

**POLITICAL SUBDIVISION LIABILITY
UNDER THE TEXAS TORT CLAIMS ACT**

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Contents

I. BACKGROUND AND HISTORY	1
II. GOVERNMENTAL FUNCTIONS v. PROPRIETARY FUNCTIONS	2
III. WAIVER OF SOVEREIGN IMMUNITY.....	6
A. Generally.....	6
B. Condition of Real Property	9
1. Premise Defects - Statutory Duty	9
2. Standard of Care— Invitee	11
3. Standard of Care—Licensee	12
4. Standard of Care— Trespassers.....	12
5. Special Defects	14
6. Recreation Facilities	16
C. Condition or Use of Tangible Personal Property.....	19
1. Tangible Property	20
2. Use of Property	22
D. Use of Motor-Driven Vehicle and Equipment.....	24
E. Joint Enterprise	27
IV. EXEMPTIONS AND EXCEPTIONS FROM THE WAIVER OF IMMUNITY.....	28
A. Exceptions to Waiver of Immunity.....	28
B. Specific Exceptions and Exemptions.....	30
1. Discretionary Acts. Tex. Civ. Prac. & Rem. Code §101.056	30
2. Method for Providing Police/Fire Protection—Tex. Civ. Prac. & Rem. Code §101.055(3)	31
3. Intentional Tort—Tex. Civ. Prac. & Rem. Code §101.057	31

4. Traffic Signs, Signals, and Warning Devices— Tex. Civ. Prac. & Rem.
Code §101.060 31

C.	Plea to the Jurisdiction.....	33
V.	INDIVIDUAL IMMUNITY FROM LIABILITY.....	34
VI.	DAMAGES	39
A.	Statutory Limits	39
B.	Damages	40
VII.	MISCELLANEOUS MATTERS.....	42
A.	Notice of Claim.....	42
B.	Payment of Award against Employee.....	44
C.	Insurance.....	45
D.	Representation	45

POLITICAL SUBDIVISION LIABILITY UNDER THE TEXAS TORT CLAIMS ACT

I. BACKGROUND AND HISTORY

Under the English common law, a person could not sue the state for a wrong committed against that person – “The King could do no wrong.” Because English common law is the source of much of the law initially adopted in the United States, this country followed that doctrine. Texas courts held that, under the doctrine of sovereign immunity, the state and its political subdivisions were not liable for the torts of their agents or officers unless there was a constitutional or statutory waiver of immunity. In 1969, the Texas Legislature enacted such a waiver of sovereign immunity when it passed the Texas Tort Claims Act. Tex. Civ. Prac. & Rem. Code Ann. §101.001, *et. seq.* (Vernon 2005 & Supp. 2006). (Originally enacted as Tex. Rev. Stat. Art. 6252-19.) The Act is a partial waiver of the sovereign immunity of governmental units of the state. ‘Governmental unit’ as used in the Act means the State and its various agencies, departments, bureaus, boards, commissions, etc., and political subdivisions of the state, including cities, counties, school districts, and other types of districts created by state law or state constitution. *See, for example, Texas A&M Univ. v. Bishop*, 996 S.W.2d 209 (Tex. App.—Houston [14th Dist.] 1999, *reversed on other grounds*, 156 S.W.3d 580 (Tex. 2005); *Loyd v. ECO Resources, Inc.*, 956 S.W.2d 110 (Tex. App.—Houston [14th Dist.] 1997, no writ); *Clark v. University of Texas Health Science Center at Houston*, 919 S.W.2d 185 (Tex. App.—Eastland 1996, writ denied).

This is an overview of political subdivision liability under the Tort Claims Act and its waiver of sovereign immunity. It is not an exhaustive analysis of the Act. The paper does not

address liability under the Federal Civil Rights Act, immunities under which are governed by the United States Constitution and federal laws. The Tort Claims Act and the liability limits under the Act have no application to the Federal Civil Rights Act. Generally, actions brought under the Texas Tort Claims Act involve allegations of negligent conduct, while actions brought under the Federal Civil Rights Act involve allegations of intentional conduct.

II. GOVERNMENTAL FUNCTIONS v. PROPRIETARY FUNCTIONS

Before the enactment of the Tort Claims Act, Texas courts held that a municipality could not be held liable for property damages, personal injury, or death arising from a “governmental function” performed by the municipality. However, municipalities were liable for damages, injuries, or death arising from a “proprietary function,” where the courts treated municipalities in the same manner that a private entity would be treated and subjected them to the same risks as private entities. It should be noted that Texas courts have held that the State performed no proprietary functions and consequently had no tort liability until the Tort Claims Act was enacted. As counties were regarded as legal subdivisions of the State, they also could not perform proprietary functions and had no tort liability until the passage of the Tort Claims Act. Distinguishing between governmental and proprietary functions based on a reading of court cases was difficult and confusing. Generally, governmental functions were those which the municipality was required by state law to perform in the interest of the public. Proprietary functions were those which the municipality chose to perform when it believed it would be in the best interest of its inhabitants, or when it sought to compete with private enterprise. Among the operations held to be governmental functions were: garbage collection and disposal, sanitary sewer operations, police, fire suppression, and traffic regulation. Activities held to be proprietary

functions included: construction of sanitary sewer lines; construction, repair, and maintenance of streets; and construction and operation of storm sewer facilities.

As part of the tort reform laws passed by the 70th Texas Legislative Session in 1987, the Legislature sought to define governmental functions and thereby limit the liability of municipalities. Some functions previously held to be proprietary in court decisions were changed to governmental functions by the Legislature. To insure the validity of the legislative action, an amendment to Article 11, §13 of the Texas Constitution was presented to the voters for approval. That amendment was approved by voters in November 1987 and states:

- (a) Notwithstanding any other provision of this constitution, the legislature may by law define for all purposes those functions of a municipality that are to be considered governmental and those that are proprietary, including reclassifying a function's classification assigned under prior statute or common law.
- (b) This section applies to laws enacted by the 70th Legislature, Regular Session, 1987, and to all subsequent regular or special sessions of the legislature. TEX. CONST. art. 11, §13.

By the adoption of Tex. Civ. Practices and Remedies Code §101.0215, the Texas Legislature defined which functions were governmental and which were proprietary. Subsection (a) provides that a municipality is liable for damages arising from its governmental functions, which are those functions that are enjoined on a municipality by law and are given to it by the state as part of the state's sovereignty, to be exercised by the municipality in the public interest, including, but not limited to:

- (1) police and fire protection and control;
- (2) health and sanitation services;
- (3) street construction and design;
- (4) bridge construction and maintenance and street maintenance;
- (5) cemeteries and cemetery care;
- (6) garbage and solid waste removal, collection, and disposal;
- (7) establishment and maintenance of jails;

- (8) hospitals;
- (9) sanitary and storm sewers;
- (10) airports;
- (11) waterworks;
- (12) repair garages;
- (13) parks and zoos;
- (14) museums;
- (15) libraries and library maintenance;
- (16) civic, convention centers, or coliseums;
- (17) community, neighborhood, or senior citizen centers;
- (18) operation of emergency ambulance service;
- (19) dams and reservoirs;
- (20) warning signals;
- (21) regulation of traffic;
- (22) transportation systems;
- (23) recreational facilities, including but not limited to swimming pools, beaches, and marinas;
- (24) vehicle and motor driven equipment maintenance;
- (25) parking facilities;
- (26) tax collections;
- (27) firework displays;
- (28) building codes and inspection;
- (29) zoning, planning, and plat approval;
- (30) engineering functions;
- (31) maintenance of traffic signals, signs, and hazards;
- (32) water and sewer service;
- (33) animal control;
- (34) community development or urban renewal activities undertaken by municipalities and authorized under Chapters 373 and 374, Local Government Code;
- (35) latchkey programs conducted exclusively on a school campus under an interlocal agreement with the school district in which the school campus is located; and
- (36) enforcement of land use restrictions under Subchapter A, Chapter 230, Local Government Code. Tex. Civ. Prac. & Rem. Code Ann. §101.0215(a) (Vernon 2005 & Supp. 2006).

Section 101.0215 provides that the Tort Claims Act does not apply to the liability of a municipality for damages arising from its proprietary functions, which are those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality, including, but not limited to:

- (1) the operation and maintenance of a public utility;
- (2) amusements owned and operated by the municipality; and

- (3) any activity that is abnormally dangerous or ultra hazardous.
§101.0215(b).

However, Subsection (a) is not an independent waiver of governmental immunity, and therefore a plaintiff must establish the applicability of the Tort Claims Act under another section, such as §101.021, before relying on §101.0215. *Bellnoa v. City of Austin*, 894 S.W.2d 821, 826 (Tex. App. Austin 1995, no writ); *City of San Antonio v. Winkenhower*, 875 S.W.2d 388, 391 (Tex. App. San Antonio 1994, writ denied). Further, §101.0215(c) provides that the proprietary functions of a municipality do not include the thirty-six functions listed in §101.0215(a). For proprietary functions, a political subdivision has the same liability as a private person. Although the vast majority of actions by a governmental unit will be governmental functions, court of appeals decisions have held the actions of a city to be proprietary.

