IN THE SUPREME COURT OF TEXAS

NO. 02-1031

REATA CONSTRUCTION CORPORATION, PETITIONER,

v.

CITY OF DALLAS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued December 12, 2004

JUSTICE JOHNSON delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE WAINWRIGHT, JUSTICE MEDINA, and JUSTICE GREEN joined.

JUSTICE BRISTER filed a concurrence in which JUSTICE HECHT and JUSTICE O'NEILL joined.

JUSTICE WILLETT did not participate in the decision.

We grant the City of Dallas's motion for rehearing. We withdraw our opinion of April 2, 2004, and substitute the following in its place.

The issue in this case is whether the City of Dallas has governmental immunity from suit for claims by Reata Construction Corporation arising from the City's alleged negligence. The court of appeals held that the City had immunity. We conclude that the City does not have immunity from suit as to Reata's claims which are germane to, connected with, and properly defensive to the City's

claims, to the extent Reata's claims offset those asserted by the City. We reverse the court of appeals' judgment and remand the case to the trial court for further proceedings.

I. Background

The City of Dallas issued Dynamic Cable Construction Corporation, Inc., a temporary license to install fiber optic cable in Dallas. Dynamic subcontracted with Reata Construction Corporation to do the drilling for the project. Reata inadvertently drilled into a thirty-inch water main, flooding a nearby building owned by Southwest Properties Group, Inc. Southwest sued Dynamic and Reata for negligence, and some tenants of the building intervened. Reata filed a third-party claim against the City alleging that the City negligently misidentified the water main's location. Before answering Reata's third-party claim, the City intervened in the case, asserting negligence claims against Dynamic. A few weeks after intervening in the suit, the City answered Reata's petition and filed special exceptions asserting that Reata's claims were not within the Texas Tort Claims Act's waiver of immunity. *See* TEX. CIV. PRAC. & REM. CODE § 101.021. The City subsequently filed an amended plea in intervention asserting claims of negligence against Reata and a plea to the jurisdiction asserting governmental immunity from suit. Reata filed a response claiming that (1) governmental immunity did not apply because the City subjected itself to the trial court's jurisdiction by intervening in the lawsuit and seeking affirmative relief; (2) the Dallas City Charter and section 51.075 of the Texas Local Government Code contain express waivers of governmental immunity because they provide, respectively, that the City may "sue or be sued" and "plead and be impleaded"; (3) under the common law, the City could not assert governmental immunity for its actions in failing to properly identify the water main's location prior to 1970 because water services were considered

a proprietary function; and (4) even if the Texas Tort Claims Act applied, Reata's claim fell within the Act's waiver of immunity. The trial court denied the City's plea to the jurisdiction, and the City took an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8).

Rejecting each of Reata's asserted bases for a waiver of governmental immunity, the court of appeals reversed and dismissed Reata's claims against the City. 83 S.W.3d 400. The court of appeals held that even though the City intervened in the suit against Reata, by such action the City asserted its right to sue but did not waive its governmental immunity from suit. *Id*. at 398-400.

In *Anderson, Clayton & Co. v. State ex rel. Allred*, 62 S.W.2d 107, 110 (Tex. 1933), we stated: "[W]here a state voluntarily files a suit and submits its rights for judicial determination it will be bound thereby and the defense will be entitled to plead and prove all matters properly defensive. This includes the right to make any defense by answer or cross-complaint germane to the matter in controversy." But the court of appeals relied on other language in that opinion providing that the State, having invoked the jurisdiction of the district court, was "subject to the same rules as other litigants, except in so far as such rules may be modified in favor of the State by statute or may be inapplicable or unenforceable because of exemptions inherent in sovereignty." 83 S.W.3d at 399 (quoting *Anderson*, 62 S.W.2d at 110). The court of appeals concluded that when a governmental entity intervenes in a lawsuit, "sovereign immunity still forecloses suit against that governmental entity." *Id.*

In this Court, Reata asserts (1) governmental immunity did not apply because the City subjected itself to the trial court's jurisdiction by intervening in the lawsuit and seeking affirmative relief; (2) the Dallas City Charter and section 51.075 of the Texas Local Government Code contain

express waivers of governmental immunity because they provide, respectively, that the City may "sue or be sued" and "plead and be impleaded"; and (3) even if the Texas Tort Claims Act applied, Reata stated a claim within the Act's waiver of immunity.

