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No. 14-20-00457-CV

In the Court of Appeals
For the Fourteenth District Court of Texas

HARRIS COUNTY FLOOD CONTROL DISTRICT

Defendant-Appellant

v.

LANCE HALSTEAD

Plaintiff-Appellee

On Appeal from the 127th District Court of Harris County, Texas
Trial Court Cause No. 2018-33563

APPELLANT HARRIS COUNTY FLOOD CONTROL DISTRICT'S AMENDED INITIAL BRIEF

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
Seth.Hopkins@cao.hctx.net
ATTORNEY FOR APPELLANT

ORAL ARGUMENT REQUESTED

IDENTITIES OF PARTIES AND COUNSEL

Appellant:

Harris County Flood Control District

Trial Counsel
Cheryl Elliott Thornton
Steve Smith (former counsel)
Senior Assistant County Attorneys
1019 Congress Avenue, 15th Floor
Houston, Texas 77002
Phone: (713) 274-5146
Cheryl.Thornton@cao.hctx.net

Appellate Counsel
Seth Hopkins
Assistant County Attorney
1019 Congress Avenue, 15th Floor
Houston, Texas 77002
Phone: (713) 274-5141
Seth.Hopkins@cao.hctx.net

Appellee:

Lance Halstead

Trial and Appellate Counsel
M. Paul Skrabanek
Pierce Skrabanek, PLLC
3701 Kirby Drive, Suite 760
Houston, Texas 77098
Phone: (832) 690-7000
Fax: (832) 616-5576
paul@pstriallaw.com
service@pstriallaw.com

Additional parties and counsel:

Grillot Construction, LLC and Phillips & Jordan, Inc.	**Trial Counsel** Wesson Tribble Rick Gibson Tribble & Ross 6371 Richmond Avenue Houston, Texas 77057 Phone: (713) 622-0444 wtribble@tribblelawfirm.com
Stuart Consulting Group, Inc.	**Trial Counsel** Grant Gealy Mills Shirley, LLP 3 Riverway, Suite 670 Houston, Texas 77056 Phone: (713) 225-0547 ggealy@millsshirley.com
Gary Earls d/b/a Hoods Done Right	**Unrepresented Party** 710 Box Car Road Lufkin, Texas 75904

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STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument, which would aid the justices in their decisional process in this case.

RECORD AND PARTY REFERENCES AND CITATIONS

Appellant's brief uses the following references, with specific page numbers in brackets, unless otherwise noted.

Record References

The Clerk's record consists of one volume and supplement, referenced as follows:

Clerk's Record, filed June 26, 2020	C.R. [page]
Supplemental Clerk's Record, filed August 6, 2020	S.C.R. [page]

STATEMENT OF THE CASE

Nature of the Case:	On November 25, 2017, Plaintiff Lance Halstead was working in the course and scope of his employment for Ag Power as a chainsaw operator clearing land in the Harris County Flood Control District right of way after Hurricane Harvey. Under Ag Power's direction, Mr. Halstead unsuccessfully attempted to cut a tree, which fell on him. Among other things, he claims the Flood Control District was negligent under the Texas Tort Claims Act because it allegedly had a defective tree and did not adequately supervise him while he used his own chainsaw. The Flood Control District asserts that Halstead failed to overcome the doctrine of sovereign immunity.
Course of Proceedings:	On May 18, 2018, Plaintiff filed suit against the contractor defendants. On July 13, 2018, Plaintiff filed a First Amended Petition and added a premise liability claim against the Flood Control District. On September 26, 2018, Plaintiff filed a Second Amended Petition. On November 11, 2019, the Flood Control District filed a Plea to the Jurisdiction, which was granted on December 12, 2019. On May 11, 2019, Plaintiff filed a Third Amended Petition re-urging his premise liability claim and adding claims for negligent use of motorized equipment and failure to supervise. On May 21, 2020, the Flood Control District filed a Second Plea to the Jurisdiction, which was denied on June 19, 2020 and is the subject of this appeal.
Trial Court:	The Honorable R.K. Sandill, 127th District Court, Harris County, Texas, Cause No. 2018-33563.
Trial Court's Disposition:	On June 19, 2020, the trial court denied the Harris County Flood Control District's Second Plea to the Jurisdiction without providing written reasons.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over this accelerated interlocutory appeal under Tex. Civ. Prac. & Rem. Code § 51.014(a)(8) and Tex. Civ. Prac. & Rem. Code § 51.014(f).

