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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 17-0329

IN THE
SUPREME COURT OF TEXAS

HARRIS COUNTY, TEXAS,
Petitioner

v.

LORI ANNAB,
Respondent

On Petition for Review from the
Fourteenth Court of Appeals at Houston, Texas
No. 14-16-00348-CV

PETITIONER HARRIS COUNTY'S BRIEF ON THE MERITS

VINCE RYAN
HARRIS COUNTY ATTORNEY

SETH HOPKINS
Assistant County Attorney
State Bar No. 24032435
1019 Congress, 15th Floor
Houston, Texas 77002
Telephone: (713) 274-5141
Facsimile: (713) 755-8924
Seth.Hopkins@cao.hctx.net

ATTORNEY FOR PETITIONER

IDENTITIES OF PARTIES AND COUNSEL

Parties to the Trial Court's Order
Petitioner/Appellee/Defendant:
Harris County, Texas

Respondent/Appellant/Plaintiff:
Lori Annab

Trial and Appellate Counsel

Bruce S. Powers
Assistant County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002
— Appellate Counsel for Petitioner/Appellee/Defendant

B. Jorey Herrscher
Assistant County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002
— Trial Counsel for Petitioner/Appellee/Defendant

Seth Hopkins
Assistant County Attorney
1019 Congress, 15h Floor
Houston, Texas 77002
— Trial and Appellate Counsel for Petitioner/Appellee/Defendant

Steve E. Couch
Kelly, Sutter & Kendrick, P.C.
3050 Post Oak Blvd., Suite 200
Houston, Texas 77056-6570
— Trial and Appellate Counsel for Respondent/Appellant/Plaintiff

Other Parties

Kenneth Caplan
9701 Stella Link Road, No. B62
Houston, Texas 77025
— *Pro se* Defendant

Michael Blaise
Lorance and Thompson
2900 N. Loop West, Suite 500
Houston, Texas 77092
— Trial Counsel for former Defendant Dr. Carole Busick (Dismissed April 1, 2017).

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Fourteenth Court of Appeals	"Court of Appeals"
Harris County, Texas	"Harris County" or "County"
Lori Annab	"Annab" or "Plaintiff"

STATEMENT OF THE CASE

Nature of the Case:	Respondent Lori Annab brought this suit for damages against Petitioner Harris County and Defendant Kenneth Caplan and asserted that Caplan, a reserve deputy, intentionally shot Annab while off-duty.
Trial Court:	The Honorable Debra Ibarra Mayfield, 165th District Court of Harris County, Texas. Trial Court Cause No. 2015-58707.
Trial Court's Disposition:	The trial court granted Harris County's Plea to the Jurisdiction/Supplemental Plea to the Jurisdiction. (*See* Petition for Review Appendix, Tab 1).
Parties in Court of Appeals:	Lori Annab, Appellant; Harris County, Appellee.
Court of Appeals:	Fourteenth Court of Appeals – Justice Brown, joined by Justice Busby; Justice Donovan dissented. *Annab v. Harris County*, No. 14-16-00348-CV, 2017 WL 1015554 (Houston [14th Dist.] March 14, 2017, pet. filed) (Majority and Dissenting Opinions attached in Petition for Review Appendix, Tabs 2 and 3).
Court of Appeals' Disposition:	Affirmed in part, reversed and remanded in part.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over this interlocutory appeal under Tex. Gov't Code Ann. §§ 22.001(a)(1) & (2), 22.225(c) & (e), and Tex. Civ. Prac. & Rem. Code § 51.014(8).

ISSUES PRESENTED

1. Did the Court of Appeals err in concluding that Annab stated a claim against Harris County for a reserve officer's intentional shooting of her, despite the County's immunity for battery and "any other intentional torts" under Tex. Civ. Prac. & Rem. Code § 101.057(2)?

2. Did the Court of Appeals err in concluding that Annab's allegations that Harris County negligently "used" an off-duty reserve officer's firearm by authorizing him to use it on duty "are sufficient to demonstrate the trial court's jurisdiction to hear the case" under Tex. Civ. Prac. & Rem. Code § 101.021(2)?

3. Did the Court of Appeals err in concluding that Harris County has not "established that Annab would be unable to show the existence of jurisdiction if this case were remanded" despite the justices below unanimously concluding that Annab pled no facts to demonstrate that Harris County proximately caused her injuries?

TO THE HONORABLE SUPREME COURT OF TEXAS:

Plaintiff sued Harris County after a former off-duty volunteer reserve deputy constable—on his own time, with his own gun, and while driving with his wife in his own car—intentionally shot a motorist in a fit of road rage. The trial court correctly dismissed the case because, as a matter of law, plaintiff stated no claim against the County. A sharply divided Fourteenth Court of Appeals narrowly reversed on the premise that under the Texas Tort Claims Act, Harris County "*used*" the reserve deputy's personal weapon by approving it for duty, and that this "*use*" continued even while he was off-duty.

