

05-0321

**In the
Supreme Court of Texas**

TEXAS A&M UNIVERSITY SYSTEM,
TEXAS ENGINEERING EXPERIMENT STATION, AND DR. MARK MCLELLAN,
Petitioners,

v.

DR. SEFA KOSEOGLU,
Respondent.

On Petition for Review from the
Tenth Court of Appeals at Waco, Texas

PETITIONERS' REPLY BRIEF ON THE MERITS

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TO THE HONORABLE SUPREME COURT OF TEXAS:

This case can resolve two issues that have caused confusion in the courts below. First, it can resolve a three-way split that has entangled at least eight of the courts of appeals concerning whether an official sued in his official capacity can take an interlocutory appeal under Texas Civil Practices and Remedies Code §51.014(a)(8). And second, it can resolve a disagreement among several courts of appeals over when it is appropriate to render a judgment of dismissal because a plaintiff has failed to avail himself of a reasonable opportunity to amend his petition. The Court should grant the petition and reverse.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE SPLIT REGARDING INTERLOCUTORY APPEALS BY GOVERNMENT OFFICIALS SUED IN THEIR OFFICIAL CAPACITY IN FAVOR OF APPEAL.

A. It Is Undisputed That There Is a Deep Split Among the Courts of Appeals.

Koseoglu does not deny the existence of a three-way split among the courts of appeals on the question whether an official sued in his official capacity can bring an interlocutory appeal. *See* Pet. Br. 7-9 (discussing the split). This Court’s intervention is needed to remove the resulting confusion to litigants on both sides of the bar.

B. The Statute Permits an Official Sued in His Official Capacity—Who Is, Under Texas Law, the Entity Itself—To Protect the Entity’s Sovereign Immunity Through an Interlocutory Appeal.

Koseoglu suggests that, because the provision authorizing interlocutory appeal says “governmental unit” instead of “employee,” TEX. CIV. PRAC. & REM. CODE §51.014(a)(8), the Legislature cannot have meant to allow an appeal by an official in his official capacity. Resp. Br. 8-9. But suing an official in his official capacity is just another way of pleading a claim against the government itself. *See* Pet. Br. 13-14 (collecting authority). Indeed, Koseoglu acknowledges as much later in his brief, arguing that a judgment against McLellan in his official capacity “would have been enforceable against TAMU and TEES in that a suit against an individual acting in his or her official capacity is a claim against the entity itself.” Resp. Br. 22. And the Legislature removed any doubt about its intent by linking the term “governmental unit” to the definition of that term in the Texas Tort Claims Act, under which officials sued in their official capacity

have long been treated as the equivalent of the governmental entities themselves. *See* Pet. Br. 16-18 (discussing how §101.001(3) has been applied in tort cases, in which officials sued in their official capacity are treated as having the entity’s sovereign immunity from suit).

In arguing that the Legislature still meant to draw such an arbitrary distinction, Koseoglu would construe the statute as providing that only “governmental units” are within the “class[] of ‘persons’ . . . allowed to bring interlocutory appeals.” Resp. Br. 9. But that is inconsistent with the structure of the statute and would also require the Court to construe part of the statute as being meaningless.

First, the statute is written so that the term “persons” explains *who* can appeal, while the phrase “order . . . that . . . grants or denies a plea to the jurisdiction by a governmental unit” explains *what* can be appealed. TEX. CIV. PRAC. & REM. CODE §51.014(a) (“A person may appeal from an interlocutory order . . . that: . . . (8) grants or denies a plea to the jurisdiction by a governmental unit . . .”). There is no indication in the text that the term “governmental unit” was meant to somehow modify the word “person” that appears earlier in that statute. Nor would such a reading fit the common practice of an aggrieved *plaintiff*—who is plainly not a “governmental unit”—bringing an interlocutory appeal under §51.014(a)(8) to challenge the *grant* of a plea. *E.g.*, *Smith v. Lutz*, 149 S.W.3d 752, 756 (Tex. App.—2004, no pet.); *De Miño v. Sheridan*, No. 01-03-00794-CV, 2004 WL 1794558, at *1 (Tex. App.—Houston [1st Dist.] Aug. 12, 2004, no pet.) (mem. op.).