STATEMENT OF ISSUES PRESENTED

Issue 1:

Did the lower court err in denying sovereign immunity and finding that Plaintiff stated a premise liability claim under Tex. Civ. Prac. & Rem. Code § 101.022(a) when the Harris County Flood Control District had no notice of any alleged defect in its tree and exercised ordinary care by hiring professionals to use their skills and expertise to remove the tree?

Issue 2:

Did the lower court err in denying sovereign immunity and finding that Plaintiff stated a claim for injury "caused by the use of motor-driven equipment" under Tex. Civ. Prac. & Rem Code § 101.021(2) when Plaintiff was using his own chainsaw when he was injured, and no Harris County Flood Control District employee was using any type of motorized equipment?

Issue 3:

Did the lower court err in denying sovereign immunity as to Plaintiff's other negligence claims, when the Legislature does not permit such claims?

TO THE HONORABLE JUSTICES:

Appellant Harris County Flood Control District submits this Initial Brief and respectfully represents as follows:

STATEMENT OF THE FACTS

I. Phillips & Jordan agreed to provide equipment and labor to remove 1,100 flood-damaged trees along the Harris County Flood Control District's drainage canal embankments.

The Harris County Flood Control District is responsible for protecting Harris County residents from the catastrophic effects of flooding. As part of this work, flood plains and drainage canals must be periodically cleared of trees and other debris that slow the ability of water to drain from neighborhoods. On May 22, 2015, the Flood Control District entered into a contract with Phillips & Jordan, Inc. for "Emergency Response for Storm Debris Removal and Disposal Services"[1] That contract was renewed several times, and the scope of work dramatically increased after Hurricane Harvey in August, 2017.

The contract specified that Phillips & Jordan would "…furnish all equipment and labor necessary to remove, load, haul, and dispose of debris from designated HCFCD rights-of-ways (ROW) and channels from the result of any natural or man-made disaster or emergency situation." This included removing organic and inorganic matter such as "storm damaged tree and tree limbs" lodged

[1] C.R. 79.

underwater and along the steep banks of drainage canals. The parties estimated Phillips & Jordan would remove 2,000 tree limbs and 1,100 trees, consisting of 800 trees with a 6 inch DBH,[2] 200 trees with a 15.1 to 25 inch DBH, and 100 trees with a 25.1 inch or larger DBH.[3]

The Flood Control District selected Phillips & Jordan because of its extensive experience removing trees and other debris from waterways and canals after Hurricanes Frances, Jeanne, Wilma, Isaac, Katrina, and Rita, Superstorm Sandy, and numerous floods, tornados, and other major disasters.[4] Based on this experience, the Flood Control District reasonably relied on Phillips & Jordan to inspect the job sites, hire competent employees, and supervise those employees.

II. Although the Flood Control District has sovereign immunity, Phillips & Jordan also agreed to indemnify it and maintain liability and worker's compensation insurance.

Although the Flood Control District was already protected by sovereign immunity, it contracted for a second layer of immunity through a Hold Harmless Agreement which required Phillips & Jordan to "indemnify, defend, and hold Harris County harmless from all claims for personal injury, death and/or property damage resulting directly or indirectly from contractor's performance." Further, Phillips & Jordan was required to maintain liability insurance "to cover

[2] "DBH" is a term of art which means "diameter at breast height." That refers to the diameter of the tree 4.5 feet above ground level, as explained at C.R. 116.

[3] C.R. 96.