This fundamental misinterpretation of the Texas Tort Claims Act not only nullifies the Act's intentional tort exception, but also expands governmental liability well beyond the Legislature's intent, usurps this Court's prior holdings, and creates a confusing patchwork of jurisprudence. Unless the lower court's error is corrected, the State's 254 counties and 1,216 cities may be liable for every tort committed by every employee or volunteer—at any time and for any reason. This unprecedented threat to the public fisc should be reversed, and Harris County respectfully requests that this Court reinstate the trial court's dismissal and set clear precedent as to the scope of the Tort Claims Act.

STATEMENT OF FACTS

The Court of Appeals correctly stated the nature of the case. Kenneth Caplan, a former deputy constable,[1] was driving with his wife in his personal vehicle when he allegedly used a personal weapon to intentionally shoot a motorist in a fit of road rage. The motorist, Lori Annab, sued Caplan and Harris County. Annab made two claims against Harris County—that it negligently provided Caplan with tangible personal property used to commit the tort and that Caplan (who was off-duty) was within the scope of his job when he shot plaintiff.[2]

During discovery, it was established that Caplan was not acting within the scope of his job and that Harris County never provided Caplan with any weapon.[3] Harris County's only connection to Caplan's weapon was to assure that he knew how to use it, as required by the Commission on Accreditation for Law Enforcement Agencies (CALEA).[4] Based on that proficiency, Precinct Six approved Caplan's duty weapon for work purposes. This "authorization" had no effect on Caplan's legal right to carry a weapon off-duty.

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[1] After an allegation of misconduct, Caplan was removed from the payroll prior to the incident leading to this lawsuit. Because he held an active peace officer's license, he was given the opportunity to serve as a part-time, unpaid reserve deputy, subject to remedial training, including attending 12 hours of anger management classes. C.R. 289.

[2] Plaintiff's Third Amended Petition. C.R. 118, 120-124, 129-132.

[3] The Court of Appeals noted that plaintiff's counsel conceded this point during oral argument. *See also,* Suppl. 5, establishing that Precinct Six never issued a weapon to any deputy.

[4] This is a requirement of CALEA Standard 1.3.9, 1.3.10, and 1.3.11. Precinct Six's policies cite and follow the appropriate law enforcement accreditation standards. *See* C.R. 339-346.

Harris County filed a plea to the jurisdiction and made three arguments:

(1) Caplan's deliberate shooting was an intentional tort, for which the Legislature has not waived sovereign immunity under Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2) (C.R. 43-46);

(2) Caplan, who was not working for Harris County and was driving his personal vehicle at the time of the incident, did not act within the scope of his employment when he shot plaintiff (C.R. 46-48); and

(3) Caplan used his own weapon to shoot Annab, and Harris County did not issue Caplan any tangible personal property used in the shooting. (C.R. 48-49, Suppl. 5).

The trial court granted Harris County's plea to the jurisdiction (C.R. 395), and Annab appealed. On appeal, Annab argued that the Tort Claims Act's intentional tort exception did not apply, that a fact issue existed as to the County's alleged negligent use of property, and that Harris County failed to meet its alleged burden to "conclusively prove that the trial court lacks jurisdiction."[5]

Harris County responded and noted that ***plaintiff*** has the burden of demonstrating jurisdiction, and she not only failed to do so, but she ***cannot*** do so under these facts. Even assuming the intentional tort exception did not apply, plaintiff failed to plead how the County "used" Caplan's gun, or how that alleged use was contemporaneous with her injury, or directly caused her injury.[6]

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[5] Appellant Lori Annab's Brief to the Fourteenth Court of Appeals (Appendix 5 to Harris County's Petition for Review) at 14-23.

[6] Appellee Harris County's Brief to the Fourteenth Court of Appeals (Appendix 6 to Harris County's Petition for Review) at 5, 8-15.

A divided court of appeals reversed in part. The justices unanimously agreed that Harris County did not provide (or negligently entrust) Caplan with the firearm he used in his crime.[7] Despite this dispositive finding, two justices held that Annab's "allegations are sufficient to demonstrate the trial court's jurisdiction to hear the case." (Majority Opinion of the Court of Appeals at 11.) They suggested that Harris County's approval of Caplan's duty weapon was tantamount to its "using" that weapon, even when he was off-duty.

The majority also found that plaintiff never established a causal link between Harris County's approval of Caplan's duty weapon and Annab's alleged injuries:

> As Annab has not alleged facts affirmatively demonstrating personal injury proximately caused by Harris County's use of tangible personal property, we conclude she has not meet [sic] her burden of affirmatively establishing jurisdiction based on the pleadings.[8]

Still, the majority remanded plaintiff's case so it could proceed.

