

# No. 08-0453

---

IN THE SUPREME COURT OF TEXAS

---

**GEFFREY KLEIN, M.D. and  
BAYLOR COLLEGE OF MEDICINE,**

*Petitioners,*

v.

**CYNTHIA HERNANDEZ, As The Parent  
And Next Friend Of N.H., A Minor,**

*Respondent.*

---

**On Petition For Review From The  
First Court Of Appeals At Houston, Texas**

---

**BAYLOR COLLEGE OF MEDICINE'S PETITION FOR REVIEW**

---

Kendall M. Gray  
State Bar No. 00790782  
Cameron P. Pope  
State Bar No. 24032958  
ANDREWS KURTH LLP  
600 Travis, Suite 4200  
Houston, Texas 77002  
(713) 220-4200  
(713) 220-4285 (Facsimile)

**ATTORNEYS FOR PETITIONERS GEFREY KLEIN, M.D. and  
BAYLOR COLLEGE OF MEDICINE**

## LIST OF PARTIES AND COUNSEL

### **Petitioners (Defendants below)**

Geffrey Klein, M.D. (“Dr. Klein”)

Baylor College of Medicine (“Baylor”)

### **Petitioners’ Counsel**

ANDREWS KURTH LLP

Kendall M. Gray

Cameron P. Pope

600 Travis, Suite 4200

Houston, Texas 77002

### **Petitioners’ Trial Counsel and Counsel in the Court of Appeals**

KRUSE LAW FIRM

Marion W. Kruse, Jr.

Alicia T. Kramer

3355 W. Alabama, Suite 1050

Houston, Texas 77098

### **Respondent (Plaintiff below)**

Cynthia Hernandez as the Parent and  
Next Friend of N.H., A Minor  
 (“Hernandez”)

### **Respondents’ Trial and Appellate Counsel**

THE TALASKA LAW FIRM

Robert J. Talaska

Theodore Gregory Skarbowski

Timothy Lyle Culberson

1415 North Loop West, Suite 200

Houston, Texas 77087

**TABLE OF CONTENTS**

LIST OF PARTIES AND COUNSEL..... i

REFERENCES TO THE RECORD .....iv

APPENDIX .....iv

INDEX OF AUTHORITIES ..... v

STATEMENT OF THE CASE..... viii

STATEMENT OF JURISDICTION..... ix

ISSUES PRESENTED ..... x

I. INTRODUCTION ..... 1

II. STATEMENT OF FACTS..... 2

    A. Baylor Provides Medical Care At Ben Taub, A County  
    Hospital Created To Provide Care To The Indigent And  
    Needy ..... 2

    B. Baylor’s Compensation For This Care Is Approved And Paid  
    By The State And The County ..... 3

    C. The Legislature Has Granted Baylor Governmental  
    Protections For The Services It Provides To The Public At  
    Ben Taub..... 6

III. SUMMARY OF THE ARGUMENT ..... 8

IV. ARGUMENT AND AUTHORITIES ..... 8

    A. Reasons The Court Should Grant The Petition..... 8

    B. Section 51.014(a)(8) Requires Only A Plea To The Jurisdiction  
    By A “Governmental Unit” For Appellate Jurisdiction To Exist ..... 9

    C. Chapter 312 Makes Baylor The Equivalent Of A  
    “Governmental Unit” ..... 9

        I. *Under section 312.006, Baylor must be treated as “a  
        governmental unit of state government”* ..... 9

2. *Under section 312.007, Baylor “is a state agency” for purposes of this litigation* ..... 12

D. The Court Of Appeals Confused The Jurisdictional Inquiry With The Merits Inquiry (And Got The Answer Wrong To Boot)..... 14

V. CONCLUSION AND PRAYER ..... 15

CERTIFICATE OF SERVICE ..... 16

## REFERENCES TO THE RECORD

- 2CR4 Clerk's Record in Cause Number 01-06-00569-CV, volume 2 of 6, page 4.
- 1st Supp. at 6:1791 First Supplemental Clerk's Record in Cause Number 01-06-00569-CV, volume 6, page 1791.
- R8 Reporter's Record at page 8.
- App. Br. at 6 Appellants' Brief filed in *Klein v. Hernandez*, Cause Number 01-06-00569-CV, in the First Court of Appeals at Houston, Texas.

## APPENDIX

The attached Appendix—cited as “App.” followed by the letter of the tab identifying the exhibit—consists of the following:

### Tab

- A.** Order from the trial court signed May 30, 2006, denying Petitioners' motion to dismiss for lack of jurisdiction.
- B.** Order from the trial court signed May 30, 2006, denying Petitioners' motion for summary judgment.
- C.** Opinion dated August 3, 2007, in the First Court of Appeals at Houston, Texas.
- D.** Substituted opinion dated April 17, 2008, in the First Court of Appeals at Houston, Texas.
- E.** Tex Civ. Prac. & Rem. Code Ann. § 51.014 (Vernon Supp. 2007).
- F.** Tex. Health & Safety Code Ann. §§ 312.001–.007 (Vernon 2001 & Supp. 2007).
- G.** *Young v. Villegas*, 231 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

