No. 10-0043

IN THE SUPREME COURT OF TEXAS

TARRANT COUNTY, TEXAS

Petitioner

v.

TAMMY HOWLETT

Respondent

PETITIONER'S BRIEF ON THE MERITS

ON PETITION FOR REVIEW FROM THE SECOND COURT OF APPEALS AT FORT WORTH, TEXAS

Respectfully submitted,

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IDENTITY OF PARTIES AND COUNSEL

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STATE STATUTES:

OTHER:

I.
STATEMENT OF THE CASE

Nature of the Case: This appeal arises from a suit for personal injuries brought pursuant to the Texas Tort Claims Act.

Trial Court: The Honorable Bob McGrath, Presiding Judge, 342nd Judicial District Court of Tarrant County, Texas.

Trial Court Disposition: On August 17, 2007, the trial court granted the motion to dismiss filed by Tarrant County. *See* CR 34 (Tab A). Howlett filed a motion to reinstate, which was denied on October 5, 2007. *See* CR 39-49 (Tab B). Howlett timely filed her notice of appeal on October 31, 2007. *See* CR 56.

Parties in Court of Appeals: Appellant: Tammy Howlett
Appellee: Tarrant County

Court of Appeals: Second Court of Appeals at Fort Worth; Justices Cayce, Gardner and Walker. Justice Gardner authored the opinion of the court on rehearing. *See Howlett v. Tarrant County*, 301 S.W.3d 840 (Tex. App.—Fort Worth 2009, pet. filed) (Tab C). Justice Walker authored a concurring opinion on rehearing.

Appellate Disposition: On August 29, 2008, the court of appeals issued its decision reversing the trial court's order. On September 12, 2008, Tarrant County filed a motion for rehearing. The rehearing was denied, but the court of appeals withdrew its initial opinion and substituted one of December 3, 2009.

II.
STATEMENT OF JURISDICTION

This Court has jurisdiction because the Fort Worth Court of Appeals' decision is in conflict with the decision of the Beaumont Court of Appeals in *Roccaforte v. Jefferson County*, 281 S.W.3d 230 (Tex. App.—Beaumont 2009, pet. pending) (holding that "substantial compliance" with post-suit notice provision of Local Government Code is inadequate). Such conflict is a sufficient basis for Supreme Court jurisdiction. TEX. GOV'T CODE ANN. §22.001(a)(2) (Vernon 2004).

III.
ISSUE PRESENTED

1) Section 89.0041 of the Texas Local Government Code requires dismissal of a suit against a county if post-suit notice is not provided to the county judge and the attorney for the county. The appellate court permitted less than strict compliance with the statute and reversed the trial court's dismissal. Is "substantial compliance" with § 89.0041 sufficient to satisfy the statute and prevent dismissal?

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner, Tarrant County, Texas, submits this Brief on the Merits urging reversal of the Fort Worth Court of Appeals' decision to reverse the trial court's dismissal of Tammy Howlett's suit for the failure to provide notice of suit as required by the Local Government Code. The court of appeals erroneously held that "substantial compliance" with the notice provision was sufficient.

IV.
STATEMENT OF FACTS

This suit arises from an automobile accident in which Howlett was a passenger in a vehicle struck by a Tarrant County Sheriff's Office patrol vehicle driven by Deputy Timothy Pickle. On April 16, 2007, Plaintiff/Respondent Tammy Howlett filed suit for injuries allegedly received in the accident; Howlett named Tarrant County and Deputy Pickle as defendants. (CR 2-6) Tarrant County and Deputy Pickle were both served on May 1, 2007. An answer for both defendants was filed on May 22, 2007. After the trial court dismissed the deputy pursuant to the provisions of §101.106 of the Tort Claims Act, Tarrant County filed a motion to dismiss pursuant to § 89.0041 of the Texas Local Government Code. The motion averred that Howlett had not complied with the statute's post-suit notice

provisions. (CR 15-17) *See* TEX. LOC. GOV'T CODE ANN. § 89.0041 (Vernon 2008).

The trial court granted Tarrant County's Motion to Dismiss on August 17, 2007, disposing of all claims and all parties. (CR 34) Howlett sought reconsideration in the form of a motion to reinstate, but the trial court denied her request on October 31, 2007.

Howlett filed a notice of appeal and both parties submitted full briefing to the court of appeals. The Fort Worth Court of Appeals issued its original opinion on August 29, 2008; the relevant portion of the opinion held that the notice provision of § 89.0041 did not apply to suits brought under the Tort Claims Act. The court of appeals followed the guidance of the Dallas Court of Appeals' opinion in *Dallas County v. Coutee*, 233 S.W.3d 542, 543 (Tex. App.—Dallas 2007, pet. denied), in reaching this decision.

Tarrant County sought a rehearing on the court's decision that the notice provisions of § 89.0041 were not applicable in a case brought under the Tort Claims Act. On December 3, 2009, the appellate court denied the request for rehearing, but withdrew its original opinion and substituted the opinion that forms the basis of this petition for review. The court agreed with Tarrant County that § 89.0041 did apply to suits brought under the Tort Claims Act, but found that Howlett had nonetheless substantially complied

with the notice requirements. *Howlett v. Tarrant County*, 301 S.W.3d 840 (Tex. App.—Fort Worth 2009, pet. filed).

