629 (Tex. 1887).

objecting to venue today must file a motion to transfer that complies with the form requirements of Rule 86 and the deadlines of Rule 87.[15] Similarly, a nonresident objecting to personal jurisdiction must file a special appearance that meets the requirements of Rule 120a.[16] In substance, these motions could still be categorized as "pleas to the jurisdiction;" but in form, they must comply with the current rules of civil procedure.

Case law as well as rule amendments have contributed to the trend away from the common-law plea to the jurisdiction. For example, we have held that a complaint based on dominant jurisdiction in another court must be raised by plea in abatement in the second court, or it is waived.[17] Again, though this complaint could be characterized as a plea to the jurisdiction, a more specific motion and procedure has rendered the common-law term obsolete.

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

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

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

[17] *Mower v. Boyer*, 811 S.W.2d 560, 563 n.2 (Tex 1991); *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 247 (Tex. 1988).

- general demurrer;[18]
- special demurrer;[19]
- special exception;[20]
- plea to the jurisdiction;[21]
- plea in abatement;[22] or
- summary judgment.[23]

In 1997, the Legislature amended the Civil Practices and Remedies Code to allow interlocutory appeals "from an interlocutory order . . . [that] grants or denies a plea to the jurisdiction by a governmental unit."[24] We have held this section must be strictly construed, as it is an exception to the general rule that interlocutory orders are not appealable.[25]

As a result, almost overnight a "plea to the jurisdiction" became the motion of choice for

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[18] *See*, *e.g.*, *State v. Hale*, 146 S.W.2d 731, 735 (Tex. 1941); *Herring v. Houston Nat'l Exch. Bank*, 253 S.W. 813, 814 (Tex. 1923); *Stephens v. Tex. & P. Ry. Co.*, 97 S.W. 309, 310 (Tex. 1906); *Thomson v. Baker*, 38 S.W. 21, 22 (Tex. 1896).

[19] *See*, *e.g.*, *Thomson*, 38 S.W. at 22.

[20] *See*, *e.g.*, *Duhart v. State*, 610 S.W.2d 740, 741 (Tex. 1980); *Dir. of Dep't of Agric. & Env't v. Printing Indus. Ass'n of Tex.*, 600 S.W.2d 264, 265 (Tex. 1980); *Stephens*, 97 S.W. at 310.

[21] *See*, *e.g.*, *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 403 (Tex. 1997), *superseded by statute on other grounds as stated in Gen. Servs. Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 593 (Tex. 2001); *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976); *State v. Lain*, 349 S.W.2d 579, 580 (Tex. 1961); *Griffin v. Hawn*, 341 S.W.2d 151, 152 (Tex. 1960); *Short v. W. T. Carter & Bro.*, 126 S.W.2d 953, 955 (Tex. 1938).

[22] *See*, *e.g.*, *Duhart v. State*, 610 S.W.2d 740, 741 (Tex. 1980); *Lowe*, 540 S.W.2d at 298; *Griffin v. Hawn*, 341 S.W.2d 151, 152 (Tex. 1960); *W. D. Haden Co. v. Dodgen*, 308 S.W.2d 838, 838 (Tex. 1958); *Cobb v. Harrington*, 190 S.W.2d 709, 710 (Tex. 1945); *Short v. W. T. Carter & Bro.*, 126 S.W.2d 953, 955 (Tex. 1938).

[23] *See*, *e.g.*, *Overton Mem'l Hosp. v. McGuire*, 518 S.W.2d 528, 528 (Tex. 1975) (per curiam); *Tex. Dept. of Corr. v. Herring*, 513 S.W.2d 6, 7 (Tex. 1974).

[24] TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8).

[25] *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001).

asserting immunity;[26] indeed, some appellate courts have refused to consider any other.[27] This development exalts form over substance. For example, before the Legislature's amendment, one governmental entity unsuccessfully asserted immunity by means of a summary judgment and special exceptions; immediately after the effective date, the entity filed the same objection as a "plea to jurisdiction" – and prevailed.[28]

For several reasons, we should put a stop to this resurgence of common-law pleadings in immunity cases. First, it is fraught with uncertainty. Despite hundreds of haphazardly-numbered rules, only once do the Texas Rules of Civil Procedure mention pleas to the jurisdiction, and then only in a rule regarding permissible parts of an *answer* rather than permissible motions.[29] There is

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

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

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

[29] TEX. R. CIV. PROC. 85:

> The original answer may consist of motions to transfer venue, *pleas to the jurisdiction*, in abatement, or any other dilatory pleas; of special exceptions, of general denial, and any defense by way of avoidance or estoppel, and it may present a cross-action, which to that extent will place defendant in the attitude of a plaintiff. Matters in avoidance and estoppel may be stated together, or in several special pleas, each presenting a distinct defense, and numbered so as to admit of separate issues to be formed on them.

(Emphasis added).

no rule — no case and no code — that specifies the form, deadlines, or evidentiary requirements for pleas to the jurisdiction generally.

In *Bland Independent School District v. Blue*,[30] we attempted to bring some order to this resurgence by setting guidelines for handling such pleas. But due to the broad range of issues a plea to the jurisdiction might address, that was not easy to do. As we pointed out in several examples, consideration of some pleas should not go beyond the pleadings, but consideration of others must.[31] When necessary, trial courts must consider evidence relating to the jurisdictional facts, but should not consider evidence relating to the merits,[32] even though the two are sometimes the same. Nor could we be specific about when pleas should be decided, leaving it to the trial court's discretion whether to address the issue at a preliminary hearing or after fuller development of the merits.[33]

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

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[30] 34 S.W.3d 547 (Tex. 2000).