## INDEX OF AUTHORITIES

### Cases

<i>Bland Indep. Sch. Dist. v. Blue</i> , 34 S.W.3d 547 (Tex. 2000).....	11, 14
<i>Brooks v. Northglenn Ass'n</i> , 141 S.W.3d 158 (Tex. 2004).....	11
<i>Brown v. Todd</i> , 53 S.W.3d 297 (Tex. 2001).....	ix, 8
<i>City of Beverly Hills v. Guevara</i> , 904 S.W.2d 655 (Tex. 1995) (per curiam).....	12
<i>Collins v. County of El Paso</i> , 954 S.W.2d 137 (Tex. App.—El Paso 1997, pet. denied).....	15
<i>Diversicare Gen. Partner, Inc. v. Rubio</i> , 185 S.W.3d 842 (Tex. 2005).....	9, 10
<i>Fitzgerald v. Advanced Spine Fixation Sys.</i> , 996 S.W.2d 864 (Tex. 1999).....	10
<i>Franka v. Velasquez</i> , 216 S.W.3d 409 (Tex. App.—San Antonio 2006, pet. granted) .....	x
<i>Johnson v. City of Fort Worth</i> , 774 S.W.2d 653 (Tex. 1989).....	9
<i>Klein v. Hernandez</i> , __ S.W.3d __, No. 01-06-00569-CV, 2008 WL 1747479 (Tex. App.—Houston [1st Dist.] Apr. 17, 2008, pet. filed) .....	<i>passim</i>
<i>Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.</i> , 966 S.W.2d 482 (Tex. 1998).....	11
<i>McBride v. Clayton</i> , 166 S.W.2d 125 (Tex. 1942).....	14
<i>Simmons v. Arnim</i> , 110 Tex. 309, 220 S.W. 66 (Tex. 1920).....	9

<i>State v. Dyer</i> , 200 S.W.2d 813 (Tex. 1947).....	14
<i>State v. Jackson</i> , 376 S.W.2d 341 (Tex. 1964).....	10
<i>Univ. of Tex. Med. Branch at Galveston v. York</i> , 871 S.W.2d 175 (Tex 1994).....	15
<i>Young v. Villegas</i> , 231 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) .....	ix
<i>Zimmerman v. Anaya</i> , No. 01-07-00570-CV, 2008 WL 2339805 (Tex. App.—Houston [1st Dist.] June 5, 2008, no pet. h.) (mem. op.) .....	8

**Statutes**

Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8) (Vernon Supp. 2007) .....	9
Tex. Civ. Prac. & Rem. Code Ann. § 101.001(3)(A) (Vernon 2005).....	12
Tex. Civ. Prac. & Rem. Code Ann. § 101.001(3)(D) (Vernon 2005) .....	12
Tex. Civ. Prac. & Rem. Code Ann. § 101.002 (Vernon Supp. 2007) .....	6
Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (Vernon 2005).....	15
Tex. Civ. Prac. & Rem. Code Ann. § 101.023(a) (Vernon 2005).....	6
Tex. Civ. Prac. & Rem. Code Ann. § 101.025(a) (Vernon 2005).....	15
Tex. Civ. Prac. & Rem. Code Ann. §§ 104.001-.009 (Vernon 2005 & Supp. 2007) .....	7
Tex. Gov’t Code Ann. § 22.001(a)(2) (Vernon 2004) .....	ix
Tex. Gov’t Code Ann. § 22.001(a)(6) (Vernon 2004) .....	ix
Tex. Gov’t Code Ann. § 22.001(e) (Vernon 2004) .....	ix
Tex. Health & Safety Code Ann. § 281.002(a) (Vernon 2001 & Supp. 2007) .....	2
Tex. Health & Safety Code Ann. § 312.001(b) (Vernon 2001) .....	3

Tex. Health & Safety Code Ann. § 312.002(5) (Vernon 2001 & Supp. 2007).....3

Tex. Health & Safety Code Ann. § 312.002(6) (Vernon 2001 & Supp. 2007).....3

Tex. Health & Safety Code Ann. § 312.003 (Vernon 2001) .....3

Tex. Health & Safety Code Ann. § 312.004 (Vernon 2001) .....3

Tex. Health & Safety Code Ann. § 312.006(a) (Vernon 2001)..... x, 6, 10

Tex. Health & Safety Code Ann. § 312.007(a) (Vernon 2001).....x, 7, 12, 13

Tex. Occ. Code Ann. § 162.001(b) (Vernon 2004 & Supp. 2007).....4

**Rules**

Tex. R. App. P. 53.4..... x

**Miscellaneous**

[www.hchdonline.com/about/history.htm](http://www.hchdonline.com/about/history.htm).....2

## STATEMENT OF THE CASE

### **Nature of the Case:**

Respondents initially brought a health care liability claim against Baylor College of Medicine, a nonprofit medical school, for alleged negligence in medical care provided by its physicians, residents, and employees at a public hospital for the indigent and needy owned and operated by the Harris County Hospital District. Respondents

This appeal concerns whether Baylor and Dr. Klein are immune from suit and immune from liability under chapter 312 of the Texas Health and Safety Code and all the provisions of the Texas Tort Claims Act that it incorporates.

