

No. 09-0369

IN THE SUPREME COURT OF TEXAS

**Glenn Colquitt,
*Petitioner,***
vs.
**Brazoria County,
*Respondent.***

**From the Fourteenth Court of Appeals, Houston
Cause No. 14-08-00210-CV**

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

On February 9, 2006, Plaintiff sued Brazoria County in the 412th District Court, Brazoria County (W. Edwin Denman, J.) for personal injuries that occurred on December 5, 2005 while Plaintiff was working at the Brazoria County jail. App. 3 (Plaintiff's Petition).

In January 2008, Brazoria County moved to dismiss for lack of jurisdiction (CR 10-14), arguing it did not receive formal written notice of Plaintiff's claim as allegedly required by section 311.034 of the Government Code. Plaintiff responded that the act of filing of a lawsuit was actual notice under existing law and this fact was not altered by the 2005 amendment of section 311.034 of the Government Code. CR 15-17.

On March 12, 2008, the 412th District Court (Denman, J.) concluded that Plaintiff's petition gave Brazoria County adequate actual notice of claim, and thus denied the County's motion to dismiss. Apps. 1,2. It found Plaintiff's petition was sufficiently detailed and that its filing constituted actual notice under section 101.101 of the Civil Practice and Remedies Code, *citing Cavazos v. City of Mission*, 797 S.W.2d 268 (Tex. App.—Corpus Christi 1990, no writ). It also found the 2005 amendment to section 311.034 of the Government Code did not alter this fact, or conflict with section 101.101. Apps. 1, 2.

Brazoria County filed an accelerated appeal. On January 27, 2009, the 14th Court of Appeals (Anderson, J.; Frost, Hudson, JJs) issued a published opinion reversing the trial court's order. 282 S.W.3d 582; App. 4. This Petition follows. On August 21, 2009, this Court requested briefing on the merits.

STATEMENT OF JURISDICTION

The Supreme Court has conflicts jurisdiction to entertain this Petition from an accelerated appeal. TEX. GOVT. CODE § 22.225(b); *Gonzalez v. Avalos*, 907 S.W.2d 443, 444 (Tex. 1995); *Southwest Ref. Co. v. Bernal*, 22 S.W.3d 425, 430 (Tex. 2000)(Supreme Court has jurisdiction over interlocutory appeals when the court of appeals's decision conflicts with a prior decision of another appeals court or Supreme Court). To establish conflicts jurisdiction, the conflict must be on the question of law actually involved and determined, the test being whether one would operate to overrule the other in case they were both rendered by the same court. *Coastal Corp. v. Garza*, 979 S.W.2d 318, 319 (Tex.1998).

Conflict exists between the Thirteenth, Fourteenth, and Fifth Courts of Appeals regarding what constitutes acceptable notice of claim to a governmental entity. *Cf. Cavazos v. City of Mission*, 797 S.W.2d 268, 271 (Tex. App –Corpus Christi 1990, no writ)(filing suit within the time required for notice under section 101.101(a) amounts to actual notice, obviating the need for separate written notice). The Fourteenth Court of Appeals acknowledged *Cavazos*, but did not follow it because it “was decided fifteen years before 311.034 was enacted and we choose not to follow it here.” *Cf. City of Dallas v. Carbajal*, 278 S.W.3d 802 (Tex. App.–Dallas 2009, pet filed May 21, 2009)(“. . . we conclude the [written police] report here constitutes evidence of Carbajal's identity and injury, as well as evidence of the City's subjective awareness . . .thus establishing actual notice pursuant to section 101.101(c).”).

ISSUES PRESENTED

- 1. Whether filing a petition within six months of an incident, followed by service on the governmental entity, is sufficient notice of a claim under the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE §101.101(c).**

The trial court found the Plaintiff's petition (App. 3) contains the required information of notice. App. 1. The Fourteenth Court of Appeals incorrectly determined, however, plaintiff's filing his petition within six months of his accident did not satisfy the notice requirements of the Tort Claims Act. *Colquitt*, 282 S.W.3d 582 (Tex.App.–Houston [14th Dist.] 2009, pet. req'd). App. 4. Texas case law recognizes that filing a lawsuit satisfies the actual notice requirement. *Cavazos*, 797 S.W.2d at 271. The Court of Appeals acknowledged *Cavazos*, but declined to follow it because it was decided fifteen years before section 311.034 was enacted. Subsequent case law –*City of Dallas v. Carbajal*, 278 S.W.3d 802 (Tex. App.–Dallas 2009, pet. filed May 21, 2009)– confirms the vitality of *Cavazos*'s logic, however.

- 2. Whether this Court should resolve the conflict between the appellate decision herein and *Cavazos*, 797 S.W.2d 268, 271 (Tex. App.–Corpus Christi 1990, no writ) and *Carbajal*, 278 S.W.3d 802 (Tex. App.–Dallas 2009, pet filed 5/21/2009).**

This Court should resolve the conflict between the Fourteenth Court of Appeals's decision herein and *Cavazos*, 797 S.W.2d 268 (Tex. App.–Corpus Christi 1990, no writ) and *Carbajal*, 278 S.W.3d 802 (Tex. App.–Dallas 2009, pet. filed May 21, 2009).

