

CAUSE NO. 2009-550-359

MIKE LEACH,
Plaintiff,

v.

TEXAS TECH UNIVERSITY, ET AL.
Defendant.

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IN THE DISTRICT COURT

LUBBOCK COUNTY, TEXAS

99TH JUDICIAL DISTRICT

**DEFENDANTS, GERALD MYERS, GUY BAILEY,
KENT HANCE, AND CHARLOTTE BINGHAM'S ORIGINAL
ANSWER, AFFIRMATIVE DEFENSES, AND PLEA TO THE JURISDICTION**

TO THE HONORABLE WILLIAM SOWDER:

Defendants, GERALD MYERS, GUY BAILEY, KENT HANCE AND CHARLOTTE BINGHAM (referred to jointly as "Defendants" or "Individual Defendants") file their *Original Answer, Affirmative Defenses and Plea to the Jurisdiction* to Plaintiff's Sixth Amended Petition, and in support thereof, would show this Court the following:

I. GENERAL DENIAL

In accordance with Rule 192 of the Texas Rules of Civil Procedure, Defendants, Gerald Myers, Guy Bailey, Kent Hance and Charlotte Bingham generally deny each and every allegation set forth in the Plaintiff's Sixth Amended Petition and demand strict proof thereof.

II. AFFIRMATIVE DEFENSES

Defendants assert the following affirmative defenses to each claim to which they may apply and expressly reserve the right to assert additional affirmative defenses as necessary:

1. Defendants assert the defense of official immunity to all state law claims asserted against them in their individual capacities.

2. Defendants assert the affirmative defense of sovereign immunity in regard to all claims made against them in their official capacities.
3. Defendants assert the affirmative defense of qualified privilege.
4. Defendants assert the affirmative defense of substantive truth.
5. Defendants assert that Plaintiff has failed to mitigate his damages, if any.
6. Defendants assert and reserve the right to amend these Affirmative Defenses to assert additional defenses as they may become known to the Defendants.

III. PLEA TO THE JURISDICTION

Defendants Myers, Bailey, Hance and Bingham assert this Plea to the Jurisdiction in regard to all of Plaintiff's allegations. A plea to the jurisdiction challenges the court's authority to determine the subject matter of a controversy. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000); *Axtell v. Univ. of Texas*, 69 S.W.3d 261, 263 (Tex. App.--Austin 2002, no pet.). Subject matter jurisdiction cannot be presumed and cannot be waived. *Continental Coffee Prods. v. Cazarez*, 937 S.W.2d 444, 449 n.2 (Tex. 1996). Whether a trial court has subject matter jurisdiction is a question of law. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

A. Standard of Review

The plaintiff bears the burden of alleging facts affirmatively showing that the trial court has subject matter jurisdiction. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). The reviewing court should construe the pleadings liberally in favor of the plaintiff and look to the pleader's intent. *Texas Dept. of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex.2004). If the pleadings affirmatively negate the existence of

jurisdiction, the plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Id.* at 227.

When reviewing a plea to the jurisdiction, a court should limit itself to the jurisdictional issues and avoid considering the merits of the claims. *Bland Indep. Sch. Dist.*, 34 S.W.3d at 552. If a trial court lacks subject-matter jurisdiction, it has no discretion and must dismiss the case or claims at issue. *Hampton v. University of Tex. M.D. Anderson Cancer Ctr.*, 6 S.W.3d 627, 629 (Tex. App.—Houston [1st Dist.] 1999, reh’g overruled).

B. Section 101.106 Texas Tort Claims Act

Dismissal of Defendants Myers, Bailey, Hance and Bingham is mandatory pursuant to section 101.106(e), which provides: “If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.” Texas Tech University has filed a motion to dismiss each of these defendants pursuant to section 101.106(e) of the Tort Claims Act. Therefore, Defendants’ dismissal is required by section 101.106(e) of the Act

C. Sovereign Immunity

A suit against a governmental employee in his or her official capacity is essentially a suit against the governmental agency whom the employee serves. *Cloud v. McKinney*, 228 S.W.3d 326, 333 (Tex.App.-Austin 2007, no pet.); *see City of Hempstead v. Kmiec*, 902 S.W.2d 118, 122 (Tex.App.-Houston [1st Dist.] 1995, no writ). A party suing a governmental entity must first establish the State’s consent to suit. The State’s consent may be alleged either by reference to a statute or by pleading express legislative permission. *Little-Tex Insulation Co.*, 39 S.W.3d at 594; *Texas Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex.1999). Legislative consent to sue the State must be expressed in "clear and unambiguous language." *University of Tex. Med. Branch v.*

