

LET'S SHAKE ON IT: SETTLING WITH A MUNICIPALITY WHEN GOVERNMENTAL IMMUNITY APPLIES

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I. INTRODUCTION

Sovereign immunity is at once a tangled web and a firm foundation. A web because the intricacies associated with the threads of sovereign immunity—federal, state, constitutional, common law, statutory, inherent, derived, contract, and tort—work together to create a potentially sticky trap that will ensnare the unaware and unwise. A firm foundation because all governmental actions are grounded on the bedrock principle that the sovereign—that is, the people¹—must act in a way that safeguards its own interests. Otherwise, it would act in vain, at most, and counter to its own interests, at least.

Many scholars have pontificated about the history and development of the concept of sovereign immunity. See, for example, the myriads of commentaries and cases discussing Eleventh Amendment immunity,² or the

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¹United States v. Lee, 106 U.S. 196, 208 (1882) (“Under our system the people, who are there called subjects, are the sovereign.”).

²See, e.g., John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 82 COLUM. L. REV. 1890, 1889–2005 (1983); Anthony J. Harwood, *A Narrow Eleventh Amendment Immunity for Political Subdivisions: Reconciling the Arm of the State Doctrine with Federalism Principles*, 55 FORDHAM L. REV. 101, 101 (1986); Paul C. Weick, *Erosion of State Sovereign Immunity and the Eleventh Amendment by Federal Decisional Law*, 10 AKRON L. REV. 583, 583 (1977); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 UNIV. OF PA. L. REV. 515, 515–49 (1977). For representative case law from the United States Supreme Court discussing Eleventh Amendment sovereign immunity, see *Chisholm v. Georgia*, 2 U.S. 419 (1793) (superseded by ratification of the Eleventh Amendment on March 4, 1794); *Hollingsworth v. Virginia*, 3 U.S. 378 (1798); *Hans v. Louisiana*, 134 U.S. 1 (1890); *Ex parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan*, 415 U.S. 651

ongoing debate of whether sovereign immunity should remain in force and effect in a modern society.³ This article will avoid repeating what other scholars have taken well in hand. Instead, this article will narrow the inquiry to one type of governmental entity and one type of governmental action within one jurisdiction—Texas municipal settlement agreements. This article will more specifically address the following question: does the doctrine of governmental immunity render settlement agreements unenforceable in the absence of an express waiver of immunity by the State?

First, this article will begin with a brief overview of the nature of the inherent sovereign immunity of states. Second, this article will examine the distinction between sovereign, or inherent, immunity and governmental, or derived, immunity. Third, this article will review waivers of governmental immunity. Finally, this article will turn to the nature of settlement agreements, and whether courts should enforce settlement agreements made with a governmental entity in light of the entrenched doctrine of sovereign immunity in Texas.

II. A BRIEF OVERVIEW OF THE SOVEREIGN IMMUNITY OF STATES: ITS CREATION AND NATURE

The concept of sovereign immunity has existed since our nation's founding.⁴ With the ratification of the Eleventh Amendment, the States chose to constitutionalize sovereign immunity's application to litigation against states.⁵ This action, taken in response to the Supreme Court's surprising decision in *Chisholm v. Georgia*, laid the foundation for the development of the law of sovereign immunity at the state level.⁶

(1974); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944) (“A state’s freedom from litigation was established as a constitutional right through the Eleventh Amendment.”).

³See, e.g., Alfred Hill, *In Defense of our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 485–586 (2001); Marilyn Phelan, *A Synopsis of Texas and Federal Sovereign Immunity Principles: Are Recent Sovereign Immunity Decisions Protecting Wrongful Governmental Conduct?*, 42 ST. MARY’S L. J. 725, 725–91 (2011).

⁴Hill, *supra* note 3, at 493; *Nevada v. Hall*, 440 U.S. 410, 414 (1979) (“The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as an absolute right for centuries.”).

⁵*Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

⁶*Id.*

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A. *The Source of Sovereign Immunity within the States*

1. Co-terminus Sovereignty: The Standard at Nationhood

As Alfred Hill laid out in his 2001 treatise “In Defense of our Law of Sovereign Immunity,” sovereign immunity effectively exists in a co-terminus state: both the federal government and the governments of the individual states enjoy inherent immunity as sovereigns.⁷ As Hill pointed out, in 1788 Alexander Hamilton wrote in defense of the inherent nature of state sovereign immunity in *The Federalist No. 81*:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal.⁸

Hamilton went on to describe the sovereign immunity of the States of the Union as “a pre-existing right of the State governments.”⁹

2. Eleventh Amendment Immunity: Constitutionalizing the Established Tradition

At the time of its ratification, the Eleventh Amendment came about as the result of a combination of several important political and philosophical realities. During the early years of our country’s existence, President Washington’s ability to hold together a coalition internally while fending off attacks from abroad depended on his ability to balance competing interests, among which were a grassroots campaign by states’ rights Republicans and pro-French activists; an attempt to avoid a Constitutional convention by the Federalists in Washington’s second term administration,

⁷Hill, *supra* note 3, at 497 (“In sum, at the time of adoption of the Constitution, it was generally assumed that the states were protected by sovereign immunity if sued in their own courts.”).

⁸THE FEDERALIST NO. 81 at 487 (Alexander Hamilton) (Clinton Rossiter, ed., 1961); *see also* Hill, *supra* note 3, at 493.

⁹THE FEDERALIST NO. 81 at 487 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

who wanted to avoid war with Great Britain; and proposals by several states' governors to secure the sovereignty of the States.¹⁰ Despite the unique circumstances in which the Eleventh Amendment materialized, we can trace its roots back to Hamilton's declaration of the fundamental assumption that a sovereign retains immunity unless it expressly waives it.¹¹ This bedrock principle is the foundation upon which all sovereign immunity claims are built.¹²

B. *Sovereign Immunity in Texas*

1. Inherent Sovereign Immunity of the State

The Texas Supreme Court “has long recognized that sovereign immunity, unless waived, protects the State of Texas, its agencies and its officials from lawsuits for damages, absent legislative consent to sue the State.”¹³ As far back as the founding of Texas as an independent entity, the Texas Supreme Court held “that no State can be sued in her own courts without her consent, and then only in the manner indicated by that consent.”¹⁴ More recently in *Wasson Interests, Ltd. v. City of Jacksonville*, Justice Brown stated the matter in succinct terms: “Texas is inviolably sovereign.”¹⁵ He expanded by opining that Texas’s “sovereignty is inherent in its statehood . . . and generally protects the state from suits for money

¹⁰Gibbons, *supra* note 2, at 1926–39.

¹¹See *Parden v. Terminal Ry. of Ala. State Docks Dep't*, 377 U.S. 184, 186 (1964) (“But the immunity may of course be waived; the State’s freedom from suit without its consent does not protect it from a suit to which it has consented.”); *Clark v. Barnard*, 108 U.S. 436, 447 (1883); *Gunter v. Atl. Coast Line R. Co.*, 200 U.S. 273, 284 (1906); *Petty v. Tennessee-Missouri Bridge Comm’n*, 359 U.S. 275, 276 (1959).