[4] C.R. 97-101.

contractor's liability as may arise directly or indirectly from work performed under terms of this bid."[5] Finally, Phillips & Jordan was required to maintain worker's compensation insurance on each of its contractors and employees.[6]

III. Phillips & Jordan understood it was hired to remove hazardous trees on steep embankments that are "still standing but likely to fall."

The Contract made clear that Phillips & Jordan and its contractors and employees would be working on "channel berms, slopes, bottoms, or other designated rights-of-way" and that "[w]ork will include trees that are still standing but likely to fall…"[7] The parties agreed: "Tree removals may be hazardous in nature due to proximity to existing structures, overall condition of the tree, and available access to the work site."[8] The Flood Control District made clear that this project required specialized knowledge and experience, especially following Hurricane Harvey's unprecedented floods.

The Flood Control District's inspector, Audrie Miller, traveled around the County to make sure contractors followed the agreement by preserving safe and healthy trees and cutting only those that were hazardous and in danger of falling, whose roots were eroded by flood waters, or those of certain species.[9] Trees at the

[5] C.R. 85 & 94.

[6] C.R. 96.

[7] C.R. 117.

[8] C.R. 117.

[9] C.R. 139.

top of the channels (above the water) tended to be healthy, and as Miller explained, "[m]ost of every tree we cut down was on the slope bank…"[10] Miller had no duty (or right) to directly supervise Phillips & Jordan's employees or subcontractors, or tell them how to do their jobs.

IV. Mr. Halstead was injured when he made an unsafe cut.

Two and a half months after Hurricane Harvey, Phillips & Jordan was working under this contract. It selected and hired a subcontractor named Ag Power, which employed Plaintiff-Appellee Lance Halstead. Halstead represented himself to be a qualified saw man capable of cutting trees in the Flood Control District's channels.

Mr. Halstead testified he spent four days at the Brays Bayou work site, where he had an opportunity to inspect the property and assess his ability to complete his tasks.[11] Ag Power assigned him to cut an oak tree with severely eroded roots.[12] Based on his expertise, Mr. Halstead believed he could safely cut

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[10] C.R. 148.

[11] S.C.R. 86 at 70:12-15; S.C.R. 95 at 106:10-15; & S.C.R.117 at 197:22-24.

[12] C.R. 140.

the tree,[13] and he admitted that if he thought it was unsafe to cut the tree, he could have stopped the job and "done a…work shutdown."[14]

Mr. Halstead did not shut down the job. Instead, he "evaluated the whole situation," including how and where he wanted the tree to fall, and began cutting the tree "to the best of my expertise."[15] He understood there was "a lot of uneven ground" where he was working[16] and he had "the opportunity to inspect the ground."[17] He made sure he had adequate footing, and he began to cut.[18] However, Mr. Halstead miscalculated his cut, and the tree fell and injured him.

V. The lower court held sovereign immunity was waived.

On May 18, 2018, Plaintiff filed suit against the contractors, and on July 13, 2018, Plaintiff filed a First Amended Petition asserting a premise liability claim against the Flood Control District based on the theory that the tree he tried to cut was defective. On September 26, 2018, Plaintiff filed a Second Amended Petition.

[13] S.C.R. 94 at 102:19-103:5 ("I thought I could do it.")

[14] S.C.R. 94 at 102:19-103:5.

[15] S.C.R. 121 at 211:8-22.

[16] S.C.R. 118 at 199:10-17.

[17] S.C.R. 123 at 220:14-20.

[18] S.C.R. 123 at 221:12.

On November 11, 2019, the Harris County Flood Control District filed a Plea to the Jurisdiction, which was granted on December 12, 2019.

On May 11, 2019, Plaintiff filed a Third Amended Petition which restated his dismissed premise liability claim against the Flood Control District and added a new claim for negligent use of motorized equipment and an unspecified claim for general negligence or failure to supervise, which is not covered by the Tort Claims Act. On May 21, 2020, the Harris County Flood Control District filed a Second Plea to the Jurisdiction, which was denied without reason on June 19, 2020. That ruling is the subject of this appeal.