In a well-reasoned dissent, Justice Donovan concluded that Annab's injuries were caused by an intentional tort, for which Harris County can have no liability. (Dissenting Opinion of the Court of Appeals at 2.) ("Annab's pleadings state that Caplan shot and severely injured her, clearly an intentional tort.") Even if Harris County had negligently provided Caplan with the weapon used to shoot plaintiff, it was Caplan – not Harris County – who used the weapon:

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[7] The Court of Appeals noted that Annab conceded at oral argument that Caplan purchased and owned the firearm. Majority Opinion of the Court of Appeals at 9. *See also,* Suppl. 5.

[8] Majority Opinion of the Court of Appeals at 16. (emphasis added).

> Annab's injuries were caused by Caplan's gun and there are no allegations of a causal connection between the alleged negligent conduct and Caplan's use of that gun. . . . There are no factual allegations in Annab's pleadings as to how Harris County used or misused the gun.

(Dissenting Opinion of the Court of Appeals at 5.) Justice Donovan further noted that Annab never pled that Harris County had any control over Caplan's private weapon or any authority to prevent Caplan from owning and using it:

> It is not alleged that Harris County had any right to take Caplan's gun or that if Harris County had never authorized, or withdrawn its authorization, for Caplan to use the gun he would not have been in lawful possession of his own gun in his own personal car.[9]

Harris County filed a petition for review on May 30, 2017. Annab responded on June 28, 2017. On September 1, 2017, the Court requested that the parties file briefs on the merits.

SUMMARY OF THE ARGUMENT

A Texas government entity is immune from suit except in certain narrow circumstances promulgated in Tex. Civ. Prac. & Rem. Code Ann. § 101.021.[10] Under this statute, a government unit can be held liable for the negligent (but not intentional) acts of employees while using motor vehicles and when the government's "use of tangible personal or real property" causes injury or death. The government cannot waive sovereignty without clear and unambiguous

[9] Dissenting Opinion of the Court of Appeals at 5.

[10] This is also referred to as the Texas Tort Claims Act.

language, and any ambiguity is resolved in favor of preserving sovereignty to protect taxpayers from claims that would divert resources from the public good.

Annab's pleadings allege that an off-duty reserve deputy driving his own vehicle intentionally shot a motorist using his own weapon. Under the Texas Tort Claims Act, these facts could never impute liability to a government entity, yet on appeal, the majority overturned the trial court's dismissal and remanded.

The court of appeals erred for three reasons. First, Annab's central premise is that she was the victim of a road rage shooting, which is clearly an intentional tort. Under this Court's holding in *City of Watauga v. Gordon*, 434 S.W.3d 586 (Tex. 2014), her negligence claim is subsumed into her intentional tort claim and falls outside the Tort Claims Act. *See, also,* Tex. Civ. Prac. & Rem. Code § 101.057(2).

Second, even if Annab had an independent claim against Harris County under Tex. Civ. Prac. & Rem. Code § 101.021(2), she failed to allege how Harris County used tangible personal property to injure her. Annab suggests Harris County's "approval" of Caplan's duty weapon is a "use" of that weapon. However, even if Caplan had been acting for Harris County when he shot Annab, this Court has held that a public entity's use of ***information*** (such as training) is not a use of "tangible personal property" under the Tort Claims Act. *Texas Dep't of Public Safety v. Petta*, 44 S.W.3d 575 (Tex. 2001). Further, a public entity does

not "use" property just by providing it to someone. *San Antonio State Hosp. v. Cowan*, 128 S.W. 3d 244 (Tex. 2004).

The majority conceded that Annab failed to establish that Harris County "used" Caplan's weapon—"[w]e conclude the facts alleged by Annab in her pleading, and the evidence submitted, do not conclusively establish Harris County's use of the firearm under Section 101.021(2)."[11]

Third, all three justices concluded there is no causal link between Harris County and plaintiff's damages. (Majority Opinion of the Court of Appeals at 16.) Without such a link, it is impossible for plaintiff to prevail in this case.

This is precisely the type of case for which the Legislature chose to retain immunity, and this ruling improperly subjects Texas public entities to litigation and potential liability for the actions of any employee or volunteer—at any time—even while using his own property. That is not what the Legislature intended, not what this Court has held, and it sets a dangerous precedent in Texas jurisprudence.

[11] Majority Opinion of the Court of Appeals at 15 (emphasis added). *See also,* Dissenting Opinion of the Court of Appeals.

ARGUMENT

I. This Honorable Court should exercise jurisdiction to resolve the disagreement between the justices of the Court of Appeals and to resolve the conflict of decision with this Court regarding the scope of governmental immunity for intentional torts under Tex. Civ. Prac. & Rem. Code § 101.057(2) and "use" of "tangible personal property" under Tex. Civ. Prac. & Rem. Code § 101.021(2).

