

CAUSE NUMBER 09-0523

IN THE SUPREME COURT OF TEXAS

TARA PARTNERS, LTD,
GRANADA TERRACE, LTD,
DAVID R. WISE,
1606 SAVANNAH LLC,
WINDSOR GARDENS, LTD,
FREEPORT VILLA BRAZOS APARTMENTS, LTD,

Petitioners,

v.

CITY OF SOUTH HOUSTON,

Respondent.

ON APPEAL FROM THE FOURTEENTH COURT OF APPEALS

PETITION FOR REVIEW

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STATEMENT OF THE CASE

I. The Nature of the Case

The City of South Houston operates a municipal utility which furnishes water and sewer service to Petitioners' apartment complexes. After the City altered its rate structure in November 2004, Petitioners filed this lawsuit in the 157th Judicial District Court of Harris County, Texas, the Honorable Randy Wilson presiding. The Petitioners alleged that the new rates (including a new per unit monthly base rate) violate the United States and Texas Constitutions, the Federal Fair Housing Act, 42 U.S.C. §§ 3601 et seq., and Texas statutory and common law. *See* CR 7–10, 34–39, 117–123.¹ Petitioners sought partial reimbursement of their water and sewer service fee payments. *See id.* at 10, 34, 122–23.

II. The Course of Proceedings Below

On February 7, 2007, the City filed a plea to the jurisdiction and (alternatively) special exceptions. CR 43–48. The City alleged that the trial court lacked jurisdiction to entertain the Petitioners' claims because the Petitioners had not exhausted their administrative remedies before the Texas Commission on Environmental Quality. *See id.* The City also argued that the trial court lacked jurisdiction over Petitioners' causes of action for damages and for breach of a settlement agreement. *See id.* at 46–47.

¹ After the City removed the instant matter to the U.S. District Court for the Southern District of Texas, Petitioners abandoned all federal causes of action, prompting remand. *Cf.* CR 34–39, 117–123.

III. The Disposition by the Trial Court

After considering Petitioners' objections to the City's plea and hearing argument, the trial court granted the plea to the jurisdiction, "without prejudice for lack of jurisdiction." CR 187; 2007 WL 5112507.²

IV. The Disposition by the Fourteenth Court of Appeals

Petitioners appealed to the Fourteenth Court of Appeals. Judge Charles Seymore, writing for a unanimous panel (with a concurrence by Judge Frost), reversed the trial court's determination that it lacked jurisdiction to entertain the Petitioners' challenge to the City's water and sewer service rates. 282 S.W.3d 564, 571–75.³ The panel nevertheless held that, upon the instant record, Petitioners could not obtain refunds of allegedly unlawful water and sewer payments, as Petitioners had not satisfactorily alleged that the payments were made under duress. *See id.* at 576–78. The panel also held that, by failing to seek permission to replead from the trial court, Petitioners had waived the right so to do. *See id.* at 578.

² Appendix Tab A.

³ Appendix Tab B.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal of a final order under subsections (a)(2), (a)(4), and (a)(6) of section 22.001 of the Texas Government Code.⁴

First, jurisdiction exists under subsection (a)(2) because the court of appeals misinterpreted pivotal language in *Dallas Community College District v. Bolton*, 185 S.W.3d 868 (Tex. 2005), *abrogated on other grounds*, *Texas A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835 (Tex. 2007). The error touches upon the nature of a tax/ratepayer's duty to plead duress as a precondition to recovering an unlawfully exacted tax or fee from a governmental entity, which otherwise would enjoy immunity. Jurisdiction also exists under subsection (a)(2) in order to correct the court of appeals' effective abandonment of established doctrines of liberal rules of pleading, as well as to correct the court of appeals' misapplication of *County of Cameron v. Brown*, 80 S.W.3d 549 (Tex. 2002).⁵

Second, as to all questions presented, because a City is a subdivision of the State, jurisdiction is maintainable under TEX. GOV'T CODE § 22.001(a)(4).

Third, as to all questions presented, jurisdiction may be predicated on TEX. GOV'T CODE § 22.001(a)(6). The scope of a tax/ratepayer's right to recover sums paid over to a governmental entity is a matter of great importance to the jurisprudence of the State.

⁴ The trial court's order disposes of all parties and all claims; it is not interlocutory.

⁵ Of course, under the doctrine of extended jurisdiction, jurisdiction over one question presented permits jurisdiction over all. *See Brown v. Todd*, 53 S.W.3d 297, 301 (Tex. 2001) (citations omitted).

ISSUES PRESENTED

(I) Whether the holding reached by the panel, that Petitioners have failed to properly allege that they were compelled under duress to make excessive water and sewer rate payments to the City of South Houston, in a manner sufficient to permit the airing of a claim for disgorgement of the excessive part of such fees on remand (a claim for “money had and received”), departs impermissibly from *Dallas County Community College District v. Bolton*, 185 S.W.3d 868 (Tex. 2005), *abrogated on other grounds*, *Texas A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835 (Tex. 2007), since *Bolton* provides that the allegation of duress is but a rejoinder to the setting up by a governmental entity of the affirmative defense of voluntary payment?

(II) Whether the holding reached by the panel, that Petitioners have failed to properly allege that they were compelled under duress to make excessive water and sewer rate payments to the City of South Houston, in a manner sufficient to permit the airing of a claim for disgorgement of the excessive part of such fees on remand (a claim for “money had and received”), is also in irreparable tension with modern, liberal rules of notice pleading?

