IN THE SUPREME COURT OF TEXAS

NO. 09-0326

LARRY ROCCAFORTE, PETITIONER,

v.

JEFFERSON COUNTY, RESPONDENT

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

Argued October 14, 2010

JUSTICE WILLETT, concurring in part.

I join Parts I–III of the Court's opinion. As for Part IV, I join the result but not the reasoning. There is a better approach, one more allegiant to the Legislature's words. Roccaforte's claim should proceed, but the reason is rooted not in his substantial compliance but rather the County's substantial dalliance.

* * *

Aristotle would have enjoyed this case, which perfectly illustrates the challenge he recognized of reconciling the "absoluteness" of the written law with equity in the particular case.[1] Believing that "the equitable is superior" and that rigid laws must bend,[2] Aristotle urged "a

[1] Aristotle, Nicomachean Ethics bk. V, ch. 10.

[2] *Id*.

correction of law where it is defective owing to its universality."[3] From Athens, Greece to Athens, Texas (and beyond), judges still debate the bounds of interpretive discretion—whether it is appropriate to temper the "absoluteness" of statutory mandates and ameliorate their seeming harshness. Millennia may have passed since Aristotle's Lyceum, but this great philosophical and jurisprudential debate endures.

I

As the Court persuasively explains in Part III, the post-suit notice requirements in Section 89.0041 are not jurisdictional, meaning a County can waive a plaintiff's noncompliance.[4] Here, the County objected to Roccaforte's noncompliance, prompting the Court to ask: "Did the Legislature intend to bar Roccaforte's claim, merely because that notice was hand-delivered rather than mailed?"[5] If phrased that way, our recent and unanimous precedent answers the question "yes," since "the surest guide to legislative intent" is the language lawmakers chose.[6] In other words, "Where text is clear, it is determinative of that intent."[7] The Court today agrees that nothing in Section 89.0041 relieves Roccaforte from compliance. So, to escape the statute's emphatic "shall dismiss the suit" mandate,[8] the Court pivots on "actual notice" and "substantial compliance" and holds that the statute's purpose was fulfilled via hand-delivery.

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[3] *Id*.

[4] __ S.W.3d __, __ (explaining that compliance with the notice requirements of Section 89.0041 of the Local Government Code "is not jurisdictional") (citation omitted).

[5] __ S.W.3d at __.

[6] *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010) (citation and quotation marks omitted).

[7] *Id*.

[8] *See* TEX. LOC. GOV'T CODE § 89.0041(c).

Honoring a statute's plain words is indispensable, even if enforcing those words as written works an unpalatable result. To be sure, courts deviate from otherwise-clear textual commands to avert "absurd" results or to vindicate constitutional principles.[9] But as a general matter, if the legal deck is stacked via technical statutory requirements, the Legislature should reshuffle the equities, not us.[10]

As for whether Section 89.0041's use of phrases like "shall deliver,"[11] "must be delivered,"[12] "as required,"[13] and "shall dismiss"[14] mandates strict compliance, I would take the statute at face value. Beyond that, those desiring additional reassurance that lawmakers intended what they enacted can find it in a properly contextual reading of other notice-related statutes.

First, the Legislature, while omitting an actual-notice exception from Section 89.0041, expressly included one in the Tort Claims Act, stating the Act's pre-suit notice requirements "do not apply if the governmental unit has actual notice . . . ."[15] The Legislature understands how to let actual notice excuse technical noncompliance; it easily could have said actual notice suffices, thus

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[9] The absurdity doctrine, rightly understood, is a safety valve reserved for truly exceptional cases, not just those where the mandated statutory outcome is thought unwise or inequitable. *See generally* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003). As Chief Justice Marshall famously put it, a court's allegiance to the text ceases when applying the text "would be so monstrous that all mankind would, without hesitation, unite in rejecting the application." *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819).

[10] The Legislature can, of course, if it wishes, statutorily overturn today's holding that Section 89.0041 is nonjurisdictional and subject to an actual-notice exception.

