IN THE SUPREME COURT OF TEXAS

NO. 04-0890

CITY OF GALVESTON, PETITIONER,

v.

STATE OF TEXAS, RESPONDENT

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

Argued February 16, 2006

JUSTICE WILLETT, joined by CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, and JUSTICE WAINWRIGHT, dissenting.

Much about this case is novel. We have found no instances where Texas has sued one of its cities for money damages. And this Court has never before said legislators rather than judges must determine the existence vel non of court-created immunity. From the start and whatever the outcome, this case was destined to be precedent-setting.

The Court makes the best arguments that can be made for rejecting "State v. City" suits, but I remain unpersuaded and respectfully dissent. I agree with the court of appeals that the State's immunity cannot be turned against the State itself.

The crux of my disagreement is simple: The Court says only legislative consent can abrogate a city's immunity no matter what, even when the plaintiff is the State, and I believe a city's immunity

is nonexistent when the plaintiff is the State. Waiver presupposes that there is something to waive, and there is no need to waive what does not exist.

Today's case may be unheard-of, but in my view the principles underlying Texas immunity law coupled with our relevant case law favor the State's position: the State's immunity cannot bar a suit by the State itself in its own courts.

I. Determining the Existence and Boundaries of Common-Law Immunity Is a Judicial Responsibility

The Court urges that disputes like this one are "more suited to the Legislature than the courts,"[1] but less than a year ago in *Reata* we held that "it remains the *judiciary's* responsibility to define the boundaries of the common-law doctrine [of sovereign immunity] and to determine under what circumstances sovereign immunity exists in the first instance."[2] That is no less true today than it was eight months ago.

The Court is undoubtedly correct that disputes between municipalities and the State have historically been resolved "by political rather than judicial means,"[3] but that is only because the State, for whatever reason(s), never forced the issue via litigation. As a society we are fortunate that countless would-be litigants heed President Lincoln's admonition to "compromise whenever you can" and resolve disputes peaceably short of litigation,[4] but when lawsuits erupt, it remains the

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[1] ___ S.W.3d ___, ___.

[2] *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006) (emphasis added).

[3] ___ S.W.3d at ___.

[4] Abraham Lincoln, Fragment: Notes for a Law Lecture, *in* 2 COLLECTED WORKS OF ABRAHAM LINCOLN 81, 81 (Roy P. Basler ed., 1953).

judiciary's solemn duty to adjudicate them.[5] The Court says only legislators should abrogate immunity, but punting to the Legislature itself constitutes abrogation—our own. This Court has repeatedly held that "sovereign immunity is a creature of the common law and not of any legislative enactment."[6] Before tackling waiver, there is an antecedent question here: whether governmental immunity even exists in a case like this. This Court created governmental immunity; this Court delineates its terms (absent legislation); and this Court must decide whether it exists in such cases. The Legislature's focus is critical but confined; its role is limited to waiving *pre-existing* common-law immunity.[7] Obviously, if the Legislature had spoken statutorily to today's issue, we would dutifully follow the Legislature's wishes, but it has not. And the Legislature can certainly codify any disagreements with what we say. But however uncommon and however unwelcome, the question is now squarely presented, and as we recognized in *Reata*, it is this Court's duty to squarely decide it.[8]

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[5] *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 779 (Tex. 2005) ("[T]he judiciary's duty is to decide the legal issues properly before it without dictating policy matters.").

[6] *Tex. A&M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518, 520 (Tex. 2002) (plurality opinion).

[7] *See Univ. of Tex. Med. Branch v. York*, 871 S.W.2d 175, 177 (Tex. 1994) (reaffirming that "waiver of governmental immunity is a matter addressed to the Legislature"); *see also City of Tyler v. Likes*, 962 S.W.2d 489, 494 (Tex. 1997) (explaining "that the Tort Claims Act does not create a cause of action; it merely waives sovereign immunity as a bar to a suit that would otherwise exist"); *Thomas v. Oldham*, 895 S.W.2d 352, 357 (Tex. 1995) (noting that the "Tort Claims Act created a limited waiver" of common-law immunity).

