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Plea to the Jurisdiction: Defining the Undefined.

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PLEA TO THE JURISDICTION: DEFINING THE UNDEFINED

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I. INTRODUCTION

Pleas to the jurisdiction have been part of Texas jurisprudence since shortly after Texas became a state.¹ After a long period of dormancy, the seldom-used plea to the jurisdiction has become the primary means of challenging a waiver of sovereign immunity. The resulting confusion over the procedure and standards to be employed in resolving a plea was partially alleviated by the Texas

* Justice, Texas Fourth Judicial District Court of Appeals; J.D., Baylor University. The opinions expressed in this article are solely those of the authors and are not necessarily in accordance with the views of the Fourth Court of Appeals. The authors express their appreciation to briefing attorney Matt Compton for his dedication and attention to detail, without which this article would never have been completed. We also thank the editors at the *Journal*, John Muller, Allen Keller, and the entire *St. Mary's Law Journal* staff for their assistance in preparing this article for publication.

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1. See Act approved May 13, 1846, 1st Leg., § 31, 1846 Tex. Gen. Laws 371, 371, reprinted in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1839-1846, at 1677, 1677 (Austin, Gammel Book Co. 1898) (“[N]o plea in abatement, except a plea to the jurisdiction of the court . . . shall be received . . . unless the party pleading the same . . . shall make affidavit to the truth thereof.”).

Supreme Court's decision in *Texas Department of Parks & Wildlife v. Miranda*.² However, as reflected in the number of recent supreme court and courts of appeals opinions addressing the plea to the jurisdiction, the courts continue to struggle with the plea.³ There are currently no established procedural rules to assist the practitioner or the trial court with resolution of a plea to the jurisdiction. Thus, procedures vary from court to court and case to case. Like a summary judgment, a plea to the jurisdiction may be dispositive,⁴ yet unlike summary judgment, there are no set procedures that ensure the requirements of due process are met.⁵ This result is particularly worrisome.

Currently, Texas Rule of Civil Procedure 85 is the only rule that addresses a plea to the jurisdiction. Rule 85 identifies a plea to the jurisdiction as one of several dilatory pleas that may be contained in the original answer.⁶ In 1941, when Rule 85 was adopted, a plea perhaps warranted only a brief reference. But in 1997, the relative

2. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004).

3. Since *Miranda* was decided in 2004, ten Texas Supreme Court cases have addressed pleas to the jurisdiction. *See generally* *FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619 (Tex. 2008) (reviewing a plea to the jurisdiction in a condemnation action); *City of Corsicana v. Stewart*, 249 S.W.3d 412 (Tex. 2008) (*per curiam*) (reviewing a plea to the jurisdiction in a premises liability action); *Houston Mun. Employees Pension Sys. v. Ferrell*, 248 S.W.3d 151 (Tex. 2007) (reviewing a plea to the jurisdiction made by city employees seeking injunctive relief); *In re Sw. Bell Tel. Co.*, 235 S.W.3d 619 (Tex. 2007) (reviewing a class action against the telephone company); *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835 (Tex. 2007) (reviewing a plea to the jurisdiction in an action to enforce a settlement agreement); *Christus Health Gulf Coast v. Aetna, Inc.*, 237 S.W.3d 338 (Tex. 2007) (reviewing a plea to the jurisdiction in a breach of contract action against Medicare); *State v. Holland*, 221 S.W.3d 639 (Tex. 2007) (reviewing a plea to the jurisdiction in a takings action); *Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338 (Tex. 2004) (reviewing a plea to the jurisdiction in a tort action against the Department of Criminal Justice), *superseded by statute*, TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2008); *Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351 (Tex. 2004) (reviewing a plea to the jurisdiction in a medical malpractice action), *superseded by statute*, Act of June 18, 2005, 79th Leg., R.S., ch. 1150, § 1, sec. 311.034, 2005 Tex. Gen. Laws 3783, 3783 (current version at TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2008)), *as recognized in* *Igal v. Brightstar Info. Tech. Group, Inc.*, 250 S.W.3d 78 (Tex. 2008); *Harris County v. Sykes*, 136 S.W.3d 635 (Tex. 2004) (reviewing a plea to the jurisdiction in a negligence action against a county jail).

4. *Sykes*, 136 S.W.3d at 638.

5. *Cf. Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996, writ denied) (noting that summary judgment is a harsh remedy requiring strict construction and is not intended to permit a trial by deposition or affidavit).

6. TEX. R. CIV. P. 85 (“The original answer may consist of motions to transfer venue, pleas to the jurisdiction, in abatement, or any other dilatory pleas; of special exceptions, of general denial, and any defense by way of avoidance or estoppel . . .”).

obscurity of a plea to the jurisdiction was dramatically altered by the addition of section 51.014(a)(8) to the Texas Civil Practice and Remedies Code, which provides for interlocutory appeals from a grant or denial of a plea to the jurisdiction filed by a governmental unit.⁷ Although the supreme court has articulated a standard of review for resolving a plea to the jurisdiction, it has not provided sufficient guidance about the procedure to be employed in making that determination, other than to rely on the discretion of the trial judge.⁸

The purpose of this article is to review the current state of pleas to the jurisdiction and highlight the need for procedural rules to govern their resolution. Potential rules of procedure are suggested to provide order to the variety of practices currently employed by trial courts. This article concludes by recognizing the necessity for the Texas Supreme Court to adopt specific rules of procedure for pleas to the jurisdiction.

A review of the history of the plea prior to 1997 is required to understand the problems caused by the lack of any procedural rules governing pleas to the jurisdiction. Accordingly, Part II contains a brief overview of the history, scope, and dispositions of pleas to the jurisdiction prior to 1997. Legislation authorizing interlocutory appeals from pleas to the jurisdiction in sovereign immunity cases was enacted in 1997, and resulted in a dramatic increase in the assertion of the plea. With increased use, a corresponding need to address the standards for reviewing pleas to the jurisdiction developed. Part III, therefore, briefly addresses the cases immediately preceding the current announcement of the standard defined in *Texas Department of Parks & Wildlife v. Miranda*. An analysis of *Miranda* follows in Part IV. In Part V, implementation of the review defined in *Miranda* is discussed and current practices are identified. Part VI examines the need for procedural rules to govern pleas to the jurisdiction. Proposed

7. Act of June 20, 1997, 75th Leg., R.S., ch. 1296, § 1, sec. 51.014(a)(8), 1997 Tex. Gen. Laws 4936, 4937 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (Vernon 2008)) (providing for an interlocutory appeal from an order that “grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in [s]ection 101.001”).

8. See *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227–28 (Tex. 2004) (leaving to the trial court’s discretion the scheduling of hearings on a plea to the jurisdiction and whether a jurisdictional determination should be made at the hearing or after “a fuller development of the case”).

rules that could assist both trial courts and practitioners in resolving pleas to the jurisdiction are discussed in Part VII.

II. HISTORY

In its earliest form, a plea to the jurisdiction was flexible and served as the means to contest venue,⁹ personal jurisdiction,¹⁰ capacity,¹¹ standing,¹² and the extent of a court's jurisdiction to assert challenges based on the amount in controversy.¹³ Disputes concerning a court's dominant jurisdiction were also initially resolved through pleas to the jurisdiction.¹⁴ Other matters touching on subject matter jurisdiction were likewise resolved through pleas to the jurisdiction, including failure to exhaust administrative remedies¹⁵ and sovereign immunity.¹⁶

While a plea to the jurisdiction could encompass a number of different complaints to the plaintiff's suit, it was more specific than the general demurrer. The general demurrer was a general complaint that a pleading failed to state a claim.¹⁷ An understanding of the application and demise of a general demurrer is instructive as we examine pleas to the jurisdiction. "A general demurrer confesses all the facts alleged in the petition . . . and then claims that the party is not entitled to recover."¹⁸ If a demurrer

9. *Tucker v. Anderson*, 27 Tex. 276, 277 (1863).

10. *Rice v. Peteeet*, 66 Tex. 568, 568, 1 S.W. 657, 657 (1886).

11. *See Brown v. Gay*, 76 Tex. 444, 447, 13 S.W. 472, 472-73 (1890) (deciding a suit by a wife and child against the railroad receiver to recover for their husband's and father's death).

12. *Id.*

13. *Nahm v. J.R. Fleming & Co.*, 116 S.W.2d 1174, 1176 (Tex. Civ. App.—Eastland 1938, no writ).

14. *See, e.g., Cleveland v. Ward*, 116 Tex. 1, 16, 285 S.W. 1063, 1069 (1926) (resolving a plea to the jurisdiction), *overruled on other grounds by Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992); *Roberts v. Roberts*, 165 S.W.2d 122, 123 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.) (stating that the appellant filed a plea to the jurisdiction to challenge the court's jurisdiction). The current practice is to resolve dominant jurisdiction issues through a plea in abatement. *Mower v. Boyer*, 811 S.W.2d 560, 562 n.2 (Tex. 1991).

15. *City of Strawn v. Bd. of Water Eng'rs of Tex.*, 134 S.W.2d 397, 398-99 (Tex. Civ. App.—Austin 1939, writ ref'd).

16. *State v. Lain*, 162 Tex. 549, 550, 349 S.W.2d 579, 580 (Tex. 1961).

17. *See Kelly v. Wright*, 144 Tex. 114, 119, 188 S.W.2d 983, 985 (1945) (stating that a general demurrer is a suggestion to the court that the facts stated in the pleadings demurred to, if true, do not entitle the pleader to any relief from the court).

18. *Tucker v. Anderson*, 27 Tex. 276, 279 (1863).

The legal effect of a general demurrer is to admit the facts plead to be true, but to

was granted, the pleader had a right to amend, but if the pleader did not amend, the cause was dismissed.¹⁹ “Because the general demurrer contained no specificity requirement, the complaining party did not have to bring any particular error to the trial court’s attention.”²⁰ In response to a demurrer, the court was required to search through the pleading to discover any error.²¹ The ability to obtain dismissal of a claim without having to identify any specific complaint made pleas to the jurisdiction unpopular.²² Rule 90 of the Texas Rules of Civil Procedure abolished the general demurrer in 1941.²³ Shortly after the demurrer’s demise, some courts rejected any other pleading that resembled a general demurrer, including pleas to the jurisdiction.²⁴ Today, courts continue to struggle with an undefined plea to the jurisdiction practice that at times resembles the much criticized general demurrer.²⁵

deny that they constitute a cause of action or ground of defense; and the only question which will be considered under it is, whether any cause of action or ground of defense is disclosed in the pleading demurred to.

Williams v. Warnell, 28 Tex. 610, 610 (1866).

19. Rogers v. Port City Barber & Beauty Supply Co., 138 S.W.2d 219, 220 (Tex. Civ. App.—Galveston 1940, no writ).

20. Laura E. Spatz, Comment, *Rule 90 Special Exceptions*, 48 BAYLOR L. REV. 907, 909 (1996).

21. *Id.*; see, e.g., State v. Williams, 8 Tex. 255, 265 (1852) (affirming a general demurrer because the charge contained imprecise language and alleged insufficient facts). On appeal, the party urging the demurrer could assert any error, including one never specifically brought to the attention of the trial court. Pirtle v. Gregory, 629 S.W.2d 919, 919 (Tex. 1982) (noting that, until the Rules of Civil Procedure became effective, nineteenth-century Texas statutes allowed appellate courts to consider unassigned errors).

22. Laura E. Spatz, Comment, *Rule 90 Special Exceptions*, 48 BAYLOR L. REV. 907, 909 (1996).

23. Robert W. Stayton, *The Scope and Function of Pleading Under the New Federal and Texas Rules: A Comparison*, 20 TEX. L. REV. 16, 24–25 (1941) (discussing that the then newly adopted rules, effective September 1, 1941, eliminated the general demurrer, but retained the special demurrer—which is now referred to as the special exception).

24. Jud v. City of San Antonio, 143 Tex. 303, 306, 184 S.W.2d 821, 822–23 (1945) (comparing the plaintiff’s plea with a general demurrer); Yancey Rural High Sch. Dist. No. 16 v. Schweers, 266 S.W.2d 244, 246 (Tex. Civ. App.—San Antonio 1954, no writ).

25. See *Wilson County v. Thomas*, No. 04-06-00675-CV, 2007 WL 2253486, at *5 (Tex. App.—San Antonio Aug. 8, 2007, no pet.) (mem. op.) (noting that a plea to the jurisdiction “was unsupported by any affidavits or other evidence relevant to the . . . claim” and that the court had no “reporter’s record from the hearing on the plea to the jurisdiction”); *In re C.M.C.*, 192 S.W.3d 866, 869 n.3 (Tex. App.—Texarkana 2006, no pet.) (describing as a “rather generic term” Child Protective Services’ motion to dismiss). In *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299 (Tex. 2008), DaimlerChrysler’s motion for summary judgment asserted the plaintiffs failed to state a claim. *DaimlerChrysler*, 252 S.W.3d at 302. DaimlerChrysler raised lack of standing and thus lack of jurisdiction on

In some circumstances, current plea to the jurisdiction practice is analogous to demurrer practice. For instance, in response to a plaintiff's petition, a governmental unit may file a plea to the jurisdiction based on sovereign immunity seeking the dismissal of plaintiff's suit for failure to properly articulate a waiver of immunity, thereby failing to state a claim.²⁶ On appeal, the appellate court would be confronted with very little in the way of a record to review.²⁷ The problems inherent with this procedure led to the abolition of general demurrer practice, and adoption of specific rules of civil procedure.

Ultimately, several of the various jurisdictional complaints encompassed by pleas to the jurisdiction were either abolished or afforded their own procedures when the Rules of Civil Procedure were implemented. Thus, a plea to the jurisdiction based on venue was replaced by rules of civil procedure and statutes governing venue proceedings.²⁸ Procedures for special appearances are now detailed in Texas Rule of Civil Procedure 120a.²⁹ Additionally, a plea in abatement was determined to be the appropriate procedure for asserting a jurisdictional challenge based on the dominant jurisdiction between two courts.³⁰ The remaining jurisdictional claims asserted through a plea to the jurisdiction—exhaustion of administrative remedies, standing, sovereign immunity and other traditional jurisdictional issues—were more often resolved through summary judgment and special exceptions.

Current pleas to the jurisdiction most commonly arise from claims of sovereign or governmental immunity; therefore, it is worth recalling the history of sovereign immunity and its effect on pleas to the jurisdiction.

appeal. *Id.* at 303.

26. *See* *Washington v. Fort Bend Indep. Sch. Dist.*, 892 S.W.2d 156, 159 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (noting the plea to the jurisdiction was insufficient “to apprise Washington of a pleading deficiency”). This case also demonstrates the summary disposition of a claim when there was only one day between the filing of the alleged deficient pleading and the granting of the plea to the jurisdiction. *Id.*

27. *Christus Health Gulf Coast v. Aetna, Inc.*, 237 S.W.3d 338, 341–42 (Tex. 2007).

28. *See generally* TEX. R. CIV. P. (Vernon 1941) (citing the effective date of the Texas Rules of Civil Procedure as September 1, 1941). The Civil Practice and Remedies Code was created later. *See* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3246–51 (recodifying the former civil statutes and procedures as the Civil Practice and Remedies Code with chapter fifteen addressing venue in civil suits).

29. TEX. R. CIV. P. 120a.

30. *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974) (orig. proceeding).

A. *History of Sovereign Immunity*

The predominant reason for asserting a plea to the jurisdiction is to claim sovereign immunity.³¹ Historically, this was not always the case. The Texas Supreme Court adopted the doctrine of sovereign immunity in 1847, in *Hosner v. DeYoung*.³² The doctrine of sovereign immunity includes two principles: immunity from suit and immunity from liability.³³ It is immunity from suit that precludes a claim against the state.³⁴ Absent consent to sue, a trial court does not have subject matter jurisdiction over the action.³⁵ It was not until 1969 that the Texas legislature adopted the Texas Tort Claims Act, which provides a limited waiver of sovereign immunity for the acts of state officers and employees.³⁶ The scope of the waiver was limited to the negligence of a state employee arising from the “operation or use of a motor-driven vehicle [or] motor-driven equipment” and damages caused by a “condition or some use of tangible property, real or personal.”³⁷ Prior to the enactment of the Texas Tort Claims Act, very few pleas to the jurisdiction were based on sovereign immunity.³⁸ Following the enactment in 1997 of the right to interlocutory appeals, sovereign immunity-based jurisdictional challenges using

31. See generally Jeffrey S. Boyd, *An Ace in the Hole & a Jack of All Trades: Recent Developments Affecting Sovereign Immunity & Pleas to the Jurisdiction*, 6 TEX. TECH J. TEX. ADMIN. L. 59 (2005) (detailing sovereign immunity defenses and the use of pleas to the jurisdiction). After the 1997 legislative changes, “governmental units began filing pleas to the jurisdiction in every possible case, to take advantage of the opportunity to avoid, or at least delay, discovery and trial.” *Id.* at 92.

32. *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847) (“[N]o state can be sued in her own courts without her consent, and then only in the manner indicated by that consent.”).

33. *Tex. Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999).

34. *Id.*

35. *Id.*

36. See Texas Tort Claims Act, 61st Leg., R.S., ch. 292, §§ 2–3, 18(a), 1969 Tex. Gen. Laws 874, 875, 878 (amended repeatedly) (current version at TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001–109 (Vernon 2005 & Supp. 2008)) (waiving, in part, sovereign immunity in Title 5, “Governmental Liability”). The Act became effective on January 1, 1970. Texas Tort Claims Act, 61st Leg., R.S., ch. 292, 1969 Tex. Gen. Laws 874, 879.

37. Texas Tort Claims Act, 61st Leg., R.S., ch. 292, § 3, 1969 Tex. Gen. Laws 874, 875.

38. From September 1, 1939 to December 31, 1969, Texas appellate courts heard twelve appeals regarding pleas to the jurisdiction based on sovereign immunity. Two of the twelve cases were heard by the Texas Supreme Court and were the same causes heard in the intermediate appellate courts. For a list of these cases from Westlaw, search the Texas cases database (tx-cs) using the following terms: “plea-to-the-jurisdiction & ((sovereign state government!) /3 immunity) & da(aft 9/1/1939 & bef 1/1/1970).”

pleas to the jurisdiction increased dramatically.³⁹ Today, the complexities surrounding the existence and extent of the state's consent to suit form the basis of most pleas to the jurisdiction.⁴⁰

B. *Procedure for Resolving a Plea to the Jurisdiction*

Historically, pleas to the jurisdiction were usually resolved based on the pleadings and without evidentiary support.⁴¹ There was an exception for those cases where the amount in dispute was challenged as a fraudulent attempt to establish the jurisdiction of a court.⁴² In those cases, the plea was to be verified or evidence was

39. For the ten-year period beginning on September 1, 1997, the Fourth Court of Appeals heard approximately ninety cases involving pleas to the jurisdiction based on sovereign or governmental immunity. In the previous ten-year period, there were none. For a list of the cases from Westlaw for the latter period, search the Texas cases database (tx-cs) using the following terms: "plea-to-the-jurisdiction & ((sovereign state government!) /3 immunity) & co(san antonio) & da(aft 8/31/1997 & bef 9/1/2007)."

40. For the ten-year period beginning on September 1, 1997, Texas appellate courts heard approximately nine hundred cases involving pleas to the jurisdiction based on sovereign or governmental immunity. In the previous ten-year period, there were less than fifty. For a list of these cases from Westlaw for the latter period, search the Texas cases database (tx-cs) using the following terms: "plea-to-the-jurisdiction & ((sovereign state government!) /3 immunity) & da(aft 8/31/1997 & bef 9/1/2007)."

