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

JUSTICE BRISTER delivered the opinion of the Court, in which JUSTICE O'NEILL, JUSTICE GREEN, JUSTICE MEDINA, and JUSTICE JOHNSON joined.

JUSTICE WILLETT filed a dissenting opinion, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, and JUSTICE WAINWRIGHT joined.

In the 171 years since the Alamo, San Jacinto, and independence, it appears that Texas has never sued one of its cities for money damages. No one questions that the Legislature may prescribe whether it can do so, and under what conditions. But as the State relies on no such legislation here, the question is whether we should fill that gap. As disputes like this one have apparently been settled throughout Texas history by political rather than judicial means, we hold that the party seeking to change the status quo ought to bear the burden of changing the rules.[1]

[1] *Cf. Tooke v. City of Mexia*, 197 S.W.3d 325, 342 (Tex. 2006) (noting this Court's opinions upholding immunity, and legislative responses to them); *Fed. Sign v. Texas S. Univ.*, 951 S.W.2d 401, 406-11 (Tex. 1997).

This case is not a routine dispute about property damage. The taxpayers have already paid for the roadway repairs here; the only question is whether Galveston taxpayers rather than Texas taxpayers should bear the cost. That is as much a question of allocating taxes as of allocating fault, and not one as to which courts have special expertise. Accordingly, we affirm the judgment of the trial court dismissing this case.

I. Background

As part of a 1982 agreement with the Texas Department of Transportation for construction of State Highway 275, the City of Galveston agreed to move and maintain nearby utilities. One of those utilities, a City water line, ruptured in 2001 and allegedly caused $180,872.53 in damages to the highway.

The Attorney General filed suit in the name of the State of Texas to recover damages for the City's "negligent installation, maintenance, and upkeep" of its water line and the resulting damage to state property. The City filed a plea to the jurisdiction, special exceptions, and a motion for summary judgment asserting governmental immunity; the trial court granted the jurisdictional plea. A divided court of appeals reversed, holding that cities have no immunity from suit by the State.[2] We granted the City's petition, and now reverse.

[2] 175 S.W.3d 1, 17 (Tex. App.–Houston [1st Dist.] 2004).

II. Has the Legislature Authorized the State to Sue Cities?

"We take as our starting point the premise that in Texas a governmental unit is immune from tort liability unless the Legislature has waived immunity."[3]

Political subdivisions in Texas have long enjoyed immunity from suit when performing governmental functions like that involved here.[4] While this immunity can be waived, we have consistently deferred to the Legislature to do so;[5] indeed, we have said immunity from liability "depends entirely upon statute."[6] For its part, the Legislature has mandated that no statute should be construed to waive immunity absent "clear and unambiguous language."[7] The State asserts no such statute here.

This high standard is especially true for home-rule cities like Galveston. Such cities derive their powers from the Texas Constitution, not the Legislature.[8] They have "all the powers of the state not inconsistent with the Constitution, the general laws, or the city's charter."[9] Among those

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[3] *Dallas County Mental Health and Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998) (citing *Harris County v. Dillard*, 883 S.W.2d 166, 168 (Tex. 1994)).

[4] *See Tooke*, 197 S.W.3d at 332; *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003); *Ellis v. City of W. Univ. Place*, 175 S.W.2d 396, 398-99 (Tex. 1943); *City of Galveston v. Posnainsky*, 62 Tex. 118, 127 (Tex. 1884).

[5] *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006) ("We have generally deferred to the Legislature to waive immunity because the Legislature is better suited to address the conflicting policy issues involved."); *see Tooke*, 197 S.W.3d at 332; *Wichita Falls State Hosp.*, 106 S.W.3d at 695; *Fed. Sign*, 951 S.W.2d at 409; *Griffin v. Hawn*, 341 S.W.2d 151, 152 (Tex. 1960).

[6] *Bossley*, 968 S.W.2d at 341.

[7] TEX. GOV'T CODE § 311.034.

[8] *See* TEX. CONST. art. XI, § 5; *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998) (citing *Lower Colorado River Auth. v. City of San Marcos*, 523 S.W.2d 641, 643 (Tex. 1975)).