Governmental immunity has two components: immunity from suit and immunity from liability. *Texas Dep't of Transp. v. Jones*, 8 S.W.3d 626, 638 (Tex. 1999). Immunity from suit bars an action against a government entity without express consent from the state. *Id. See also*, *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004).

Political subdivisions in Texas may raise governmental immunity by a plea to the jurisdiction. *Id.* A plea may challenge either the pleadings or the existence of jurisdictional facts. *Texas Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 226-227 (Tex. 2004). When a plea challenges the pleadings, a court must "consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised." *Id.* at 227. However, it is plaintiff's duty to affirmatively plead and prove jurisdiction to hear a lawsuit under the Texas Tort Claims Act, and a trial court does not err if it refuses to allow any discovery when jurisdiction can be determined from the pleadings. *Donohue v. Butts*, 516 S.W.3d 578, 582 (Tex. App.—San Antonio, 2017, no pet.).

Whether a court has subject matter jurisdiction over a claim is a question of law. *Sykes*, 136 S.W.3d at 638. Such questions are reviewed *de novo*. *Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). Under Tex. Civ. Prac. & Rem. Code Ann. § 51.014(8) and Tex. Gov't Code Ann. § 22.225(c) and (e), this Court may consider an interlocutory appeal when a justice dissents in the court of appeals or the court of appeals' decision conflicts with a prior decision. *City of Watauga v. Gordon*, 434 S.W.3d 586, 588 (Tex. 2014). This case implicates four of the six factors in Tex. Gov. Code Ann. § 22.001(a):

(1) In reversing the trial court, the Court of Appeals issued a split decision from which Justice Donovan strongly dissented on several questions of law material to the decision;

(2) The Court of Appeals held differently from this Court in the cases of: *City of Watauga v. Gordon*, 434 S.W.3d 586 (Tex. 2014), *Texas Dep't of Public Safety v. Petta*, 44 S.W.3d 575 (Tex. 2001), *San Antonio State Hosp. v. Cowan*, 128 S.W. 3d 244 (Tex. 2004), *Sampson v. Univ. of Texas at Austin*, 500 S.W.3d 380 (Tex. 2016), and *City of Dallas v. Sanchez*, 494 S.W.3d 722 (Tex. 2016).

(3) This case involves construction of Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2) and Tex. Civ. Prac. & Rem. Code § 101.021(2). These statutes are the lynchpin of Texas governmental immunity, and their proper interpretation is a matter of great significance to the State's 254 counties and 1,216 cities; and

(4) This case involves the Court of Appeals' basic error in holding that a plaintiff can proceed with her case, even though she cannot plead facts sufficient to establish a waiver of immunity or causation. This error is of such importance to the State's jurisprudence that it should be corrected, since it imposes liability on the public and confusion and uncertainty in what had been settled law.

II. The Court of Appeals erred in concluding that Annab stated a claim against Harris County for Caplan's intentional shooting of her, despite the Legislature's bar against such suits under Tex. Civ. Prac. & Rem. Code § 101.057(2).

A. History of sovereign immunity in Texas.

The concept of sovereign immunity began with the English monarchy ("the king cannot be sued") and was adopted in the United States. Alexander Hamilton noted in the Federalist Papers:

> It is inherent in the nature of sovereignty not to be amenable to suit of an individual without its consent. This is the general scheme and the general practice of mankind; and the exception, of one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.

FEDERALIST NO. 81, at 487. Texas first recognized in 1847 that "[a] state cannot be sued in her own courts without her own consent, and then only in the manner indicated by that consent." *Rufus K. Hosner v. John Deyoung, Surveyor, etc.*, 1 Tex. 764 (1847).

In 1953, Representative DeWitt Hale of Corpus Christi introduced the first bill to allow lawsuits against the State of Texas. Tex. Senate Interim Comm., 61st Leg., Report on Study of Governmental Immunity, R.S. (1969). *See also, Dallas Cty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 342 (Tex. 1998). The bill failed. It was not until 1967 that a similar bill finally passed in the House of Representatives. However, that bill failed in the Senate.

In 1969, both houses of the Texas Legislature passed a bill allowing suits against the State, but Governor Preston Smith vetoed it. In his message accompanying the veto, the governor declared that the bill imposed an onerous burden upon the State taxpayers. He expressed concern that because the government provides so many essential services that private businesses do not (such as police and fire protection) the bill would make the State a target for litigation and ultimately deprive the people of public benefits. Veto Message of Gov. Preston Smith, Tex. H.B. 117, H.J. of Tex., 61st Leg., R.S. (1969). *See, Governmental Immunity,* 49 Tex. L. Rev. 462, 467 (1971). *See also, Todaro v. City of Houston*, 135 S.W.3d 287, 293 (Tex. App. 2004).