¹²See *Hollingsworth v. Virginia*, 3 U.S. 378, 382 (1798) (“[T]here could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another states, or by citizens, or subjects, of any foreign state.”); *Edelman v. Jordan*, 415 U.S. 651, 662–63 (1974) (“While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.”); see generally *Hans v. Louisiana*, 134 U.S. 1 (1890); *Duhne v. New Jersey*, 251 U.S. 311 (1920); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47 (1944); *Parden*, 377 U.S. 184; *Employees v. Dep’t of Pub. Health and Welfare*, 411 U.S. 279 (1973).

¹³*Fed. Sign v. Tex. State Univ.*, 951 S.W.2d 401, 405 (Tex. 1997).

¹⁴*Hosner v. DeYoung*, 1 Tex. 764, 769 (1846).

¹⁵489 S.W.3d 427, 429 (Tex. 2016).

damages”¹⁶ The Texas Supreme Court reiterated the inherent nature of sovereign immunity in *Wichita Falls State Hospital v. Taylor* when it also quoted *The Federalist No. 81*: “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”¹⁷

In *Texas Department of Parks & Wildlife v. Miranda*, the Texas Supreme Court stated the consequence of inherent immunity: “In Texas, sovereign immunity deprives a trial court of subject matter jurisdiction for lawsuits in which the state or certain governmental units have been sued unless the state consents to suit.”¹⁸

2. Derived Governmental Immunity of Political Subdivisions of the State

The distinction between the “state” and “certain governmental units,” as alluded to in *Miranda*, is subtle yet important.¹⁹ The immunity enjoyed by governmental units within the State of Texas is like a shawl draped over each unit—the State grants the immunity when it creates the political subdivision, and only the State can take that immunity away by pulling the shawl off the shoulders of lesser governmental entities. The entities themselves have no inherent power to create or waive sovereign immunity; they must look to the State. “Political subdivisions of the state—such as counties, municipalities, and school districts—share in the state’s inherent immunity,”²⁰ but only to the extent that they act within the limits of their sovereign’s immunity.²¹

The shawl of the State’s inherent immunity will only cover certain types of political subdivisions’ functions. For example, “in the realm of sovereign immunity as it applies to . . . political subdivisions—referred to as governmental immunity,” the Texas Supreme Court has distinguished

¹⁶ *Id.*

¹⁷ 106 S.W.3d 692, 695 (Tex. 2003).

¹⁸ 133 S.W.3d 217, 224 (Tex. 2004) (citing *Tex. Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999)).

¹⁹ *See id.*

²⁰ *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 429–30 (Tex. 2016) (“[T]hey represent no sovereignty distinct from the State and possess only such powers and privileges as have been expressly or impliedly conferred upon them.”); *see also Reata Constr. Corp. v. City of Dall.*, 197 S.W.3d 371, 374 (Tex. 2006) (“Political subdivisions of the State, including cities, are entitled to such immunity [that the State has]—referred to as governmental immunity—unless it has been waived.”).

²¹ *See Wasson*, 489 S.W.3d at 429–30.

“between those acts performed as a branch of the state and those acts performed in a proprietary, non-governmental capacity.”²² The Legislature also made that distinction, stating in Section 101.0215 of the Texas Tort Claims Act that:

[a] municipality is liable under this chapter for damages arising from its governmental functions . . . [but] this chapter does not apply to the liability of a municipality for damages arising from its proprietary functions²³

Whether acting in its proprietary or governmental capacity, a municipality *may* be immune from suit or liability, but that determination will depend upon an exacting analysis, beginning with the type of immunity sought.

C. Immunity from Suit Versus Immunity from Liability

In *Federal Sign v. Texas State University*, the Texas Supreme Court outlined the two types of immunity that apply to both governmental and sovereign immunity. While addressing an appeal from a private contractor to overrule the university’s immunity defense, the court stated, “[s]overeign immunity embraces two principles: immunity from suit and immunity from liability.”²⁴

1. Immunity from Suit

Immunity from suit protects the State from lawsuits even when the State clearly bears liability. In the words of the *Federal Sign* court: “Immunity from suit bars a suit against the State unless the State expressly gives its consent to the suit.”²⁵

In *Federal Sign*, Texas State University (TSU) took bids for the construction of basketball scoreboards.²⁶ After *Federal Sign* secured Pepsi-Cola as a sponsor for its board, TSU accepted its bid.²⁷ TSU instructed

²²*Id.* at 430.

²³TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215 (West 2018).

²⁴*Fed. Sign v. Tex. State Univ.*, 951 S.W.2d 401, 405 (Tex. 1997) (quoting *Mo. Pac. R.R. Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812, 813 (Tex. 1970)).

²⁵*Id.* at 405; *see also Mo. Pac. R.R. Co.*, 453 S.W.2d at 813; TEX. CIV. PRAC. & REM. CODE §§ 101.025, 107.001–.005.

²⁶951 S.W.2d at 403.

²⁷*Id.*

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Federal Sign to begin construction, which it did.²⁸ In September 1989, a few months after accepting Federal Sign's bid and before delivery of the boards, TSU informed Federal Sign that it no longer found Federal Sign's bid acceptable.²⁹ TSU proceeded to contract with Spectrum Scoreboards and Coca-Cola for their basketball scoreboards.³⁰ In response, Federal Sign sued TSU on two counts: first, breach of contract; and second, a violation of Texas's competitive bidding and open meeting laws.³¹ Federal Sign sought money damages for lost profits and the recovery of expenses.³²

TSU answered by filing a plea to the jurisdiction, claiming sovereign immunity barred Federal Sign's suit.³³ In other words, TSU claimed immunity from suit in its answer.³⁴ The trial court abated the suit so that Federal Sign could obtain legislative permission to sue TSU.³⁵ Federal Sign chose not to pursue legislative consent; instead, Federal Sign claimed it did not need legislative consent under the facts of the case.³⁶ At a jury trial, the trial court awarded Federal Sign money damages.³⁷ TSU appealed, claiming that the trial court erred by allowing the suit to commence.³⁸

At the court of appeals, TSU again raised sovereign immunity, claiming that its immunity barred Federal Sign's contract claims.³⁹ The court of appeals ruled in favor of TSU, agreeing with its sovereign immunity claims.⁴⁰ On appeal by writ of error to the Texas Supreme Court, Federal Sign argued that it did not need to obtain legislative consent for suit because (1) TSU violated state law; and (2) TSU waived immunity from suit by entering into a contract with a private citizen.⁴¹

The court quickly dispensed with the first issue. While "a private litigant does not need legislative permission to sue the State for a state official's

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 403–04.