41. See, e.g., *Bybee v. Fireman's Fund Ins. Co.*, 160 Tex. 429, 438, 331 S.W.2d 910, 917 (1960) (determining the court's jurisdiction based upon the pleadings); *Pecos & N. Tex. Ry. Co. v. Rayzor*, 106 Tex. 544, 546, 172 S.W. 1103, 1104 (1915) (looking to the damages averred in the plaintiff's petition to determine if they "exceeded the county court's jurisdiction"); *Dwyer v. Bassett & Bassett*, 63 Tex. 274, 276 (1885) (reiterating that averments in the plaintiff's petition as to the amount in controversy, absent any evidence of fraud, establish the court's jurisdiction); *Sullivan v. Wilmer Hutchins Indep. Sch. Dist.*, 47 S.W.3d 529, 531 (Tex. App.—Dallas 2000) (restricting the trial judge "to the allegations in the petition" unless the defendant alleges the plaintiff has entered sham pleadings to improperly confer jurisdiction), *rev'd*, 51 S.W.3d 293 (Tex. 2001), *disapproved of by Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004); *Tex. State Employees Union/CWA Local 6184 v. Tex. Workforce Comm'n*, 16 S.W.3d 61, 65 (Tex. App.—Austin 2000, no pet.) (determining the court's jurisdiction based upon the pleadings), *disapproved of by Miranda*, 133 S.W.3d at 224; *Firemen's Ins. Co. v. Bd. of Regents of Univ. of Tex. Sys.*, 909 S.W.2d 540, 541 (Tex. App.—Austin 1995, writ denied) ("In a plea to the jurisdiction, the trial court must base its decision solely on the allegations in the plaintiff's pleadings."), *disapproved of by Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000).

42. *Worth Fin. Co. v. Charlie Hillard Motor Co.*, 131 S.W.2d 417, 419 (Tex. Civ. App.—Fort Worth 1939, no writ); *Nahm v. J.R. Fleming & Co.*, 116 S.W.2d 1174, 1176 (Tex. Civ. App.—Eastland 1938, no writ). "[F]actual allegations, including those related to any jurisdictional prerequisites, must be taken as true unless the defendant pleads and proves that they were fraudulently made to confer jurisdiction." *Curbo v. State*, 998 S.W.2d 337, 341 (Tex. App.—Austin 1999, no pet.), *disapproved of by Miranda*, 133 S.W.3d at 224; *accord Flowers v. Lavaca County Appraisal Dist.*, 766 S.W.2d 825, 827

to be submitted.⁴³ Other attempts to introduce evidence were met with disfavor. In *Jud v. City of San Antonio*,⁴⁴ the supreme court reviewed the dismissal of a case based on evidence submitted at a hearing on a plea to the jurisdiction.⁴⁵ The court noted its disfavor with the introduction of evidence at the hearing and the trial court's ultimate determination on the merits. The court compared such a summary procedure to that of the abolished general demurrer:

To dismiss a plaintiff's case upon sustaining a plea to the jurisdiction on the ground that his petition is insufficient to state a cause of action when he is praying for judgment for an amount within the jurisdiction of the Court, is even a more summary proceeding than to sustain a general demurrer.⁴⁶

In addition to those cases involving fraudulent amounts in controversy, there are a few cases indicating that the trial court's consideration of evidence is appropriate in some circumstances.⁴⁷

(Tex. App.—Corpus Christi 1989, writ denied) (explaining that the pleadings will not be accepted as true if the defendant pleads and proves that they were fraudulent); *Bernard Hanyard Enters. v. McBeath*, 663 S.W.2d 639, 642 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (“If the defendant contends the plaintiff's allegations are made in bad faith, he must *first* establish that conclusion before his plea to the jurisdiction may be heard.”). Where fraudulent allegations of the amount in controversy formed the basis of the plea to the jurisdiction, affidavits establishing such fraud were required. *See Pryor v. Universal C.I.T. Credit Corp.*, 253 S.W.2d 493, 494–95 (Tex. Civ. App.—San Antonio 1952, no writ) (criticizing the trial court's reception of oral testimony regarding a defensive, non-jurisdictional issue). The appellate court reversed the trial court: “The procedure followed by the trial court would permit the defense issue to be pre-determined in advance of the plaintiff's right to develop his facts according to the order of proceedings stated in Rule 265, Texas Rules of Civil Procedure, relating to the trial of jury causes.” *Id.* at 495.

43. *Olivas v. Barajas*, 285 S.W.2d 894, 895 (Tex. Civ. App.—San Antonio 1955, no writ) (“The allegations of the petition are accepted as true for the purpose of determining jurisdiction unless they are challenged by a proper dilatory plea . . .”). The plea to the jurisdiction had to be verified for going outside the pleadings to allege a fraudulent amount asserted. *Id.*

44. *Jud v. City of San Antonio*, 143 Tex. 303, 184 S.W.2d 821 (1945).

45. *Id.* at 306, 184 S.W.2d at 822–23.

46. *Id.* at 306, 184 S.W.2d at 822. The court's reasoning was based on the inability of a plaintiff to amend following a determination on the plea to the jurisdiction, as opposed to the ability to amend following the granting of a general demurrer. *Id.* at 306, 184 S.W.2d at 822–23.

47. *See, e.g., Diocese of Galveston-Houston v. Stone*, 892 S.W.2d 169, 175 (Tex. App.—Houston [14th Dist.] 1994, no writ) (noting there was “evidence . . . apparently appended to the plea to the jurisdiction” but further noting the tension between a strict review of a jurisdictional plea and a factual dispute); *Roberts v. Roberts*, 165 S.W.2d 122, 124 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.) (“[J]urisdiction may be shown by

One specific exception to the pleadings-only review involved jurisdictional issues relating to the state's title to real property. In *State v. Lain*,⁴⁸ the plaintiff sued a number of state officials for dredging a channel over his property.⁴⁹ The officials filed a plea to the jurisdiction based on sovereign immunity.⁵⁰ The supreme court determined that in a trespass action against state officials, the defendants' mere assertion that they are state officials will not bar prosecution of the suit based on sovereign immunity.⁵¹

[I]t is the duty of the court to hear evidence on the issue of title and right of possession and to delay action on the plea until the evidence is in. If the plaintiff fails to establish his title and right of possession, a take nothing judgment should be entered against him as in other trespass to try title cases.⁵²

On the other hand, if the title is established in the plaintiff, the possession by the officials is wrongful and the plaintiff is entitled to relief. *Lain* continues to be followed in circumstances where a takings claim is made against state officials.⁵³

C. *Historic Timing of Pleas to the Jurisdiction*

Prior to the adoption of Rule 175 of the Texas Rules of Civil Procedure in 1941, dilatory pleas had to be heard in the term in which they were filed.⁵⁴ Thus, courts urged the early resolution of

proof that the administration [of an estate] has been closed.”).

48. *State v. Lain*, 162 Tex. 549, 349 S.W.2d 579 (1961).

49. *Id.* at 550, 349 S.W.2d at 580.

50. *Id.*

51. *Id.* at 551, 349 S.W.2d at 581.

52. *Id.* at 553, 349 S.W.2d at 582.

53. *E.g.*, *Porretto v. Patterson*, 251 S.W.3d 701, 710 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (relying on *Lain*); *John G. & Marie Stella Kenedy Mem'l Found. v. Mauro*, 921 S.W.2d 278, 282 (Tex. App.—Corpus Christi 1995, writ denied) (relying on *Lain*); *State v. Noser*, 422 S.W.2d 594, 597 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.) (relying on *Lain*); *see also State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007) (reviewing a plea to the jurisdiction in a takings claim).

54. *See Grubbs v. Bowers*, 272 S.W.2d 956, 957 (Tex. Civ. App.—Galveston 1954, no writ) (recognizing that the Texas Rules of Civil Procedure eliminated the former requirement to have dilatory pleas “determined during the term in which they are filed” (quoting *Davis v. Southland Cotton Oil Co.*, 259 S.W. 298, 299 (Tex. Civ. App.—Dallas 1924, no writ))). Texas Rule of Civil Procedure 175 provides:

When a case is called for trial in which there has been no pretrial hearing as provided by Rule 166, the issues of law arising on the pleadings, all pleas in abatement and other dilatory pleas remaining undisposed of shall be determined; and it shall be no cause for postponement of a trial of the issues of law that a party is not

a plea to the jurisdiction before any other pleading.⁵⁵ Waiver could occur due to the failure to abide by due order of pleading—similar to the waiver of personal jurisdiction when not timely asserted.⁵⁶ Waiver also occurred when a hearing or ruling on a plea was not obtained in the term in which the plea was filed.⁵⁷ Today, subject matter jurisdiction is essential to the authority of a court to decide a case and cannot be waived.⁵⁸

D. *Summary Judgment and Special Exceptions*

Traditionally, jurisdictional claims could be resolved by special exceptions or summary judgment. The special exception was used to address pleading deficiencies related to jurisdiction.⁵⁹

prepared to try the issues of fact.

TEX. R. CIV. P. 175.

55. *Law Offices of Yarborough & Pope, Inc. v. Nat'l Auto. & Cas. Ins. Co.*, 548 S.W.2d 462, 463 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.); *Chapman v. Fennessy*, 262 S.W. 185, 185 (Tex. Civ. App.—El Paso 1924, no writ).

56. *Schauer v. Beitel's Ex'r*, 92 Tex. 601, 603, 50 S.W. 931, 932 (1899) (affirming the denial of a plea to the jurisdiction for violating the due order of pleading); *Collin County Nat'l Bank v. Turner*, 111 S.W. 670, 671 (Tex. Civ. App.—Dallas 1908, no writ) (deciding that a dilatory plea was not waived, although filed with other pleas, because it followed the due order of pleading); *Watson v. Mirike*, 25 Tex. Civ. App. 527, 529, 61 S.W. 538, 539–40 (Dallas 1901, no writ) (“[A] plea to the jurisdiction . . . is required to be filed in due order of pleading.”). In *Schauer*, the plea to the jurisdiction was based on improper venue. *Schauer*, 92 Tex. at 602, 50 S.W. at 932. The court noted that the defendants’ plea to the jurisdiction was filed after the answer and the trial court correctly overruled the plea because it “was not filed in the due order of pleading.” *Id.* at 603, 50 S.W. at 932.

57. See *Matthews v. Hedley Motor Co.*, 47 S.W.2d 661, 662 (Tex. Civ. App.—Amarillo 1932, no writ) (holding that a waiver had occurred); *Davis*, 259 S.W. at 300 (deciding that the plaintiff waived any contest to the defendant’s plea of privilege—and thus transfer of venue was proper—because the plaintiff failed to contest the plea within the same term of the court); *Weekes v. Sunset Brick & Tile Co.*, 22 Tex. Civ. App. 556, 563, 56 S.W. 243, 247 (Galveston 1900, no writ) (determining that because the appellant failed to raise his plea to the jurisdiction in the following two terms of court, he was held to have waived the same); *Spencer v. James*, 10 Tex. Civ. App. 327, 332, 31 S.W. 540, 542 (Fort Worth 1895, no writ) (holding that a waiver had occurred when two terms of the district court had passed).

58. *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 853–54 (Tex. 2000) (reiterating that courts are obliged to ascertain if they have subject matter jurisdiction even if the parties do not raise it); *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993).

59. See *Bybee v. Firemen’s Fund Ins. Co.*, 160 Tex. 429, 437, 331 S.W.2d 910, 916 (1960) (referring to the use of a special exception to challenge the plaintiff’s pleadings alleging an amount in controversy that controlled which court had subject matter jurisdiction). “When pleadings fail to state a cause of action, the proper course for the opposing party is to file special exceptions. If . . . after an opportunity for amendment,

Summary judgments were often used to resolve jurisdictional issues including sovereign immunity.⁶⁰

E. *Historic Disposition of Pleas to the Jurisdiction*

The disposition of a plea to the jurisdiction has historically been a dismissal without prejudice, because when a trial court determined it lacked subject matter jurisdiction it “had no jurisdiction . . . to render any other judgment than one dismissing the suit.”⁶¹ No judgment on the merits could be rendered.

In *Texas Highway Department v. Jarrell*,⁶² the supreme court reviewed three dilatory pleas and noted their required dispositions.⁶³ Justice Calvert, writing for the majority, analyzed a

[the pleadings] still fail to state a cause of action, the appropriate remedy is dismissal, not summary judgment.” *Spencer v. City of Seagoville*, 700 S.W.2d 953, 957 (Tex. App.—Dallas 1985, no writ) (citing *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983)). *But see* *Prof'l Ass'n of Coll. Educators v. El Paso County Cmty. Coll. Dist.*, 678 S.W.2d 94, 96 (Tex. App.—El Paso 1984, writ ref'd n.r.e.) (“A summary judgment may be based upon the pleadings alone where the petition fails to state a cause of action.”); *Spencer*, 700 S.W.2d at 957 (noting that *Lane v. Dickinson State Bank*, 605 S.W.2d 650, 653 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ), had “affirmed a summary judgment on the ground that the pleadings, after proper special exceptions and opportunity to amend, failed to state a cause of action”). “Apparently, at least a partial rationale for [the *Lane* and *Professional Association of College Educators*] opinions is that summary judgment in this situation serves as the functional equivalent of the appropriate remedy, dismissal, and that reversal is consequently not warranted.” *Spencer*, 700 S.W.2d at 957.

60. *Gordy v. Alexander*, 550 S.W.2d 146, 149 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.), *superseded by statute*, Act of May 17, 1979, 66th Leg., R.S., ch. 713, § 3, 1979 Tex. Gen. Laws 1740, 1741; *Jones v. Tex. Gulf Sulphur Co.*, 397 S.W.2d 304, 308 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.) (affirming a summary judgment in favor of a navigation district based on governmental immunity).

61. *Spann Bros. Auto Supply Co. v. Miles*, 135 S.W.2d 1016, 1017 (Tex. Civ. App.—Eastland 1940, no writ) (reversing the trial court’s judgment “that plaintiff take nothing by reason of this suit and that the defendant go hence” as improvident since there was no jurisdiction for the trial court to make a determination on the merits); *see, e.g.*, *Martinez v. Second Injury Fund of Tex.*, 789 S.W.2d 267, 277 (Tex. 1990) (“Rendition of judgment on the merits is inappropriate in an action over which the trial court lacks jurisdiction.”); *City of Strawn v. Bd. of Water Eng'rs of Tex.*, 134 S.W.2d 397, 399 (Tex. 1939) (affirming dismissal on a plea to the jurisdiction but stating that the plea “in no way affects or adjudicates whatever rights Strawn may have to enjoin [the defendant]”); *Washington v. Fort Bend Indep. Sch. Dist.*, 892 S.W.2d 156, 160 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (reversing and remanding because it was error to dismiss with prejudice); *Hankey v. Employer's Cas. Co.*, 176 S.W.2d 357, 363 (Tex. Civ. App.—Galveston 1943, no writ) (stating that when a plea to the jurisdiction is sustained, the plaintiff should be afforded an opportunity to amend).

62. *Tex. Highway Dep't v. Jarrell*, 418 S.W.2d 486 (Tex. 1967).

63. *Id.* at 488–89.

plea to the jurisdiction, a plea of *res judicata*, and a plea in abatement.⁶⁴ Specifically, he stated: “[A] plea to the jurisdiction, if sustained, would require a dismissal.”⁶⁵ A plea in bar, which would include *res judicata*, “would require a judgment that the claimant take nothing”; and a plea in abatement “would require an abatement.”⁶⁶ In *Washington v. Fort Bend Independent School District*,⁶⁷ the Fourteenth Court of Appeals reversed the trial court’s dismissal with prejudice based on a plea to the jurisdiction.⁶⁸ The Houston court noted that a plea to the jurisdiction is a dilatory plea that does not impinge on the merits of a case, and “the dismissal does not bar the plaintiff from filing the same cause of action in a forum with jurisdiction.”⁶⁹ The disposition of a plea to the jurisdiction continues to be a dismissal without prejudice, but as discussed below, a recent exception to this disposition exists for dismissals based on sovereign immunity. Currently, the dismissal is with prejudice in those cases where governmental or sovereign immunity is found.⁷⁰

F. *Introduction of Interlocutory Appeal*

Prior to 1997, there was no right to an interlocutory appeal or mandamus from a plea to the jurisdiction.⁷¹ In 1997, the Texas legislature passed an act amending section 51.014(a) of the Texas

64. *Id.* at 488. Justice Calvert “observe[d] that a plea of *res judicata* is not a plea in abatement or a plea to the jurisdiction, but is a plea in bar.” *Id.*

65. *Id.*

66. *Jarrell*, 418 S.W.2d at 488 (citing *Kelley v. Bluff Creek Oil Co.*, 158 Tex. 180, 189, 309 S.W.2d 208, 214 (1958)).

67. *Washington v. Fort Bend Indep. Sch. Dist.*, 892 S.W.2d 156 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

68. *Id.* at 160.

69. *Id.* at 159 (citing *Cox v. Klug*, 855 S.W.2d 276, 279 (Tex. App.—Amarillo 1993, no writ)).

70. *Harris County v. Sykes*, 136 S.W.3d 635, 640–41 (Tex. 2004).

71. *See Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990) (indicating that mandamus generally will not lie from a plea to the jurisdiction, and “cost and delay of pursuing an appeal will not, in themselves, render appeal an inadequate alternative to mandamus review”); *Abor v. Black*, 695 S.W.2d 564, 566 (Tex. 1985) (remarking that the court lacks jurisdiction to issue writs of mandamus for incidental rulings such as a ruling on a plea to the jurisdiction); *Carpenter Body Works, Inc. v. McCulley*, 389 S.W.2d 331, 332–33 (Tex. Civ. App.—Houston 1965, writ ref’d) (relating that a denial of a plea to the jurisdiction is a purely interlocutory ruling not subject to mandamus). For a current exception to mandamus, see *In re Southwestern Bell Telephone Co.*, 235 S.W.3d 619, 623 (Tex. 2007).

Civil Practice and Remedies Code, thereby granting officials, governmental units, and their employees the right to an interlocutory appeal of a grant or denial of a plea to the jurisdiction or motion for summary judgment based on immunity.⁷² Specifically, section 51.014(a) provides in part: “A person may appeal from an interlocutory order of a district court, county court at law, or county court that: . . . (8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in [s]ection 101.001.”⁷³ This right of appeal permits the issue of sovereign immunity to be determined prior to a trial on the merits, thereby avoiding unnecessary expense.⁷⁴ Although other procedural vehicles existed to resolve sovereign immunity prior to a trial on the merits, the statute specifically described interlocutory appeals from a “plea to the jurisdiction.” Thus, pleas to the jurisdiction took on new importance as state and governmental units contested jurisdiction in cases filed against them.⁷⁵

Consequently, the number of pleas to the jurisdiction based on sovereign immunity increased exponentially.⁷⁶ Summary

72. Act of June 20, 1997, 75th Leg., R.S., ch. 1296, § 1, sec. 51.014(a), 1997 Tex. Gen. Laws 4936, 4937 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (Vernon 2008)); *see also* Tex. A&M Univ. Sys. v. Koseoglu, 233 S.W.3d 835, 841 (Tex. 2007) (considering section 51.014(a)'s interlocutory appeal provision applicable to pleas to the jurisdiction by governmental units).

73. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (Vernon 2008).

74. *See* House Research Org., Bill Analysis, Tex. S.B. 453, 75th Leg., R.S. (1997), available at <http://www.hro.house.state.tx.us/pdf/ba75r/sb0453.pdf#navpanes=0> (“[I]ncorrect rulings . . . needlessly waste the time of the courts and can cost litigants hundreds of thousands of dollars as they defend cases which should have been dismissed.”). The supreme court has referred to section 51.014(a)(8)'s purpose, which is to reduce litigation expenses for all parties involved in suits against state entities by resolving the question of sovereign immunity prior to suit. *Koseoglu*, 233 S.W.3d at 845.

75. Section 51.014(a)(5) permits an interlocutory appeal from a denial of a “motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state.” TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5) (Vernon 2008). Summary judgment procedure continues to be used in cases involving individuals.

