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 on October 30, 2002

JUSTICE JEFFERSON, dissenting.

I dissent on two grounds. First, I do not agree that our precedent requires the Mirandas to produce evidence on all essential elements of their cause of action to establish the trial court's jurisdiction. The Court's holding is inconsistent with the distinction *Bland* draws between requiring the plaintiff to prove preliminary facts as a predicate to the trial court's power to entertain the merits, and requiring her to present the merits themselves on pain of dismissal. *Bland Indep. School Dist. v. Blue*, 34 S.W.3d 547 (Tex. 2000).[1]

[1] I agree that the court of appeals' holding conflicts with *Bland* to the extent it holds that the trial court was prohibited from inquiring into the merits *because* ". . . the Department did not specifically allege that the Mirandas' allegations were pled merely as a sham for the purpose of wrongfully obtaining jurisdiction." 55 S.W.3d 648, 652. *Bland* does not require that form of defensive pleading as the sole gateway through which the trial court may consider evidence. If that were so, we could not have held that there are limited circumstances in which, even in the absence of a defendant's pleading that the plaintiff's pleadings were a sham, the trial court is required to consider evidence. I depart from the Court's holding, however, that this is such a case.

Second, I cannot agree that the Mirandas' pleading has alleged sufficient facts to confer jurisdiction on the trial court. The Mirandas assert that the Department was aware that branches fall from trees, but consciously chose not to post warnings. Is that gross negligence? *No*. *Texas law does not impose on landowners a duty to warn trespassers about all conceivable dangers inherent in nature.* What if you add the allegation that the Department did not inspect or prune trees in Garner State Park? *The Court today makes clear that the Department has no duty to inspect trees in state parks*. ___ S.W.3d ___. *If there is no duty, a complaint about the failure to inspect or prune cannot possibly constitute a gross negligence pleading sufficient to invoke the court's jurisdiction.* But the Mirandas used the words "gross negligence." *Not enough. The Mirandas pleaded no facts even remotely suggesting the Department was aware the limb was about to fall, much less that it would injure Maria.*

I

***Bland*, in Proper Context**

In deciding a plea to the jurisdiction, the trial court must consider evidence "when necessary to resolve the jurisdictional issues raised." *Bland,* 34 S.W.3d at 555. That quote must be read in context. We noted that when a defendant challenges an organization's standing to sue, the organization must present evidence of its nature and purpose before it can pursue its claims – a burden that "does not involve a significant inquiry into the substance of the claims." *Id*. at 554. Similarly, we observed that a challenge to personal jurisdiction may "touch on the merits of the case," but is not aimed at "whether the defendant may be liable as alleged." *Id*. at 555. That theme – that a plaintiff is not required to litigate the merits to establish jurisdiction – was emphasized

throughout our opinion. *Id*. at 554. We cautioned that "the proper function of a dilatory plea does not authorize an inquiry so far into the substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction." *Id.*

I interpret *Bland* to mean that if a plea to the jurisdiction requires the trial court to wade deeply into the lawsuit's merits, it is not a valid plea. Yet today the Court immerses itself in the merits by reaching and deciding the ultimate issue in the case: ". . . *the evidence in the record establishes that the Department was not grossly negligent and that the Mirandas have failed to raise a fact question regarding the Department's alleged gross negligence.*" ___ S.W.3d at ___ (emphasis added). This holding misapplies *Bland* because it permits a defendant, on painfully short notice and before evidence has been developed, to force the plaintiff either to present evidence on the ultimate issue in the lawsuit, or lose the right to a jury trial on the merits.

The Court asserts that its standard "mirrors that of a summary judgment. . . ." ___ S.W.3d ___. It is a poor reflection. Our summary judgment rule, unlike the Court's standard, contains procedural safeguards to ensure that the merits are not determined before the nonmovant has had an adequate time for discovery and an opportunity to respond. TEX. R. CIV. P. 166a(c) ("Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response."); 166a(i) ("After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense. . . ."). As a

uniform rule of procedure, the summary judgment rule leaves little to the imagination. A party whose claim is subject to adjudication on the merits is entitled to advance notice that it must present evidence and has an adequate opportunity to respond.[2] The procedure the Court adopts today, in contrast, will vary from county to county and from judge to judge.

The Court cites a number of federal decisions holding that when jurisdictional facts are intertwined with the merits, the trial court, in considering evidence, should either employ the standard applicable to a summary judgment or leave the jurisdictional determination to trial. ___ S.W.3d ___; *see also* 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.30[3], at 12-37 to 12-38 (3d ed. 2003). I do not disagree with that proposition, but it does not answer a fundamental question. This Court must decide what procedure governs *in Texas* when a plea to the jurisdiction is treated like a motion for summary judgment.

