

SUPREME COURT OF TEXAS

Judy Tooke and Everett Tooke d/b/a Tooke & Sons and d/b/a Nature's
Way Organic Landscaping v. City of Mexia

197 S.W.3d 325 (Tex. 2006) · No. No. 03-0878 · Decided June 30, 2006

SUMMARY

The Supreme Court of Texas held that statutory phrases such as "sue and be sued" and "plead and be impleaded" do not, standing alone, clearly and unambiguously waive governmental immunity from suit. The Court overruled Missouri Pacific Railroad Co. v. Brownsville Navigation District to the extent it held otherwise and concluded that section 51.075 of the Texas Local Government Code did not waive the City of Mexia's immunity from the Tookes' breach-of-contract claim. The Court affirmed the court of appeals' judgment, noting that a later statutory waiver did not permit recovery of the consequential damages awarded.

CASE DETAILS

COURT	Supreme Court of Texas
WRITING FOR THE COURT	Justice Hecht; Chief Justice Jefferson; Justice Wainwright; Justice Brister; Justice Medina; Justice Green
JURISDICTION	Texas
DECIDED	June 30, 2006
DOCKET	No. 03-0878
DISPOSITION	affirmed
PROCEDURAL POSTURE	The Tookes sued the City of Mexia for breach of a contract to provide curbside brush and leaf collection. After a jury awarded lost profits and attorney fees, the trial court entered judgment for the Tookes. The court of appeals reversed and rendered judgment for the City on governmental-immunity grounds. The Supreme Court of Texas granted review and affirmed.
STANDARD OF REVIEW	Statutory construction and governmental-immunity waiver are reviewed de novo. Whether the statutory language clearly and unambiguously waives immunity is a question of law.
PRECEDENTIAL VALUE	binding

PARTIES

Judy Tooke and Everett Tooke d/b/a Tooke & Sons and d/b/a Nature's Way Organic Landscaping v. City of Mexia

TOPICS

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether Texas Local Government Code section 51.075, providing that a home-rule municipality may plead and be impleaded in any court, clearly and unambiguously waives governmental immunity from suit for breach of contract.
2. Whether the City's partial performance of the contract and acceptance of its benefits waived immunity from suit.
3. Whether the governmental/proprietary-function distinction eliminated the City's immunity from suit for this contract.
4. Whether the City's charter provision allowing it to sue and be sued, contract and be contracted with, and implead and be impleaded waived immunity from suit.
5. Whether the 2005 statutory waiver in Texas Local Government Code sections 271.151-.160 applied retroactively and authorized the Tookes' lost-profit claim.
6. Whether Missouri Pacific Railroad Co. v. Brownsville Navigation District should be overruled to the extent it held that a standalone statutory sue-and-be-sued clause always waives governmental immunity from suit.

HOLDINGS

1. Such phrases do not, by themselves, clearly and unambiguously waive governmental immunity from suit. Their meaning depends on the statutory context and may concern only an entity's capacity to sue and be sued.
2. Section 51.075, which states that a home-rule municipality may plead and be impleaded in any court, does not clearly and unambiguously waive the City's immunity from suit for breach of contract.
3. The City's partial performance and payment for the work actually performed did not waive immunity from suit for the Tookes' claim for lost profits on unperformed work.
4. The Court did not decide whether the proprietary-governmental distinction governs immunity from suit for breach-of-contract claims, but held that the contract involved solid-waste collection, a statutory governmental function.
5. The City's charter provision stating that the City may sue and be sued, contract and be contracted with, and implead and be impleaded did not clearly and unambiguously waive governmental immunity from

suit.

6. Texas Local Government Code sections 271.151-.160 applied retroactively to the pre-effective-date contract, but did not waive immunity for the Tookes' claim because their lost-profit damages were consequential damages excluded by section 271.153.
7. *Missouri Pacific Railroad Co. v. Brownsville Navigation District* is overruled to the extent it held that a standalone sue-and-be-sued clause in an organic statute always waives governmental immunity from suit.