[8] The Court declares that "waiving immunity or finding it nonexistent have precisely the same effect," ___ S.W.3d at ___, but the distinction is more fateful than fine. Whether Texas cities inherently possess immunity from suit, or instead borrow the State's, is in my view legally dispositive. It is one thing to waive my Fifth Amendment right to remain silent but quite another to hear that no such right exists in the first place.

It is true, as we reaffirmed in *Wichita Falls State Hospital v. Taylor*, that "the Legislature is better suited to balance the conflicting policy issues associated with waiving immunity,"[9] but this maxim presupposes that immunity in fact already exists and does not suggest that courts are ill-equipped to determine its threshold existence.[10] Whether and to what extent to waive common-law immunity are primarily legislative judgments; whether there is anything to waive is a judicial judgment. To say that waiver of sovereign immunity is best left to the Legislature does not mean that every assertion of immunity by every governmental unit is valid and that courts are powerless to hold otherwise. As we recently stated in *Reata*, "Sovereign immunity is a common-law doctrine that initially developed without any legislative or constitutional enactment."[11] Far from a judicial incursion, and as we held just 245 days ago in *Reata*, it is incumbent upon the judiciary to delimit its boundaries and decide whether it exists in the first place.[12]

Accordingly, while the Court notes "the political nature of all the parties, and the sensitivity of these intergovernmental issues,"[13] I believe that the issue of the existence of governmental immunity vel non is not judicially unmanageable, but properly before us as the institution that recognized governmental immunity in the first instance. The existence and scope of that court-

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[9] 106 S.W.3d 692, 695 (Tex. 2003); *see also Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 409 (Tex. 1997) ("[T]his Court has uniformly held that it is the Legislature's sole province to waive or abrogate sovereign immunity.").

[10] We also wrote in *Taylor* that this Court, like those in other jurisdictions, has not "foreclosed the possibility that the judiciary may abrogate immunity." 106 S.W.3d at 695–96. If this Court has the authority to consider abolishing immunity, then we may certainly determine its existence.

[11] 197 S.W.3d at 374.

[12] *See id.*

[13] ___ S.W.3d at ___.

created immunity are front and center, and I see no prudential or jurisdictional impediment to deciding them.

II. States Possess Inherent Sovereignty and Inherent Immunity; Cities Possess Neither

The State of Texas, of course, is a stand-alone sovereign entity.[14] While the States forfeited certain attributes of sovereignty when they entered the federal system, they retained "a residuary and inviolable sovereignty,"[15] and central to that preserved sovereignty is "'the States' traditional immunity from private suits.'"[16] Such immunity is an inherent attribute of sovereignty. By contrast, the City of Galveston is a political subdivision of the State,[17] and as we held 60 years ago, municipalities have no sovereignty apart from the state,

> are creatures of our law and are created as political subdivisions of the state as a convenient agency for the exercise of such powers as are conferred upon them by the state. They represent no sovereignty distinct from the state and possess only such powers and privileges as have been expressly or impliedly conferred upon them.[18]

The United States Supreme Court holds the same view, declaring, "Ours is a '*dual* system of government,' which has no place for sovereign cities."[19] Leading legal commentaries agree that

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[14] *Alden v. Maine*, 527 U.S. 706, 713 (1999) (noting that the United States Constitution "'specifically recognizes the States as sovereign entities'") (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.15 (1996)).

[15] *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting THE FEDERALIST No. 39 (James Madison)).

[16] *Alden*, 527 U.S. at 724.

[17] TEX. CIV. PRAC. & REM. CODE § 101.001(3)(B) (including "any city" among the listed political subdivisions); *City of Lancaster v. Chambers*, 883 S.W.2d 650, 658 (Tex. 1994).

[18] *Payne v. Massey*, 196 S.W.2d 493, 495 (Tex. 1946).