³⁵ *Id.* at 404.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

violations of state law,” in this case Federal Sign also brought a breach of contract claim.⁴² To sue on the breach of contract claim—in order to bring suit—Federal Sign needed legislative permission. As the court clarified, “Federal Sign’s state violation claims did not dispense with the necessity that Federal Sign secure legislative consent to sue TSU for damages for breach of contract.”⁴³

It is important to note that while unpacking the need for legislative permission to sue a governmental entity, the Texas Supreme Court distinguished between bringing suit to determine a party’s rights and bringing suit for money damages. In the words of the court, “[a] party can maintain a suit to determine its rights without legislative permission.”⁴⁴ When bringing suit for money damages, however, the aggrieved party must obtain legislative consent absent a clear and unambiguous waiver of sovereign immunity.⁴⁵

The governmental entity’s ability to raise immunity from suit bars the whole suit. Even though Federal Sign sued on two counts, one of which was clearly permissible, TSU needed to defeat the governmental immunity jurisdictional claims for the suit to commence. Further, even if the State granted permission for suit, in doing so “[t]he State neither creates nor admits liability by granting [said] permission”⁴⁶

In discussing whether or not TSU waived immunity from suit by entering into a contract, the *Federal Sign* court acknowledged conflicting authority on the issue: “there is a conflict among the courts of appeals on whether the State, by entering into a contract with a private citizen, waives immunity from suit by the fact that it has made the contract”⁴⁷ After listing the cases upon which both sides relied, the court dispensed with that precedent by pointing out that “despite the different conclusions these courts reached, all [mistakenly] relied on *Fristoe v. Blum*”⁴⁸ A case about conflicting claims to title in real property, “*Fristoe* taken as a whole,

⁴² *Id.* at 404–05.

⁴³ *Id.* at 405.

⁴⁴ *Id.* at 404; *Cobb v. Harrington*, 190 S.W.2d 709, 712 (Tex. 1945) (“[A]n action . . . for the determination and protection of . . . rights . . . is not a suit against the State within the rule of immunity of the State from suit.”).

⁴⁵ *Fed. Sign*, 951 S.W.2d at 405.

⁴⁶ *Id.*

⁴⁷ *Id.* at 406.

⁴⁸ *Id.*

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says nothing about whether the State waives or retains its sovereign immunity when it contracts with private citizens.”⁴⁹

According to the *Federal Sign* court, the correct precedent to determine whether or not a governmental entity waives immunity when it enters into a contract comes from the Texas Supreme Court’s examination of the State and breach of contract claims.⁵⁰ “The three times this court considered sovereign immunity in the breach of contract context, we held that the State is immune from suit arising from breach of contract suits.”⁵¹ Therefore, the Supreme Court in *Federal Sign* held that because *Federal Sign* failed to receive legislative permission to sue, “the State did not waive its immunity from suit and *Federal Sign* could not maintain a breach of contract suit against TSU.”⁵²

2. Immunity from Liability

Black’s Law Dictionary defines liability as “the quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.”⁵³ *Federal Sign* also expands upon the concept of immunity from liability: “Immunity from liability protects the State from judgments even if the Legislature has expressly given consent to the suit.”⁵⁴

In *Wichita Falls State Hospital v. Taylor*, the Texas Supreme Court further delineated the bounds of immunity from liability.⁵⁵ That case involved the wife of a mentally ill person, who killed himself after discharge from a state-run mental health facility, suing the State in a wrongful death action.⁵⁶ Noting the key distinguisher between immunity from suit and immunity from liability, the court stated: “Unlike immunity

⁴⁹ *Id.*

⁵⁰ *See id.* at 408.

⁵¹ *Id.*; *see also* *Mo. Pac. R.R. Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812, 813–14 (Tex. 1970), *overruled by* *Tooke v. City of Mexia*, 197 S.W.3d 325, 342 (Tex. 2006); *W.D. Haden Co. v. Dodgen*, 308 S.W.2d 838, 839–41 (Tex. 1958); *Herring v. Hous. Nat’l Exch. Bank*, 269 S.W. 1031, 1033 (Tex. 1925).

⁵² *Fed. Sign*, 951 S.W.2d at 408.

⁵³ *Liability*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁵⁴ 951 S.W.2d at 405 (quoting *Mo. Pac. R.R. Co.*, 453 S.W.2d at 813).

⁵⁵ *See* 106 S.W.3d 692, 693–94 (Tex. 2003).

⁵⁶ *Id.*

from suit, immunity from liability does not affect a court's jurisdiction to hear a case and cannot be raised in a plea to the jurisdiction."⁵⁷

As the court further explained in *Texas Department of Parks & Wildlife v. Miranda*, another personal injury case involving a tort claim against a governmental entity, "[i]mmunity from liability is an affirmative defense, while immunity from suit deprives a court of subject matter jurisdiction."⁵⁸

III. WAIVING SOVEREIGN IMMUNITY

Absent a clear and unambiguous expression of the Legislature's intent to waive immunity, either from suit or liability, sovereign immunity will protect the State and its subdivisions from both suit and liability. Even though sovereign immunity is a judicially-created common law doctrine,⁵⁹ "[the Texas Supreme] Court has long recognized that 'it is the Legislature's sole province to waive or abrogate sovereign immunity.'"⁶⁰ As the court stated in *Federal Sign*, "sovereign immunity, unless waived, protects the State of Texas, its agencies and its officials from lawsuits for damages, absent legislative consent to sue the State."⁶¹

A. *The Need for Express Legislative Intent*

Fundamental to all judicial interpretation of statutes is the need for the judiciary to "give effect to the legislative intent."⁶² Because the judicial branch may only interpret the law enacted by the legislative branch, the courts cannot rule in favor of waiver of immunity absent clear, express legislative intent to waive. As the Texas Supreme Court noted in *Reata Construction Corporation v. City of Dallas*, "[w]e have generally deferred to the Legislature to waive immunity because the Legislature is better suited to address the conflicting policy issues involved."⁶³

⁵⁷ *Id.* at 696.

⁵⁸ 133 S.W.3d 217, 224 (Tex. 2004).

⁵⁹ *Reata Constr. Corp. v. City of Dall.*, 197 S.W.3d 371, 374 (Tex. 2006) ("Sovereign immunity is a common-law doctrine that initially developed without any legislative or constitutional enactment.").

⁶⁰ *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002).

⁶¹ 951 S.W.2d 401, 405 (Tex. 1997).

⁶² *Drilex Sys., Inc. v. Flores*, 1 S.W.3d 112, 123 (Tex. 1999).

⁶³ 197 S.W.3d 371 at 375.

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B. The Clear and Unambiguous Language Requirement

With the passage of Section 311.034 of the Texas Government Code, known as the Code Construction Act, the Texas Legislature aided the judiciary in knowing how and when to find legislative intent to waive sovereign or governmental immunity: when the Legislature states the waiver in clear and unambiguous terms, the judiciary may find for a waiver of immunity.