76. For the ten-year period beginning on September 1, 1997, the Fourth Court of Appeals heard approximately ninety cases involving a plea to the jurisdiction based on sovereign or governmental immunity; the Texas Supreme Court heard approximately sixty-five. In the previous ten-year period, the Fourth Court heard none; the Texas Supreme Court heard one. For a list of the cases from Westlaw, search the Texas cases database (tx-cs) using the following terms: “plea-to-the-jurisdiction & ((sovereign state government!) /3 immunity)” and select either “co(san antonio)” or “co(tex. sup. ct.)” and enter the appropriate date range for the desired search, e.g., “da(aft 8/31/1997 & bef 9/1/2007).”

judgment motions based on sovereign immunity were renamed or duplicated as pleas to the jurisdiction, because section 51.014(a)(8) specifically referenced a “plea to the jurisdiction.”⁷⁷ Problems associated with a lack of rules to govern the increasingly popular plea to the jurisdiction became apparent.

The post-1997 pleas to the jurisdiction based on sovereign immunity were more complicated than prior pleas. Waiver of immunity under the Texas Tort Claims Act was the predominant subject of post-1997 pleas to the jurisdiction. A resolution of such a plea often required a determination of the use or misuse of property, or the government’s awareness of a premises defect.⁷⁸ Determinative issues in these cases, including lack of intent, lack of knowledge, and the use or misuse of property, were not easily ascertainable by merely reviewing the pleadings. Whereas the absence of jurisdictional facts underlying the pleadings could be attacked by a motion for summary judgment accompanied by evidence,⁷⁹ a plea to the jurisdiction was historically assessed by reviewing the pleadings.⁸⁰ Plaintiffs, therefore, could generally

77. See *Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 355 (Tex. 2004) (summarizing that the Medical Center had filed a summary judgment that was denied, and then filed a plea to the jurisdiction immediately before trial containing the same arguments to obtain an interlocutory appeal), *superseded by statute*, TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2008), *as recognized in* *Igal v. Brightstar Info. Tech. Group, Inc.*, 250 S.W.3d 78 (Tex. 2008). “The Medical Center . . . candidly acknowledged that it had filed the plea so that it could take an interlocutory appeal from an adverse ruling” *Id.* A motion does not have to be named a “plea to the jurisdiction” to obtain interlocutory review. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 242–43, 242 n.35 (Tex. 2004) (Brister, J., dissenting) (citing *Speer v. Stover*, 685 S.W.2d 22, 23 (Tex. 1985) (per curiam)).

78. Prior to 1997, several cases addressed the Texas Tort Claims Act’s “use of tangible property” language. *E.g.*, *Tex. Dep't of Corr. v. Herring*, 513 S.W.2d 6, 9 (Tex. 1974) (interpreting the Texas Tort Claims Act); *Hampton v. Univ. of Tex.—M.D. Anderson Cancer Ctr.*, 6 S.W.3d 627, 630 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (applying the use of tangible property language). Other cases addressed the “premises defect” language used in the Texas Tort Claims Act. *E.g.*, *Ramos v. Tex. Dep't of Pub. Safety*, 35 S.W.3d 723, 731 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (considering a premises defect claim); *Sutton v. State Highway Dep't*, 549 S.W.2d 59, 61 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.).

79. *TEX. R. CIV. P. 166a(b)*; see also *Gordy v. Alexander*, 550 S.W.2d 146, 149 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.) (deciding that the dismissal of a case due to lack of standing was error because “summary disposition based upon pleadings, affidavits, and arguments of counsel can be had only by summary judgment proceedings”), *superseded by statute*, TEX. PROB. CODE ANN. § 5A(b) (Vernon 2003).

80. See *Brannon v. Pac. Emp. Ins. Co.*, 148 Tex. 289, 294, 224 S.W.2d 466, 469 (1949) (“It is a fundamental rule that in determining the jurisdiction of the trial court, the

allege that the government knew of a premises defect or that the use or misuse of property caused the injury and the appellate court was constrained to “construe the pleadings in favor of the plaintiff and look to the pleader’s intent.”⁸¹ Governmental and sovereign immunity were sometimes resolved through summary judgment procedure.⁸² Because an interlocutory appeal was traditionally unavailable from the denial of a motion for summary judgment and the statute granting interlocutory appeals to a governmental unit arguably applied only to the “plea to the jurisdiction,” practitioners filed both.⁸³

The surging use of pleas to the jurisdiction to resolve complicated governmental immunity issues created a tension between a review of only the pleadings and the need to delve deeper into the jurisdictional facts.⁸⁴ Addressing the tension, the court re-examined the standard of review for pleas to the jurisdiction in *Bland Independent School District v. Blue*.⁸⁵

allegations of the petition made in good faith are determinative of the cause of action.”); *Pecos & N. Tex. Ry. Co. v. Rayzor*, 106 Tex. 544, 546, 172 S.W. 1103, 1104 (1915) (looking to the plaintiff’s petition for allegations of the jurisdictional amount); *Dwyer v. Bassett & Bassett*, 63 Tex. 274, 276 (1885) (determining the court’s jurisdiction based on the plaintiff’s petition alleging a cause of action with an amount in controversy clearly within the jurisdiction of the court); *Dolenz v. Tex. State Bd. of Med. Exam’rs*, 899 S.W.2d 809, 812 (Tex. App.—Austin 1995, no writ) (“In deciding whether to grant a plea to the jurisdiction, the trial court must look solely to the allegations in the petition.” (quoting *Liberty Mut. Ins. Co. v. Sharp*, 874 S.W.2d 736, 739 (Tex. App.—Austin 1994, writ denied))).

81. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *accord Longoria v. Alamia*, 149 Tex. 234, 235, 230 S.W.2d 1022, 1022 (1950) (“In reviewing [a plea to the] jurisdiction, we take as true the allegations of fact in the petition.”).

82. *NME Hosps., Inc. v. Rennels*, 994 S.W.2d 142, 144 (Tex. 1999).

83. *E.g.*, *Tex. Dep’t of Criminal Justice v. Miller*, 51 S.W.3d 583, 586 (Tex. 2001) (“TDCJ filed a plea to the jurisdiction, and alternatively a motion for summary judgment . . .”); *Tex. Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 637 (Tex. 1999) (per curiam) (considering the Department’s interlocutory appeal of a denial of its plea to the jurisdiction where it also filed a motion for summary judgment); *City of Houston v. Rushing*, 7 S.W.3d 909, 912 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (en banc) (reversing and rendering on an interlocutory appeal from a denied plea to the jurisdiction where the city also filed a motion for summary judgment).

84. *See Tex. State Employees Union/CWA Local 6184 v. Tex. Workforce Comm’n*, 16 S.W.3d 61, 65 (Tex. App.—Austin 2000, no pet.) (differentiating between a plea to the jurisdiction, which must be based on the pleadings, and a summary judgment, which includes a review of evidence), *disapproved of by Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004). *But see F/R Cattle Co. v. State*, 866 S.W.2d 200, 205 (Tex. 1993) (implying that trial courts could consider evidence when ruling on a plea to the jurisdiction).

85. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547 (Tex. 2000).

III. PROLOGUE TO *TEXAS DEPARTMENT OF PARKS & WILDLIFE V. MIRANDA*

A. *Bland Independent School District v. Blue*

In *Bland*, the supreme court articulated a new method of addressing pleas to the jurisdiction. In order to address the appeal, the court explored the conflict among the courts of appeals regarding pleas to the jurisdiction.⁸⁶ As described above, except in very limited circumstances, Texas courts had resolved pleas to the jurisdiction for over one hundred years by examining the pleadings rather than the evidence.⁸⁷ However, the limited review historically available under a plea to the jurisdiction conflicted with the legislature's preference for early resolution of sovereign immunity issues prior to trial—to avoid needless expense and use of judicial resources.⁸⁸ If the resolution of the plea to the jurisdiction was going to be based on more than just the pleadings, the plea had to be transformed into a procedural device capable of challenging the evidence underlying the plaintiff's jurisdictional allegations. *Bland* presented the supreme court with an opportunity to review and modify plea to the jurisdiction practice.

A detailed discussion of *Bland* is necessary in order to grasp the significance of the shift from a strictly pleadings review to an evidentiary review. *Bland* involved taxpayers, the Blues, who sought a permanent injunction against a school district to prohibit it from making payments to a bank based on a lease-purchase

86. *Id.* at 559 (Phillips, C.J., dissenting) (encouraging the court to restrain from asserting jurisdiction in this interlocutory appeal). Chief Justice Phillips stated: "I realize that it is difficult to resist 'the desire to remedy significant errors' arising in interlocutory appeals. But as a Court of limited appellate jurisdiction we must wait until issues are properly before us before we address them by judicial decision." *Id.* (quoting *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 441 (Tex. 2000) (Enoch, J., dissenting)). The Texas Government Code limits the Texas Supreme Court's appellate jurisdiction but does not exclude jurisdiction over cases "in which the justices of the courts of appeals disagree on a question of law material to the decision." TEX. GOV'T CODE ANN. § 22.225 (Vernon Supp. 2008).

87. *E.g.*, *Tex. State Employees Union*, 16 S.W.3d at 65. The refusal to go beyond the pleadings in a jurisdictional review was so widely supported that in order to change this practice the supreme court relied upon *F/R Cattle Co.*, a case in which there was no issue or discussion about the introduction of evidence in support of a plea.

88. *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 845 (Tex. 2007) ("Section 51.014(a)(8) was designed to reduce litigation expenses for all parties involved in suits against state entities by resolving the question of sovereign immunity prior to suit . . .").

agreement that financed the construction of a new high school.⁸⁹ The Blues pleaded the financing was illegal because it failed to comply with the Public Property Finance Act.⁹⁰ The school district filed a plea to the jurisdiction claiming the Blues had no standing because they lacked any particularized injury in that construction of the school was complete, and the state's—rather than taxpayers'—money was used to make the loan payments.⁹¹ At the hearing on the plea to the jurisdiction, the trial court refused to consider evidence regarding the status of the project or source of the funds used to pay the loan and decided to deny in part the plea based on the Blues' pleadings.⁹² The court of appeals affirmed the trial court's refusal to consider evidence and held the Blues had pleaded sufficient allegations to give them standing to sue.⁹³

The Texas Supreme Court reversed, holding the trial court should have considered the evidence submitted by the school district in resolving the plea to the jurisdiction.⁹⁴ The court explored the parameters of a dilatory plea and indicated the absence of subject matter jurisdiction may be raised by both a plea to the jurisdiction and other procedural mechanisms, such as a motion for summary judgment.⁹⁵ The comparison to summary judgment is instructive. If both procedures may be used to resolve issues of subject matter jurisdiction, the trial court should review the same evidence regardless of the procedural vehicle. If the purpose is to resolve the jurisdictional underpinnings of the suit, then the issues raised “are often such that they cannot be resolved

89. *Bland*, 34 S.W.3d at 549–50.

90. *Id.* See generally TEX. LOC. GOV'T CODE ANN. §§ 271.001–.009 (Vernon 2005) (establishing procedures to follow regarding financing real and personal property purchases by school districts).

91. *Bland*, 34 S.W.3d at 549–50. The Blues contended that they came within an exception to particularized standing because the lease-purchase agreement was an illegal contract. *Id.* at 550. The school district argued that the Blues could not take advantage of the exception to particularized standing because the transaction the Blues sought to challenge was completed and all that remained was repayment of the loan. *Id.*

92. *Id.*

93. *Id.* at 551.

94. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 557–58 (Tex. 2000).

95. *Id.* at 554 (“The absence of subject-matter jurisdiction may be raised by a plea to the jurisdiction, as well as by other procedural vehicles, such as a motion for summary judgment.”).

without hearing evidence.”⁹⁶ Consistent with motions for summary judgment based on lack of subject matter jurisdiction, the Texas Supreme Court held that pleas to the jurisdiction may be supported by evidence.⁹⁷

Extending the trial court's review beyond the pleadings to include evidence of the jurisdictional underpinnings of plaintiffs' allegations would prove problematic. Such a review could veer dangerously close to a determination of the merits of the case. In response to that danger, the court cautioned against considering the merits: “[T]he plea should be decided without delving into the merits of the case.”⁹⁸ Any evidence submitted should be limited to the jurisdictional issue.⁹⁹ In addition, the court optimistically claimed there is no reason why the merits of the plaintiff's claim should ever be reached, and thus, the plaintiff need not preview his case.¹⁰⁰ The prohibition against delving into the merits of a case is easily stated but difficult to implement. The court provided examples of jurisdictional facts easily resolved without implicating the merits from the historic line of cases that permitted the submission of evidence to challenge the amount in controversy based on fraud. But the court's deceptively simple examples do not address the complex jurisdictional fact patterns that arise under the Texas Tort Claims Act.¹⁰¹

In addition to resolving the use of evidence, the *Bland* court also discussed the timing of the jurisdictional determination: “Whether a determination of subject-matter jurisdiction can be made in a preliminary hearing or should await a fuller development . . . must be left largely to the trial court's sound exercise of discretion.”¹⁰²

Thus, one interpretation of *Bland* was that evidence could be considered in determining jurisdiction but not so deeply that it

96. *Id.* (citing 5 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 70.03[1] (2000)).

97. *Id.* at 555 (“[A] court deciding a plea to the jurisdiction is not required to look solely to the pleadings but may consider evidence and must do so when necessary to resolve the jurisdictional issues raised.”).

98. *Id.* at 554.

99. *Bland*, 34 S.W.3d at 554 (offering associational standing as an example of a “situation[] in which a plaintiff is required to prove [primarily jurisdictional] facts”).

100. *Id.*

101. *See Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 590 (Tex. 2001) (Hecht, J., concurring) (decrying the continuing confusion as to what actions constitute “use” under the Texas Tort Claims Act).

102. *Bland*, 34 S.W.3d at 554.

delved into the merits of the plaintiff's claim. But how far was too far?¹⁰³ The extent to which the jurisdictional inquiry could reach the merits would have to be resolved. Likewise, further reflection on the standard for reviewing evidence and determining fact issues proved necessary.

B. *Bland Progeny*

Following *Bland*, the difficulty in avoiding the merits of some jurisdictional claims became apparent. Courts took two approaches: (1) if the facts were intertwined with the merits, the courts refused to review the merits to resolve the plea;¹⁰⁴ or (2) they reviewed the evidence and resolved the plea irrespective of the merits.¹⁰⁵

*Texas Department of Criminal Justice v. Miller*¹⁰⁶ is an example of a case where the merits were resolved by a plea to the jurisdiction. *Miller* involved a claim by Jeannie Miller that her husband contracted meningitis while in prison and the use and misuse of various medications and equipment masked the symptoms which prevented appropriate treatment that would have saved his life.¹⁰⁷ The supreme court reversed the court of appeals and held that a mere reference in the petition to waiver of immunity under the Texas Tort Claims Act is insufficient to establish the state's consent to be sued.¹⁰⁸ To determine waiver of immunity, the majority had to review the distinction between use

103. See generally Jeffrey S. Boyd, *An Ace in the Hole & a Jack of All Trades: Recent Developments Affecting Sovereign Immunity & Pleas to the Jurisdiction*, 6 TEX. TECH J. TEX. ADMIN. L. 59, 97 (2005) (discussing the fine dividing line between determining jurisdictional facts and deciding a case on the merits).

104. See *TAC Realty, Inc. v. City of Bryan*, 126 S.W.3d 558, 564 (Tex. App.—Houston [14th Dist.] 2003, pet. granted, judgment vacated w.r.m.) (“[A] hearing on the merits of [the taxpayer’s] claim in response to the City’s plea to the jurisdiction was not proper.”); *City of Dallas v. Porter*, No. 05-02-00364-CV, 2002 WL 1773008, at *5 (Tex. App.—Dallas Aug. 2, 2002, no pet.) (not designated for publication) (stating that requiring the plaintiff to carry her ultimate burden at trial impermissibly required her to prove her case on the merits to establish jurisdiction).

105. See *Miller*, 51 S.W.3d at 587 (stating that in order to determine jurisdiction the court must look to the facts alleged and the evidence submitted); *Roemer v. Roemer*, No. 03-00-00694-CV, 2001 WL 459733, at *3 (Tex. App.—Austin May 3, 2001, no pet.) (not designated for publication) (determining that resolution of standing required resolution of merits of ownership of property).

106. *Tex. Dep’t of Criminal Justice v. Miller*, 51 S.W.3d 583 (Tex. 2001).

107. *Id.* at 585.

108. *Id.* at 587.

and non-use of tangible property.¹⁰⁹ The court's analysis of "use or non-use" focused on causation. The court determined that the use of property did not cause Miller's demise; rather, the lack of appropriate treatment caused his death.¹¹⁰ The dissent criticized the supreme court's analysis for not just delving into the merits, but for resolving the case entirely based on lack of causation.¹¹¹ Jeannie Miller was required to plead use of property to satisfy the Texas Tort Claims Act, but because the analysis of her claim was intertwined with causation, she needed to establish causation to avoid dismissal.¹¹² As *Miller* shows, it was impossible to avoid the merits in certain cases. A clearer analysis was necessary.

IV. THE TEST: *TEXAS DEPARTMENT OF PARKS & WILDLIFE V. MIRANDA*

In *Texas Department of Parks & Wildlife v. Miranda*,¹¹³ the Texas Supreme Court set forth the standard of review for pleas to the jurisdiction.¹¹⁴ Prior to *Miranda*, the courts of appeals were struggling with how to determine pleas to the jurisdiction without inquiring into the merits of the case.¹¹⁵ *Miranda* provided a method of reviewing the pleadings and evidence, if necessary,

109. *Id.*

110. *Id.* at 588. The court reasoned:

Miller's treatment might have furnished the condition that made the injury possible by suppressing symptoms that TDCJ staff otherwise could have recognized as meningitis, but the treatment did not actually cause his death. Neither the drugs nor the treatment afforded to Miller hurt him or made him worse, in and of themselves. His meningitis became progressively worse due to the passage of time and an alleged error in medical judgment; there is no evidence that any [of] defendant's acts hastened or exacerbated his decline.

Miller, 51 S.W.3d at 588.

111. *See id.* at 593–96 (Enoch, J., dissenting) (arguing the plaintiffs had, in fact, provided sufficient evidence to raise a fact issue as to whether state property had caused the injuries complained of). Other courts found fact issues existed where causation was at issue. *See, e.g.,* Hous. Auth. of Beaumont v. Landrio, 269 S.W.3d 735, 738 (Tex. App.—Beaumont 2008, pet. filed) (finding that disputed evidence existed regarding causation, and thus the plea to the jurisdiction should have been denied).

112. *Miller*, 51 S.W.3d at 593 (Enoch, J., dissenting).

113. Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217 (Tex. 2004).

114. *Id.* at 227.

115. *E.g., Miller*, 51 S.W.3d at 587 (stating that the facts must be considered prior to a decision as to jurisdiction); Roemer v. Roemer, No. 03-00-00694-CV, 2001 WL 459733, at *3 (Tex. App.—Austin May 3, 2001, no pet.) (not designated for publication) (holding that evidence is necessary to determine jurisdictional issues).

without negating a plaintiff's fundamental right to have factual determinations made by a jury.¹¹⁶

The Mirandas filed suit against the Texas Department of Parks and Wildlife for injuries caused by a tree limb that fell on Mrs. Miranda while she was visiting a state park.¹¹⁷ The Mirandas sued the Department alleging negligence and gross negligence and claiming waiver of sovereign immunity under the Texas Tort Claims Act.¹¹⁸ The Department filed a plea to the jurisdiction with supporting evidence.¹¹⁹ The trial court denied the plea to the jurisdiction, and the court of appeals affirmed, holding that the trial court could not consider evidence, and the Mirandas' pleadings were "sufficient to state a premises defect cause of action based on gross negligence."¹²⁰

The Texas Supreme Court reversed the court of appeals.¹²¹ To understand the supreme court's decision, it is important to understand the court of appeals' analysis of the plea to the jurisdiction. The court of appeals upheld the trial court's exclusion of evidence of the Department's lack of actual knowledge of the alleged defect and held that the trial court must rely on the pleadings, unless there is a specific allegation that the plaintiffs' pleadings are a sham.¹²² The court of appeals held that the Mirandas had pled a premises defect cause of action based on gross negligence under the recreational use statute.¹²³ Observing the warning to avoid delving into the merits of the case, the court rejected the Department's assertion that there was no evidence to support gross negligence and therefore no waiver of governmental immunity.¹²⁴ On appeal before the supreme court, the issue was

116. *Miranda*, 133 S.W.3d at 228. Under the standards set forth in *Miranda*, the court "preserve[s] the parties' right to present the merits of their case at trial." *Id.*

117. *Id.* at 221.