[9] *Proctor*, 972 S.W.2d at 733.

powers is, again, immunity from suit for governmental functions.[10] The question thus is not whether any statute *grants* home-rule cities immunity from suit, but whether any statute *limits* their immunity from suit.[11] Such limits exist only when a statute speaks with "unmistakable clarity."[12] Again, the State asserts no such statute here.

This heavy presumption in favor of immunity arises not just from separation-of-powers principles but from practical concerns. In a world with increasingly complex webs of government units, the Legislature is better suited to make the distinctions, exceptions, and limitations that different situations require. The extent to which any particular city, county, port, municipal utility district, school district, or university should pay damages involves policy issues the Legislature is better able to balance.[13] For example, the Legislature's decision to waive immunity for the University of Texas at Tyler[14] but not for the University of Houston[15] is not the kind of line courts can easily draw. The Legislature can also enact damage caps that limit the impact of liability,[16] and

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[10] *See Tooke*, 197 S.W.3d at 332; *City of LaPorte v. Barfield*, 898 S.W.2d 288, 291 (Tex. 1995); *City of Round Rock v. Smith*, 687 S.W.2d 300, 302 (Tex. 1985); *City of Wichita Falls v. Robison*, 46 S.W.2d 965, 966 (Tex. 1932).

[11] *See Proctor*, 972 S.W.2d at 733.

[12] *Id*.; *see also In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002); *Quick v. City of Austin*, 7 S.W.3d 109, 122 (Tex. 1998); *City of College Station v. Turtle Rock Corp*., 680 S.W.2d 802, 807 (Tex. 1984).

[13] *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003); *Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002).

[14] *See* TEX. EDUC. CODE § 76.04.

[15] *See id*. § 111.33.

[16] *See Wichita Falls State Hosp.*, 106 S.W.3d at 698 ("[W]hen waiving immunity by explicit language, the Legislature often enacts simultaneous measures to insulate public resources from the reach of judgment creditors.").

create exceptions for particular activities.[17] Given the Legislature's recent efforts to channel government claims away from litigation, we have endeavored to avoid across-the-board rulings abrogating immunity.[18]

The Legislature has waived cities' immunity from suit in a few general statutes. In 1969, the Texas Tort Claims Act waived immunity for certain torts.[19] More recently, immunity for local government entities was waived in suits based on written contracts.[20] These statutes are not blanket waivers: they apply only to specified claims, impose limits on damages,[21] differentiate among government entities,[22] and exempt a variety of activities from any waiver at all.[23]

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[17] *See* TEX. CONST. art. XI, § 13 (authorizing Legislature to define functions of municipalities as governmental or proprietary).

[18] *See Tooke v. City of Mexia*, 197 S.W.3d 325, 342 (Tex. 2006) (holding that Legislature's more detailed scheme for handling contract claims would be disrupted if "sue and be sued" statutes broadly waived immunity); *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 597 (Tex. 2001) (refusing to adopt waiver of immunity by conduct after Legislature's adoption of claims procedure).

[19] Act of May 22, 1969, 61st Leg., R.S., ch. 292, 1969 Tex. Gen. Laws 879 (current version at TEX. CIV. PRAC. & REM. CODE §§ 101.001-.066).

[20] *See* TEX. LOC. GOV'T CODE §§ 271.151-.160.

[21] *See id.* § 271.153 (limiting damages to amounts due on contract and prohibiting consequential damages, exemplary damages, and damages for unabsorbed home office overhead); TEX. CIV. PRAC. & REM. CODE §§ 101.023 (limiting damages against cities to $250,000 per person and against other entities to $100,000), 101.024 (prohibiting exemplary damages).

[22] For example, school districts and junior colleges are liable only when they use motor vehicles, but most other entities are liable for use of personal or real property as well. *See* TEX. CIV. PRAC. & REM. CODE §§ 101.021, 101.051.

[23] *See*, *e.g.*, *id.* §§ 101.055 (exempting tax collections, emergency situations, and provision of police or fire protection from waiver of Tort Claims Act), 101.056 (exempting discretionary governmental acts), 101.057 (exempting intentional acts).