(III) Whether the holding reached by the panel, that Petitioners have forfeited their right to amend their claim for money had and received in order to explicitly allege duress, conflicts with *County of Cameron v. Brown*, 80 S.W.3d 549 (Tex. 2002); is inconsistent with the abolition of the general demurrer; and is unwarranted upon the facts set forth herein?

STATEMENT OF FACTS

In November 2004, and without benefit of a current water or sewer rate study, the City adopted new water and sewer service rates which increased the charges for commercial customers such as Petitioners. *See* CR 111, 115–117. Specifically, the City, which had previously billed for water and sewer service on the basis of consumption and meter size, began charging Petitioners a monthly base rate per extant apartment dwelling unit (regardless of Petitioners’ occupancy rates). *See* CR 111–112. At the same time, while transferring money from its water and sewer fund into its general fund, the City enacted an employee-wide pay raise and increased its police budget. *See* CR 115–116.⁶ In early 2005, the Petitioners filed suit in the 157th Judicial District Court of Harris County, Texas, complaining of the legality of the City’s water and sewer rates. *See* CR 2–19.⁷

SUMMARY OF ARGUMENT

Petitioners are apartment owners in the City of South Houston who are contesting the constitutionality and lawfulness of the City’s water and sewer rates. Petitioners respectfully urge this Court to correct the decision of the court of appeals, which determined that Petitioners are barred from recovering any rate

⁶ The City had made comparable transfers into its general fund in 2003 and 2004. *See* CR 116; *cf.* *Spears v. City of South Houston*, 150 S.W.2d 74 (Tex.Comm.App. 1941).

⁷ The City enacted a new water and sewer rate ordinance on January 6, 2009, which, among other things, reduced the amount of the City’s base rate charges by thirty-nine percent. Petitioners appraised the court of appeals of this development by letter dated February 25, 2009. In accordance with section 13.043(c) of the Texas Water Code, the new rate structure is presently being challenged by Petitioner Tara Partners, on behalf of such of its tenants as reside outside the City of South Houston, before the Texas Commission on Environmental Quality and the State Office of Administrative Hearings. SOAH Docket No. 582-09-4286; TCEQ Docket No. 2009-0445-UCR; *Petition by Tara Partners, Ltd. for Review of City of South Houston Water and Sewer Service Rates*.

payments because they did not sufficiently plead that the payments were made under duress. Among other things, the court of appeals' decision proceeds from a misinterpretation of *Dallas Community College District v. Bolton*, 185 S.W.3d 868 (Tex. 2005), *abrogated on other grounds*, *Texas A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835 (Tex. 2007), where this Court held that duress is but a rejoinder to a defensive claim of voluntary payment, which the City herein has neither plead nor proven.

The decision below is preceded by another, similarly errant interpretation of Texas law governing taxpayers' (and, by implication, ratepayers') rights to recover voluntary payments made to the Government. In *Nivens v. City of League City*, 245 S.W.3d 470 (Tex.App.—Houston [1st Dist.] 2007, pet. denied), the First Court of Appeals, citing *Bolton*, sustained a governmental entity's plea to the jurisdiction by holding that a taxpayer has an affirmative duty to establish jurisdiction by pleading duress. *See Nivens*, 245 S.W.3d at 474 (citing *Bolton*, 185 S.W.3d at 876–879). The *Nivens* Court said nothing about a municipality's antecedent obligation to claim voluntariness. *See id.* Thus, two courts of appeals have now misinterpreted *Bolton*.

This Court should grant the Petitioners' petition for review in order to further elucidate and reaffirm the rules attending the manner in which a party who pays an allegedly unlawful governmental exaction must demonstrate his eligibility

to recover the same.⁸ The question is arising with some frequency. *See, e.g.*, Brief of Appellees at *2–*7 (WL), *Gatesco, Inc. et al. v. City of Rosenberg et al.* (No. 14-08-01109-CV), *available at*, 2009 WL 585325. Thus, there is no need for more percolation—especially if the government and its subdivisions will, as a general matter, be heard later on to say that it is unfair or impractical to tender refunds. For while the City (like all Texas governmental subdivisions) possesses important interests in (1) protecting itself from claims for money damages and (2) remaining free of litigation,⁹ *see Bolton*, 185 S.W.3d at 185–86 (citations omitted), these interests are not disserved by the elaboration of needed clarity in the law.

This Court should also grant the Petitioners’ petition for review so as to reconcile the holding of the court of appeals with modern rules of notice pleading, and with *County of Cameron v. Brown*, 80 S.W.3d 549 (Tex. 2002).

ARGUMENT AND AUTHORITIES

- (I) By requiring Petitioners to plead duress in order to recover upon their claim for money had and received, despite the fact that the City has never alleged voluntary payment as an affirmative defense, the panel opinion contravenes a central tenet of *Bolton v. Dallas County Community College District*.
 - (A) *Bolton* compels the conclusion that, because the City never raised the issue of voluntary payment before the trial court or in regular briefing before the court of appeals, the panel should not have invoked the doctrine in order to bar recovery by Petitioners upon their claim for money had and received.