While the case law referred to a necessity for clarity prior to the passage of Section 311.034 of the Texas Government Code, the Legislature removed any uncertainty by passing the Code Construction Act in 1985.⁶⁴ The Legislature added Section 311.034, titled “Waiver of Sovereign Immunity,” in 2001 (amended 2005). It reads as follows:

In order to preserve the legislature’s interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected *by clear and unambiguous language*. In a statute, the use of “person,” as defined by § 311.005 to include governmental entities, does not indicate *legislative intent* to waive sovereign immunity unless the context of the statute indicates *no other reasonable construction*. Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.⁶⁵

After its summation of the nature of sovereign immunity, the Texas Supreme Court in *Tooke v. City of Mexia* ended its analysis with this fundamental principle: “To ensure that . . . legislative control is not lightly disturbed, a waiver of immunity *must* be clear and unambiguous.”⁶⁶ In *Duhart v. State*, the Texas Supreme Court reiterated the need for clarity in a waiver of immunity: “It is a well-established rule that for the Legislature to waive the State’s sovereign immunity, it must do so by clear and unambiguous language.”⁶⁷

Whether the Legislature has clearly and unambiguously waived sovereign immunity is the threshold question. In certain instances, the

⁶⁴ TEX. GOV’T CODE ANN. § 311.001 (West 2013).

⁶⁵ *Id.* § 311.034 (emphasis added).

⁶⁶ 197 S.W.3d at 32–33 (emphasis added).

⁶⁷ 610 S.W.2d 740, 742 (Tex. 1980).

Legislature leaves no doubt as to its intention to waive.⁶⁸ In others, the judiciary must ascertain the Legislature's intent through its interpretation of the statute at issue.⁶⁹ In still other very limited contexts, the judiciary has found "waiver by conduct" to suffice as a waiver of immunity.⁷⁰

C. Example of Statutory Waivers in the Tort Context: The Texas Tort Claims Act

In 1949, Representative Johnson introduced House Bill 169, known as the State Tort Claims Act, to expressly waive immunity and restore liability to the State, its agencies, and its officers "for torts committed by the negligent or wrongful acts or omissions of any officer or employee of the State acting within the scope of his office or employment."⁷¹ It took twenty years for the Texas Tort Claims Act, as we know it today, to finally pass the Legislature.⁷²

The Texas Tort Claims Act restores liability for the State and its political subdivisions in two instances: (1) "property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment . . ."; and (2) "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law."⁷³

The first instance of liability—negligence of an employee acting within his or her "scope of employment"—only applies if:

- (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

⁶⁸ See TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2018) (stating "[a] governmental unit in the State is liable for . . ."); TEX. GOV'T CODE ANN. § 554.0035 (West 2013) ("Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter for a violation of this chapter.")

⁶⁹ See, e.g., *Tooke*, 197 S.W.3d at 333 (discussing whether the Legislature's insertion of "sue and be sued" or "may plead and be impleaded" language is a statutory waiver of immunity).

⁷⁰ See, e.g., *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 856 (Tex. 2002).

⁷¹ Tex. H.B. 169, 51st Leg., R.S. (1949).

⁷² See TEX. CIV. PRAC. & REM. CODE ANN. § 101.002 (West 2018).

⁷³ *Id.* § 101.021.

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(B) the employee would be personally liable to the claimant according to Texas law.⁷⁴

“Scope of employment” liability applies to property damage, personal injury, and death, while liability that arises out of the “condition or use” of property only applies to personal injury and death, and only applies if the employee would be liable to the claimant in a private context.⁷⁵

The Texas Tort Claims Act represents the Legislature’s attempt to open itself up to accountability while simultaneously protecting itself—and thus the resources of all its citizens—from truly accidental or unintentional circumstances in which injury occurs.

D. Example of Statutory Waivers in the Context of Contractual Claims: The Public Property Finance Act

In 2005, the Legislature enacted Section 271.152 of the Public Property Finance Act in the Local Government Code in 2005.⁷⁶ Section 271.152 states:

A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.⁷⁷

In *Federal Sign*, the Texas Supreme Court held “that the State [and its subdivisions are] . . . immune from suit arising from breach of contract suits” even though immunity from liability is waived when a governmental entity enters into a contract.⁷⁸ Given that this immunity waiver and retention is firmly established in Texas common law, the Legislature’s 2005 waiver of immunity for municipalities who enter into contracts at first glance seems significant.

The Legislature narrowed the waiver, however, to only those contracts in which the municipality receives goods or services.⁷⁹ In the words of the

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ TEX. LOC. GOV’T CODE ANN. § 271.152 (West 2018).

⁷⁷ *Id.*

⁷⁸ Fed. Sign v. Tex. State Univ., 951 S.W.2d 401, 408 (1997).

⁷⁹ See TEX. LOC. GOV’T CODE § 271.151.

Legislature, “[C]ontract subject to this subchapter means: (A) a written contract . . . for providing goods or services to the local governmental entity . . . ; or (B) a written contract . . . regarding the sale or delivery of not less than 1,000 acre-feet of reclaimed water by a local governmental entity intended for industrial use.”⁸⁰ Courts have interpreted this statute strictly; immunity is waived only in those instances when a local governmental entity receives goods or services as a result of a contract.⁸¹

Prior to the enactment of Section 271.152, the Texas Supreme Court held clearly that a governmental entity waives its immunity from suit, by its conduct, when it enters into a contract.⁸² With the passage of Section 271.152, the Legislature modified the common law on immunity and contracts.

E. Judicial Exception to Legislative Language Requirement: Waiver by Conduct

Because “sovereign immunity is a common-law doctrine that initially developed without any legislative or constitutional enactment . . . it 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.”⁸³ Justice Johnson, in his opinion in *Reata*, went on to admit “[w]e have generally deferred to the Legislature to waive immunity because the Legislature is better suited to address the conflicting policy issues involved.”⁸⁴

Note the important distinction: the judiciary will decide if immunity exists *in the first place*, but the Legislature will decide if immunity may be waived.

⁸⁰ *Id.*

⁸¹ *See, e.g.,* Donna Indep. Sch. Dist. v. Gracia, 286 S.W.3d 392, 394 (Tex. App.—Corpus Christi 2008, no pet.); *see also* El Paso Educ. Initiative, Inc. v. Amex Props., LLC, 385 S.W.3d 701, 706–08 (Tex. App.—El Paso 2012, pet. denied). *Compare* LTTS Charter Sch., Inc., v. C2 Constr., Inc., 358 S.W.3d 725, 740 (Tex. App.—Dallas 2011, pet. denied), *with* General Servs. Comm’n v. Little-Tex Insulation Co., 39 S.W.3d 591, 593 (Tex. 2001).

⁸² *Fed. Sign*, 951 S.W.2d at 405; *see also* *General Servs. Comm’n*, 39 S.W.3d at 594.

⁸³ *Reata Constr. Corp. v. City of Dall.*, 197 S.W.3d 371, 374–75 (Tex. 2006).

⁸⁴ *Id.* at 375.