118. *Id.* Specifically, the Mirandas alleged "the Department knew of the danger" of the tree limbs and failed to warn them of the danger or assign them a different campsite. *Id.*

119. *Miranda*, 133 S.W.3d at 221. The Department also filed a motion for summary judgment on the same matter but did not appeal its denial. *Id.* at 222 n.2. The Department attached evidence obtained from discovery to the plea. *Id.* at 221.

120. *Tex. Dep't of Parks & Wildlife v. Miranda*, 55 S.W.3d 648, 652 (Tex. App.—San Antonio 2001), *rev'd*, 133 S.W.3d 217 (Tex. 2004).

121. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 221 (Tex. 2004).

122. *Miranda*, 55 S.W.3d at 651.

123. *Id.* at 652.

124. *Id.* at 651–52 ("[T]he trial court was not authorized to inquire into the substance

whether the court of appeals should have ventured beyond the allegations in the petition and reviewed the evidence to evaluate the gross negligence claims.¹²⁵ Citing *Bland*, the supreme court held that the trial court was required to fully examine the evidence to determine whether a fact issue existed regarding the alleged gross negligence.¹²⁶

The supreme court began its analysis of *Miranda* by referring to the preferred timing for the trial court to determine subject matter jurisdiction. In *Bland*, the court recognized that subject matter jurisdiction should be determined before proceeding with a case but noted: “Whether a determination of subject-matter jurisdiction can be made in a preliminary hearing or should await a fuller development of the merits of the case must be left largely to the trial court’s sound exercise of discretion.”¹²⁷ In *Miranda*, the supreme court was clear that the trial court must determine subject matter jurisdiction at its earliest opportunity.¹²⁸ At least four times in the opinion the court referenced the requirement for timely disposition of the plea.¹²⁹

In its standard of review analysis, the supreme court recognized that the undisputed evidence implicated both the subject matter jurisdiction of the court and the merits of the *Mirandas*’ case.¹³⁰

of the claims . . .”).

125. *Miranda*, 133 S.W.3d at 223. The Department argued that the *Mirandas* failed to plead specific facts alleging gross negligence in their petition and their conclusory allegations were insufficient. *Id.* at 222.

126. *Id.* at 221. According to the recreational use statute, the Department’s duty for premises defects would be that owed to a trespasser—to refrain from causing injury willfully, wantonly, or through gross negligence. *Id.* at 225 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 75.002 (Vernon Supp. 2008)).

127. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

128. *Miranda*, 133 S.W.3d at 226. “The trial court must determine at its earliest opportunity whether it has the constitutional or statutory authority to decide the case before allowing the litigation to proceed.” *Id.* The supreme court referenced its language in *Bland* acknowledging the trial court’s discretion to decide whether the jurisdictional determination should be made at a preliminary hearing or await fuller development of the case, but concluded “that this determination must be made as soon as practicable.” *Id.* at 227.

129. *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) (“[T]he trial court must determine [jurisdiction] at its earliest opportunity . . .”); *id.* at 227 (“[T]his [jurisdictional] determination must be made as soon as practicable.”); *id.* at 228 (“[A] court must not proceed on the merits of a case until legitimate challenges to its jurisdiction have been decided.”); *id.* at 233 (“Trial courts should decide dilatory pleas early[—]at the pleading stage of litigation if possible.”).

130. *Id.* at 225–26.

Rather than avoiding the merits, the court described a method of analyzing the case with an approach based on whether evidence is necessary to resolve the jurisdictional challenge.¹³¹

A. *On the Pleadings*

If the plea to the jurisdiction challenges the pleadings, the court determines if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the action. The pleadings are construed liberally to give effect to the pleader's intent.¹³² Should the pleadings "not contain sufficient facts to affirmatively demonstrate . . . incurable defects in jurisdiction, the issue is one of pleading sufficiency and"—as in special exception practice—"the plaintiffs should be afforded the opportunity to amend."¹³³ Notably, "[i]f the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing . . . opportunity to amend."¹³⁴

B. *Development of Jurisdictional Facts*

If a plea to the jurisdiction challenges the existence of jurisdictional facts, relevant evidence submitted by the parties must be considered when necessary to resolve jurisdictional issues. It is in regard to this type of challenge that the trial court has discretion to determine if a fuller development of the case is warranted. Additional time may be necessary to obtain evidence to support or negate jurisdiction before hearing a plea to the jurisdiction.¹³⁵

C. *Implication of the Merits*

When a jurisdictional challenge implicates the merits of a case and a plea to the jurisdiction includes evidence, "the trial court reviews the relevant evidence to determine if a fact issue exists."¹³⁶ If a fact issue is created, then the trial court cannot grant a plea to the jurisdiction and the issue will be resolved by the fact finder.¹³⁷ "However, if the relevant evidence is undisputed or

131. *Miranda*, 133 S.W.3d at 225–28.

132. *Id.* at 226.

133. *Id.* at 226–27.

134. *Id.* at 227.

135. *Id.*

136. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004).

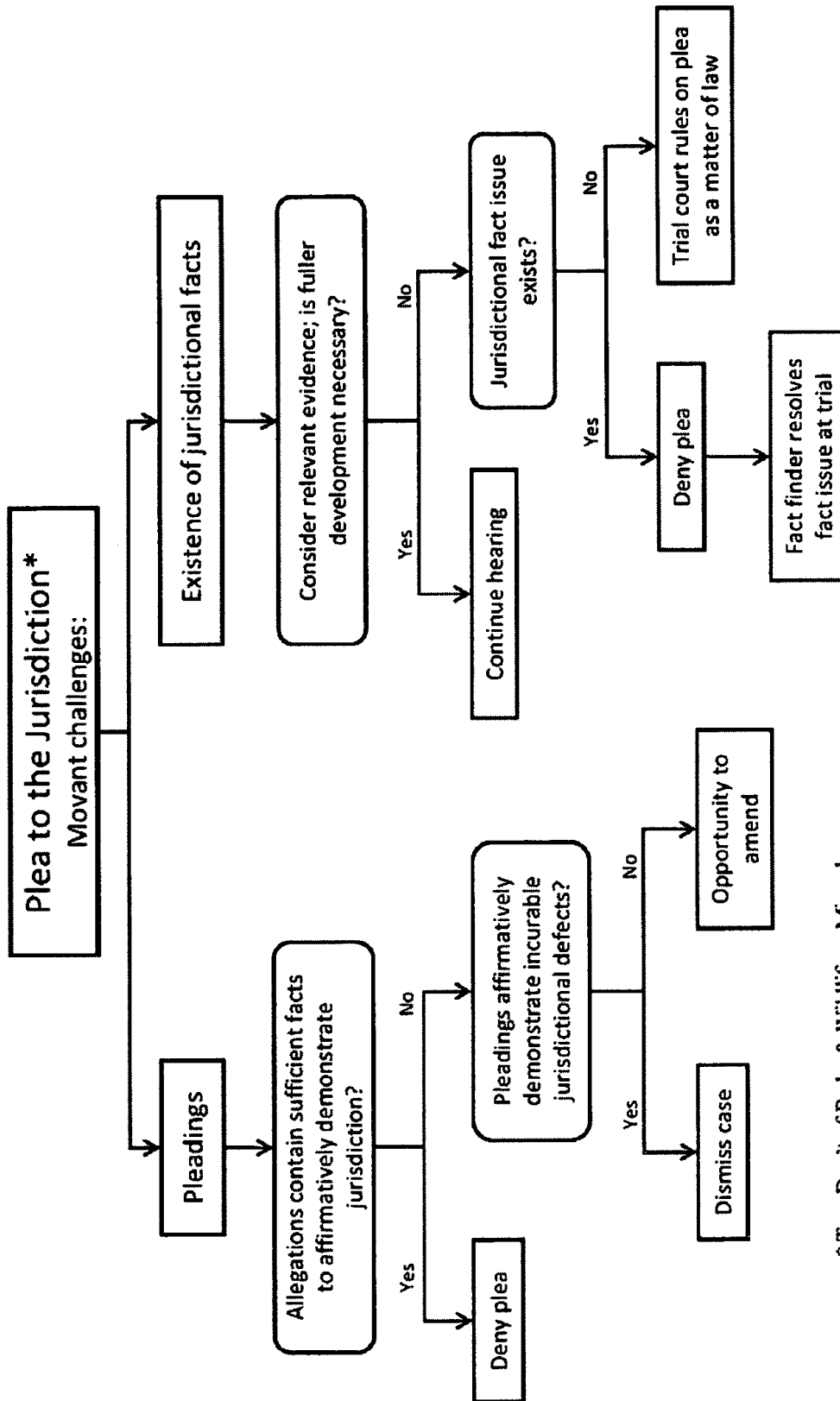
137. *Id.*

fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law.”¹³⁸ If the defendant asserts and supports his or her contention that the trial court lacks subject matter jurisdiction, the plaintiff must merely show there is a disputed material fact issue regarding jurisdiction.¹³⁹ Recognizing that the suggested review mirrors that of a traditional summary judgment, the court noted the benefit obtained from a timely resolution is that the state receives an early jurisdictional determination, and the plaintiff retains the right to present any disputed fact issue to the fact finder at trial.¹⁴⁰

138. *Id.* at 228. The court referenced numerous federal cases that relied on evidence to resolve issues regarding subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Notably, and as will be discussed below, federal motions to dismiss for subject matter jurisdiction generally are not determined under a summary judgment process. See Bradley Scott Shannon, *A Summary Judgment Is Not a Dismissal!*, 56 DRAKE L. REV. 1, 3 n.10 (2007) (contrasting a motion for summary judgment and a motion to dismiss).

139. *Miranda*, 133 S.W.3d at 228 (citing *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 420 (Tex. 2000)).

140. *Id.*



* Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226-28 (Tex. 2004)

D. *Appellate Review*

Miranda also described the appropriate appellate review of a plea to the jurisdiction. Appellate courts review a challenge to subject matter jurisdiction de novo.¹⁴¹

When reviewing a plea to the jurisdiction in which the pleading requirement has been met and evidence has been submitted . . . that implicates the merits of the case, [the reviewing court] take[s] as true all evidence favorable to the nonmovant . . . [and] indulge[s] every reasonable inference and resolve[s] any doubts in the nonmovant's favor.¹⁴²

Following the court's explanation of the new standard of review, the majority addressed the two dissenting opinions.¹⁴³ Justice Jefferson's dissent first discussed the *Mirandas*' deficient pleading that fails to state a claim for gross negligence.¹⁴⁴ His analysis would stop upon finding the pleading deficient. He then criticized the lack of procedural safeguards associated with a plea to the jurisdiction.¹⁴⁵ Justice Brister, in his dissent, urged the abandonment of pleas to the jurisdiction preferring existing procedures for resolving subject matter jurisdiction—including summary judgment and special exceptions.¹⁴⁶ Reviewing the history of the plea to the jurisdiction, Justice Brister criticized the complete lack of procedure: “[T]here is no rule—no case and no code—that specifies the form, deadlines, or evidentiary requirements for pleas to the jurisdiction generally.”¹⁴⁷ The majority responded to both dissents' requests for a better procedure by referencing the long history of the plea to the jurisdiction as evidence of its usefulness.¹⁴⁸ However, a strong policy argument favors rules to govern pleas to the jurisdiction.

141. *Id.* (citing *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002)).

142. *Id.* at 228.

143. *Id.* at 228–29.

144. *Miranda*, 133 S.W.3d at 235 (Jefferson, J., dissenting).

145. *Id.* (criticizing the majority's resolution of the merits without procedural safeguards to ensure that the merits are not determined before the non-movant has an adequate time for discovery and opportunity to respond (citing *TEX. R. CIV. P. 166a*)).

146. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 243–44 (Tex. 2004) (Brister, J., joined by O'Neill & Schneider, JJ., dissenting) (noting the uncertainty inherent in an undefined plea that is detrimental to the parties and the trial court).

147. *Id.* at 242.

148. *Id.* at 229 (majority opinion).

V. POST-MIRANDA DECISIONS

Miranda left the scheduling of pleas to the jurisdiction to the trial court's sound discretion.¹⁴⁹ No deadlines or evidentiary rules were provided to guide a determination of subject matter jurisdiction other than an instruction to accomplish the determination "as soon as practicable."¹⁵⁰ In subsequent cases, the court likened the plea to the jurisdiction proceedings to summary judgment and approved the submission of "summary judgment-type evidence."¹⁵¹ However, many questions still remain.

A. Evidence

In *Bland*, the supreme court held that the trial court could review evidence to determine a plea to the jurisdiction.¹⁵² *Miranda* reaffirmed this holding without describing the form of evidence appropriate for a plea.¹⁵³ The supreme court, in *FKM Partnership, Ltd. v. Board of Regents of the University of Houston System*,¹⁵⁴ confirmed that the trial court could conduct a hearing in a manner similar to a hearing on a summary judgment motion and may consider "affidavits and other summary judgment-type evidence."¹⁵⁵ The ability to use affidavits and summary judgment-type evidence is notable because under the rules of evidence, affidavits, as out of court statements, by definition are hearsay, and subject to objection.¹⁵⁶ Specific rules of civil procedure permit the filing of affidavits in support of motions for summary judgment and special appearances, but no similar rules exist for pleas to the jurisdiction.¹⁵⁷

149. *Id.* at 227.

150. *Id.*

151. *FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 628 (Tex. 2008) (citing *Miranda*, 133 S.W.3d at 227) ("The trial court is allowed to conduct a hearing on a plea to the jurisdiction or motion to dismiss for lack of jurisdiction in a manner similar to how it hears a summary judgment motion, and may consider affidavits and other summary judgment-type evidence.").

152. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 552 (Tex. 2000).

153. *Miranda*, 133 S.W.3d at 221.

154. *FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619 (Tex. 2008).

155. *Id.* at 628.

156. See generally TEX. R. EVID. 801-06 (containing the hearsay provisions).

157. See TEX. R. CIV. P. 166a(c) (explaining summary judgment procedures); TEX. R. CIV. P. 120a (explaining special appearance procedures).

Courts have not limited themselves to consideration of evidence permitted under Rule 166a. Significantly, live testimony is permissible at the hearing.¹⁵⁸ In *Pickett v. Texas Mutual Insurance Co.*,¹⁵⁹ the Austin Court of Appeals considered objections to live testimony at a rehearing on a motion to dismiss.¹⁶⁰ The court held there was no abuse of discretion by permitting live testimony.¹⁶¹

A motion to dismiss is the functional equivalent of a plea to the jurisdiction [A] court deciding a plea to the jurisdiction is not required to look solely to the pleadings but may also consider other evidence and must do so when necessary to resolve jurisdictional issues raised.¹⁶²

Citing *Bland*, the *Pickett* court concluded that “other evidence” properly included live testimony.¹⁶³ The court also reasoned that the plaintiffs were not harmed or surprised when the defendants called a live witness at the rehearing because the same witness had been called at the hearing on a motion to dismiss held seven months earlier.¹⁶⁴

The complexity of the jurisdictional question may require significant evidence to be presented at the hearing to resolve the plea to the jurisdiction. In *City of Corsicana v. Stewart*,¹⁶⁵ the dispositive issue was whether the City had knowledge of the significant flooding that occurred the night two children drowned.¹⁶⁶ To establish waiver of immunity, the plaintiffs had to show the City had actual knowledge of the dangerous condition at the time of the accident, not that a dangerous condition could possibly develop. Substantial discovery was admitted at the

158. *Pallotta v. Tex. Dep't of Licensing & Regulation*, No. 09-07-322-CV, 2008 WL 2760246, at *2 (Tex. App.—Beaumont June 11, 2008, no pet.) (mem. op.); see *City of Pasadena v. Kuhn*, 260 S.W.3d 93, 97–98 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (reviewing witness testimony from a hearing on a plea to the jurisdiction); *In re D.K.M.*, 242 S.W.3d 863, 865 n.1 (Tex. App.—Austin 2007, no pet.) (stating the trial court considered live testimony at a hearing on a plea to the jurisdiction); *Pickett v. Tex. Mut. Ins. Co.*, 239 S.W.3d 826, 839 (Tex. App.—Austin 2007, no pet.) (“[T]he trial court did not abuse its discretion by permitting live testimony . . .”).

159. *Pickett v. Tex. Mut. Ins. Co.*, 239 S.W.3d 826 (Tex. App.—Austin 2007, no pet.).

160. *Id.* at 839–40.

161. *Id.* at 839.

162. *Id.* (quoting *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000)).

163. *Id.* at 839–40.

164. *Pickett*, 239 S.W.3d at 840.

165. *City of Corsicana v. Stewart*, 249 S.W.3d 412 (Tex. 2008) (per curiam).

166. *Id.* at 413.

hearing.¹⁶⁷ The court of appeals held the evidence was sufficient to raise a fact issue concerning the City's actual knowledge of flooding the night in question.¹⁶⁸ The supreme court reversed and held the evidence did not raise an issue of actual knowledge.¹⁶⁹ The substantial record available in this case may be contrasted with the extremely limited record available to the supreme court in *Christus Health Gulf Coast v. Aetna, Inc.*¹⁷⁰ At issue was an alleged failure to exhaust remedies under the Medicare Act.¹⁷¹ The court felt hampered, commenting that none of the contracts or other documents referred to at the hearing were contained in the record.¹⁷² Questioning the adequacy of the single volume reporter's record, the court remarked that it left "many open questions unanswered."¹⁷³ However, the supreme court ultimately required no evidence to determine that the plaintiff's pleadings set forth an appropriate claim.¹⁷⁴ These two cases illustrate the different approaches available to review a case under *Miranda*. In *Christus Health*, the court was able to determine jurisdiction based on the pleadings.¹⁷⁵ In *City of Corsicana*, substantial evidence implicating the merits of the case was required to resolve the jurisdictional issue.¹⁷⁶

It is clear that trial courts may consider a significant amount of evidence in determining a plea to the jurisdiction. Because of the ability to assert subject matter jurisdiction at any time, the question has arisen whether additional evidence not presented to

167. *Id.* at 414.

168. *Id.*

169. *Id.* at 413.

170. *Christus Health Gulf Coast v. Aetna, Inc.*, 237 S.W.3d 338, 341 (Tex. 2007).

171. *Id.* at 340–42.

172. *Id.* at 341–42.

173. *Id.* at 341. Despite the unanswered questions, the court nonetheless determined the pleading sufficiently alleged a claim that did not require an exhaustion of administrative remedies. *Id.* at 343.

174. *Christus Health*, 237 S.W.3d at 342, 345.

175. *Id.* at 342.

176. *City of Corsicana v. Stewart*, 249 S.W.3d 412, 414 (Tex. 2008) (per curiam); see also *City of San Antonio v. Tex. Mut. Ins. Co.*, No. 04-07-00837-CV, 2009 WL 89700, at *4 (Tex. App.—San Antonio Jan. 14, 2009, no pet.) (mem. op.) (reciting, in a premises defect case, substantial evidence presented on actual knowledge, but with a dissent disagreeing on the interpretation of the evidence); *City of Celina v. Blair*, 171 S.W.3d 608, 610 (Tex. App.—Dallas 2005, no pet.) (considering evidence found in a document attached to the petition to support knowledge in a premises defect case).

the trial court can be considered by the court of appeals.¹⁷⁷ In *Hendee v. Dewhurst*,¹⁷⁸ the State challenged the sufficiency of the plaintiffs' pleadings by a plea to the jurisdiction.¹⁷⁹ The plaintiffs filed a response that included attached evidence.¹⁸⁰ On appeal, the State sought to broaden its initial attack on the pleadings by attaching public records not provided to the trial court.¹⁸¹ Referencing summary judgment rules, the Austin Court of Appeals noted that when reviewing a summary judgment, "an appellate court cannot consider independent grounds—much less summary judgment evidence—not presented to the trial court."¹⁸² The court pointed out that the State was attempting to raise a challenge to jurisdictional facts on appeal that would "improperly circumvent the procedural protections required by *Miranda*."¹⁸³ The court also reflected that "an appellate court's decision to take judicial notice of a fact on appeal is generally discretionary and appellate courts are generally reluctant to do so when such evidence has not been presented to the trial court."¹⁸⁴ New evidence was not considered on appeal.