⁸ In other similar contexts, the Legislature has already provided needed guidance. *See, e.g.*, TEX. GOV’T CODE § 403.202; TEX. TAX CODE §§ 31.115, 112.051.

⁹ That is, where the City’s immunity has not been waived. *See, e.g., Texas National Resource Conservation Commission v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002) (citation omitted).

The court of appeals erroneously held that Petitioners cannot recover excessive water and sewer surcharges because they did not sufficiently allege that the payments were made under duress. *See* 282 S.W.3d at 575–78. Such reasoning distorts the Court’s teaching in *Dallas County Community College District v. Bolton*, 185 S.W.3d 368 (Tex. 2005), *abrogated on other grounds*, *Texas A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835 (Tex. 2007), which characterizes duress as being a rejoinder to the affirmative defense of voluntary payment.¹⁰ *Bolton* mandates the conclusion that, as this case currently stands, Petitioners have no duty to plead and prove duress, because the City has not plead and proved voluntary payment as an affirmative defense to the Petitioners’ claim for money had and received. *See* CR 20–22. *Bolton* lays down a vital rule for this reason: as a principle of natural law, the City has no moral right to money which it collects under demonstrably unconstitutional or unlawful ordinances. To benefit from Sovereign immunity, a positivist (at times pragmatic) shield against equity, the City should be made to adduce evidence of all conditions precedent—including voluntariness—to the invocation of its great privilege. *Accord Tara Partners*, 282 S.W.3d at 577 (“The revenue generated by a tax determined to be illegal should not be treated as property of the State or municipality to which the

¹⁰ At oral argument, the court of appeals raised the question whether Petitioners’ entitlement to equitable reimbursement was barred, and Petitioners subsequently filed a post-submission brief. *See* Appendix Tab C; 2008 WL 2204340. Voluntary payment and duress are not specifically mentioned in any of the parties’ pre-submission briefs. *Accord* the City’s reply to Plaintiffs’ response to the City’s plea to the jurisdiction at CR 66 (“The Plaintiffs have not stated any waiver of immunity under which they can recover the ‘damages’ they allege against the City . . . whether or not the City has waived its ‘exclusive original jurisdiction’ is immaterial. It is immaterial because, even if the City has waived original jurisdiction, the TCEQ retains appellate jurisdiction usurping this Court’s jurisdiction.”) (citation omitted).

principles of sovereign immunity apply. . . .”) (citations omitted); *Nivens*, 245 S.W.3d at 474–75 & n.2 (“A claim for money had and received arises when the defendant obtains money which in equity and good conscience belongs to the plaintiff. It is an equitable doctrine applied to prevent unjust enrichment.”) (citation omitted) (emphasis added).^{11 12}

Bolton was a class action lawsuit brought by college students who contended that increases in technology fees and student service fees imposed by the Dallas County Community College District were unlawful under the Texas Education Code. *See Bolton*, 185 S.W.3d at 872–73. The *Bolton* Court ruled that the District—as the defendant seeking the protection of governmental immunity—possessed the initial burden of pleading and proving voluntary payment, to which duress is a rejoinder:

Defendants [the District] filed a motion for partial summary judgment under Rules 166a(c) and 166a(i) seeking a determination that the Class’s claims were barred by the defense of the voluntary payment rule as a matter of law and asserting that there was no evidence of duress. The Class responded that they were entitled to summary judgment defeating the District’s defense as a matter of law because they paid the technology fees under duress, *which rebuts a voluntary payment defense. The District had the burden of conclusively establishing its defense of voluntary payment. Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). It introduced evidence that all of the named plaintiffs paid the fees without any type of

¹¹ Petitioners stringently disagree with the logic of the remainder of the quoted sentence, which provides that the taxpayer must allege duress in order to defeat immunity. *See id.*

¹² *See Chisolm v. Georgia*, 2 U.S. 419, 454 (1793) (Wilson, J.) (“To the Constitution of the United States the term SOVEREIGN is totally unknown.”) (emphasis supplied); *id.* at 460–61 (“Judges ought to know, that the poorest peasant is a man as well as the King himself: all men ought to obtain justice; since in the estimation of justice, all men are equal; whether a Prince complain of a peasant, or a peasant complain of the Prince.’ These are the words of a King, of the late Frederic of Prussia. In his Courts of Justice, that great man stood his native greatness; and disdained to mount upon the artificial stilts of sovereignty.”) (citation omitted) (emphasis added).

grievance or protest. The District's motion asserted that there was no evidence of duress. *See* TEX. R. CIV. P. 166a(i).

Bolton, 185 S.W.3d at 871 (emphasis added).¹³ In their post-submission brief to the court of appeals, Petitioners raised the indisputable contention that the City has never set up the voluntary payment rule as a defense to the Petitioners' equitable money had and received claim. *See* Appendix Tab C; 2008 WL 2204340, at pp. *5–*6 (citing *Bolton*, 185 S.W.3d at 883).¹⁴ Hence, the court of appeals should not have cited *Bolton* for the proposition that Petitioners' money had and received claim is pretermitted by failure to properly plead duress. *See* 282 S.W.3d at 576.