II. Sovereign Immunity

"Sovereign immunity protects the State from lawsuits for money damages." *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). Political subdivisions of the state, including cities, are entitled to such immunity—referred to as governmental immunity—unless it has been waived.[1] *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). Sovereign immunity encompasses immunity from suit, which bars a suit unless the state has consented, and immunity from liability, which protects the state from judgments even if it has consented to the suit. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). We have held that sovereign immunity from suit deprives a trial court of subject-matter jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004); *Jones*, 8 S.W.3d at 638.

Sovereign immunity is a common-law doctrine that initially developed without any legislative or constitutional enactment. *See Cohens v. Virginia*, 19 U.S. 264, 293 (1821) (recognizing the doctrine without citing statutory or constitutional authority); *Hosner v. De Young*, 1 Tex. 764, 769 (1846) (same); *see also Tex. A&M University-Kingsville v. Lawson*, 87 S.W.3d 518, 520 (Tex. 2002). We have consistently deferred to the Legislature to *waive* such immunity. *See IT-Davy*, 74 S.W.3d at 854; *Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 813 (Tex. 1993);

[1] For ease of reference, we will use the term "sovereign immunity" to reference both sovereign immunity and governmental immunity.

Duhart v. State, 610 S.W.2d 740, 741 (Tex. 1980); *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976). We have previously discussed the possibility that a governmental entity might waive its immunity by certain actions, even absent a legislative waiver of immunity. *See Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 705-06 (Tex. 2003). However, there is tension between the concept of a governmental entity *waiving* its immunity from suit by some action independent from the Legislature's waiving immunity and the principle that only the Legislature can waive sovereign immunity. *See IT-Davy*, 74 S.W.3d at 853. There is also tension between the concept of a governmental entity waiving its immunity from suit and the principle that a court's lack of subject-matter jurisdiction generally cannot be waived. *See Fed. Underwriters Exch. v. Pugh*, 174 S.W.2d 598, 600 (Tex. 1943). Recognizing that sovereign immunity is a common-law doctrine, we have not foreclosed the possibility that the judiciary may modify or abrogate such immunity by modifying the common law. *See Taylor*, 106 S.W.3d at 695-96; *see also Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 593 (Tex. 2001) (Hecht, J., concurring) (noting that judicial abolition of immunity may be necessary to prompt the Legislature to enact a reasoned system for determining the government's responsibility for its torts). Therefore, it remains the judiciary's responsibility to define the boundaries of the common-law doctrine and to determine under what circumstances sovereign immunity exists in the first instance.

We have generally deferred to the Legislature to waive immunity because the Legislature is better suited to address the conflicting policy issues involved. *See IT-Davy*, 74 S.W.3d at 854. A lack of immunity may hamper governmental functions by requiring tax resources to be used for defending lawsuits and paying judgments rather than using those resources for their intended

purposes. *Id.* The Legislature has expressed its desire to preserve its interest in managing fiscal matters through the appropriations process by maintaining sovereign immunity unless it has clearly and unambiguously stated otherwise. TEX. GOV'T CODE § 311.034. The United States Supreme Court has also recognized that suits for money damages against states "may threaten the financial integrity of the States" and that "at the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits for money damages." *Alden v. Maine*, 527 U.S. 706, 750 (1999). However, if the governmental entity interjects itself into or chooses to engage in litigation to assert affirmative claims for monetary damages, the entity will presumably have made a decision to expend resources to pay litigation costs. If the opposing party's claims can operate only as an offset to reduce the government's recovery, no tax resources will be called upon to pay a judgment, and the fiscal planning of the governmental entity should not be disrupted. Therefore, a determination that a governmental entity's immunity from suit does not extend to a situation where the entity has filed suit is consistent with the policy issues involved with immunity. In this situation, we believe it would be fundamentally unfair to allow a governmental entity to assert affirmative claims against a party while claiming it had immunity as to the party's claims against it. *See Guar. Trust Co. v. United States*, 304 U.S. 126, 134-35 (1938) (noting that the rule allowing claims against a foreign sovereign that has asserted its own claims is assumed to be founded on principles of justice); *see also Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983) (stating that fundamental fairness requires parties to be heard on the merits of their cases).