[19] *Cmty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 53 (1982) (citation omitted); *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) ("Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities.").

under our constitutional framework, "municipalities, unlike states, are not sovereigns."[20] The equation is simple and well-established: there is no inherent immunity absent inherent sovereignty.[21] Or as one Texas court plainly put it, "a city has no sovereignty of its own and likewise no immunity of its own . . . ."[22]

III. A City's Governmental Immunity Is a Common-Law Extension of the State's Inherent Sovereign Immunity[23]

This Court in 1884 articulated the general common-law rule of "governmental immunity" for municipalities, holding that the State's sovereign immunity would protect cities when performing public functions on behalf of the State but not when performing "proprietary" functions.[24]

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[20] 18 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.02.10 (3d ed. 2004) (hereinafter MCQUILLIN).

[21] Unlike the Court, I see no legal significance in the City's status as a home-rule city, which the City insists elevates it to the level of a sovereign entity vested with inherent immunity. While home-rule cities possess the power of local self-government, *see* TEX. LOC. GOV'T CODE § 51.072, this Court's settled view is that Texas cities, home-rule or otherwise, are deemed to be State agents for immunity purposes when performing governmental functions, subject to state control, *Proctor v. Andrews*, 972 S.W.2d 729, 734 (Tex. 1998), with "no sovereignty distinct from the state," *Massey*, 196 S.W.2d at 495. Immunity from suit is an inherent attribute of sovereignty, something that only the federal and state governments have. A home-rule city's governmental immunity springs from the common law, and nothing in Texas law suggests that the governmental immunity afforded home-rule cities is more muscular than that afforded "lesser" municipalities. Texas cities—however constituted—are afforded *the State's* immunity when performing governmental functions because they are acting as the State's agents. More to the point, this "home-rule sovereignty" argument was rejected by the United States Supreme Court in *Community Communications Co. v. City of Boulder*, 455 U.S. at 53–54. In that case, the City of Boulder argued that its home-rule status entitled it to an exemption from the Sherman Act since its sovereignty derived directly from the people via the Colorado Home Rule Amendment. *Id.* at 52. The Court disagreed and refused to grant the City antitrust immunity under the so-called "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). The Court reasoned that the City of Boulder's constitutional home-rule status was insufficient to confer sovereign privileges because "[o]urs is a '*dual* system of government,' which has no place for sovereign cities." *Cmty. Commc'ns Co.*, 455 U.S. at 53 (citation omitted).

[22] *State v. Brannan*, 111 S.W.2d 347, 348–49 (Tex. Civ. App.—Waco 1937, writ ref'd).

[23] The doctrines of sovereign and governmental immunity are related but distinguishable; sovereign immunity protects the State itself (and various divisions of state government) while governmental immunity protects political subdivisions. *See Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivs. Prop./Cas. Joint Self-Ins. Fund*, ___ S.W.3d ___, ___ (Tex. 2006); *Taylor*, 106 S.W.3d at 694 n.3.

[24] *City of Galveston v. Posnainsky*, 62 Tex. 118, 127, 130–31 (1884).

In the intervening 123 years, we have repeatedly held that a city has no immunity of its own but is afforded the State's immunity when acting as the State's agent and performing governmental functions for public benefit.[25] The City dismisses as a "semantic ruse" the argument that the City is an "agent" of the State and that its immunity is "derivative." If this is an artifice, it is a well-settled one, representing this Court's uniform view throughout the nineteenth,[26] twentieth,[27] and twenty-first centuries.[28] This derived-immunity principle is the accepted view among legal commentators, too,[29] as well as numerous Texas courts of appeal.[30]

IV. A City's Derivative Immunity Thwarts Suits Brought by Private Parties, Not Suits Brought by the State Itself

Since cities possess no free-standing sovereignty and instead borrow the State's, it is conceptually untenable to allow a city, a legal and geographical subdivision of the State, and subject

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[25] *See, e.g.*, *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 840 n.12 (Tex. 2000) ("[A] city is deemed an agent of the state for sovereign immunity purposes when exercising its powers for a public purpose."); *City of Houston v. Shilling*, 240 S.W.2d 1010, 1011 (Tex. 1951) ("'[T]he rule is recognized that a municipality is exempt from liability when it performs a duty imposed upon it as the arm or agent of the state in the exercise of a strictly governmental function solely for the public benefit.'" (quoting *City of Amarillo v. Ware*, 120 Tex. 456, 456 (Tex. 1931))).