### **Trial Court:**

152nd Judicial District Court, Harris County, The Hon. Ken Wise presiding.

### **Trial Court Disposition:**

Denied Petitioners' motions to dismiss for lack of jurisdiction and for summary judgment.

### **Court of Appeals:**

The Court of Appeals for the First District of Texas, Houston, Texas: Justices Taft, Jennings, and Alcalá.

### **Parties in the Court of Appeals:**

Appellants: Geoffrey Klein, M.D. and Baylor College of Medicine.

Appellee: Cynthia Hernandez as the Parent and Next Friend of N.H., A Minor

### **Court of Appeals' Disposition:**

The Court of Appeals issued an opinion and judgment on August 3, 2007. It granted rehearing, and on April 17, 2008, in an opinion authored by Justice Jennings, withdrew its prior opinion, vacated the judgment, and dismissed Petitioners' appeals for lack of jurisdiction. \_\_\_ S.W.3d \_\_\_, No. 01-06-00569-CV, 2008 WL 1747479 (Tex. App.—Houston [1st Dist.] Apr. 17, 2008, pet. filed).

## STATEMENT OF JURISDICTION

This Court has jurisdiction under section 22.001(a)(2), (a)(6), and (e) of the Texas Government Code. Tex. Gov't Code Ann. §§ 22.001(a)(2), (a)(6), (e) (Vernon 2004). Specifically, in *Young v. Villegas*, 231 S.W.3d 1, 7-8 (Tex. App.—Houston [14th Dist.] 2007, pet. denied), the Fourteenth Court of Appeals held that section 51.014(a)(5) of the Texas Civil Practice and Remedies Code “authorized a Baylor doctor, who was similarly situated to Dr. Klein in the instant case, to appeal the denial of his summary judgment motion, in which he asserted immunity from individual liability.” *Klein v. Hernandez*, \_\_\_ S.W.3d \_\_\_, No. 01-06-00569-CV, 2008 WL 1747479, at \*6 (Tex. App.—Houston [1st Dist.] Apr. 17, 2008, pet. filed).

Here, however, the First Court of Appeals held “that section 51.014(a)(5) does not authorize Dr. Klein’s interlocutory appeal of the trial court’s denial of his summary judgment motion.” *Id.* at \*7 (“respectfully disagree[ing] with the Fourteenth Court of Appeals’s holding in *Young*”). Appellate jurisdiction in these cases, therefore, depends upon whether a case is randomly assigned to the First or the Fourteenth Court of Appeals. Because of this conflict, the Court has jurisdiction over the entire case, including Dr. Klein’s other issues and issues specific to Baylor. *Brown v. Todd*, 53 S.W.3d 297, 301 (Tex. 2001) (“As we have repeatedly recognized, if our jurisdiction is properly invoked on one issue, we acquire jurisdiction of the entire case.”).

Moreover, the availability of appeal and the underlying issues regarding the interpretation and application of chapter 312 of the Texas Health and Safety Code are important to the jurisprudence of the State. Indeed, the Court is currently considering

*Franka v. Velasquez*, 216 S.W.3d 409 (Tex. App.—San Antonio 2006, pet. granted), which involves the relationship between section 312.007(a) and section 101.106 of the Texas Tort Claims Act. That issue will also be presented to the Court in a petition shortly to be filed seeking review of Cause No. 01-07-00570-CV. *See infra* § IV.A.

## **ISSUES PRESENTED**

### **Jurisdiction over Baylor’s appeal:**

Chapter 312 of the Texas Health and Safety Code declares that a supported medical school “is a state agency” for purposes of determining the liability of its employees, and “*is not liable* for its acts and omissions” in connection with the services it provides at public hospitals subject to waivers and exceptions imported from the Texas Tort Claims Act.<sup>1</sup> Baylor filed a plea to the jurisdiction and a motion for summary judgment, asserting immunity under chapter 312 as the equivalent of a governmental unit, and the trial court denied those defenses. Did the Court of Appeals err in finding that it had no jurisdiction to consider Baylor’s appeal?

### **The merits of Baylor’s assertion of immunity:<sup>2</sup>**

Under the circumstances of this case, do Baylor and Dr. Klein have immunity in connection with their activities, including patient care, at a public hospital?

---

<sup>1</sup> Tex. Health & Safety Code Ann. §§ 312.006(a), 312.007(a) (Vernon 2001) (emphasis added).

<sup>2</sup> Because of its erroneous resolution of the jurisdictional issue against Baylor, the Court of Appeals found it unnecessary to reach its points of error regarding chapter 312. Argument and briefing is reserved for Baylor’s brief on the merits pursuant to Tex. R. App. P. 53.4 for issues listed here and not fully treated herein.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner Baylor College of Medicine respectfully files this Petition For Review to complain of the Court of Appeals' opinion and judgment issued on April 17, 2008 and would show the Court as follows:

## **I. INTRODUCTION**

This state provides health care to indigent patients and medical educations to qualified residents in a variety of fashions. One of the ways the Legislature does so is through "supported medical schools" like Baylor, which educates its students and provides indigent care through the Harris County Hospital District. In connection with accomplishing that public purpose with public funds, the Legislature has expressly stated that Baylor is to be treated as a "state agency." It has also stated that Baylor "is not liable," subject to a waiver of immunity and cap on liability that is incorporated from the Texas Tort Claims Act.