Thus, even if *Miranda* does not, strictly speaking, compel our holding that we may not consider the State Defendants' new jurisdictional challenge and evidence, we exercise our discretion to decline to take judicial notice of this evidence in light of our concerns that neither Plaintiffs nor the district court have had the opportunity to address this evidence.¹⁸⁵

177. See *Hendee v. Dewhurst*, 228 S.W.3d 354, 376 (Tex. App.—Austin 2007, pet. denied) (analyzing the scope of evidentiary review for a plea to the jurisdiction).

178. *Hendee v. Dewhurst*, 228 S.W.3d 354 (Tex. App.—Austin 2007, pet. denied).

179. *Id.* at 365–66.

180. *Id.* at 366.

181. *Id.* at 367–68. The state sought to have the appellate court consider the comptroller's revenue estimate submitted in the regular session of the 79th legislature and a memo to the Lieutenant Governor regarding amounts in the general revenue. *Id.*

182. *Hendee*, 228 S.W.3d at 376 (citing *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex. 1996)).

183. *Id.* at 377. The court also stated that "[b]ecause the district court did not specify its grounds for dismissal, [the court of appeals could] affirm on any meritorious ground." *Id.* at 367.

184. *Id.* at 377 (footnote omitted) (citing *Tran v. Fiorenza*, 934 S.W.2d 740, 742–43 (Tex. App.—Houston [1st Dist.] 1996, no writ)).

185. *Id.* at 377–78.

B. *Opportunity to Amend*

An opportunity to cure pleading defects was reaffirmed in *Texas A&M University System v. Koseoglu*.¹⁸⁶ Texas A&M argued that the plaintiff's opportunity to amend was triggered by the filing of the plea to the jurisdiction, and any amendment must occur before the hearing on the plea to the jurisdiction.¹⁸⁷ The trial court agreed and dismissed Koseoglu's lawsuit based on sovereign immunity.¹⁸⁸ The court of appeals reversed, concurring with Koseoglu that "a plaintiff may stand on his pleadings in the face of a plea to the jurisdiction unless and until a court determines that the plea is meritorious."¹⁸⁹ Thereafter, the plaintiff must be given "a reasonable opportunity to amend' his pleadings to attempt to cure the jurisdictional defects found," unless the pleadings are incurably defective.¹⁹⁰ The supreme court "generally agree[d]" with the court of appeals, commenting that "Texas A&M's proposed rule would essentially allow governmental entities the unjust advantage of being not only a litigant, but also the judge of the plaintiff's pleadings. . . . Thus, we agree that Koseoglu deserves the opportunity to amend his pleadings if the defects can be cured."¹⁹¹ The court then examined Koseoglu's pleadings and determined that his pleading defects could not be cured, thereby requiring dismissal.¹⁹²

A request for permission to amend must be made following the trial court's grant of the plea to the jurisdiction. A trap for the unwary practitioner exists if, after the trial court grants a plea to the jurisdiction, the respondent fails to seek permission to amend. Absent such a request, the respondent forfeits the right to

186. *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835 (Tex. 2007).

187. *Id.* at 839.

188. *Id.* at 837.

189. *Tex. A&M Univ. Sys. v. Koseoglu*, 167 S.W.3d 374, 383 (Tex. App.—Waco 2005), *aff'd in part, rev'd in part*, 233 S.W.3d 835 (Tex. 2007).

190. *Id.*; *see also* *Tex. State Univ. v. Bonnin*, No. 03-07-00593-CV, 2008 WL 5264980, at *1 (Tex. App.—Austin Dec. 18, 2008, no pet.) (mem. op.) (remanding the case to allow Bonnin to replead).

191. *Koseoglu*, 233 S.W.3d at 839–40.

192. *Id.* at 840. Interestingly, the court also noted that "he has made no suggestion as to how to cure the jurisdictional defect." *Id.* It is unclear whether a plaintiff has the burden to show that his pleadings can be amended to cure the jurisdictional defect before obtaining an opportunity to amend.

complain on appeal.¹⁹³ In *Haddix v. American Zurich Insurance Co.*,¹⁹⁴ the plaintiff requested leave to supplement but failed to amend his pleadings both before the hearing on the plea to the jurisdiction, or after the hearing but before the order dismissing his case was entered.¹⁹⁵ On appeal, the plaintiff objected to the failure of the trial court to allow him leave to amend. In affirming the trial court's grant of the plea to the jurisdiction, the appellate court noted:

Even if we assume that the better practice would have been served by specifically providing Haddix with an opportunity to amend his pleadings, he had the opportunity in response to defendant's pleas to amend but did not do so, and he had over one month following the hearing to amend but did not do so; however, he has never advised either the trial court or this court what he could plead that would address any of the jurisdictional challenges.¹⁹⁶

Haddix is troubling because it implies, contrary to the holding in *Koseoglu*, that the plaintiff has a duty to amend his petition prior to the hearing on a plea to the jurisdiction.¹⁹⁷ Less troubling is the court's holding, similar to that in *Koseoglu*, that the plaintiff did not show that an amendment would cure the jurisdictional defects. Based on these cases, plaintiffs should: (1) respond to a plea to the jurisdiction with an alternative request for leave to amend, and (2) if the plea is granted, again ask for leave to amend and be prepared to establish that an amended pleading would resolve the jurisdictional defect.

193. *Tara Partners, Ltd. v. City of S. Houston*, No. 14-07-00330-CV, 2009 WL 62942, at *9 (Tex. App.—Houston [14th Dist.] Jan. 13, 2009, no pet.) (citing *Dahl ex rel. Dahl v. State*, 92 S.W.3d 856, 862 n.6 (Tex. App.—Houston [14th Dist.] 2002, no pet.)) (“By failing to seek permission to amend after the trial court found the City’s plea meritorious, appellants forfeited the opportunity to amend . . .”).

194. *Haddix v. Am. Zurich Ins. Co.*, 253 S.W.3d 339 (Tex. App.—Eastland 2008, no pet.).

195. *Id.* at 347.

196. *Id.*

197. *Id.* (reiterating that Haddix had an “opportunity to amend his pleadings, [and] he had the opportunity in response to defendants’ pleas to amend [before the court ruled on the plea to the jurisdiction] but did not do so”). *Contra Koseoglu*, 233 S.W.3d at 839–40 (declining to adopt a rule that the plaintiff must replead in response to a plea to the jurisdiction “before the trial court takes any definitive action” rather than waiting “to amend his pleadings until they are determined by a court to be deficient”).

C. *When Should the Plea Be Raised?*

A deadline for asserting jurisdiction does not exist.¹⁹⁸ Because a plea to the jurisdiction challenges subject matter jurisdiction, it may be raised at any time.¹⁹⁹ A plea to the jurisdiction has been raised post-verdict,²⁰⁰ on motion for rehearing,²⁰¹ and in the appellate courts.²⁰² Yet there are some limitations to resolving lack of subject matter jurisdiction on appeal. “Although subject matter jurisdiction, as a general principle, may be challenged for the first time on appeal[,] . . . there are limits to this principle when the challenge concerns jurisdictional evidence.”²⁰³ Additional jurisdictional facts may not be supplemented on appeal.²⁰⁴ Likewise, appellate courts have refused to consider grounds not raised in the plea to the jurisdiction.²⁰⁵

D. *When Is the Plea to the Jurisdiction Heard?*

Justice Jefferson criticized the majority’s holding in *Miranda* because “it permits a defendant, on painfully short notice and

198. See *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993) (“Subject matter jurisdiction is an issue that may be raised for the first time on appeal; it may not be waived by the parties.”).

199. See *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 313 (Tex. 2008) (asserting that challenges to subject matter jurisdiction are “so important that [they] can be raised for the first time on appeal”).

200. See *Tex. Dep’t of Transp. v. Gutierrez*, 243 S.W.3d 127, 131 (Tex. App.—San Antonio 2007, pet. filed) (affirming the trial court’s denial of a post-trial plea to the jurisdiction); *Antonov v. Walters*, 168 S.W.3d 901, 904 (Tex. App.—Fort Worth 2005, pet. denied) (overruling “appellants’ postjudgment motions, including a plea to the jurisdiction”).

201. See *State v. Beeson*, 232 S.W.3d 265, 268 (Tex. App.—Eastland 2007, pet. abated) (considering a plea to the jurisdiction raised for the first time on rehearing).

202. See *DaimlerChrysler*, 252 S.W.3d at 313 (considering a plea to the jurisdiction raised in the appellate court).

203. *Hendee v. Dewhurst*, 228 S.W.3d 354, 375 (Tex. App.—Austin 2007, no pet.) (citation and footnote omitted). A challenge based on jurisdictional facts must be raised in the trial court and be supported by jurisdictional evidence. *Id.*; see also *City of Dallas v. Heard*, 252 S.W.3d 98, 103 (Tex. App.—Dallas 2008, pet. denied) (“[Appellate] jurisdiction is limited to reviewing the . . . plea to the jurisdiction that was filed.”). “We do not have jurisdiction to consider grounds outside those raised in the plea to the jurisdiction.” *Heard*, 252 S.W.3d at 103 (citing *City of Dallas v. First Trade Union Sav. Bank*, 133 S.W.3d 680, 687 (Tex. App.—Dallas 2003, pet. denied)). *Contra City of Houston v. Northwood Mun. Util. Dist. No. 1*, 73 S.W.3d 304, 308 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (looking beyond the pleadings to “consider evidence to prove the jurisdictional issues raised”).

204. *Heard*, 252 S.W.3d at 103.

205. *Id.*

before evidence has been developed, to force the plaintiff either to present evidence on the ultimate issue in the lawsuit, or lose the right to a jury trial on the merits.”²⁰⁶ He predicted that the procedure for pleas to the jurisdiction created in *Miranda* will vary from “county to county and from judge to judge.”²⁰⁷ His prediction has come true.

The majority in *Miranda* found the three-day notice period adequate and identified special appearance and motion to strike intervention as procedures governed by the three-day notice of hearing provision set forth in Texas Rule of Civil Procedure 21.²⁰⁸ The majority also referenced procedures and rules that allow parties to request additional time to prepare or conduct discovery, such as the rule permitting extensions of summary judgment hearings to conduct adequate discovery, noting: “[T]he Texas civil procedural scheme entrusts many scheduling and procedural issues to the sound discretion of the trial court, subject to appellate review.”²⁰⁹ When the consideration of subject matter jurisdiction requires the examination of evidence, *Miranda* contemplates the exercise of discretion by the trial court to decide “whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case.”²¹⁰

There is no uniform time for the court to consider a plea to the jurisdiction other than the admonition to determine the jurisdictional issue as soon as practicable.²¹¹ At least one court has held that a trial court’s determination of a jurisdictional issue implicating the merits at a preliminary stage of development is an abuse of discretion.²¹² It is notable that although a review of a grant or denial of a plea to the jurisdiction is *de novo*, the supreme court gave the trial court discretion to determine if a fuller development of the case is necessary before resolving jurisdiction. Thus, a decision to deny a plea to the jurisdiction to await further case development is reviewed for abuse of discretion.

206. *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 235 (Tex. 2004) (Jefferson, J., dissenting).

207. *Id.*

208. *Id.* at 229 (majority opinion) (citing TEX. R. CIV. P. 21).

209. *Id.*

210. *Id.* at 227.

211. *Miranda*, 133 S.W.3d at 227.

212. *Davis v. Burnam*, 137 S.W.3d 325, 334–35 (Tex. App.—Austin 2004, no pet.).

Interestingly, in *Davis v. Burnam*,²¹³ it was the defendant, the Texas Department of Public Safety, that claimed the trial court had acted too swiftly in addressing the jurisdictional issue, which was intertwined with the merits of the case.²¹⁴ In reversing the trial court, the court of appeals noted that the plaintiff added a claim one day before the hearing on the plea that expanded the nature of the claims against the Department.²¹⁵ The Department claimed it lacked sufficient notice to prepare a meaningful response to the additional claim.²¹⁶ The court of appeals held the trial court abused discretion by ruling on the underlying merits of the case when the Department lacked adequate notice.²¹⁷

It was the petitioner in *In re C.M.C.*²¹⁸ who complained of the lack of notice of the hearing on the plea to the jurisdiction as well as the inability to obtain discovery before the hearing.²¹⁹ The Topes, grandparents of two children, appealed a trial court's order dismissing their petition for adoption.²²⁰ Child Protective Services had filed a motion to dismiss based on lack of standing.²²¹ The court characterized the motion to dismiss as a plea to the jurisdiction based on its substance.²²² The Topes, comparing the motion to dismiss to a motion for summary judgment, complained that they should have received twenty-one days' notice of the hearing.²²³ The court of appeals held that the trial court did not abuse its discretion, twenty-one days' notice was not required, and in accordance with *Miranda*, timing should be left to the discretion

213. *Davis v. Burnam*, 137 S.W.3d 325 (Tex. App.—Austin 2004, no pet.).

214. *Id.* at 334.

215. *Id.* at 335.

216. Appellants' Brief at 13–14, *Davis*, 137 S.W.3d 325 (No. 03-03-00518-CV).

217. *Davis*, 137 S.W.3d at 325.

218. *In re C.M.C.*, 192 S.W.3d 866 (Tex. App.—Texarkana 2006, no pet.).

219. *Id.* at 869. For an example of rapid resolution, see *Texas Logos, L.P. v. Brinkmeyer*, 254 S.W.3d 644, 652 (Tex. App.—Austin 2008, no pet.). On December 11, 2006, Texas Logos filed suit and the temporary injunction hearing was set for December 18. *Id.* The morning of December 18, defendant Media Choice filed a plea to the jurisdiction and the temporary injunction hearing was reset, and the plea to the jurisdiction set, for December 19, 2006. *Id.* The morning of December 19, before the injunction hearing, defendant Brinkmeyer filed a plea to the jurisdiction. *Id.* At the hearing, the injunction and both pleas were heard. *Id.*

220. *C.M.C.*, 192 S.W.3d at 868.

221. *Id.* at 869.

222. *Id.*

223. *Id.*

of the trial court.²²⁴ Because the trial court determined the Topes lacked standing, it did not address the Topes' objection that they were not permitted to conduct discovery before the hearing. The dissent criticized the majority opinion, asserting that discovery was necessary to resolve the standing issue.²²⁵

Trial courts are charged with balancing delay in considering the plea with the supreme court's directive that the determination of jurisdiction "must be made as soon as practicable."²²⁶ The Austin Court of Appeals has discussed the propriety of granting a plea to the jurisdiction when a fuller development of the case and resolution of the merits-based jurisdictional issues through summary judgment proceedings may be more appropriate.²²⁷ A specific request for continuance of the hearing to conduct further discovery may be necessary. The San Antonio Court of Appeals recently held that a request for continuance prior to the plea hearing is required to preserve the right to additional discovery.²²⁸

E. *Delving into the Merits*

Perhaps because of the absence of procedures and the ability to assert a plea to the jurisdiction at any time, some parties seek a determination of the merits under the guise of a plea to the jurisdiction.²²⁹ The accepted procedure for resolving a case on

224. *Id.*

225. *C.M.C.*, 192 S.W.3d at 875 (Ross, J., concurring in part, dissenting in part).

226. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004).

227. *City of Austin v. Savetownlake.org*, No. 03-07-00410-CV, 2008 WL 3877683, at *4 (Tex. App.—Austin Aug. 22, 2008, no pet.) (mem. op.) (approving the trial court's decision to "require a 'fuller development of the case'" (quoting *Miranda*, 113 S.W.3d at 227)); *Hendee v. Dewhurst*, 228 S.W.3d 354, 383 (Tex. App.—Austin 2007, pet. denied) (remanding for the plaintiffs to amend their pleadings to address jurisdictional defects).

228. *Bexar Metro. Water Dist. v. Evans*, No. 04-07-00133-CV, 2007 WL 2481023, at *4 (Tex. App.—San Antonio Sept. 5, 2007, no pet.) (mem. op.). Because the plaintiff failed to ask for a continuance prior to the hearing, "the trial court did not have discretion to deny the plea on the ground there had been an inadequate opportunity for discovery." *Id.*

229. *See, e.g., City of Argyle v. Pierce*, 258 S.W.3d 674, 677–78 (Tex. App.—Fort Worth 2008, pet. filed) (considering a plea to the jurisdiction filed in an inverse condemnation action); *Ahmed v. Metro. Transit Auth.*, 257 S.W.3d 29, 33 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (refusing to dismiss on a plea to the jurisdiction because the defendant's contentions "extend beyond . . . what a trial court . . . is allowed to resolve under *Miranda*"); *City of Celina v. Dynavest Joint Venture*, 253 S.W.3d 399, 403 (Tex. App.—Austin 2008, no pet.) ("[W]e are not persuaded that appellants' pleas to the jurisdiction required the trial court to decide [any jurisdictional facts]."). The *Dynavest* court decided that the defendant's position was "an argument on the merits without a

the merits before trial is a motion for summary judgment.²³⁰ However, to the movant, the plea to the jurisdiction may be preferable because it is faster, less burdensome, and has the added benefit of permitting live testimony at the hearing. Justice Patterson, concurring in *Hendee*, referenced the problems inherent in using the plea to the jurisdiction when the appropriate vehicle for resolution on the merits is a summary judgment.²³¹ “[T]he posture of this case shows the inefficiencies of using a plea to the jurisdiction . . . to make an ad hoc decision and give an advisory opinion that should be determined after a fuller ventilation of pleadings, evidence, and briefing in the district court”²³² A similar conclusion was reached in *City of Austin v. Savetownlake.org*,²³³ where the appellate court affirmed the trial court’s decision to allow fuller development of the case because the City’s arguments were more appropriately raised by a motion for summary judgment.²³⁴

As noted by Justice Brister in *Miranda*, there are a variety of procedural vehicles currently used to raise jurisdiction.²³⁵ Pleas to the jurisdiction are often raised in combination with summary judgment motions.²³⁶ There are also cases where the procedural vehicle is an undefined motion to dismiss, described by one court

jurisdictional dimension.” *Dynavest*, 253 S.W.3d at 403.

230. See TEX. R. CIV. P. 166a (describing summary judgment procedures).

231. *Hendee*, 228 S.W.3d at 383 (Patterson, J., concurring).

232. *Id.*

233. *City of Austin v. Savetownlake.org*, No. 03-07-00410-CV, 2008 WL 3877683 (Tex. App.—Austin Aug. 22, 2008, no pet.) (mem. op.).

234. *Id.* at *1.

235. *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 240–41 (Tex. 2004) (Brister, J., joined by O’Neill & Schneider, JJ., dissenting).

