IN THE SUPREME COURT OF TEXAS

NO. 05-0340

BEN BOLT-PALITO BLANCO CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, PETITIONER,

v.

TEXAS POLITICAL SUBDIVISIONS PROPERTY/CASUALTY JOINT SELF-INSURANCE FUND, RESPONDENT

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

Argued March 22, 2006

JUSTICE WILLETT, joined by JUSTICE HECHT, dissenting in part.

I agree with most of the Court's opinion, but respectfully dissent from Part II(D) because I do not believe that section 271.152 of the Local Government Code clearly and unambiguously waives the Fund's governmental immunity.

I agree with the Court that the Fund is a discrete governmental unit performing a governmental function, and therefore possesses immunity from suit unless the Legislature has waived it. I also agree that the Fund is a "local governmental entity" under sections 271.151(3) and 271.152. However, I part company on whether the Legislature in 2005 clearly waived the Fund's immunity for two principal reasons: (1) deciding whether a contract is "subject to this subchapter"

requires this Court to actually see and read the contract, which exists nowhere in the record; and (2) even accepting Ben Bolt's description of the contract, it falls outside the restrictive language of the statute's immunity waiver (or at minimum does not "clearly and unambiguously" fall within it).

It is axiomatic that "a waiver of immunity must be clear and unambiguous," *Tooke v. City of Mexia*, 197 S.W.3d 325, 333 (Tex. 2006), *see also* TEX. GOV'T CODE § 311.034 (immunity waivers must be "effected by clear and unambiguous language"), and any ambiguity must be resolved in favor of retaining immunity, *see Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003). As the Court's opinion explains, the Legislature has waived immunity in certain contract actions against local governments. A contract subject to this limited immunity waiver is "a written contract stating the essential terms of the agreement for providing goods or services *to* the local governmental entity . . . ." TEX. LOC. GOV'T CODE § 271.151(2) (emphasis added). As the parties describe the contract, however, this dispute does not concern a contract whereby Ben Bolt provided goods or services to the Fund, the entity claiming governmental immunity. Quite the opposite: the Fund provided goods or services to Ben Bolt.

Rightly or wrongly, the Legislature chose the preposition "to"—not the opposite term "from"—and this is a grammatical distinction with a difference. As any fax cover sheet (or elementary school valentine card) makes clear, the words have diametrically opposite definitions and convey diametrically opposite meanings; generally, the preposition "to" means "in a direction toward" while "from" means "in a direction away." The core commodity covered by the agreement, casualty insurance, flows *from* the Fund, not *to* the Fund as the statute requires.

Certainly, reasonable people can argue that construing the statute as not providing a waiver of immunity impairs the purpose underlying the overall scheme, but we interpret statutory text as we find it. The clearest manifestation of what lawmakers intended is what lawmakers enacted, and it is not this Court's role to embroider or spruce up statutory language, particularly when such embellishment requires us to read a term as really meaning the polar opposite. This is not an overly technical interpretation but one that recognizes the special deference owed legislative policy choices in the context of contract claims against the government, even if critics find those choices odd, unfair, or imprudent. Moreover, it is an interpretation that acknowledges the settled principle that immunity waivers must be unequivocal.

The Court relies principally on two arguments to scale the "to/from" hurdle. First, it avers that "the relationship between the Fund and its members differs from an ordinary consumer/seller relationship" and that because members like Ben Bolt "elect a governing board, and a board subcommittee resolves claims disputes," the members do in fact provide services to the Fund. ___ S.W.3d ___, ___. The Court insists that this suffices to waive the Fund's immunity, but in reaching to satisfy the definitional requirement of section 271.151(2), the Court disregards the actual waiver provision of section 271.152. This section waives immunity from suit "for the purpose of adjudicating a claim for breach of the contract," TEX. LOCAL GOV'T CODE § 271.152, and that contract must be one of providing goods or services to a local government entity, *id.* § 271.151(2). Ben Bolt's ancillary activities may well be found in the Fund's by-laws, as the Fund's counsel surmised at oral argument, but neither Ben Bolt nor the Court cites any record evidence that shows these activities are prescribed by the insurance contract that Ben Bolt alleges was breached. Indeed,

the sparse record in this case excludes the Interlocal Cooperation Contract, the Fund's by-laws and any other pertinent documents that might describe in detail the parties' contractual relationship. This is a breach of contract case, and when the statute waiving immunity requires that the contract specify "the essential terms of the agreement for providing goods or services to the local governmental entity," *id.*, it seems reasonable for the party alleging breach of that contract to produce it, not just describe it, particularly when its terms dictate whether immunity survives.