York, 871 S.W.2d 175, 177 (Tex. 1994). Moreover, the State must waive its immunity from suit *and* its immunity from liability. *Jones*, 8 S.W.3d at 638. Agencies of the State enjoy the same sovereign immunity protections as the State itself. *Federal Sign*, 951 S.W.2d at 405; *Director of the Dept. of Agriculture and Environment v. Printing Industries Association of Texas*, 600 S.W.2d 264, 265 (Tex. 1980). Absent the State's consent to suit, a trial court lacks subject matter jurisdiction to render a valid judgment. *Jones*, 8 S.W.3d at 638.

1. Intentional Torts

The Texas Tort Claims Act does not waive immunity for intentional torts, and Plaintiff's fraud in the inducement, defamation, conspiracy to defraud and civil conspiracy claims each are excepted from the limited waiver of immunity provided by the Texas Tort Claims Act. The Tort Claims Act expressly excludes any claims based on intentional acts. Specifically, the Act provides:

This chapter does not apply to a claim:

- (1) based on an injury or death connected with any act or omission arising out of civil disobedience, riot, insurrection, or rebellion; or
- (2) arising out of assault, battery, false imprisonment, *or any other intentional tort,*

TEX. CIV. PRAC. & REM. CODE § 101.057 (Vernon 2009)(emphasis added).

Texas courts have consistently held that the Tort Claims Act provides that sovereign immunity exists for intentional torts, such as conspiracy. *TCI West End, Inc. v. City of Dallas*, 274 S.W.3d 913, 921 (Tex.App.-Dallas 2008, no pet.); *Univ. of Tex. Med. Branch of Galveston v. Hohman*, 6 S.W.3d 767, 777 (Tex.App.-Houston [1st Dist.] 1999, pet. dismiss'd w.o.j.). TEX. CIV. PRAC. & REM. CODE § 101.057. Tex. Civ. Prac. & Rem. Code Ann. § 101.057. Governmental units cannot be held liable for the intentional tort of conspiracy. *TCI West End, Inc. v. City of Dallas*, 274 S.W.3d 913, 921 (Tex.App.-Dallas 2008, no pet.); *see* TEX. CIV. PRAC. & REM. CODE

Tex. Civ. Prac. & Rem. Code §§ 101.001(3)(A)-(B) and 101.057. Defamation is an intentional tort for which sovereign immunity has not been waived. *City of Hempstead v. Kmiec*, 902 S.W.2d 118, 122 (Tex.App.-Houston [1st Dist.] 1995, no writ). Intentional torts including tortious interference with contract, conspiracy to commit fraud and conspiracy to tortiously interfere with contract, and conspiracy to engage in an unlawful restraint are intentional torts that do not fall within the limited waiver of the Tort Claims Act. *Ethio Express Shuttle Serv., Inc. v. City of Houston*, 164 S.W.3d 751, 758 (Tex.App.-Houston [14th Dist.] 2005, no pet.); see *Holloway v. Skinner*, 898 S.W.2d 793, 795-96 (Tex.1995)(the elements of a tortious interference with contract include willful and intentional acts of interference). Accordingly, all intentional tort claims against the Individual Defendants in their official capacities are barred by the Tort Claims Act.

2. Negligent Misrepresentation Claim

Plaintiff also alleges claims of negligent misrepresentation and tortious interference with his contract. To the extent these claims are brought against the Individual Defendants in their official capacities, they are barred by the Tort Claims act. Plaintiff's negligence claim fails to state a claim within the limited exceptions of the Texas Tort Claims Act. The Tort Claims Act provides that "[a] governmental unit in the state is liable for:

- (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
 - (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
 - (B) the employee would be personally liable to the claimant according to Texas law; and
- (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law."

TEX. CIV. PRAC. & REM. CODE §101.021.

Negligent misrepresentation claims fall outside the limited waiver of immunity provided by section 101.021 of the Tort Claims Act. *Ethio Exp. Shuttle Service, Inc. v. City of Houston*, 164 S.W.3d 751, 757-58 (Tex.App.—Houston [14th Dist.] 2005, no pet.); *City of San Antonio v. Polanco & Co., L.L.C.*, 2007 WL 3171360 (Tex.App.—San Antonio Oct. 30, 2007, pet. denied) (unpublished). Accordingly, Plaintiff’s allegations of negligent misrepresentation against the Individual Defendants in their official capacities are barred as a matter of law.