1. Waiver by Lawsuit

Justice Johnson illuminated an instance in which the judiciary will interpret the State's actions as a waiver. He wrote: "However, if the governmental entity interjects itself into or chooses to engage in litigation to assert affirmative claims . . . [that] entity's immunity from suit does not extend to a situation where the entity has filed suit . . ." ⁸⁵

This waiver-by-conduct exception does not extend to situations in which private parties sue the State. In its analysis of *Ho v. University of Texas at Arlington*, the court in *Texas Natural Resource Conservation Commission v. IT-Davy*, concluded, "Ho rejects any waiver-by-conduct exception to sovereign immunity when a private party sues the State . . ." ⁸⁶

2. Waiver by Contract

In *IT-Davy*, the court added that, in addition to waiving immunity from suit by choosing to enter into a lawsuit, the State will waive immunity from liability by choosing to enter into a contract. ⁸⁷ The *IT-Davy* court stated: "When the State contracts with a private party, it waives immunity from liability." ⁸⁸ In *General Services Commission v. Little-Tex. Insulation Company*, the court found "that once the State has accepted benefits under a contract, it is unfair to allow the State to shield itself from suit by evoking sovereign immunity." ⁸⁹

In these two limited instances, the court has found equitable remedies regarding waivers of sovereign and governmental immunity. In both circumstances, the State must take an affirmative action to open itself up to potential conflict. But these equitable waivers have their limits: waiver of immunity from suit by conduct only applies when the governmental entity enters into the lawsuit affirmatively; a governmental entity only waives immunity from liability, not suit, when it contracts with a private party. The much higher jurisdictional bar remains when a governmental entity contracts.

⁸⁵ *Id.*

⁸⁶ 74 S.W.3d 849, 853 (Tex. 2002).

⁸⁷ *Id.* at 854.

⁸⁸ *Id.*

⁸⁹ 39 S.W.3d 591, 595 (Tex. 2001).

3. Contract Waiver and Local Governmental Entities

Today, the doctrine of sovereign immunity as it applies to local governmental entities and the act of contracting is well-developed. The State and its political subdivisions are immune from suit and liability unless the Legislature waives immunity in clear and unambiguous language. The Texas Supreme Court has said that governmental entities waive immunity from liability by conduct when they insert themselves into a lawsuit. The court has also said governmental entities waive immunity by conduct when they enter into any contract, but retain immunity from suit even in the act of contracting unless the Legislature clearly and unambiguously waives it.

As discussed in the Public Property Finance Act example in Section II.D., the Legislature has clearly and unambiguously waived the immunity of local governments *when they contract for goods and services*.⁹⁰

The Texas Legislature has declined to waive the immunity of local governmental entities when they contract in any other setting. The question remains, therefore: do municipalities, a type of local governmental entity, waive immunity through the act of entering into a settlement agreement, a contract specifically designed to prevent a lawsuit?

F. Key Cases from the Texas Supreme Court on Immunity as it applies to Cities

1. *Reata Construction Corp. v. City of Dallas* (Argued December 12, 2004; Delivered June 30, 2006)

The Texas Supreme Court heard this case twice.⁹¹ It vacated its earlier opinion of April 2, 2004, and substituted the 2006 opinion in its place.⁹² In this case, Reata Construction Corp. (Reata) subcontracted with Dynamic Cable Construction Corporation, Inc. (Dynamic), to drill for a project involving the installation of fiber optic cable.⁹³ While drilling, Reata hit a water main, causing flooding of a nearby building.⁹⁴

⁹⁰TEX. LOC. GOV'T CODE ANN. § 271.152 (West 2017) (emphasis added).

⁹¹*Reata Constr. Corp. v. City of Dall.*, 197 S.W.3d 371, 373 (Tex. 2006).

⁹²*Id.*

⁹³*Id.*

⁹⁴*Id.*

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The owner of the building and some of its tenants sued Dynamic and Reata for negligence.⁹⁵ Reata filed against the City (in the same suit), “alleging that the City negligently misidentified the water main’s location.”⁹⁶ Before answering Reata, the City of Dallas intervened in the case with its own claim against Dynamic.⁹⁷ Weeks after intervening, the City answered Reata’s petition with, among other things, a plea to the jurisdiction.⁹⁸ The City claimed sovereign immunity barred Reata’s claim against it.⁹⁹

Overruling the court of appeals’ holding that the City did not waive immunity by affirmatively entering into the lawsuit, the Texas Supreme Court stated “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.”¹⁰⁰

The *Reata* court held that (a) the City of Dallas did waive immunity by inserting itself affirmatively (rather than simply responding) into the lawsuit; (b) the Texas Tort Claims Act’s waiver of immunity was the applicable statutory waiver; and (c) because Reata did not claim money damages that fall under that particular statute, the statutory waiver did not apply.¹⁰¹ The City would have retained immunity because of Reata’s failure to plead in such a way that invoked the statute, but the City chose to insert itself into the lawsuit, “leav[ing] its sphere of immunity from suit for claims against it which are germane to, connected with and properly defensive to claims the City asserts.”¹⁰²

2. *Tooke v. City of Mexia* (Argued April 21, 2004; Delivered June 30, 2006)

“This case involves a suit against a city for breach of contract.”¹⁰³ The City of Mexia sought and received competitive bids for the collection of

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 375–76.

¹⁰¹ *Id.* at 377–78.

¹⁰² *Id.* at 377.

¹⁰³ *Tooke v. City of Mexia*, 197 S.W.3d 325, 329 (Tex. 2006).

brush and leaves curbside within the city.¹⁰⁴ Judy and Everett Tooke won the bid, and the City awarded them the contract.¹⁰⁵

The terms of the contract stated that the agreement covered a three-year period, and that the relationship between the Tookes and the City would automatically renew every year on the anniversary of the contract's effective date.¹⁰⁶ Prior written notice, sixty days prior to the anniversary, would terminate their agreement.¹⁰⁷

The Tookes performed under the contract for fourteen months.¹⁰⁸ In December 1997, after the contract's first anniversary, the City Manager told the Tookes that the City had no more money in the budget for their services.¹⁰⁹ The Tookes discontinued their services, per the Manager's recommendation, and received a letter from the City in March of 1998 informing them the contract was terminated.¹¹⁰ In response, the Tookes sued the City for breach of contract, claiming reliance on the three-year term.¹¹¹ The City filed a plea to the jurisdiction, claiming sovereign immunity from suit, a claim the trial court rejected.¹¹²

The court of appeals overruled the trial court's denial of the City's plea to the jurisdiction and found that the City did not waive its immunity.¹¹³ Specifically, the court of appeals found no waiver in three areas: (1) no waiver by contract because performing under a contract would only waive immunity from liability, not suit; (2) no waiver per Section 101.0215(a)(6) of the Texas Civil Practice and Remedies Code because that section specifically states that (a) cities are immune when they act in their governmental capacities, and (b) "solid waste removal, collection, and disposal is a governmental function;" and (3) no waiver via the inclusion of the following language in Section 51.075 of the Texas Local Government Code.¹¹⁴

¹⁰⁴ *Id.* at 330.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 330–31.

¹¹⁴ *Id.* at 331.