Second, if Koseoglu is correct that only a “governmental unit” may file an interlocutory appeal under §51.014(a)(8), the part of the statute that authorizes the appeal of an “order . . . that . . . *grants*” a plea to the jurisdiction would be rendered meaningless. TEX. CIV. PRAC. & REM. CODE §51.014(a)(8) (emphasis added). After all, a governmental unit would have little need to appeal the *grant* of a plea; instead, the logical appellant in such a situation would be an aggrieved plaintiff after a plea is granted. For both halves of the phrase “grants or denies” in the statute to be given effect, the statute must allow an appeal to be filed either by a non-governmental plaintiff or a governmental defendant. *Cf. In re Mo. Pac. R.R. Co.*, 998 S.W.2d 212, 216 (Tex. 1999) (orig. proceeding) (“We do not lightly presume that the Legislature may have done a useless act.”). For that reason, Koseoglu cannot be correct that the phrase “governmental unit” defines the only class of persons who can appeal.

C. The Availability of Interlocutory Appeal Turns on the Capacity in Which the Official Was Sued—Official or Individual Capacity.

The availability of interlocutory appeal under §51.014(a)(8) for a government official turns on what *capacity* he was sued in—his official capacity for injunctive or equitable relief or his individual capacity for damages. Pet. Br. 12-26. That distinction mirrors the common-law understanding of what it means for an official to be sued in his official capacity, namely, that he is being sued as the State itself and thus is shielded by the State’s sovereign immunity from suit. Pet. Br. 12-14. By contrast, if sued in his individual capacity, an official would have available the defense of “official immunity” that would shield him from an award of damages. *See City of Houston v. Kilburn*, 849

S.W.2d. 810, 812 n.1 (Tex. 1993) (per curiam) (listing “official immunity” among the “several interchangeable terms . . . used to refer to an affirmative defense available for government employees sued in their individual capacities”).

Koseoglu offers a different distinction, suggesting that the availability of interlocutory appeal under §51.014(a)(8) should turn on what *function* a particular official serves—whether they serve the type of function traditionally afforded “absolute immunity” (such as legislators while legislating, judges while performing judicial functions, etc.) or whether they could merely assert “qualified immunity” because they serve a different function. Resp. Br. 11-12. There is no authority for the proposition that this dichotomy is relevant to §51.014(a)(8), and Koseoglu has offered none. Nor did even the court of appeals take that approach, instead erroneously suggesting that the statute would permit interlocutory appeal for “constitutional” officials but not to other officials. *See Koseoglu*, 167 S.W.3d at 378. But for much the same reason that the statute does not lend itself to the court of appeals’s contorted reading, *see also* Pet. Br. 24-26, it also does not lend itself to Koseoglu’s.

II. THE COURT OF APPEALS SHOULD HAVE RENDERED JUDGMENT ON THIS CONTRACT CLAIM ASSERTED AGAINST SOVEREIGN DEFENDANTS.

A. Rendition Is Proper When a Plaintiff Has Failed To Avail Himself of a Reasonable Opportunity to Amend.

In order for the trial court to meaningfully evaluate whether it has subject-matter jurisdiction over a case—and in order for an appellate court hearing an interlocutory appeal to meaningfully decide the same fundamental, threshold question—the plaintiff must be required to put its best foot forward in the trial court. *See* Pet. Br. 28-30. It is

the plaintiff's burden to show jurisdiction. The question is *when* must a plaintiff do so—can a plaintiff, by steadfastly refusing to amend, deprive a court of appeals of the power to render a meaningful decision about that threshold question? The answer must be “no.”

In *Harris County v. Sykes*, this Court stated the rule that should have been applied by the court of appeals here:

If a plaintiff has been provided a reasonable opportunity to amend after a governmental entity files its plea to the jurisdiction, and the plaintiff's amended pleading still does not allege facts that would constitute a waiver of immunity, then the trial court should dismiss the plaintiff's action.