In any event, even if the described board- and claims-related activities were detailed in the insurance contract itself, these seem to be little more than oversight-related activities to help set up and maintain the Fund, and the Legislature has expressly preserved immunity for such functions: "[t]he establishment and maintenance of a self-insurance program by a governmental unit is not a waiver of immunity . . . ." TEX. GOV'T CODE § 2259.002; *see also* TEX. GOV'T CODE §§ 2259.001(1)–(2) (defining "governmental unit" to include "a combination of political subdivisions, including a combination created under Chapter 791," the Interlocal Cooperation Act). Given these gaps and the governing statutory framework, it is difficult to conclude that section 271.152 has clearly and unambiguously waived the Fund's immunity from suit.

Second, the Court cites a House bill analysis to bolster its view that "to" should also be read to mean "from," and concludes, "There is no indication that the Legislature intended to exclude self-insurance fund agreements from enforcement." ___ S.W.3d at ___. There *is* such indication: the literal text that our elected representatives and senators enacted. As we recently cautioned in *Sheshunoff*, if the statutory text is plain, "we must take the Legislature at its word and not rummage around in legislative minutiae." *Alex Sheshunoff Mgmt. Servs. v. Johnson*, ___ S.W.3d ___, ___n.4

(Tex. 2006). In any event, the bill analysis quoted by the Court offers such indication, too, in qualifying language found in the very same sentence; this language, omitted by the Court, is shown here in italics: "all local governmental entities that have been given or are given the statutory authority to enter into contracts shall not be immune from suits arising from those contracts, *subject to the limitations set forth in C.S.H.B. 2039.*"[1] HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Tex. H.B. 2039, 79th Leg., R.S. (2005) (emphasis added). Even if the Legislature intended to waive broadly a local government's immunity on contracts, it expressly recognized that terms and conditions within subchapter I itself would exclude some contracts from this waiver. One such limitation is section 271.151(2): the suit must be on a contract to provide goods or services *to* a local governmental entity.

At minimum, the Legislature's selection of "to" instead of the directionally opposite "from" renders the purported waiver less than conclusive and a flimsy basis for holding that the Legislature has waived immunity beyond all doubt. More fundamentally, it is difficult to conclude with unalloyed certainty that a contract is "subject to this subchapter" and thus an undeniable waiver of immunity when the contract itself appears nowhere in the record.

In sum, the statute's immunity language does not evince the Legislature's unequivocal intent to cover this specific contract. Accordingly, since we must resolve uncertainties over legislative

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[1] These dueling snippets of legislative history illustrate the peril of placing undue reliance on secondary materials. Anyone looking for a preferred interpretation can usually find a ready ally lurking in the legislative record, even if the statute's literal text points the opposite direction. I do not reject out of hand the principled use of legislative history to unearth reliable guidance (unless the text's plain language is unequivocal), *Sheshunoff*, ___ S.W.3d at ___, but it certainly merits a jurisprudential grain of salt. The enacted, voted-on text is what constitutes the law. We may not know the origin of a phrase tucked into a bill analysis, but we do know it is unwise to consider such materials a watertight index of the collective wishes of 181 lawmakers.

consent in favor of immunity, I would hold that the Legislature has not abrogated the Fund's immunity from suit.

I find none of Ben Bolt's other arguments for disregarding the Fund's immunity persuasive and would affirm the judgment of the court of appeals.

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Don R. Willett
Justice

Opinion delivered: December 29, 2006