3. Did the Fourteenth Court of Appeals err in construing section 311.034 of the Government Code to conflict with section 101.101 of the Civil Practice and Remedies Code.

This Court should reverse the decision of the Fourteenth Court of Appeals because it construed section 311.034 of the Government Code to conflict with section 101.101 of the Civil Practice and Remedies Code.

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PETITIONER’S BRIEF ON THE MERITS

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner Glenn Colquitt seeks review of the opinion of the Fourteenth Court of Appeals, 282 S.W.3d 582 (App. 4), respectfully showing:

I. INTRODUCTION

This Petition challenges the Fourteenth Court of Appeals’s construction of section 101.101 of the Civil Practice and Remedies Code which provides for “actual notice” of a claim and section 311.034 of the Government Code, a 2005 enactment which states that statutory notice requirements are jurisdictional. This Petition presents an issue of statutory

construction. The Fourteenth Court of Appeals effectively construed the two statutes so as to conflict with each other; moreover, the opinion below conflicts with *Cavazos v. City of Mission*, 797 S.W.2d 268, 271 (Tex. App –Corpus Christi 1990, no writ), which recognized that a lawsuit constituted sufficient notice of a claim, and with *City of Dallas v. Carbajal*, 278 S.W.3d 802, 805-06 (Tex. App.–Dallas 2009, pet. filed May 21, 2009), which recognized that a police report constituted sufficient actual notice of a claim.

II. STATEMENT OF FACTS

Plaintiff Glenn Colquitt was working for private contractor Volt Telecom at the Brazoria County jail when, on December 15, 2005, he “was seriously injured when the floor collapsed in the jail’s second story equipment room, causing him to fall through the floor.” App. 3 (Plaintiff’s Petition) at p. 2.

On February 9, 2006, Plaintiff Colquitt filed suit against Brazoria County asserting causes of action for negligence and premises liability. App. 3. The District Court found that Colquitt’s petition “contain[s] all of the required [notice] information.” App. 1 at p. 1. Apart from filing and serving the suit, Mr. Colquitt did not give the County a separate written notice of his claim. However, Colquitt’s five-page petition was very detailed and specific: “Plaintiff was injured because of Defendant’s negligence, gross negligence, and malice when Defendant: *constructed the jail; * installed the floor; *maintained the floor; *failed to adequately warn Colquitt of the dangerous condition on the property; *failed to provide adequate lighting; and *for other reasons deemed negligent.” *Id.* at p. 3. “Defendant owned,

occupied and/or controlled the jail and the area of the jail where Plaintiff was injured.” *Id.* at p. 3 Colquitt also claimed the County failed to warn him of an unreasonably dangerous condition and breached that duty by failing to make the unreasonably dangerous condition reasonably safe. *Id.* at pp. 3-4.

Brazoria County was served with Mr. Colquitt’s original petition and has never contested this fact, nor has it ever maintained that it was unaware of Mr. Colquitt’s lawsuit. In 2006, Brazoria County first moved to dismiss Mr. Colquitt’s suit for lack of jurisdiction, but the district court denied the motion and on interlocutory appeal, the First Court of Appeals concluded that questions of fact regarding Brazoria County’s awareness of suit existed, and thus affirmed the trial court’s denial of the County’s plea to the jurisdiction. *See Brazoria County v. Colquitt*, 226 S.W.3d 551 (Tex. App.– Houston [1st Dist.] Jan. 4, 2007), App. 5.

Undaunted, in January 2008, Brazoria County again moved to dismiss Mr. Colquitt’s suit for lack of jurisdiction, this time on grounds the County was not given separate written notice of Colquitt’s claim in the form supposedly mandated by the 2005 addition to section 311.034 of the Government Code (*i.e.*, a notice letter). CR 10-14. Colquitt responded to the County’s second jurisdictional challenge, showing that Texas case law recognized that the act of filing a lawsuit and serving the petition on the County constituted “actual notice” under section 101.101 of the Civil Practice and Remedies Code and that such an act was “statutory

notice” under section 311.034 of the Government Code. CR 15-17; see 282 S.W.3d at 584-85.

On March 12, 2008, following an oral hearing, the 412th District Court issued a written opinion concluding that Mr. Colquitt properly gave the County actual notice under section 101.101 of the Tort Claims Act and denied the County’s motion to dismiss. CR 34-36; Apps. 1, 2. The District Court found that filing suit within six months of the accident constituted “actual notice” under section 101.101 of the Civil Practice and Remedies Code. *Id.*, citing *Cavazos*, 797 S.W.2d at 271. The District Court further concluded that section 311.034 of the Government Code did not alter the statutory underpinnings of section 101.101 of the Civil Practice and Remedies Code (*i.e.*, “actual notice” is a category of “statutory notice”) and thus jurisdiction existed because Colquitt satisfied the statutory prerequisites to suit. *Id.*, CR 36; App. 2.