236. See, e.g., *Montgomery County v. Park*, 246 S.W.3d 610, 613 (Tex. 2007) (“The County filed a plea to the jurisdiction and motion for summary judgment”); *City of Galveston v. State*, 217 S.W.3d 466, 468 (Tex. 2007) (“The City filed a plea to the jurisdiction, special exceptions, and a motion for summary judgment”); *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 177 (Tex. 2004) (“In all the cases, the landowners filed cross-motions for partial summary judgment and pleas to the jurisdiction”); *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003) (“DART filed a plea to the jurisdiction and a motion for summary judgment”); *Buffalo Equities, Ltd. v. City of Austin*, No. 03-05-00356-CV, 2008 WL 1990295, at *2 (Tex. App.—Austin May 9, 2008, no pet.) (mem. op.) (noting the defendant filed a plea to the jurisdiction and both parties filed cross-motions for summary judgment); *Horton v. City of Smithville*, No. 03-07-00174-CV, 2008 WL 204160, at *1 (Tex. App.—Austin Jan. 25, 2008, pet. denied) (mem. op.) (noting the City filed a plea to the jurisdiction “and, in the alternative, a motion for summary judgment”).

of appeals as a “generic term” better characterized as a plea to the jurisdiction.²³⁷ Other courts have characterized some motions to dismiss as summary judgment motions rather than pleas to the jurisdiction.²³⁸ Yet another court has cautioned that “[a] plea to the jurisdiction is not a surrogate for a summary judgment.”²³⁹

The concurrent filing of pleas to the jurisdiction and summary judgment motions on the merits may present problems if the trial court grants both. If the trial court determines it lacks jurisdiction, it should refrain from proceeding on the merits.²⁴⁰ The logical inconsistency in ruling on the merits after determining the court lacks jurisdiction will be discussed further below.

The appropriateness of requesting findings of fact and conclusions of law following a plea to the jurisdiction ruling was addressed in *Goldberg v. Commission for Lawyer Discipline*.²⁴¹ Recognizing that under Rule 296 of the Texas Rules of Civil Procedure, findings of fact can be entered after a conventional bench trial, the court noted that in other cases involving a final disposition, findings are proper, but a party is not entitled to them.²⁴² Thus, the court of appeals held that the failure of the trial court to enter findings of fact was not reversible error since the entry of findings of fact would be immaterial. Although the rules may allow the entry of findings of fact because the plea to the jurisdiction may be dispositive, as in the summary judgment context, findings of fact serve no useful purpose.²⁴³

237. *In re C.M.C.*, 192 S.W.3d 866, 869 n.3 (Tex. App.—Texarkana 2006, no pet.).

238. *Harris County Hosp. Dist. v. Textac Partners I*, 257 S.W.3d 303, 312–13 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

239. *City of Celina v. Dynavest Joint Venture*, 253 S.W.3d 399, 404 (Tex. App.—Austin 2008, no pet.); *accord Sw. Bell Tel., L.P. v. Harris County*, 267 S.W.3d 490, 498 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (citing *Dynavest*, 253 S.W.3d at 404) (explaining that SWBT’s request to “treat Harris County’s plea to the jurisdiction as a motion for summary judgment” cannot be done because the court must only examine “the plaintiffs’ pleadings and evidence pertinent to the jurisdictional inquiry” and not “the merits of the case or the issues raised in a motion for summary judgment”).

240. *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008) (noting that when a trial court lacks jurisdiction, “it should simply dismiss the case”).

241. *Goldberg v. Comm’n for Lawyer Discipline*, 265 S.W.3d 568 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

242. *Id.* at 578 (“Although findings of fact and conclusions of law can be entered after a ruling on a jurisdictional plea if there has been an evidentiary hearing, a party cannot compel their preparation.”).

243. *IKB Indus. (Nig.) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 441 (Tex. 1997) (citing *Linwood v. NCNB Tex.*, 885 S.W.2d 102, 103 (Tex. 1994)) (refusing to require findings of

In what appears to be an aberration, the Corpus Christi Court of Appeals reviewed a trial court's dismissal of a plea to the jurisdiction relying on the accompanying findings of fact and conclusions of law.²⁴⁴ The opinion stated the correct standard of review as *de novo*, but then proceeded to review "the evidence presented and the facts determined at the hearing."²⁴⁵ The appellate court criticized the appellants for not challenging the sufficiency of the evidence supporting the court's findings of fact and conclusions of law, holding the appellants waived any challenge to the findings and conclusions by failing to address them.²⁴⁶ The court of appeals' analysis and reliance on findings of fact ignored the standard for the appellate court's review: if the evidence creates a fact question regarding the jurisdictional issue, the trial court cannot grant the plea to the jurisdiction. Because there are no fact issues to resolve, findings of fact are superfluous.

F. *Texas Whistleblower Act Cases and Miranda*

The application of *Miranda* to a Texas Whistleblower Act²⁴⁷ claim is pending in the supreme court in the case of *State v. Lueck*.²⁴⁸ Although the topic warrants its own article, a brief discussion follows. A short overview of the waiver of immunity under the Act is necessary to set the arguments in context.

Texas's Whistleblower Act contains the following immunity waiver:

A public employee who alleges a violation of this chapter may sue the employing state or local governmental entity for the relief provided by this chapter. Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter for a violation of this chapter.²⁴⁹

The Texas Supreme Court previously considered the pleading

fact after a summary judgment because "if summary judgment is proper, there are no facts to find").

244. See *Lopez v. State Farm Mut. Auto. Ins. Co.*, No. 13-06-276-CV, 2008 WL 2744609, at *1 (Tex. App.—Corpus Christi June 30, 2008, no pet.) (mem. op.) (reviewing the trial court's findings of facts and conclusions of law).

245. *Id.* at *2.

246. *Id.* at *7. This review appears inapposite to a *de novo* review.

247. TEX. GOV'T CODE ANN. §§ 554.001–.010 (Vernon 2004).

248. *State v. Lueck*, 212 S.W.3d 630 (Tex. App.—Austin 2006, pet. granted).

249. TEX. GOV'T CODE ANN. § 554.0035 (Vernon 2004).

requirement under this statutory waiver of immunity and determined that the first sentence of section 554.0035 is a clear and unambiguous expression of the legislature's intent to waive immunity from liability and suit.²⁵⁰ Some courts, construing the immunity provision, have held that a public employee need only allege a violation of the Whistleblower Act to confer subject matter jurisdiction on the trial court.²⁵¹ The issue is whether such a bare-bones pleading is sufficient under *Miranda*.

George Lueck sued the State of Texas and the Texas Department of Transportation alleging a violation of the Texas Whistleblower Act.²⁵² The Department filed a plea to the jurisdiction alleging Lueck "failed to show a clear and unambiguous waiver of sovereign immunity."²⁵³ Specifically, the Department contended Lueck did not satisfy two elements of a whistleblower claim: (1) a good faith report of a violation of law, and (2) a good faith belief that he was reporting a violation of law to an appropriate law enforcement authority.²⁵⁴ In response, "Lueck filed a motion to dismiss the Department's plea to the jurisdiction insisting that his allegations were sufficient to waive sovereign immunity," and he did not have to plead facts in support of the elements because they were not jurisdictional.²⁵⁵ The trial court granted Lueck's motion to dismiss the Department's plea to the jurisdiction without a hearing.²⁵⁶ The court of appeals held that the trial court was not required to afford the Department an evidentiary hearing because the Department's plea to the jurisdiction did not challenge jurisdictional facts.²⁵⁷ In short, the appellate court concluded that the absence of facts in the pleadings to support the elements of a whistleblower action does not affect

250. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696–97, 696 n.5, 697 n.6 (Tex. 2003).

251. *See City of New Braunfels v. Allen*, 132 S.W.3d 157, 164 n.11 (Tex. App.—Austin 2004, no pet.) (stating a plaintiff does not need to comply with all the provisions of the Texas Whistleblower Act to overcome sovereign immunity).

252. *Lueck*, 212 S.W.3d at 632.

253. *Id.*

254. *Id.* at 634.

255. *Id.* at 632.

256. *Id.* at 638. Notably, the appellate court stated: "A traditional or no-evidence motion for summary judgment is the proper avenue for raising the Department's concerns that its evidence would negate two essential elements of Lueck's whistleblower claim." *Lueck*, 212 S.W.3d at 638 n.4 (citing TEX. R. CIV. P. 166a(c), (i)).

257. *Id.* at 638.

the trial court's subject matter jurisdiction, but rather the employee's ability to prevail on the merits of the claim.²⁵⁸ Unlike *Miranda*, where more detailed pleadings may be necessary to support a waiver of immunity under the Texas Tort Claims Act, "a public employee need only allege a violation of the Whistleblower Act to confer subject-matter jurisdiction on the trial court."²⁵⁹ The appellate court concluded that "Lueck's pleadings affirmatively demonstrate the district court's [subject matter] jurisdiction to hear the case."²⁶⁰

The court of appeals' acceptance of conclusory statements of waiver of immunity appears inconsistent with *Miranda*. The distinction in the analysis between *Miranda* and *Lueck* appears to turn on particular aspects of each case's underlying waiver of immunity legislation. Under the Texas Tort Claims Act, "[s]overeign immunity involves two distinct principles: immunity from suit and immunity from liability."²⁶¹ Immunity from liability is an affirmative defense, while immunity from suit deprives a court of subject matter jurisdiction.²⁶² By contrast, the Texas Whistleblower Act does not make sovereign immunity from suit and sovereign immunity from liability coextensive.²⁶³ Under the court of appeals' construction of the Whistleblower Act, the waiver of sovereign immunity from suit renders an investigation into any jurisdictional facts relating to liability unnecessary. In other words, the facts raised by the Department in *Lueck* are treated as elements of a whistleblower's claim, not a jurisdictional prerequisite to suit. Courts of appeals are divided on whether the factual underpinnings of a Whistleblower Act claim may be reached through a plea to the jurisdiction. Some courts are in accord with the *Lueck* court.²⁶⁴ Other courts have treated

258. *Id.* at 635–36 (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004)).

259. *Id.* at 636.

260. *State v. Lueck*, 212 S.W.3d 630, 638 (Tex. App.—Austin 2006, pet. granted).

261. Jeffrey S. Boyd, *An Ace in the Hole & a Jack of All Trades: Recent Developments Affecting Sovereign Immunity & Pleas to the Jurisdiction*, 6 TEX. TECH J. TEX. ADMIN. L. 59, 63 (2005).

262. *Miranda*, 133 S.W.3d at 224.

263. *Lueck*, 212 S.W.3d at 637.

264. *See Tex. Dep't of Human Servs. v. Okoli*, 263 S.W.3d 275, 278–82 (Tex. App.—Houston [1st Dist.] 2007, pet. filed) (deciding that whether the Texas Department of Human Services is an "appropriate law enforcement agency" is not a jurisdictional issue); *Tex. Dep't of Transp. v. Garcia*, 243 S.W.3d 759, 761–63 (Tex. App.—Corpus Christi 2007,

sovereign immunity challenges to Whistleblower Act claims as appropriately made by a plea to the jurisdiction requiring the consideration of evidence based on *Miranda*.²⁶⁵

On appeal before the supreme court, the Department urged the supreme court to apply *Miranda* and require the consideration of evidence that would negate two essential elements of Lueck's claim.²⁶⁶ Lueck argued *Miranda* does not control because of the construction of the Whistleblower Act, and the elements do not implicate sovereign immunity and ultimately subject matter jurisdiction.²⁶⁷ The resolution of *Miranda*'s application to Texas Whistleblower Act cases will necessarily await the supreme court's decision in *Lueck*. Until this issue is determined, Whistleblower Act claims may be resolved more easily through summary judgment procedure.

VI. CLARIFYING THE PLEA TO THE JURISDICTION

Before suggesting that new rules of civil procedure should be implemented to apply to all pleas to the jurisdiction, we must address why the current practice surrounding a plea to the jurisdiction is inadequate. Justice Brister made excellent points in

pet. filed) (holding that a good faith belief in a whistleblower claim is not a jurisdictional issue); *Tex. Bd. of Pardons & Paroles v. Feinblatt*, 82 S.W.3d 513, 520–22 (Tex. App.—Austin 2002, pet. denied) (“[A] good-faith belief . . . is an element of a whistleblower cause of action that goes to an employee’s ultimate recovery on the merits and is not a jurisdictional prerequisite to suit.”).

265. See *City of Waco v. Lopez*, 183 S.W.3d 825, 829–31 (Tex. App.—Waco 2005) (considering evidence of good faith), *rev'd on other grounds*, 259 S.W.3d 147 (Tex. 2008); *Potter County v. Parton*, No. 07-03-0338-CV, 2005 WL 1355111, at *3 (Tex. App.—Amarillo June 8, 2005, no pet.) (per curiam) (holding that a good faith belief in a whistleblower claim is a jurisdictional issue); *County of Bexar v. Steward*, 139 S.W.3d 354, 358–62 (Tex. App.—San Antonio 2004, no pet.) (considering evidence of good faith); *Henderson v. Tex. Dep't of Transp.*, No. 08-02-00058-CV, 2003 WL 21710744, at *3 (Tex. App.—El Paso July 24, 2003, no pet.) (mem. op., not designated for publication) (reviewing the record for evidence “in the pleadings or on the motion to dismiss”); *Bexar County v. Lopez*, 94 S.W.3d 711, 713–16 (Tex. App.—San Antonio 2002, no pet.) (considering evidence of good faith); *Burnet County Sheriff's Dep't v. Carlisle*, No. 03-00-00398-CV, 2001 WL 23204, at *2–8 (Tex. App.—Austin Jan. 11, 2001, no pet.) (mem. op., not designated for publication) (seeking evidence to determine if there had been a “violation of the law” in a whistleblower action).

266. Petitioner's Reply Brief on the Merits at 20 & n.1, *State v. Lueck*, No. 06-1034 (Tex. Oct. 22, 2007).

267. Respondent's Brief on the Merits at 31–32, *State v. Lueck*, No. 06-1034 (Tex. Sept. 18, 2007).

his concurrence in *Sykes* and in his dissent in *Miranda*.²⁶⁸ The plea to the jurisdiction has no corresponding procedures, as do motions for summary judgment and special exceptions. Despite a lack of clearly defined procedure, pleas to the jurisdiction are increasingly used to resolve subject matter jurisdiction and dispose of claims on the merits.

With the enactment of the Texas Tort Claims Act and the subsequent availability of interlocutory appeal, the plea to the jurisdiction surprisingly became the primary means of attacking lack of subject matter jurisdiction based on sovereign immunity. Having no procedure in place, courts and practitioners are struggling to create a procedure. The supreme court has offered little assistance. In responding to Justice Brister's dissent in *Miranda*, the majority implied that having such a long history, the plea to the jurisdiction must be useful: "[P]leas have been a useful procedural vehicle in Texas for over 150 years" ²⁶⁹ This statement implied procedural rules are unnecessary because the plea to the jurisdiction has existed for the past 150 years without problem. The absence of procedural rules associated with the plea to the jurisdiction, however, speaks less of its positive qualities and more to its infrequent use prior to 1997. Past use does not negate the need for procedural rules to assist courts and practitioners to adapt the plea to modern practice. The Ford Model T was an extremely useful vehicle on the roads of its day, but it is not the best mode of transportation in our modern era. Plea to the jurisdiction practice has changed dramatically and new procedures are warranted.

A. *The Problem with Judicial Discretion*

In response to Justice Jefferson's concern with a lack of procedural safeguards associated with pleas to the jurisdiction, the majority in *Miranda* replied that the procedure should be left to the trial court's discretion.²⁷⁰ The majority compared plea to the

268. See *Harris County v. Sykes*, 136 S.W.3d 635, 641–42 (Tex. 2004) (Brister, J., joined by O'Neill, J., concurring) (comparing pleas to the jurisdiction with summary judgments and special exceptions); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 239–45 (Tex. 2004) (Brister, J., joined by O'Neill & Schneider, JJ., dissenting) (discussing the inadequacies of the plea to the jurisdiction).

269. *Miranda*, 133 S.W.3d at 232.

270. *Id.* at 229.

jurisdiction procedures with special appearance procedures, specifically noting the basic three-day notice rule applicable to special appearances.²⁷¹ The court also referenced other procedures that lacked a specific notice period, including motions to strike intervention and class certification decisions.²⁷² But these comparisons are not instructive. The disposition of the foregoing motions does not result in a judgment on the merits. According to *Sykes*, pleas to the jurisdiction involving sovereign immunity should be disposed of by dismissal with prejudice.²⁷³ Because a plea to the jurisdiction regarding sovereign immunity may be dispositive of a plaintiff's claims, the same procedural protections should be afforded to the parties as are afforded to summary judgment participants.

A trial court's discretionary actions are subject to appellate review for an abuse of discretion;²⁷⁴ in other words, "whether the court acted without reference to any guiding rules and principles."²⁷⁵ The appellate court can reverse the ruling of the trial court "only if it was arbitrary or unreasonable"²⁷⁶ or if it was "so arbitrary and unreasonable as to amount to a clear and prejudicial error of law."²⁷⁷ Although the majority in *Miranda* referred to the trial court as being "in the best position to evaluate the appropriate time frame for hearing a plea in any particular case,"²⁷⁸ a lack of clear procedures requires the trial court, absent an agreement of the parties, to make a determination of the

271. *Id.* In the case of a special appearance, the rules require that any affidavits that will be used at the hearing must be served on the opposing party at least seven days in advance. TEX. R. CIV. P. 120a(3).

272. Texas Rule of Civil Procedure 60 allows a party to intervene in an existing cause of action, "subject to being stricken out by the court for sufficient cause on the motion of any party." TEX. R. CIV. P. 60. Rule 42 of the Texas Rules of Civil Procedure governs class action certification. TEX. R. CIV. P. 42.

273. *Sykes*, 136 S.W.3d at 639.

274. *See In re Doe*, 19 S.W.3d 249, 253 (Tex. 2000) ("The abuse of discretion standard applies when a trial court has discretion either to grant or deny relief based on its factual determinations."). *See generally* W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47, 60 (2006) (explaining the standard of review for an abuse of discretion).

275. *Cire v. Cummings*, 134 S.W.3d 835, 839 (Tex. 2004) (quoting *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985)).

276. *Id.*

277. *In re Bass*, 113 S.W.3d 735, 738 (Tex. 2003) (quoting *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding)).

278. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 229 (Tex. 2004).

appropriate time frame for a hearing in each plea that comes before the court.²⁷⁹ Should the resulting ruling appear unfair or harsh, the burden on the party seeking to overturn it is so heavy as to be almost preclusive.²⁸⁰

A comparison between summary judgment procedure and current plea to the jurisdiction practice is instructive. Because parties are aware of the specific summary judgment twenty-one day notice provision,²⁸¹ only departures from that time period require trial court intervention.²⁸² A determination need not be made before each summary judgment hearing of whether three days or twenty-one days is the appropriate amount of notice for the hearing.²⁸³ Likewise, the twenty-one day notice provision applies regardless of the geographic location of the court. Under current plea to the jurisdiction practice, the default notice period is three days, hardly long enough for a hearing that may dispose of a plaintiff's claim.²⁸⁴ Thus, the parties may struggle over the initial timing of the hearing, and thereafter, over any repleading and subsequent hearing settings. Not only must the settings be determined on a case-by-case basis, but the amount of notice provided is also determined on a court-by-court basis. Such an ad hoc determination results in judicial inefficiency, inconsistency,

279. At least one court has ruled on a plea to the jurisdiction without conducting a hearing. *See State v. Lueck*, 212 S.W.3d 630, 638 (Tex. App.—Austin 2006, pet. granted) (holding that the trial court did not err by granting a motion to dismiss a plea to the jurisdiction without a hearing).

280. By analogy, when a party receives in excess of twenty-one days' notice of a motion for summary judgment hearing, a denial of continuance for insufficient time to prepare is generally not an abuse of discretion. *Medford v. Medford*, 68 S.W.3d 242, 248 (Tex. App.—Fort Worth 2002, no pet.); *Hatteberg v. Hatteberg*, 933 S.W.2d 522, 527 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Cronen v. Nix*, 611 S.W.2d 651, 653 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.). *But see Verkin v. Sw. Ctr. One, Ltd.*, 784 S.W.2d 92, 95–96 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (holding that it may be an abuse of discretion to deny continuance to a defendant who has received more than twenty-one days' notice of a summary judgment hearing because a plaintiff can be presumed to have investigated his case, whereas the same presumption may not be applicable to a defendant).

281. TEX. R. CIV. P. 166a(c).

282. *See Miranda*, 133 S.W.3d at 235 (Jefferson, J., dissenting) (“As a uniform rule of procedure, the summary judgment rule leaves little to the imagination.”).

