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Governmental Immunity

Recent Issues and Decisions

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Table of Contents

I. Introduction

Courts have often held that the doctrines of "sovereign immunity" and "governmental immunity" are essentially the same, and frequently the terms are used the terms interchangeably. *See, e.g.*, *Lubbock Cnty. Water Control & Improvement Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 300 n.4 (Tex. 2014); *Travis Cent. Appraisal Dist. v. Norman*, 342 S.W.3d 54, 58 (Tex. 2011); *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323-24 n.2 (Tex. 2006). Both encompass immunity from suit, which bars suit against the entity altogether, and immunity from liability, which bars enforcement of a judgment against the entity. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 93 (Tex. 2012) (sovereign immunity); *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006) (governmental immunity). Both are common law doctrines, the boundaries of which are defined by the judiciary. *Wasson Interests, Ltd. v. City of Jacksonville*, ___ S.W.3d ___, No. 14-0645, 2016 WL 1267697 at *3-4 (Tex. Apr. 1, 2016). And in the case of both sovereign and governmental immunity, the courts have ordinarily deferred to the Legislature to find waivers of immunity from suit. *Tex. Natural Resource Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002).

The basic distinction between the two, of course, is that sovereign immunity "protects the State and state-level governmental entities, while 'governmental immunity' protects political subdivisions of the State," such as counties, cities, and school districts. *Lubbock Cnty. Water Control & Improvement Dist.*, 442 S.W.3d at 300 n.4; *see also Ben Bolt*, 212 S.W.3d at 324 ("The State's sovereign immunity extends to various divisions of state government, including agencies, boards, hospitals, and universities. The appurtenant common-law doctrine of governmental immunity similarly protects political subdivisions of the State, including counties, cities, and school districts.") (internal citations omitted).

This paper examines recent decisions of the Supreme Court of Texas that address the scope and applicability of governmental immunity in the context of claims for breach of contract, claims alleging ultra vires conduct by governmental officials, claims under the Texas Tort Claims Act, and claims for inverse condemnation.

II. Contract Claims

In recognizing a difference between the State's sovereign immunity and the governmental immunity enjoyed by political subdivisions, the law also acknowledges that these entities acquire immunity from different sources. The sovereignty of the State "is inherent in its statehood" and "initially developed without any legislative or constitutional enactment." *Wasson Interests*, 2016 WL 1267697 at *2-3. A subdivision of the State, however, "is not a freestanding sovereign with its own inherent immunity." *Id.* at *4. Rather, it derives its authority from the State when acting as the State's agent. *Id.*

The fact that a political subdivision of the State derives its immunity from the State gave rise to a historical distinction, well established in the context of tort claims, commonly known as the "governmental/proprietary dichotomy." In essence, a political subdivision is not considered to be acting "as the agent of the State" and thus does not enjoy immunity from suit when it engages in proprietary functions, but instead is subject to the same duties and liabilities as private persons and corporations. *Gates v. City of Dallas*, 704 S.W.2d 737, 738-39 (Tex. 1986).

The Supreme Court of Texas, in *Dilley v. City of Houston*, succinctly described this dichotomy as it pertains to a municipality's liability for negligence:

> A municipal corporation functions in a dual capacity. At times it functions as a private corporation, and at other times it functions as an arm of the government. Therefore its liability or nonliability rests upon the following two rules:
>
> (1) When a municipal corporation acts in its private capacity, for the benefit only of those within its corporate limits, and not as an arm of the government, it is liable for the negligence of its representatives.
>
> (2) A municipal corporation is not liable for the negligence of its agents and employees in the performance of purely governmental matters solely for the public benefit.

Dilley v. City of Houston, 222 S.W.2d 992, 993 (Tex. 1949) (internal citations omitted).

Following *Dilley*, the Supreme Court of Texas at least one time discussed the governmental/proprietary dichotomy within the context of contract liability, noting in *Gates v. City of Dallas* that a municipal corporation contracting in its proprietary role was "clothed with the same authority and subject to the same liabilities as a private citizen." *Gates*, 704 S.W.2d at 739. Yet the Court, twenty years later in *Tooke v. City of Mexia*, cited to *Gates* while at the same

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