136 S.W.3d 635, 639 (Tex. 2004). Although Koseoglu rightly observes that the district court in *Sykes* had waited until after the plaintiff made one futile amendment before formally granting the plea, *see* Resp. Br. 17, that prior amendment was not the fulcrum on which turned this Court's analysis. This Court did not frame the test in terms of whether the plaintiff chose to amend, but instead whether it had a “reasonable opportunity” to do so. 136 S.W.3d at 639. By the same token, the Court emphasized the importance of the courts being able to make meaningful and final decisions about jurisdictional questions without being subjected to pointless repleading—“Such a dismissal is with prejudice because a plaintiff should not be permitted to relitigate jurisdiction once that issue has been finally determined.” *Id.*

Moreover, an arbitrary rule such as proposed by Koseoglu—that dismissal would only be proper where “the litigant had already amended several times,” *see* Resp.

Br. 16—would only discourage a plaintiff from stating his best case.¹ After all, why would a plaintiff take the risk of attempting to cure if—by doing so—they were to forfeit the safety net of an automatic remand from the court of appeals? And if plaintiffs are given an incentive *not* to amend their complaints to put their best case forward, then everyone suffers—trial courts will have less information on which to rule; courts of appeals will be left handling meaningless “first interlocutory appeals” in which they cannot render a judgment of dismissal; and litigants on both sides of the bar will be left expending needless resources on claims that will eventually be found to be barred by sovereign immunity from suit.

Nor is there any inequity in asking a plaintiff to at least plead a claim over which the court has jurisdiction at the outset of his case. On several occasions, Koseoglu protests that requiring him to put his best foot forward in the trial court would be unfair when the State is the opposing litigant. *See* Resp. Br. 7, 18, 24. In particular, he suggests that “the State [would] have the sole and exclusive power to determine whether a waiver of jurisdiction has been properly asserted.” Resp. Br. 7. But that has never been the State’s position. Rather, by requiring a litigant such as Koseoglu to try to rectify the defects in his pleadings at the outset, the State’s rule would empower the courts—both the original trial court and the court of appeals—to make a complete evaluation of

¹ Koseoglu places his primary reliance on certain language in *County of Cameron v. Brown*, 80 S.W.3d 549 (Tex. 2002), Resp. Br. 14, 17-18, but does not acknowledge that it concerned special-exception practice rather than plea-to-the-jurisdiction practice. *See* Pet. Br. 29-30.

whether they have jurisdiction to proceed. *See Koseoglu*, 167 S.W.3d at 384 (Gray, C.J., concurring in part and dissenting in part).

B. There Is Confusion in This Area of Law That Warrants This Court's Intervention, and the Court of Appeals's Decision Is a Sharp Departure from Precedent Concerning Contract Cases.

Although Koseoglu at one point asserts that the courts of appeals are not divided on the question of whether dismissal can be proper in this situation, *see* Resp. Br. 14, even he acknowledges that the Third Court of Appeals has reached a contrary holding. Resp. 15 (citing *O'Neal v. Tex. Bd. of Chiropractic Exam'rs*, No. 03-03-00270-CV, 2004 WL 2027787 (Tex. App.—Austin Sept. 10, 2004, no pet.) (mem. op.)). And the court of appeals's decision candidly acknowledges its disagreement with other decisions of both the Third Court of Appeals and the Fourth Court of Appeals, as well as the court's disagreement with a statement in a plurality decision of this Court. *See Koseoglu*, 167 S.W.3d at 383 (discussing *Save Our Springs Alliance v. City of Austin*, 149 S.W.3d 674, 686 (Tex. App.—Austin 2004, no pet.); *Salas v. Wilson Mem'l Hosp. Dist.*, 139 S.W.3d 398, 405 (Tex. App.—San Antonio 2004, no pet.); and *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 231 (Tex. 2004) (plurality)).