Although the State's claim here might have been asserted as either a tort or breach of contract,[24] the State has never argued or pleaded that it falls under either of these statutes. Nor does it assert that the Legislature has ever passed a general statute unambiguously and unmistakably authorizing the State to sue political subdivisions for money damages. Nor does any statute specifically authorize such suits by the Attorney General, who exercises only those powers authorized by the Constitution or statute.[25]

This is not a question of *power*, but of *authority*. While the State has the power, for example, to impose a personal income tax, it has no authority to do so without a statewide vote.[26] Likewise, the State has the power to waive immunity from suit for cities, but no authority to do so without the Legislature's clear and unambiguous consent. There is no such authority here.

The Attorney General or the Department of Transportation could have requested legislative consent to sue the City, but neither tried. And judging from the alarmed briefs filed in this case on behalf of hundreds of Texas counties, cities, school boards, mental health centers, and water districts, it is questionable whether they would have succeeded. Given the novelty of this suit, the political nature of all the parties, and the sensitivity of these intergovernmental issues, "[t]he decision as to

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[24] While the duty of subjacent support arises from the general law, *see Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 27-28 (Tex. 1978), the contract between the City and the State governs this claim if it spells out the parties' respective rights. *See DeWitt County Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 105 (Tex. 1999).

[25] *See Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001); *Day Land & Cattle Co. v. State*, 4 S.W. 865, 867 (Tex. 1887); *see also* TEX. CONST. art. IV, § 22 (providing that attorney general "shall represent the State in all suits and pleas in the Supreme Court of the State . . . and perform such other duties as may be required by law"); TEX. GOV'T CODE § 402.021 ("The attorney general shall prosecute and defend all actions in which the state is interested before the supreme court and courts of appeals."); *cf.* TEX. CONST. art. V, § 21 ("The County Attorneys shall represent the State in all cases in the District and inferior courts . . . . ").

[26] *See* TEX. CONST. art. VIII, § 24.

who should bear responsibility for governmental employees' misconduct should be made by the peoples' representatives."[27]

III. Should This Court Authorize the State to Sue Cities?

The State argues that unambiguous legislation is unnecessary here because the question is not one of waiver, but of the existence of immunity in the first instance. "[I]t 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."[28] But this distinction is a fine one, as waiving immunity or finding it nonexistent have precisely the same effect.[29] Due to the risk that the latter could become a ruse for avoiding the Legislature, courts should be very hesitant to declare immunity nonexistent in any particular case.

It is true that we recently held in *Reata Construction Corp. v. City of Dallas* that immunity does not exist when a government affirmatively files suit for money damages, although the Legislature had never said so.[30] But that rule had been recognized for decades in both Texas and federal courts.[31] By contrast, the parties here do not point to a single case in which the State has ever

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[27] *Dallas County Mental Health and Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998).

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

[29] *See Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 814 (Tex. 1993) (noting that narrowing scope of governmental immunity would have the same effect as waiver).

[30] 197 S.W.3d at 377.

[31] *See id.* at 381 (Brister, J., concurring) (citing *Lapides v. Bd. of Regents of Univ. Sys. of Georgia.*, 535 U.S. 613, 616 (2002)); *Gardner v. New Jersey*, 329 U.S. 565, 573-75 (1947); *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883); *Kinnear v. Texas Comm'n on Human Rights*, 14 S.W.3d 299, 300 (Tex. 2000); *Anderson, Clayton & Co. v. State ex rel. Allred*, 62 S.W.2d 107, 110 (Tex. 1933).

been allowed to sue a city for money damages. The court of appeals cited one case each from Texas, Maryland, and Ohio to support its judgment.[32] But in the Texas case, a statute unambiguously rendered cities liable for workers' compensation penalties,[33] a circumstance not present here. And while the common law of governmental immunity in Maryland and Ohio is certainly interesting, it is entirely alien to our own — Maryland cities and counties have long been subject to contract suits by private parties,[34] and Ohio courts have subsequently abolished immunity altogether.[35]

Moreover, none of the policies behind governmental immunity were implicated in *Reata*,[36] while they would be here. First, when the State sues a private party, the general public stands to lose nothing;[37] but when the State sues a city, a substantial part of the public will no longer be shielded "from the costs and consequences of improvident actions of their governments."[38] While this case involves $180,000 (a small amount relative to most government budgets), the rule we adopt today must apply even if the claim is for $180 million, or billion. If a levee or skyscraper collapses, issues

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[32] 175 S.W.3d 1, 6-9 (Tex. App.–Houston [1st Dist.] 2004).

