# IN THE SUPREME COURT OF TEXAS

NO. 02-1014

HARRIS COUNTY, TEXAS AND CARL BORCHERS, PETITIONERS

v.

FAYE SYKES, INDIVIDUALLY AND A/N/F OF TRENARD BATTLE, RESPONDENTS

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

**Argued November 12, 2003**

CHIEF JUSTICE PHILLIPS delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE OWEN, JUSTICE JEFFERSON, JUSTICE SMITH, and JUSTICE WAINWRIGHT joined.

JUSTICE BRISTER filed a concurring opinion, in which JUSTICE O'NEILL joined.

JUSTICE SCHNEIDER did not participate in the decision.

This case raises two issues. First, we address whether an order granting a governmental unit's plea to the jurisdiction should be with or without prejudice when the claimant has failed to state a claim that is cognizable under the Texas Tort Claims Act. Regardless of the answer, we must then decide whether such a dismissal is a judgment for the purposes of section 101.106 of the Texas Tort Claims Act, that would bar a plaintiff from proceeding against governmental agents for claims arising from the same subject matter. *See* TEX. CIV. PRAC. & REM. CODE § 101.106. The court of appeals held that a dismissal pursuant to a plea to the jurisdiction is a dismissal without prejudice,

and as such, not a judgment under the Texas Tort Claims Act. 89 S.W.3d 661, 670. We hold that such a dismissal is with prejudice because it fully and finally adjudicates whether the claims that were asserted, or that could have been asserted, come within the Texas Tort Claims Act's waiver of sovereign immunity. We further hold that such a dismissal is a judgment under section 101.106 of the Texas Tort Claims Act. Accordingly, we modify the judgment of the court of appeals to render judgment dismissing the plaintiff's claims with prejudice and render judgment that the plaintiff take nothing.

I

George Sykes and his wife, Faye, brought this suit for injuries Mr. Sykes allegedly sustained in the Harris County jail. While incarcerated there, Mr. Sykes was assigned to a bed next to an inmate who was infected with tuberculosis. The Sykeses claimed that the county was negligent in failing to quarantine the infected inmate and in failing to warn Mr. Sykes of the inmate's infection. Several months after filing suit, Faye Sykes filed a suggestion informing the trial court of her husband's death. At the same time, she filed a motion, on which the trial court apparently never ruled, requesting that Trenard Battle, Mr. Sykes's minor son, be added as a plaintiff and that the estate of George Sykes be substituted in the place of her late husband.

Asserting governmental immunity from suit, Harris County filed a plea to the jurisdiction arguing that the Legislature has not waived immunity from suits like the Sykes's. Sykes responded that immunity was waived by the Texas Tort Claims Act because her husband's injuries arose out of the condition or use of property. TEX. CIV. PRAC. & REM. CODE § 101.021. Specifically, Sykes argued that the words "housed," "room," and "sleeping space" in their pleadings all connote use of

the tangible personal or real property that caused Mr. Sykes's injury and eventual death.

By amended petition, Sykes added Carl Borchers, the major of the Harris County jail, as a defendant both individually and in his official capacity. The trial court subsequently granted Harris County's plea to the jurisdiction and dismissed Sykes's claims against Harris County with prejudice. Borchers then moved for summary judgment, urging that the trial court's dismissal of Harris County entitled him to derivative immunity under section 101.106 of the Texas Tort Claims Act. *See id.* § 101.106; *Thomas v. Oldham*, 895 S.W.2d 352, 357 (Tex. 1995). The trial court granted Borchers's motion and signed an order that Sykes take nothing.

Sykes appealed, arguing that the trial court erred in granting the plea to the jurisdiction and dismissing her claims against Harris County because the Texas Tort Claims Act waives immunity when a condition or use of tangible personal property causes injury. *See* TEX. CIV. PRAC. & REM. CODE § 101.021. Sykes also argued that the trial court further erred in granting Borchers's motion for summary judgment because Harris County's dismissal was not a judgment for purposes of section 101.106. *See id.* § 101.106. The court of appeals affirmed the trial court's dismissal of Harris County, holding that Sykes's amended petition did not affirmatively plead facts sufficient to confer jurisdiction on the trial court. 89 S.W.3d at 667. But the court decided that, in granting the plea to the jurisdiction, the trial court could only dismiss the suit without prejudice, which did not qualify as a judgment under section 101.106 of the Texas Tort Claims Act. 89 S.W.3d at 668. Accordingly, the court of appeals reversed Carl Borchers's summary judgment and remanded the case to the trial court. We granted Carl Borchers and Harris County's petition for review.