Thereafter, Brazoria County filed an accelerated appeal (CR 30-31) and on January 27, 2009, the Fourteenth Court of Appeals reversed and rendered in Brazoria County’s favor. *Brazoria County v. Colquitt*, 282 S.W.3d 582 (Tex. App.–Houston [14th Dist.] 2009, pet. filed). App. 4. In so holding, the Fourteenth Court of Appeals “chose not to follow” *Cavazos* (1990) because it was “decided fifteen years before section 311.034 was enacted.” 282 S.W.3d at 587; App. 4.

III. SUMMARY OF THE ARGUMENT

The District Court correctly determined that Colquitt’s filing of his petition within six months of his accident satisfied the “actual notice” requirements of section 101.101 of the

Civil Practice and Remedies Code. This is true because section 101.101 allows two types of notice: written and actual and Texas case law recognizes that filing of a petition or a police report is sufficient actual notice. *See Cavazos*, 797 S.W.2d 268 (petition serves as actual notice of claim under section 101.101); *Carbajal*, 278 S.W.3d at 805-06 (a police report serves as actual notice under section 101.101).

Section 311.034 of the Government Code (specifically, the 2005 amendment thereto) did not alter this fact, because it merely states that *statutory notice* requirements are prerequisite to a suit: “Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.” “Actual notice” is statutory notice because it is allowed by section 101.101(c). The Fourteenth Court of Appeals did not follow this logic, however, concluding that the 2005 amendment had the effect of abolishing actual notice, at least in the form of lawsuit-created notice: “. . . the notice prerequisite may not be satisfied by notice that comes as a result of a lawsuit being filed.”

The recognition that a county is fairly notified of a claim by filing and service of a lawsuit makes common sense and is sound policy. A properly written petition --in this case, five pages in length-- accomplishes the same end, if not more, than a notice letter. The District Court’s decision should be reinstated because it is legally correct under *Cavazos* and *Carbajal* and properly construes sections 101.101 and 311.034 in harmony. The decision of the Fourteenth Court of Appeals herein should be reversed because it: (1) ignores the plain

wording of section 101.101 and finds section 311.034 to conflict with it; (2) contradicts case law (*i.e.*, *Cavazos* and *Carbajal*), and (3) serves no sound public policy interest. The decision of the Fourteenth Court of Appeals also creates discord among the several courts of appeals on the issue of what constitutes actual notice under the Tort Claims Act.

IV. ARGUMENT

This Court should grant this Petition for Review, and upon consideration, reverse the decision of the Fourteenth Court of Appeals for the following reasons:

A. Governmental units must have notice of suit if they are to be sued

Governmental units have immunity from suit, except to the extent permitted by the Tort Claims Act. TEX. CIV. PRAC. & REM. CODE, §101.025; *Tex. Dept. Of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). Section 101.101 of the Act provides that a person injured by a governmental entity must give notice of a claim not later than six months after the date of the incident giving rise to the claim. TEX. CIV. PRAC. & REM. CODE § 101.101(a). The notice must reasonably describe the damage or injury claimed, the time and place of the incident, and the incident itself. *Id.* However, the notice requirements do not apply if the governmental unit has *actual notice* of negligence that results in injury to the claimant. TEX. CIV. PRAC. & REM. CODE § 101.101(c).

Section 101.101 of the Civil Practice and Remedies Code provides, *in toto*:

§ 101.101. Notice

- (a) A governmental unit is entitled to receive notice of a claim against it under this chapter not later than six months after the day that the

incident giving rise to the claim occurred. The notice must reasonably describe:

- (1) the damage or injury claimed;
 - (2) the time and place of the incident; and
 - (3) the incident.
- (b) A city's charter and ordinance provisions requiring notice within a charter period permitted by law are ratified and approved.
- (c) The notice requirements provided or ratified and approved by Subsections (a) and (b) **do not apply if the governmental unit has actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged.**

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985 (emphasis added). The purpose of the notice requirement is to ensure that claims against government bodies are promptly reported and that the entity has an opportunity to investigate the merits of a claim while the facts are fresh and conditions remain substantially the same. *City of Houston v. Torres*, 621 S.W.2d 588, 591 (Tex. 1981); *Texas Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 348 (Tex. 2004)(actual notice requires a governmental unit have knowledge of the information set forth in section 101.101 and a subjective awareness that its fault produced or contributed to the injury).

In *Cavazos*, 797 S.W.2d 268, 271 (1990, no writ), the Thirteenth Court of Appeals held that filing suit within the time required for notice under section 101.101(a) of the Civil Practice and Remedies Code amounts to actual notice, obviating any need for separate written notice. In *Cavazos*, the plaintiff was injured when she stepped into an alley behind

her property and fell into an abandoned irrigation pipe. The plaintiff sued the City of Mission for damages, alleging that the irrigation pipe was located on city property and that the city failed to properly maintain it. The district court granted the city summary judgment, finding it had not been given proper notice under the Tort Claims Act. The Thirteenth Court of Appeals reversed, finding *inter alia*, that the filing of a lawsuit was legally sufficient notice of claim:

. . . under the Act, when there are allegations of actual notice and suit is filed *within* the notice of claim period, no purpose is served in requiring additional formal notice. Thus, we hold that under the Tort Claims Act a city may have actual notice of a claim when suit is filed within the notice of claim period.