In 1970, Texas finally passed the Texas Tort Claims Act, which waived government immunity in three areas – use of public automobiles, premise defects, and injuries arising out of the condition of property or use of property. In 1985, the Texas Legislature codified the Texas Tort Claims Act into Section 101, *et seq.*, of the Texas Civil Practices & Remedies Code.

B. Sovereign immunity is narrowly construed and is waived only when a statute does so "beyond doubt."

In recent years, this Court and the Legislature repeatedly reaffirmed the high burden a party asserting a waiver of immunity bears. In 2001, the Legislature promulgated this by codifying Texas Gov't Code § 311.034, which requires "clear and unambiguous language" to waive immunity:

> In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language . . . Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a government entity.

In applying § 311.034, this Court does not permit damages against a government entity unless an underlying statute waives immunity "beyond doubt." This Court has further held "we generally resolve ambiguities by retaining immunity." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003). The policy rationale behind this is as true today as it was in 1970: "[s]ubjecting the government to liability may hamper governmental functions by shifting tax resources away from their intended purposes toward defending lawsuits and paying judgments." *Texas Natural Resources Conservation Com'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002).

C. Annab's claim arises out of an intentional tort.

There is no ambiguity in the instant case. The Texas Tort Claims Act expressly bars suits against government entities "arising out of assault, battery, false imprisonment, or any other intentional tort . . . " Texas Civil Practices & Remedies Code § 101.057. Under Texas Penal Code § 22.02(a)(2), it is an assault to intentionally, knowingly, or recklessly threaten or cause bodily harm to another. Annab's damages are based on injuries received from Caplan's assault, and no matter how Annab presents her claim, it still "arises out of" Caplan's intentional

off-duty shooting—not Harris County's approval of Caplan's duty weapon. As Justice Donovan correctly observed in his dissenting opinion:

> Annab's pleadings state that Caplan shot and severely injured her, clearly an intentional tort. Thus, to maintain a negligence claim against Harris County, Annab's pleadings must allege facts that, taken as true, reflect her claim does not 'arise out of' being intentionally shot by Caplan.[12]

This principle has been repeatedly upheld by this Court. In *Gordon*, 434 S.W.3d 586 (Tex. 2014), a city police officer injured an arrestee when he tightened his handcuffs too tightly. Gordon sued the city for its negligent use of tangible personal property—the handcuffs. The city filed a plea to the jurisdiction on the basis that it was immune because the officer's actions were intentional. The trial court denied the plea, and the court of appeals affirmed.

This Court granted review to correct conflicting appellate court decisions involving the intentional-tort immunity exception arising from a police officer's use of tangible property. *Id.*, 434 S.W.3d at 589-590. Though the officer had the right to handcuff plaintiff and did so in the line of duty on behalf of the city using the city's handcuffs, this Court held the city retained immunity because Gordon's real claim was that the officer deliberately tightened the handcuffs too tightly. By alleging that the officer acted deliberately, Gordon asserted that his injuries arose out of an assault under Tex. Pen. Code Ann. § 22.01(a), which is an intentional

[12] Dissenting Opinion of the Court of Appeals at 2.

tort. Accordingly, the city was entitled to immunity under the Tort Claims Act." *Id.*, 434 S.W.3d at 594.

In the case of *City of Garland v. Rivera*, 146 S.W.3d 334 (Tex. App.—Dallas 2004, no pet.), a city provided officers with pepper spray, handcuffs, a police dog, and other "departmentally issued property" used to kill an arrestee. The arrestee's daughter filed suit, alleging the officers did not intend to kill her father, but that they did intend to use this property to harm him.

Rivera, like Annab, alleged the city's providing of tangible personal property was a separate, negligent act, independent of the intentional tort. However, the appellate court found the officer's use of the city's pepper spray, dog, and handcuffs was "clearly intentional," even if the outcome was not. The fundamental question will always be whether the actor using the government property did so with intent. *See also, Holder v. Mellon Mortgage Co.*, 954 S.W.2d 786, 806-807 (Tex. App.—Houston [14th Dist.] 1997), *rev'd on other grounds*, 5 S.W.3d 654 (Tex. 1999), where a city retained immunity despite providing a police car and badge used by an officer to rape a woman.

The majority in the instant case held that Annab's claim against Harris County did not arise out of Caplan's intentional use of his gun. It reached this conclusion in part because of the ruling in *Young v. City of Dimmitt*, 787 S.W.2d 50, 51 (Tex. 1990), in which this Court issued a one-page opinion disapproving an

appellate court's decision to subsume a negligence claim against a public entity into an intentional tort claim. However, the case was not reversed, which led to confusion in the court of appeals. The instant case should be reversed because Annab's claim clearly arises out of an intentional tort, and any alleged negligence against Harris County is far too attenuated to establish a waiver of immunity that is "clear and unambiguous" and "beyond doubt."