[26] *Posnainsky*, 62 Tex. at 127.

[27] *Gates v. City of Dallas*, 704 S.W.2d 737, 738–39 (Tex. 1986).

[28] *Fort Worth Indep. Sch. Dist.*, 22 S.W.3d at 840 n.12.

[29] "A municipality derives its general tort immunity from the state because it is deemed to act as the state's arm or agent when performing governmental functions." 18 MCQUILLIN § 53.24.

[30] *See, e.g.*, *Tex. Workers' Comp. Comm'n v. City of Eagle Pass/Tex. Mun. League Workers' Comp. Joint Ins. Fund*, 14 S.W.3d 801, 803–04 (Tex. App.—Austin 2000, pet. denied); *City of Crystal City v. Crystal City Country Club*, 486 S.W.2d 887, 889 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.). Moreover, while the Court eschews the notion that "an entity can sue itself," ___ S.W.3d at ___, there is nothing novel about allowing a principal to sue his agent. The Restatement of Agency, in fact, devotes a whole chapter to the duties and liabilities of the agent to his principal. RESTATEMENT (SECOND) OF AGENCY §§ 376–431 (1958).

to State control, to assert governmental immunity against the sovereign that controls it.[31] As one leading treatise observes:

> A municipality derives its general tort immunity from the state because it is deemed to act as the state's arm or agent when performing governmental functions. Therefore, it would be illogical to allow a municipality sued by the state to assert its immunity against the very source of that immunity.[32]

I agree. A necessary corollary to the notion that cities borrow their common-law immunity from the State, a notion rooted in basic Texas immunity law, is that a city cannot wield the State's own immunity against the State itself. It is indeed mystifying that the State's immunity could be used to undermine the State's sovereign interests.

It also merits mention that two other state supreme courts have reasoned that the derivative nature of a municipality's immunity prevents cities from asserting immunity against a tort claim brought by the State.[33] The Maryland Supreme Court held that "the immunity of counties and municipalities is derived from the State's sovereign immunity" and "the nature of governmental immunity for counties and municipalities prevents them from asserting the defense of immunity when sued by the State or a State agency."[34] The Ohio Supreme Court has likewise held that a

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[31] We note that a similar argument would not necessarily apply to a State in relation to the federal government. As a historical matter States possessed and retained a certain measure of sovereignty when they joined the United States, and a component of that sovereignty was sovereign immunity. *See Alden*, 527 U.S. at 712–27.

[32] 18 MCQUILLIN § 53.24. The United States Supreme Court spoke to immunity's early history in *Alden v. Maine*, 527 U.S. at 741, noting, "In England, the rule was well established that 'no lord could be sued by a vassal in his own court, but each petty lord was subject to suit in the courts of a higher lord.'" (quoting *Nevada v. Hall*, 440 U.S. 410, 414–15 (1979)). The Court in *Alden* recognized that it is one thing to say that a lord cannot be sued by one of his serfs, and quite another to say that this principle shields the lord from any claim for redress from his king.

[33] These are apparently the only two published cases in the nation confronting the question before us.

[34] *Bd. of Educ. v. Mayor & Common Council*, 578 A.2d 207, 210 (Md. 1990) (a tort case where a state agency sued town officials for property damage to a school caused by leaks from an underground gas tank maintained by the town).

municipality cannot assert immunity against the State's negligence action, noting that it is inscrutable to let a city assert immunity against the State itself.[35]

While the laws of Maryland and Ohio differ from Texas law in some respects, as the Court's opinion details,[36] the analysis of these state high courts pivoted not on any oddities of Maryland and Ohio law, but on the same fundamental legal principles that form the crux of the instant dispute: whether a city may wield its borrowed immunity against the State that loaned it.[37]

For years and unsuccessfully, injured parties have castigated the legal doctrine of immunity as fundamentally unfair.[38] Another one-sided truism of immunity is this: what the State giveth, the