In *Josephine E. Abercrombie Interests, Inc. v. City of Houston*, 830 S.W.2d 305 (Tex. App.—Corpus Christi 1992, writ denied), the City of Houston was sued after it foreclosed upon a development project which it had agreed to fund in part through federal community development block grant loans. The court held that the city engaged in a proprietary act when it gave federal community development block grant loans to private developers for a project designed to revitalize an area of the city. The developer sued the city alleging fraud, negligent misrepresentation, constructive fraud, wrong foreclosure, breach of fiduciary duty, and breach of express and implied warranties and covenants. The city was not immune from suit because the cause of action arose from the performance of a proprietary function.

In *City of Houston v. Southwest Concrete Constr., Inc.*, 835 S.W.2d 728 (Tex. App.—Houston [1st Dist.] 1992, writ denied), the city was sued for tortious interference with a

contract, negligence, breach of contract, breach of the covenant of good faith and fair dealing, retaliation, and harassment arising out of its administration of rehabilitation construction projects under the federal Rental Rehabilitation Program. The city was held to have no immunity to suit since the activity was a proprietary activity.

In *City of Corpus Christi v. Absolute Industries*, 120 S.W.3d 1 (Tex. App.—Corpus Christi 2001, no pet.), the court held that merely because the cause of action intentional interference with a contract touched upon waste and disposal, did not make the act a governmental function; and in light of the pleadings alleging that this act was done on the city's part to avoid monetary loss, the court held that the action was proprietary.

Section 101.0215 determines only whether the particular act involved is a governmental or proprietary function. Section 101.0215 does not itself waive sovereign immunity. If an act is determined to be a governmental act, one must then look to §101.021 to determine if the municipality has waived immunity.

III. WAIVER OF SOVEREIGN IMMUNITY

A. Generally

With regard to governmental functions, the Tort Claims Act waives sovereign immunity to suit to the extent set out in the Act. The Tort Claims Act does NOT apply to proprietary functions. Therefore, municipalities performing proprietary functions are liable on the same basis and under the same conditions as private entities. Section 101.021 provides that:

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. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.001 (Vernon 2005 & Supp. 2006) and *Harris County v. Dillard*, 883 S.W.2d 166 (Tex. 1994) (holding that

volunteers are not employees). However, *compare Bishop v. Texas A&M Univ.*, 35 S.W.3d 605 (Tex. 2000) 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 the “and” should be “or.” An error was made in the codification of Article 6252-19 into Chapter 101 of the Civil Practices and Remedies Code.
- (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. Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (Vernon 2005 & Supp. 2006).

It should be noted that property damages can be recovered only where the wrongful act, omission, or negligence involves the operation or use of a motor-driven vehicle or motor-driven equipment. For example, a political subdivision has no liability for property damage resulting from driving through a pothole, but is liable for personal injuries suffered in an accident caused by driving through a pothole. Also, there is normally no liability for property damage from a sewer backup, but there may be liability for some sort of personal injury (e.g. mental anguish damages). Damages for personal injury or death are recoverable if the wrongful act, omission, or negligence in issue: (i) involves the operation or use of a motor-driven vehicle or motor-driven equipment or (ii) involves a condition or use of tangible personal or real property.

Table 1 Damages Recoverable

	<u>Motor Vehicle/Equipment</u>	<u>Real Property</u>	<u>Personal Property</u>
<i>Plaintiff Can</i>	Property Damage		
<i>Recover:</i>	Personal Injury	Personal Injury	Personal Injury
	Death	Death	Death

The plaintiff must plead and prove that an act falling within those areas for which sovereign immunity has been waived was a proximate cause of some compensable damage or injury. Proximate causation consists of: (1) cause in fact and (2) foreseeability. Cause in fact means that the negligent act or omission was a substantial factor in bringing about the injury, and without which no harm would have been incurred. Mere usage of a motor-driven vehicle or tangible personal property does not establish causation. Foreseeability means that the actor who caused the injury, as a person of ordinary intelligence, should have anticipated the dangers that his negligent act or omission created for others.

The Tort Claims Act does not create new legal duties, but only waives governmental immunity in circumstances where a private person similarly situated would be liable. To establish tort liability, a plaintiff must prove the existence and violation of a legal duty owed to him by the defendant. The existence of a legal duty is a question of law for the court, although in some instances it may require the resolution of disputed facts or inferences which are inappropriate as questions of law. *Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392 (Tex. 1991).

Further, the Act does not expressly recognize state constitutional torts. There is no state law similar to 42 U.S.C. §1983, and therefore, there is no direct cause of action for the violation of the Texas Constitution. *See City of Beaumont v. Bouillion*, 896 S.W.2d 143 (Tex. 1995).

The defense of sovereign immunity must be affirmatively pled and proved or it is waived. The failure to plead sovereign immunity as a defense waives that defense, and it cannot be raised for the first time on appeal. In 1988, the Texas Supreme Court ruled that a city had waived its sovereign immunity defense in a malicious prosecution case by failing to plead the defense. *Davis v. City of San Antonio*, 752 S.W.2d 518, 520 (Tex. 1988); *Harris County Hosp. Dist. V. Estrada*, 872 S.W.2d 759, 764 (Tex. 1993).

B. Condition of Real Property

As stated above, liability for premises defects extends only to personal injury and death. It does not extend to property damage. The premises for which the governmental unit is sought to be held liable must be owned, occupied, or controlled by the governmental unit. *Kinnear v. Texas Comm'n v. Human Rights*, 14 S.W.3d 199, 300 (Tex. 2000).

1. Premise Defects - Statutory Duty

A condition or use of real property involves what are referred to as “premise defects.” Premise defects include such things as a pothole in a street, a water hose placed across a sidewalk at a state university, a slippery floor in a building, etc. Section 101.021 waives governmental immunity for certain premise defects. The degree of liability that the governmental unit has for a premise defect depends on what duty is owed to the person entering the real property. The person’s status on the property, i.e. invitee, licensee, or trespasser, determines what duty the city owes. *See Gunn v. Harris Methodist Affiliated Hosp.*, 887 S.W.2d 248, 250 (Tex. App. Fort Worth 1994, writ denied). The Tort Claims Act declares the duty of a governmental unit as follows:

- (a) If a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises.
- (b) The limitation of duty in this section does not apply to the duty to warn of special defects such as excavations or obstructions on highways, roads, or streets or to the duty to warn of the absence, condition, or malfunction of traffic signs, signals, or warning devices as is required by §101.060.
- (c) If a claim arises from a premise defect on a toll highway, road, or street, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property. Tex. Civ. Prac. & Rem. Code Ann. §101.022 (Vernon 2005 & Supp. 2006).

Therefore, the standard of care that is generally imposed in premise defect cases against a governmental entity is that of the licensor to licensee. As with §101.0215, §101.022 does not create a separate basis for liability. Section 101.022 acts to limit the duty owed by the governmental entity and serves as a limitation upon the general liability created under §101.021.

M.O. Dental Lab, et al. v. Rape, 139 S.W.3d 671 (Tex. 2004) involved ordinary mud or dirt that accumulated naturally on a concrete slab outside a business. Rape slipped and fell on the slippery mud. The mud had accumulated on the sidewalk as a result of rain. The Texas Supreme Court held that ordinary mud that accumulates naturally on an outdoor concrete slab without the assistance or involvement of unnatural contact is, in normal circumstances, nothing more than dirt in its natural state and is not a condition posing an unreasonable risk of harm.

Brownsville Nav. Dist. v. Izaguirre, 829 S.W.2d 159 (Tex. 1992) concerned a warehouse built and operated on District land by a lessee. A trailer, disconnected from the tractor, had its front end resting on its extendable supports. Because of mud from recent rains, a board was placed under the supports to keep them from sinking into the mud. The board broke, the trailer

shifted to one side, and Izaguirre was crushed. Izaguirre's heirs sued, asserting that the District failed to warn the lessee of a dangerous condition of the premises that made it unsafe to load trailers. The Texas Supreme Court held that plain dirt which ordinarily becomes soft and muddy when wet is not a dangerous condition of property for which a landlord may be liable. *Id.* at 160.

2. Standard of Care— Invitee

When a person makes payment for the use of the premises, the governmental unit owes that person the duty it owes to an invitee, which is:

- (i) the duty to maintain the premises in a reasonably safe condition,
- (ii) the duty of reasonable care to inspect and discover a condition involving an unreasonable risk of harm, and
- (iii) the duty to protect against danger and to make safe any defects or to give adequate warning thereof. The duty owed is to exercise reasonable care to protect against danger from a condition on the land that creates an unreasonable risk of harm of which the owner or occupier knew or by the exercise of reasonable care would discover.

State ex rel. Texas Dept. of Parks and Wildlife v. Shumake, 131 S.W.3d 66 (Tex. App.—Austin 2003), *judgment affirmed by State v. Shumake*, 199 S.W.3d 279 (Tex. 2006). It is important to note that the payment must be for the use of the premises in questions. In *State Dept. of Highways and Public Transp. v. Kitchen*, 867 S.W.2d 784 (Tex. 1993), the Texas Supreme Court

held that payment of vehicle registration and licensing fees did not constitute payment for the use of the state's highways.