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Section 51.075 provides that a “municipality may plead and be impleaded in any court.”¹¹⁵ The court of appeals began its analysis of whether “plead and be impleaded” constitutes a waiver of immunity by examining four aids “to help guide . . . analysis in determining whether the Legislature has clearly and unambiguously waived sovereign immunity,” as set out in the Texas Supreme Court’s opinion in *Wichita Falls State Hospital v. Taylor*.¹¹⁶

“First, a statute that waives the State’s immunity must do so beyond doubt, even though we do not insist that the statute be a model of ‘perfect clarity.’”¹¹⁷ Here the court referenced the “clear and unambiguous language” requirement codified in Section 311.034.¹¹⁸

Second, the *Tooke* court noted the presumption in favor of immunity.¹¹⁹ “[W]hen construing a statute that purportedly waives sovereign immunity, we generally resolve ambiguities by retaining immunity.”¹²⁰

Third, the *Tooke* court referenced its decision in *Reata Construction Corp. v. City of Dallas* by discussing the consequences of entering into a lawsuit. In *Reata*, the court made it clear that, should a governmental entity enter into a lawsuit, that entity will waive immunity [from suit] by its conduct.¹²¹ In *Federal Sign*, the court noted another type of waiver by conduct: “when the State contracts with private citizens, the State waives only immunity from liability.”¹²² “[T]he State is immune [, however,] from suit arising from breach of contract suits.”¹²³

The only judicially-recognized waiver-by-conduct exemption that waives immunity from *suit*, therefore, is a governmental entity’s entry into a lawsuit proceeding. By pointing out in Section 311.034 that “[s]tatutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity,”¹²⁴ the Legislature applied sovereign immunity to every stage of a lawsuit. In *Tooke*, the court

¹¹⁵TEX. LOC. GOV’T CODE ANN. § 51.075 (West 2017).

¹¹⁶*Tooke*, 197 S.W.3d at 330.

¹¹⁷*Id.*

¹¹⁸*See id.*; TEX. GOV’T CODE ANN. § 311.034 (West 2016).

¹¹⁹*Tooke*, 197 S.W.3d at 330.

¹²⁰*Id.*

¹²¹197 S.W.3d 371, 375 (Tex. 2006) (“[A] governmental entity’s immunity from suit does not extend to a situation where the entity has filed suit . . .”).

¹²²951 S.W.2d 401, 408 (1997).

¹²³*Id.*

¹²⁴TEX. GOV’T CODE ANN. § 311.034 (West 2016).

made clear that a waiver of immunity from suit must also be affected by clear and unambiguous language: “if the Legislature requires that the State be joined in a lawsuit for which immunity would otherwise attach, the Legislature has intentionally waived the State’s sovereign immunity”¹²⁵

Finally, the fourth aid enumerated by the *Tooke* court reflects the Legislature’s requirement that judicial interpretation of a statute waiving immunity can only be found to be a waiver if “no other reasonable construction” of the statute in question is possible.¹²⁶ In the words of the court:

[W]e are cognizant that, when waiving immunity by explicit language, the Legislature often enacts simultaneous measures to insulate public resources from the reach of judgment creditors Therefore, when deciding whether the Legislature intended to waive sovereign immunity and permit monetary damages against the State, one factor to consider is whether the statute also provides an objective limitation on the State’s potential liability.¹²⁷

In all of these instances, the requirement that intent be clear and unambiguous for a waiver of immunity to apply is the threshold issue that each court must decide.

In *Tooke*, the court of appeals reasoned that it must give effect to every word in a statute.¹²⁸ Applying the Texas Supreme Court’s holding in *Missouri Pacific Railroad Co. v. Brownsville Navigation District*, where the court held that the inclusion of “sue and be sued” in a statute waives immunity from suit, the court of appeals reasoned that “plead and be impleaded” must be found to mean something different than “sue and be sued.”¹²⁹ In other words, if the Legislature had intended a waiver of immunity, it would have used the “sue and be sued” language, not “plead and be impleaded.” According to the court of appeals, the language in Section 51.075 “can reasonably be construed as authorization for

¹²⁵ 197 S.W.3d at 330.

¹²⁶ TEX. GOV’T CODE § 311.034.

¹²⁷ *Tooke*, 197 S.W.3d at 330.

¹²⁸ *See id.* at 331.

¹²⁹ *Id.*

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municipalities to file pleadings and be named in adverse pleadings in lawsuits in which immunity from suit has already been waived.”¹³⁰

In its review of the lower court’s holding, the Texas Supreme Court reiterated that “the rule [of sovereign immunity] remains firmly established, and . . . has come to be applied to the various governmental entities in this State”¹³¹ After an exhaustive look at the history of the language “sue and be sued” and “plead and be impleaded” as it relates to municipalities, the court concluded: “Reasonably construed, the 1858, 1875, and 1913 statutes meant only that a municipality was the sort of entity that it was possible to sue, leaving aside whether suit was barred by immunity.”¹³²

After exploring the early statutes, the Texas Supreme Court went on to look at how both it and the United States Supreme Court has handled “sue and be sued” and “plead and be impleaded.”¹³³ Both courts have held that the inclusion of such language constitutes a legislative waiver of immunity, but both courts have also held that the inclusion of such language does *not* constitute a legislative waiver of immunity.

Finally coming to its opinion in *Missouri Pacific Railroad Co. v. Brownsville Navigation District*, decided in 1970, the court acknowledged the confusion its holding in that case might cause.¹³⁴ Re-addressing its decision and subsequent statutory and case law, the court noted that its earlier “conclusion that the phrase [sue and be sued] is ‘quite plain and gives general consent for [a governmental entity] to be sued in the courts of Texas in the same manner as other defendants’ simply cannot be applied as a general rule.”¹³⁵ In other words, whether or not the Legislature’s inclusion of “sue and be sued” or “plead or may be impleaded” indicates a clear and unambiguous waiver of immunity will depend on the context in which the language exists.¹³⁶

Because of its analysis on the treatment of this language, and because the Legislature passed two express waivers of immunity after its decision in

¹³⁰ *Id.*

¹³¹ *Id.* at 332.

¹³² *Id.* at 334.

¹³³ *See id.* at 334–36.

¹³⁴ *See id.* at 337–40.

¹³⁵ *Id.* at 340.

¹³⁶ *See id.* at 337, 339–42.

Missouri Pacific, the court “conclude[d] that *Missouri Pacific* must be, and now is, overruled.”¹³⁷

In the end, the Texas Supreme Court rejected all of the Tookes’ arguments that the City of Mexia waived immunity.¹³⁸ Even though the newly passed Section 271.152 would apply to the City’s contract for services with the Tookes, the Tookes claimed consequential damages for lost profits, a claim that does not fall within the narrow damages allowed under Section 271.152.¹³⁹ For this reason alone, the Tookes claim that sovereign immunity was waived under the contract was overruled; the court ruled that immunity was not waived.

The court’s holding in *Tooke* stands for the principle that, while a legislative waiver of immunity must include clear and unambiguous language, even the clearest language does not automatically indicate a waiver. Specifically, the phrases “may sue and be sued” and “may plead and be impleaded” do not automatically mean the Legislature waived immunity. Judicial interpretation of the context in which that language lies will determine whether the Legislature intended to waive immunity in each specific statute.