SUMMARY OF THE ARGUMENT

Sovereign immunity is one of the most important doctrines in Texas law. The lower court incorrectly found the Harris County Flood Control District waived sovereign immunity when the employee of a subcontractor hired to cut trees in a right-of-way injured himself by using his own chainsaw to make an unsafe cut. Not even a private landowner is liable to a contractor injured through his own negligence, and a government is certainly not liable.

The lower court also erred in permitting a duplicate claim for use of motorized equipment when no government employee was using motorized equipment when Plaintiff was injured and the equipment did not cause Plaintiff's

injury. Finally, the lower court erred in allowing Plaintiff to plead a negligence claim not even identified in the Texas Tort Claims Act.

A court may rule on sovereign immunity based on pleadings alone, or even when the defense is raised for the first time on appeal, so long as the other party has a "fair opportunity to address jurisdictional issues by amending its pleadings or developing the record when the jurisdictional issues were not raised in the trial court." *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 96 (Tex. 2012). Plaintiff-Appellee has had adequate time, and the lower court erred in not granting the Flood Control District's Second Plea to the Jurisdiction. This denial should be reversed, and all claims dismissed against the Flood Control District.

ARGUMENT

I. Standard of Review

A trial court may not allow litigation to proceed without first determining that it has subject matter jurisdiction. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex.2004). A trial court has no subject matter jurisdiction over claims against governmental units unless the claims fall squarely within the scope of the Texas Tort Claims Act. *Miranda*, 133 S.W.3d at 224-25.

A governmental unit may challenge a trial court's jurisdiction through a plea to the jurisdiction or motion for summary judgment, and if denied, the government may file an accelerated interlocutory appeal under Tex. Civ. Prac. & Rem. Code §

51.014(a)(8) and § 51.014(f). Subject matter jurisdiction is a question of law reviewed *de novo*. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 911, 928 (Tex.1998); *Harris County v. Estate of Ciccia*, 125 S.W.3d 749, 752 (Tex. App.—Houston [1st Dist.] Dec. 23, 2003, pet. denied).

II. Plaintiff has a high burden to defeat governmental immunity.

A. Texas has only waived sovereign immunity in three narrow areas.

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 1970, Texas 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. Any waiver of immunity must be "beyond doubt."

In recent years, the Supreme Court and Legislature reaffirmed the high burden a party asserting a waiver of immunity bears. In 2001, the Legislature codified Tex. 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, the Texas Supreme Court does not permit damages against a government entity unless an underlying statute waives immunity "beyond doubt." It has further held "we generally resolve ambiguities by retaining immunity." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003)(emphasis added). 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. Immunity is properly raised by a plea to the jurisdiction or motion for summary judgment.

Political subdivisions in Texas may raise governmental immunity by a plea to the jurisdiction, which challenges either the pleadings or the existence of jurisdictional facts. *Miranda*, 133 S.W.3d at 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 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 to be reviewed *de novo*. *Texas National Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). Under Tex. Civ. Prac. & Rem. Code § 51.014(a)(8) and § 51.014(f), this Court may consider an interlocutory appeal of the denial of a dismissal based on sovereign immunity.

III. First Issue for Review: The lower court erred in denying sovereign immunity and finding Plaintiff stated a premise liability claim under Tex. Civ. Prac. & Rem. Code § 101.022(a) when the Harris County Flood Control District had no notice of any alleged defect in its tree and exercised ordinary care in hiring professionals to remove the tree.

One of the three limited waivers of sovereign immunity occurs under § 101.022(a), which states that "…if a claim arises from a premises defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property..." To plead a premise liability claim, Halstead had the burden of showing:

(1) The Flood Control District's tree posed an unreasonable risk of harm, **and**

(2) The Flood Control District actually knew of this danger, **and**

(3) Mr. Halstead did not know of this danger, **and**

(4) The Flood Control District failed to exercise ordinary care to protect Mr. Halstead. The Flood Control District exercises ordinary care if it **either** warns Mr. Halstead of the condition **or** makes the condition reasonably safe **and**

(5) The Flood Control District's failure to exercise ordinary care caused injury.