3. Standard of Care—Licensee

A licensor owes a licensee the duty not to injure him by a willful or wanton act or through gross negligence while the licensee is on the licensor's private property. Gross negligence can be defined as knowing indifference to the rights, welfare, or safety of others. *See Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981). If the licensor has actual knowledge of the defect, and the licensee does not, then the licensor has a duty to either warn the licensee or make the condition reasonably safe. Actual knowledge embraces those things that a reasonably diligent inquiry would have disclosed. *City of San Benito v. Cantu*, 831 S.W.2d 416 (Tex. App.—Corpus Christi 1992, no writ). “A licensee is not entitled to expect that the possessor [of land] will warn him of conditions that are perceptible to him, or the existence of which can be inferred from facts within his present or past knowledge.” *Wal-Mart Stores, Inc. v. Miller*, 102 S.W.3d 706, 709 (Tex. 2003), citing *Lower Neches Valley Auth. v. Murphy*, 536 S.W.2d 561, 564 (Tex. 1976). Even if the city has knowledge of a dangerous condition, the city has no duty to warn or make the danger reasonably safe if the claimant has actual knowledge of the danger as well. Whether a premise defect is open and obvious is not a complete defense to liability, but is merely one of the things that a fact finder can consider when determining questions of the comparative negligence of the parties.

4. Standard of Care— Trespassers

Generally, a person owes a trespasser only the legal duty to refrain from injuring him willfully, wantonly, or through gross negligence. *Lampasas v. Spring Center, Inc.*, 988 S.W.2d 428 (Tex. App.-Houston [14th Dist.] 1999, no pet.). Moreover, a trespasser must take the

premises as he finds them, and if he is injured by unexpected dangers, the loss is his own. *Spencer v. City of Dallas*, 819 S.W.2d 612, 627 (Tex. App. -- Dallas 1991, no writ). “The distinction between the duty owed to a trespasser as opposed to a licensee is important. The premises occupier does not owe a trespasser the duty to warn or make safe dangerous (latent) conditions known to it. It has only the duty to refrain from injuries to the trespasser through acts or omissions. The acts or omissions in question refer to the activities or conduct of the occupier on the premises, not the conditions of the premises.” *Smithers v. Texas Utilities Elec. Co.* 824 S.W.2D 693 (Tex. App. -- El Paso 1992).

Table 2. Standards for Premise Defects

	Invitee	Licensee	Trespasser
	Person who enters another’s land with owner’s knowledge and for the mutual benefit of both.	Person who enters premises by permission only, without invitation, enticement, or allurement.	Person who enters land without permission.
Standard of Care	Duty to maintain premises in reasonably safe condition. Reasonable care.	Duty not to injure by willful or wanton act or gross negligence.	Duty to refrain from injuring Trespasser willfully, wantonly, or through gross negligence.
Duty to Warn	Duty to inspect and discover condition involving unreasonable risk of harm. Duty to protect against danger and to make safe any defects or to give adequate warning.	If licensor knows of defect, and licensee does not, licensor has duty to warn or make condition reasonably safe.	No duty to warn.

5. Special Defects

Section 101.022(b) imposes a duty on the governmental unit to warn of “special defects” and cites as examples of special defects obstructions or excavations on roadways. Special defects have been held to include such things as floodwater on a state highway and an abnormally large hole that six to ten inches deep covering ninety percent of the width of the asphalt roadway. *Compare City of Houston v. Rushing*, 7 S.W.3d 909 (Tex. App. Houston [1st Dist.] 1999, no pet.), where the court found that a stopped pickup truck blocking a lane of traffic was not a special defect; *Compare City of Grapevine v. Roberts*, 946 S.W.2d 841 (Tex. 1997), where the Texas Supreme Court found that a sidewalk and its steps to the street were not special defects. In the case of *State Dept. of Highways and Public Transp. v. Payne*, 838 S.W.2d 235 (Tex. 1992), the Texas Supreme Court stated that the question of whether a condition is a premise defect or special defect is a question of duty involving statutory interpretation and thus an issue of law for the court to decide. *See also State v. Burris*, 877 S.W.2d 298 (Tex. 1994); *Morse v. State*, 905 S.W.2d 470, 473-74 (Tex. App.—Beaumont 1995, writ denied). But, the threshold question of whether the particular set of circumstances created a dangerous condition is a fact question for a jury. *State v. McBride*, 601 S.W.2d 552 (Tex. Civ. App.—Waco 1980, writ ref’d n.r.e.).

Payne, 838 S.W.2d 235, involved a man who sustained injuries when he walked off the end of a culvert built and maintained by the State. The culvert ran perpendicular to and beneath the road, ending about twenty-two feet from the roadbed. In the dark, Payne stepped off the culvert and fell about twelve feet into a drainage ditch. Payne claimed he did not see where the culvert ended that morning because vegetation obscured it and a reflective marker was missing. Payne alleged that the culvert was a special defect. The Texas Supreme Court held that the

question of whether a defect is a premise defect or a special defect is a question of law. However, the Court concluded that the culvert was not a special defect because special defects are excavations or obstructions on highways, roads, or streets which present unexpected and unusual dangers to ordinary users of roadways.

In the *Kitchen* case, a driver in a pickup truck hit a patch of ice on a bridge and skidded out of control, colliding with an oncoming truck. *Kitchen*, 867 S.W.2d at 786. The State had closed a sign warning of ice on the bridge the night before because of weather reports that the day of the accident would be warmer and drier. *Id.* When the weather did not change the day of the accident, the State dispatched crews to reopen the sign; however the accident occurred before the sign was reopened. *Id.* Given that a special defect is an excavation, obstruction, or other condition that presents an unexpected and unusual danger to ordinary users of roadways, *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.022(b); *Payne*, 838 S.W.2d at 238, the Texas Supreme Court held that an icy bridge is not a special defect. *Id.* The Court reasoned that “when there is precipitation accompanied by near-freezing temperatures, as in this case, an icy bridge is neither unexpected nor unusual, but rather, entirely predictable.” *Id.* The same rationale was the basis for the Supreme Court’s determination that a flooded low water crossing is not a special defect. **Reyes v. Laredo, 335 S.W.3d 605 (Tex. 2010)**; *Tex.Dot v. Petersen*, 2011 Tex. App. Lexis 8623.

If a warning is not provided, and it can be shown that the governmental unit actually knew or should have known about the defect, the governmental unit may be held liable for personal injuries or death caused by the defect. Section 101.022 also imposes a duty to warn of the absence, condition, or malfunction of traffic signals, signs, or warnings. *See* §101.060, which states that a governmental unit is liable only if the situation is not corrected within a

reasonable time after notice of the missing or malfunctioning sign or signal. With special defects, the governmental unit owes the same duty to warn that a private landowner owes to an invitee. *Payne*, 838 S.W.2d at 237; *Harris County v. Eaton*, 573 S.W.2d 177, 180 (Tex. 1978).

Further, in *Military Highway Water Supply Corp. v. Morin*, 156 S.W.3d 569 (Tex. 2005), the Texas Supreme Court held that although normally landowners have a duty to warn for any excavations or artificial conditions on or near a roadway, when the traveler is not in the ordinary course of travel, no duty is owed. *Id.* at 574. The Court held that “ordinary course of travel” did not include the traveler deviating from the roadway some five hundred feet from the point of impact with a horse, before coming in contact with an excavation left by the Military Highway Water Supply Corp. twenty feet off of the opposite side of the roadway. *Id.* at 573. This was beyond what the landowner could have reasonably anticipated. *Id.* Therefore, the landowner had no duty to warn.

6. Recreation Facilities

Section 75.002 of the Tex. Civ. Practices and Remedies Code provides governmental entities some protection from liability with regard to lands used for recreational purposes. It states that:

- (c) If an owner, lessee, or occupant of real property other than agricultural land gives permission to another to enter the premises for recreation, the owner, lessee, or occupant, by giving the permission, does not:
 - (1) assure that the premises are safe for that purpose;
 - (2) owe to the person to whom permission is granted a greater degree of care than is owed to a trespasser on the premises; or
 - (3) assume responsibility or incur liability for any injury to any individual or property caused by any act of the person to whom permission is granted.

- (d) Subsections (a), (b), and (c) shall not limit the liability of an owner, lessee, or occupant of real property who has been grossly negligent or has acted with malicious intent or in bad faith. Tex. Civ. Prac. & Rem. Code Ann. § 75.002 (Vernon 2005 & Supp. 2006).

Section 75.001 defines “recreation” as:

- (3) “Recreation” means an activity such as:
- (A) hunting;
 - (B) fishing;
 - (C) swimming;
 - (D) boating;
 - (E) camping;
 - (F) picnicking;
 - (G) hiking;
 - (H) pleasure driving;
 - (I) nature study, including bird-watching;
 - (J) cave exploration;
 - (K) waterskiing and other water sports;
 - (L) any other activity associated with enjoying nature or the outdoors;
 - (M) bicycling and mountain biking;
 - (N) disc golf; or
 - (O) on-leash and off-leash walking of dogs. § 75.001(3).

The Legislature later added §75.002(e), which states:

- (e) In this section, “recreation” means, in addition to its meaning under §75.001, the following activities only if the activities take place on premises owned, operated, or maintained by a governmental unit for the purposes of those activities:
- (1) hockey and in-line hockey;
 - (2) skating, in-line skating, roller-skating, skateboarding, and rollerblading;
and
 - (3) soap box derby use. §75.002(e).