In this connection, Petitioners respectfully would that contrary language in other precedents be recognized as overruled by *Bolton*. In particular, to the limited degree that *Nabisco v. State*, 134 Tex. 293, 303 (Tex. 1940); *Austin National Bank of Austin v. Sheppard*, 123 Tex. 272 (Tex.Com.App. 1934); *Nivens v. City of League City*, 245 S.W.3d 470, 474 (Tex.App.—Houston [1st Dist.]

¹³ *See also* *Bolton*, 185 S.W.3d at 870 (“We hold that the Texas Education Code authorized the District to impose the technology fee. We further conclude that the Class cannot seek repayment of the student services fee because the District established as a matter of law that the fee was a voluntary payment and the undisputed evidence did not establish that the fee was paid under duress to rebut the voluntary payment rule.”).

¹⁴ *Bolton* provides that the Court should not raise the matter of duress on its own, without waiting for the City to plead and prove voluntary payment. *Compare* *Bolton*, 185 S.W.3d at 883, with *Tara Partners*, 282 S.W.3d at 577 (citing *Nivens v. City of League City*, 245 S.W.3d 470, 474 (Tex.App.—Houston [1st Dist.] 2007, pet. denied)).

Indeed, Justice Wainwright, writing for the majority in *Bolton*, answered Justice Brister's dissenting opinion by reasserting that the voluntary payment rule, like any defense, is waived if it is not raised. *See* *Bolton*, 185 S.W.3d at 883 (“The dissent also suggests that today's decision is inconsistent with recent case law and cites several cases in which this Court ordered that government fees be reimbursed. *See, e.g., Lubbock County, Tex. v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 585–86 (Tex. 2002); *Camacho v. Samaniego*, 831 S.W.2d 804, 815 (Tex. 1992). The dissent itself refutes the force of these opinions by noting that ‘these cases all have one thing in common—there is no mention in any of them of voluntary payment as a defense.’ The parties did not raise the issue of voluntary payment in those cases, and the Court did not address it. *See* *Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 304 n.1 (Tex. 2004) (noting that the Court does not consider issues not raised by the parties).”).

2007, pet. denied); and *Camacho v. Samaniego*, 954 S.W.2d 811 (Tex.App.—El Paso 1997, pet. denied) impose an independent, affirmative duty to plead duress, none can any longer be considered to reflect good law. *Bolton* holds that duress is a rebuttal to voluntary payment, not vice versa. *See Bolton*, 185 S.W.3d at 870.

Even assuming *arguendo* that the City’s failure to plead and argue voluntary payment is of no dispositive importance in respect of the proper presentation of said defense (notwithstanding that, if such were indeed the case, the City would benefit from a generous reading of its pleadings, though Petitioners have been denied such treatment on the companion subject of duress), the court of appeals’ decision regarding voluntary payment should be vacated to the degree it allows that, without presenting any evidence, the City has proven voluntary payment as a matter of law. *See Bolton*, 185 S.W.3d at 871.¹⁵ The idea that any reasonable juror could, upon the instant record, conclude that Petitioners are volunteers is incredible. For, within mere months of the November 2004 enactment of the ordinances setting forth the complained-of water and sewer rates, Petitioners filed their lawsuit, evincing conclusively the forced character of the Petitioners’ water and sewer surcharge payments. *See* CR 114–115.¹⁶ As this Court indicated in *Lowenberg v. City of Dallas*, 261 S.W.3d 54, 59 (Tex. 2008) (per curiam) (“*Lowenberg II*”)—an appeal involving claims for refunds of

¹⁵ Surely the *Bolton* Court, by discussing burdens of proof in summary judgment proceedings and stating that “The District had the burden of conclusively establishing its defense of voluntary payment,” did not mean for voluntary payment to be a thing easily conceded in a plea to the jurisdiction, almost unwittingly. *See Bolton*, 185 S.W.3d at 871.

¹⁶ Additionally, on March 14, 2005, Appellant Tara Partners, Ltd. filed a petition for review of the City’s water and sewer surcharges (as to the provision of utilities outside the jurisdiction of the City) before the TCEQ. *See* CR 178–80; TEX. WATER CODE § 13.043(c).

unlawful fire registration fees assessed during a nine month period in 1995 by the City of Dallas—time is an essential variable in the determination of whether a litigated payment is voluntary:

In the present case, however, it is not clear whether any action could have been brought to stop collection of the registration fee before the City repealed it. The City collected some \$1.7 million in fees and \$50,000 in fines during the nine months the Ordinance was in effect. *In these circumstances, we think that as a matter of law, class members did not fail to avail themselves of other relief so that their payment of the registration fee was voluntary, barring refund.*

Id. (emphasis added). Considering *Lowenberg II*, Petitioners’ lawsuit is itself the most compelling available form of protest of the City’s water and sewer service surcharges (more compelling than a notation scribbled in the memorandum line of a check or money order, reading “paid under protest” and delivered to the City’s ministerial bill collector)—civil litigation, initiated without delay.¹⁷

¹⁷ By contrast, there can be said to be a more genuine controversy about voluntary payment in a case like *Bolton*, which involved a large, certified class of students, none of whom, among other things, had sought available waivers of the fees at issue therein. *See Bolton*, 185 S.W.3d at 880–81 & n.9. The *Bolton* Court noted: “Payment of the increased fee was not mandatory for any member of the Class; it was contingent on enrollment in a junior college in the Dallas County Community College District and selection of a certain number of credit hours for the semester.” *Id.* at 881.