State v. Williams, 940 S.W.2d 583, 584 (Tex. 1996); *State v. Tennison*, 509 S.W.2d 560, 562 (Tex. 1974). Mr. Halstead cannot satisfy any of these elements.

A. The condition of the tree was open and obvious and did not pose a risk of harm until Mr. Halstead used his chainsaw to cut it.

Mr. Halstead cannot satisfy the first element of the test above, because this particular tree did not pose an unreasonable risk of harm to a professional hired to use his knowledge and skills to cut it down. A tree that grows naturally and falls when deliberately cut is not a premise defect, and although cutting a tree can be hazardous, the hazard comes from the act of cutting—not the natural condition of the tree itself. Texas courts have consistently held that naturally occurring conditions that are open and obvious do not create an unreasonable risk of harm.

In the *Scott* case, the Supreme Court held that accumulating ice in the parking lot of a hospital after a storm is not a premise defect. *Scott and White Mem. Hosp. v. Fair*, 310 S.W.3d 411, 412-414 (Tex. 2010). In the *Surratt* case, the Eastland court of appeals explained that even when a plaintiff is unaware of ice or snow that he slips on, such a risk is open and obvious in the winter, and a property own has no duty to protect him from this hazard. *Wal-Mart Stores v. Surratt*, 102 S.W. 2d 437 (Tex. App.—Eastland, 2003, pet denied).

In the *Cogburn* case, the First Court of Appeals reversed a trial court's denial of a plea to the jurisdiction when a woman tripped and fell over exposed tree roots excavated near a city parking meter. The court held the tree roots were a naturally occurring condition that was open and obvious. *City of Houston v. Cogburn*, 2014 WL 1778279 (Tex. App. – Houston [1st Dist.] 2014, no pet.)

In this case, the tree that Mr. Halstead cut was similar to these examples because it was predictable, natural, and not unexpected. It was also predictable, natural, and not unexpected that when Mr. Halstead cut the tree, it would fall, and that the direction it fell would depend on the way it was cut, the slope of the ground, the proximity to other trees and debris, and conditions such as the wind that day. Accordingly, the tree itself posed no unreasonable risk of harm.

B. The Flood Control District had no knowledge that this particular tree was unreasonably dangerous.

Mr. Halstead has also not pleaded facts to satisfy the second element, because he cannot show that the Flood Control District had greater knowledge than he did about the dangers of cutting this particular tree. The Flood Control District generally knew trees could be dangerous, which is why it hired professionals to remove them. However, there is no evidence pleaded that the Flood Control District had particular knowledge about this tree. There were no reports of problems with this tree, no complaints from other contractors, and no evidence that other tree cutters had alerted the Flood Control District that this tree posed a particular challenge.

In fact, Mr. Halstead was the tree expert on the scene, and he testified that the tree was not damaged in any way, and it looked good.[19] He further testified that he never told anybody he couldn't make this cut:

> Q. …And when you assessed the situation yourself, you saw it was a tight space; but did you ever say, "Look, I can't do this. It's dangerous?"
>
> A. I thought I could do it.
>
> Q. …I mean, you didn't express to anybody that you were concerned for your safety?
>
> A. No…[20]

Accordingly, there are no facts pleaded to show how this tree was unreasonably dangerous, or that the Flood Control District had knowledge of this alleged danger.

C. As a contractor with expertise in trees, Mr. Halstead knew and accepted the risk of cutting this tree, and the Flood Control District had no duty to warn him.

Assuming, *arguendo*, Mr. Halstead could satisfy the first two burdens, he still failed to plead how he could not have known of the risk of cutting this tree. Mr. Halstead argued that the tree was dangerous because it was on a slope, or because it was close to other trees. However, as discussed, he was paid to inspect the tree and make a professional decision about the risks of cutting it. It was that

[19] S.C.R. 92 at 94:4-6.

[20] S.C.R. 94 at 102:19-25.

very expertise that the Flood Control District relied on when it contracted with Phillips & Jordan to remove the trees in its channel.