Baylor contends that these protections place it in the same position as state universities and their medical students and faculties that provide the same type of care at other public hospitals. They limit the types of claims that may be brought against Baylor, they incorporate the provisions of section 101.106 of the Tort Claims Act that serve to channel claims away from public servants and toward governmental entities, and they likewise subject those claims to the caps that apply to claims against governmental entities. Most importantly, when the protections are invoked, they are subject to interlocutory review afforded to governmental units and their employees under section 51.014 of the Civil Practice and Remedies Code.

In this case, however (and another which is soon to follow) the First Court of Appeals has created a direct conflict with the Fourteenth Court of Appeals by refusing the right of appeal to Baylor and its physicians, has failed to treat Baylor like similarly situated public universities doing the same work, and in so doing has put at risk the legislative balance struck as part of funding and providing publicly-funded health care. Only this Court is in a position to restore the Legislature's plan.

## II. STATEMENT OF FACTS

### A. **Baylor Provides Medical Care At Ben Taub, A County Hospital Created To Provide Care To The Indigent And Needy**

Counties with at least 190,000 inhabitants, like Harris County, are statutorily empowered to “create a countywide hospital district and provide for the establishment of a hospital or hospital system to furnish medical aid and hospital care to indigent and needy persons residing in the district.”<sup>3</sup> This case concerns medical care provided in 1994 by Dr. Klein, then a second-year resident in Baylor's obstetrics and gynecology residency program, at one such hospital for the indigent and needy, Ben Taub General Hospital (“Ben Taub”), part of the Harris County Hospital District.<sup>4</sup>

In 1994, the residents and faculty of Baylor's residency program provided all obstetrical and gynecological medical care services at Ben Taub, and they still do so today.<sup>5</sup>

---

<sup>3</sup> Tex. Health & Safety Code Ann. § 281.002(a) (Vernon 2001 & Supp. 2007).

<sup>4</sup> See *Klein*, 2008 WL 1747479, at \*1; 1st Supp. at 6:1791; see also [www.hchdonline.com/about/history.htm](http://www.hchdonline.com/about/history.htm) (giving the history of the Harris County Hospital District, including Ben Taub).

<sup>5</sup> See *Klein*, 2008 WL 1747479, at \*1; 1CR56-134; 2CR290-364, 370-535.

They do so because Baylor, a private, non-profit institution, is a supported medical school,<sup>6</sup> and the Legislature has authorized “coordination and cooperation” between public hospitals like Ben Taub<sup>7</sup> and “supported medical or dental schools.”<sup>8</sup> In chapter 312 of the Texas Health and Safety Code, the Legislature has “remove[d] impediments to that coordination and cooperation in order to: (1) enhance the education of students, interns, residents, and fellows attending [the schools]; (2) enhance patient care; and (3) avoid any waste of public money.”<sup>9</sup> Basically, supported medical or dental schools contract to provide medical, dental or other patient services to public hospitals<sup>10</sup>; schools get places to teach, their medical residents or dental trainees and staff get patients to treat, patients receive the most up-to-date care, and the State saves money by not having to do these things itself.

## **B. Baylor’s Compensation For This Care Is Approved And Paid By The State And The County**

Chapter 312 authorizes supported medical and dental schools to contract with public hospitals through a coordinating entity.<sup>11</sup> Here, Baylor and the University of Texas Medical School at Houston (“UT”), through the University of Texas Health Science Center at

---

<sup>6</sup> See *Klein*, 2008 WL 1747479, at \*3 (“Baylor did present summary judgment evidence that it is a supported medical school engaged in the type of medical clinical education required for Baylor to invoke section 312.006.”); see also Tex. Health & Safety Code Ann. § 312.002(6) (Vernon 2001 & Supp. 2007) (defining “supported medical or dental school”).

<sup>7</sup> See Tex. Health & Safety Code Ann. § 312.002(5) (Vernon 2001 & Supp. 2007) (“‘Public hospital’ means a hospital, clinic, or other facility for the provision of health care or dental care that is owned or operated by the federal government, the state, or a political subdivision or municipal corporation of the state, including a hospital district or authority.”).

<sup>8</sup> Tex. Health & Safety Code Ann. § 312.001(b) (Vernon 2001).

<sup>9</sup> *Id.*

<sup>10</sup> See Tex. Health & Safety Code Ann. §§ 312.003, .004 (Vernon 2001).

<sup>11</sup> *Id.*

Houston, agreed to provide medical care and services, and medical education, training and research activities at Ben Taub and the other public hospital facilities and clinics owned and operated by the Harris County Hospital District through a coordinating entity called Affiliated Medical Services (“AMS”).<sup>12</sup> The agreement between Baylor and UT regarding AMS was submitted to and approved by the Texas Commissioner of Health.<sup>13</sup> Likewise, AMS was approved and certified by the State Board of Medical Examiners as a non-profit corporation organized to benefit “the public.”<sup>14</sup>

AMS entered into an “Agreement of Affiliation” with the Harris County Hospital District.<sup>15</sup> This agreement also had to be submitted to and approved by the Commissioner of Health.<sup>16</sup> In addition, it had to be approved by the Commissioner’s Court of Harris County, Texas, “sitting as the governing body of Harris County.”<sup>17</sup> The agreement sets out

---

<sup>12</sup> See 1CR56-134; 2CR290-364.