V.
SUMMARY OF THE ARGUMENT

Issue No. 1: Section 89.0041 of the Texas Local Government Code requires dismissal of a suit against a county if post-suit notice is not provided to the county judge and the attorney for the county. The appellate court permitted less than strict compliance with the statute and reversed the trial court's dismissal. Is "substantial compliance" with § 89.0041 sufficient to satisfy the statute and prevent dismissal?

The Fort Worth Court of Appeals erroneously held that satisfaction of the notice requirements of § 89.0041 of the Texas Local Government Code may be achieved through "substantial compliance." This holding is in direct conflict with the statute's plain language and intent.

The clear and unambiguous language of this statute mandates dismissal where post-suit notice to the county judge and county's attorney is not provided in suits against a county. Allowing apparent service of the citation on the county judge as full satisfaction of § 89.0041 does not fulfill the goals of the statute and would render it meaningless.

VI.
ARGUMENT

A. Section 89.0041 – Notice of Suit Against County

Section 89.0041 of the Texas Local Government Code states:

> (a) A person filing suit against a county or against a county official in the official's capacity as a county official shall deliver written notice to:
>
> (1) the county judge; and
> (2) the county or district attorney having jurisdiction to defend the county in a civil suit.
>
> (b) The written notice must be delivered by certified or registered mail by the 30th business day after suit is filed and contain:
>
> (1) the style and cause number of the suit;
> (2) the court in which the suit was filed; and
> (3) the date on which the suit was filed.
>
> (c) If a person does not give notice as required by this section, the court in which the suit is pending shall dismiss the suit on a motion for dismissal made by the county or the county official.

TEX. LOC. GOV'T CODE ANN. § 89.0041 (Vernon 2008). (Tab D). A more clear and direct provision could not be found in the statutes of this State.

This provision dates to the 78th Legislature, which included it in a bill that was a response to the Supreme Court's decision in *Travis County v. Pelzel*, 77 S.W.3d 246 (Tex. 2002), where the Court held that § 89.004 of the Texas Local Government Code did not clearly and

unambiguously waive a county's sovereign immunity from suit and liability. The early versions of this bill do not include any mention of §89.0041, which was added sometime during the legislative process.

1. ACTUAL KNOWLEDGE EXCEPTION

The Fort Worth Court of Appeals in the present case followed a recent line of cases that disagree with strict compliance with § 89.0041. *Howlett v. Tarrant County*, 301 S.W.3d 840 (Tex. App.—Fort Worth 2009, pet. filed). In so holding, the appellate court below has created an "actual knowledge" exception, akin to the actual knowledge exception explicitly found in the Texas Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(c) (Vernon 2011) ("The [notice] requirements . . . do not apply if the governmental unit has actual notice that the [injury occurred.]"). And like the Tort Claims Act's actual knowledge exception, the objective analysis of notice is replaced with a cumbersome subjective assessment. Creating an "actual knowledge" exception to § 89.0041 originated with the Dallas Court of Appeals.

In *Dallas County v. Coskey*, 247 S.W.3d 753 (Tex. App.—Dallas 2008, pet. denied), the Dallas court held that strict compliance with §89.0041 was unnecessary. And despite the mandatory language of the statute, the court created a judicial exception to the requirements. The court found that since the plaintiff served the county with process and conducted regular litigation

activities within the 30-day period contemplated by § 89.0041, the plaintiff had substantially complied with the notice requirement.

Twenty-two days later the author of the opinion in *Coskey* wrote the opinion in *Dallas County v. Autry*, 251 S.W.3d 155 (Tex. App.—Dallas 2008, pet. denied), which followed the same line of reasoning. The court held that "substantial compliance satisfies [§ 89.0041]'s notice requirements." *Id.* at 158. The Corpus Christi Court of Appeals followed suit in a 2-1 decision in *Ballesteros v. Nueces County*, 286 S.W.3d 566 (Tex. App.—Corpus Christi 2009, pet. granted). The dissent in *Ballesteros*, however, argued that compliance with the statute was mandatory and that a judicial exemption was improper. Noting the departure from traditional statutory construction, Justice Vela stated: "There is nothing in the language of the local government code that would relieve Ballesteros from compliance . . . ."

2. COMPLIANCE WITH PLAIN LANGUAGE

Echoing the sentiment of the dissenting justice in *Ballesteros*, the Beaumont Court of Appeals in *Roccaforte v. Jefferson County*, 281 S.W.3d 230 (Tex. App.—Beaumont 2009, pet. granted), held that the notice provisions of § 89.0041 were mandatory, required strict compliance, and gave clear instruction to trial courts. The Beaumont Court of Appeals refused to substitute their judgment for that of the Legislature and instead applied the statute as written. *See id.* at 236, fn. 3.

3. PRECEDENT FOR SUBSTANTIAL COMPLIANCE

The court in *Coskey*, upon which the *Howlett* opinion is based, cited this Court's opinions in *Artco-Bell Corp. v. City of Temple*, 616 S.W.2d 190 (Tex. 1981), and *Cox Enterprises, Inc. v. Board of Trustees of Austin Independent School District*, 706 S.W.2d 956 (Tex. 1986), for the proposition that § 89.0041 can be satisfied through substantial compliance.

