

Governmental Newsletter

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TEXAS SUPREME COURT CLARIFIES SOVEREIGN IMMUNITY

IF YOU HAVE QUESTIONS REGARDING THIS MATTER, PLEASE CONTACT:



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For several years, Texas courts have distinguished between sovereign immunity from suit and sovereign immunity from liability. Generally, immunity from suit prohibits lawsuits against a governmental entity unless the entity's immunity has been waived. Immunity from liability, however, shields the entity from monetary judgments even if immunity from suit has been waived.

Sovereign immunity from suit may be waived by statute, by ordinances, or by other legislative enactments. Below is a discussion of recent Texas Supreme Court rulings which shed light on this issue.

In *Reata Construction, Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006), the issue of immunity arose when a city water main was damaged during installation of a cable line causing extensive damage to an adjacent building. The plaintiff claimed the City of Dallas failed to properly identify the location of the water main. The City sought to invoke the defense of sovereign immunity from suit. The City also asserted affirmative claims against the cable company.

The Texas Supreme Court ruled that the City was not immune from suit, but that it did retain immunity from liability to the extent that Plaintiff's claims for monetary damages exceeded any recovery by the City. The Court reasoned that when a governmental entity files suit or asserts affirmative claims for monetary damages, the entity presumably has decided to use resources to pay for litigation and is effectively waiving its immunity from suit. Since the entity still retains sovereign immunity from liability, any claims against the entity for money damages will serve only as an offset to reduce the entity's recovery, if any. Thus, allowing adverse parties to make claims as an offset to those made by an entity should not interfere with governmental functions, eliminating the policy need for immunity from suit.

The Court declined to recognize any distinction between an entity's filing of a claim when it is a defendant, as in this case, and an entity's filing of an original suit. It also made no difference to the Court that the party suing the City was not the same party against whom the City itself made claims. The Court consequently held that a governmental entity does not enjoy immunity from suit for claims against it which are "germane to, connected with, and properly defensive to" claims asserted by the entity.

What does this mean for you? If a governmental entity files affirmative claims for monetary damages against a party, whether in an original suit or otherwise, the governmental entity may be sued by any party for claims which are relevant to the claims the entity itself asserted. In other words, in this context, immunity from suit is waived. On the other hand, the entity's liability should be limited to the amount of its own recovery.

In *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006), the claim arose when sidewalk cleaners sued the City for breach of contract. The City contended that it was immune from suit. Plaintiff argued that the City's sovereign immunity from suit was waived by section 51.075 of the Local Government Code, which states that a home-rule municipality "may plead and be impleaded in any court." The Texas Supreme Court held that section 51.075 did not waive the City's

The facts of each particular case will guide most court determinations on the issue of sovereign immunity.

immunity from suit. The Court recognized that “scores” of Texas statutes and municipal charters and ordinances contain language such as “plead and be impleaded,” “sue and be sued,” “prosecute and defend,” and other similar phrases. The Court stressed that the meaning of such phrases, and whether they waive sovereign immunity, depends greatly on the context in which they are found. The Court observed that waiver of immunity requires clear and unambiguous language, and indicated that because phrases like “plead and be impleaded” and “sue and be sued” mean different things in different statutes, they are neither clear nor unambiguous. The Court therefore held that, standing alone, such phrases alone do not waive immunity.

The decision in *Tooke* does little to clarify the meaning of “plead and be impleaded,” “sue and be sued,” and similar phrases. Any statutes, charters, or ordinances that contain such phrases may or may not waive sovereign immunity from suit, depending on the context in which the phrases are used. This issue will continue to be litigated regularly until future court decisions clarify its meaning.

The plaintiffs in *State v. Shumake*, 199 S.W.3d 279 (Tex. 2006) sued the State of Texas as a result of the death of their child in a state park. Plaintiffs brought their claim under the Texas Tort Claims Act (TEX. CIV. PRAC. & REM. CODE §§ 101.001-.109), which waives immunity from lawsuits alleging personal injury or death caused by a condition or use of real property.

The State sought dismissal of the suit on the grounds of the recreational use statute (TEX. CIV. PRAC. & REM. CODE §§ 75.001-.004) which generally provides immunity from liability to governmental entities and others who open their land for recreational purposes, unless they are guilty of gross negligence or willful or malicious conduct.

The Supreme Court found that the recreational use statute did not provide absolute immunity. The Court interpreted the statute as merely raising the burden of proof for recreational users to show gross negligence or willful or malicious conduct.

Governmental entities holding open public lands for “recreational use” may not be immune from claims alleging personal injury or death due to premises defects on that property. On the other hand, an entity is only subject to liability if the plaintiff’s losses were caused by the entity’s gross negligence or willful or malicious conduct. The question of whether an entity committed gross negligence or willful or malicious conduct is a fact question, so future litigation can be anticipated.