Cavazos, 797 S.W.2d at 271. The Fourteenth Court of Appeals’s decision did not criticize or distinguish *Cavazos*; it merely observed that the case was “decided fifteen years before section 311.034 [of the Government Code] was enacted” and thus would not be followed. 282 S.W.3d at 587.

B. In 2005, the Legislature made statutory notice requirements “jurisdictional” but did not abolish the statutory category of “actual notice”

Section 311.034 of the Government Code is entitled “Waiver of Sovereign Immunity” and was enacted in 2001. It was amended in 2005 (effective September 1, 2005) by adding a single sentence. Section 311.034 now provides, *in toto*:

§ 311.034. Waiver of Sovereign 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. In a statute, the use of “person,” as defined by Section 311.005 to include governmental entities, does not indicate legislative intent to waive sovereign immunity unless the context of the statute indicates no other reasonable construction. Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.

Added by Acts 2001, 77th Leg., ch. 1158, § 8, eff. June 15, 2001. Amended by Acts 2005, 79th Leg., ch. 1150, § 1, effective Sept. 1, 2005. (2005 amendment is underlined).

The added sentence from 2005 is what is at issue in this Petition. The Texas Legislature added this sentence to section 311.034, effective September 1, 2005, to “clarify the legislature's intent with regard to the relationship between statutory prerequisites to a suit and sovereign immunity.” *See Texas Dept. of Criminal Justice v. Thomas*, 263 S.W.3d 212, 217-18 (Tex.App.–Houston [1st Dist.] 2007, pet. denied). The amendment's brief legislative history shows that the Legislature merely intended to clarify the existing section 311.034. *See* House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 2988, 79th Leg., R.S. (2005), cited in *Thomas, supra*. The legislative history makes no mention of altering existing practice regarding actual notice. App. 6 (House Research Organization, Bill Analysis for H.B. 2988)(“The bill would not affect anyone’s substantive rights, but would simply clarify the procedure required to sue a government entity.”).

In the proceedings below, Brazoria County maintained that the 2005 addition effectively made the “actual notice” provisions in section 101.101 of the Civil Practice and Remedies Code inapplicable and required a written notice of claim in all cases. It argued that the 2005 amendment to section 311.034 of the Government Code effectively abolished the

concept of “actual notice” making a notice letter an absolute “jurisdictional prerequisite to suit.” Under the County’s logic, a petition –even if it gave actual notice– could no longer suffice because actual notice was supposedly abolished by the 2005 amendment to section 311.034.

As can be seen from reading section 311.034, however, the 2005 amendment does not alter section 101.101 or abolish actual notice. Section 311.034 mentions “statutory prerequisites to a suit” meaning that it complements and harmonizes with section 101.101 of the Civil Practice and Remedies Code. A guiding principle in statutory interpretation is that two statutes must be read in harmony so as to complement each other –not cancel one out. TEX. GOV’T CODE § 311.026 (a) (“If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both.”). Additionally, courts presume statutes are “enacted by the legislature with full knowledge of the existing condition of the law and with reference to it.” *McBride v. Clayton*, 140 Tex. 71, 76-77, 166 S.W.2d 125, 128 (1942). The 2005 Legislature could have repealed subsection (c) of section 101.101 of the Civil Practice and Remedies Code, which allows for actual notice. But it did not. Unless the Legislature abolishes the actual notice provisions found in subsection (c) of section 101.101 of the Civil Practice and Remedies Code, the 2005 amendment cannot be read as obviating actual notice. Actual notice is recognized by statute, and was not abolished by the 2005 amendment. To the contrary, the 2005 amendment

mentions “statutory prerequisites to a suit.” The filing and service of a lawsuit constitutes actual notice and is thus a “statutory prerequisite” to suit.

The 2005 addition to section 311.034 of the Government Code does not alter the fact that section 101.101 of Civil Practice and Remedies Code allows actual notice. Receipt of suit papers (or a police report) is a form of actual notice. The logic of *Cavazos* remains valid today: when there are allegations of actual notice and suit is filed *within* the notice of claim period, no purpose is served in requiring an additional formal notice. *Cavazos*, 797 S.W.2d at 271. When a document provides the necessary elements of notice, it will also show that the governmental entity had “subjective awareness” that its fault produced or contributed to the claimed injury. Because the purpose of the notice requirement is to ensure that claims against government bodies are promptly reported and that the entity has an opportunity to investigate the merits of a claim while the facts are fresh, this recognition makes common sense and serves valid policy interests. Being served with an original petition –which is required by the Texas Rules of Civil Procedure to describe the nature of the claim– satisfies the notice requirements of section 101.101. TEX. R. CIV. P. 45 (a petition, like other pleadings, must consist of a statement in plain and concise language of the plaintiff’s cause of action); R. 47 (a petition shall contain “a short statement of the cause of action sufficient to give fair notice of the claim involved” and make a demand for relief).