III. Analysis

A. The City's Claim for Relief

Although there may have been some question after *Anderson* regarding whether sovereign immunity continues to exist when an affirmative claim for relief is filed by a governmental entity, subsequent cases indicate that under such circumstances immunity from suit no longer completely exists for the governmental entity.[2] In *State v. Humble Oil & Refining Co.*, 169 S.W.2d 707, 708 (Tex. 1943), we considered whether a defendant in a tax suit could assert an offset against the State for taxes it had previously overpaid. The court of appeals concluded that the rule announced in *Anderson* applied: the defendant was entitled to claim an offset for any matter dependent upon or connected with the State's suit. *Id*. at 709. We stated that "[w]e have no fault to find with the rule of law announced in . . . *Anderson* . . . when applied in a proper case." *Id*. However, we went on to hold that the *Anderson* rule did not apply in *Humble Oil* because (1) its application would abolish the rule that taxes due the State cannot be offset, and (2) the defendant's claim was not connected with the State's claim as the two involved taxes for different months and years. *Id*. at 710. While our opinion in *Humble Oil* did not specifically address the issue of whether the trial court had jurisdiction over Humble's claims against the State, we acknowledged that in certain circumstances, a defendant would be entitled to assert a claim against the State if the State filed suit.

In *Kinnear v. Texas Commission on Human Rights*, 14 S.W.3d 299, 300 (Tex. 2000), we acknowledged that the trial court had jurisdiction over claims against the State in a case where the

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[2] The City argues that *Anderson* is in conflict with two prior cases from this Court in which we held immunity had not been waived as to claims brought against the governmental entity plaintiffs by the defendants. *See Borden v. Houston*, 2 Tex. 594, 611 (1847); *Bates v. Republic*, 2 Tex. 616, 618 (1847). However, those cases are distinguishable from *Anderson* because they involved claims by the defendants for set-offs unrelated to the governmental entities' claims. *Borden*, 2 Tex. at 595-96; *Bates*, 2 Tex. at 616-17.

State had filed suit. In *Kinnear*, the Texas Commission on Human Rights filed suit against Kinnear, alleging that he had violated the Texas Fair Housing Act. *Id*. at 299. Kinnear counterclaimed for attorney's fees as provided by the Act, and when he prevailed, the trial court awarded them. *Id*. at 300. In response to the question of whether the trial court had jurisdiction, we said that "[b]ecause the Commission initiated [the] proceeding under the Texas Fair Housing Act, and Kinnear claimed attorney fees as a consequence of that suit, the jurisdictional question in this case was answered when the Commission filed suit." *Id*. Later, four concurring justices in a plurality opinion cited *Kinnear* and *Anderson* for the proposition that "the State can waive immunity by filing suit." *IT-Davy*, 74 S.W.3d at 861 (Hecht, J., concurring).

In circumstances such as those now before us, where the governmental entity has joined into the litigation process by asserting its own affirmative claims for monetary relief, we see no ill befalling the governmental entity or hampering of its governmental functions by allowing adverse parties to assert, as an offset, claims germane to, connected with, and properly defensive to those asserted by the governmental entity. And, our decisions that immunity from suit does not bar claims against the governmental entity if the claims are connected to, germane to, and defensive to the claims asserted by the entity, in effect, modified the common-law immunity doctrine and, to an extent, abrogated immunity of the entity that filed suit. *See Humble Oil*, 169 S.W.2d at 710; *Anderson*, 62 S.W.2d at 110.

Therefore, we hold that the decision by the City of Dallas to file suit for damages encompassed a decision to leave its sphere of immunity from suit for claims against it which are germane to, connected with and properly defensive to claims the City asserts. Once it asserts

affirmative claims for monetary recovery, the City must participate in the litigation process as an ordinary litigant, save for the limitation that the City continues to have immunity from affirmative damage claims against it for monetary relief exceeding amounts necessary to offset the City's claims. Moreover, we see no substantive difference between a decision by the City to file an original suit and the City's decision to file its claim as an intervenor in Southwest's suit. Accordingly, when the City filed its affirmative claims for relief as an intervenor, the trial court acquired subject-matter jurisdiction over claims made against the City which were connected to, germane to, and properly defensive to the matters on which the City based its claim for damages. *See Anderson*, 62 S.W.2d at 110. Absent the Legislature's waiver of the City's immunity from suit, however, the trial court did not acquire jurisdiction over a claim for damages against the City in excess of damages sufficient to offset the City's recovery, if any. *See City of LaPorte v. Barfield*, 898 S.W.2d 288, 297 (Tex. 1995); *Anderson*, 62 S.W.2d at 110 (holding that when a governmental entity files suit, "the defense will be entitled to plead and prove all matters properly defensive").[3]

Because the City's assertion of claims for damages against Reata means that the City does not have immunity from Reata's claims to the limited extent we have explained above, we must consider Reata's remaining arguments to determine if the City's immunity from suit has been completely waived in some manner.