In *Artco-Bell*, the issue was whether a notice was sufficient to satisfy a notice of claim provision of a city's charter. *Artco-Bell*, 616 S.W.2d at 191. The notice provided by the claimant was sufficient in all aspects except that it was not verified. In finding that the notice provided to the city "substantially complied" with the notice of claim provision, this Court held that the verification requirement did nothing to "aid in the administration of justice" and "in fact place[d] an obstacle in the path of citizens pursuing a legitimate redress for wrongs committed by public entities." *Id.* at 193.

Other than the one technical aspect of the notice provided by the claimant in *Artco-Bell*, it complied with the notice of claim provision. Only the absence of an oath or attestation prevented the notice from complete compliance. The notice in *Artco-Bell* is a far cry from the facts considered in the present case, or even those in *Coskey*. No notice on the county's attorney was even attempted by Howlett in the present case. Instead, the service of

citation on the county judge alone was deemed sufficient to satisfy the two-step notice provision of § 89.0041.

In *Cox Enterprises*, this Court denied the application of "substantial compliance" principles to notice held deficient under the Texas Open Meetings Act. *Cox Enterprises*, 706 S.W.2d at 957. The plaintiff in that case attacked the adequacy of notice posted by a city council in an attempt to comply with the Open Meetings Act. The notices provided by the city council gave broad headings that did not convey the important nature of the issues to be considered, using terms like "personnel," "litigation," and real estate matters." *Id.* at 957. And while the city council did not need to post all consequences that might flow from the topic, the reader must at least be alerted to the topic for consideration. *Id.* at 958. This Court held that the notice was not sufficient to justify the "substantial compliance" exception, because the general terms used in an attempt to comply were insufficient. And the Supreme Court held that "less than full disclosure is not substantial compliance." *Id.* at 960.

The holding in *Cox Enterprises* actually militates against the lenient standard advocated by the *Coskey* and *Howlett* courts. The service of citation on the county judge is a meek substitute for the explicit requirements of §89.0041. Like the notice in *Cox Enterprises*, the lenient standard approved in *Howlett* is less than the full disclosure that would justify substantial

compliance. By substituting traditional service of citation for the clear requirements of § 89.0041, the court of appeals "simply arrogates to itself the exercise of legislative prerogative," *Robinson v. Central Texas MHMR Center*, 780 S.W.2d 169, 172 (Tex. 1989) (Hecht, J., dissenting), by disregarding the full intent of the statute.

4. HOW TO SUBSTANTIALLY COMPLY (ACCORDING to *Coskey* & *Howlett*)

In *Coskey*, the county was sued and the county judge was served with citation on July 26, 2006. *Coskey*, 247 S.W.3d at 754. On August 21, 2006, the county filed an answer and served discovery requests on the plaintiff. *Id.* The next day an assistant district attorney representing the county wrote a letter to plaintiff's counsel asking for dates to conduct the plaintiff's deposition. *Id.* All of these activities occurred within 30 days of suit being filed on July 26, 2006. The Dallas Court of Appeals, observing the obvious notice to both the county judge and attorney representing the county, found §89.0041 to be superfluous and unnecessary.

The facts of the present case are similar, but diverge in one important area. Howlett filed suit against Tarrant County and Deputy Pickle on April 16, 2007. Both defendants were served on May 1, 2007, but did not answer until May 22, 2007. Like *Coskey*, the county judge presumably had notice of the suit within 30 days from the filing of suit, but there is nothing to suggest

that the attorney representing the county received notice within the 30-day period contemplated by § 89.0041. Therefore § 89.0041, as currently interpreted, permits service on the county judge within 30 days of filing suit as *full* satisfaction of the post-suit notice requirement of § 89.0041; an interpretation that completely ignores the requirement of notice to the county's attorney.

This is not "substantial compliance," but, instead, "partial compliance." The notice to the attorney representing the county is no less an important part of the statute as the notice to the county judge.

5. § 89.0041 IS NOT USELESS

Important among the principles of statutory construction, the Legislature is never to be credited with passing a useless statute. If the holding in *Howlett* is allowed to prevail then § 89.0041 will have no application and will indeed be useless. "The Legislature is never presumed to do a useless act." *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 551 (Tex. 1981); *Webb County Appraisal Dist. v. New Laredo Hotel, Inc.*, 792 S.W.2d 952, 954 (Tex. 1990). It must be presumed that the Legislature intended for the county judge *and* the attorney representing the county to receive post-suit notice, and allowing mere substitution of service of process on the county judge for that which § 89.0041 requires would render the requirement worthless.