As correctly found by the District Court, section 311.034 of the Government Code does *not* conflict with section 101.101(c) of the Civil Practice and Remedies Code. Section

311.034 merely states that *statutory notice* requirements are prerequisite to suit. This begs the question, “*What are the statutory notice requirements for suit?*” Section 101.101 of the Civil Practice and Remedies Code allows for two types of notice: one is written and the other is actual notice. Texas case law, in particular *Cavazos*, holds that the filing of a lawsuit within the six month notice period constitutes actual notice. *Cavazos*, 797 S.W.2d at 271. The District Court reviewed the Plaintiff’s petition (App. 3) and determined that it indeed contains the required information that would be included in a notice letter. App. 1.

The harmony between the two statutory provisions is confirmed by the Dallas Court of Appeals’s recent decision in *City of Dallas v. Carbajal*, 278 S.W.3d 802, 805-06 (Tex. App.–Dallas, Jan. 22, 2009, pet. filed May 21, 2009). The Dallas Court of Appeals cited and applied both sections 101.101 and 311.034 in harmony with each other to find that actual notice had been given. *Id.*

In *Carbajal*, a motorist sued the City of Dallas for injuries sustained in a one-vehicle traffic accident. Carbajal drove her vehicle into a large excavated hole on Kessler Parkway and was injured. Carbajal sued the City of Dallas contending that barriers were near the roadway but were not blocking the traffic lane. 278 S.W.3d at 802-03. The city filed a plea to the jurisdiction, arguing that Carbajal did not provide written notice of her claim within six months of the incident pursuant to section 101.101(a) of the Civil Practice and Remedies Code (Tort Claims Act), but relied on a police officer’s investigation and report concerning her accident as evidence of subjective awareness of the City’s fault, establishing actual notice.

278 S.W.3d at 803. The report was made the same day as the incident, identified Carbajal, and noted the date and time of the incident. *Id.* at 805. The district court denied the city's plea to the jurisdiction, and the city took an interlocutory appeal. On appeal, the city argued that although the police report showed the officer may have conducted an investigation and obtained information reasonably suggesting the city's culpability, it did not prove the city had subjective awareness that its fault produced or contributed to Carbajal's injuries. *Id.* at 805-06. The Dallas Court of Appeals disagreed, holding that the police investigative report gave the city subjective awareness of its fault, thus establishing actual notice:

Not every police investigation will result in actual notice sufficient to satisfy section 101.101(c), nor will every police report constitute evidence of such actual notice. However, we conclude the report here constitutes evidence of Carbajal's identity and injury, as well as evidence of the City's subjective awareness of its possible fault in producing or contributing to Carbajal's injury, thus establishing actual notice pursuant to section 101.101(c).

Id. *Carbajal* shows that when a document (a police report) provides the necessary elements of notice, it shows that the governmental entity had “subjective awareness” that its fault produced or contributed to the claimed injury. The *Carbajal* court’s discussion of the law is helpful:

However, as relevant here, the section 101.101(a) written notice requirement does not apply if the governmental unit has actual notice that the claimant has received some injury. Tex. Civ. Prac. & Rem. Code Ann. § 101.101(c). In relevant part, to have actual notice, the governmental entity must have knowledge of: (1) an injury; (2) its alleged fault producing or contributing to the injury; and (3) the identity of the parties involved. *See Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex.1995) (per curiam). As clarified by the supreme court in *Texas Department of Criminal Justice v. Simons*, 140 S.W.3d 338, 347-48 (Tex.2004):

What we intended in *Cathey* by the second requirement for actual notice was that a governmental unit have knowledge that amounts to the same notice to which it is entitled by section 101.101(a). That includes subjective awareness of its fault, as ultimately alleged by the claimant, in producing or contributing to the claimed injury. If a governmental unit has this subjective awareness of fault, along with the other information to which it is entitled under section 101.101(a), then requiring formal, written notice in addition would do nothing to further the purpose of the statute-which is, “to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial.” [*Cathey*, 900 S.W.2d at 341]. It is not enough that a governmental unit should have investigated an incident as a prudent person would have, or that it did investigate, perhaps as part of routine safety procedures, or that it should have known from the investigation it conducted that it might have been at fault. If a governmental unit is not subjectively aware of its fault, it does not have the same incentive to gather information that the statute is designed to provide, even when it would not be unreasonable to believe that the governmental unit was at fault.”

Carbajal, 278 S.W.3d at 804-05, citing *Simons*, 140 S.W.3d 338, 347-48 (Tex. 2004).

In this case, the fact that Brazoria County had knowledge of Mr. Colquitt’s accident and subjective awareness of its potential fault in causing it, was firmly established by at least three separate things:

- (1) the filing and service of Mr. Colquitt’s petition (App. 3);
- (2) the fact that a Brazoria County employee of the Sheriff’s Department was with Mr. Colquitt on the day he fell through the floor, which is evidence the County had actual awareness that Mr. Colquitt fell through the floor of the County jail and was injured; and
- (3) the fact that Brazoria County had placed caution tape around the area in question, which is evidence the County had subjective awareness that

the area was hazardous and was aware it had a duty to warn and/or protect people from the hazard.