[33] *See Texas Workers' Comp. Comm'n v. City of Eagle Pass/Texas Mun. League Workers' Comp. Joint Ins. Fund*, 14 S.W.3d 801, 806 (Tex. App.–Austin 2000, pet. denied); *see also* TEX. LAB. CODE § 415.021; TEX. GOV'T CODE § 311.005(2).

[34] *See Am. Structures, Inc. v. City of Baltimore*, 364 A.2d 55, 56 (Md. 1976).

[35] *See Haverlack v. Portage Homes, Inc.*, 442 N.E.2d 749, 752 (Ohio 1982).

[36] *See Reata*, 197 S.W.3d at 377 (noting that governments that file suit have affirmatively decided to incur litigation costs, and will not have their fiscal planning disrupted if counterclaims are limited to offsets); *id.* at 382-83 (Brister, J., concurring) (detailing how allowing offsets against governmental entities that file suit "is consistent with all of the purposes of sovereign immunity").

[37] *Id.* at 375 (majority opinion).

[38] *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006) (noting that an important purpose of immunity "as it has come to be applied to the various governmental entities in this State . . . [is] to shield the public from the costs and consequences of improvident actions of their governments").

of fault and causation pale in comparison to issues of who can bear and repair such staggering losses. These are precisely the kinds of issues more suited to the Legislature than the courts.

Second, there are jurisdictional problems in asking courts to enforce a judgment against a government entity, even if it is a local one.[39] If the State can sue cities successfully, what will the courts do if the cities refuse to pay? Will courts order them to raise taxes, or impound funds for police, fire, or sanitation workers so the State can collect? Or will the court order execution on city property — perhaps its parks, buses, water works, or airport?

Third, there is the problem of fundamental fairness. As we noted in *Reata*, "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."[40] In this case, finding immunity nonexistent would mean the State can sue the City, but the City cannot sue the State.[41] If the Legislature chooses to adopt such a rule, so be it. But until then, fundamental fairness weighs against our doing so.

We do not, as the dissent suggests, defer to the Legislature to decide whether immunity exists; for the reasons noted above, we decide that it does. But we do defer to the Legislature — as we always have done — to decide whether and to what extent that immunity should be waived.[42]

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[39] *See Reata*, 197 S.W.3d at 381 (Brister, J., concurring) (noting that immunity is based in part on "concerns about a court's power to order the government to appear, give evidence, and pay a judgment").

[40] *Id*. at 375-76 (majority opinion).

[41] *See Texas Dept. of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 644 (Tex. 2004) (holding city cannot sue state without waiver of immunity).

[42] *See* TEX. CONST. art. V, § 1. ("The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof . . . .").

IV. Does Logic Require that the State Be Allowed to Sue Cities?

The State argues that because the City's immunity is derived from the State, it "defies logic" to allow it to be asserted against the State.

First, the primary question here is not logic, but legislative intent. Judges cannot simply abrogate immunity every time they believe the Legislature's failure to do so "defies logic." For all the reasons noted above, legislation rather than logic governs immunity, just as Holmes said experience rather than logic governs the common law.[43]

Moreover, there are several difficulties with the logic that cities cannot invoke immunity against the State because they derive their immunity from it. First, there is the historical difficulty that the City of Galveston is older than the State itself.[44] More important, both ultimately derive their authority from the people;[45] if immunity cannot logically be invoked against one from whom it is derived, it is hard to see how the State has been invoking it against Texas citizens for more than a century.

But the major flaw in this reasoning is that it assumes the State "gave" immunity to cities. That is simply not the case. Cities are not created by the State, but by the Constitution and the consent of their inhabitants.[46] Immunity was not bestowed by legislative or executive act; it arose

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[43] O. HOLMES, THE COMMON LAW 1 (1881).