It is clear from the decisions in *Howlett* and *Coskey* that these courts disagree with the requirements placed by the Legislature. When Legislative pronouncements are disregarded by judicial fiat it brings to mind Justice Hecht's dissent in *Robinson v. Central Texas MHMR*, where he cited to Alice's exchange with Humpty Dumpty in *Through the Looking Glass*: "'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean – neither more nor less.'" *Robinson v. Central Texas MHMR*, 780 S.W.2d at 176, *citing* Lewis Carroll, *Through the Looking-Glass*, ch. VI, at 163 (W.W. Norton & Co. 1971). If the Legislature thought it prudent to require notice on both the county judge and the county's attorney, it could not effectuate that desire in any clearer manner than that stated in § 89.0041.

B. <u>". . . attorney having jurisdiction to defend the county . . ."</u>

No decision interpreting § 89.0041 has commented on the importance of notice to the county's attorney, an aspect of the provision with no less importance than the service on the county judge.

The officeholder that has the "jurisdiction to defend the county in a civil suit" is not consistent among the 254 counties in Texas. There are three types of attorneys for a county: County Attorneys, District Attorneys, and Criminal District Attorneys. *See* 36 David B. Brooks, TEXAS PRACTICE: COUNTY AND SPECIAL DISTRICT LAW § 21.3 (2002). Their rights and

responsibilities over suits against their respective counties vary. For instance, in Tarrant County the Criminal District Attorney has bracketed legislation that provides that he "shall represent Tarrant County in any court in which the county has pending business." TEX. GOV'T CODE ANN. § 44.320 (Vernon 2004). Not all county attorneys, district attorneys, and criminal district attorneys have the language that vests them with mandatory authority to represent their county, but those that don't have a mandatory duty, have at least the authority.

The interest of the elected official who represents the county in civil suits is worthy of consideration. The "substantial compliance" exception created by the court of appeals in *Coskey*, and adopted by courts like the one in *Howlett*, completely vitiates the protection of that interest.

The post-suit notice provision is intended to protect not only the public's interest in assuring that the county administration is made aware of a lawsuit filed against it, but also that the attorney whose office is charged with representing the county's interests is made aware of the suit.

Section 89.0041 was instituted to protect all 254 different counties, irrespective of their size. Anecdotally, the local farmer that is also the county judge and the private practitioner that is also the county attorney - often for a district that covers three different counties - may not have the well established lines of a communication as the full-time county judge and

criminal district attorney of a large urban county. The post-suit notice provision is in place to ensure that the rural county attorney who may have the exclusive statutory authority to represent the county is provided notice of a civil suit that was served upon a county judge, who may or may not be the county attorney's political ally.

Allowing the mere service of citation on the county judge as a substitute for a two-step post-suit notice provision that the Legislature deemed an appropriate protection of public interests is the type of results-oriented holding that treads on the clear separation of powers.

VII.
CONCLUSION AND PRAYER

For the reasons shown, the Fort Worth Court of Appeals in this case erred in applying a standard of "substantial compliance" to the explicit requirements found in § 89.0041 of the Local Government Code. Petitioner Tarrant County requests that this Supreme Court exercise its discretionary jurisdiction, grant the Petition for Review, reverse the decision of the Fort Worth Court of Appeals, and affirm the judgment of the trial court dismissing the suit against Tarrant County. Tarrant County also requests such other and further relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this the 14th day of March, 2011, a true and correct copy of the foregoing document was served via U.S. Certified Mail, Return Receipt Requested on the following person:

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CHRISTOPHER W. PONDER

APPENDIX OF DOCUMENTS

TAB

A. Cause No. 342-223544-07; styled *Tammy Howlett v. Timothy Glenn Pickle and Tarrant County*, in the 342nd Judicial District Court for Tarrant County, Texas, ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

B. Cause No. 342-223544-07; styled *Tammy Howlett v. Timothy Glenn Pickle and Tarrant County*, , in the 342nd Judicial District Court for Tarrant County, Texas, ORDER DENYING MOTION TO REINSTATE

C. No. 2-07-373-CV; styled *Tammy Howlett v. Tarrant County*, in the Court of Appeals for the Second District of Texas, JUDGMENT ON REHEARING, OPINION ON REHEARING, and CONCURRING OPINION ON REHEARING.

D. TEX. LOC. GOV'T CODE ANN. § 89.0041 (Vernon 2008)

CAUSE NO. 342-223544-07

TAMMY HOWLETT	§	IN THE DISTRICT COURT OF
	§	
VS.	§	TARRANT COUNTY, TEXAS
	§	
TIMOTHY GLENN PICKLE and TARRANT COUNTY	§	
	§	342ND JUDICIAL DISTRICT

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

On the 17th day of August, 2007, Defendant Tarrant County's Motion to Dismiss came on to be heard. All parties were present by and through their attorneys of record. After hearing argument and considering the Motion and the Response thereto, the Court finds that Defendant Tarrant County's Motion to Dismiss is well taken and should in all things be GRANTED.

IT IS THEREFORE ORDERED that Plaintiff Tammy Howlett's suit against Defendant Tarrant County, Texas is hereby DISMISSED and that all costs of court are to be borne by the party incurring same.

SIGNED August 17, 2007.