As JUSTICE BRISTER observes, no procedural rule currently requires a trial court to advise the plaintiff that evidence may or must be presented in opposition to a plea to the jurisdiction, and no rule requires an adequate time for discovery before the court dismisses a case on the merits. ___ S.W.3d at ___. By default, then, trial courts will turn to Rule 21. TEX. R. CIV. P. 21. Presumably, if a trial court's ruling comports with Rule 21's minimum procedural requirements, a dismissal on

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[2] The prevailing view appears to be that the timeline is strictly enforced. *See Luna v. Estate of Rodriguez*, 906 S.W.2d 576, 582 (Tex. App.–Austin 1995, no writ) ("Because summary judgment is a harsh remedy, we strictly construe the twenty-one day time limit."). *Accord Burns Motors, Inc. v. Gulf Ins. Co.*, 975 S.W.2d 810, 812 (Tex. App.–Corpus Christi 1998) *rev'd on other grounds*, 22 S.W.3d 417 (Tex. 2000); *Martin v. Martin, Martin & Richards, Inc.*, 991 S.W.2d 1, 11 (Tex. App.–Fort Worth 1997) *rev'd on other grounds*, 989 S.W.2d 357 (Tex. 1998); *Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 759 (Tex. App.–Amarillo 1995,writ denied); *Stephens v. Turtle Creek Apartments, Ltd.*, 875 S.W.2d 25, 27 (Tex. App.–Houston [14th Dist.] 1994, no writ); *Wavell v. Caller-Times Pub. Co.*, 809 S.W.2d 633, 637 (Tex. App.–Corpus Christi 1991, writ denied); *Williams v. City of Angleton*, 724 S.W.2d 414, 417 (Tex. App.–Houston [1st Dist.] 1987, writ ref'd n.r.e.) *disapproved of on other grounds*, 876 S.W.2d 314 (Tex. 1994).

the merits will survive any challenge based on an abuse of discretion standard. We should ask ourselves, then, whether the Rule's minimum requirements are adequate when the stakes are no less than a party's ability to present its case on the merits.

Under Rule 21, a plea to the jurisdiction may be served "three days before the time specified for the hearing unless otherwise provided by these rules or shortened by the court." *Id*. The rule does not mention an adverse party's right to present opposing evidence, which may explain why the Mirandas did not controvert the Department's plea with their own evidence. Compiling evidence of simple negligence on three days' notice – evidence that typically requires months of discovery – would be daunting in itself; but where, as here, a plaintiff must prove *gross negligence*, her ability to contest the Department's jurisdictional plea could be essentially non-existent.

The Mirandas had no reason to suspect that a summary judgment standard applied, requiring them to controvert the Department's evidence, because the Department's plea to the jurisdiction was subject to *Bland*. 34 S.W.3d at 554-55 (trial court not authorized to inquire so far into the substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction). At a minimum, I would hold that if a summary judgment standard applies, the trial court must so advise the parties and employ Rule 166a procedures.

II

Pleading Requirements Under Recreational Use Statute

Rather than dismiss the case on the merits under a summary judgment standard, I would examine the pleadings to determine whether the Mirandas alleged facts sufficient to invoke the trial court's jurisdiction. *See Tex. Ass'n Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993)

(plaintiff has burden to allege facts affirmatively demonstrating that the trial court has subject matter jurisdiction). In my view, the Mirandas' pleading falls short. Just as the Department owes no duty to warn trespassers that rattlesnakes may strike, it owes no duty to advise statutory trespassers that tree limbs fall in state parks. The Mirandas did not allege that the Department had so much as an inkling that the branch in question would fall. *See* TEX. CIV. PRAC. & REM CODE § 41.001(7); *see also Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 21-22 (Tex. 1994) (explaining that gross negligence requires at a minimum that the defendant subjectively "have actual awareness of the extreme risk created by his or her conduct"). Rather, she alleges that the Department is generally aware that tree limbs fall, just as it must know of countless other natural perils in state parks. Because the Department owes no duty to warn trespassers that forces of nature may cause random harm, I would hold, contrary to the Court's conclusion, that the Mirandas' pleading does not invoke the trial court's jurisdiction.

The Mirandas did not allege that the Department was subjectively aware of any specific risk of injury. *See id*. Instead, they alleged:

> Defendant knew of the dangers of its falling tree branches, failed to inspect, failed to prune, failed to alleviate or remove the danger, and consciously and deliberately failed to warn Plaintiffs of the extremely dangerous condition. Plaintiffs paid a campsite rental fee and specifically asked defendant to assign them a safe campsite. Defendant knew that its property contained hidden, dangerous defect (sic) in that its tree branches which have not been inspected or pruned regularly fall. Defendant did not warn Plaintiffs of the hidden danger.
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> * * *
>
> Plaintiffs would show the court that the occurrence made the basis of this suit and the resulting damages set out below were a direct and proximate result of Defendant's negligence and its agents, servants, and officers, both of commission or

> omission, or both separately and collectively, in failing to properly maintain and inspect the campsite where Plaintiffs were injured, in failing to properly maintain the campsite in a safe condition and/or in failing to exercise ordinary care to protect Plaintiffs from the danger.