<sup>13</sup> 1CR68; see 2CR415.

<sup>14</sup> 1CR68 (stating that AMS was approved and certified under what is now section 162.001 of the Texas Occupations Code). Section 162.001(b) provides in pertinent part:

The board shall approve and certify a health organization that:

(1) is a nonprofit corporation . . . organized to: (A) conduct scientific research and research projects in the public interest in the field of medical science, medical economics, public health, sociology, or a related area; (B) support medical education in medical schools through grants and scholarships; (C) improve and develop the capabilities of individuals and institutions studying, teaching, and practicing medicine; (D) deliver health care to the public; or (E) instruct the general public in medical science, public health, and hygiene and provide related instruction useful to individuals and beneficial to the community;

Tex. Occ. Code Ann. § 162.001(b) (Vernon 2004 & Supp. 2007).

<sup>15</sup> See 2CR410-12.

<sup>16</sup> 2CR506.

<sup>17</sup> 2CR508.

Baylor's responsibilities with regard to staffing the District's various facilities, the amounts of public money Baylor is to receive, the public purposes Baylor is expected to serve in exchange for the money, and the oversight and approval exercised by various public officials and bodies.<sup>18</sup>

With regard to compensation in particular, Baylor's compensation is recalculated every year.<sup>19</sup> The agreed amount includes "only the costs associated with the actual District patient care activities and District administrative activities of Providers furnished to the District," and must be "presented to the Commissioner's Court of Harris County for its review and approval," and "filed with the Board of Health for approval by the Commissioner of Health."<sup>20</sup> The "absolute essence" of the agreement is that the compensation owed Baylor is part of the Harris County Hospital District's publicly-funded budget for the year.<sup>21</sup>

Moreover, while Baylor is expected to provide and pay for malpractice coverage or self-insurance for itself and its "medical and other students,"<sup>22</sup> to the extent the claims experience increases the cost of such insurance, it is a cost that goes into the formula for

---

<sup>18</sup> See generally 2CR416-487.

<sup>19</sup> 2CR453-54.

<sup>20</sup> 2CR455-58.

<sup>21</sup> See 2CR462 ("Prior to the execution of the Agreement, the District has advised AMS, and AMS clearly understands and agrees, such understanding and agreement being of the absolute essence of this Agreement, that with respect to each Fiscal Year during the Term, the District intends to place in its annual Fiscal Year budget the annual Contract Amount . . . , which intended budget amount is subject to Harris County Commissioner's Court approval.").

<sup>22</sup> See 2CR438-40.

computing Baylor’s compensation and comes directly out of the public coffers.<sup>23</sup> That is, “the District has agreed to pay such costs for House Staff professional liability insurance coverage as an element of the annual Contract Amount.”<sup>24</sup>

**C. The Legislature Has Granted Baylor Governmental Protections For The Services It Provides To The Public At Ben Taub**

Because Baylor is providing services to the public at public facilities and receiving public money for it, the Legislature—in chapter 312—declared that Baylor should be granted certain protections afforded to governmental units.

Section 312.006(a), part of a section entitled “Limitation on Liability,” provides that a “supported medical or dental school . . . engaged in coordinated or cooperative medical or dental clinical education under Section 312.004, including patient care and the provision or performance of health or dental services or research at a public hospital, *is not liable* for its acts and omissions in connection with those activities *except to the extent and up to the maximum amount of liability* of state government under Section 101.023(a), Civil Practice and Remedies Code,<sup>25</sup> for the acts and omissions of a governmental unit of state government under Chapter 101, Civil Practice and Remedies Code.”<sup>26</sup> There are thus three parts to the statute: a grant of immunity (“is not liable”), a limited waiver (“except to the

---

<sup>23</sup> 2CR456-58.

<sup>24</sup> 2CR458.

<sup>25</sup> Section 101.023(a), part of a section entitled “Limitation on Amount of Liability,” provides that: “Liability of the state government under this chapter is limited to money damages in a maximum amount of \$250,000 for each person and \$500,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property.” Tex. Civ. Prac. & Rem. Code Ann. § 101.023(a) (Vernon 2005).

<sup>26</sup> Tex. Health & Safety Code Ann. § 312.006(a) (Vernon 2001) (emphasis added). Chapter 101 is the Tort Claims Act. See Tex. Civ. Prac. & Rem. Code Ann. § 101.002 (Vernon Supp. 2007).

extent . . . of a governmental unit of state government [under the Tort Claims Act]”), and a limitation on damages (“except . . . up to the maximum amount of liability of state government [under the Tort Claims Act]”). The Court of Appeals’ analysis only accounts for the last clause and ignores the rest. *See* § IV.B.1, *infra*.