[31] *Id*. at 555.

[32] *Id*.

[33] *Id*. at 554.

drawing up the rules after the game has been played.[34]

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

Such repetition is unnecessary for interlocutory review. Nothing in the Civil Practice and Remedies Code suggests the Legislature intended to specify a *form* motions had to take for that purpose, rather than their *substance*. Indeed, the opposite is suggested by the Legislature's selection of a common-law term applicable to a broad category of motions, rather than a term pointing to any particular motion in the current rules of civil procedure. It has long been our practice to consider the substance of motions rather than their form;[35] nothing in the legislative history suggests the interlocutory appeal statute was intended to be an exception to that rule.

For plaintiffs, the problems created by the resurgence of pleas to the jurisdiction are even more acute. Defendants uncertain about how to present an immunity defense can simply try a little

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

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

of everything; plaintiffs, by contrast, may lose their case if they guess wrong. In this case, for example, the Mirandas did not attach any evidence to their responses to the various motions. The lower courts agreed they did not need to, but if we hold otherwise, then the Mirandas will learn three years too late that they should have presented evidence at the jurisdictional hearing.

From a trial judge's vantage point, pleas to the jurisdiction create uncertainty, not just about the rules to be applied but about the role of the judge. This case is one of many in which immunity from suit under the Texas Tort Claims Act is coextensive with immunity from liability.[36] As a result, deciding the jurisdictional question bears a strong resemblance to deciding the merits.

In these circumstances, it is difficult for Texas judges to detect the line between jurisdictional questions they *must* decide before going further and liability questions they *cannot* decide without usurping the function of the jury. Here, the Mirandas convinced the lower courts that whether their pleadings were supported by any evidence was a question solely for the jury. But that is not true if they raised no material facts that could establish a waiver of immunity.[37]

By contrast, returning to standard motions as the vehicles for asserting governmental immunity would clarify what the jurisdictional hearing will be like and simplify many procedural questions. For decades, governmental units have asserted immunity by special exceptions[38] or

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

[37] *See* TEX. R. CIV. PROC. 166a(c).

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

motions for summary judgment.[39] In many cases (including this one), they still do so today.[40] Relying on standard procedural motions would eliminate many questions about deadlines, forms, and evidence. It would make government entities rather than trial judges decide whether the jurisdictional challenge is directed to the plaintiff's pleadings or the underlying facts. If a governmental unit chooses wrong,[41] it may always try again. But the plaintiff is not required to guess what rules or procedures the trial judge might apply.

Returning to pre-resurgence practice would not change the incidence of governmental immunity. As we recently held, if a plea to the jurisdiction is directed only to the plaintiff's pleadings, we construe them in the plaintiff's favor and allow an opportunity to amend unless they affirmatively negate jurisdiction.[42] This is, of course, identical to the rules governing special exceptions.[43] And when governmental entities wish to rely on evidence, any questions of fact that

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App.—Dallas 1913, writ refused).

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

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

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

[42] *Cameron*, 80 S.W.3d at 555; *Tex. Dep't of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex. 2002).

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

affect jurisdictional issues must be settled by the jury,[44] the same standard that applies to summary judgments.

Nor can it be argued that courts exceed their jurisdiction by requiring immunity pleas to be brought in standard motions according to settled rules of procedure. As we stated shortly after the rules of civil procedure were enacted:

> Since [the trial court] had the power to sustain the demurrers and grant the motions, it had the power to overrule them. The jurisdiction of a court must be determined, not upon the court's action in deciding the questions presented in a case, but upon the character of the case itself. Jurisdiction is the power to decide, and not merely the power to decide correctly.[45]

Of course, returning to established procedural motions will not remove all difficulties with issues of governmental immunity. Judges of goodwill and intellect will still disagree about whether a particular pleading is sufficiently specific, as JUSTICES JEFFERSON and WAINWRIGHT do here. Governmental units may incur unnecessary discovery costs and delays unless judges agree to hear summary judgment motions on jurisdictional matters as early in the case as they might hear a plea to the jurisdiction. And appellate courts must still distinguish between immunity from suit (as to which an interlocutory appeal will lie) and immunity from liability (as to which it will not).[46] But simplification of our procedures should not be rejected because we cannot simplify everything.

If the Texas Legislature mandated interlocutory review of "pleas in bar asserting limitations" (a development devoutly to be wished against), few would suggest such review was available only

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

[45] *Martin v. Sheppard*, 201 S.W.2d 810, 812-13 (Tex. 1947).

[46] *See Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638-39 (Tex. 1999).

for motions entitled "Plea in Bar" instead of the summary judgment or special exception forms that have long been used to raise such issues.[47] We should stop making the assumption that the Legislature intended something different for pleas of governmental immunity.

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

Scott Brister
Justice

OPINION DELIVERED: April 2, 2004

[47] *See Baker v. Monsanto Co.*, 111 S.W.3d 158, 159 (Tex. 2003) (per curiam) (asserting limitations by summary judgment); *City of Port Arthur v. Tillman*, 398 S.W.2d 750, 751 (Tex. 1965) (asserting limitations by special exception).