Voluntary payment would also be a much more colorable defense where a plaintiff, after making tax or fee payments for many years without comment, suddenly files suit for a recovery. *Cf. Nivens*, 245 S.W.3d at 475.

Should the Court reject the notion that the most effective manifestation of involuntary payment is a lawsuit (of which a notation upon a check is, at best, but a harbinger), the Court might risk adopting an “envelope rule,” whereby a payment made under protest must, of necessity, be accompanied by a note enclosed within the same envelope. *Contra Nabisco v. State*, 134 Tex. 293, 304 (Tex. 1940) (“That in the absence of a statute to that effect, it is immaterial to the right of repayment whether or not an illegal tax is paid under protest.”) (citing *Austin National Bank v. Sheppard*, 123 Tex. 272 (Tex.Comm.App. 1934)) with TEX. GOV’T CODE § 403.202; TEX. TAX CODE §§ 31.115, 112.051; *see also Bolton*, 185 S.W.3d at 879–880 (noting the partial supplanting by statute of *Nabisco*); *State v. Akin Products Co.*, 155 Tex. 348, 351 (Tex. 1956) (same). No doubt this instant lawsuit, which the City has vigorously contested, has done much more to place City officials on notice that Petitioners are not willingly parting with water and sewer surcharges, than could any other kind of demonstration beside a taxpayer revolt.

Finally, even assuming that voluntary payment is correctly understood to be a defense to jurisdiction (a point contested in section I(B) of this petition), the City did not offer any evidence of voluntary payment into the record in support of its plea to the jurisdiction—not even cancelled checks. *See*

- (B) *Bolton* suggests that the affirmative defense of voluntary payment is not jurisdictional, and, accordingly, that a consideration of voluntariness in the context of a plea to the jurisdiction is improper.

Petitioners interpret *Bolton* to hold that inquiry into voluntary payment (and duress) should not be regarded as a subset of governmental immunity, yet as a separate, prudential restriction on damages which ought not to be the subject of a plea to the jurisdiction. *See Bolton*, 185 S.W.3d at 882 (“To be sure, we do not base the inability to recoup the payments in this case on any philosophical view of the government’s entitlement to the funds, but we adhere to longstanding precedent and predictability in the law, and acknowledge practical considerations of the public fisc.”). Though other cases are not free from ambiguity,¹⁸ it is dispositive that the *Bolton* Court treated voluntary payment as waivable:

The dissent also suggests that today’s decision is inconsistent with recent case law and cites several cases in which this Court ordered that government fees be reimbursed. *See, e.g., Lubbock County, Tex. v. Trammel’s Lubbock Bail Bonds*, 80 S.W.3d 580, 585–86 (Tex. 2002); *Camacho v. Samaniego*, 831 S.W.2d 804, 815 (Tex. 1992). The dissent itself refutes the force of these opinions by noting that ‘these cases all have one thing in common—there is no mention in any of them of voluntary payment as a defense.’ The parties did not raise the issue of voluntary payment in those cases, and the Court did not address it.

Bland Ind. School Dist. v. Blue, 34 S.W.3d 547, 554 (Tex. 2000) (“And because a court must not act without determining that it has subject matter jurisdiction to do so, it should hear evidence as necessary to determine the issue before proceeding with the case.”).

¹⁸ Dicta in *Nueces County v. San Patricio County*, 246 S.W.3d 651, 652 (Tex. 2008) is arguably to the contrary. *See id.* (“[w]e have likewise recognized immunity in suits alleging that the governmental unit exercised what could as well be characterized as nondelegated powers, like collection of illegal taxes from voluntary payers, *see Dallas County Comm. College District v. Bolton*, 185 S.W.3d 868, 876–79 (Tex. 2005), injury against citizens, and breach of contract”) (citations omitted). *Compare Saturn Capital Corp. v. City of Houston*, 246 S.W.3d 242, 245 (Tex.App.—Houston [14th Dist.] 2007, pet. denied).

Id. at 883 (citation omitted). Were voluntary payment a jurisdictional matter, the Court would have been obliged to raise it *sua sponte*. See *University of Texas Southwestern Medical Center at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004).^{19 20}

What's more, a determination that voluntary payment is a jurisdictional question, would bring the dismissal without prejudice of Petitioners' money had and received claim into open conflict with *Harris County v. Sykes*, 136 S.W.3d 635, 639–40 (Tex. 2004), as dismissal upon jurisdictional grounds must be with prejudice.²¹ Compare Appendix Tab A.

Because the affirmative defense of voluntary payment ought not to be treated as a subset of governmental immunity, this Court should vacate the trial court's affirmance of the City's plea to the jurisdiction in respect of Petitioners' reimbursement claim. See *City of Mont Belvieu v. Enterprise Products Operating, L.P.*, 222 S.W.3d 515, 521 (Tex.App.—Houston [14th Dist.] 2007, no pet.).

(II) The panel's conclusion that Petitioners have not sufficiently alleged duress, constitutes an improper departure from the principle that pleadings should be read liberally.

¹⁹ As stated in *Igal v. Brightstar Information Technology Group, Inc.*, 250 S.W.3d 78, 84 (Tex. 2008), the *Loutzenhiser* decision has been superseded by statute on other grounds.