In addition, section 312.007(a) provides that a supported medical school like Baylor “is a state agency . . . for purposes of Chapter 104, Civil Practice and Remedies Code, and for purposes of determining the liability, if any,” of its health care professionals or employees for their “acts or omissions while engaged in the coordinated or cooperative activities of the unit, school, or entity.”<sup>27</sup> As Hernandez seeks to hold Baylor liable for Dr. Klein’s conduct at Ben Taub, Baylor is a state agency for purposes of this litigation.

Baylor thus filed a plea to the jurisdiction asserting it is immune from suit under chapter 312, and moved for summary judgment as well on the basis that it is immune from liability under chapter 312 to the extent liability is alleged by section 101.021 of the Civil Practice and Remedies Code.<sup>28</sup> The trial court denied both the plea and the motion, and the Court of Appeals—focusing only on the monetary limitation and ignoring the two other parts of section 312.006—dismissed Baylor’s interlocutory appeal for lack of jurisdiction.<sup>29</sup>

---

<sup>27</sup> Tex. Health & Safety Code Ann. § 312.007(a) (Vernon 2001). Chapter 104 “provides the circumstances under which the state must indemnify its employees, former employees, and certain individuals under contract with or in the service of particular state entities for damages, court costs, and attorney’s fees.” *Klein*, 2008 WL 1747479, at \*4 n.14 (citing Tex. Civ. Prac. & Rem. Code Ann. §§ 104.001-.009 (Vernon 2005 & Supp. 2007)).

<sup>28</sup> *See Klein*, 2008 WL 1747479, at \*1.

<sup>29</sup> *Klein*, 2008 WL 1747479, at \*1.

### **III. SUMMARY OF THE ARGUMENT**

Separately, sections 312.006(a) and 312.007(a) make Baylor a “governmental unit.” And there is a right to interlocutory appeal from the grant or denial of a plea to the jurisdiction by a governmental unit. The Court of Appeals thus had no power to dismiss Baylor’s appeal from the denial of its plea to the jurisdiction for lack of jurisdiction.

### **IV. ARGUMENT AND AUTHORITIES**

#### **A. Reasons The Court Should Grant The Petition**

As detailed in Dr. Klein’s petition for review, a Baylor physician’s entitlement to take an interlocutory appeal depends entirely upon whether his or her case is assigned to the Fourteenth Court, which will rightly exercise jurisdiction, and the First Court, which will not. This conflict ensures that interlocutory appeals will continue to be taken when, as here and in *Zimmerman v. Anaya*, No. 01-07-00570-CV, 2008 WL 2339805 (Tex. App.—Houston [1st Dist.] June 5, 2008, no pet. h.) (mem. op.), a Baylor physician is sued for his or her work at a public hospital. This conflict gives the Court jurisdiction over the entire case, including Baylor’s claims. *Brown*, 53 S.W.3d at 301. The importance of the immunity provisions of chapter 312 to the provision of public healthcare in Harris County and throughout the state means that this jurisdiction should be exercised—particularly as the public will ultimately pay both for these interlocutory appeals and any failure to apply chapter 312’s plain language.<sup>30</sup>

---

<sup>30</sup> This is because Baylor will obviously recoup any amounts that it has to pay subject to its indemnity obligations to its employees under chapter 312 through increased contract amounts from the Harris County Hospital District and other such political subdivisions.

**B. Section 51.014(a)(8) Requires Only A Plea To The Jurisdiction By A “Governmental Unit” For Appellate Jurisdiction To Exist**

Section 51.014(a)(8) of the Civil Practice and Remedies Code provides that a person may appeal from an interlocutory order of a district court that “grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001.” Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8) (Vernon Supp. 2007). That is, appellate jurisdiction exists when there is (1) a ruling on a plea to the jurisdiction, brought by (2) a governmental unit. Here, there is no dispute that Baylor is appealing from the denial of a plea to the jurisdiction. *See Klein*, 2008 WL 1747479, at \*1 (“In this interlocutory appeal, Baylor and Dr. Klein challenge the trial court’s order denying their joint motion to dismiss, for lack of jurisdiction, . . . and the trial court’s order denying their joint motion for summary judgment.”) (citation omitted). And the Legislature requires Baylor to be treated as a “governmental unit.”

**C. Chapter 312 Makes Baylor The Equivalent Of A “Governmental Unit”**

**I. Under section 312.006, Baylor must be treated as “a governmental unit of state government”**

Statutory construction is a question of law. *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex. 1989). “Courts must take statutes as they find them. More than that, they should be willing to take them as they find them. They should search out carefully the intendment of a statute, giving full effect to all of its terms. But they must find its intent in its language, and not elsewhere.’” *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 860 (Tex. 2005) (Jefferson, C.J., concurring in part, dissenting in part, and concurring in the judgment) (quoting *Simmons v. Arnim*, 110 Tex. 309, 220 S.W. 66, 70 (Tex. 1920)). “Straightforward statutory construction ensures that ordinary citizens are able ‘to rely on the

plain language of a statute to mean what it says.’” *Id.* (quoting *Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 866 (Tex. 1999)). “But when courts ‘abandon the plain meaning of words, statutory construction rests upon insecure and obscure foundations at best.’” *Id.* (quoting *State v. Jackson*, 376 S.W.2d 341, 346 (Tex. 1964)). The Court of Appeals simply failed to give section 312.006(a) its plain meaning here.