Section 75.002(f) limits the duty owed by a municipality to the degree of care owed to a trespasser for any person who enters the municipality’s premises and engages in recreation. §75.002(f). Furthermore, a municipality that owns, operates, or maintains premises on which recreational activities described in §75.002(e) are conducted must post and maintain a clearly

readable sign that contains language from §75.002(g). §75.002(g). There has been some speculation that the Recreational Use Statute abolished liability altogether because the statute states that it does not waive sovereign immunity, however, the court in *City of Houston v. Morua*, 982 S.W.2d 126, 130 (Tex. App.—Houston [1st Dist.] 1998, no pet.), *overruled on other grounds by Smith v. Brown*, 51 S.W.3d 376, 381 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) rejected this argument. It stated that “...section 75.003(f) merely emphasize[d] that the recreational use statute limits *preexisting* liability, and does not, in and of itself, waive sovereign immunity or abolish the waiver of liability found in the Act.” *Id* (emphasis in original). Therefore, if the premises fall within the definition of recreational facility under Chapter 75, the duty owed is effectively reduced from a licensee to that of a trespasser. *Id*.

The initial question is whether the Recreational Use Statute applies. If it does, the duty owed is only of that owed to a trespasser on the premises. The Legislature clearly expressed its intent to shield governmental entities from liability for recreational activities by enacting §101.085 of the Tex. Civ. Practices and Remedies Code, which states that “[t]o the extent that Chapter 75 limits the liability of a governmental unit under circumstances in which the governmental unit would be liable under this chapter, Chapter 75 controls.” §101.58. *City of Bellmead v. Torres*, 89 S.W.3d 611 (Tex. 2002). However, the common law standard applicable to a trespasser does not apply to a person who is “trespasser” under the Recreational Use Statute. As discussed earlier, the under common law test, the terms “willful, wanton or grossly negligent” refer to the contemporaneous acts or omissions of the landowner, not the condition of the premises. In *State v Schumake*, 199 S.W.3d 279 (Tex. 2006), The Court determined that the Legislature did not intend to distinguish between injuries caused by activities

of the landowner as opposed to injuries caused by a condition of the property. It concluded that the Recreational Use Statute permits a premise defect claim for gross negligence. *Id.* at 287. That decision in *Schumake* was based on the specific language of Tex. Civ. Prac. & Code §75.002(d).

C. Condition or Use of Tangible Personal Property

Liability with regard to tangible personal property requires that the injury or death be proximately caused by some condition or use of the tangible personal property. *See Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998) (“death must be proximately caused by the condition or use of tangible property...[p]roperty does not cause injury if it does no more than furnish the condition that makes the injury possible”), *citing Union Pump Co. v. Allbritton*, 898 S.W.2d 773 (Tex. 1995); *Texas Dept. of Mental Health and Mental Retardation v. Pearce*, 16 S.W.3d 456 (Tex. App.—Waco 2000, pet. dismissed w.o.j.). One court held that the injury must be proximately caused either by the negligence of an employee acting within the scope of his employment in the use of tangible property, or under circumstances where an employee or agent furnished tangible property the use of which caused the personal injury or death. As noted earlier, the liability for a condition or use of tangible personal property only extends to personal injuries or death, not to property damage. One of the areas where this distinction is important is with regard to claims for sewer backups. There is no liability for sewer backup claims involving property damage. However, if damages for mental anguish or some type of personal injury can be proven, they are recoverable. *See Texas Dept. of Transp. v. Jones*, 8 S.W.3d 636 (Tex. 1999).

1. Tangible Property

Normally, when one thinks of tangible personal property, one thinks of something that can be handled, touched, or seen. In Texas, a line of cases developed that raised the question whether certain types of records or printed documents are tangible personal property under the Tort Claims Act. In *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30 (Tex. 1983), the Texas Supreme Court held an electrocardiogram to be tangible personal property. In that case, the alleged negligence was in the misinterpretation of the electrocardiogram graph.

In 1992, the Texas Supreme Court considered the scope of governmental immunity arising from the negligent use of medical records in *Texas Dept. of Mental Health and Mental Retardation v. Petty*, 848 S.W.2d 680 (Tex. 1992). Opal Petty was committed to the Austin State Hospital in 1934. *Id.* at 681. “Over time, the State’s diagnosis for Ms. Petty ranged from hebephrenic schizophrenic, mentally ill, not mentally ill, mildly mentally retarded, moderately mentally retarded, to not mentally retarded at all.” *Id.* For five decades, her treatment consisted of only “custodial care.” *Id.* After her release, at 74 years of age, she sued TDMHMR alleging negligence. The Court held that “Ms. Petty’s treatment records, as used and relied on here, are tangible property, the misuse of which will subject the government to liability just as if it were a ‘private person...in accordance with the law of this state.’” *Id.* at 684; *Baston v. City of Port Isabel*, 49 S.S.3d 425, 428 (Tex. 2001).

In the case of *University of Texas Med. Branch at Galveston v. York*, 871 S.W.2d 175 (Tex. 1994), the Texas Supreme Court stopped short of overruling *Petty* and *Salcedo*, and characterized the decisions as having very little precedential value, which would control in only identical factual circumstances. *Id.* at 178-79. *York* explicitly disapproved of the old line of cases mentioned above and instead imposed a new rule of law. It held that misuse of

information, that may or may not be recorded in medical records, is not a negligent use of personal property under the Tort Claims Act. *Id.* at 179. Therefore, governmental immunity is not waived for negligence involving the use, misuse, or non-use of information found in medical records.

Furthermore, the Court in *Dallas County v. Harper*, 913 S.W.2d 207 (Tex. 1995), using the *York* rationale, reaffirmed that a written statement is not tangible personal property for Tort Claims Act purposes. *Harper* involved the release of an indictment that had been expunged. *Id.* The Court stated that an indictment was the written statement of a grand jury accusing a person of an act or omission, and was not tangible personal property. *Id.* at 208. The act of simply reducing information to writing on paper does not make the information personal property. *Id.* at 207-08. In *Jefferson County v. Sterk*, 830 S.W.2d 260 (Tex. App.—Beaumont 1992, writ denied), the Court held that a *capias*, which was inadvertently not removed from the active warrant files and resulted in the mistaken arrest of an individual, was not tangible personal property. In *Eakle v. Texas Dept. of Human Servs.*, 815 S.W.2d 869 (Tex. App.—Austin 1991, writ denied), the Court held that a list of registered family homes was not tangible personal property. In *Robinson v. City of San Antonio*, 727 S.W.2d 40 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.), the Court held that a written protective order was not tangible personal property. In *Wilkins v. State*, 716 S.W.2d 96 (Tex. App.—Waco 1986, writ ref'd n.r.e.), the Court held that a permit used by the Highway Department to transport a mobile home on a narrow highway was a piece of paper evidencing permission, but in no way constituted tangible personal property.

2. Use of Property

The Tort Claims Act does not define what is meant by “a condition or use” of property. Therefore, it has been left to the courts to determine when property has been used. In dealing with claims concerning the failure of a governmental employee to use tangible personal property, the courts have generally stated that the “use” required by the Tort Claims Act before immunity is waived requires that the personal property be put or brought into action or service, or that it be employed or applied to a given purpose. Therefore, the non-use of personal property does not impose liability on a governmental unit. Among the allegations held to involve a non-use of property are: the failure of a nurse to read a doctor’s notes on a medical chart; the failure to use available drugs and equipment to render emergency medical care to a person who later died; and the failure to use a building to confine a schizophrenic person who later burned a house, however, some decisions have held that the failure to furnish an item of property may come within the statutory waiver of immunity for a “condition or use” of property.

In *Lowe v. Texas Tech University*, 540 S.W.2d 297 (Tex. 1976), the Texas Supreme Court held that a football player stated a cause of action involving a condition or use of property by alleging that the university was negligent in failing to provide him with proper protective items to be used as part of the uniform.

In *Robinson v. Central Texas Mental Health and Mental Retardation Center*, 780 S.W.2d 169 (Tex. 1989), the Texas Supreme Court held that the failure to furnish a life preserver as part of a patient’s swimming attire stated a cause of action involving the condition or use of property. In *Kassen v. Hatley*, 887 S.W.2d 4, 14 (Tex. 1994), the plaintiff brought suit claiming that the non-use of medication was an actionable use of personal property under the Tort Claims Act. The Texas Supreme Court rejected this argument stating, “we have never held that non-use

of property can support a claim under the Texas Tort Claims Act...nonuse of available drugs during emergency medical treatment is not a use of tangible personal property that triggers waiver of sovereign immunity....” *Id.*

The Court reiterated this logic in *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582 (Tex. 1996), by holding that the failure to administer a drug by injection was a non-use of tangible personal property and therefore did not trigger the waiver provisions of the Tort Claims Act. The Court also limited the applicability of the *Robinson* and *Lowe* decisions. It explained that the value of those cases was “limited to claims in which a plaintiff alleges that a state actor has provided property that lacks an integral safety component and that the lack of this integral component [leads] to the plaintiff’s injuries.” *Clark*, 923 S.W.2d at 585. The Court used the example of a hospital bed provided to a patient without the safety bed rails, the lack of which leads to the patient’s injury.

In *San Antonio Hosp. v. Cowan*, 128 S.W.3d 244 (Tex. 2004), the deceased was involuntarily committed to the state hospital because of his psychotic behavior, acute depression, and suicidal tendencies. *Id.* at 245. The hospital took possession of his personal effects, including his suspenders and walker, but allowed him to keep these two items with him. *Id.* Two days later, Cowan used his suspenders and a piece of pipe from the walker to commit suicide. *Id.* The Court held that merely providing someone with personal property that is not inherently unsafe is not “use” of the property within the meaning of the Tort Claims Act provision, thereby waiving governmental immunity for death caused by use of tangible personal property. *Id.* at 247. In *Cowan*, it was the deceased’s misuse of the property provided to him by the hospital that resulted in his death, not the use of the property by the hospital.