3. *City of Galveston v. State* (Argued February 16, 2006;
Delivered March 2, 2007)

Justice Brister, in this 2007 opinion, began his analysis with a bold statement: “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.”¹⁴⁰ In this case, the State sued the City of Galveston, alleging negligence on the part of the City, to recover money damages.¹⁴¹ In 1982, the City of Galveston entered into an agreement with the Texas Department of Transportation.¹⁴² Per that agreement, the City agreed to move and maintain nearby utilities while the State constructed Highway

¹³⁷ *Id.* at 342; see TEX. LOC. GOV’T CODE ANN. §§ 262.007, 271.151–160 (West 2017).

¹³⁸ *Tooke*, 197 S.W.3d at 342–45.

¹³⁹ TEX. LOC. GOV’T CODE § 271.152.

¹⁴⁰ *City of Galveston v. State*, 217 S.W.3d 466, 468 (Tex. 2007).

¹⁴¹ *Id.*

¹⁴² *Id.*

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275.¹⁴³ In 2001, a water line ruptured, causing over \$180,000 in damages to the highway.¹⁴⁴

The Attorney General sued the City to recover “for the City’s ‘negligent installation, maintenance, and upkeep’ of its water line and the resulting damage to state property.”¹⁴⁵ In its response, the City filed a plea to the jurisdiction, claiming governmental immunity. The trial court found for the City; the appeals court reversed, “holding that cities have no immunity from suit by the State”; the Texas Supreme Court reversed the appeals court, restoring the trial court’s original holding that the City did not waive immunity.¹⁴⁶

The court, as it does in all cases involving immunity, began its analysis with “the premise that in Texas a governmental unit is immune from tort liability *unless the Legislature has waived immunity.*”¹⁴⁷ The court went on to say that the “high standard [of clear and unambiguous language to waive immunity] is especially true for home-rule cities like Galveston, [since] such cities derive their powers from the Texas Constitution, not the Legislature.”¹⁴⁸

When analyzing whether a city has immunity or not, there exists a “heavy presumption in favor of immunity”¹⁴⁹ “The question thus is not whether any statute grants home-rule cities immunity from suit, but whether any statute limits their immunity from suit.”¹⁵⁰

Though the Legislature has waived a city’s immunity in several statutes, the court pointed out that “these statutes are not blanket waivers; they apply only to specified claims, impose limits on damages, differentiate among government entities, and exempt a variety of activities from any waiver at all.”¹⁵¹ In this case, the State failed to assert any statutory basis for its claim that the City had no immunity. The court found that lack a sufficient cause to reject the State’s ability to sue without a clear waiver of immunity:

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (emphasis added).

¹⁴⁸ *Id.* at 469.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 470.

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. 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.¹⁵²

Thus, no blanket waiver of immunity of cities exists, and the State cannot waive the immunity simply by suing a city. The immovable standard for a clear and unambiguous expression of legislative intent to waive remains firmly established.

4. *Wasson Interests, Ltd. v. City of Jacksonville* (Argued January 14, 2016; Delivered April 1, 2016)

In this case the Texas Supreme Court attempted to put to rest the confusion surrounding the governmental-proprietary dichotomy.¹⁵³ Wasson had a lease with the City of Jacksonville.¹⁵⁴ The lease, a contract, restricted their use of the land to residential purposes only.¹⁵⁵ Wasson subleased the land to Wasson Interests, Ltd., who leased the land to short-term, commercial tenants. The City evicted Wasson, and Wasson sued.¹⁵⁶

The City claimed governmental immunity. The court of appeals affirmed that claim based on a different court of appeals holding that held "the proprietary-governmental dichotomy [did not apply] in the contract-claims context."¹⁵⁷ Wasson Interests, Ltd. appealed to the Supreme Court to resolve the question of whether or not the proprietary-governmental dichotomy extended to the contract-claims context.¹⁵⁸

In its discussion of the doctrine of sovereign immunity, the court noted that, first, immunity is rooted in the sovereign, and, second, "immunity does not equally attach to every act by every governmental entity . . ."¹⁵⁹ "Acts done as a branch of the state – such as when a city 'exercise[s] powers

¹⁵² *Id.* at 471

¹⁵³ *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 430 (Tex. 2016).

¹⁵⁴ *Id.* at 430–31.

¹⁵⁵ *Id.* at 431.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 433.

conferred on [it] for purposes essentially public . . . pertaining to the administration of general laws made to enforce the general policy of the state’—are protected by immunity.”¹⁶⁰ “[A] city is deemed an agent of the state for sovereign immunity purposes when exercising its powers for a public purpose,” therefore, and not when acting in its proprietary capacity.¹⁶¹

In *Wasson*, the City tried to argue that the court’s decision in *Tooke* meant “that a city is *never* subject to suit for contract claims unless there is a legislative waiver.”¹⁶² However, the court, as it has with the waiver-by-conduct exceptions in the common law, declined to create a default rule of immunity limiting it exclusively to a *legislative* waiver.¹⁶³ The key is legislative intent; whether that intent is expressed in clear and unambiguous language in a statute or via an action by the State or one of its political subdivisions is not the central question. The central question is: does the Legislature intend to waive immunity?

Because the rationale behind the doctrine of sovereign immunity should apply equally to contract- and tort-claims contexts, the *Wasson* court concluded “that the dichotomy applies in the contracts-claims contexts.”¹⁶⁴

IV. SETTLEMENT AGREEMENTS AND SOVEREIGN IMMUNITY

A settlement agreement is a contract.¹⁶⁵ In Texas, Chapter 42 of the Texas Civil Practice and Remedies Code, as well as Rule 167 of the Texas

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 433–34 (“[A] city is not a freestanding sovereign with its own inherent immunity.”); *id.* (“Acts that are proprietary in nature . . . are not done as a branch of the state . . .”); *id.* (“Like *ultra vires* acts, acts performed as part of a city’s proprietary function do not implicate the state’s immunity for the simple reason that they are not performed under the authority, or for the benefit, of the sovereign.”); *see also* *City of Hous. v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011) (“When performing governmental functions, political subdivisions derive governmental immunity from the state’s sovereign immunity.”).

¹⁶² 489 S.W.3d at 434.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Garza v. Villarreal*, 345 S.W.3d 473, 479 (Tex. App.—San Antonio 2011, pet. denied); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 154.071(a) (West 2017) (“[I]f the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.”); *Donzis v. McLaughlin*, 981 S.W.2d 58, 61 (Tex. App.—San Antonio 2014, no pet.) (“[A] settlement agreement is a contract, and its construction is governed by legal principles applicable to contracts generally.”).