KEY QUOTATIONS

“Because immunity is waived only by clear and unambiguous language, and because the import of these phrases cannot be ascertained apart from the context in which they occur, we hold that they do not, in and of themselves, waive immunity from suit.” (at 328)

“As we have seen, the words “sue and be sued”, standing alone, are if anything, unclear and ambiguous.” (at 342)

“Their only claim is for lost profits, which are consequential damages excluded from recovery under the statute.” (at 346)

FACTUAL BACKGROUND

The City of Mexia awarded J.E. Tooke & Sons, a sole proprietorship owned by Judy and Everett Tooke, a contract to provide labor and equipment for curbside collection of brush and leaves. Although the contract stated a three-year term with annual automatic renewal unless either party gave sixty days' notice, the City stopped the work after approximately fourteen months because its budget had been exhausted. The Tookes sought lost profits and attorney fees, but did not seek payment for work already performed; the jury awarded \$8,659 in lost profits and \$7,500 in attorney fees.

PROCEDURAL HISTORY

The City awarded the Tookes a three-year contract, later discontinued it for lack of funding, and the Tookes sued for breach. The trial court rejected the City's immunity defense and entered judgment on the jury's verdict. The court of appeals held that the City was immune from suit and that Texas Local Government Code section 51.075 did not waive immunity; the Supreme Court affirmed and further held that the later-enacted statutory waiver did not permit the damages claimed.

DISPOSITION

affirmed

CASES CITED

- *Wichita Falls State Hospital v. Taylor*, 106 S.W.3d 692 (Tex. 2003)
- *Missouri Pacific Railroad Co. v. Brownsville Navigation District*, 453 S.W.2d 812 (Tex. 1970)

- Federal Sign v. Texas Southern University, 951 S.W.2d 401 (Tex. 1997)
- Texas Natural Resource Conservation Commission v. IT-Davy, 74 S.W.3d 849 (Tex. 2002)
- Texas A&M University-Kingsville v. Lawson, 87 S.W.3d 518 (Tex. 2002)
- Catalina Development, Inc. v. County of El Paso, 121 S.W.3d 704 (Tex. 2003)
- Duhart v. State, 610 S.W.2d 740 (Tex. 1980)
- City of LaPorte v. Barfield, 898 S.W.2d 288 (Tex. 1995)
- Travis County v. Pelzel & Associates, Inc., 77 S.W.3d 246 (Tex. 2002)
- Jones v. Texas Gulf Sulphur Co., 397 S.W.2d 304 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.)
- National Surety Corp. v. Friendswood Independent School District, 433 S.W.2d 690 (Tex. 1968)
- Harkness v. Hutcherson, 38 S.W. 1120 (Tex. 1897)
- Barnhart v. Hidalgo County Water Improvement District No. 4, 278 S.W. 499 (Tex. Civ. App.—San Antonio 1925, writ ref'd)
- Cameron County Water Improvement District No. 1 v. Hall, 280 S.W. 838 (Tex. Civ. App.—San Antonio 1925, writ ref'd)
- United States Postal Service v. Flamingo Industries (USA) Ltd., 540 U.S. 736 (2004)
- Federal Housing Administration v. Burr, 309 U.S. 242 (1940)
- Franchise Tax Board of California v. United States Postal Service, 467 U.S. 512 (1984)
- FDIC v. Meyer, 510 U.S. 471 (1994)
- Loeffler v. Frank, 486 U.S. 549 (1988)
- United States v. Williams, 514 U.S. 527 (1995)
- Grapevine Excavation, Inc. v. Maryland Lloyds, 35 S.W.3d 1 (Tex. 2000)
- James v. Vernon Calhoun Packing Co., 498 S.W.2d 160 (Tex. 1973)
- In re City of Georgetown, 53 S.W.3d 328 (Tex. 2001)
- Am. Transitional Care Centers of Texas, Inc. v. Palacios, 46 S.W.3d 873 (Tex. 2001)
- Wich v. Fleming, 652 S.W.2d 353 (Tex. 1983)
- Douglass v. County of Pike, 101 U.S. 677 (1880)