The Texas Supreme Court on several occasions has requested that the Legislature clarify the waiver of immunity provisions, particularly the “condition or use” language, as the language in the Tort Claims Act is susceptible to broad or narrow interpretations. To date, the Legislature has not acted to provide any guidance for the application of the waiver of governmental immunity. In a dissenting opinion, a frustrated Texas Supreme Court Justice resorted to quoting from Lewis Carroll in Through the Looking Glass. Citing Alice’s retort to Humpty Dumpty’s statement that a word “means just what I choose it to mean—neither more or less,” the Justice described the situation in Alice’s words: “That’s a great deal to make one word mean.” *Robinson*, 780 S.W.2d at 176. The Justice writing the majority opinion in the case responded to his colleague by stating that while Humpty Dumpty had been willing to explain the meaning of his words to Alice, the Texas Legislature had not attempted to do so despite repeated requests for definitional assistance. *Id.* at 170.

D. Use of Motor-Driven Vehicle and Equipment

With regard to motor-driven vehicles or motor-driven equipment, the claim for damages must arise from operation or use of the vehicle or equipment in performing governmental functions. *See City of El Paso v. Hernandez*, 16 S.W.3d 409 (Tex. App.—El Paso 2000, no pet.), where a complaint that city emergency personnel failed to recognize that a patient had a life-threatening condition and thus negligently failed to transport her by ambulance to the nearest hospital amounted to a complaint about the non-use of the ambulance, and therefore, the city’s sovereign immunity was not waived under the Tort Claims Act provision for “use” of any motor-driven vehicle. As with the phrase “use of tangible personal...property,” the courts have been left with the task of defining “operation or use.”

In *Texas Natural Resource Conservation Com'n v. White*, 46 S.W.3d 864 (Tex. 2001), the Texas Supreme Court considered whether a stationary electric motor-driven pump qualified as motor-driven equipment, and whether the pump in question caused the plaintiff's property damage. The case involved a storeowner who called the Texas Natural Resource Conservation Commission ("TNRCC") out to her property. TNRCC dug a trench on her property and installed a motor-driven pump to dissipate the fumes. Several days later, TNRCC removed the pump. Six days later, the fumes migrated and pooled in a corner of White's store and started a fire that completely destroyed it. *Id.* at 866. The Court held that a pump was "motor-driven equipment" because the pump was in fact driven by a motor to perform its task, and therefore it fit the general definition of "motor-driven equipment" found in Black's Law Dictionary. *Id.* at 868.

The Court stated that the Legislature used "motor-driven equipment" in the Tort Claims Act, and not just "motor-driven vehicle." Therefore a stationary pump would fall within the scope of the Act. On the issue of whether White's injury arose from the pump's "operation or use," the Court found that White had not presented any evidence to support the contention. The Court found that the injury must have been caused by the TNRCC's actual use of the pump, not its failure to use it. The Court stated, "[t]his court has never held that non-use of property can support a claim under the Texas Tort Claims Act...doing so _would be tantamount to abolishing governmental immunity, contrary to the limited waiver the Legislature clearly intended." *Id.* at 869-70, *citing Clark*, 923 S.W.2d at 585.

"Operation" has been described as "a doing or performing of practical work," while "use has been defined as meaning "to put or bring into action or service; to employ for or apply to a

given purpose....” *Mount Pleasant Indep. Sch. Dist. v. Estate of Linburg*, 766 S.W.2d 208, 211 (Tex. 1989). Some wrongful act or omission or negligence in the operation or use must be the proximate cause of the injury suffered.

The mere presence of a motor-driven vehicle or motor-driven equipment is not a basis of liability. The operation or use of the motor-driven vehicle or motor-driven equipment must cause the injury or property damage. The courts have dealt with a number of cases where an injury occurred on school buses. In several of these cases, the courts held that the vehicle was the physical setting of the injury, but that its use or operation did not cause the injury. *See Dart v. Whitley*, 104 S.W.3d 540 (Tex. 2003); *Hopkins v. Spring Indep. Sch. Dist.*, 736 S.W.2d 617 (Tex. 1987) (student with cerebral palsy suffered severe convulsions while on a bus); *Garza’s Estate v. McAllen Indep. Sch. Dist.*, 613 S.W.2d 526 (Tex. Civ. App.—Beaumont 1981, writ ref’d n.r.e.) (high school student stabbed to death on school bus, which the Court described as a failure to control and supervise the public). One of the issues involved in a 1992 Texas Supreme Court case was whose operation or use of the motor-driven vehicle or equipment is necessary to give rise to liability—the employee’s, the injured person’s, or some third party’s. The Court held that it is the employee’s use that negligently causes an injury or property damage. *Leleaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49 (Tex. 1992). Again, in this case, the Court held that the bus was nothing more than the site of the injury, not the cause of the injury. *Id.* at 51.

So, if the employee is not liable, the governmental unit is not liable. Section 101.021 states that a governmental employee’s act creates liability for the governmental entity only if “the employee would be personally liable to the claimant according to Texas law.” In a case involving a Johnson County Constable who pulled over a driver because of faulty tail lights, the

Court held that the Constable was discharging discretionary duties in good faith. Therefore, the Constable was entitled to official or qualified immunity. In the absence of the Constable's liability, Johnson County was not liable under the Tort Claims Act. *Carpenter v. Barner*, 797 S.W.2d 99 (Tex. App.—Waco 1990, writ denied), *overruled on other grounds by Travis v. City of Mesquite*, 830 S.W.2d 94 (Tex. 1992). Consequently, if the judge or jury determines that the employee is not liable to the injured party, the governmental unit cannot be held liable.

The use of a motor-driven vehicle that may present the most issues for political subdivision liability is the use of police vehicles to chase suspects. A number of cases have resulted from police chases that ended in a collision between the fleeing suspect and a third party. Previously, appellate courts held that there was no liability for injuries to third parties in such collisions because the actions of the police vehicle were not a proximate cause of the accident. *See Dent v. City of Dallas*, 729 S.W.2d 114 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). In *Travis v. City of Mesquite*, 830 S.W.2d 94 (Tex. 1992), the Texas Supreme Court held that the decision to initiate or continue a police pursuit may be negligent when the heightened risk of injury to third parties is unreasonable in relation to the interest of apprehending suspects. "Police officers must balance the risk to the public with their duty to enforce the law to choose an appropriate course of conduct. Public safety should not be thrown to the winds in the heat of the chase." *Id.* at 98. The Texas Supreme Court made the issue about whether an officer properly engaged in a pursuit of a fleeing suspect a fact question for a jury to determine.

E. Joint Enterprise

The Texas Supreme Court has held that a governmental entity can waive sovereign immunity under the theory of joint enterprise. *Texas Dept. of Transp. v. Able*, 35 S.W.3d 608

(Tex. 2000); *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513 (Tex. 2002). In *Able*, the Texas Department of Transportation (“TxDOT”) engaged in a joint enterprise with the Houston Metropolitan Transit Authority (“Metro”) to build and maintain a High Occupancy Vehicle (“HOV”) lane. An accident occurred which implicated the safety of the HOV lane. The Texas Supreme Court held that TxDOT waived immunity under §101.021 of the Tort Claims Act because Metro, as its agent, would have been liable as a private person for its negligence in the construction and maintenance of the HOV lane. To be engaged in a joint enterprise, the governmental entity must meet these four requirements: (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right to control. In *Able*, the Court held that if a governmental entity that would otherwise be immune engaged in a joint enterprise whereby the other party was an agent for the governmental entity, the governmental entity would be liable for the agent’s negligence as if it were a private person. *Id.* at 613. Therefore, the governmental entity has waived its immunity and is liable if a plaintiff pleads a cause of action under the Tort Claims Act. *Id.*

IV. EXEMPTIONS AND EXCEPTIONS FROM THE WAIVER OF IMMUNITY

A. Exceptions to Waiver of Immunity

Although the Tort Claims Act waives sovereign immunity in certain circumstances, the Act also specifically sets out areas where sovereign immunity is NOT waived. The Act does not apply to:

- (1) Claims against a school district or a junior college district, except as to the operation of motor vehicles. Tex. Civ. Prac. & Rem. Code Ann. § 101.051 (Vernon 2005 & Supp. 2006).
- (2) Any act or omission of the legislature or a member of the legislature acting in his official capacity or to the legislative functions of a governmental unit. §101.052.
- (3) Any act or omission of a court or any member of the court acting his official capacity or to a judicial function of a governmental unit. §101.053(a).
- (4) Any act or omission of an employee in the execution of a lawful order of any court. §101.053(b).
- (5) Activities of the state military forces when on active duty under the lawful orders of competent authority. §101.054.
- (6) In connection with the assessment or collection of taxes by a governmental unit. §101.055(1).
- (7) The action of an employee while responding to an emergency call or reacting to an emergency situation if the action is in compliance with the laws and ordinances applicable to emergency action, or in the absence of such a law or ordinance, if the action is not taken with conscious indifference or reckless disregard for the safety of others. §101.055(2).
- (8) The failure to provide or the method of providing police or fire protection. §101.055(3).
- (9) The failure of a governmental unit to perform an act that the unit is not required by law to perform. §101.056(1).
- (10) A governmental unit's decision not to perform an act or on its failure to make a decision on the performance or nonperformance of an act, if the law leaves the performance or nonperformance of the act to the discretion of the governmental unit. §101.056 (2).
- (11) An injury or death connected with any at or omission arising out of civil disobedience, riot, insurrection, or rebellion. §101.057(1).
- (12) Assault, battery, false imprisonment, or any other intentional tort, including a tort involving disciplinary action by school authorities. §101.057(2).
- (13) The theory of attractive nuisance. §101.059.
- (14) The failure of a governmental unit initially to place a traffic or road sign, signal, or warning device, if the failure is a result of discretionary action of the governmental unit. §101.060(1).
- (15) The absence, condition, or malfunction of a traffic or road sign, signal, or warning device, unless the absence, condition, or malfunction is not corrected by the

responsible governmental unit within a reasonable time after notice. §101.060(2).