JUDGE PRESIDING

F

8-20-07

Court's Minutes
Transaction # 17

TAB A

CAUSE NO. 342-223544-07

TAMMY HOWLETT Plaintiff,	§	IN THE DISTRICT COURT
V.	§	342ND JUDICIAL DISTRICT
TIMOTHY GLENN PICKLE AND TARRANT COUNTY Defendants.	§	TARRANT COUNTY, TEXAS

DENYING

ORDER ~~GRANTING~~ MOTION TO REINSTATE

On 10-5-07, the Court considered the Plaintiff's Motion to Reinstate and after reviewing the evidence and hearing the arguments of counsel, finds that the Motion should be ~~GRANTED~~ DENIED.

IT IS THEREFORE ORDERED that the Plaintiff's Motion to Reinstate is DENIED and that Defendant, TARRANT COUNTY, ~~is~~ is NOT reinstated on the court's docket ~~and that counsel of record for the parties be notified of this action.~~

SIGNED on 10-5, 2007.

JUDGE PRESIDING

Court's Minutes
Transaction # 25

copies handed out at hearing

TAB B

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-07-373-CV

Tammy Howlett	§	From the 342nd District Court
	§	of Tarrant County (342-223544-07)
v.	§	December 3, 2009
Tarrant County	§	Opinion by Justice Gardner Concurrence by Justice Walker

JUDGMENT ON REHEARING

After reviewing Appellee's motion for rehearing, we deny the motion. We withdraw our August 29, 2008 opinion and judgment and substitute the following. This court has again considered the record on appeal in this case and holds that there was error in the judgment of the trial court. It is the order of this court that the judgment of the trial court is reversed and remanded. It is further ordered that appellee, Tarrant County, shall pay all costs of this appeal, for which let execution issue.

Terrie Gardner

TAB C

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-07-373-CV

TAMMY HOWLETT — APPELLANT

V.

TARRANT COUNTY — APPELLEE

FROM THE 342ND DISTRICT COURT OF TARRANT COUNTY

OPINION ON REHEARING

After reviewing Tarrant County's motion for rehearing, we deny the motion. We withdraw our August 29, 2008 opinion and judgment and substitute the following.

Appellant Tammy Howlett appeals from the trial court's order dismissing her tort claim against Appellee Tarrant County for failure to serve notice of suit on the county judge and district attorney under local government code section

89.0041. Tex. Loc. Gov't Code Ann. § 89.0041 (Vernon 2008). We reverse and remand.

I. Background

Howlett sued the County, alleging she sustained personal injuries when a vehicle driven by a deputy sheriff collided with the vehicle in which Howlett was a passenger.[1] The County concedes that Howlett served presuit notice on the County within the six-month period prescribed by the Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.101 (Vernon 2005). The County filed an original answer and a motion to dismiss, alleging that Howlett had failed to serve notice of her lawsuit on the county judge and the district attorney under local government code section 89.0041. *See* Tex. Loc. Gov't Code Ann. § 89.0041. After a hearing, the trial court granted the motion to dismiss on August 17, 2007.

On September 6, 2007, Howlett filed a "Motion to Reinstate." The trial court denied the motion on October 5, 2007. Howlett filed a notice of appeal on October 31, 2007.

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[1]Howlett also sued the deputy sheriff. The trial court dismissed her claims against the deputy upon the County's motion under the election of remedies provision of the Tort Claims Act, and Howlett has not appealed that dismissal. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.106(e) (Vernon 2005).

II. Did the motion to reinstate extend the deadline to file a notice of appeal?

In her second issue, Howlett argues that her motion to reinstate was really a misnamed motion for new trial and as such extended the deadline for filing her notice of appeal.

To perfect an appeal, a party must file a written notice of appeal with the trial court within thirty days after the trial court signs the judgment. Tex. R. App. P. 26.1. But if any party timely files (1) a motion for new trial, (2) a motion to modify the judgment, (3) a motion to reinstate under rule of procedure 165a, or (4) a request for findings of fact and conclusions of law, then the notice of appeal is not due until ninety days after the trial court signs the judgment. Tex. R. App. P. 26.1(a). A timely-filed notice of appeal confers jurisdiction on this court, and absent a timely filed notice of appeal, we must dismiss the appeal. *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997).

The trial court signed the order dismissing the case on August 17. Howlett filed her notice of appeal October 31, more than thirty days later. Thus, unless Howlett filed a motion that extended the deadline for filing a notice of appeal under rule 26.1(a), her notice is untimely, and we lack jurisdiction over the appeal. *See id.* On the other hand, if she filed a deadline-extending motion under rule 26.1(a), then her notice of appeal, filed within

ninety days of the date the trial court signed the dismissal order, was timely, and we have jurisdiction.

Howlett filed a verified "motion to reinstate" "pursuant to Texas Rules of Civil Procedure, Rule 165a(3)" twenty days after the trial court signed the order dismissing her claims against the County. The motion cited a recent case in which the Dallas court of appeals held that local government code section 89.0041 does not apply to a claim brought under the Tort Claims Act and asked the trial court to "reinstate" Howlett's claim.

Rule 165a concerns dismissal for want of prosecution. Tex. R. Civ. P. 165a. Section 3 of the rule provides that a party may file a verified motion to reinstate a claim dismissed for want of prosecution within thirty days after the trial court signs the order of dismissal. Tex. R. Civ. P. 165a(3).