II

Sovereign immunity from suit defeats a trial court's subject matter jurisdiction unless the state expressly consents to suit. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Governmental immunity operates like sovereign immunity to afford similar protection to subdivisions of the State, including counties, cities, and school districts. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003) (recognizing that sovereign immunity and governmental immunity are distinct concepts although courts often use the terms interchangeably). The Texas Tort Claims Act provides a limited waiver of governmental immunity if certain conditions are met. *See* TEX. CIV. PRAC. & REM. CODE §§ 101.021, 101.025.[1]

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject matter jurisdiction. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Because governmental immunity from suit defeats a trial court's jurisdiction, it may be raised by such a plea. *Tex. Dep't of Parks & Wildlife v. Miranda*, __ S.W.3d __, __(Tex. 2004); *Jones*, 8 S.W.3d at 639. Whether a court has subject matter jurisdiction is a legal question. *State ex rel. State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002); *Mayhew v. Town of*

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[1] The Texas Tort Claims Act states:

> A governmental unit in the state is liable for:
> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
> (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
> (B) the employee would be personally liable to the claimant according to Texas law; and
> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

*Id*. § 101.021.

*Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). If the trial court denies the governmental entity's claim of no jurisdiction, whether it has been asserted by a plea to the jurisdiction, a motion for summary judgment, or otherwise, the Legislature has provided that an interlocutory appeal may be brought. *See* TEX. CIV. PRAC. & REM. CODE § 51.014; *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244, 245 n.3 (Tex. 2004). However, if the court grants the plea to the jurisdiction, as the trial court did in this case, the plaintiff may take an appeal once that judgment becomes final. *See Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 15 (Tex. 2000).

A trial court must grant a plea to the jurisdiction, after providing an appropriate opportunity to amend, when the pleadings do not state a cause of action upon which the trial court has jurisdiction. *See Bybee v. Fireman's Fund Ins. Co.*, 331 S.W.2d 910, 917 (Tex. 1960) (citing *Lone Star Fin. Corp. v. Davis*, 77 S.W.2d 711, 715 (Tex. App.—Eastland 1934, no writ)). This was such a case. After Harris County filed its plea to the jurisdiction, Sykes amended her petition to state with greater particularity the theory that Harris County waived governmental immunity by placing Mr. Sykes in the same room with, and assigning him a bed near, an inmate infected with tuberculosis. The trial court dismissed Sykes's claims, and the court of appeals agreed that "any effect that the room's walls and Sykes's bed had on Sykes's alleged exposure to tuberculosis is too attenuated to constitute a waiver of immunity under the [Texas Tort Claims Act]." 89 S.W.3d at 667 (citing *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998)).[2]

The court of appeals disagreed with the trial court, however, on whether such a dismissal

[2] Sykes did not petition this Court for review of the court of appeals' judgment.

should be with or without prejudice. In general, a dismissal with prejudice is improper when the plaintiff is capable of remedying the jurisdictional defect. *See Dahl v. State*, 92 S.W.3d 856, 862 (Tex. App.—Houston [14th Dist.] 2002, no pet.)*; Thomas v. Skinner*, 54 S.W.3d 845, 847 (Tex. App.—Corpus Christi 2001, pet. denied); *Bell v. State Dep't of Highways & Pub. Transp.*, 945 S.W.2d 292, 295 (Tex. App.—Houston [14th Dist.] 1997, writ denied). The court of appeals in this case relied on *Bell* to hold that Sykes's claims should have been dismissed without prejudice. In so doing, the court ruled contrary to a line of decisions stating that dismissal with prejudice is appropriate when a trial court lacks subject matter jurisdiction because of the sovereign immunity bar. *See Martin v. Tex. Bd. of Criminal Justice*, 60 S.W.3d 226, 231 (Tex. App.—Corpus Christi 2001, no pet.); *City of Midland v. Sullivan*, 33 S.W.3d 1, 6 (Tex. App.—El Paso 2000, pet. dism'd w.o.j.); *City of Cleburne v. Trussell*, 10 S.W.3d 407, 409 (Tex. App.—Waco 2000, no pet.); *Univ. of Tex. Med. Branch v. Hohman*, 6 S.W.3d 767, 771 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd w.o.j.); *Hampton v. Univ. of Tex.-M.D. Anderson Cancer Ctr.*, 6 S.W.3d 627, 629 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *Lamar Univ. v. Doe*, 971 S.W.2d 191, 197 (Tex. App.—Beaumont 1998, no pet.); *Jones v. City of Stephenville*, 896 S.W.2d 574, 577 (Tex. App.—Eastland 1995, no writ); *Liberty Mut. Ins. Co. v. Sharp*, 874 S.W.2d 736, 740 (Tex. App.—Austin 1994, writ denied). We granted Borchers and Harris County's petition to resolve this conflict.