- (16) The removal or destruction of a traffic or road sign, signal, or warning device by a third person, unless the governmental unit fails to correct the removal or destruction within a reasonable time after actual notice. §101.060(3).
- (17) An act or omission that occurred before January 1, 1970. §101.061.

B. Specific Exceptions and Exemptions

1. Discretionary Acts Tex. Civ. Prac. & Rem. Code §101.056

The courts have stated that the discretionary decisions, or policy decisions, of a governmental entity are not to be second-guessed by the courts. The discretionary function exception is limited to the exercise of governmental discretion and does not apply to the exercise of non-governmental discretion such as professional or occupational discretion. *Christilles v. Southwest Texas State Univ.*, 639 S.W.2d 38, 42 (Tex. App.—Austin 1982, writ ref'd n.r.e.), *overruled on other grounds by Texas A&M Univ. v. Bishop*, 156 S.W.3d 580 (Tex. 2005). A court reviewing a claim of immunity for discretionary acts should determine whether imposing liability will cause the court to substitute its judgment for that of the government. *Eakle*, 815 S.W.2d at 874. Some decisions have characterized the analysis as an issue of separation of powers, with the judiciary not second-guessing an executive or legislative decision. The question of whether a city's actions fall within its discretionary power is probably a question of law for the courts.

Once a city makes a discretionary decision, negligence in the implementation of the decision can give rise to liability. In other words, the decision on whether to repair a bridge may be discretionary, i.e. a budgetary issue for the governmental unit; however, once the city makes the decision to repair the bridge, it must not be negligent in how it does the repairs.

2. Method for Providing Police/Fire Protection Tex. Civ. Prac. & Rem. Code §101.055(3)

The courts have construed this exception to liability as not applying broadly to any act or omission that occurs while an officer is providing police protection. The Texas Supreme Court held that the “method” of providing police or fire protection refers to the governmental decisions as to how to provide police or fire protection. *State of Texas v. Terrell*, 588 S.W.2d 784 (Tex. 1979); *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653 (Tex. 2007). While the Court held that a governmental unit may be immune from liability for policy formulation, it may be liable for policy implementation. As so construed, this exception is very similar to the §101.056 exception.

3. Intentional Tort Tex. Civ. Prac. & Rem. Code §101.057

The Texas Supreme Court construed the phrase “arising from” in §101.057 to mean that the intentional tort must have been committed by the governmental employee or agent before the governmental unit may claim this exception from liability. *Delaney v. Univ. of Houston*, 835 S.W.2d 56 (Tex. 1992).

4. Traffic Signs, Signals, and Warning Devices Tex. Civ. Prac. & Rem. Code §101.060

When making a discretionary decision to erect a traffic sign, signal, or warning device, the governmental unit has immunity. Decisions involving design and placement usually involve the exercise of discretion. With regard to the actual erection of the sign or signal, which must generally comply with the Manual of Uniform Traffic Control Devices, there may be liability. *City of Fort Worth*, 51 S.W.3d 436 (Tex. App.—Fort Worth 2001, no pet.), *overruled on other grounds by City of Grapevine v. Sipes*, 195 S.W.3d 689 (Tex. 2006); *Villarreal v. State*, 819 S.W.2d 419 (Tex. App.—Dallas 1991, writ denied).

With regard to the removal or destruction of a traffic sign, signal, or warning device by a third person, the governmental unit is liable only if it fails to correct the situation within a reasonable time after actual notice. At least one appellate court defined “actual notice” as “information...actually communicated to or obtained by a city employee responsible for acting on the information.” *City of Dallas v. Donovan*, 768 S.W.2d 905 (Tex. App.—Dallas 1989, no writ). In *Donovan*, it was shown that police officers and sanitation workers had passed through an intersection where the plaintiff sustained injuries when other witnesses testified that the stop sign was down. As persons responsible for acting on the information that the stop sign was missing were in a position to obtain that information, the Court concluded that there was sufficient evidence to hold that the city had actual notice.

The Texas Supreme Court held that the State’s failure to stop the repeated removal of traffic signs by vandals did not waive the State’s immunity. The Court stated that the Tort Claims Act created a duty for the State to correct a traffic sign’s removal or destruction by a third person upon receiving actual notice; however, the Department of Transportation’s alleged failure to make certain discretionary decisions affecting a stop sign’s susceptibility to repeated vandalism was not a failure to correct the sign’s “condition.” *State ex rel. State Dept. of Highways and Public Transp. v. Gonzalez*, 82 S.W.3d 322 (Tex. 2002).

Finally, a governmental unit will be given a reasonable time to replace a missing sign or repair a malfunctioning one only if the malfunction or absence was the result of a component failure, act of God, or act of a third party. *Texas Dept. of Transp. v. Ramming*, 861 S.W.2d 460, 465 (Tex. App.—Houston [14th Dist.] 1993, writ denied). The Court in *Ramming* held that a

governmental unit could be held strictly liable for injuries and deaths if the absence or malfunction of the traffic control device was caused by one of its employees. *Id.*

C. Plea to the Jurisdiction

A plaintiff must plead an exception to sovereign immunity to be successful in a suit against a governmental entity under the Tort Claims Act. If a plaintiff does not plead a cause of action within the express terms of the Tort Claims Act or another statutory waiver of immunity, the trial court lacks subject matter jurisdiction. *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Governmental entities can use this to their advantage when sued by filing a plea to the jurisdiction, challenging the trial court's subject matter jurisdiction. A plea to the jurisdiction challenges a trial court's jurisdiction by attacking the sufficiency of the plaintiff's pleadings. A plaintiff must plead a cause of action within the Act's express terms of the Tort Claims Act or other statutory waiver of immunity. *City of El Paso v. W.E.B. Investments*, 950 S.W.2d 166, 169 (Tex. App.—El Paso 1997, pet. denied). When a plaintiff's petition lacks the proper language to show that the governmental entity has waived immunity, a plea to the jurisdiction is proper. *Texas Dept. of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Specifically, if a plaintiff fails to plead a cause of action that falls under §101.021 of the Tort Claims Act, and the pleadings affirmatively negate the existence of jurisdiction, the defendant's plea to the jurisdiction should be granted without the opportunity for the plaintiff to amend. *Texas Dept. of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004). If the failure to plead a cause of action that waives sovereign immunity under the Tort Claims Act can be cured, the plaintiff must be given the opportunity to amend. *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). Used effectively, a plea to the jurisdiction will prompt the trial court to dismiss

with prejudice a claim based on sovereign immunity. *Sykes*, 136 S.W.3d at 639; *Speer v. Stover*, 685 S.W.2d 22, 23 (Tex. 1985).

The trial court's denial of a plea to the Jurisdiction is immediately appealable under Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). Further, if the plea to the jurisdiction is filed and requested for submission or hearing not later than the later of the 180th day after the date a defendants filed an original answer or other first responsive pleading raising immunity, as required by Tex. Civ. Prac. & Rem. Code § 51.014(c), then the perfection of an interlocutory appeal from a trial court order denying the plea to the jurisdiction stays all proceedings in the trial court, including trial on the merits and discovery, pending resolution of the appeal. Tex. Civ. Prac. & Rem. Code § 51.014(b). *In re Hudak*, 267 S.W 3d 569 (Tex. App. 2008).

V. INDIVIDUAL IMMUNITY FROM LIABILITY

In general, an employee can be held liable for their own wrongful acts or omissions. In claims involving negligence, the employer may also be liable of the acts of its employees under the doctrine of *respondeat superior* (the master is responsible for the servant). *Respondeat superior* is a sword to be used by the plaintiff to recover from the employer, not a shield from personal liability for the employee. A governmental employee has special defenses to civil liability. One is known as official immunity. The other is Sec. 101.106 of the Texas Tort Claims Act. Official immunity for an employee sued personally is a distinct from that of the defense of sovereign available to the governmental entity. §101.026 of the Tort Claims Act provides that to the passage of the Tort Claims Act does not abrogate the individual's common law defense of official immunity.

Texas has adopted a three-part test to guide courts in the application of qualified or official immunity. The elements that must be shown in asserting the defense are:

- (1) the governmental actor was performing a discretionary act;
- (2) the act was performed in good faith; and
- (3) it was within the scope of his official authority.