283. *See id.* at 235 n.2 (reflecting that, because of the harsh nature of summary judgment, “the [minimum notice] timeline is strictly enforced”).

284. *See id.* at 236 (decrying the inadequacy of three days' notice to prepare evidence for matters that could be dispositive).

and likely confusion.²⁸⁵ Without any guidelines, arbitrariness and lack of consistency are built into the resulting procedure.

The absence of procedures associated with pleas to the jurisdiction results in a lack of uniformity in practice and the potential for the denial of due process to plaintiffs. The supreme court may have provided the trial court with the discretion to determine the appropriate procedures in resolving a plea to the jurisdiction, but trial courts and practitioners would probably prefer some guidelines.

B. *Existing Procedures Do Not Work*

While special exceptions and motions for summary judgment may be useful tools in resolving jurisdiction, the adoption of either as a definitive procedure for pleas to the jurisdiction is problematic. Justice Brister made a persuasive argument in his concurrence in *Sykes* and dissent in *Miranda* that there are available procedures better suited for disposing of lack of subject matter jurisdiction claims.²⁸⁶ He pointed out that summary judgments and special exceptions have been used in the past, and under the standards set forth in *Miranda*, would be suitable for resolving jurisdiction without using an undefined plea to the jurisdiction.²⁸⁷ According to Justice Brister, special exceptions could be used for analysis of claims of lack of jurisdiction based on the pleadings, and summary judgment would be an appropriate means of resolving jurisdictional issues requiring evidence.²⁸⁸ He

285. *See id.* at 235 (observing that the majority's holding will result in procedures that "vary from county to county and from judge to judge").

286. *See generally* *Harris County v. Sykes*, 136 S.W.3d 635, 641–42 (Tex. 2004) (Brister, J., joined by O'Neill, J., concurring) (explaining why summary judgments and special exceptions are better than a "plea to the jurisdiction" motion for raising the issue of governmental immunity); *Miranda*, 133 S.W.3d at 239–45 (Brister, J., joined by O'Neill & Schneider, JJ., dissenting) (advocating the use of standard motions for asserting governmental immunity, such as summary judgment and special exceptions, while criticizing the use of pleas to the jurisdiction as a vehicle for asserting governmental immunity).

287. *See Miranda*, 133 S.W.3d at 243 (Brister, J., joined by O'Neill & Schneider, JJ., dissenting) ("[R]eturning to standard motions as the vehicles for asserting governmental immunity would clarify what the jurisdictional hearing will be like and simplify many procedural questions.").

288. *See id.* at 243–44 (explaining that avoidance of pleas to jurisdiction would not change the use of governmental immunity since the process associated with a plea to jurisdiction based on the plaintiff's pleadings is "identical to the rules governing special exceptions," and governmental immunity based on evidence requires a determination by a

noted such procedures were often used to resolve past jurisdictional issues.²⁸⁹

Although special exceptions may be appropriate when the plaintiff has pled herself out of court, most cases will involve a more detailed examination of the jurisdictional issue and the evidence.²⁹⁰ Many times a plea to the jurisdiction challenges both the pleadings and the underlying jurisdictional facts. Even in those cases where the jurisdictional claim is based on a pleading defect, the better practice under *Miranda* is to file a plea to the jurisdiction rather than a special exception.

The purpose of special exceptions is to point out with particularity the defect, omission, generality, or other insufficiency in the pleading.²⁹¹ Special exceptions are used to challenge the sufficiency of a pleading.²⁹² If a trial court sustains a special exception, an opportunity to amend the pleadings to cure the defect is afforded the other party before the case is dismissed.²⁹³ In reviewing the trial court's order of dismissal upon special exceptions, the appellate court accepts as true all factual allegations set forth in the pleadings.²⁹⁴ On appeal, the appellate court reviews the trial court's ruling under an abuse of discretion standard.²⁹⁵ Under *Miranda*, however, the plea to the jurisdiction is reviewed de novo regardless of whether the plea is based on a pleading defect or underlying factual deficiencies.²⁹⁶ Given the different standards of review between special exceptions and pleas to the jurisdiction, reviewing a grant of special exceptions based on

jury, which is the same standard found with summary judgments).

289. *See id.* at 243, 244 nn.38–39 (stating that governmental immunity has been asserted through special exceptions and summary judgment “[f]or decades,” and citing several cases as examples of both).

290. *But see* Mahon v. Vandygriff, 578 S.W.2d 144, 146 n.1 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (“The preferable method to question jurisdiction is by plea to the jurisdiction rather than by special exception.”), *disapproved in part by* Tex.-N.M. Power Co. v. Tex. Indus. Energy Consumers, 806 S.W.2d 230, 231 n.3 (Tex. 1991).

291. TEX. R. CIV. P. 91.

292. *Id.*; *see also* Roark v. Allen, 633 S.W.2d 804, 810 (Tex. 1982) (stating that if the defendant in a medical malpractice case considered the petition against him to be “obscure,” then he should have “specifically excepted” to the petition).

293. Friesenhahn v. Ryan, 960 S.W.2d 656, 658 (Tex. 1998).

294. Pack v. Crossroads, Inc., 53 S.W.3d 492, 507 (Tex. App.—Fort Worth 2001, pet. denied).

295. LaRue v. GeneScreen, Inc., 957 S.W.2d 958, 961 (Tex. App.—Beaumont 1997, pet. denied).

296. Tex. Dep’t of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226 (Tex. 2004).

lack of jurisdiction could lead to application of the wrong standard.

Summary judgment procedure initially appears appropriate to resolve jurisdictional disputes because its standard of review mirrors the plea to the jurisdiction standard of review set forth in *Miranda*.²⁹⁷ Abandoning the plea and using summary judgment procedure to resolve jurisdictional issues would resolve complaints regarding the lack of procedure associated with pleas to the jurisdiction.²⁹⁸ In his concurrence in *Sykes*, Justice Brister noted that the current difference in the disposition of pleas to the jurisdiction based on sovereign immunity vanishes if a summary judgment procedure is used because the disposition is a judgment on the merits.²⁹⁹ Thus, there would be no distinction in the disposition of the plea to the jurisdiction depending on the jurisdictional claim being resolved.³⁰⁰ But federal courts do not use summary judgment procedure to determine jurisdiction precisely because summary judgment is a resolution on the merits.³⁰¹

Summary judgments are better suited to resolve matters on the merits.³⁰² They result in both issue and claim preclusion.³⁰³ Yet

297. *See id.* at 228 (“We acknowledge that this standard generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a(c).”).

298. Specifically employing summary judgment would resolve the complaints announced by Chief Justice Wallace Jefferson in his dissent in *Miranda*. *See id.* at 236 (Jefferson, J., dissenting) (warning that Rule 21’s three-day notice may provide plaintiffs with inadequate time for discovery before a hearing on a plea to the jurisdiction).

299. *Harris County v. Sykes*, 136 S.W.3d 635, 641–42 (Tex. 2005) (Brister, J., joined by O’Neill, J., concurring).

300. *Id.* According to the majority in *Sykes*, pleas to the jurisdiction resolving issues of sovereign immunity must be dismissed with prejudice. *Id.* at 639 (majority opinion). However, those involving other aspects of jurisdiction, including standing, are dismissed without prejudice. *Id.*; *see DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 308–09, 313–14 (Tex. 2008) (noting summary judgment is improper if the court has no jurisdiction).

301. *See, e.g., Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 430–33 (5th Cir. 2002) (discussing dismissal without prejudice in the context of a settlement agreement involving state health officials).

302. *Prakash v. Am. Univ.*, 727 F.2d 1174, 1181–82 (D.C. Cir. 1984); *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 855 (Tex. 1995); *see also Spencer v. Allied Van Lines*, 937 S.W.2d 587, 589 (Tex. App.—Texarkana 1996, no writ) (“A court must grant summary judgment not on the nonmovant’s default, but on the merit of the summary judgment proof the movant adduces.”).

303. *See Dicken v. Ashcroft*, 972 F.2d 231, 233 n.5 (8th Cir. 1992) (“It is well established that summary judgment is a final judgment on the merits for purposes of *res judicata*.”); *Meador v. Oryx Energy Co.*, 87 F. Supp. 2d 658, 664 (E.D. Tex. 2000) (explaining that all the requirements for claim and issue preclusion were satisfied in a case involving the same claims and issues as an earlier case, which had ended in a summary judgment serving as a final judgment on the merits); *Morris v. White*, 380 S.W.2d 916, 917

a determination on the merits is inappropriate when the court lacks jurisdiction.³⁰⁴ Prior to *Liberty Mutual Insurance Co. v. Sharp*,³⁰⁵ courts held that the only disposition available when the court lacked jurisdiction was a dismissal without prejudice.³⁰⁶ The rationale was that the court had jurisdiction to make a determination about its jurisdiction, but once it determined it lacked jurisdiction, the court had no jurisdiction to make any determination on the merits.³⁰⁷ The supreme court in *Sykes* held that the disposition of a plea to the jurisdiction based on sovereign immunity is a dismissal with prejudice, yet curiously, dismissals based on standing and exhaustion of administrative remedies are not with prejudice.³⁰⁸

There is no articulated basis for the difference in disposition when a court determines that it lacks subject matter jurisdiction. In *Sykes*, the supreme court relied on several appellate cases that approved dismissal of sovereign immunity claims with

(Tex. Civ. App.—San Antonio 1964, writ ref'd) (explaining that a summary judgment afforded res judicata effect preventing the affected action from being filed in a different county).

304. *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 917 (6th Cir. 1986); *DaimlerChrysler*, 252 S.W.3d at 304; *see also* *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999) (“Jurisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court’s decision will bind them.”).

305. *Liberty Mut. Ins. Co. v. Sharp*, 874 S.W.2d 736 (Tex. App.—Austin 1994, writ denied).

306. *Stephanou v. Tex. Med. Liab. Ins. Underwriting Ass’n*, 792 S.W.2d 498, 500 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (“A dismissal for lack of jurisdiction is without prejudice.”); *Mercer v. Gray*, 109 S.W.2d 1107, 1107–08 (Tex. Civ. App.—Fort Worth 1937, no writ) (stating that the trial court should have dismissed the plaintiff’s claims without prejudice); *see* *Doggett v. Nitschke*, 498 S.W.2d 339, 339–40 (Tex. 1973) (per curiam) (vacating a county court’s judgment after determining that it lacked jurisdiction to hear the case); *Ross v. Brown*, 491 S.W.2d 690, 691 (Tex. Civ. App.—Tyler 1973, writ ref’d n.r.e.) (dismissing a case “without prejudice to appellants to seek relief in the proper forum,” after determining that the trial court did not have jurisdiction over the case); *Smith v. Miller*, 285 S.W.2d 413, 414 (Tex. Civ. App.—Galveston 1956, no writ) (stating that a dismissal without prejudice is proper when the court lacks jurisdiction).

307. *Washington v. Fort Bend Indep. Sch. Dist.*, 892 S.W.2d 156, 159 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (“A plea to the jurisdiction is a dilatory plea to defeat a cause of action without impinging on its merits . . .”); *cf.* *Tex. Highway Dept. v. Jarrell*, 418 S.W.2d 486, 488 (Tex. 1967) (distinguishing between a plea to the jurisdiction, a plea in abatement and a plea in bar).

308. *See Harris County v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004) (“[A] dismissal with prejudice is improper when the plaintiff is capable of remedying the jurisdictional defect.”).

prejudice.³⁰⁹ Yet, the referenced sovereign immunity cases merely state, without explanation, that the disposition is with prejudice.³¹⁰ The case cited most frequently in support of disposition with prejudice is *Liberty Mutual*. Yet, *Liberty Mutual* contains little explanation in support of dismissal with prejudice.³¹¹ Referencing special exception practice, the court approved the trial court's dismissal of the plaintiff's case because the plaintiff was unable to amend his claim to allege consent to sue. The appellate court characterized the trial court's actions by stating: "The trial court dismissed this suit for lack of jurisdiction, not on the merits of Liberty Mutual's case."³¹² This analysis appears inconsistent with the trial court's dismissal with prejudice.

The court should reconsider its holding in *Sykes* regarding the disposition of pleas to the jurisdiction involving sovereign immunity with prejudice particularly in view of *DaimlerChrysler v. Inman*.³¹³ In *DaimlerChrysler*, the supreme court reviewed a trial court's class certification. In deciding the trial court lacked jurisdiction to determine the class certification because the plaintiffs lacked standing, the court noted: "Without jurisdiction, the trial court should not render judgment that the plaintiffs take

309. *Id.*

310. See *Martin v. Tex. Bd. of Criminal Justice*, 60 S.W.3d 226, 231 (Tex. App.—Corpus Christi 2001, no pet.) (citing *Liberty Mut.*, 874 S.W.2d at 739) ("[W]hen a lawsuit is barred by sovereign immunity, dismissal with prejudice is proper."); *City of Midland v. Sullivan*, 33 S.W.3d 1, 6 (Tex. App.—El Paso 2000, pet. dism'd w.o.j.) (citing *Lamar Univ. v. Doe*, 971 S.W.2d 191, 196 (Tex. App.—Beaumont 1998, no pet.)) (relating that when a lawsuit is barred by sovereign immunity, dismissal with prejudice is proper); *City of Cleburne v. Trussell*, 10 S.W.3d 407, 409 (Tex. App.—Waco 2000, no pet.) (citing *Liberty Mut.*, 874 S.W.2d at 739) (noting that when a lawsuit is barred by sovereign immunity, dismissal with prejudice is proper); *Univ. of Tex. Med. Branch v. Hohman*, 6 S.W.3d 767, 771 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd w.o.j.) (citing *Liberty Mut.*, 874 S.W.2d at 739) (stating, without further comment, that dismissal with prejudice is proper in a sovereign immunity case); *Hampton v. Univ. of Tex.—M.D. Anderson Cancer Ctr.*, 6 S.W.3d 627, 631 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (reversing the trial court's dismissal with prejudice); *Lamar Univ.*, 971 S.W.2d at 196 (citing *Liberty Mut.*, 874 S.W.2d at 739); *Jones v. City of Stephenville*, 896 S.W.2d 574, 577 (Tex. App.—Eastland 1995, no writ) ("The trial court correctly dismissed with prejudice plaintiffs' claims under the Texas [c]onstitution."); *Liberty Mut.*, 874 S.W.2d at 740 (dismissing "with prejudice for want of jurisdiction" without further explanation for "with prejudice").

311. See generally *Liberty Mut.*, 874 S.W.2d at 740 (affirming the trial court's "order dismissing the cause with prejudice for want of jurisdiction").

312. *Id.* at 739.

313. *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299 (Tex. 2008).

nothing; it should simply dismiss the case.”³¹⁴ The recognition of the inability of the court to rule on the merits when it lacks standing appears inapposite to *Sykes*. The *Miranda* opinion contains a lengthy footnote citing with approval the federal circuits’ consideration of evidence before resolving a jurisdictional issue.³¹⁵ Notably, the referenced federal circuits’ opinions uniformly do not dismiss a case for lack of subject matter jurisdiction with prejudice.³¹⁶

Disposition under federal Rule 12(b)(1), motions claiming lack of jurisdiction, is uniformly a dismissal without prejudice.³¹⁷ “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause.”³¹⁸ Unlike 12(b)(6) motions, a motion attacking jurisdiction can never ripen into a summary judgment because the disposition of a summary judgment is a judgment on the merits of the matter presented.³¹⁹ “Since the granting of summary judgment is a disposition on the merits of the

314. *Id.* at 304.

315. See *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 n.6 (Tex. 2004) (listing federal cases allowing courts to hear evidence on fact questions involving jurisdiction).

316. *Pa. Prison Soc’y v. Cortes*, 508 F.3d 156, 169 (3d Cir. 2007); *Graham v. Hartford Life & Accident Ins. Co.*, 501 F.3d 1153, 1163 (10th Cir. 2007); *Rigby v. Damant*, 486 F.3d 692, 692 (1st Cir. 2007); *Henderson v. Munn*, 439 F.3d 497, 504 (8th Cir. 2006); *Intera Corp. v. Henderson*, 428 F.3d 605, 621 (6th Cir. 2005); *Nat’l Adver. Co. v. City of Miami*, 402 F.3d 1335, 1341 (11th Cir. 2005); *Freudensprung v. Offshore Tech. Servs. Inc.*, 379 F.3d 327, 347 (5th Cir. 2004); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 828 (9th Cir. 2003); *Motorola Credit Corp. v. Uzan*, 322 F.3d 130, 138 (2d Cir. 2003); *Mabrey v. Farthing*, 280 F.3d 400, 403 (4th Cir. 2002).

317. See *Stalley ex rel. United States v. Orlando Reg’l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008) (“A dismissal for lack of subject matter jurisdiction is not a judgment on the merits and is entered without prejudice.”); *Davis v. United States*, 961 F.2d 53, 55–57 (5th Cir. 1991) (stating that a district court’s decision to dismiss a case with prejudice based on a 12(b)(1) motion was incorrect because the court did not reach the merits of the case).

318. *Hix v. U.S. Army Corps of Eng’rs*, 155 F. App’x 121, 127 (5th Cir. 2005) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998)). When it lacks jurisdiction, “the court should not adjudicate the merits of the [case]” but should dismiss the same. *Id.* (quoting *Stanley v. CIA*, 639 F.2d 1146, 1157 (5th Cir. 1981)).

319. See *Frederiksen v. City of Lockport*, 384 F.3d 437, 438 (7th Cir. 2004) (instructing that, under the federal *Rooker-Feldman* doctrine, a dismissal for lack of jurisdiction and a dismissal with prejudice are mutually exclusive). “A suit dismissed for lack of jurisdiction cannot *also* be dismissed ‘with prejudice’; [that is] a disposition on the merits, which only a court with jurisdiction may render.” *Id.*

case, a motion for summary judgment is not the appropriate procedure for raising the defense of lack of subject matter jurisdiction.”³²⁰ Federal courts make no distinction between the disposition of claims involving sovereign immunity and other jurisdictional claims.

Currently, in cases involving subject matter jurisdiction disputes not based on sovereign immunity, the disposition is dismissal without prejudice.³²¹ Summary judgment practice does not accommodate such a disposition. The use of a separate procedure designed for a plea to the jurisdiction would ensure that the correct disposition is obtained.

VII. PROPOSAL

We suggest the adoption of a uniform procedure to apply to all pleas to the jurisdiction. Such a procedure would provide safeguards to the plaintiff and assist the trial court and practitioners in efficiently resolving jurisdictional disputes. The supreme court should adopt rules of civil procedure to govern plea to the jurisdiction practice.³²² Because attorneys and courts are familiar with the rules governing motions for summary judgment, a procedure reflecting similar timelines and evidence could be adopted for pleas to the jurisdiction.³²³ However, other models within the current rules of civil procedure should also be explored.

A. Models

As previously noted, current procedures are insufficient to address the needs of courts and practitioners in resolving pleas to the jurisdiction. The Texas Supreme Court has referenced at least three different procedures governed by specific rules of civil

320. *Hix*, 155 F. App'x at 128 (quoting *Stanley*, 639 F.2d at 1157). In *Hix*, the Fifth Circuit held that the district court erred in dismissing the plaintiffs' claims with prejudice because the district court lacked subject matter jurisdiction and could not reach the merits of the plaintiffs' claims. *Id.*

321. *Harris County v. Sykes*, 136 S.W.3d 635, 641 (Tex. 2004) (Brister, J., joined by O'Neill, J., concurring) (“We have recently held dismissal must be *without* prejudice when based on mootness, forum non conveniens, or exclusive jurisdiction.”).

322. *See In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008) (citing TEX. CONST. art. V, § 31(b)) (“[The Texas Supreme Court] is obligated to promulgate rules of practice and procedure in civil cases.”).