[11] TEX. LOC. GOV'T CODE § 89.0041(a).

[12] *Id.* § 89.0041(b).

[13] *Id.* § 89.0041(c).

[14] *Id.*

[15] TEX. CIV. PRAC. & REM. CODE § 101.101(c).

obviating the need for service via certified or registered mail. Instead, it opted against actual notice, presumably on purpose. For better or worse, lawmakers enacted strict compliance, not substantial compliance. Our interpretive focus, both textual and contextual, must be on the law as written, and we should refuse to engraft what the Legislature has refused to enact.

Second, reading "actual notice" into Section 89.0041's *post*-suit notice requirement robs it of any real meaning and also makes Section 89.004's *pre*-suit notice requirement redundant. Section 89.004 forbids someone from suing a county or county official "unless the person has presented the claim to the commissioners court and the commissioners court neglects or refuses to pay all or part of the claim . . . ."[16] This presentment requirement assures actual notice of a claim before it is filed and was already on the books when Section 89.0041 was added in 2003. Logically then, Section 89.0041 must require something *in addition to* the preexisting notice and presentment requirements.[17]

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[16] TEX. LOC. GOV'T CODE § 89.004(a).

[17] Another point: As the Court notes, some courts of appeals have concluded that a substantial-compliance exception lies hidden within Section 89.0041, notwithstanding the statute's emphatic "shall dismiss" mandate. __ S.W.3d at __ (citing *Howlett v. Tarrant Cnty.*, 301 S.W.3d 840, 847 (Tex. App.—Fort Worth 2009, pet. denied) (holding that substantial compliance with Section 89.0041 was sufficient because the purpose of the statute was to ensure notice, and that purpose was accomplished); *Ballesteros v. Nueces Cnty.*, 286 S.W.3d 566, 570 (Tex. App.—Corpus Christi 2009, pet. denied) (same); *Dallas Cnty. v. Coskey*, 247 S.W.3d 753, 757 (Tex. App.—Dallas 2008, pet. denied) (same); *Dallas Cnty. v. Autry*, 251 S.W.3d 155, 158 (Tex. App.—Dallas 2008, pet. denied) (same)). Two of the three courts of appeals even cite as support two of our decisions involving notice in other contexts. *Coskey*, 247 S.W.3d at 757 ("Both *Artco-Bell Corp.* and *Cox Enterprises, Inc.* support a standard of substantial compliance with notice requirements under certain circumstances, and we conclude that standard applies in these circumstances.") (citations omitted); *Ballesteros*, 286 S.W.3d at 571–72. A third court of appeals opinion in turn relies upon *Coskey*. *See Autry*, 251 S.W.3d at 158.

Closer analysis reveals *Coskey* and *Ballesteros* offer feeble support, as they misinterpret this Court's holdings in *Cox Enters., Inc. v. Bd. of Trs. of Austin Indep. Sch. Dist.,* 706 S.W.2d 956 (Tex. 1986), and *Artco-Bell Corp. v. City of Temple*, 616 S.W.2d 190 (Tex. 1981). The issue in *Cox* involved *how much* particularity was required in notice. 706 S.W.2d at 960 (noting that "less than full disclosure is not substantial compliance" and that "the Open Meetings Act requires a full disclosure of the subject matter of the meetings"). *Artco-Bell* is likewise inapposite. In *Artco-Bell*, the Court simply invalidated the notice requirement in a city's charter and held the plaintiff had provided sufficient notice. 616 S.W.2d at 193–94 ("[W]e hold that the requirement of verification represents an unreasonable limitation on the

The requisite officials here received notice, but they did not receive "requisite notice," as the Court states.[18] The Court may deem it *adequate*, but it is irrefutably not *requisite*. As the Court reads Section 89.0041, it is not only nonjurisdictional (I agree on this point), but also nonmandatory. I acknowledge the statute's no-exceptions mandate works a harsh result,[19] but to the degree this seems a trap for the unwary, it is a trap the Legislature left well marked.