III. The Court of Appeals erred in concluding that Annab stated a claim against Harris County for an off-duty officer's negligent "use" of "tangible personal property" under Tex. Civ. Prac. & Rem. Code § 101.021(2), when Harris County did not own the property, and its only connection to the property was to approve it for duty use.

The majority in the court below issued an opinion conflicting with this Court's rulings in *Texas Dep't of Public Safety v. Petta*, 44 S.W.3d 575 (Tex. 2001) and *San Antonio State Hosp. v. Cowan*, 128 S.W. 3d 244 (Tex. 2004).

A. "Approving" a duty weapon is, at most, the use of "information," which is not "tangible" property under the Tort Claims Act.

Plaintiff's Third Amended Petition invokes the Tort Claims Act by asserting "the County negligently used and misused property by repeatedly approving/authorizing and qualifying the Deputy Constable to have, possess, and use the Glock gun as a firearm."[13] The majority improperly found this to state a

[13] C.R. 129. During her appeal, plaintiff has continued to file pleadings in the trial court and is currently on her Sixth Amended Petition. Though the live pleading is not in the record, its jurisdictional basis has not changed. Paragraph 40 of plaintiff's Sixth Amended Petition states the County negligently "used and misused property by repeatedly approving/authorizing and qualifying the Deputy Constable to have, possess, and use the Glock gun as a firearm."

claim under Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2), despite this Court's clear holding that the use of information (such as "approving" or "qualifying" a weapon) is not the use of tangible property under the Tort Claims Act.

In the *Petta* case, an on-duty highway patrol officer threatened to kill a woman, chased her at high speed, aimed a handgun and shotgun at her, and fired at her vehicle multiples times until a civilian finally disarmed him. Petta sued the officer and the Department of Public Safety. Like Annab, Petta attempted to bring her claim within the Texas Tort Claims Act by arguing the Department negligently trained the officer, and the training manuals he relied on were the Department's tangible physical property. This Court rejected that argument:

> To state a claim under the Tort Claims Act, a plaintiff must allege an injury resulting from the 'condition or use of tangible personal or real property.' We have long held that information is not tangible personal property, since it is an abstract concept that lacks corporeal, physical, or palpable qualities. In *Dallas County v. Harper*, we concluded that simply reducing information to writing on paper does not make the information 'tangible personal property.' And in *Kasen v. Hatley*, we specifically held that the information in an emergency room procedures manual is not tangible personal property. Thus, while instructional manuals can be seen and touched, the Legislature has not waived immunity for negligence involving the use, misuse, or non-use of the information they contain. Because written information in the form of instructions and manuals is not tangible personal property, we conclude that the information contained in the Department's policy and training manuals in this case is not tangible personal property and, accordingly, does not give rise to a claim under the Tort Claims Act.[14]

[14] *Texas Dep't of Public Safety v. Petta*, 44 S.W.3d 575 (Tex. 2001).

Similarly, Harris County's alleged "approval" of a duty weapon as part of Precinct Six's efforts to comply with national accreditation standards is, at most, information—not tangible property.[15] The majority erred in concluding otherwise.

B. Annab never alleges Harris County "used" Caplan's firearm.

This Court has also held that immunity is not waived just because a public entity makes property available for someone else to use—the entity must also actively use that property for its own purpose. In *San Antonio State Hosp. v. Cowan*, 128 S.W. 3d 244 (Tex. 2004), this Court held that making tangible personal property available to a suicidal patient to hang himself was not "use" of property by the government:

> Respondents concede that section 101.021(2) waives immunity for a use of personal property only when the government unit is itself the user. This limitation is not expressly stated in section 101.021, but we have read it into section 101.021(1), which waives immunity for the use of motor-driven vehicles and equipment, and there is no reason to construe 'use' differently in section 101.021(2). Thus, the Hospital's immunity can be waived only for its own use of Cowan's walker and suspenders, and not by Cowan's use of them.
>
> . . .
>
> A governmental unit does not 'use' personal property merely by allowing someone else to use it and nothing more. If all 'use' meant were 'to make available', the statutory restriction would have very little force. As difficult as the restriction has been to construe, it was clearly intended as a real limit on the waiver of sovereign immunity. .

[15] *See also, City of Garland v. Rivera*, 146 S.W.3d 334 (Tex. App.—Dallas 2004, no pet.).

> . . By providing Cowan his walker and suspenders, the Hospital did not 'use' them within the meaning of section 101.021(2). [16]

Annab alleges only that Harris County allowed Caplan to use his own weapon, but she never alleges Harris County used Caplan's weapon at the time of the tort. Caplan was not arresting Annab or conducting any business for the County—he was using his property for his own unlawful purpose. That is not a "use" by Harris County.