²⁰ It is true that an assertion by a public official of qualified immunity, furnishes at least one example of a jurisdiction-stripping affirmative defense. See *Pearson v. Callahan*, --- U.S. ---, 129 S.Ct. 808, 815–816 (2009); see also 67 C.J.S. Officers § 254 (2008). Nevertheless, if not timely asserted, qualified immunity is waived. See *Pearson*, 129 S.Ct. at 815 (citations omitted); cf. *Travis v. City of Mesquite*, 830 S.W.2d 94, 100 (Tex. 1992) (decreeing the waiver of a public official's claim to common-law immunity for discretionary acts).

²¹ See also *Lowell v. City of Baytown*, 264 S.W.3d 31, 35, 37 n.7 (Tex.App.—Houston [1st Dist.] 2007, pet. granted) (where trial court failed to specify whether dismissal on the ground of governmental immunity was with or without prejudice, deeming the same to be with prejudice) (citing *Sykes*, 136 S.W.3d at 636); *contra Tara Partners*, 282 S.W.3d at 578 n.16.

Should the Court reject the foregoing arguments, a liberal construction of the Petitioners' third amended petition compels the conclusion that Petitioners have sufficiently alleged the payment of water and sewer surcharges under duress. The panel noted that said petition provides: "Since December 1, 2004, under the [2004] Ordinance, Plaintiffs have been forced to pay arbitrary, unreasonable, excessive, confiscatory, and discriminatory charges for water and sewer service." *Tara Partners*, 282 S.W.3d at 577 (emphasis added) (internal citations omitted); CR 114–115.²² Nevertheless, the panel held the foregoing statement to be legally inadequate to connote duress:

Despite having included multiple paragraphs setting forth specific facts related to the enactment and effects of the 2004 ordinance, appellants never pleaded the potential for penalties of late payment charges and cessation of water service. They never characterized late charges and cessation of service as "punishment" or "duress." Their reference to being "forced" to pay the 2004 water and sewer charges appears in a paragraph completely separate from the jurisdictional paragraphs.

Tara Partners, 282 S.W.3d at 577. In respect of the panel's reasoning, Petitioners acknowledge that they have not yet pled "the potential for penalties of late payment charges and cessation of water service" as evidence of duress, nor have Petitioners explicitly employed the terms "duress" and "punishment." *See id.* Still, duress—in the sense of involuntary compulsion—was obvious on the face of the Petitioners' pleadings; perhaps for this reason, the City did not specially except

²² In their third amended petition, the Petitioners assert their right to equitable reimbursement of water and sewer service surcharges, CR 122–23, and they also pray for said relief. CR 124.

to the Petitioners’ allegation about making forced payments.²³ See CR 43–51, 114–115, 117–118; *Gorman v. Life Insurance Company of North America*, 811 S.W.2d 542, 548 n.9 (Tex.), cert. denied, 502 U.S. 824 (1991); 1 TEX. JUR.3d § 39 (2009); FED.R. CIV. PRO. R. 9(b).²⁴

²³ The City labeled its plea to the jurisdiction as constituting a request, in the alternative, for special exceptions, though the City only prayed for the granting of the plea. See CR 43–49. The City attacked the Petitioners’ claims for tort damages, but did not mention voluntary payment. See CR 46 (citing *City of Beaumont v. Bouillion*, 896 S.W.2d 143 (Tex. 1995)).

Petitioners’ third amended petition—filed prior to the granting of the plea—grounds their request for the return of water and sewer surcharges (which request is easily distinguishable from claims for consequential and incidental damages) in equitable terms. See CR 122–24.

²⁴ Liberal rules of pleading are an essential tool for avoiding the resolution of civil disputes upon arbitrary technicalities. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 388-89 & n.1 (1971) (complaint alleging the execution of a warrantless search is fairly read as alleging the execution of a search without probable cause). Liberal rules are an important antidote to the complexity of derived procedures attending pleas to the jurisdiction. See *Harris County v. Sykes*, 136 S.W.3d 635, 642 (Tex. 2004) (Brister & O’Neill, JJ., concurring) (“Today’s holding can only be explained as another ad hoc effort to modernize an obsolete common-law plea. Because a plea to the jurisdiction is not so much a motion as a category of complaints, it will always be hard to say with particularity or uniformity what rules ought to apply. Wisely, the Texas Rules of Civil Procedure do not even try; we should follow that lead.”). And, liberal rules are essential where longstanding notions about fundamental justice undergird a claim. See *Louisiana v. Wood*, 12 Otto 294, 102 U.S. 294, 299 (1880) (“As we took occasion to say in *Marsh v. Fulton County* (10 Wall. 676), ‘the obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.’”); *Lowenberg II*, 261 S.W.3d at 58 (“But the City cannot extract millions in unlawful fees and fines, decide the whole thing was a mistake, keep the money, and insist the whole matter is moot. For those who paid, the controversy remains real.”).

