

Texas Contractors, With Immunity And Liability For Some

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The Texas Supreme Court in a case of first impression^[1] declined to extend the sovereign immunity of a toll-road authority to a private engineering company whose design, the plaintiffs alleged, caused deaths and personal injuries. *Brown & Gay Engineering Inc. v. Olivares* (Tex. April 24, 2015). The engineer pressed creative arguments for the extension of immunity. Some wondered, however, why the court elected to decide the case, believing the arguments put forth were a bit of a reach. Indeed, the three concurring justices saw the case as a simple proposition.

Immunity protects the government. An independent contractor is not the government. Therefore, immunity does not protect an independent contractor. That simple syllogism seems to me to resolve this case.^[2]

But, the court did decide the case and the majority provided thoughtful analysis that helps define the boundaries and purpose of sovereign immunity in Texas. Ultimately, the court declined to extend sovereign immunity to the engineer, based solely on the nature of the engineer's services, because the rationale for the doctrine provided no support for doing so.^[3]



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Background

The case concerned auto accident deaths and injuries that occurred early on a New Year's morning caused by an intoxicated driver traveling the wrong way on the authority's toll road.^[4] The injured parties filed suit against the authority, the engineer and others.^[5] The plaintiffs later dismissed the authority after the trial court's denial of its sovereign immunity was reversed in an interlocutory appeal.^[6] The plaintiffs sued the engineer for negligence in designing the road signs and traffic layouts including, among other things, the exit ramp area at which the driver entered the toll road in the wrong direction. The engineer also made a plea to the jurisdiction.^[7]

The trial court granted the engineer's plea to the jurisdiction based upon governmental immunity because the engineer was, under the circumstances, an "employee" of the authority under the Texas Torts Claim Act § 101.001(2).^[8] This was because of the alleged extent of the authority's right of control over the engineering services.^[9] For example, the contract required that all of the services must be performed under the authority's supervision. Also, the authority delegated all design responsibilities because the authority had no employees.^[10] The intermediate court of appeals rejected the control arguments and found that the engineer failed to meet its burden of presenting conclusive facts showing the authority's right to control the details of the engineer's services.^[11] The case was reversed and

remanded.[12]

The engineer's petition to the Texas Supreme Court was granted. There, the engineer essentially abandoned its argument that it was an "employee" because of the authority's contractual right of control over the engineer's services.[13] The engineer argued in this court: (1) that its status as an independent contractor rather than a government employee did not foreclose its entitlement to the same immunity afforded to the authority; (2) that the court of appeals' reliance on the Tort Claims Act was misplaced because the act "uses 'employee' to delineate the circumstances where the government will be liable under a waiver of immunity," not "to limit the scope of ... unwaived governmental immunity" and (3) that the purposes of sovereign immunity are served by extending it to private entities performing authorized governmental functions for which the government itself would be immune from liability.[14]

The Origin, Boundaries and Purposes of Sovereign Immunity

The origins of sovereign immunity developed with the notion that the king can do no wrong. Today, of course, the doctrine protects the state government and its political subdivisions from money damages and other forms of judicial relief.[15]

While sovereign immunity is a creature of common law, waivers of sovereign immunity leave the legislature to determine when to allow resources to be shifted away from the legislature's other intended allocations. Legislative determinations of these waivers reinforce separation of powers principals by preserving the legislature's prerogative to allocate tax dollars. Sovereign immunity protects the taxpaying public as a whole, but at a high price. It shields the government and public from the consequences of improvident government actions but harshly places the loss suffered at the hands of the government and its employees on the injured party. The doctrine does so by foreclosing litigation and judicial remedies against governmental entities, absent legislative waiver.[16]

In some instances, an independent contractor may act as the government, in effect becoming the government for limited purposes and, when it does, it should be entitled to the government's immunity. But, an independent contractor acting only in the service of the government is not a government actor entitled to summary disposition of claims based upon immunity.[17]

Sovereign immunity was "designed to guard against the 'unforeseen expenditures' associated with the government's defending lawsuits and paying judgments 'that could hamper government functions' by diverting funds from their allocated purposes." [18]

[I]mmunizing the government, both the state and its political subdivisions, from suit directly serves the doctrine's purposes because the costs associated with a potential lawsuit cannot be anticipated at the project's outset. Litigation against the government therefore disrupts the government's allocation of funds on the back end, when the only option may be to divert money previously earmarked for another purpose. It is this diversion — and the associated risk of disrupting government services — that sovereign immunity addresses.[19]

The court determined that this rationale did not support granting immunity to the engineer, or private contractors in general.[20]

Court Analysis of the Engineer's Arguments

The engineer pressed creative arguments for extending sovereign immunity to private contractors like it, none of which prevailed.

Argument: Not saying "no" does not necessarily mean "yes."