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[35] *State v. City of Bowling Green*, 313 N.E.2d 409, 412 (Ohio 1974) (a tort case where the state sued the city after numerous fish were killed by the city's negligent operation of a sewage-treatment plant). In this case, the Ohio Supreme Court explained:

> [A] municipality is not directly clothed with or relieved from immunity from liability in tort by any constitutional provision. Its immunity is derivative; it arises because the municipality, when performing a governmental function, is acting as an arm or agent of the state.
>
> Where a municipality negligently performs a governmental function, and as a proximate result thereof a private injury is caused, the injured party cannot maintain a damage suit against the municipality because the city is clothed with the state's immunity. In such a situation the state is analogous to a principal with immunity, and the municipality to an agent, and the injured party to a third person. The immunity of the principal filters down to the agent. However, where the injured party is the state itself, this analogy disintegrates. Instead, the situation resembles a suit by a principal against an agent whose negligence has resulted in damage to the principal. In such a situation it would be illogical to allow the municipality to assert its general tort immunity against the very source of that immunity.

Id. at 412 (footnote omitted).

[36] ___ S.W.3d at ___ & nn.35–36.

[37] The Austin Court of Appeals reached the same conclusion in *City of Eagle Pass*, 14 S.W.3d at 803. In that case, the court rejected the argument of two political subdivisions that they were immune from Commission-assessed penalties absent an unequivocal waiver of their immunity. The court stressed the derivative nature of governmental immunity and, quoting our decision in *Payne*, concluded that "[b]ecause political subdivisions of the State do not possess such independent sovereignty, they have no immunity as against the State." *Id.* at 803.

[38] The Court raises that objection here, casting it as one of "fundamental fairness." ___ S.W.3d at ___. But just as immunity is inherent to sovereignty, unfairness is inherent to immunity. Indeed, that is precisely the point of one-sided immunity—to let government off the hook. In any event, under *Reata*, if the State sues for monetary damages, it waives immunity from any relevant offset counterclaims. 197 S.W.3d at 376–77.

State can taketh away. That is true in the Tort Claims Act, where the State waives tort immunity but then carves out numerous exceptions to that waiver,[39] or here, where the State shares its immunity with cities but then yanks it back when it decides to sue one. Like a teenager's allowance, a city's derived immunity rises or falls (or disappears) on the sovereign's whim and benevolence.

V. The City's Alternative Arguments Also Miss the Mark

The City and amici posit several alternative arguments, all unpersuasive.

For example, they warn strenuously that if political subdivisions are not afforded immunity from State negligence suits, municipal coffers will be raided and plundered by state agencies. Whether such criticism portends a Pandora's box or merely a can of worms, such alarm is misdirected and unwarranted.[40]

There exist specific constitutional, budgetary and pragmatic safeguards that, while not guaranteeing the total absence of imprudent litigation, would certainly militate against indiscriminate suits. First, such litigation would not be launched willy-nilly by a rogue, unaccountable state agency, but by or with the express approval of the Attorney General in the name of the State of Texas, acting within the scope of his authority as a constitutional officer and State government's principal lawyer. As we have noted, "The Attorney General, as the chief legal officer of the State, has broad discretionary power in conducting his legal duty and responsibility to represent the State."[41] Moreover, "[t]he Attorney General is a member of the Executive Department whose primary duties

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[39] TEX. CIV. PRAC. & REM. CODE §§ 101.001–101.109.

[40] The Court says a trial court may have trouble enforcing a judgment against a government defendant who refuses to pay damages, ___ S.W.3d at ___, but this is not a novel concern. Such difficulties are no more acute here than when a private plaintiff successfully sues a government entity on a claim for which legislators have waived immunity.

[41] *Terrazas v. Ramirez*, 829 S.W.2d 712, 721 (Tex. 1992).

are to render legal advice in opinions to various political agencies and to represent the State in civil litigation."[42] The Appropriations Act makes clear that a state agency cannot use appropriated funds to "initiate a civil suit or defend itself against a legal action without the consent of the Attorney General."[43] In addition, the Appropriations Act and the Texas Government Code both require the Attorney General's express approval of a state agency's request to retain outside legal counsel.[44] Again, such oversight does not prevent all inadvisable litigation—whether the caption reads "State v. City" or "State v. ACME Widget Co."—but it imposes a measure of accountability, however imperfect.