In the matter of Petitioners’ claim of having paid water and sewer surcharges under duress, the problem of pleading is respectfully contended to be not much more than a nicety: it is obvious from the Petitioners’ pleadings that great harm will be visited upon Petitioners’ apartment businesses—indeed, the businesses will cease—if they do not pay the City its water and sewer surcharges. See *Akin Products Co.*, 155 Tex. at 351. At issue here is mostly but the failure to recite a magic word, “duress.” Yet the overriding and countervailing historical trend in the law—from the development and institutionalization of equity in the days of the landmark Lord Chancellor, the Martyr Saint Thomas More, through the gradual abolition of the forms of pleading, the merger of law and equity, and the adoption of the Federal Rules of Civil Procedure—has been the setting away of arbitrary and technical traps for the unwary, in favor of a liberalized standard governed by the concept of fair notice. See 71 C.J.S. Pleading § 4; see also *Brooks v. Norris*, 11 How. 204, 52 U.S. 204, 208 (1850) (“The forms of proceeding in the English courts of error have never been adopted or followed in this court.”).

Notice is not an issue here. Undeniably, the City has always had notice that Petitioners wish to have returned to them, that portion of the water and sewer service charges which Petitioners contend is excessive; the City has always known that Petitioners seek more than a declaratory judgment that would operate prospectively following the completion of proceedings which may well span a decade, see CR 11 (request for reimbursement in plaintiff’s original petition); and the City has to know (indeed, it has benefitted fully from the reality) that—as a monopolistic, government utility provider—it is able to compel the Petitioners to pay its fees, for it has always been emphatically recognized, “That the power to tax involves the power to destroy.” See *M’Cullough v. Maryland*, 4 Wheat. 316, 17 U.S. 316, passim (1819).

The court of appeals punishes the Petitioners for not explicitly stating what is a common truth: if Petitioners do not pay the full amount of their water and sewer bills every month, the City will have the ability and right to disconnect the Petitioners' water and sewer service and thereby shut down the Petitioners' businesses.²⁵ *See Bolton*, 185 S.W.3d at 878 (threat of “substantial damage to a business” constitutes duress sufficient to abrogate the applicability of the voluntary payment rule).²⁶ Therefore, this Court should vacate the determination below that Petitioners' pleadings do not adequately allege duress.

(III) The holding reached by the Panel, that Petitioners have forfeited their right to amend their claim for money had and received in order to explicitly allege duress, conflicts with *County of Cameron v. Brown*, 80 S.W.3d 549 (Tex. 2002); is inconsistent with the abolition of the general demurrer; and is unwarranted upon the facts set forth herein.

Because the trial court granted the City's plea to the jurisdiction without sustaining any of the City's special exceptions (none of which concerned duress, *see* CR 46),²⁷ the court of appeals erred by foreclosing petitioners' right to replead

²⁵ To keep from losing their businesses in the event of non-payment, Petitioners could seek injunctive relief to prevent the City from shutting off water and sewer service. By nature, however, Petitioners' right to such relief is speculative. *Cf. Spears v. City of South Houston*, 150 S.W.2d 74 (Tex.Comm.App. 1941) (affirming the denial of an injunction in the face of allegations about unlawful transfers by the appellee of waterworks extension, sewer, and bond payments into appellee's general fund). In the related context of unlawful taxation, the U.S. Supreme Court has already minimized the constitutional importance of pre-deprivation process. *See McKesson v. Division of Alcoholic Beverages and Tobacco, Dept. of Bus. Reg.*, 496 U.S. 18, 36–37 (1990). The Court has, however, emphasized the importance—for Fourteenth Amendment Due Process purposes—of post-deprivation remedies where, as here, no pre-deprivation process (other than injunctive relief) is available to Petitioners. *Accord Reich v. Collins*, 513 U.S. 106, 111–112 (1994).

²⁶ *See Miga v. Jensen*, 214 S.W.3d 81, 91–92 (Tex.App.—Fort Worth 2006, pet. granted) (because “unconditional” payment was made by judgment creditor in order to avoid accrual of post-judgment interest on judgment debt which was subsequently reduced by the Texas Supreme Court, payment was held to have been made under implied duress, negating the applicability of the voluntary payment rule and enabling restitution); *State v. Akin Products Co.*, 155 Tex. 348, 350–51 (Tex. 1956).

²⁷ Judge Wilson signed the City's proposed order granting the City's plea on April 4, 2007 without specifically sustaining any special exceptions, *see* CR 187; Appendix Tab A, following the hearing had

in order to allege in greater detail that past surcharge payments were made under duress. In *County of Cameron v. Brown*, 80 S.W.3d 549 (Tex. 2002), where the plaintiffs had insufficiently alleged that a decedent did not possess actual knowledge of a dangerous condition, this Court so held:

Because the trial court did not rule on the defendants’ special exceptions and allow the plaintiffs an opportunity to amend their pleadings, omitting this element cannot support the trial court’s judgment. *See Herring*, 513 S.W.2d at 9–10 [Tex. 1974] (holding that when the allegations do not “affirmatively negate” a claim, dismissal for failure to state a claim is appropriate only when the plaintiff has been “given an opportunity to amend after special exceptions have been sustained”).

Id. at 559 (citation omitted) (emphasis added). By denying the right to re-plead, the court of appeals transforms the City’s plea into a general demurrer, a form which has been abolished. *See* TEX. R. CIV. PRO. R. 90.

The character of the order granting the City’s plea to the jurisdiction prevented Petitioners from filing a fourth amended petition, as the order dismissed all of the Petitioners’ claims on forum-preclusive jurisdictional grounds. *See* CR 187; Appendix Tab A.²⁸ Though the panel states that Petitioners “fail[ed] to seek permission to amend after the trial court found the City’s plea meritorious,” 282

upon the subject on March 30, 2007. *See* RR 1–33. Petitioners filed their third amended petition on March 27, 2007, three days before the hearing on the plea to the jurisdiction. *See* CR 108–147.