IV. The Court of Appeals erred in concluding that Annab could proceed with her case despite her failure to plead any facts to suggest a causal link between Harris County and her alleged injuries.

To state a claim under Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2), plaintiff must establish proximate cause between Harris County's alleged use of property and her damages. *City of Dallas v. Sanchez*, 494 S.W.3d 722 (Tex. 2016). "When a condition or use of property merely furnishes a circumstance 'that makes the injury possible,' the condition or use is not a substantial factor in causing the injury." *Id.* "To be a substantial factor, the condition or use of the property 'must actually have caused the injury." *Id.* Plaintiff failed to plead any legally sufficient connection between the County's alleged use of Caplan's firearm and her injury.[17]

In the *Sampson* case, a law professor fell over an extension cord on public property. This Court held that to state a Texas Tort Claims Act case based on the

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[16] *San Antonio State Hosp. v. Cowan*, 128 S.W. 3d 244, 245-246 (Tex. 2004).

[17] All three justices unanimously found that Annab provided no evidence of causation *See, supra*. *See also,* Majority Opinion of the Court of Appeals at 16.

use of tangible personal property, a public entity must be using the property at the time damage occurs. Otherwise, there is no causation. ("The injury did not result from the use of tangible personal property because a UT employee was not putting or bringing the [subject extension] cord into action or service *at the time* of the injury.") *Sampson v. Univ. of Texas at Austin*, 500 S.W.3d 380, 390 (Tex. 2016).

On September 29, 2017, this Court issued a *per curiam* opinion emphasizing that in negligent entrustment cases, the alleged injury must be the natural and probable result of the entrustment. The element of time is important, and as a matter of law, there is no proximate cause between giving a loaner car to a visibly intoxicated alcoholic, and an accident that took place 18 days later. *Allways Auto Group v. Walters*, No. 16-0134, slip op. at 4 (Tex. Sept. 29, 2017), *available at* http://www.txcourts.gov/media/1439005/160134.pdf (per curiam). Likewise, even if Harris County had directly given a gun to Caplan (which it did not), it could never be liable for anything Caplan did with that gun months or years later.

None of Annab's six amended petitions alleges she was injured at the time a County employee allegedly approved, authorized, or qualified Caplan to carry his firearm. Thus, Harris County did nothing to *proximately cause* her injuries. As Justice Donovan pointed out, Annab never alleged Harris County had the right to keep Caplan from owning or possessing his own gun, in his own car, while off-duty. (Dissenting Opinion of the Court of Appeals at 5. *See also*, C.R. 317.)

Perhaps realizing this fundamental omission, plaintiff has since misrepresented to the courts that Caplan "needed County authorization to 'carry' weapons while off-duty."[18] That not only misses the point, but it is also untrue. Caplan did not "*need*" Harris County's permission to carry a firearm. Caplan had that right under the Second Amendment of the United States Constitution, Texas Constitution art. I, § 23, Tex. Penal Code Ann. § 46.15(a)(1), and through his Texas Peace Officer's License.[19]

Harris County never had the right or the intention to prevent Caplan from carrying an off-duty weapon. The only policy regarding off-duty weapons was to instruct deputies to follow CALEA Standard 1.3.9, state law, and common sense. Policy 1.3.4 advises deputies carrying revolvers or semiautomatic pistols off-duty that they should be made by a reputable company and use standard ammunition. It also restates Tex. Gov't Code §311.204 by explaining that off-duty officers should not carry weapons into places where the primary business activity is the service of alcoholic beverages or while consuming alcoholic beverages. (C.R. 340-342).

This short, common sense advice did not give Caplan a license to carry a weapon off-duty, endorse him to carry a weapon off-duty, or affect his rights to

[18] *See, e.g.,* Respondent's Response to Petitioner's Petition for Review at 3, filed with this Court on June 28, 2017. (Annab's Response incorrectly certifies it was served August 6, 2016.)

[19] Details of Caplan's peace officer's license are at C.R. 166.

carry a weapon off-duty. Current Precinct 6 Chief Deputy Constable Armando Tello explained this when he testified:

> Q. In reference to the authorization to use firearms, what is the purpose of authorizing a firearm?
>
> A. First of all, we want to ensure that the deputy can show proficiency with the weapon, the approved weapon, for conducting his job.
>
> Q. Is the authorization a license to carry that firearm?
>
> A. No, sir.
>
> Q. Does it have any effect on Mr. Caplan's or any other deputy's legal right to carry a firearm?
>
> . . .
>
> A. No, sir.

Chief Deputy Tello explained the "authorization" is "just a policy to show proficiency with the weapon" Caplan used while *on duty*. It had no effect on whether Caplan could carry the weapon off duty. (C.R. 317 at 103:16-21). Tello testified that even if Caplan ignored this policy, he is still "authorized to carry a weapon . . . It doesn't mean that legally I cannot carry a weapon." (C.R. 317 at 104:6-13). There is nothing Harris County did (or could do) that would have prevented Caplan from carrying his own Glock, in his own car, on his own time.