Rules of Civil Procedure, govern settlement agreements.¹⁶⁶ While the Rule states that parties may place conditions on an offer as long as they are reasonable, “including the execution of appropriate releases, indemnities, and other documents,” the nature of governmental immunity will almost always invalidate any conditions unless they are the result of a clear and unambiguous expression of the Legislature’s consent.¹⁶⁷

A. Settlement Agreements and Governmental Immunity: No Statutory Waiver

While the Texas Legislature has authorized the State or its agents to enter into settlement agreements in certain statutes, the Texas Legislature has declined to clearly and unambiguously waive immunity from suit or liability specifically when a governmental entity enters into a settlement agreement with a private party.¹⁶⁸ Because the contractual nature of a settlement agreement is to enforce a pretrial agreement, and not for the provision of goods or services from which the State will benefit, the distinction between immunity from suit and not from liability does not, in all practicality, apply. How can the State be held liable for breaching a settlement agreement when the equitable remedy for breach of a pretrial mechanism intended to avoid suit would be to allow suit?

B. Settlement Agreements and Governmental Immunity: No Judicial Waiver

The Texas Supreme Court has never directly addressed this conundrum. The closest the court has come to directly addressing settlement agreements and governmental immunity is its 2002 opinion *Texas A&M University-Kingsville v. Lawson*.¹⁶⁹ In that case, the University terminated the employment of Grant M. Lawson, a faculty member and clarinet instructor.¹⁷⁰ After terminating his employment, Lawson sued the University for violations of the Whistleblower Act, among other things.¹⁷¹ The University filed a plea to the jurisdiction, claiming that sovereign

¹⁶⁶TEX. CIV. PRAC. & REM. CODE §§ 42.001–.005; *see also* TEX. R. CIV. P. 167.

¹⁶⁷TEX. R. CIV. P. 167.2(c).

¹⁶⁸*See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 111.003; *see also id.* § 101.105.

¹⁶⁹87 S.W.3d 518, 518 (Tex. 2002).

¹⁷⁰*Id.*

¹⁷¹*Id.* at 518–19.

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immunity barred Lawson's complaints.¹⁷² The trial court granted the University's pleas on all counts except two: Lawson's Whistleblower Act claim and his constitutional claims for equitable relief.¹⁷³

Rather than proceed to trial on these two claims, the two parties reached a settlement in which Lawson released his claims.¹⁷⁴ As part of the settlement agreement, the University agreed to provide a neutral response to any inquiry by subsequent employers.¹⁷⁵ The University's promised response was specifically worded within the settlement agreement.¹⁷⁶ Later, Lawson sued the University for breach of the settlement agreement, alleging that the University did not adhere to the strict wording of the agreement when third parties called to inquire about the nature of Lawson's employment with the University.¹⁷⁷

At trial, the court overruled the University's plea to the jurisdiction.¹⁷⁸ In the language of the court, the University subjected itself to suit for breach of the settlement agreement when it entered into the agreement.¹⁷⁹ "[A] plaintiff can bring a suit to enforce or seek damages for violation of that settlement agreement and the state has waived its sovereign immunity, or doesn't have any sovereign immunity . . . when you're talking about the settlement of a case within the court's jurisdiction."¹⁸⁰ Importantly, the trial court based its holding on the necessity of an equitable remedy when the State benefits from any contract into which it enters.¹⁸¹

The appeals court affirmed the trial court's findings.¹⁸² It expanded upon the trial court's reasoning by more clearly stating the necessity for equitable relief: "state agencies waive their immunity from suit by accepting some of the benefits of a contract and refusing to pay for them."¹⁸³

The Texas Supreme Court overruled both the trial and appeals courts, however. In this case, the Texas Supreme Court reiterated it "[has] held that

¹⁷² *Id.* at 519.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 519–20.

¹⁸⁰ *Id.* at 519.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

a governmental entity by entering into a contract waives immunity from liability for breach of the contract but does not, merely by entering into a contract, waive immunity from suit.”¹⁸⁴ It also noted “since the court of appeals’ ruling in the present case, we have also rejected its view that immunity from suit is waived merely by accepting some of the benefits of a contract.”¹⁸⁵

Even if it could be argued that a governmental entity accepts a benefit by entering into a settlement agreement, therefore, that fact alone is insufficient to establish waiver-by-conduct of governmental immunity. In its holding in *Texas A&M University-Kingsville*, the court upheld its narrow reading of waiver-by-conduct.¹⁸⁶ “[W]hile we reject the court of appeals’ adoption of a broad waiver-by-conduct exception to sovereign immunity, we hold that, having waived immunity from suit in the Whistleblower Act, the State may not now claim immunity from a suit brought to enforce a settlement agreement reached to dispose of a claim brought under that Act.”¹⁸⁷

In other words, the *Texas A&M University-Kingsville* case should not be read to establish a complete waiver of sovereign immunity in all settlement agreements. This opinion applied narrowly in the Whistleblower context, and must be confined to contexts in which sovereign immunity has been waived in the original, underlying action.

On the other hand, the *Texas A&M University-Kingsville* case can be read to include the principle that, where a statutory waiver applies to the underlying dispute, the act of settling is not a way to circumvent that waiver to restore immunity. After all, “the State should not regain waived immunity by settling a case.”¹⁸⁸

V. CONCLUSION: THE ULTIMATE GENTLEMAN’S AGREEMENT

Absent a statutory waiver in clear and unambiguous language, or a judicially-created waiver-by-conduct equitable remedy in the contractual context, it would seem that the enforceability of a governmental entity’s settlement agreements turns on nothing more than good faith. When a

¹⁸⁴ *Id.* at 520; *see also* Gen. Servs. Comm’n v. Little-Tex. Insulation Co., 39 S.W.3d 591, 594 (Tex. 2001); Fed. Sign v. Tex. State Univ., 951 S.W.2d 401, 408 (1997).

¹⁸⁵ *Tex. A&M University-Kingsville*, 87 S.W.3d at 520–21.

¹⁸⁶ *Id.* at 522–23.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

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governmental entity enters into a settlement agreement, nothing in law or equity waives its immunity from suit. Therefore, should a governmental entity choose to breach the settlement agreement, the breach of contract remedies usually available to aggrieved parties to a contract are unreachable by any party who contracts with a governmental entity absent a clear waiver of immunity from suit.

The court's holding in *Wasson Interests, Ltd.*, however, leaves open the question as to whether or not a party can sue for breach of a settlement agreement. Because the proprietary-governmental dichotomy now clearly applies to contracts claims,¹⁸⁹ a party might have the option of suing a municipality who breaches a settlement agreement for specific performance if the dispute underlying the agreement involved a city's proprietary function. This scenario has never been directly addressed by either the Legislature or the courts, however, so it remains to be seen how a court would respond if a governmental entity were to claim governmental immunity from a breach of settlement agreement claim.

The logical question becomes: why do parties enter into settlement agreements with governmental entities if their enforceability stands on such shaky grounds? In this author's opinion, the answer truly does rest on good faith. The parties come together, reach an agreement, shake on it (so to speak), and hope, even expect, each party to fulfill its side of the bargain. Because there are currently no cases, statutes, or journals addressing the dubious nature of governmental entities' settlement agreements, it appears we may conclude that a handshake will still suffice to seal the deal.

¹⁸⁹ See *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 430 (Tex. 2016).