Factors numbers 2 and 3 were established in the first interlocutory appeal from this case, *Brazoria County v. Colquitt*, 226 S.W.3d 551, 553-554 (Tex. App.–Houston [1st Dist.] 2007, no pet.), in which the First Court of Appeals was asked to consider, *inter alia*, whether the trial court possessed jurisdiction over Colquitt’s claim against Brazoria County. Significantly, the Fourteenth Court of Appeals did not mention or take into account the First Court of Appeals’s 2007 opinion in its opinion from which this petition is based. In its opinion, the First Court of Appeals affirmed the trial court’s decision to retain jurisdiction of Mr. Colquitt’s claim, noting that there was evidence of Brazoria County’s knowledge and awareness:

. . . . The County also attached [in support of its plea to the jurisdiction] the affidavit of Brandon Griffin, an employee of the Sheriff's Department, who stated that, when he escorted Colquitt to the equipment room on the day of the incident, he observed the caution tape. A series of four photographs, taken after the incident, showed the placement of the caution tape around the tiled area and the general condition of the equipment room. The County argued that the sum of this evidence led to the conclusion that it did not have actual knowledge of the allegedly dangerous condition, that it exercised ordinary care in warning Colquitt of any potential danger, and that, therefore, Colquitt could not establish the County's liability for premises defects under the TTCA [i.e., awareness of the dangerous condition].

In response, Colquitt argued that the photographs submitted by the County did not accurately reflect the condition of the equipment room on the day he was injured. Specifically, Colquitt alleged by affidavit that there was “no sunlight or artificial illumination in the subject work area”. . . . In addition to his affidavit, Colquitt offered a “Supervisor's Investigation Report” prepared by Jim Chapman, a senior manager at Volt who was in the equipment room with Colquitt at the time he fell. In his report, Chapman indicated that the equipment room “was dark, we had been walking on all

concrete floors, [the] drop ceiling was the same level as the concrete floor. There was nothing indicating there was a drop ceiling there. And [Colquitt] did not see it.”.

Colquitt, 226 S.W.3d at 553-554 (2007)(emphasis added). The First Court of Appeals

continued:

. . . the County's own evidence creates a fact issue regarding its knowledge of the danger posed by the condition of the floor. As stated in the Wagner affidavit, yellow caution tape was placed around the ceiling tiles when the building was constructed in 1994. That tape has remained in place since that time. This constitutes some evidence that the County actually knew the ceiling tiles presented some danger to persons working in the equipment room. Given that this fact issue was raised, it would have been improper for the trial court to grant the County's plea on the grounds that Colquitt failed to plead facts concerning the requisite element of actual knowledge.

Colquitt, 226 S.W.3d at 556 (2007).¹ The First Court of Appeals concluded:

In sum, Colquitt's pleadings and the evidence submitted by the parties create questions of fact regarding the County's knowledge and exercise of ordinary care in this case. Because these questions of fact are pertinent to the jurisdictional issue, the trial court did not err in denying the County's plea to the jurisdiction.

Accordingly, we affirm the order of the trial court.

¹ When the State challenges jurisdiction, a plaintiff has the burden to show simply that there is a genuine issue of material fact as to the presence of jurisdiction; this satisfies the jurisdictional burden. See *City of Houston v. Harris*, 192 S.W.3d 167, 175-76 (Tex.App.—Houston [14th Dist.] 2006, no pet.) (the appeals court dismissed a plaintiff's suit against the City of Houston for lack of jurisdiction because the plaintiff failed to meet his burden to show that there was a disputed question of material fact regarding the jurisdictional issue of the city's knowledge). Where a jurisdictional challenge implicates the merits of the plaintiff's cause of action and relevant evidence is submitted by the parties, the trial court reviews the evidence to determine whether a fact issue exists. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004). If the evidence creates a fact question regarding the jurisdictional issue, the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact-finder. *Id.* at 227-28. The trial court rules on the plea to the jurisdiction as a matter of law, however, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue. *Id.* at 228. The court takes as true all evidence favorable to the nonmovant and indulges every reasonable inference and resolve any doubts in his favor. *Id.*

Colquitt, 226 S.W.3d at 556 (emphasis added). A copy of the First Court of Appeals decision in the first interlocutory appeal herein is attached as Appendix 5 to this Brief.

Given the filing and service of Mr. Colquitt’s lawsuit coupled with the facts established in the 2007 interlocutory appeal, 226 S.W.3d 551, it is beyond dispute that Brazoria County had both “actual knowledge” and “subjective awareness” of Mr. Colquitt’s claim, actual knowledge that Colquitt fell through the jailhouse floor, and subjective awareness of a hazardous condition at the jailhouse of which Brazoria County needed to warn, as proven in part by the presence of yellow caution tape. Given all these facts, Brazoria County had the requisite actual notice and subjective awareness needed to sustain jurisdiction under the Tort Claims Act. The service of Colquitt’s petition simply enhanced the notice.