B. Texas Tort Claims Act

[3] At the time *Anderson* was decided, a claim of an offset was referred to as a defensive matter. *See Sw. Contract Purchase Corp. v. McGee*, 36 S.W.2d 978, 979 (Tex. 1931) (stating "defendant in error pleaded in defense . . . certain offsets and defenses").

Reata claims that the court of appeals erred in holding that its claims against the City do not fit within any waiver of immunity under the Tort Claims Act. Specifically, Reata claims that the court of appeals did not liberally construe its pleadings as asserting damages for personal injuries. *See Tex. Dep't of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex. 2002) (noting that pleadings should be liberally construed in favor of jurisdiction).

Through the Tort Claims Act, the Legislature has waived the City's immunity for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." TEX. CIV. PRAC. & REM. CODE § 101.021(2).

The court of appeals concluded that none of the damages claimed against the City—property and mental anguish damages—were recoverable under that subsection. 83 S.W.3d at 396. Reata argues that a claim for personal injury damages was made as the intervenors asserted that fumes from generators used in the flooded building after the water shorted out the electricity made them sick. However, section 101.021(2) only waives immunity when the governmental unit is the user of the property. *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244, 245-46 (Tex. 2004). There is no claim that the City was the user of the generators.

Reata also argues that if its claim was not properly pleaded to demonstrate a waiver of immunity, it should be given the opportunity to amend before its case is dismissed. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004). But, in the trial court, the City twice filed special exceptions claiming that Reata failed to state a cause of action for which the City could be liable under the Tort Claims Act. Reata amended its petition twice, but its pleadings still

fail to demonstrate a waiver of immunity. Accordingly, we hold that the court of appeals correctly determined that Reata's claims do not fit within any waiver of immunity under the Tort Claims Act and that Reata was not entitled to replead.

C. Waiver of Immunity by the Local Government Code and City Charter

Reata also claims the City's immunity from suit is waived by section 51.075 of the Local Government Code, which provides that a home-rule municipality "may plead and be impleaded in any court." *See* TEX. LOC. GOV'T CODE § 51.075. However, waiver of immunity for tort claims is governed by the Texas Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE ch. 101; *Miranda*, 133 S.W.3d at 224-25 (holding that the governmental entity was immune from suit for a tort unless it was expressly waived by the Tort Claims Act). Under rules of statutory construction, we give precedence to the Tort Claims Act over section 51.075 because the Tort Claims Act is the later-enacted, more specific statute regarding waiver of immunity in tort cases. *See* TEX. GOV'T CODE § 311.026. Moreover, in *Tooke v. City of Mexia*, ___ S.W.3d ___, ___ (Tex. 2006), we have held that the phrase "plead and be impleaded" in section 51.075 does not clearly and unambiguously reflect legislative intent to waive immunity from suit. *See Taylor*, 106 S.W.3d at 697-98 (Tex. 2003).

Reata also claims the City's immunity is waived by the Dallas City Charter which states that the City may "sue and be sued" and "implead and be impleaded." DALLAS, TEX., CITY CHARTER ch. II, § 1(2), (3). As we explain in *Tooke*, such phrases, separately or together, do not comprise a clear and unambiguous waiver of immunity to suit. *Tooke*, ___ S.W.3d at ___. The City Charter provision does not waive the City's immunity from suit. *See id*.

IV. Conclusion

Because the City asserted affirmative claims for monetary relief against Reata, the City does not have immunity from Reata's claims germane to, connected to, and properly defensive to claims asserted by the City, to the extent any recovery on those claims will offset any recovery by the City from Reata. We reverse the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion.

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Phil Johnson
Justice

OPINION DELIVERED: June 30, 2006