Koseoglu tries to place the court of appeals's refusal to dismiss these claims within what he calls a "long-standing and regularly followed rule." Resp. Br. 14. But the cases cited by Koseoglu for this supposed proposition are tort cases; he does not give any examples of a contract case, such as his own, being remanding for further pleading. *See* Resp. Br. 14-15. In contract cases such as this, the usual course is to render a judgment

of dismissal rather than remanding for further factual pleading. *See* Pet. Br. 31-32 (discussing the distinction between contract and tort claims in terms of repleading).

C. In Any Event, Koseoglu’s Claims Were Incurably Defective.

Koseoglu suggests that *Texas A&M University–Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002), saves his breach-of-contract claim, which Koseoglu contends is an attempt to enforce a settlement agreement. *See* Resp. Br. 18-20. But as the court of appeals noted, the only underlying, purportedly-settled claim in this case sounded under 42 U.S.C. §1983, *Koseoglu*, 167 S.W.3d at 380, and the Texas Legislature has not waived sovereign immunity from suit for such claims, *Koseoglu*, 167 S.W.3d at 380; *see also* Resp. Br. 18-19 (discussing §1983). Thus, the court of appeals correctly held that Koseoglu’s petition did not state a claim that fell within the parameters of any limited waiver of immunity from suit that might be read into this Court’s *Lawson* decision.

But the court of appeals erred in choosing to remand these claims. Because there is no legislative waiver for any underlying §1983 claim, the defects in Koseoglu’s claims against TAMU, TEES, and McLellan in his official capacity are incurable. *See* Pet. Br. 33-39. Koseoglu suggests no way to cure his pleading, because there is none; no amount of factual embellishment of his pleadings can overcome the lack of a legislative waiver.

III. THIS INTERLOCUTORY APPEAL DOES NOT INVOLVE ANY CLAIMS AGAINST MCELLELLAN IN HIS INDIVIDUAL CAPACITY.

Koseoglu’s brief might be read to imply that he could have chosen to assert a claim against McLellan in his individual capacity—a claim that has never been stated and that he does not even now describe using that term of art.²

Yet this interlocutory appeal does not involve any claims against McLellan in his individual capacity. McLellan’s plea to the jurisdiction invokes sovereign immunity “to the extent [he] is sued in his official capacity.” CR.24; *see also* CR.24-26 (discussing how the allegations against him concern his official acts). And it is the denial of that plea that forms the basis of this interlocutory appeal. *See* CR.236-37 (notice of appeal).

But even if Koseoglu had also asserted claims against McLellan in his *individual* capacity—which he did not—that would not bear on the substantive issues in this interlocutory appeal, which involves only sovereign immunity from suit. If anything, those theoretical individual-capacity claims would have remained pending in the trial court awaiting the termination of this interlocutory appeal, which concerns only the claims against the entities and the claims against McLellan in his official capacity. *E.g.*, *Smith*, 149 S.W.3d at 756 n.3 (noting that the individual-capacity claims remained pending in the trial court during the pendency of the interlocutory appeal).

² The closest to such an implication is Koseoglu’s allusion to federal qualified-immunity standards in suggesting that he “would have been entitled to pursue a claim against Dr. McLellan” if he could establish that “Dr. McLellan violated clearly established rights the existence of which a reasonable person would have known.” Resp. Br. 22-23. But when Koseoglu refers explicitly to the capacity of McLellan, he refers to his official capacity. *See* Resp. Br. 22 (“Dr. Koseoglu would have been entitled to pursue an action under 42 U.S.C. §1983 against Dr. McLellan *in his official capacities* for prospective injunctive relief”) (emphasis added).

PRAYER

For these reasons, Petitioners respectfully request that the petition be granted, the judgment of the court of appeals be reversed, and judgment be rendered dismissing the claims against Petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 27, 2005 a true and correct copy of **Petitioners' Reply Brief on the Merits** was served by certified U.S. mail, return receipt requested, on all appellate counsel of record in this proceeding as listed below.

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