The trial court did not dismiss Howlett's claim for want of prosecution. Therefore, the reinstatement procedure set forth in rule 165a(3) was inapplicable, and her motion to reinstate under that rule was inapposite. Under the circumstances, a motion for new trial would have been the appropriate instrument to file.

But the explicit provision in rule 26.1(a), providing that a timely-filed motion to reinstate extends the deadline for filing a notice of appeal, does not limit the deadline-extending effect of a timely motion to reinstate to only those

circumstances where the motion is meritorious or even appropriate. Thus, under the plain language of the rule, the filing of a motion to reinstate that meets the requirements of rule 165a will extend the deadline to file a notice of appeal, even if the trial court did not dismiss the underlying claim for want of prosecution under rule 165a. *See* Tex. R. App. P. 26.1(a).

Under rule 165a, a motion to reinstate must (1) be filed within thirty days of the date the trial court signed the order and (2) be verified. Tex. R. Civ. P. 165a(3). Howlett filed her motion within thirty days of the date the trial court signed the dismissal order, and her counsel verified the motion. Therefore, her motion met the requirements of rule 165a, and while the motion was not the appropriate or best procedure to bring recent case law to the trial court's attention, it was sufficient to extend the deadline to file her notice of appeal under rule 26.1(a). Thus, for purposes of determining whether Howlett timely filed her notice of appeal, we need not decide whether her motion to reinstate was really a misnamed motion for new trial.

The County cites *Butts v. Capitol City Nursing Home, Inc.*, for the proposition that a motion to reinstate under rule 165a is not a motion for new trial and will not extend the deadline for filing a notice of appeal. *See* 700 S.W.2d 628 (Tex. App.—Austin 1985), *writ ref'd n.r.e.*, 705 S.W.2d 696 (Tex. 1986). In *Butts*, the trial court dismissed the plaintiff's claims for want of

prosecution. *Id.* at 629. The plaintiff filed a timely but unverified motion to reinstate and later filed a notice of appeal more than thirty days after the trial court signed the order of dismissal. *Id.* On appeal, the plaintiff suggested that the court of appeals treat the unverified motion to reinstate as a motion for new trial. *Id.* at 630. The court of appeals dismissed the appeal for want of jurisdiction, stating, "Without treating every motion to reinstate as a motion for new trial, it is difficult to see how the motion in question could be other than a motion to reinstate." *Id.* In denying writ, no reversible error, the supreme court noted that if the plaintiff's motion to reinstate had been verified as required by rule 165a, it would have extended the time for perfecting appeal. *Butts v. Capitol City Nursing Home, Inc.*, 705 S.W.2d 696, 697 (Tex. 1986).

Butts is distinguishable from this case because Howlett filed a timely, verified motion under rule 165a that extended the time for perfecting appeal under rule 26.1(a). Therefore, unlike the court of appeals in *Butts*, we need not decide whether Howlett's motion to reinstate should be treated as a motion for new trial. But even if we approach the question from that angle, it is clear that Howlett's motion sought a "substantial change" in the judgment and, as such, it qualified as a motion to modify, correct, or reform the judgment that extended the appellate timetable. *See* Tex. R. App. P. 26.1(a)(2); Tex. R. Civ.

P. 329b(g); *Lane Bank Equip. Co. v. Smith S. Equip. Inc.*, 10 S.W.3d 308, 314 (Tex. 2000).

In light of the foregoing discussion, we hold that Howlett's motion to reinstate extended the deadline for filing her notice of appeal, that she timely filed her notice of appeal, and that we have jurisdiction over the appeal. We sustain Howlett's second issue.

III. Does section 89.0041 apply to claims filed under the Tort Claims Act?

In her first issue, Howlett argues that local government code section 89.0041's postsuit notice requirement does not apply to claims brought under the Tort Claims Act.

Section 89.0041 provides as follows:

> (a) A person filing suit against a county or against a county official in the official's capacity as a county official shall deliver written notice to:
>
> (1) the county judge; and
>
> (2) the county or district attorney having jurisdiction to defend the county in a civil suit.
>
> (b) The written notice must be delivered by certified or registered mail by the 30th business day after suit is filed and contain:
>
> (1) the style and cause number of the suit;
>
> (2) the court in which the suit was filed;
>
> (3) the date on which the suit was filed; and

(4) the name of the person filing suit.

(c) If a person does not give notice as required by this section, the court in which the suit is pending shall dismiss the suit on a motion for dismissal made by the county or the county official.

Tex. Loc. Gov't Code Ann. § 89.0041.

Howlett concedes that she did not give the notice required by section 89.0041, but she argues that the section does not apply to claims brought under the Tort Claims Act, which requires a claimant to provide a governmental defendant presuit notice of the claim. Tex. Civ. Prac. & Rem. Code Ann. § 101.101 (Vernon 2006).