[44] *See* 11 ENCYCLOPEDIA BRITANNICA 431 (1911) (stating that the town was incorporated by the Legislature of the Republic of Texas in 1839).

[45] *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003).

[46] *See* TEX. CONST. art. XI, § 5; *Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 814 (Tex. 1993).

as a common-law creation of the judiciary.[47] As already noted, the same policies that led courts to recognize immunity in the first place still apply when the plaintiff is the State. The Legislature, of course, may change the common law, and has broad power to say whether cities are immune from suit.[48] But until it does so, the same logic that created governmental immunity for cities protects them from suits by the State for money damages.

Moreover, the State's logic goes too far. All state agencies derive immunity from the State, so presumably the State could sue one agency on behalf of another. Besides playing havoc with their budgets, this would conflict with the Legislature's preference that such disputes be settled by the State's administrators and accountants, not the State's lawyers.[49] And while cities are clearly subdivisions of the State,[50] that fact alone determines the question before us only if an entity can sue itself — a proposition that makes little sense.

While allowing the State to sue cities might not open Pandora's box (as the dissent below maintained),[51] it would certainly open a can of worms. The current Attorney General's plans to file

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

[48] *See* TEX. CONST. art. XI, § 13(a) ("Notwithstanding any other provision of this constitution, the legislature may by law define for all purposes those functions of a municipality that are to be considered governmental and those that are proprietary, including reclassifying a function's classification assigned under prior statute or common law.").

[49] *See* TEX. GOV'T CODE § 2009.002 ("It is the policy of this state that disputes before governmental bodies be resolved as fairly and expeditiously as possible and that each governmental body support this policy by developing and using alternative dispute resolution procedures in appropriate aspects of the governmental body's operations and programs."); *see also* TEX. TRANSP. CODE § 203.058 (providing for vouchers and accounting adjustments if Department of Transportation acquires property from other state agencies); TEX. GOV'T CODE § 531.035 (providing that Health and Human Services commissioner "shall arbitrate and render the final decision on interagency disputes").

[50] *See Reata*, 197 S.W.3d at 374.

[51] 175 S.W.3d at 25 (Keyes, J., dissenting).

few suits against cities is no guarantee of the future. If cities have no immunity against the State, they must begin preparing immediately for potentially unlimited liability.

We have said that "all governmental immunity derives from the State, and a governmental entity acquires no vested rights against the State."[52] But while the State undoubtedly may revoke the City's immunity at any time, the question is whether it can do so at the instance of the Attorney General rather than the Legislature.[53] As the divided opinions here and below suggest, reasonable judges may disagree whether the inherent nature of cities and states should render the former immune from suits by the latter. We can avoid basing today's decision on our personal inferences only by adhering to the traditional rule that requires unambiguous legislation before setting immunity aside.[54]

V. Conclusion

Texas has long required the Legislature's permission to bring suit against governmental entities.[55] There is no reason the Attorney General or the Department of Transportation could not have applied for such permission here.

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[52] *Tooke v. City of Mexia*, 197 S.W.3d 325, 345 (Tex. 2006).

[53] *Cf. Reed Tool Co. v. Copelin*, 610 S.W.2d 736, 740 (Tex. 1980) (holding husband's acceptance of workers' compensation benefits after injury did not release wife's derivative claim); *see also Knutson v. Morton Foods, Inc*., 603 S.W.2d 805, 807 (Tex. 1980) (holding release of agent did not release principal).

[54] *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003) ("Under our form of government, the state derives its authority from 'the people.' In Texas, the people's will is expressed in the Constitution and laws of the State. Consequently, to waive immunity, consent to suit must ordinarily be found in a constitutional provision or legislative enactment."). (citations omitted).

[55] *Fed. Sign v. Texas S. Univ.*, 951 S.W.2d 401, 411 (Tex. 1997) (citing TEX. CIV. PRAC. & REM. CODE §§ 107.001-.005).

Accordingly, we reverse the court of appeals' judgment and render judgment dismissing the State's claim.

Scott Brister
Justice

OPINION DELIVERED: March 2, 2007