II

Having said all that, I agree with the Court that Roccaforte ultimately wins his notice dispute, but on different grounds. Instead of asking whether the Legislature meant to bar Roccaforte's claim, I would rephrase the question in a manner less assaultive to the statutory text: Did the County effectively *waive* Roccaforte's noncompliance by not timely asserting it? I believe so.[20]

City's liability and is invalid as it is contrary to the limitation of authority placed upon home rule cities . . . .") (footnote omitted).

Cox was about the specificity of notice; *Arcto-Bell* resulted in the invalidation of notice. In neither case did the Court craft an *exception* for notice. The lower courts' treatment of these cases was thus strained, and should not be taken as a correct reading of our jurisprudence on statutory notice requirements.

[18] __ S.W.3d at __.

[19] Had the County "timely asserted" Roccaforte's noncompliance, dismissal would have been mandatory under the statute's rigid, no-discretion mandate, thus raising the question of whether Section 89.0041's notice regime is preempted by 42 U.S.C. § 1983. *See Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 359 (Tex. 2004) ("The failure of a non-jurisdictional requirement mandated by statute may result in the loss of a claim, but that failure must be timely asserted and compliance can be waived."). That question, while interesting legally, is not before us.

[20] Waiver may actually be the wrong term; it may be more accurate to call this forfeiture. As the United States Supreme Court explains: "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the *timely assertion* of a right, waiver is the intentional relinquishment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (emphasis added) (citations and quotation marks omitted). In any event, under our definition:

> "[W]aiver" is the intentional relinquishment of a right actually or constructively known, or intentional conduct inconsistent with claiming that right. The elements of waiver include (1) an existing right, benefit, or advantage held by a party; (2) the party's actual or constructive knowledge of its existence; and (3) the party's actual intent to relinquish the right or intentional conduct inconsistent with the right.

Perry Homes v. Cull, 258 S.W.3d 580, 602–03 (Tex. 2008) (citations omitted).

True, the County, after waiting for limitations to expire, filed a motion for dismissal complaining that Roccaforte provided notice via personal service rather than registered or certified mail. I believe that obscures the key point, which on these facts is not *whether* the County sought dismissal, but *when*. A governmental body can raise a jurisdictional bar like immunity from suit whenever it pleases because "the trial court does not have—and never had—power to decide the case,"[21] thus making judgments forever vulnerable to delayed attack. Not so with nonjurisdictional requirements like this, which are waived if not timely raised. Under our precedent, dismissal delayed is sometimes dismissal denied: "The failure of a non-jurisdictional requirement mandated by statute may result in the loss of a claim, but *that failure must be timely asserted* and compliance can be waived."[22] Moreover, "if a governmental unit is to avoid litigation to which it should not be subjected because of lack of notice, it should raise the issue as soon as possible."[23] On these facts, there was no timely assertion, much less one made "as soon as possible."[24]

We have held that waiver is decided on a case-by-case basis, meaning courts look to the

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[21] *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 306 (Tex. 2010) (citation omitted).

[22] *Loutzenhiser*, 140 S.W.3d at 359 (emphasis added).

[23] *Id*. at 360. "Moreover, if in a particular case a governmental unit were not prejudiced by lack of notice and chose to waive it, we do not see how the statutory purpose would thereby be impaired." *Id*.

[24] Reading Section 89.0041 in tandem with our settled precedent distinguishing mandatory requirements (waivable) from jurisdictional ones (nonwaivable) is consistent with a textualist approach that integrates established interpretive norms. For example, even the most ardent textualist would read a statute of limitations in light of the common-law rules of equitable tolling. *See Young v. United States*, 535 U.S. 43, 49 (2002) ("It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute.") (citations and quotation marks omitted); *see also United States v. Beggerly*, 524 U.S. 38, 48 (1998). As Justice Scalia noted in *Young*, a limitations period is subject to the principles of equitable tolling, so long as the statutory text does not preclude such tolling. 535 U.S. at 47. Same here, where the Legislature drafts notice requirements in light of our decisions differentiating between mandatory and jurisdictional provisions and the consequences that flow from each characterization.