²⁸ The dismissal was without prejudice yet was nevertheless partly preclusive, CR 187; the filing of an entirely new cause of action seeking recovery of water and sewer service fees paid more than two years prior to the date of filing may be barred as to said payments. *See Lowenberg v. City of Dallas*, 168 S.W.3d 800, 801 (Tex. 2002) (per curiam) (“*Lowenberg I*”) (citing *Lubbock County v. Trammel’s Lubbock Bail Bonds*, 80 S.W.3d 580, 584–85 (Tex. 2002); TEX. CIV. PRAC. & REM. CODE § 16.003(a)). Hence—upon this case’s present procedural posture—Petitioners are barred from procuring the disgorgement of a portion of their water and sewer service surcharges. Should the holding of the Court be modified and should Petitioners be permitted to amend their pleadings, the relation-back doctrine would save the Petitioners’ money had and received claim from any limitations defense.

S.W.3d at 578, Petitioners actually did request a continuance and time to replead should any of the City’s special exceptions be granted. *See* CR 52–62, 60.²⁹ Moreover, after entry of the April 4, 2007 order, re-pleading would have been in vain, as the trial court must be understood as having ruled that it did not possess jurisdiction of any sort over any of Petitioners’ claims, and that Petitioners’ only remedy was before the Texas Commission on Environmental Quality. 282 S.W.3d at 571–75.³⁰ Thus, *Brown* requires vacatur of the panel opinion and affirmation of the right to re-plead. *See Brown*, 80 S.W.3d at 552, 554, 559.³¹

PRAYER

Wherefore, Petitioners pray that the Court grant their petition, vacating such parts of the opinion of the court of appeals, as are hereby objected to.

²⁹ Petitioners were under no duty to seek the continuance. *See Herring*, 513 S.W.2d at 10.

³⁰ At least as to the Petitioners’ declaratory claims, the plea must be construed as based solely upon forum-preclusive grounds; no other ground will support the plea. *See* CR 43–51; RR 1–33. *Accord Sixth RMA Partners, Ltd. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003).

³¹ Review of many cases in which repleading was an issue reveals that most involve plaintiffs who, unlike Petitioners, could not plead any set of facts whatever that would confer judicial subject matter jurisdiction over their claims. In *Texas A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835 (Tex. 2007), for example, this Court noted that a party should be given the opportunity to cure a jurisdictional defect after a plea to the jurisdiction is granted. *See id.* at 839–40. The Court refused a remand in that case only because it concluded that the plaintiff did not possess tenable causes of action, and so remand would be fruitless. *See id.* In *Harris County v. Sykes*, another controversy decided on a plea to the jurisdiction, there was nothing to be gained by re-pleading; the plaintiffs’ (a mother and son’s) claims for injuries sustained by their deceased relation, a Harris County jail inmate who contracted tuberculosis, were fully and finally determined to be barred by the Texas Tort Claims Act. *See Sykes*, 136 S.W.3d at 639. Similarly, *Haddix v. American Zurich Ins. Co.*, 253 S.W.3d 339 (Tex.App.—Eastland 2008, no pet.) featured a litigant who brought suit against his former employers. Unlike Petitioners, the plaintiff in *Haddix* made no effort to amend his pleadings either *before or after* a trial court hearing upon the defendant employers’ plea to the jurisdiction. *See id.* at 347. The *Haddix* Court noted that it could not envision any way that Mr. Haddix (unlike Petitioners) could cure the complained of jurisdictional defects. *See id.* (“however, [plaintiff] has never advised *either the trial court or this court* what he could plead that would address any of the jurisdictional challenges”) (emphasis added); *Dahl ex rel. Dahl v. State*, 92 S.W.3d 856, 862 (Tex.App.—Houston [14th Dist.] 2002, no pet.) (“there is nothing appellants could have added to their petition that would have conferred jurisdiction; *instead, their petition affirmatively showed lack of jurisdiction*”) (emphasis added).

Respectfully submitted,

Date: July 26, 2009

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CERTIFICATE OF SERVICE

The undersigned certifies that on July 27, 2009, a true and correct copy of the above and foregoing document, including the appendix following this page and its exhibits, was served by Lone Star Overnight private courier delivery service, in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure, upon the following counsel of record:

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CAUSE NUMBER 09-0523

IN THE SUPREME COURT OF TEXAS

TARA PARTNERS, LTD,
GRANADA TERRACE, LTD,
DAVID R. WISE,
1606 SAVANNAH LLC,
WINDSOR GARDENS, LTD,
FREEPORT VILLA BRAZOS APARTMENTS, LTD,

Petitioners,

v.

CITY OF SOUTH HOUSTON,

Respondent.

ON APPEAL FROM THE FOURTEENTH COURT OF APPEALS

APPENDIX TO PETITION FOR REVIEW

- A. Trial court order sustaining plea to the jurisdiction
- B. Opinion of the court of appeals
- C. Petitioners' (Appellants below) post-submission brief to the court of appeals

- D. Petitioners' (Plaintiffs below) third amended petition
- E. City of South Houston's plea to the jurisdiction, alternatively, special exceptions