Howlett relies solely on a case so holding from the Dallas court of appeals, *Dallas County v. Coutee*, 233 S.W.3d 542 (Tex. App.—Dallas 2007, pet denied). Coutee sued Dallas County under the Tort Claims Act, alleging that a vehicle driven by a deputy sheriff collided with a vehicle in which Coutee was traveling. *Id.* at 543. The county did not dispute that Coutee gave presuit notice under the Tort Claims Act, but it moved to dismiss her claims for failing to give postsuit notice under section 89.0041. *Id.* The trial court denied the motion, and the county appealed. *Id.*

The Dallas court noted that the Tort Claims Act is a unique statutory scheme that specifically addresses all aspects of tort claims against governmental units, including notice of claims, venue, identification of the

governmental unit against which liability is to be established, and service of citation. *Id.* at 547 (quoting *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004)). Section 89.0041, on the other hand, generally addresses notices of suits against counties without reference to tort suits. *Id.*; Tex. Loc. Gov't Code Ann. § 89.0041. Applying the rule of construction codified in section 311.026 of the Code Construction Act that specific statutes control over general statutes, also called the doctrine of *in pari materia*, the court held that the specific notice provision of the Tort Claims Act applies to the exclusion of the general notice provision of section 89.0041. *Coutee*, 233 S.W.3d at 547; *see* Tex. Gov't Code Ann. § 311.026 (Vernon 2008). In other words, a claimant pursuing a tort claim against a county must comply with the Tort Claims Act's notice provisions and not those of section 89.0041.[2] *See id.*

We disagree with the conclusion reached by the Dallas court in *Coutee* that the doctrine of *in pari materia* applies to our interpretation of section 89.0041. Section 311.026 of the code construction act provides as follows:

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[2]In reaching this conclusion, the Dallas court relied on its holdings in two earlier cases, *Raymond v. Hanson*, 970 S.W.2d 175 (Tex. App.—Dallas 1998, no pet.), and *Parsons v. Dallas County*, 197 S.W.3d 915 (Tex. App.—Dallas 2006, no pet.). *Raymond* and *Parsons* both held that a Tort Claims Act claimant was not required to comply with the *presuit* notice-of-claim provision of a different section of the local government code, section 89.004(a). *Parsons*, 197 S.W.3d at 919–20; *Raymond*, 970 S.W.2d at 178.

> (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.
>
> (b) If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.

Tex. Gov't Code Ann. § 311.026 (Vernon 2008). That rule applies only if two statutes share a common purpose or object. *Strickland v. State*, 193 S.W.3d 662, 666 (Tex. App.—Fort Worth 2006, pet. ref'd). If the statutes share a common purpose or object, they must be harmonized if possible. *Id.*; Tex. Gov't Code Ann. § 311.026(a); *see also La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984) ("Generally, courts are to construe statutes so as to harmonize with other relevant laws, if possible."). Only if the statutes irreconcilably conflict and cannot be harmonized does the specific statute apply to the exclusion of the general. Tex. Gov't Code Ann. § 311.026(b); *Strickland*, 193 S.W.3d at 666.

Section 311.026 does not apply to the two statutes at issue here because the statutes do not share a common purpose or object. Tort Claims Act section 101.101 concerns *presuit* notice of a claim, whereas local government code section 89.0041 concerns *postfiling* notice of the suit itself. The purpose of notice under section 101.101 is "to ensure prompt reporting of

claims in order to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial." *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). The apparent purpose of section 89.0041 is to ensure that the person responsible for answering and defending the suit—the county or district attorney—has actual notice of the suit itself. *See* Loc. Gov't Code Ann. § 89.0041. Thus, the two statutes do not share a common purpose or object, and the doctrine of *in pari materia* and Code Construction Act section 311.026 do not apply.

Even if we assume that the statutes share a common purpose or object, they do not conflict and can be harmonized. Giving presuit notice of a claim under section 101.101 does not preclude a party from giving postfiling notice of suit under section 89.0041. Nothing prevents a party like Howlett who asserts a tort claim against a county from complying with the requirements of both Tort Claims Act section 101.101 and local government code section 89.0041.

Because Tort Claims Act section 101.101 and local government code section 89.0041 do not share a common purpose, and because even if they did share a common purpose, they can be harmonized, we hold that a party asserting a Tort Claims Act claim against a county must furnish both the presuit

notice required by Tort Claims Act section 101.101 and the postsuit notice required by local government code section 89.0041.

IV. Did substantial compliance with section 89.0041 suffice?

Howlett allegedly sustained personal injuries on April 26, 2005. The County concedes that it received presuit notice of Howlett's claims for damages by a letter from her attorney on May 10, 2005, within the six-month period set by the Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code § 101.101 (Vernon 2005).[3] The receipt of that letter was acknowledged in a response letter from the Tarrant County District Attorney, dated August 8, 2005, and signed by Christopher W. Ponder, Assistant District Attorney, in which he advised Howlett's attorney to direct any future telephone calls or correspondence to that office.

Howlett filed suit on April 16, 2007, and served the county judge with her petition. Her original petition specifically alleges that "Defendant, TARRANT COUNTY, a county in Texas, may be served with process by serving the county judge, B. Glen Whitley" and sets forth the address for service. The

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[3]The record also establishes presentment by Howlett of her claim and its denial by the commissioner's court on February 1, 2006. *See* Tex. Local Gov't Code Ann. § 89.004 (providing suit may not be filed against county or elected or appointed county official unless claim is presented and commissioners court neglects or refuses to pay all or part of claim before 60th day after presentment).

unty acknowledges that it received service on May 1, 2007. Thus, the ty judge County Judge of Tarrant County was served with written notice of Howlett's suit before the 30th day after suit was filed (by serving the original petition on the county judge) as directed by section 89.0041(a)(1). Tex. Loc. Gov't Code Ann. § 89.0041(a)(1).