Mr. Halstead testified that he had been working on this job site four days and had every opportunity to inspect the area and the trees he was cutting:

> Q. …When you went out to the tree, you did look at the tree. You had an opportunity to inspect it before you started, didn't you?
>
> A. Yes sir.
>
> Q. Okay. And did you look at the ground around the tree?
>
> A. I was in a narrow space, but—
>
> Q. You did have an opportunity to inspect the ground, didn't you?
>
> A. Yes, sir.[21]

Mr. Halstead speculated that his accident may have occurred because the tree he cut was close to two others. However, he knew that before he started the job, and he testified:

> A. Because all three trees were together, yes that was the dangerous situation.
>
> Q. Which you were aware of before you started to cut.
>
> A. Which I was aware of.[22]

[21] S.C.R. 123 at 220:14-24.

[22] S.C.R. 124 at 224:20-22.

Despite knowing that these trees were close together, Mr. Halstead believed the job was safe and chose to proceed. No one pressured him, and he always had the opportunity to stop the job if he felt unsafe:

> Q. And you said earlier you could have done what, like a work stoppage or a safety stoppage?
>
> A. Yes, sir.
>
> Q. Which you didn't do.
>
> A. No, sir.[23]

D. The Flood Control District disclosed to its contractors that cutting trees had inherent risks.

Next, the Flood Control District did warn its contractors about the risk of cutting trees. As discussed, the Flood Control District's contract for the tree removal made clear that the work would be on "channel berms, slopes, bottoms, or other designated rights-of-way" and that "[w]ork will include trees that are still standing but likely to fall…"[24] The parties agreed: "Tree removals may be hazardous in nature due to proximity to existing structures, overall condition of the tree, and available access to the work site."[25]

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[23] S.C.R. 125 at 227:12-16.

[24] C.R. 117.

[25] C.R. 117.

E. The Flood Control District exercised ordinary care in hiring experienced contractors to remove the trees.

Halstead's final burden is to show the Flood Control District failed to exercise ordinary care in its handling of the tree. It is undisputed that the Flood Control District hired contractors specifically so they would be exercising ordinary (or greater) care. This is different from a situation where a property owner neglects a dying tree until it falls and injures an unsuspecting person. In this case, Halstead's very reason for being on the property was because the Flood Control District was acting as a prudent property owner. Halstead cannot satisfy **any** of the elements required to plead a premise liability case.

IV. Second Issue for Review: The lower court erred in denying sovereign immunity and finding that Plaintiff stated a claim for injury "caused by the use of motor-driven equipment" under Tex. Civ. Prac. & Rem Code § 101.021(2) when Plaintiff was using his own chainsaw when he was injured, and no Harris County Flood Control District employee was using any type of motorized equipment.

A. Halstead cannot plead claims under both premise liability and use of motor-driven equipment, because they are mutually exclusive.

Under the Tort Claims Act, sovereign immunity is waived when a person is injured by a government employee's negligent use of a government's motorized equipment. Tex. Civ. Prac. & Rem. Code § 101.021. These types of cases typically involve automobile accidents.

However, Mr. Halstead cannot state a case for the negligent use of motor equipment because his claim is more accurately classified as a premise liability

claim, and the two claims are mutually exclusive. When a Plaintiff asserts a premise liability claim, any other negligence allegation is subsumed into that premise liability claim, and the two claims cannot overlap.

In the *Miranda* case, a woman was injured by a falling tree branch at Garner State Park while standing at a campsite recommended by a park ranger. The *Miranda* plaintiffs asserted claims against the Texas Department of Parks and Wildlife based on premise liability and the negligent condition of tangible property (the tree).[26] The Supreme Court held:

> The Tort Claims Act's scheme of a limited waiver of immunity from suit does not allow plaintiffs to circumvent the heightened standards of a premise defect claim contained in section 101.022 by re-casting the same acts as a claim relating to the negligent condition or use of tangible property.

Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 233 (Tex. 2004). This Court has held that injury from a statue of an elephant can only be brought under premise liability because the elephant was "erected or growing upon or affixed to land." *City of Houston v. Harris*, 192 S.W.3d 167, 174 (Tex. App.—Houston [14th Dist.] 2006, no pet.) The elephant statue, like the tree which fell on Mr. Halstead, was "growing upon or affixed to land" and the fact that Mr. Halstead cut it down with a chainsaw does not convert his premise liability claim into one for injury from motorized equipment.

[26] Ironically, Mr. Halstead was hired to prevent exactly this kind of event from occurring to someone walking through the Flood Control District right-of-way.

This Court has also held that injury from a defective elevator can only be brought under premise liability. Even though the elevator is motorized, the danger "arises from" the underlying property. *University of Texas Medical Branch at Galveston v. Davidson*, 882 S.W.2d 83, 85 (Tex. App.—Houston [14th Dist.] 1994, no writ). Similarly, though Mr. Halstead's chainsaw had a motor, his underlying injury was from a tree which arose from the property—not from cutting himself with the chainsaw. That is a premise defect.

Even when a government-owned truck being driven by a government employee and leaks hydraulic fluid onto a highway that causes a motor vehicle accident, the accident arises only in premise liability because it was caused by truck's effect on the road—not from the truck itself:

> However, the evidence shows that Mr. Mackey's injuries were not directly related to the activity itself—the employment of the TxDOT truck—instead, his injuries were the result of the hydraulic leak, which created the slippery condition on Highway 21. Because Mr. Mackey's case did not involve the contemporaneous actions or omissions in others' conduct, and his injuries were caused by a condition created by the employment of the TxDOT truck, namely the consequential leakage of hydraulic fluid from the vehicle, the negligent activity theory of liability is not applicable in this case, and Mr. Mackey is limited to a premises defect theory of liability.

Texas Dep't of Transp. v. Mackey, 345 S.W.3d 760, 767 (Tex. App.—El Paso 2001, pet denied). In this case, Mr. Halstead's use of the chainsaw caused a tree to fall. As the Supreme Court said in the *Miranda* case, an injury from a falling tree

can only be pleaded as premise liability. As discussed, *supra*, the Flood Control District retains sovereign immunity for Mr. Halstead's premise liability claim.

B. Halstead does not have a claim for injury caused by motor-driven equipment because his alleged injury was not caused by a government employee's use of motorized equipment.

Assuming, *arguendo*, Mr. Halstead could plead a claim for injury from motorized equipment, that claim would still fail because no government employee injured him with motorized equipment. Halstead is not a government employee, and the chainsaw that he used was his own—not the Flood Control District's.

Under Tex. Civ. Prac. & Rem. Code § 101.021(1), a governmental unit can also be liable for injury caused by a government employee while using motorized equipment:

> (1) …personal injury and death proximately caused by the wrongful act or omission or the negligence **of an employee** acting within the scope of employment if:
>
> > (A) the … personal injury, or death arises from the operation or use of motor driven vehicle or motor-driven equipment…

Under Tex. Civ. Prac. & Rem. Code § 101.001(2), an employee is a "person…who is in the paid service of a governmental unit by competent authority, **but does not include an independent contractor**." (emphasis added).

Further, the government employee must be actively using motor-driven equipment when an accident occurs for the waiver of immunity to apply. *Ryder*

Integrated Logistics v. Fayette County, 453 S.W.3d 922, 927 (Tex. 2015). *See also, Heyes v. North East Indep. Sch. Dist.*, 730 S.W.3d 130 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.) (plaintiff could not recover from an automobile accident injury on school property when the car was being driven by a student).

The San Antonio court of appeals found no liability when a police officer (a government employee) used a motor vehicle to chase a speeding automobile, which collided with another car and killed its driver. The court of appeals held: "[w]ith regard to…injury caused by an employee's use of a motor-drive vehicle, immunity is only waived where the governmental employee, not a third party, is the operator of the motor vehicle causing the injury." *Ramos v. City of San Antonio*, 974 S.W.2d 112 (Tex. App.—San Antonio 1998, no pet.)