V. Annab had an opportunity to respond to Harris County's arguments and failed to allege a basis for jurisdiction after six amended petitions.

Annab asserts this case should be remanded because she did not have an opportunity to fully brief the issues, conduct discovery, or amend her pleadings in the lower courts. However, Annab was provided extensive responses to her discovery requests and deposed Harris County's witnesses regarding every issue germane to the matters before the Court. By the time she appealed, plaintiff had filed her Third Amended Petition.

Plaintiff continued to amend even while the case was on appeal and is now on her ***Sixth Amended Petition***.[20] Through these amendments, Annab never pled facts to establish jurisdiction, and her allegations against Harris County are substantially the same today as they were when the trial court dismissed her case.

Harris County's plea to the jurisdiction put Annab on notice that her suit was barred (1) under the intentional tort exception (C.R. 46-48), (2) because Caplan acted outside the scope of his job (C.R. 46-48), and (3) because Caplan used his own weapon to shoot Annab (C.R. 48-49, Suppl. 5). Those are precisely the arguments being made now, and precisely the issues upon which Annab conducted discovery. On appeal, Harris County renewed these arguments.[21]

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[20] Because plaintiff continued to amend during appeal, her live pleading is not in the record before the Court.

[21] The majority opinion pointed out that Harris County only briefly addressed the intentional torts exclusion. However, it conceded that Harris County stated, "**[t]he act of firing the weapon**

Under the holding of *Rusk State Hospital v. Black*, 392 S.W.3d 88 (Tex. 2012) a case can be remanded if a government entity makes an immunity argument for the first time on appeal. That is not what happened in this case. Further, even if an immunity argument is made on appeal for the first time, a plaintiff is not entitled to remand if the government can show any of the following:

(1) The pleadings in the record negate jurisdiction;

(2) Plaintiff had a full and fair opportunity in the trial court to develop the record and amend her pleadings to show jurisdiction; **or**

(3) Plaintiff would be unable to show jurisdiction even if she had the opportunity to develop the record.

Id., 392 S.W.3d at 100. All three factors are present. As noted, plaintiff herself pled that Caplan intentionally shot her. She had a full and fair opportunity to develop the record and amend her pleadings if she believed Caplan's actions were negligent, rather than deliberate. She failed to do this, and it is beyond dispute that she was the victim of an intentional tort that falls outside the scope of the Texas Tort Claims Act.

Plaintiff had the opportunity to fully and fairly develop the record that Caplan was acting within the scope of his job or using a weapon that was negligently supplied to him. As the facts developed, it was discovered that Caplan

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could not be the basis of a claim against Harris County in this case, because that act was an intentional tort specifically excluded from coverage of the Tort claims Act." (Majority Opinion at 7). This preserved the intentional tort exclusion argument.

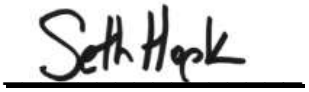
purchased the weapon from Academy Sports and was using it outside the scope of his job. As a matter of law, and as testified by Precinct 6 Chief Deputy Constable Tello, Caplan had every legal right to have his firearm in his personal vehicle, regardless of anything Harris County said or did. The pleadings and record negate jurisdiction and there is nothing plaintiff could do to change the facts and law to establish jurisdiction.

PRAYER

Petitioner Harris County respectfully prays that this Court grant its petition for review, reverse the portion of the judgment of the Court of Appeals which reversed the trial court's judgment, and affirm the trial court's dismissal of the case against Harris County.

Respectfully submitted,

VINCE RYAN
HARRIS COUNTY ATTORNEY



SETH HOPKINS
State Bar No. 24032435
Assistant County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002
Telephone: (713) 755-5141
Facsimile: (713) 755-8924

ATTORNEY FOR PETITIONER

CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this document was produced on a computer and printed in a conventional typeface no smaller than 14-point, except for footnotes, which are no smaller than 12-point. This document also complies with the word-count limitations of Tex. R. App. P. 9.4. Relying on the word count of the computer program used to prepare this document, it contains 6,120 words, excluding the portions listed in Tex. R. App. P. 9.4(i)(1).

Seth Hopk
SETH HOPKINS

CERTIFICATE OF SERVICE

I certify that on the 2nd day of October, 2017, a true and correct copy of the foregoing instrument was served by electronic transmission on Respondent Lori Annab, through her counsel of record, Steve E. Couch, 3050 Post Oak Boulevard, Suite 200, Houston, Texas 77056-6570, email scouch@ksklawyers.com.

Seth Hopk
SETH HOPKINS