The Tarrant County District Attorney's Office answered on behalf of the County and its employee thirty-six days after suit was filed. Thus, the County and its employee received actual knowledge of each item required to be included in the postsuit notice under local government code section 89.0041(b): the style and cause number of the case, the court in which it was filed, the date suit was filed, and the name of the person filing suit. *Id.* § 89.0041(b).

Applying the rule of construction that we are to consider the objective of the statute, which is "to ensure that the person responsible for answering and defending the suit—the county or district attorney—has actual notice of the suit itself," we find that this objective is accomplished by substantial compliance and that such compliance was achieved here. *See Ballesteros v. Nueces County*, 286 S.W.3d 566, 570 (Tex. App.—Corpus Christi 2009, pet. filed) (op. on reh'g) (holding substantial compliance with section 89.0041 by proof of actual notice sufficient); *Dallas County v. Autry,* 251 S.W.3d 155, 158 (Tex. App.—Dallas 2008, pet. denied) (same); *Dallas County v. Coskey*, 247 S.W.3d

753, 756 (Tex. App.—Dallas 2008, pet. denied) (same); *but see Roccaforte*, 281 S.W.3d at 236–37 (refusing to find substantial compliance exception to section 89.0041 under circumstances where plaintiff made no attempt to comply). Having concluded that Howlett substantially complied with the postsuit notice requirement of local government code section 89.0041, we sustain her first issue.

V. Conclusion

Having sustained Howlett's first and second issues and held that she timely filed her notice of appeal and substantially complied with local government code section 89.0041, we reverse the judgment of the trial court dismissing her suit and remand this cause for further proceedings consistent with this opinion.

ANNE GARDNER
JUSTICE

PANEL: CAYCE, C.J.; GARDNER and WALKER, JJ.

WALKER, J. filed a concurring opinion.

DELIVERED: December 3, 2009

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-07-373-CV

TAMMY HOWLETT — APPELLANT

V.

TARRANT COUNTY — APPELLEE

FROM THE 342ND DISTRICT COURT OF TARRANT COUNTY

CONCURRING OPINION ON REHEARING

I concur with the majority's opinion on rehearing denying Appellee Tarrant County's motion for rehearing in this appeal. The majority correctly holds that Appellant Tammy Howlett substantially complied with section 89.0041 of the Texas Local Government Code if that section is applicable to her suit. *See* Tex. Loc. Gov't Code Ann. § 89.0041 (Vernon 2008). I write separately, however, because I disagree with the majority's analysis of *Dallas County v. Coutee*, 233 S.W.3d 542, 543 (Tex. App.—Dallas 2007, pet. denied), and analysis of the

scope of applicability of section 89.0041; in light of the majority's holding that Howlett substantially complied with section 89.0041, I believe that the majority's analysis of *Coutee* and of the scope of applicability of section 89.0041 are dicta. *See* Black's Law Dictionary 409 (5th ed. 1979) (defining dictum as an observation or remark made concerning some rule, principle, or application of law suggested in a particular case, which observation or remark is not necessary to the determination of the case); *see generally Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 400 n.6 (Tex. 2000) (noting dicta is not binding); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1261–63 (2006) (discussing reasons that "disfavor lawmaking through dictum"). Because I agree with the majority's ultimate holding that, in any event, Howlett substantially complied with section 89.0041, I respectfully concur.

Sue Walker

SUE WALKER
JUSTICE

DELIVERED: December 3, 2009

Effective: September 1, 2005

Vernon's Texas Statutes and Codes Annotated Currentness
Local Government Code (Refs & Annos)
Title 3. Organization of County Government
Subtitle B. Commissioners Court and County Officers
Chapter 89. General Provisions Relating to County Administration (Refs & Annos)
§ 89.0041. Notice of Suit Against County

(a) A person filing suit against a county or against a county official in the official's capacity as a county official shall deliver written notice to:

(1) the county judge; and

(2) the county or district attorney having jurisdiction to defend the county in a civil suit.

(b) The written notice must be delivered by certified or registered mail by the 30th business day after suit is filed and contain:

(1) the style and cause number of the suit;

(2) the court in which the suit was filed;

(3) the date on which the suit was filed; and

(4) the name of the person filing suit.

(c) If a person does not give notice as required by this section, the court in which the suit is pending shall dismiss the suit on a motion for dismissal made by the county or the county official.

CREDIT(S)

Added by Acts 2003, 78th Leg., ch. 1203, § 3, eff. Sept. 1, 2003. Amended by Acts 2005, 79th Leg., ch. 1094, § 21, eff. Sept. 1, 2005.

TAB D

PENGAD-Bayonne, N. J.

Current through the end of the 2009 Regular and First Called Session of the 81st Legislature.

END OF DOCUMENT