

**Dismissed and Opinion filed September 7, 2000.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-99-00104-CV**  
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**CITY OF HOUSTON, Appellant**

**V.**

**MIGUEL HERNANDEZ, Appellee**

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**On Appeal from the County Civil Court at Law No. 3  
Harris County, Texas  
Trial Court Cause No. 708,759**

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**OPINION**

This is an interlocutory appeal<sup>1</sup> from an order denying a plea to the jurisdiction filed by appellant, the City of Houston. In one point of error, the City claims the trial court erred in denying its plea to the jurisdiction because appellee, Miguel Hernandez, failed to state a claim within the limited waiver provision

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<sup>1</sup> We have jurisdiction to hear this interlocutory appeal pursuant to TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (Vernon Supp. 2000). *See Texas Dept. of Transp., v. Jones*, 8 S.W.3d 636,637 (Tex. 1999). *See also, e.g., Lamar Univ. v. Doe*, 971 S.W.2d 191, 193 (Tex. App.—Beaumont 1998, no pet.).

of the Texas Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997). We vacate the trial court's order and dismiss Hernandez's cause of action.

Hernandez was at the City of Houston Municipal Court No. 9 when a police officer told Hernandez he had an outstanding warrant and arrested him. The outstanding warrant was actually for a different Miguel Hernandez with the same birth date. Hernandez tried to explain that there was a mistake and that he was not the person in question. However, he was fingerprinted, photographed, and placed in a jail cell for three nights.

Hernandez filed suit against the City alleging a negligence cause of action arising from his arrest. In his petition, he claims that the City was negligent in failing to utilize proper methods to investigate and ascertain whether he was the individual to be arrested. The City filed a plea to the jurisdiction asserting Hernandez did not allege a cause of action within the limited waiver provisions of the Tort Claims Act. The City argued that immunity from suit had not been waived and jurisdiction was not conferred upon the trial court. The trial court denied the City's plea to the jurisdiction.

A plea to the jurisdiction contests the trial court's authority to determine the subject-matter of a cause of action. *See Texas Parks & Wildlife Dept. v. Garrett Place, Inc.*, 972 S.W.2d 140, 142 (Tex. App.—Dallas 1998, no pet.). In considering a plea to the jurisdiction, the trial court must look solely to the allegations in the plaintiff's petition. *See Liberty Mut. Ins. Co. v. Sharp*, 874 S.W.2d 736, 739 (Tex. App.—Austin 1994, writ denied) (citing *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993)). It is the plaintiff's burden to allege facts affirmatively showing that the trial court has subject-matter jurisdiction. *See Texas Air Control Bd.*, 852 S.W.2d at 446. A reviewing court accepts the allegations in the plaintiff's petition as true and construes them in the plaintiff's favor. *See id.* Whether a trial court has subject-matter jurisdiction is a question of law reviewed *de novo*. *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998); *Hampton v. University of Texas - M.D. Anderson Cancer Ctr.*, 6 S.W.3d 627, 629 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1999, no pet. h.).

Under the doctrine of sovereign immunity, a governmental unit is not liable for the torts of its officers or agents in the absence of a constitutional or statutory provision creating liability. *See Dallas County Mental Health & Mental Retardation v. Bosley*, 968 S.W.2d 339, 341 (Tex. 1998). Sovereign immunity has two component parts - immunity from suit and immunity from liability.<sup>2</sup> *See Missouri Pac. R.R. v. Brownsville Navigation Dist.*, 453 S.W.2d 812, 813 (Tex. 1970); *Texas Parks & Wildlife Dept. v. Garrett Place, Inc.*, 972 S.W.2d 140, 143 (Tex. App.—Dallas 1998, no pet.). In enacting the Tort Claims Act, the Legislature has created a limited waiver of sovereign immunity from suit. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.001 *et seq.* (Vernon 1997). A court is without subject-matter jurisdiction, unless sovereign immunity from suit is waived. *See LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992).

In a suit against a governmental unit, if the plaintiff's pleadings do not allege facts within the waiver of sovereign immunity, then the plaintiff has not invoked the court's subject-matter jurisdiction. *See Texas Parks & Wildlife Dept.*, 972 S.W.2d at 143. In such case, a governmental unit's plea to the jurisdiction should be granted. *See id.* However, a failure to allege sufficient facts does not necessarily authorize immediate dismissal. *See City of Austin v. L.S. Ranch, Ltd.*, 970 S.W.2d 750, 753 (Tex. App.—Austin 1998, no pet.). "It is only where the court can see from the allegations of a pleading that, even by amendment, no cause of action can be stated consistent with the facts alleged that it can be said that the court is without jurisdiction." *Id.* (quoting *Bybee v. Fireman's Fund Ins. Co.*, 331 S.W.2d 910, 917 (Tex. 1960)). Therefore, immediate dismissal of the case is proper only when the facts affirmatively demonstrate an absence of jurisdiction. *See id.*

Under the limited waiver of the Tort Claims Act, a governmental unit<sup>3</sup> may be held liable for personal injury caused by a condition or use of tangible personal property. *See* TEX. CIV. PRAC. & REM.