Again, a supported medical school like Baylor “***is not liable***” except to the extent the immunity granted by this clause is waived and then capped by the Tort Claims Act. Tex. Health & Safety Code Ann. § 312.006(a) (Vernon 2001) (emphasis added). In reading this provision, the Legislature’s use of “except” and “and,” combined with its punctuation, means that ***both*** the “extent” and “amount” of liability relate to “state government.” Any other construction would render the “except to the extent” language meaningless—except to ***what*** extent if not to the extent of “state government . . . for the acts and omissions of a governmental unit of state government”? That is, section 312.006(a) has three parts:

- (1) Supported medical schools are not liable for their acts and omissions at public hospitals,

***except***

- (2) to the extent of liability of state government for the acts and omissions of a governmental unit of state government under [the Tort Claims Act],

***and***

- (3) up to the maximum amount of liability of state government under section 101.023(a) of the Civil Practice and Remedies Code, for the acts and omissions of a governmental unit of state government under [the Tort Claims Act].

For its acts and omissions at Ben Taub and other public hospitals, therefore, Baylor is subject to the same rules as a governmental unit of state government: it enjoys immunity, but

that immunity is waived to a limited extent and amount by the Tort Claims Act. As such, Baylor is a governmental unit authorized to pursue an interlocutory appeal under section 51.014(a)(8).

“When construing a statute, the Court must presume that every word of the legislation has meaning.” *Brooks v. Northglenn Ass’n*, 141 S.W.3d 158, 169 (Tex. 2004); *see Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 485 (Tex. 1998) (“But we do not lightly presume that the Legislature may have done a useless act.”). The Court of Appeals, however, made no attempt to construe section 312.006(a) to give effect to all of its language. *See Klein*, 2008 WL 1747479, at \*\*3-4. In particular, the court provides no explanation as to what it believes the “except to the extent” language means—let alone explains why the three-part construction is incorrect. It simply reads this language out of the statute in two conclusory sentences, without any analysis whatsoever:

However, section 312.006, with its references to the Tort Claims Act, does not make Baylor the equivalent of a governmental unit that enjoys immunity from suit. Nor does it convert Baylor into a governmental unit authorized to pursue an appeal under section 51.014(a)(8) of the interlocutory appeal statute.

*Id.* at \*3.

The only analysis the Court of Appeals undertakes with regard to section 312.006 is into its damages cap and the merits. *See id.* at \*\*3-4. And it gets the analysis wrong. *See* § IV.D, *infra*. But Baylor’s qualification as a “governmental unit” is independent of the merits of its immunity defense. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) (“A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a cause of action without regard to whether the claims asserted have merit. The claims may form

the context in which a dilatory plea is raised, but the plea should be decided without delving into the merits of the case.”) (citations omitted).<sup>31</sup> The Legislature requires Baylor to be treated as a governmental unit entitled to argue those merits in an interlocutory appeal. Because the Court of Appeals failed to do so, its action in dismissing Baylor’s appeal must be reversed.

**2. Under section 312.007, Baylor “is a state agency” for purposes of this litigation**

Interlocutory appellate jurisdiction exists for an additional reason. For purposes of section 51.014(a)(8), a “governmental unit” means “all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts.” Tex. Civ. Prac. & Rem. Code Ann. § 101.001(3)(A) (Vernon 2005). It also includes “any other . . . agency . . . of government the status and authority of which [is] derived from the Constitution of Texas or from laws passed by the legislature under the constitution.” *Id.* at § 101.001(3)(D). And in section 312.007(a), the Legislature made Baylor a “state agency.” Tex. Health & Safety Code Ann. § 312.007(a) (Vernon 2001).

According to the Court of Appeals, the section “limits the situations in which Baylor may be treated as if it were a state agency to those involving indemnity of its employees and contractors (chapter 104) and determinations of its employees’ (or directors’, trustees’, officers’, interns’, residents’, fellows’, faculty members’, or other associated health care

---

<sup>31</sup> See also *City of Beverly Hills v. Guevara*, 904 S.W.2d 655, 656 (Tex. 1995) (per curiam) (recognizing, under a prior version of section 51.014, that whether a claim of immunity “was valid should have been decided on the merits.”).

professionals’) liability, if any.” *Klein*, 2008 WL 1747479, at \*4. This is not the proper construction of section 312.007(a). The placement of a comma after “state agency” but not after “employee of a state agency,” in conjunction with the position of “and,” indicates that the Legislature intended the limitations to apply only to *individuals*, not state supported medical schools. *See* Tex. Health & Safety Code Ann. § 312.007(a) (Vernon 2001). In other words, section 312.007(a) has two parts:

- (1) A supported medical school is a state agency,
- and***
- (2) a director, trustee, officer, intern, resident, fellow, faculty member, or other associated health care professional or employee of a supported medical school is an employee of a state agency for purposes of Chapter 104, Civil Practice and Remedies Code, and for purposes of determining the liability, if any, of the person for the person’s acts or omissions while engaged in the coordinated or cooperative activities of the school.