C. The decision of the Fourteenth Court of Appeals herein does not comport with case law

The Fourteenth Court of Appeals’s opinion maintains that the 2005 amendment to section 311.014 mandates that “the notice prerequisite may not be satisfied by notice that comes as a result of a lawsuit being filed.” 282 S.W.3d at 587; App. 4. This is not an accurate statement of Texas law and threatens to create a rule of law where one should not be created. The filing and service of a petition can legitimately serve as actual notice of a claim. The Fourteenth Court of Appeals cited three cases for the proposition that notice achieved through a lawsuit is *per se* insufficient, but none of the three cases supports this idea. In fact one of the three cases cited by the Court of Appeals, *Ballesteros v. Nueces County*, 2007 WL

2473454 (Tex. App.–Corpus Christi Aug. 31, 2007, no pet.), has since been reversed in a subsequent opinion on rehearing, and replaced with an opinion that supports Mr. Colquitt. See *Ballesteros v. Nueces County*, 286 S.W.3d 566 (Tex. App.–Corpus Christi May 14, 2009, pet. stricken). The three cases cited by the Fourteenth Court of Appeals’s opinion are:

1. *Texas Dept. of Criminal Justice v. Thomas*, 263 S.W.3d 212, 218 (Tex. App.–Houston [1st Dist.] 2007, pet. denied). In *Thomas*, the court held that the Texas Department of Criminal Justice (TDCJ) did not have, within six months of an inmate's death, actual notice of the claims of the inmate’s estate who died while being forcibly transferred to psychiatric unit. The trial court thus lacked jurisdiction over the estate's wrongful death complaint. In order to have actual notice, the appeals court found that the statute required that TDCJ have knowledge of information that the statute required to be given and a subjective awareness that its fault produced or contributed to the injury. In *Thomas*, a letter from the estate's counsel to a TDCJ warden referring to the inmate's death did not sufficiently describe the incident because it was merely a request for additional information rather than a formal notice of the estate's claim against the State. “Counsel's letter to the warden is not a notice of a claim by appellees against TDCJ. Although it refers to Hollimon's death (the damage or injury) and gives the date of the death at the Estelle Unit (the time and place), it does not describe the incident. Thus, the letter does not meet the requirements of section 101.101(a), but is merely a request for additional information regarding Hollimon's death.” 263 S.W.3d at 218. *Thomas* is plainly distinguishable and does not involve the sufficiency of a petition.

2. *County of Bexar v. Brunton*, 256 S.W.3d 345, 348 (Tex. App.–San Antonio 2008, no pet.). The Fourteenth Court of Appeals’s reliance on *Brunton* is

puzzling. *Brunton* holds that in a motorist's action against the county arising from an accident with a vehicle driven by a Bexar County employee, the trial court was not deprived of subject-matter jurisdiction by the plaintiff's (motorist's) failure to comply with the notice requirement for suits against the county, because the notice requirement was not a jurisdictional requirement. The notice requirement was a requirement for maintaining a suit, not a prerequisite for filing a suit. TEX. LOCAL GOV'T CODE § 89.0041; TEX. GOV'T CODE §311.034. *Brunton* does not support the idea that notice that is achieved through lawsuit papers is *per se* insufficient notice. In any event, *Brunton* arises under section 89.0041 of the Local Government Code.

3. *Ballesteros v. Nueces County*, 2007 WL 2473454 (Tex. App.—Corpus Christi Aug. 31, 2007, no pet.). As noted above, the opinion cited by the Fourteenth Court of Appeals in its opinion was vacated and withdrawn, with a new opinion submitted in its place. See *Ballesteros v. Nueces County*, 286 S.W.3d 566 (Tex. App.—Corpus Christi May 14, 2009, pet. stricken). The new opinion holds that a section 89.0041 of the Local Government Code, requiring a person filing suit against a county or against a county official in his/her official capacity to deliver a written notice to the county judge and to the county or district attorney, is not a jurisdictional prerequisite to suit; rather, it is a post-suit notice provision. The Court of Appeals found that a former county employee substantially complied with the statutory post-suit notice requirement in his wrongful discharge suit against Nueces County, when after a hearing, the employee faxed the county attorney a copy of his original petition filed in state court the previous day, and the petition showed the style and cause number of the suit, the court in which suit was filed, the date on which suit was filed, and the name of the person filing suit. Given this development, *Ballesteros* no

longer supports Brazoria County's position or the Fourteenth Court of Appeals' opinion, but rather supports Petitioner's argument regarding actual notice.

None of the three cases cited by the Fourteenth Court of Appeals in its opinion holds that "lawsuit notice" is *per se* improper notice under the Tort Claims Act.

The District Court properly determined that the County's receipt of Plaintiff's Original Petition (App. 3) constituted sufficient actual notice under the Tort Claims Act. The District Court reviewed Plaintiff's five-page petition and found it "contain[s] all of the required information" that the statute requires. CR at 34; App. 3 (Plaintiff's petition). The Fourteenth Court of Appeals did not give similar effect to the original petition, however, in so doing, failed to give effect to *Cavazos*, 797 S.W.2d at 271, and worse, undermined the plain meaning of the 2005 addition to the statute and failed to read sections 101.101 and 311.014 of the Code in harmony. This is not a case where the plaintiff's petition was somehow defective, or where the County was never served with it, or never received it. The County does not deny that it was in receipt of Mr. Colquitt's petition. Actual notice may be obtained through a petition that conforms with the statutory notice requirements, and this gives the governmental agency the "subjective awareness" described in *Simons*, 140 S.W.3d at 348. Additionally, the 2007 interlocutory appeal to the First Court of Appeals further establishes that Brazoria County had both actual knowledge of Colquitt's accident and subjective awareness of its fault in bringing it about.