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<sup>2</sup> Immunity from liability does not affect jurisdiction. In reality, it is nothing more than another term for an affirmative defense that must be raised by a governmental unit. *See Texas Dept. of Transp., v. Jones*, S.W.3d (Tex. 1999). "In contrast, immunity from suit bars an action against the state unless the state expressly consents to the suit." *Id.*

<sup>3</sup> The Tort Claims Act defines "governmental unit" to include "a political subdivision of this state, including any city . . . ." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(3)(B) (Vernon Supp. 2000)

CODE ANN. § 101.021(2) (Vernon 1997). Tangible personal property, while not defined in the Tort Claims Act, refers to something that has a corporeal, concrete, and palpable existence. *See University of Texas Med. Branch at Galveston v. York*, 871 S.W.2d 175, 178 (Tex. 1994). Information, on the other hand, is an abstract concept and is intangible. *See id.* at 179. The fact that the information is recorded does not render the information tangible property. *See id.* There is no waiver of immunity for claims based on the misuse of information. *See id.* “Information or misinformation remains information, whether it is transmitted by electronic equipment or by word of mouth.” *Sawyer v. Texas Dept. of Criminal Justice*, 983 S.W.2d 310, 312 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1998, pet. denied). “The medium used to communicate information does not alter its intangible nature.” *Id.*

To state a claim involving the “use” of property, a plaintiff must allege the property was used or misused by a government employee. *See Texas Parks & Wildlife Dept.*, 972 S.W.2d 140, 143 (citing *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30, 32 (Tex. 1983)). Where the allegations in the plaintiffs pleadings stem from negligent judgment or human error rather than a use or misuse of property, the pleadings fail to satisfy the limited waiver of immunity contained in the Tort Claims Act. *See Lamar Univ. v. Doe*, 971 S.W.2d 191, 197 (Tex. App.—Beaumont 1998, no pet.).

In his brief and during oral argument, Hernandez identified the offensive tangible property as a computer and a computer printed list containing the names of people to be arrested. However, he did not include this allegation in his pleadings. Regardless, recorded information is not tangible property. *See York*, 871 S.W.2d at 179. *See also Jefferson County v. Sterk*, 830 S.W.2d 260, 262-63 (Tex. App.—Beaumont 1992, writ denied) (holding *capias* is not tangible personal property); *Sawyer*, 983 S.W.2d at 312 (holding use of computer or computer printout does not fall within the tangible property waiver of immunity); *Morris v. Copeland*, 944 S.W.2d 696 (Tex. App.—Corpus Christi 1997, no pet.) (holding claim of false arrest and false imprisonment due to sheriff’s failure to implement and maintain identification procedures (including use of computers) to prevent arresting the wrong person did not fall within the tangible property waiver of immunity).

The sole issue we must determine is whether Hernandez alleged, or by proper amendment to his pleadings could have alleged, a cause of action within the limited waiver created by the Tort Claims Act sufficient to confer subject-matter jurisdiction upon the trial court. In his pleadings, without specifying what personal property caused his injuries, Hernandez alleges that his injuries arose from the negligent “use of tangible property” by the City.<sup>4</sup> Were we to accept Hernandez’s position on appeal that the City’s computer and computer printout are the tangible property complained of, there still would no claim alleged within the limited waiver provision because a computer is merely a receptacle for information and is not considered tangible property for purposes of the Tort Claims Act. *See Sawyer*, 983 S.W.2d at 312.

Hernandez’s claims, rather than asserting the use of tangible property, aver the City was negligent in failing to ascertain, investigate, or use proper methods to determine whether he was the individual to be arrested. Hernandez’s allegation is one based on the non-use of information rather than the use of tangible personal property and, as such, does not fall within the limited waiver of sovereign immunity of the Tort Claims Act. Further, because Hernandez’s pleadings affirmatively demonstrate an absence of jurisdiction, the defect is incurable and the trial court erred in denying the City’s plea to the jurisdiction.

Accordingly, we order Hernandez’s cause of action be dismissed for lack of jurisdiction.

/s/ Leslie Brock Yates  
Justice

Judgment rendered and Opinion filed September 7, 2000.

Panel consists of Justices Yates, Fowler, and Edelman.

Do Not Publish — TEX. R. APP. P. 47.3(b).

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<sup>4</sup> We note that while Hernandez has alleged a cause of action based on negligence, the crux of his complaint - false arrest and false imprisonment are both expressly barred by governmental immunity in the Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.057(2) (Vernon 1997).