totality of the circumstances.[25] Here, the County sought dismissal based on imperfect notice more than two years after suit was filed; more than two years after the County filed its answer; more than two years after the County filed its special exceptions; after the County presented three County officials for deposition and defended those depositions; after the County sent written discovery requests; after the County deposed Roccaforte; and after the County filed a motion for continuance. If two-plus years qualifies as "timely asserted" or "as soon as possible"—at least in the context of a statutory notice requirement commanding action—then these phrases have been drained of all meaning.[26] Indeed, the only thing the County "timely asserted" was limitations. I would disallow the County's belated insistence on dismissal given its decision to defend the case for so long,

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[25] *See Perry Homes*, 258 S.W.3d at 589–91 (explaining that a party waives an arbitration clause by engaging in substantial litigation to the other party's detriment or prejudice).

In *Jernigan v. Langley*, the Court considered whether a defendant physician waived his statutory right to contest the adequacy of the plaintiff's expert reports by waiting too long. 111 S.W.3d 153, 153 (Tex. 2003). The Court held that delay does not always result in waiver, but it does when the defendant's silence or inaction for such a long period shows an intent to yield a known right. *Id.* at 157. I would hold that the County's actions are inconsistent with the intent to assert its statutory right to up-front dismissal based on defective notice. Moreover, *Jernigan* predates our 2004 decision in *Loutzenhiser*, which speaks specifically to statutorily mandated notice requirements involving governmental units and says notice-based objections should be asserted "as soon as possible." 140 S.W.3d at 360.

[26] It is true that defendants may assert defenses like limitations in the trial court even following extensive discovery and other pre-trial activity. *See* TEX. R. CIV. P. 94 (affirmative defenses including limitations must be pleaded); TEX. R. CIV. P. 63 (pleadings may be amended without leave of court until seven days before trial). Today's case, though, involves a statutory notice requirement that mandates action within a prescribed time, something *Loutzenhiser* held should be raised "as soon as possible" since the statutory purpose is to avoid litigation altogether. 140 S.W.3d at 360.

Section 89.0041 may not be a prerequisite to bringing suit, but it is a postrequisite to maintaining suit. In my view, Section 89.0041, unlike the Tort Claims Act, does not allow actual notice to forgive defective notice, but that does not mean actual notice may not affect the *waiver* inquiry of whether a defendant "timely asserted" noncompliance. For reasons stated above, I believe a county that quickly asserts statutory noncompliance, even if it has actual notice, is entitled to dismissal under Section 89.0041. But a county with actual notice that untimely asserts noncompliance (here only after limitations had run two-plus years later) has waived its objection and is not entitled to dismissal. *See City of Desoto v. White*, 288 S.W.3d 389, 400–01 (Tex. 2009) (noting that a party that declines to act in light of "full knowledge" of a defect in a nonjurisdictional notice requirement generally waives any complaint). Any other result would incentivize counties to sit on their rights rather than assert them immediately. Here, the County would be rewarded for wasting over two-years' worth of judicial resources and taxpayer dollars in defending a suit it could have easily dismissed from the outset.

asserting noncompliance only after seizing tactical advantage via limitations, and thus materially prejudicing Roccaforte. There is no countervailing prejudice in allowing Roccaforte's suit to proceed against the County, which can hardly argue at this late stage that imperfect notice has harmed its legal position (unlike its fiscal position, having underwritten years of legal and judicial expenses). On these facts, two-plus years of litigation activity to run out the limitations clock betrays the County's too-little, too-late request for dismissal and constitutes waiver.

* * *

The Court's understandable desire to work an eminently fair result has led it to revise the statute as desired rather than read it as enacted. I favor a different approach to the same outcome. Roccaforte should win not because the Court waived the Legislature's words but because the County did.

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Don R. Willett
Justice

OPINION DELIVERED: April 29, 2011