Both the plaintiffs and engineer argued that the central question presented about extending liability was resolved by legislation.[21] The engineer pointed to a statute that explicitly prohibits private parties contracting with the state in connection with correctional facilities from claiming sovereign immunity. The engineer argued by inference that sovereign immunity may be claimed by private parties contracting with the state unless prohibited by statute. The court rejected the argument, stating the fact that a statute recognizes that private companies are not entitled to sovereign immunity in some circumstances does not imply that private companies are entitled to sovereign immunity in all other situations. The court also rejected the plaintiffs' argument, based upon inference, that absent affirmative statutory extensions of immunity to private contractors, the legislature intended to deny it.[22]

Argument: Immunizing private contractors does not fulfill the rationale for sovereign immunity.

The engineer argued that immunizing private contractors furthered the general purpose of sovereign immunity, protecting the public fisc. It argued that the risk of litigation to such contractors gets passed on to the government agency in higher costs. Declining to extend sovereign immunity to contractors like the engineer will make it difficult for the government to engage talented private parties fearful of personal liability, so the argument went.[23]

The court rejected the argument, even assuming this were true, because sovereign immunity has never been defended as a means to avoid increases in public expenditures. Immunizing a private contractor does not further the rationales of sovereign immunity, guarding against unforeseen expenditures associated with the government's defending lawsuits and paying judgments.[24]

Moreover, the court found the engineer's premise speculative. The engineer failed to take into account a private party's ability to manage its liability exposure through insurance. It also ignored the countervailing considerations that make contracting with the government attractive, not the least of which is lack of concern about the government's ability to pay. The engineer cited no evidence supporting a shortage of willing contractors notwithstanding an absence of sovereign immunity protection.[25]

Argument: Private contractors have been immunized, but under different circumstances.

The court declined to extend to the engineer the same immunity the government enjoys based upon the engineer's reasons that were unrelated to the rationale that justifies such immunity. One such unrelated rationale was the engineer's contention that it was entitled to share in the authority's sovereign immunity solely because the authority was statutorily authorized to engage the engineer's services and would have been immune had it performed those services itself.[26]

Indeed, governmental sovereign immunity has been extended to private contractors, as evidenced by a number of examples discussed in the court's opinion.[27] In these examples, sovereign immunity was extended to private contractors when the alleged cause of the injury was not the independent action of the contractor, but when the action taken by the government **through** the contractor caused the injury.[28] The court observed that the government's right to control the causal conduct that led these courts to extend immunity to a private contractor was utterly absent in this case.[29] In this case the engineer, not the authority, was responsible for controlling the design of all the features of which the plaintiffs complained.[30]

Argument: The issue of control over the work detail can be determinative.

The issue of control and whether the engineer had the immunity of a government employee, which was key in the lower courts, was not controlling in this court. The court indicated, however, that such control

can be determinative. As mentioned, proof of the government’s right to control that led some courts to extend immunity to private contractors was absent in this case. The evidence in this case showed that the engineer was an independent contractor with discretion to design the tollway’s signage and road layouts that were at issue. The court declined to determine whether some degree of control by the government might extend immunity protection to a private party, but held that an absence of control is determinative.[31]

Conclusion

The court declined to extend sovereign immunity not just to the engineer, but to “private contractors,” based solely upon the nature of the contractors’ work because to do so would not be supported by the rationale for the doctrine.[32] The rationale for sovereign immunity is to guard against the unforeseen government expenditures incurred in defending lawsuits and paying judgments that divert government funds from their allocated purposes.[33]

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[1] Brown & Gay Engineering Inc. v. Olivares (Tex. 2015) (not designated for publication).

[2] Id. at *7 (Hecht, J., concurring).

[3] Id.

[4] Id. at *1.

[5] Id.

[6] Id. (Fort Bend Cnty. Toll Road Auth. v. Olivares, 316 S.W.3d 114, 121-126 (Tex.App.—Houston [14th Dist.] 2010, no pet.).

[7] Brown at *1.

[8] Olivares v. Brown & Gay Engineering Inc., 401 S.W. 3d 363, 367 (Tex.App.—Houston [14th Dist.] 2013), aff’d sub nom. Brown & Gay Engineering Inc. v. Olivares (Tex. 2015).

[9] See id. at 373-374.

[10] Id. at 373.

[11] Id. at 379.

[12] Id.

[13] See Brown at *5.

[14] Id. at *2.

[15] Id.

[16] Id. (citations omitted).

[17] Id. at *8 (Hecht, J., concurring). The concurring justices, speaking to the breadth of purpose of sovereign immunity, divided from those in the majority that, according to the concurrence, says the purpose of immunity is only to protect the government from **unforeseen** expenditures, not merely to save costs. (emphasis original). Id. According to the concurring justices, the court's position is contradicted by the very authority on which it relies. *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011) (noting that sovereign immunity "shield[s] the state from lawsuits seeking other forms of relief," not just suits seeking money judgments).

[18] Id. at *3-*4 (citing *Sefzik*, 355 S.W.3d at 621 (per curium)).

[19] See *Brown* at *4.

[20] Id. at *4, *7.

[21] Id. at *3.

[22] Id.

[23] Id.

[24] Id. at *3-*4.

[25] See *Brown* at *7.

[26] Id. at *6.

[27] Id. at *4-*6 (citations omitted).

[28] Id. at *5 (emphasis original).

[29] Id.

[30] Id.

[31] See *Brown* at *5.

[32] Id. at *7.

[33] Id. at *3-*4.