Second, a Legislature displeased with certain litigation could arguably enact additional budgetary measures to starve any disfavored lawsuits and put strict conditions on how public funds are spent. Also, the Legislature is well-equipped to counter almost any Court ruling it dislikes, and if it believes that permitting "State v. City" suits will embolden the State to run roughshod over cash-strapped cities, it can severely restrict or proscribe such suits altogether if it chooses.

If anything, "the political nature of all the parties, and the sensitivity of these intergovernmental issues,"[45] cited by the Court as reasons to defer to the Legislature, would themselves help deter unreasonable suits. One meaningful political brake is that the Attorney General, aside from seeking funding from the Legislature every two years, has to reapply for his job every four years. Facing millions of Texas voters imposes an electoral safeguard that, while it cannot

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[42] *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001).

[43] General Appropriations Act, 79th Leg., R.S., ch. 1369, art. IX, § 6.21(b), 2005 Tex. Gen. Laws 4324, 5158.

[44] *Id*. § 6.21(a); TEX. GOV'T CODE § 402.0212.

[45] ___ S.W.3d at ___.

foreclose an obdurate and vengeful Attorney General Javert, at least imposes a political check in lieu of or in addition to legislative oversight. The Attorney General is politically answerable to voters throughout Texas, including voters in any municipality subject to suit, and also answerable to their respective representatives and senators who can intervene to counter adverse litigation and rein in any perceived missteps. Finally, the Attorney General, to put it mildly, faces innumerable other priorities and responsibilities when deciding how to deploy his limited litigation resources.

Among the City's myriad "sovereignty" arguments, it argues that the Attorney General exceeded his constitutional authority and violated the separation of powers by initiating this suit: "The Attorney General has no power or right to speak for the sovereign people concerning whether local governments enjoy immunity from suit by the State on behalf of TxDOT." This argument rests upon a flawed premise and distorts the nature of the instant litigation. The Attorney General has not single-handedly abrogated the City's governmental immunity; that immunity determination is for this Court, not the Attorney General. The Attorney General filed suit on the State's behalf to seek redress for damage to the State's sovereign property rights.[46] The existence and scope of governmental immunity is controlled by this Court's application of common-law principles, not the Attorney General's election to bring suit. While the Attorney General may in limited circumstances waive the *State's* sovereign immunity by suing on the State's behalf,[47] even the State's principal lawyer is powerless to nullify a *city's* common-law governmental immunity. In short, the Attorney

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[46] We recently reaffirmed that the State holds a superior right of ownership in public roads. *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 644–45 (Tex. 2004) (noting that a city merely holds roads in trust for the benefit of the State).

[47] *See Reata*, 197 S.W.3d at 376–77 (a governmental entity that brings an affirmative claim for monetary damages waives immunity for offset claims that are germane to, connected with, and properly defensive of affirmative claim).

General cannot waive what does not exist. The City's asserted immunity should fail here not because the Attorney General says so, but because its derivative nature renders it wholly nonexistent against the State. Although the Attorney General controls litigation on behalf of the State, filing an action that exposes the absence of common-law governmental immunity is not the same as invading the Legislature's province to waive pre-existing immunity. The City makes no persuasive argument that the Attorney General overstepped his authority if he is correct, as I believe he is, that a State-created subdivision cannot turn its borrowed immunity against the State itself.

VI. Conclusion

In this case, where you end up depends on where you start. The Court's starting point is that a city cannot be sued unless the Legislature has unmistakably waived immunity. I agree wholeheartedly when the petition reads "Citizen v. City" but in the exceedingly rare case when it reads "State v. City," there is nothing for the Legislature to waive.

I respectfully dissent because I believe that history, logic, precedent, and the underlying justifications for recognizing governmental immunity in the first place all weigh against recognizing its existence in this case.

Don R. Willett
Justice

OPINION DELIVERED: MARCH 2, 2007