City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex. 1994). This defense of official immunity protects government officers and employee from personal liability because of their good faith performance of discretionary duties while in the scope of their authority. *Kassen*, 887 S.W.2d at 8. Each of these elements is subject to attack by a plaintiff. To qualify for official immunity, a defendant must show that the act complained of was discretionary. A discretionary act is one that “involves personal deliberation, decision and judgment....” *Chambers*, 883 S.W.2d at 654.

However, “...government-employed medical personnel are not immune from tort liability if the character of the discretion they exercise is medical and not governmental.” *Kassen*, 887 S.W.2d at 11. To help decide whether an act entails governmental or medical discretion, the Texas Supreme Court has held that one must focus on the facts of the particular case and the policies promoted by official immunity. *Id.* at 12. If a doctor or nurse was influenced by governmental concerns or factors, policy considerations may warrant official immunity. *Id.* But, if no governmental factors affected the doctor’s or nurse’s discretion, official immunity may be improper.

An act is not discretionary, but is rather ministerial, if it is so precisely defined by law that there is no element of judgment or discretion left to the employee. *Id.* Official immunity does not extend to ministerial acts. For ministerial acts, the governmental employee is liable for

his tortious conduct to the same extent as a person who holds no governmental position. Ministerial actions are those that require obedience to orders, or the performance of a duty to which the actor is left no choice. A clerk's duties are usually held to ministerial; therefore, the clerk is liable for his tortuous conduct. Finally, the official must have acted in "good faith". The good faith test is objective. The official meets the "good faith" requirement if a reasonable and prudent official, under the same circumstances, could have believed that his or her conduct was justified based on the information they possessed when the conduct occurred. *Chambers at 556*. As with governmental immunity, the burden is upon the official to plead and prove this defense. This plea of immunity for the individual should be clearly and separately made from any plea of immunity by the governmental unit, if it is a party in the same lawsuit.

Section 101.106 of the Act provides additional protection for governmental employees. This section provides that the filing of suit under the Tort Claims Act (Chapter 101) against a governmental unit constitutes an irrevocable election by the plaintiff and forever bars any suit or recovery by the plaintiff against any employee of the governmental unit regarding the same subject matter. The filing of a suit under the Act against an employee of a governmental unit constitutes an irrevocable election by the plaintiff and bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents. Furthermore, the settlement of a claim under Chapter 101 bars a claim involving the same subject matter by the claimant against any employee of the governmental unit. A judgment against an employee of a governmental unit bars the party obtaining the judgment from any suit against or recovery from the governmental unit. If a claimant sues both the governmental unit and its employee, §101.106(e) provides that the employee shall immediately be dismissed on filing a motion by the governmental unit. If suit is filed against the employee and it could

have been brought under Chapter 101 against the governmental unit, the suit is considered against the employee only in his official capacity. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as the defendant within thirty days after the motion is filed. *See Villasan v. O'Rourke*, 166 S.W.3d 752 (Tex. App.—Beaumont 2005, pet. filed). In this case, the O'Rourkes initially sued both Dr. Villasan and the University of Texas Medical Branch, Galveston ("UTMBG"). UTMBG filed a motion under §101.106 dismissing its employee, Dr. Villasan. The O'Rourkes then amended their petition, omitting UTMBG and leaving Dr. Villasan as the sole defendant. The Court held that the O'Rourkes' claim against Dr. Villasan was dismissed. Under §101.106, the statutory right to a dismissal of an employee is perfected upon the filing of a motion to dismiss, and the employee may subsequently rely on the duty created by the motion to require the trial judge to dismiss the claims against him. Subsequent amended pleadings by the plaintiffs do not moot the right to a dismissal created by filing the motion. A procedural rule of court allowing the amendment of pleadings does not trump a legislative enactment mandating dismissal of the governmental employee.

However, in *Williams v. Nealon*, 199 S.W.3d 462, 467 (Tex. App.—Houston [1st Dist.] 2006, pet. filed), the court held that if the governmental unit's employees could not show that the claims against them could have been brought against the governmental unit under the Tort Claims Act, the employees' case could not be dismissed. In *Nealon*, the plaintiff sued two University of Texas Medical Branch at Galveston ("UTMBG") doctors for medical negligence. *Id.* at 464. The doctors tried to use §101.106(f) in filing a motion to dismiss, arguing that the plaintiff could have sued UTMBG. *Id.* For a dismissal under §101.106(f), the doctors must show that the suit: (1) was based on conduct within the general scope of the doctors'

employment with UTMBG and (2) could have been brought against UTMBG under the Tort Claims Act. *Id.* at 466. The doctors met the first requirement; however, they failed at the second requirement because a suit for medical negligence involved a discretionary decision and did not involve the negligent use of tangible property. The alleged act of negligence did not fall under one of the areas where a governmental unit waives immunity under the Tort Claims Act, (i.e. condition or use of property). *Id.* The Tort Claims Act waives sovereign immunity for a governmental unit if: (1) the injury is caused by an employee's use of a motor-driven vehicle or motor-driven equipment or (2) the injury is caused by a condition or use of tangible personal or real property. §101.021. Therefore, the Court held that the plaintiff's claims against the doctors should not have been dismissed. *Id.* at 467. **The cases discussed in this paragraph appear to have been overruled by a recent Texas Supreme Court decision, which ruled that an employee sued individually may file a motion to be dismissed when damages are sought against them based on any common law cause of action. They merely need to show that they are sued for acts performed within the course and scope of their employment. They may do so regardless of whether or not the governmental entity will ultimately be immune based on its defense of sovereign immunity. *Franka v. Velasquez*, 332 S.W.3d 367 (Tex. 2011).**

Section 101.106 does not bar an action against an employee of an independent contractor of a governmental unit. *Castro v. Cammerino*, 186 S.W.3d 671, 678 (Tex. App.—Dallas 2006, no pet.). Even though the Texas Transportation Code treats an independent contractor of a governmental unit and the governmental unit the same regarding liability and damage caps under the Tort Claims Act, it does not extend this treatment to the independent contractor's employees. *Id.* Tex. Transp. Code Ann. § 452.056(d) (Vernon 1999 & Supp. 2006). In

Cammerino, the Court held that a driver for Dallas Area Rapid Transit (“DART”), who was actually an employee of First Transit, Inc., an independent contractor of DART, was not entitled to have the action against him barred by §101.106 of the Tort Claims Act. *Id.* at 680.

Prior to §101.106 being amended in 2003, a judgment or settlement barred recovery against the employee. Summary judgment for a governmental unit was held to be a judgment and barred a subsequent action against the governmental unit’s employee. *Owens v. Medrano*, 915 S.W.2d 214 (Tex. App.—Corpus Christi 1996, writ denied). This same reasoning should also apply to the amended §101.106 and a summary judgment in favor of an employee should bar the party seeking damages from any suit against or recovery from the governmental unit. Again, this section may have become irrelevant under the *Fraga* decision.

VI. DAMAGES

A. Statutory Limits

Section 101.023 of the Tort Claims Act sets maximum damage limits on liability for actions brought under the Act, i.e. for actions against a governmental entity involving governmental functions to the extent that sovereign immunity has been waived. These liability caps apply to the total for monetary damages and prejudgment interest. The limits are:

1. For **state government**, liability is limited to money damages in a maximum amount of \$250,000 for each person, \$500,000 for each single occurrence for bodily injury or death, and \$100,000 for each single occurrence for injury to or destruction of property.
2. For a **unit of local government, except municipalities**, liability is limited to money damages in the maximum amount of \$100,000 for each person, \$300,000 for each single occurrence for bodily injury or death, and \$100,000 for each single occurrence for injury to or destruction of property.
3. For **municipalities**, liability is limited to money damages in a maximum amount of \$250,000 for each person, \$500,000 for each single occurrence for bodily

injury or death, and \$100,000 for each single occurrence for injury to or destruction of property.

In §101.024, the Act specifically provides that no exemplary or punitive damages are recoverable against the State of Texas or any of its political subdivisions, including local governments and municipalities.

The Tort Claims Act also contains provisions concerning settlement (§101.105), the payment and collection of a judgment (§101.107), the levy of an ad valorem tax for the payment of a judgment (§101.108), and the payment of claims against certain universities (§101.109).

Finally, Chapter 108 of the Tex. Civ. Practices and Remedies Code caps the personal liability for a public servant at \$100,000 for damages arising from personal injury, death, or deprivation of a right, privilege, or immunity if the damages are the result of an act or omission by the public servant in the course and scope of the public servant's office, employment, or contractual performance for or service on behalf of a governmental unit. The amount not in excess of \$100,000 is covered by the local governmental unit's authorization to indemnify under Chapter 102, by liability or errors or omissions insurance or coverage under an Interlocal Agreement. Property damages are similarly capped at \$100,000 for public servants. As long as the public servant is within the course and scope of the public servant's duties, damages are limited to \$100,000. This limit applies regardless of whether the duty is discretionary or ministerial.

B. Damages

Actual, or compensatory, damages for injuries or damages suffered by a living person may include:

- (1) Past reasonable and necessary medical expenses;
- (2) Future probably reasonable and necessary medical expenses;
- (3) Past lost earnings;
- (4) Future probable lost earnings;
- (5) Past physical pain and suffering and mental anguish;
- (6) Future probable physical pain and suffering and mental anguish;
- (7) Past property damages and losses;
- (8) Pre-judgment interest;
- (9) Post-judgment interest; and
- (10) Court costs.