D. Anticipatory Rebuttal of Respondent’s Plain Language Argument

To the degree that Brazoria County complains, or may complain, that the plain language of Government Code section 311.034 requires that any party wishing to sue a governmental entity to comply with the provisions of the Tort Claims Act by giving a written notice of the claim prior to filing their lawsuit, such an argument fails because one must read section 311.034 of the Government Code in conjunction with section 101.101 of the Civil Practice and Remedies Code. When read together, the two statutes establish that prerequisite notice was indeed achieved. The two statutes complement each other.

Colquitt’s filing of his petition within six months of his accident constitutes “actual notice” under section 101.101 of the Civil Practice and Remedies Code. This is true because section 101.101 (c) specifically allows two types of notice –written and actual. Texas case law recognizes that filing of an original petition, or a police report, constitutes actual notice under section 101.101. *See Cavazos*, 797 S.W.2d at 271 (petition serves as actual notice under section 101.101); *Carbajal*, 278 S.W.3d at 805-06 (police report serves as actual notice under section 101.101). Section 311.034 of the Government Code does not alter the fact that actual notice is acceptable, because it states that *statutory notice* requirements are prerequisite to a suit:

Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.

TEX. GOV’T CODE § 311.034. Actual notice –such as is achieved from an original petition or from a police report– is “statutory notice” because it is expressly allowed by section

101.101(c). So, yes, Petitioner gave “statutory notice” of his claim because his original petition gave “actual notice” of his claim. “Plain language” analysis of the two relevant statutes favors Mr. Colquitt –not Brazoria County. The Fourteenth Court of Appeals did violence to the statutory landscape by not reading the two provisions in harmony and consistently with each other. This Court should correct the error.

E. The construction adopted by the Court of Appeals does not serve any public policy purpose or make common sense.

Finally, the Fourteenth Court of Appeals’s position does not make any practical sense, or result in any benefit to the State and its subdivisions. While it is desirable for the State and its subdivisions to receive notice –indeed, detailed notice– of adverse claims within six months of the underlying incident, Mr. Colquitt plainly gave such notice. A petition is an excellent specimen of notice and a county or other entity is fairly notified of a claim by the filing and service of a petition within six months of the claim. A properly written petition –which is five pages long in this case, see Appendix 3– accomplishes the same end, if not far more, than any notice letter or police report. A petition –unlike a police report– is served on the defendant by an officer of the court whose work is memorialized in a return of service. Constitutional guarantees of due process of law ensure that lawsuits and the service of process constitute the ultimate form of “notice” to a defendant. In the words of the U.S. Supreme Court, “Engrained in our concept of due process is the requirement of notice.” *Lambert v. California*, 355 U.S. 225, 228 (1957).

In *Cavazos*, 797 S.W.2d at 271, the Thirteenth Court of Appeals expressly recognized this truth, holding that filing a suit within the time required for notice under section 101.101(a) amounts to actual notice, obviating any need for separate written notice. The Fourteenth Court of Appeals brushed aside *Cavazos* on grounds it was over 15 years old. It failed to offer any principled criticism of the logic of *Cavazos* or its policy results. Texas jurisprudence deserves a more thorough consideration of this issue, especially where the Dallas Court of Appeals in *Carbajal* recently held that a police report constitutes acceptable actual notice under section 101.101.

If the Fourteenth Court of Appeals's decision is allowed to stand, section 311.034 of the Government Code would, in effect, require an aggrieved plaintiff suing a county to serve a notice letter on the County and then walk down the hall to the District Clerk's office to file his petition. Such mindless formalism accomplishes nothing.

V. PRAYER

The District Court correctly determined that the act of filing and serving a lawsuit within six months of an accident constitutes "actual notice" under section 101.101(c) of the Civil Practice and Remedies Code. This result squares with Texas case law. *See Cavazos*, 797 S.W.2d at 271. The 2005 addition to section 311.034 of the Government Code did not change the law; the 2005 amendment merely provides that statutory notice requirements are prerequisite to suit. Actual notice is a statutory requirement. The two statutes complement each other; they are not contradictory.

The District Court's decision should be reinstated because it is legally correct and is sound public policy. The decision of the Fourteenth Court of Appeals does not follow the statutory language, does not follow cited authority, and creates an illogical and purposeless result. It pits two statutes against each other, creating discord among the Courts of Appeals. Petitioner prays that this Court grant review, and that on consideration, reverse the decision of the Fourteenth Court of Appeals and reinstate the trial court's decision allowing this personal-injury to proceed on the merits against Brazoria County. Petitioner Glenn Colquitt prays for all relief to which he is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Petitioner's Brief on the Merits was mailed via first class mail, return receipt requested, to the following counsel of record, this ____ day of September, 2009.

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