

# IN THE SUPREME COURT OF TEXAS

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No. 02-1014  
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HARRIS COUNTY, TEXAS AND CARL BORCHERS, PETITIONERS

v.

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

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

**Argued November 12, 2003**

JUSTICE BRISTER, joined by JUSTICE O'NEILL, concurring.

For reasons stated elsewhere, governmental immunity should not be raised in a motion called a “plea to the jurisdiction.”<sup>1</sup> This case shows another reason why.

The Court holds dismissal by plea to the jurisdiction on immunity grounds must be with prejudice.<sup>2</sup> While many intermediate appellate court opinions are cited in support, just as many others can be cited to the contrary (and are now impliedly disapproved).<sup>3</sup> How could so many courts

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<sup>1</sup> See *Tex. Dep't of Parks & Wildlife v. Miranda*, \_\_\_ S.W.3d \_\_\_ (Tex. 2004) (Brister, J., dissenting).

<sup>2</sup> \_\_\_ S.W.3d \_\_\_.

<sup>3</sup> See, e.g., *Mullins v. Estelle High Sec. Unit*, 111 S.W.3d 268, 274 (Tex. App.—Texarkana 2003, no pet.) (holding dismissal of inmate’s suit as frivolous due to defendant’s immunity should have been without prejudice); *Ab-Tex Beverage Corp. v. Angelo State Univ.*, 96 S.W.3d 683, 686 (Tex. App.—Austin 2003, no pet.); *Prairie View A & M Univ. of Tex. v. Mitchell*, 27 S.W.3d 323, 327 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *Li v. Univ. of Tex. Health Sci. Ctr. at Houston*, 984 S.W.2d 647, 654 (Tex. App.—Houston [14th Dist.] 1998, pet. denied); see also *Cervantes v.*

have been so confused?

We have recently held dismissal must be *without* prejudice when based on mootness,<sup>4</sup> forum non conveniens,<sup>5</sup> or exclusive jurisdiction.<sup>6</sup> Each of these dilatory matters could be raised in a “plea to the jurisdiction,” and presumably changing the motion’s name would not change the preclusive effect. Thus, the rule regarding pleas to the jurisdiction appears to be: dismissal is usually without prejudice, but sometimes with prejudice. When? Why?

The conflicting opinions by the courts of appeals give no satisfactory explanation for either result. Of the “with prejudice” courts, only one appears to have made any attempt to explain why dismissal based on sovereign immunity should be preclusive; the explanation in that case was that plaintiffs cannot amend their pleadings or present evidence on pleas to the jurisdiction<sup>7</sup> – both of which assertions are wrong.<sup>8</sup>

The “without prejudice” courts have explained that dismissal based on lack of jurisdiction can never be on the merits, and is improper if the plaintiff can remedy the jurisdictional defect.<sup>9</sup> But

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*Tyson Foods, Inc.*, 130 S.W.3d 152, 157-58 (Tex. App.—El Paso 2003, pet. filed) (holding order granting plea to the jurisdiction for missing deadline for filing administrative appeal must be without prejudice); *Bell v. State Dep’t of Highways & Pub. Transp.*, 945 S.W.2d 292, 295 (Tex. App.—Houston [1st Dist.] 1997, writ denied) (holding sovereign immunity claim raised by special exception could not be dismissed with prejudice).

<sup>4</sup> *Ritchey v. Vasquez*, 986 S.W.2d 611, 612 (Tex. 1999) (per curiam).

<sup>5</sup> *Owens Corning v. Carter*, 997 S.W.2d 560, 580 n.13 (Tex. 1999).

<sup>6</sup> *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002).

<sup>7</sup> *Liberty Mut. Ins. Co. v. Sharp*, 874 S.W.2d 736, 739 (Tex. App.—Austin 1994, writ denied).

<sup>8</sup> See *County of Cameron v. Brown*, 80 S.W.3d 549, 558-59 (Tex. 2002) (holding plaintiff must be given opportunity to replead before plea to the jurisdiction based on pleadings is granted); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000) (holding plea to the jurisdiction is not limited to consideration of pleadings).

<sup>9</sup> See, e.g., *Mullins*, 111 S.W.3d at 274; *Ab-Tex Beverage*, 96 S.W.3d at 686.

courts always have jurisdiction to determine their own subject-matter jurisdiction,<sup>10</sup> and a determination on that matter should not be open to endless relitigation. Further, as plaintiffs must be given an opportunity to remedy defects regarding immunity before any plea to the jurisdiction is granted,<sup>11</sup> it is unclear why that opportunity should be extended in perpetuity.

The Court adopts the “with prejudice” rule because “a plaintiff should not be permitted to relitigate jurisdiction once that issue has been finally determined.”<sup>12</sup> This begs the question; when is jurisdiction finally determined? Nothing inherent in pleas to the jurisdiction suggests an answer.

Today’s holding can only be explained as another ad hoc effort to modernize an obsolete common-law plea. Because a plea to the jurisdiction is not so much a motion as a category of complaints, it will always be hard to say with particularity or uniformity what rules ought to apply. Wisely, the Texas Rules of Civil Procedure do not even try; we should follow that lead.

There would never have been as much confusion if sovereign immunity had to be raised by summary judgment or special exceptions. The summary judgment rules make clear not only the deadlines and evidentiary rules, but also that any summary judgment granted is preclusive on the issues actually decided.<sup>13</sup> Similarly, if sovereign immunity is raised by special exceptions, claimants

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<sup>10</sup> See *Camacho v. Samaniego*, 831 S.W.2d 804, 809 (Tex. 1992).

<sup>11</sup> *Brown*, 80 S.W.3d at 559.

<sup>12</sup> \_\_\_ S.W.3d \_\_\_.

<sup>13</sup> See *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 854 (Tex. 1995) (per curiam) (holding that nonsuit without prejudice nevertheless operates as dismissal with prejudice as to issues decided in earlier partial summary judgment).

know they have one chance to replead and are thereafter barred.<sup>14</sup>

The only valid explanation for today's holding is that changing the motion's name to a "plea to the jurisdiction" should not change the preclusive effect. But rather than holding that a plea to the jurisdiction based on immunity should be dismissed with prejudice because that would be the effect of a summary judgment or dismissal after special exceptions on the same grounds, I would simply hold immunity must be raised by the latter motions. Accordingly, I agree with today's holding in Part II, though on different grounds; I join fully in Part III.

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Scott Brister  
Justice

OPINION DELIVERED: May 28, 2004

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<sup>14</sup> See *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998); *Tex. Dep't of Corr. v. Herring*, 513 S.W.2d 6, 10 (Tex. 1974).