If a plaintiff has been provided a reasonable opportunity to amend after a governmental entity files its plea to the jurisdiction, and the plaintiff's amended pleading still does not allege facts that would constitute a waiver of immunity, then the trial court should dismiss the plaintiff's action.

Such a dismissal is with prejudice because a plaintiff should not be permitted to relitigate jurisdiction once that issue has been finally determined. Before dismissing this case, the trial court allowed Sykes to file an amended petition, after which the court made a final adjudication that the Legislature has not waived governmental immunity under the Texas Tort Claims Act with respect to any claim that Sykes brought against Harris County. Therefore, Sykes is foreclosed from relitigating whether the Texas Tort Claims Act waives immunity in this case. Accordingly, the court below erred in reversing the dismissal with prejudice, and we modify the court of appeals' judgment to dismiss Sykes's claims against Harris County with prejudice.

III

Next, we address the court of appeals' holding reversing the summary judgment granted by the trial court in favor of Carl Borchers. The Texas Tort Claims Act states: "A judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim." TEX. CIV. PRAC. & REM. CODE § 101.106.[3] The purpose of section 101.106 is to protect employees of a governmental unit from liability when a judgment or settlement has been obtained from the government employer pursuant to a claim under Chapter 101 of the Texas Tort Claims Act. *Thomas v. Oldham*, 895 S.W.2d 352, 357 (Tex. 1995). Section 101.106 applies not only when there has been a judgment against a governmental entity prior to the suit against the employee, but also when the settlement or judgment against the governmental entity occurs at any time before or during

[3] This section was amended by Act of June 11, 2003, 78th Leg., R.S., ch. 204 § 11.05. The amended section became effective on September 1, 2003 and applies to actions filed on or after the effective date.

the pendency of the action against the employee. *Id*. at 355. The bar applies regardless of whether the judgment is favorable or adverse to the governmental unit. *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998).

This Court has never addressed whether a dismissal on a plea to the jurisdiction is a judgment for purposes of section 101.106 of the Texas Tort Claims Act. Several courts of appeals, however, have considered this issue. In *Brown v. Prairie View A & M Univ.*, the Fourteenth Court of Appeals held that dismissing Prairie View A & M pursuant to a plea to the jurisdiction was not a judgment that triggered the bar of the Texas Tort Claims Act. 630 S.W.2d 405, 408 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.). Since *Brown*, however, that court, as well as two other courts of appeals, have held that a dismissal pursuant to a plea to the jurisdiction is a judgment for purposes of section 101.106 of the Texas Tort Claims Act. *Liu v. City of San Antonio*, 88 S.W.3d 737, 744 (Tex. App.—San Antonio 2002, pet. denied); *Dalehite v. Nauta*, 79 S.W.3d 243, 244 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *Doyal v. Johnson County*, 79 S.W.3d 139, 140 (Tex. App.—Waco 2002, no pet.); *Lowry v. Pearce*, 72 S.W.3d 752, 755 (Tex. App.—Waco 2002, pet. denied).

Sykes argues that a granted plea to the jurisdiction does not qualify as a judgment because it does not dispose of the claims' merits. As we have already held, however, a dismissal constitutes a final determination on the merits of the matter actually decided. *See Ritchey v. Vasquez*, 986 S.W.2d 611, 612 (Tex. 1999) (per curiam); *Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991) (per curiam). In this case, there is a final adjudication that the Legislature has not waived Harris County's immunity on the facts of this case. Since the trial court properly dismissed Sykes's claims

against Harris County with prejudice, Carl Borchers is entitled to derivative immunity under section 101.106 of the Texas Tort Claims Act.

The court of appeals erred in holding that the claims against Harris County should be dismissed without prejudice and that such a dismissal is not a judgment under section 101.106 of the Texas Tort Claims Act. Accordingly, we modify the judgment of the court of appeals and render judgment that the plaintiff's suit is dismissed with prejudice. We also reverse the portion of the court of appeals' judgment reversing Carl Borchers's summary judgment and render judgment that the plaintiff take nothing.

Thomas R. Phillips
Chief Justice

Opinion delivered: May 28, 2004