323. *See generally* TEX. R. CIV. P. 166a (establishing basic rules and procedures governing motions for summary judgment in Texas).

procedure that may provide guidance in resolving a plea: special appearance, special exception, and motion for summary judgment.³²⁴ Each of the foregoing has rules that could be adapted to the plea to the jurisdiction.

B. *Basic Structure of Each Model*

1. Summary Judgment

Because the review standards set forth in *Miranda* mirror summary judgment standards, summary judgment procedure is appropriate to review. Similar to the plea to the jurisdiction, the purpose of summary judgment procedure is to permit the trial court to promptly dispose of unmeritorious claims.³²⁵ Although a judgment on the merits, summary or otherwise, is inappropriate for many types of pleas to the jurisdiction, there are several summary judgment procedures that would be useful for resolving pleas to the jurisdiction. Some of the more useful provisions that could be adopted are discussed below.³²⁶

1. The plaintiff may move for summary judgment any time after the defendant answers the lawsuit.³²⁷ The defendant may move for summary judgment at any time.³²⁸ The moving party may

324. *See* Tex. Dep't of Parks & Wildlife v. *Miranda*, 133 S.W.3d 217, 229 (Tex. 2004) (discussing the procedural similarities between a hearing on a plea to the jurisdiction and a special appearance); *see also id.* at 239 (Brister, J., joined by O'Neill & Schneider, JJ., dissenting) (comparing a plea to the jurisdiction with a special exception and a motion for summary judgment); *cf. Sykes*, 136 S.W.3d at 642 (Brister, J., joined by O'Neill, J., concurring) (contrasting plea to the jurisdiction practice with summary judgment and special exceptions practice).

325. *See* *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 n.5 (Tex. 1979) (noting that the underlying purpose of Texas's summary judgment rules is the elimination of "patently unmeritorious claims and untenable defenses" (citing *Gulbenkian v. Penn*, 151 Tex. 142, 144, 252 S.W.2d 929, 931 (1952))); *see also* *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989) ("We use summary judgments merely 'to eliminate patently unmeritorious claims and untenable defenses . . .'" (quoting *Clear Creek Basin Auth.*, 589 S.W.2d at 678 n.5)).

326. The proposed rules are modeled on Texas Rule of Civil Procedure 166a, which establishes the appropriate motions and proceedings, use of discovery, and form and use of affidavits to govern summary judgment. *See generally* TIMOTHY PATTON, *SUMMARY JUDGMENTS IN TEXAS: PRACTICE, PROCEDURE AND REVIEW* (3d ed. 2008) (reviewing and teaching summary judgment practice); David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 54 BAYLOR L. REV. 1 (2002) (examining various aspects of summary judgment evidence and procedure in Texas).

327. TEX. R. CIV. P. 166a(a).

328. TEX. R. CIV. P. 166a(b).

move with or without supporting affidavits.³²⁹

2. The motion must be in writing and state the specific grounds upon which it is based.³³⁰

3. Unless otherwise granted by leave of court, the movant has twenty-one days prior to the hearing date to file and serve the motion and supporting affidavits. The party opposing the motion must file and serve a response and opposing affidavits prior to seven days before the hearing.³³¹

4. Issues not expressly presented to the trial court in the motion may not be considered at the hearing.³³²

5. No oral testimony may be received at the hearing.³³³

6. Evidence may consist of discovery products, depositions, pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records as well as affidavits of expert and lay witnesses.³³⁴

7. Affidavits must meet form and content requirements and may be supplemented.³³⁵ Affidavits made in bad faith or solely to cause delay may invoke adverse consequences.³³⁶

8. A court may grant a continuance to obtain affidavits, depositions, or discovery.³³⁷

The previous portions of the rules relating to summary judgment procedure are well adapted to pleas to the jurisdiction. The

329. TEX. R. CIV. P. 166a(a)–(b).

330. TEX. R. CIV. P. 166a(c). If adopted for plea to the jurisdiction procedure, Rule 166a(c)'s specificity requirement would alleviate the charge that the plea to the jurisdiction is a regression to general demurrer practice.

331. *Id.*

332. *Id.*

333. *Id.*

334. TEX. R. CIV. P. 166a(d) (noting that discovery products “not on file with the clerk” may also be used as summary judgment evidence).

335. TEX. R. CIV. P. 166a(f) (detailing the appropriate form for a summary judgment affidavit).

336. TEX. R. CIV. P. 166a(h) (asserting that during summary judgment proceedings the court shall order a party employing bad faith affidavits to pay the opposing party for reasonable expenses caused by the filing, and that the offending party may also be held in contempt).

337. TEX. R. CIV. P. 166a(g) (stating that when a party opposing a motion for summary judgment is unable to present a proper affidavit, a court may order a continuance and permit further affidavits to be obtained, depositions to be taken, or allow for further discovery).

procedure is in accord with the standards set forth in *Miranda* for resolving pleas to the jurisdiction.³³⁸ The plea to the jurisdiction could be asserted as a preliminary matter, and if appropriate, resolved within twenty-one days. If discovery was necessary, the affidavit and supporting evidence procedures would be consistent with summary judgment practice.³³⁹

Absent from summary judgment practice is the ability to present live testimony before the court. Currently, trial courts may consider live testimony in resolving pleas to the jurisdiction.³⁴⁰ Yet policy reasons supporting the prohibition against live testimony at summary judgment proceedings equally apply to a plea to the jurisdiction.³⁴¹ If the standard of review is similar to that of a summary judgment motion, with no fact issues to be resolved by the trial court, the physical presence of a witness is unnecessary and may be confusing.³⁴² The use of affidavits would provide all parties and the court with notice of the basis of the plea and any evidence supporting or refuting the same. It would avoid surprise, requests for continuance, and requests for additional time to obtain controverting evidence that the non-movant did not anticipate.³⁴³ This is particularly important considering the

338. Rather than the standards for resolution set forth in Rule 166a(c), the Texas Supreme Court's analysis of the standard of review in *Miranda* could be refined and incorporated into a rule governing pleas to the jurisdiction. *Cf.* *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–34 (Tex. 2004) (reviewing standards for pleas to the jurisdiction).

339. *Cf.* *FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 628 (Tex. 2008) (“The trial court is allowed to conduct a hearing on a plea to the jurisdiction . . . in a manner similar to how it hears a summary judgment motion, and may consider affidavits and other summary judgment-type evidence.”).

340. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 559 (Tex. 2000) (Phillips, C.J., joined by Enoch & Hankinson, JJ., dissenting) (anticipating a circumstance where the introduction of hearsay testimony could be considered in a plea to the jurisdiction but not in a motion for summary judgment).

341. *Cf.* *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677 (Tex. 1979) (recognizing that if issues were allowed to be presented orally, parties would request that a court reporter record the summary judgment hearing, and such a practice would be inappropriate).

342. The presentation of live witnesses may not give the opposing party sufficient notice of the testimony that must be refuted, and implies that judgments regarding credibility and resolution of fact issues will occur at the hearing, rather than according to the standard set forth in *Miranda*. *See Miranda*, 133 S.W.3d at 227–28 (describing the standard for admitting evidence of jurisdictional facts when considering jurisdictional issues on a plea to the jurisdiction).

343. *See id.* at 235 (Jefferson, J., dissenting) (highlighting the need for providing the

supreme court has encouraged resolution of the plea to the jurisdiction on a preliminary basis.³⁴⁴

2. Special Appearance

Special appearance procedure may also serve as a model for developing a plea to the jurisdiction procedure.³⁴⁵ In *Miranda*, the majority referenced special appearance practice in reply to the argument made by Justice Jefferson that summary judgment procedures should be in place to protect the non-movant.³⁴⁶ Specifically, the majority noted special appearance rules lack any notice provision, other than the three-day notice provision of Rule of Civil Procedure 21.³⁴⁷ The majority also referenced the ability to obtain discovery as necessary under Rule 120a.³⁴⁸ The use of oral testimony to resolve a special appearance is in accord with current plea to the jurisdiction practice, but suffers from the problems noted above. The resolution of special appearance

non-movant with sufficient notice of the substance of the movant's plea to the jurisdiction in order to allow the non-movant adequate time to obtain responsive affidavits or testimony).

344. *See id.* at 233 (majority opinion) ("Trial courts should decide dilatory pleas early at the pleading stage of litigation if possible."). Pleas to the jurisdiction are often filed before any discovery; thus, the non-movant may have no knowledge of the substance of the testimony of any of the live witnesses who may testify or the necessary information to refute the testimony. *Id.* at 217.

345. *See generally* TEX. R. CIV. P. 120a(1) (noting that a special appearance is the procedure used to challenge the trial court's jurisdiction over the person or property); *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 380 n.17 (Tex. 2006) (recognizing that special appearances are used to object to a court's jurisdiction "over the person or property of the defendant on the ground that such party or property is not *amenable* to process issued by the courts of this State" (quoting TEX. R. CIV. P. 120a(1))).

346. *Miranda*, 133 S.W.3d at 228–29 (arguing that nothing prevents a court from applying the continuance and discovery procedures governing special appearance to a plea to the jurisdiction).

347. *Id.* at 229 ("[Rule 120a] does not specify the length of a notice period and is therefore presumably subject to the three-day notice period of Rule 21."). *But see* TEX. R. CIV. P. 120a(3) (requiring affidavits to be served seven days prior to the hearing).

348. *See id.* (noting that Rule 120a grants a court the ability to allow more time for discovery depending upon the circumstances and developments of the case). Rule 120a(3) provides in part:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

TEX. R. CIV. P. 120a(3).

issues before the court hears any other plea also comports with the supreme court's admonition that the plea to the jurisdiction should be heard as soon as possible.³⁴⁹

From a practical standpoint, the three-day notice provision used for a special appearance may not be sufficient for a plea to the jurisdiction.³⁵⁰ A special appearance results in a dismissal without prejudice.³⁵¹ The plaintiff is not precluded from filing a claim in another court which has personal jurisdiction over the parties. According to *Sykes*, pleas to the jurisdiction based on sovereign immunity require a dismissal with prejudice.³⁵² Three days' notice to prepare for a hearing that may dispose of the plaintiff's claims on the merits is simply inadequate.³⁵³

Rule 120a provides that a party opposing a special appearance may present affidavits to the court explaining the reason why he cannot obtain the necessary affidavits to justify his opposition.³⁵⁴ In response, the court may order a continuance to permit the affidavits to be obtained or discovery to be had. This provision would be appropriate in a plea to the jurisdiction procedure but does not justify the inadequacy of a three-day notice period.

3. Special Exceptions

Special exceptions have been used to determine pleas to the jurisdiction.³⁵⁵ Rule 91 of the Texas Rules of Civil Procedure

349. See TEX. R. CIV. P. 120a(1) (requiring a motion for special appearance to be made and filed "prior to motion to transfer venue or any other plea, pleading or motion").

350. See generally TEX. R. CIV. P. 21 (obligating a party scheduling a hearing on a motion to serve notice "not less than three days before the time specified for the hearing").

351. E.g., *Nguyen v. Desai*, 132 S.W.3d 115, 118–19 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (reiterating that a plaintiff's suit against a defendant whose special appearance is granted is dismissed without prejudice).

352. *Harris County v. Sykes*, 136 S.W.3d 635, 640–41 (Tex. 2004).

353. See *Miranda*, 133 S.W.3d at 236 (Jefferson, J., dissenting) (criticizing the three-day notice requirement under Rule 21); see also *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996, writ denied) (noting that summary judgment is a harsh remedy requiring strict construction and is not intended to permit a trial by deposition or affidavit); *Williams v. City of Angleton*, 724 S.W.2d 414, 417 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (explaining that summary judgment is a harsh remedy and that its notice provisions are intended to protect the non-movant), *disapproved of by Lewis v. Blake*, 876 S.W.2d 314 (Tex. 1994).

354. TEX. R. CIV. P. 120a(3) (stating that a court may grant a continuance to give an opposing party the opportunity to obtain affidavits with facts supporting the position).

355. E.g., *Noell v. Air Park Homeowners Ass'n, Inc.*, 246 S.W.3d 827, 831 (Tex.

governs special exceptions.³⁵⁶ The purpose of special exceptions is to inform the opposing party of defects in its pleadings so the party can cure them if possible.³⁵⁷ When special exceptions are granted, the opposing party must be granted an opportunity to amend his pleadings.³⁵⁸ Likewise, when a plea to the jurisdiction based on the pleadings is granted, the non-movant generally has a right to amend.³⁵⁹ The right to amend should be incorporated into any plea to the jurisdiction procedure. Special exception rules seem appropriate for a plea to the jurisdiction based on pleadings.

C. *Suggested Procedure*

Any procedure governing pleas to the jurisdiction must encompass a two-tier approach. Mirroring the language in *Miranda*, if a plea is based on a pleading deficiency, the respondent must be given an opportunity to amend the pleading. If a plea challenges jurisdictional facts, evidence may be considered.

In instances where the pleading is challenged, two hearings may be required. The first hearing would be set with twenty-one days' notice. If the court determined the pleading was deficient, the respondent would have one week to amend from the date of the order. The second hearing would occur no earlier than fourteen days after the order granting leave to amend is signed. The respondent could have his amended pleading considered at the second hearing by filing his amended pleading seven days before the hearing. At the second hearing, the trial court would consider

App.—Dallas 2008, pet. denied) (recognizing the practice of filing special exceptions in conjunction with a plea to the jurisdiction to argue lack of subject matter jurisdiction); *see also* State v. Lueck, 212 S.W.3d 630, 634 (Tex. App.—Austin 2006, pet. granted) (discussing a specific instance where the filing of special exceptions coincided with a plea to the jurisdiction).

356. *See* TEX. R. CIV. P. 91 (governing special exceptions and providing specific requirements for excepting to a pleading).

357. *See* Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 897 (Tex. 2000) (stating that the purpose of a special exception is to identify a pleading's defects so that they may be cured by amendment).

358. *See* Friesenhahn v. Ryan, 960 S.W.2d 656, 658 (Tex. 1998) (citing Tex. Dep't of Corr. v. Herring, 513 S.W.2d 6, 10 (Tex. 1974)) (noting that a pleader must be given an opportunity to amend the pleading when the court sustains special exceptions).

359. *See* County of Cameron v. Brown, 80 S.W.3d 549, 555 (Tex. 2002) (stating that a plaintiff should be allowed to amend a plea to the jurisdiction when the plea contains insufficient facts to establish jurisdiction); *see also* Harris County v. Sykes, 136 S.W.3d 635, 642 (Tex. 2004) (Brister, J., joined by O'Neill, J., concurring) (recognizing that a court must allow plaintiffs an opportunity to remedy defects in a plea to the jurisdiction).

the amended pleading and determine whether the plea to the jurisdiction should be granted.

If the plea challenges jurisdictional facts, the procedure would follow summary judgment practice, incorporating the time periods and evidence requirements from the rules governing summary judgment. If discovery is necessary, discovery relating to jurisdictional issues should be permitted before the hearing on the plea.

It is apparent from the review of the foregoing that a workable procedure for pleas to the jurisdiction could be crafted using existing summary judgment, special appearance, and special exception procedures. As a result, the trial court and practitioner would have a familiar procedure to govern the resolution of jurisdictional issues. Until the supreme court adopts specific rules, local court rules could be adopted addressing basic procedures for hearing a plea to the jurisdiction provided they are not inconsistent with the Rules of Civil Procedure.³⁶⁰ Suggested rules follow the conclusion of this article.

VIII. CONCLUSION

The dramatic increase in the use of the plea to the jurisdiction, combined with a lack of procedures governing the resolution of the plea, has created a hardship for both trial courts and practitioners. Cases involving sovereign immunity and purported waiver under the Texas Tort Claims Act are difficult to resolve without addressing the merits of the claim. The stakes are high when the disposition of certain pleas to the jurisdiction can result in a dismissal with prejudice. With such dire consequences possible, it is necessary to develop a consistent and coherent procedure to govern resolution of pleas to the jurisdiction. Although existing procedures like summary judgment and special exceptions have been used in the past, they are not adequate. The supreme court should address the ongoing needs of the bench and bar and enact specific rules to govern the plea to the jurisdiction.

360. *See generally* TEX. R. CIV. P. 3a (prohibiting local rules from being inconsistent with the Rules of Civil Procedure or time periods contained in the Rules).

Appendix A: Proposed Amendment to the Texas Rules of Civil Procedure

TRCP 166b. Plea to the Jurisdiction

(a) For Movant

A party seeking to challenge the subject matter jurisdiction of the court may, at any time after the opposing party has appeared or answered, move for dismissal of any or all claims based upon the court's lack of jurisdiction. A plea to the jurisdiction may be asserted as to the entire case or as to any severable claim involved therein. The Movant may seek dismissal based upon the pleadings, based upon a challenge to the existence of jurisdictional facts, or both.

(b) Plea Based upon the Evidence

A Plea to the jurisdiction challenging the existence of jurisdictional facts shall state the specific grounds therefore. Except on leave of court, with notice to opposing counsel, the plea and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the responding party, not later than seven days prior to the day of the hearing, may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. Dismissal shall be rendered if: (1) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the plea or response; and (2) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before the dismissal with permission of the court, show that there is no genuine issue as to any material fact regarding the jurisdictional issue and the moving party is entitled to dismissal as a matter of law for lack of subject matter jurisdiction based on the grounds expressly set out in the plea. Jurisdictional issues and evidence not expressly presented to the

trial court by written plea, or response, shall not be considered on appeal as grounds for reversal. A dismissal may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness, as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(c) Appendices, References, and Other Use of Discovery Not Otherwise on File

Discovery products not on file with the clerk may be used as evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as plea to the jurisdiction proofs: (1) at least twenty-one days before the hearing if such proofs are to be used to support the dismissal; or (2) at least seven days before the hearing if such proofs are to be used to oppose the plea to the jurisdiction.

(d) Partial Dismissal

If dismissal is not rendered upon the whole case and trial is necessary as to remaining claims, the judge may, at the plea to the jurisdiction hearing, examine the pleadings and the evidence on file, interrogate counsel, ascertain what claims remain, and make an order specifying the claims remaining to be tried and directing such further proceedings in the action as are just.

(e) Form of Affidavits

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by

further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(f) When Affidavits Are Unavailable

Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for dismissal or may order a continuance to permit affidavits to be obtained, depositions to be taken, or discovery to be had, or may make such other order as is just.

(g) Affidavits Made in Bad Faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Continuing Hearing

Should it appear to the court that a fuller development of the case is necessary before making a determination, the court shall continue the hearing.

(i) Plea to the Jurisdiction Based on the Pleadings

A party seeking to obtain a dismissal of a claim, based on the pleader's (1) failure to allege facts that affirmatively demonstrate the trial court's subject matter jurisdiction, or (2) assertions of facts that affirmatively negate jurisdiction, may file a plea to the jurisdiction based solely on the pleadings. The plea to the jurisdiction shall point out the specific claim or claims challenged and point out intelligibly and with particularity the defect,

omission, or other insufficiency in the allegations in the pleading. A plea to the jurisdiction based on the pleadings shall be heard and determined at the earliest opportunity in accordance with the time frame below.

(j) Plea to the Jurisdiction Based on the Pleadings Proceedings

Except with leave of court, with notice to opposing counsel, the plea to the jurisdiction based on the pleading shall be filed and served at least twenty-one days before the time specified for the hearing. Except on leave of court, the responding party, not later than seven days prior to the hearing, may file and serve a written response which may include an amended pleading. No oral testimony or other evidence shall be considered at the hearing. Only the grounds set forth in the plea to the jurisdiction will be considered at the hearing. Dismissal shall be rendered if the challenged pleading or duly filed amendment affirmatively negates the existence of jurisdiction and the impediment to jurisdiction cannot be cured. If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects, the responding party shall be afforded the opportunity to amend within seven days from the date of the order granting leave to amend. Failure to timely file an amended pleading may result in the dismissal of the claim. If the responding party timely files an amended pleading, the court shall set a hearing to consider the amended pleading no earlier than seven days from the filing of the amended pleading. At the hearing on the amended pleading, the court may render dismissal of the claim or claims if the pleading does not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction.