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SOVEREIGNTY AND GOVERNMENTAL IMMUNITY UPDATE

Arthur J. Anderson

Author Contact Information:
Arthur J. Anderson
Winstead PC
Dallas, Texas

aanderson@winstead.com
214-745-5745

I. Introduction

Sovereign immunity is an outdated, unfair concept that should be abolished. The doctrine was originally justified by the fiction that "the king can do no wrong," *id.* (citing 3 William Blackstone, Commentaries on the Laws of England 254 (1768)). But there are few legal theories created in the Middle Ages that exist today. In fairness, governmental entities should be obligated to obey statutory and common law principles like the rest of us. The often cited reasons for the concept are no longer valid:

a. Precedent. In *Harris County Hospital District v. Tomball Regional Hospital*, 283 S.W.3d 838 (Tex. 2009), the Texas Supreme Court noted that the sovereign immunity doctrine had been established in Texas since the mid-nineteenth century which apparently was reason enough to sustain it. This begs the question as to why precedent prevails over the need to compensate for wrongful acts by governmental entities.

b. Financial Resources. In *Tooke v. City of Mexia*, the Texas Supreme Court observed that immunity "shield[s] the public from the costs and consequences of improvident actions of their governments." 197 S.W.3d 325, 332 (Tex. 2006). This position overlooks one of the intended purposes of tax resources, which is to protect the public against harmful actions of the government itself.

Large municipalities have significant resources to defend themselves against lawsuits. The City of Dallas has a $1 billion annual budget and dozens of assistant city attorneys who litigate cases. Even my old home town Lubbock, Texas has a budget in excess of $100,000,000.00. Comparing the financial resources of potential litigants weighs heavily in favor of abolishing the immunity defense.

c. Meritless Suits. Some cities argue that without the immunity shield they will be forced to defend meritless lawsuits. But the Rules of Civil Procedure provide sufficient protection. According to TRCP 13, sanctions can be imposed if a frivolous lawsuit is filed against a city.

Instead of clearing the deck and allowing private litigants to sue governmental entities in legitimate lawsuits, the courts and the Legislature instead draw finer and finer distinctions as to when immunity does or does not apply. For example, why is immunity waived when the validity of an ordinance is challenged but not when the text of the ordinance needs a judicial interpretation? Why are some functions listed in the Texas Torts Claims Act considered to be governmental while others are not? Abolishing the concept of immunity would level the playing field for everyone.

II. Sovereign Immunity Principles

Although courts frequently conflate the terms and the concepts, the State of Texas and its political subdivisions are imbued with distinct forms of immunity: sovereign or governmental. Unlike the State, which through *sovereign* immunity enjoys the greatest level of protection from suit and liability, municipalities are relegated to *governmental* immunity. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 (Tex. 2003) ("Governmental immunity, on the other hand,

protects political subdivisions of the State, including counties, cities, and school districts.") (citing *City of LaPorte v. Barfield*, 898 S.W.2d 288, 291 (Tex. 1995)).

Sovereign immunity has two components: immunity from suit and immunity from liability. *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001). First, the state retains immunity from suit unless it has been expressly waived by the Legislature. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). The Legislature has mandated that a statute shall not be construed as waiving immunity absent "clear and unambiguous language." TEX. GOV'T CODE § 311.034. The Texas Supreme Court has similarly held that, to effectively waive sovereign immunity, "a statute or resolution must contain a clear and unambiguous expression" of the State's waiver. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003). A plaintiff must affirmatively demonstrate the court's subject-matter jurisdiction "by alleging a valid waiver of immunity." *See Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003).

III. Pleas to the Jurisdiction

A municipality will usually file a plea to the jurisdiction in an attempt to dismiss or delay the plaintiff's land use lawsuit. The plea is the appropriate mechanism to address the immunity defense. By filing a plea to the jurisdiction, the government challenges the trial court's power to exercise subject-matter jurisdiction over the case. A plea to the jurisdiction is a dilatory plea, which is used to defeat a plaintiff's cause of action without regard to whether the plaintiff's claims have merit. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The question of whether a trial court properly exercised subject-matter jurisdiction over a case is reviewed as a question of law. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Courts apply a *de novo* standard when reviewing trial court rulings on pleas to the jurisdiction. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). If the city prevails on the immunity defense, then there is no trial or ruling on the merits of the plaintiff's case because the petition is dismissed.

Another litigation advantage to the city is the ability to file an interlocutory appeal for a trial court decision on a plea. § 51.014(a)(8), TEX. CIV. PRAC. & REM. CODE. If the plea is heard within a few months after the lawsuit is filed, then all actions in the trial court are stayed until the appeal is resolved. § 51.014(b), TEX. CIV. PRAC. & REM. CODE. Filing and prosecuting the plea requires the plaintiff to incur more expense and delay which the city can use to its advantage.

For example, the author represents the landowner in a 13-year old case in Dallas County. There have been two interlocutory appeals related to plans to the jurisdiction filed by the city where the court of appeals ruled in the landowners' favor. *City of Dallas v. Millwee-Jackson J.V.*, No. 05-13-00278-CV, 2014 LEXIS 3691 (Tex. App.—Dallas, April 4, 2014, pet. denied); *Millwee-Jackson Joint Venture v. DART*, 350 S.W.3d 772 (Tex. App.—Dallas 2011). The continuation of the plea plus interlocutory appeal increases the cost and difficulty for private litigation.

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