Regardless, both the chapter 104 and the “determining the liability” purposes are implicated in Baylor’s interlocutory appeal. *See, e.g.*, App. Br. at 14 (“Although nonsuited by name, claims against Appellant Baylor are still pending as Appellees continue to assert that employees of Appellant Baylor injured minor appellee.”). The Court of Appeals has (wrongly) decided that Baylor’s plea to the jurisdiction should fail. *See Klein*, 2008 WL 1747479, at \*5 (“Accordingly, we hold that section 312.007 . . . does not make Baylor the equivalent of a governmental unit, *immune from suit* . . .”) (emphasis added). But this is premature; all that matters at this stage is that section 312.007(a) makes Baylor “a state agency,” and that state agencies are “governmental units” entitled to appeal under section 51.014(a)(8). The Court of Appeals thus had no authority to dismiss for lack of jurisdiction.

**D. The Court Of Appeals Confused The Jurisdictional Inquiry With The Merits Inquiry (And Got The Answer Wrong To Boot)**

The Court of Appeals' errors are explained, but not excused, by its disagreement with Baylor's assertion of immunity from suit. In particular, the court believes that "[t]he Legislature, in section 312.006, made no reference to sovereign or governmental immunity from suit." *Klein*, 2008 WL 1747479, at \*3. Again, the focus of the section 51.014(a)(8) inquiry is *not the merits*, but rather just that Baylor has "governmental unit" status. *See Bland Indep. Sch. Dist.*, 34 S.W.3d at 554. And Baylor does. Nonetheless, the Court of Appeals is wrong on the merits as well.

A full explanation of how the court erred will have to wait for briefing on the merits. In outline, however, the court gave no independent weight to the "is not liable" language of the first part of section 312.006(a), and merely read it as part of the damage cap of the third part, *i.e.*, as a limitation on liability, not immunity from suit. *See Klein*, 2008 WL 1747479, at \*\*3-4. This goes against the plain language of the statute, particularly as it renders the second part of section 312.006(a) meaningless. *See* § IV.C.1, *supra*. Moreover, despite what the Court of Appeals thinks, "is not liable" is not the same as "is immune from liability."

"All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it. They are therefore to be construed in connection and in harmony with the existing law, and as a part of a general and uniform system of jurisprudence, and their meaning and effect is to be determined in connection, not only with the common law and the constitution, but also with reference to other statutes and the decisions of the courts." *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942) (citation omitted); *see State v. Dyer*, 200 S.W.2d 813, 817 (Tex. 1947) (recognizing the rule that statutes,

“being in pari materia, and relating to the same subject,” even though enacted at different sessions of the legislature, “are to be taken together and so construed, in reference to each other, as that, if practicable, effect may be given to the entire provisions of each.”<sup>32</sup>

Here, section 312.006 must be considered in the context of the doctrine of sovereign immunity and the limited waiver of the Tort Claims Act. In this environment, “is not liable” refers to sovereign immunity in general—which embraces *both* immunity from liability and immunity from suit. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (Vernon 2005) (stating what a “governmental unit in the state is liable for”); *Id.* at § 101.025(a) (waiving immunity from suit “to the extent of liability created by this chapter”); *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex 1994) (“Under the doctrine of sovereign immunity, the State is not liable for the negligence of its employees absent constitutional or statutory provision for liability.”).

## **V. CONCLUSION AND PRAYER**

Baylor is a “governmental unit” for purposes of this litigation, and the trial court denied its plea to the jurisdiction. By law, Baylor is entitled to have its appeal of that decision heard by the Court of Appeals. Accordingly, Baylor asks this Court to order full briefing on the merits, to grant its petition for review, and to reverse the judgment of the Court of Appeals and remand, and to grant such other and further relief to which Petitioners shall show themselves entitled.

---

<sup>32</sup> *See also Collins v. County of El Paso*, 954 S.W.2d 137, 147 (Tex. App.—El Paso 1997, pet. denied) (“First, a court must consider all laws in pari materia, meaning we are to consider all laws related to the subject of the act and the general system of legislation of which the act forms a part. Our objective is to ascertain the consistent purpose of the legislature in the enactment of the laws and to carry out the legislative intent by giving effect to all laws bearing on the same subject matter, even if the laws were enacted in different sessions of the legislature.”).

Respectfully submitted,

ANDREWS KURTH LLP

By: \_\_\_\_\_

Kendall M. Gray  
State Bar No. 00790782  
Cameron P. Pope  
State Bar No. 24032958  
600 Travis, Suite 4200  
Houston, Texas 77002  
(713) 220-4200  
(713) 220-4285 (Facsimile)

**ATTORNEYS FOR PETITIONERS  
GEFFREY KLEIN, M.D. and  
BAYLOR COLLEGE OF MEDICINE**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing instrument has been served by hand delivery on this 2nd day of July, 2008, as follows:

Robert J. Talaska  
Theodore Gregory Skarbowski  
Timothy Lyle Culberson  
The Talaska Law Firm  
1415 North Loop West, Suite 200  
Houston, Texas 77087  
*(Counsel for Respondent)*

\_\_\_\_\_  
Cameron P. Pope