The Mirandas' gross negligence allegations stated:

> Plaintiffs would show the court that the occurrences made the basis of this suit and the resulting injuries and damages set out below were a direct and proximate result of Defendant's negligence in failing to make safe the dangerous condition of its campsite trees. Defendant's conduct was willful, wanton, or grossly negligent. Defendant failed to warn or make reasonably safe the dangerous condition of which it was aware and which Plaintiffs were unaware.

We can accept as true the Mirandas' allegation that the Department knew "its tree branches which have not been inspected or pruned regularly fall" and did not warn them about that contingency. That pleading, however, is of neutral value in a suit against the Department, which would owe no duty to warn unless it had actual knowledge that the branch would fall yet nevertheless instructed Maria to camp beneath it. *See id.*; *see also Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001) (reiterating that gross negligence requires that "the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others."). Indeed, nowhere in their pleadings do the Mirandas assert that the Department was aware of any risk associated with either the tree or the campsite below. Instead, they simply recast allegations of simple negligence into a claim for gross negligence.

We are bound, however, to analyze their claims in light of the policies underlying the recreational use statute. The statute exists to encourage landowners to allow the public to enjoy outdoor recreation on their property by limiting their liability for personal injury. *City of Bellmeade*

v. Torres, 89 S.W.3d 611, 617 (Tex. 2002) (Hankinson, J. dissenting). To accomplish that objective, the Legislature has placed stringent parameters around the duty landowners owe "trespassers." *See* TEX. CIV. PRAC. & REM CODE § 75.002**.** The duty implicit in the Mirandas' pleading, however, would require the Department to warn all visitors of all perils commonly confronted by human interaction with nature. The scope of that proposed duty – obligating the Department to post warnings about all naturally occurring dangers – would create such an insurmountable practical and economic burden as to frustrate the legislature's intent to encourage landowners to make property available for recreational use.

Without allegations that the Department was aware that the limb would fall and nevertheless instructed Maria to camp below it, the Mirandas have not pleaded facts sufficient to proceed on their claim under the recreational use statute. I do not mean to suggest that merely because the injury is alleged to have resulted from a natural condition, the trial court is *thereby* deprived of jurisdiction. For example, the trial court's jurisdiction would be properly invoked by a pleading that the Department told the plaintiff it was safe to dive into waters the Department knew were so shallow that the dive posed a likelihood of serious injury, and that the plaintiff was severely injured diving in reliance on that assurance. Here, by contrast, the Mirandas did not plead that the Department directed Maria to a campsite knowing that an overhanging tree branch would likely fall on her and cause serious injury.

I understand fully the Court's holding that the Mirandas gave "fair notice" that they were pursuing a gross negligence claim. Fair-notice pleadings, however, must be viewed in this case through the prism of sovereign immunity, which deprives a court of jurisdiction unless the State has

expressly waived immunity. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). The plaintiffs' pleadings against the State must affirmatively establish jurisdiction to overcome the contrary presumption. *Tex. Dep't of Crim. Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001)(quoting *Tex. Ass'n Bus.*, 852 S.W.2d at 446). The plaintiff must plead facts that, if true, would establish that the claims come within an express waiver of sovereign immunity before the trial court has jurisdiction to proceed. Just as mere reference to the Texas Tort Claims Act is insufficient to confer jurisdiction, *Miller*, 51 S.W.3d at 587, the trial court's jurisdiction is not satisfied by mere notice that the plaintiff is pursuing a gross negligence claim. The Mirandas have failed to affirmatively establish the court's jurisdiction because, even if all of the facts alleged in their pleading were true, those facts would not amount to gross negligence and therefore would not establish a waiver of sovereign immunity under the recreational use statute.

When a plaintiff fails to plead facts establishing jurisdiction, the issue is ordinarily one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). A court may grant a plea to the jurisdiction without affording an opportunity to amend only when the pleadings "affirmatively negate" the existence of jurisdiction, a circumstance not presented here. *Id.* In this case, however, the trial court overruled the Department's plea to the jurisdiction, concluding implicitly that the Mirandas' pleadings were sufficient to confer jurisdiction, and the court of appeals affirmed. Consequently, the Mirandas have never been placed on notice that they must cure the jurisdictional defect. It may well be that the facts will not lend themselves to a pleading that would confer jurisdiction, but we are not equipped to make that determination at this stage of the proceedings.

III

Conclusion

We need not and should not inquire into the ultimate merits of this case. I would remand the cause to the trial court to give the Mirandas an opportunity to amend their petition to plead facts establishing jurisdiction.

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Wallace B. Jefferson
Justice

OPINION DELIVERED: April 2, 2004