D. Lack of Subject-Matter Jurisdiction Mandates Dismissal of All UDJA Allegations

The UDJA does not establish subject-matter jurisdiction—it is merely a procedural device for deciding matters already within a court's subject-matter jurisdiction. *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex.1996); *Beacon Nat'l Ins. Co. v. Montemayor*, 86 S.W.3d 260, 266 (Tex.App.—Austin 2002, no pet.). Plaintiff ‘s claims under the UDJA must be dismissed for lack of subject matter jurisdiction, as there is no justiciable controversy between Plaintiff and the Individual Defendants. “A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought.” *Bexar Metropolitan Water Dist. v. City of Bulverde*, 234 S.W.3d 126, 130 (Tex.App.-Austin 2007, no pet.); citing *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex.1995).

To establish a justiciable controversy, Plaintiff must demonstrate a real and substantial controversy involving a genuine conflict of tangible interests and not merely a theoretical dispute. *Id.* Plaintiff can establish no pending conflict between him and any of the Individual Defendants.

Moreover, the UDJA is “not available to settle disputes already pending before a court.” *BHP Petroleum Co., Inc. v. Millard*, 800 S.W.2d 838, 841 (Tex.1990) (citing *Heritage Life v. Heritage Group Holding*, 751 S.W.2d 229, 235 (Tex.App.--Dallas 1988, writ denied)).

Ordinarily, declaratory relief will not be granted where the cause of action has fully matured and invokes a present remedy at law. *See Tucker v. Graham*, 878 S.W.2d 681, 683 (Tex.App.--Eastland 1994, no writ); *Sylvester v. Watkins*, 538 S.W.2d 827, 831 (Tex.Civ.App.--Amarillo 1976, writ ref'd n.r.e.).

A declaratory judgment is improper if the relief requested is raised for the first time in an amended petition and merely addresses the same issues as were raised in the original petition. *See Hartford Cas. Ins. Co. v. Budget Rent-A-Car Sys. Inc.*, 796 S.W.2d 763, 772 (Tex.App.-Dallas 1990, writ denied); *Kenneth Leventhal & Co. v. Reeves*, 978 S.W.2d 253, 258-59 (Tex.App.-Houston [14th Dist.] 1998, no pet.); *Tucker*, 878 S.W.2d at 683; *Texas Dept. of Public Safety v. Alexander*, --- S.W.3d ----, 2009 WL 3400999 (Tex.App.--Austin , October 22, 2009, no pet. history)(no declaratory relief under the UDJA in an employment discrimination suit).

Finally, a party cannot seek relief under the UDJA “when the party is seeking in the same action a different, enforceable remedy, and a judicial declaration would add nothing to what would be implicit or express in a final judgment for the enforceable remedy.” *Universal Printing Co. v. Premier Victorian Homes, Inc.*, 73 S.W.3d 283, 296 (Tex.App.-Houston [1st Dist.] 2001, pet. denied). For example, Plaintiff’s request for declaration that certain defendants “defamatory statements were without justification and were false” is subsumed within Plaintiff’s defamation claim.

Further, the UDJA cannot be used by Plaintiff solely as a vehicle to recover attorney's fees. *Texas State Bd. of Plumbing Exam'rs v. Associated Plumbing-Heating-Cooling Contractors of Tex., Inc.*, 31 S.W.3d 750, 753 (Tex.App.-Austin 2000, pet. dism'd by agr.)¹ Thus, Plaintiff cannot establish subject matter jurisdiction for the relief sought under the UDJA.

¹ This argument applies to the declaratory relief sought in paragraph 5 of Plaintiff’s Prayer. *Id.*

WHEREFORE, PREMISES CONSIDERED, Defendants make their appearance herein and request that they be dismissed from this lawsuit pursuant to section 101.106 of the Tort Claims Act. Defendants further request any and all other relief requested herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the above *Defendants Kent Hance's, Guy Bailey's, Gerald Myers', and Charlotte Bingham's Original Answer, Affirmative Defenses and Plea to the Jurisdiction* was served by the following manner, on the **4th day of May 2010**, upon the following individuals at the listed addresses:

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