A parent, spouse, child, brother, or sister can recover damages for his or her mental anguish over the physical injury of a counterpart relative, if he or she has a contemporaneous sensory perception of the injury to the other and is thereby caused mental anguish. A spouse can recover for loss of consortium to a negligently or intentionally injured spouse. In wrongful death cases, the estate of the deceased can recover the above-specified damages suffered by the victim before death. Under Chapter 71 of the Tex. Civ. Practices and Remedies Code, if an injured individual would have been entitled to bring an action for an injury if he had lived, the persons listed in such statute may bring an action to recover damages. Persons entitled to bring an action under the wrongful death statute are the surviving spouse, children, and parents of a deceased person. If none of those persons brings an action within three calendar months of the decedent's death, the executor or administrator of the decedent's estate may bring the action unless requested not to do so by all of the persons entitled to bring the action. The statutory survivors can recover not only for provable economic loss, but also for their own grief, shock, worry, other mental anguish, and loss of love, guidance, and support caused by the death.

VII. MISCELLANEOUS MATTERS

A. Notice of Claim

Section 101.101 of the Tort Claims Act provides that a governmental unit is entitled to receive notice of a claim against it not later than six months after the day that the incident giving rise to the claim occurred. The notice of claim requirement applies only to claims under the Texas Tort Claims Act. The requirement has no application to claims brought under the Federal Civil Rights Act. The notice must reasonably describe the damage or injury claimed, the time and place of the incident, and the incident itself.

In *Univ. of Texas Southwestern Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351 (Tex. 2004), the Texas Supreme Court held that though this notice requirement is mandatory, and failure to give such notice will bar any action under the Act, it does not deprive the court of subject matter jurisdiction. The governmental unit must raise failure to give such notice as a defense. However, the 79th Legislature added a provision to §311.034 of the Texas Government Code to provide that “statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.” This amendment reverses the effect of the *Loutzenhiser* case and allows the notice requirement to be raised by a plea to the jurisdiction.

Section 101.101 also ratified and approved city charter provisions or ordinances requiring that notice be given to a city. However, notice of claim provisions requiring that notice be given within sixty or ninety days have been declared a violation of the “open courts” provision of Article I, §13 of the Texas Constitution. See *Fitts v. City of Beaumont*, 688 S.W.2d 182, 184-85 (Tex. App.—Beaumont 1985, writ ref’d n.r.e.) for a discussion of 60-day notice; See *Schauteet v.*

City of San Antonio, 702 S.W.2d 680, 682-83 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) for a discussion of 90-day notice. Given the language of these decisions, it is probable that any notice of claim provision that is less than six months (the time §101.101 specifically sets forth) may be similarly invalidated by a reviewing court.

Regardless of the notice of claim requirements, §101.101 states that if the governmental unit has actual notice of the incident in question, a notice of claim is not required. Actual notice must consist of substantially the same information as set forth in §101.101. Actual notice to a governmental unit requires knowledge of: (1) death, injury, or property damage; (2) the governmental unit's alleged fault producing or contributing to the death, injury, or property damage; and (3) the identity of the parties involved. *Texas Dept. of Criminal Justice v. Simons*, 140 S.W.3d 338 (Tex. 2004); *Cathey v. Booth*, 900 S.W.2d 339 (Tex. 1995). What is intended by the second requirement is that the governmental unit must have knowledge that amounts to the same notice to which it is entitled under the Tort Claims Act. That includes subjective awareness of its fault, as ultimately alleged by the claimant, and producing or contributing to a claimed injury. *See Simons*, 140 S.W.3d 338. It is not enough that a governmental unit should have investigated an incident as a prudent person would have, or that it did investigate, perhaps as part of routine safety procedures, or that it should have known from the investigation it conducted that it might have been at fault. If a governmental unit is not subjectively aware of its fault, it does not have the same incentive to gather information that the statute is designed to provide, even when it would not be unreasonable to believe that the governmental unit was at fault.

Further, the six month notice period is not tolled because a person is a minor. Minors are required to give the same six month notice as adults. *Martinez v. Val Verde County Hosp. Dist.*,

140 S.W.3d 370 (Tex. 2004). In an appellate court decision prior to *Martinez*, the Court held that the discovery rule does not apply to the notice provisions of the Tort Claims Act. *Univ. of Tex. Med. Branch at Galveston v. Greenhouse*, 889 S.W.2d 427 (Tex. App.—Houston [1st Dist.] 1994, writ denied). It does not matter that the party is incapable of knowing or discovering the injury, the Tort Claims Act does not provide for such a tolling of the notice provision. Moreover, the refusal to apply the discovery rule does not violate the “open courts” provision in the Texas Constitution. The Court in *Greenhouse* stated that the “open courts” provision applies only to common law actions, whereas a suit under the Tort Claims Act is statutory in nature. Furthermore, the court in *Dinh v. Harris County Hosp. Dist.*, 896 S.W.2d 248 (Tex. App.—Houston [1st Dist.] 1995, writ dismissed w.o.j.), states that the application of the notice of a claim requirement to a person who is mentally incapacitated does not violate the “open courts” provision of the Texas Constitution.

B. Payment of Award against Employee

Chapter 102 of the Tex. Civ. Practices and Remedies Code provides that a local government, defined as a county, city, town, special purpose district, or any other political subdivision of the state, may pay actual damages awarded against an employee of the local government, if the damages result from the act or omission of the employee in the course and scope of his employment for the local government, and arise from a cause of action for negligence. The local government may also pay court costs and attorney’s fees awarded against that employee. However, the local government may not pay damages awarded against an employee that arise from a cause of action for official misconduct or that arise from a cause of action involving a willful act or omission constituting gross negligence. A local government also may not pay damages awarded against an employee to the extent that the

damages are recoverable against an insurance contract or a self-insurance plan authorized by statute. Payments under Chapter 102 may not exceed \$100,000 to any one person or \$300,000 for any single occurrence in the case of personal injury or death, or \$100,000 for a single occurrence of property damage.

C. Insurance

Section 101.027 of the Tort Claims Act provides that each governmental unit may purchase insurance policies protecting the unit and its employees against claims and may relinquish to the insurer to the right to investigate, defend, compromise, and settle any claim. The governmental unit may not require an employee to purchase liability insurance as a condition of employment if the governmental unit is insured by a liability insurance policy.

Section 101.104 of the Tort Claims Act states neither the existence, nor the amount of insurance held by a governmental unit is admissible in the trial of a lawsuit against the governmental unit. Furthermore, the existence and amount of insurance held by the governmental unit is not subject to discovery in a lawsuit against the unit. The Texas Supreme Court held that the statute prohibits discovery of insurance covering claims against a governmental unit and against its employees for which it can be directly or vicariously liable under the Tort Claims Act. *In re Sabine Valley Ctr.*, 986 S.W.2d 612 (Tex. 1999).

D. Representation

Section 101.103 of the Tort Claims Act provides that the Attorney General shall defend each action brought against a governmental unit that has authority and jurisdiction coextensive with the geographical limits of the state, and that he may be fully assisted by counsel provided by an insurance carrier. A governmental unit having an area of jurisdiction smaller than the entire state shall employ its own counsel according to the organic act under which the unit

operates, unless the governmental unit has relinquished to an insurance carrier the right to defend it against the claim.

Chapter 102 provides that a local government may provide legal counsel to represent an individual for whom the local government may pay damages under circumstances authorize by Chapter 102. The counsel provided may be the governmental unit's regularly employed counsel, provided there is no potential conflict of interest between the unit and that individual. If a potential conflict exists, the unit may employ other legal counsel to defend the lawsuit. The legal counsel employed may settle the portion of a suit that may result in the payment of damages by the local government under Chapter 102.

Similar to Chapter 102 is §180.002 of the Texas Local Government Code. Section 180.002 provides that a municipality or special purpose district shall provide an employee who is a peace officer, fire fighter, or emergency medical services personnel with legal counsel, without cost to the employee, to defend the employee against a suit for damages by a party other than a governmental entity if: (1) the employee requests such legal counsel and (2) the suit involves an official act of the employee within the scope of the employee's authority. The term "peace officer" has been given the meaning specified under Article 2.12 of the Texas Code of Criminal Procedure. The requirement to provide legal counsel applies to actions under the Federal Civil Rights Act as well as actions under state law. The municipality or special purpose district may provide counsel already employed by it or may employ and pay private counsel to defend the employee against the claim. If the employee is not provided with an attorney, the employee may sue to recover reasonable attorney's fees incurred to defend the suit if the trier of fact finds that: (1) the fees were incurred in defending a suit for which the employee was

entitled to representation and (2) the employee is without fault or that the employee acted with a reasonable good faith belief that his actions were proper.

Frequently, one attorney will be employed to represent both the governmental entity and the officer against whom a lawsuit is filed. While in many cases this representation presents no problem, because defenses available to the entity and the officer are not conflicting, the defenses can be significantly different, and an attorney representing both parties can find himself with an ethical conflict. A conflict exists if the representation of one party requires that he compromise the interests of the other party. If such a conflict arises, the attorney has an ethical obligation to advise his clients of the problem. It will then be necessary for separate counsel to be obtained for one or both of the parties. Depending on what stage of the lawsuit the conflict arises, the original attorney, if he has confidential knowledge of conflicting parties' positions, may have to withdraw from the case altogether, and the parties would need to acquire new attorneys.