Even when an employee gives car keys to a drunk driver who injures another person, there is no waiver of liability. *City of Columbus v. Barnstone*, 921 S.W.2d 268 (Tex. App.—Houston [1st Dist.] 1995, no writ). It was error for the lower court to permit Mr. Halstead to proceed on any claim based on the government's use of a chainsaw.

V. <u>Third Issue for Review</u>: The lower court erred in denying sovereign immunity on Plaintiff's other negligence claims.

There is no liability under the Tort Claims Act for any form of negligence not listed in the statute. Negligence for the failure to supervise is not listed in the Tort Claims Act, and Halstead is unable to recover against the Flood Control District under this theory. *See, Tex. Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 581 (Tex. 2001).

Even if the Flood Control District was not a government entity, it had no duty to supervise Halstead. Halstead appears to have gained this mistaken impression because, on November 25, 2017, Ms. Miller happened to be "making my rounds to all the sites" when the accident occurred.[27] When she arrived at the location, Mr. Halstead was cutting an oak whose roots were severely eroded.[28]

Ms. Miller was not watching Mr. Halstead closely because the contractors "do their own thing" and Phillips & Jordan had experience clearing debris.[29] She also knew the contractors had safety meetings every day where they discussed the "safety of cutting trees…"[30] and that Phillips & Jordan had two safety men and project managers on job sites every day.[31] Based on the parties' contracts, Ms.

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[27] C.R. 142.

[28] C.R. 140.

[29] C.R. 143.

[30] C.R. 144.

[31] C.R. 145.

Miller was "not to tell people what to do or how to do their job."[32] Further, it was not up to the Flood Control District to determine whether a job was too hazardous—"[t]hat was up to the [contractors'] foreman."[33] For these reasons, the lower court erred in permitting Halstead to proceed with his general negligence/failure to supervise claim.

CONCLUSION AND PRAYER

Mr. Halstead has the burden of showing facts sufficient to demonstrate the trial court's jurisdiction to hear this case based on the allegedly defective condition of a tree that looked healthy, had no known problems, but needed to be removed so flood waters could pass. The Harris County Flood Control District hired a professional to cut this tree, but he made a bad cut, and the tree injured him. There is no theory under the Texas Tort Claims Act that would permit this case to survive a plea to the jurisdiction and proceed to trial. Accordingly, the lower court's denial of the Harris County Flood Control District's Second Plea to the Jurisdiction should be reversed, and this case should be dismissed.

[32] C.R. 146.

[33] C.R. 148.

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
Seth.Hopkins@cao.hctx.net

ATTORNEY FOR APPELLANT
HARRIS COUNTY FLOOD
CONTROL DISTRICT

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SETH HOPKINS

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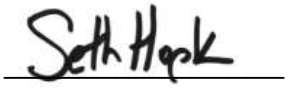

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andrea.mintzer@cao.hctx.net
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Associated Case Party: LANCE HALSTEAD

Name	BarNumber	Email	TimestampSubmitted	Status
M. Paul Skrabanek		paul@pstriallaw.com	8/14/2020 10:16:13 AM	SENT

Associated Case Party: Harris County Flood Control District

Name	BarNumber	Email	TimestampSubmitted	Status
Seth Hopkins		seth.hopkins@cao.hctx.net	8/14/2020 10:16:13 AM	SENT

Associated Case Party: Gary Earls d/b/a Hoods Done Right

Name	BarNumber	Email	TimestampSubmitted	Status
Gary Earls		Hoodsdoneright@gmail.com	8/14/2020 10:16:13 AM	SENT

Associated Case Party: Grillot Construction, LLC and Phillips & Jordan, Inc.

Name	BarNumber	Email	TimestampSubmitted	Status
Wesson H.Tribble		wtribble@tribblelawfirm.com	8/14/2020 10:16:13 AM	SENT

Associated Case Party: Stuart Consulting Group, Inc.

Name	BarNumber	Email	TimestampSubmitted	Status
Grant Gealy		ggealy@millsshirley.com	8/14/2020 10:16:13 AM	SENT