Dismissed in Part, Affirmed in Part, and Majority and Dissenting Opinions filed August 3, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00812-CV

THE CITY OF HOUSTON, Appellant

V.

THE ESTATE OF KENNETH SAMUEL JONES, DECEASED, Appellee

On Appeal from the Probate Court No. 2
Harris County, Texas
Trial Court Cause No. 378,490-401

D I S S E N T I N G O P I N I O N

The Texas Supreme Court reviewed a previous interlocutory appeal pertaining to the trial court's jurisdiction in this case and concluded that the "sue and be sued" provisions of the City charter did not constitute waiver of immunity from the instant suit. *See City of Houston v. Jones*, 197 S.W.3d 391, 392 (Tex. 2006). This was the City's first interlocutory appeal from the denial of a plea to the trial court's jurisdiction. The supreme court remanded with instructions for the trial court to give Jones an opportunity to plead and argue waiver of immunity under the authority of *Texas A & M University-*

Kingsville v. Lawson, 87 S.W.3d 518 (Tex. 2002), and recently enacted sections 271.152–.154 of the Local Government Code. *Id.* Relative to jurisprudential concern for economy and expediency, subject-matter jurisdiction is the pressing issue.

Subsequent to the supreme court's remand, the trial court signed an order granting partial summary judgment in favor of Jones on May 24, 2007. The City's second plea to the trial court's jurisdiction was pending when the trial court signed the partial summary-judgment order. Apparently, the City concedes that the effect of the order was a denial of its 2007 jurisdictional plea. However, the City contends the entirety of the plea to the trial court's jurisdiction it filed in 2009 is subject to appellate review under section 51.014(a)(8) of the Civil Practices and Remedies Code, even if a portion is "construed as a motion to reconsider" its 2007 jurisdictional plea. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8) (Vernon 2008). The majority disagrees and concludes that the City lost the opportunity to pursue an interlocutory appeal of immunity issues raised in its 2007 jurisdictional plea by failing to pursue appellate relief timely. *See* Tex. R. App. P. 26.01(b).

I am concerned that the majority's interpretation and application of procedural rules conflicts with a long line of appellate authority that subject-matter jurisdiction may be raised at any time whether the case is pending in a trial court, this court, or the supreme court. *See, e.g., Univ. Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004) ("Not only *may* an issue of subject matter jurisdiction 'be raised for the first time on appeal by the parties or by the court', a court is *obliged* to ascertain that subject matter jurisdiction exists regardless of whether the parties have questioned it." (footnote omitted)), *superseded by statute on other grounds*, Tex. Gov't Code Ann. § 311.034 (Vernon 2005); *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000) (expressing in an interlocutory appeal that "subject matter jurisdiction is essential to the authority of a court to decide a case, it cannot be waived and may be raised for the first time on appeal"); *Tex. Assoc. of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993) ("Subject matter jurisdiction is an issue that may be raised for the first time on

appeal; it may not be waived by the parties."); *Tex. Employment Comm'n v. Int'l Union of Elec., Radio and Mach. Workers, Local Union No. 782, AFL-CIO*, 163 Tex. 135, 137, 352 S.W.2d 252, 253 (1962) ("Lack of jurisdiction in the district court would be fundamental error and a plea to such effect is subject to review although first presented on appeal."); *Wagner v. Warnasch*, 156 Tex. 334, 339, 295 S.W.2d 890, 893 (1956) ("We fully recognize that the authority of the Court of Civil Appeals and of this court to take notice of unassigned errors is very much limited in its scope, but there can be no question of the authority of either of the courts to reverse a case for fundamental error, if that error is one of jurisdiction. Not to do so would be to permit the parties to confer jurisdiction on the court.").

For the following reasons, I would hold that this court should not refuse to address jurisdictional questions based on technical defects. First, section 51.014(a) of the Civil Practice and Remedies Code provides for an interlocutory appeal from an order of a court that "denies a plea to the jurisdiction" by the City. However, there is no language in the statute proscribing appeals from denials of pleas if the same or similar relief was previously requested, denied, and no timely appeal ensued. Consequently, section 51.014(a) and Appellate Rule of Procedure 26.01(b) should not be interpreted or applied in derogation of the fundamental substantive rule of law that a court's subject-matter jurisdiction may be questioned at any time, whether by a party or the court *sua sponte*.

Second, the Texas Supreme Court has held that "[i]f the trial court denies the governmental entity's claim of no jurisdiction, whether it has been asserted by a plea to the jurisdiction, a motion for summary judgment, or otherwise, the Legislature has provided that an interlocutory appeal may be brought." *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). The majority correctly acknowledges that this court has jurisdiction over a portion of the trial court's 2009 ruling. I submit that having acquired jurisdiction, this court should address all jurisdictional arguments. *See Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 850–51 (Tex. 2000); *Tex. Dep't of Transp. v. Olivares*, --- S.W.3d ---, No. 14-09-00244-CV, 2010 WL 2361421, at *1 (Tex. App.—Houston [14th

Dist.] June 15, 2010, no pet. h.) (stating that "[a]n appellate court must consider challenges to the trial court's subject-matter jurisdiction on interlocutory appeal, regardless of whether such challenges were presented to or determined by the trial court").

Third, in *Brenham Housing Authority v. Davies*, 158 S.W.3d 53, 61 (Tex. App.—Houston [14th Dist.] 2005, no pet.), this court concluded that under section 51.014(a)(8), an appellate court must confine its review on interlocutory appeal to claims addressed in the plea previously considered by the trial court. *See also Galveston Indep. Sch. Dist. v. Jaco*, 278 S.W.3d 477, 479 n.2 (Tex. App.—Houston [14th Dist.] 2009), *rev'd on other grounds*, 303 S.W.3d 699 (Tex. 2010) (per curiam); *State v. Clear Channel Outdoor, Inc.*, No. 14-07-00369-CV, 2008 WL 2986392, at *3 (Tex. App.—Houston [14th Dist.] July 31, 2008, no pet.) (mem. op.); *Clear Lake City Water Auth. v. Friendswood Dev. Co.*, 256 S.W.3d 735, 747 n.14 (Tex. App.—Houston [14th Dist.] 2008, pet. dism'd); *Prairie View A & M Univ. v. Dickens*, 243 S.W.3d 732, 736 (Tex. App.—Houston [14th Dist.] 2007, no pet.). However, in *Olivares*, this court concluded it was not bound by the above panel decisions because the Texas Supreme Court in *Gibson* concluded that an appellate court must consider challenges to subject-matter jurisdiction on interlocutory appeal, regardless of whether such challenges were presented to or determined by the trial court. --- S.W.3d ---, 2010 WL 2361421, at *1 & n.2. I would submit the postulate that the supreme court's analysis in *Gibson* covers the factual scenario in this case. Courts should not interpret or apply procedural rules to obstruct anyone, at any time, from interposing a fundamental legal question: does the court *presently* have subject-matter jurisdiction?

I acknowledge that the majority has limited its disposition of a party's right to seek appellate review of jurisdictional issues to the unique facts of this case. However, with due consideration for the settled jurisprudence described above, I am hesitant to strictly apply any procedural rule in a manner that impairs or prohibits any party or court from asserting, at any time, that the court does not have subject-matter jurisdiction. Moreover,

relative to interlocutory appeals authorized under section 51.014(a), judicial economy should be a strong consideration when the court is presented with persuasive argument and authority supporting the contention that the trial court does not have subject-matter jurisdiction.

Accordingly, I respectfully dissent.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Yates, Seymore and Brown. (Yates, J. majority)