IN THE SUPREME COURT OF TEXAS

NO. 03-0878

JUDY TOOKE AND EVERETT TOOKE D/B/A TOOKE AND SONS AND D/B/A NATURE'S WAY ORGANIC LANDSCAPING, PETITIONERS

v.

THE CITY OF MEXIA, RESPONDENT

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

Argued April 21, 2004

JUSTICE JOHNSON, concurring in part and dissenting in part.

I agree with the Court that the plain and common meaning of the phrase "plead and be impleaded" does not reflect clear and unambiguous legislative intent to waive governmental immunity from suit, and that it does not reflect such intent in the context of TEX. LOC. GOV'T CODE § 51.075. ___ S.W.3d ___. I also agree that the meaning of statutory language that an entity may "sue and be sued" depends on its context. ___ S.W.3d ___. But, I agree with Justice O'Neill that we should not overrule *Missouri Pacific Railroad Co. v. Brownsville Navigation District*, 453 S.W.2d 812 (Tex. 1970). ___ S.W.3d ___ (O'Neill, J., dissenting).

In *Missouri Pacific* we considered whether the following language waived immunity from suit:

> All navigation districts established under this Act may, by and through the navigation and canal commissioners, sue and be sued in all courts of this State in the name of such navigation district . . . .

453 S.W.2d at 813 (citation omitted). We acknowledged that there may be other language by which legislative intent to give consent to suit against a governmental entity might be more clearly expressed. *Id*. Nevertheless, we said that the language we were considering "is quite plain and gives general consent for [the] District to be sued" in the same manner as other defendants. *Id*. Our analysis was based on the plain language of the statute. We needed go no further, for "[w]hen a statute is clear and unambiguous, courts need not resort to rules of construction or extrinsic aids to construe it, but should give the statute its common meaning. The Legislature's intent is determined from the plain and common meaning of the words used." *See St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997) (citations omitted).

As the Court notes in this case, some statutes use "sue and be sued" language, yet specifically provide that governmental immunity is not waived. *See* TEX. EDUC. CODE § 111.33 (providing that the Board of Regents of the University of Houston may "sue and be sued," but that "[n]othing in this section shall be construed as granting legislative consent for suits against the board . . . ."); *see also* TEX. HEALTH & SAFETY CODE § 403.006, art. 3, sec. 3.03. Legislative intent to preserve immunity by such plain language is clear. But, clarity of language preserving immunity does not diminish the clarity of language such as we interpreted in *Missouri Pacific*, which waives immunity.

I would hold, in accordance with *Missouri Pacific*, that statutory language that a governmental entity may sue and be sued is clear and unambiguous consent for suit and that such language waives governmental immunity from suit unless the statute also contains language retaining immunity or the context otherwise demonstrates legislative intent to modify the plain meaning of the "sue and be sued" language.

I concur in the Court's judgment. I dissent from that part of the Court's opinion overruling *Missouri Pacific*.

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Phil Johnson
Justice

OPINION DELIVERED: June 30, 2006