

Affirmed and Opinion filed March 28, 2002.



In The
Fourteenth Court of Appeals

NO. 14-00-01149-CV

GULF ELECTROQUIP, INC., Appellant

V.

UNIVERSITY OF TEXAS AT AUSTIN, by and through
THE UNIVERSITY OF TEXAS SYSTEM BOARD OF REGENTS, Appellee

On Appeal from the 164th District Court
Harris County, Texas
Trial Court Cause No. 91-01187

OPINION

Gulf Electroquip, Inc., (“Gulf”) appeals the dismissal of its lawsuit against the University of Texas at Austin (“UT”) for want of jurisdiction on the grounds that: (1) Gulf’s pleadings show that the court had subject matter jurisdiction over Gulf’s claims; (2) the Legislature acted arbitrarily in failing to provide a meaningful legislative remedy for breach of contract claims against the State and in waiving sovereign immunity against only two universities; (3) the trial court’s dismissal violated the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution; and (4) the legislative scheme violates the open courts and takings clause of the Texas Constitution. We affirm.

Background

Gulf entered into two contracts (“the contracts”) with UT for the sale of custom built machinery and later filed suit against UT for breach of contract. UT filed, and the trial court granted, a plea to the jurisdiction based on sovereign immunity.

Standard of Review

A plaintiff’s petition must allege facts that affirmatively demonstrate subject matter jurisdiction. *Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).¹ In reviewing a ruling on a plea to the jurisdiction, we consider the facts alleged by the plaintiff’s petition and, to the extent it is relevant to the jurisdictional issue, the evidence submitted by the parties. *Texas Dep’t. of Criminal Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001).

Waiver By Conduct

Gulf’s first issue argues that the trial court erred in dismissing its action against UT because its petition sufficiently alleged that UT had waived any claim to sovereign immunity. Gulf claims that immunity was waived in that Gulf had tendered performance and thus fully performed the contracts. Gulf further asserts that UT waived its claim to sovereign immunity by agreeing in the two contracts to pay court costs in the event of a breach.

Sovereign immunity, unless waived, protects the State from lawsuits for damages. *Gen. Servs. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001).² Sovereign immunity encompasses immunity from both suit and liability. *Id.* Immunity from

¹ Although a plaintiff generally has a right to amend its petition to cure a failure to allege jurisdictional facts, Gulf does not complain on appeal of any denial of an opportunity to replead in this case. *See Texas Ass’n of Bus.*, 852 S.W.2d at 446.

² Gulf’s first reply point argues that UT relies on at least two unpublished Supreme Court opinions and therefore requests that this court strike these cited cases from UT’s brief. *See* TEX. R. APP. P. 77.3 (unpublished opinions have no precedential value and must not be cited as authority by counsel or by the court.); *see also id.* 47.7 (opinions not designated for publication by the court of appeals have no precedential value and must not be cited by counsel or by a court.). Although the challenged Supreme Court opinions have since been published in the South Western Reporter, we are aware of no authority or rationale that a Texas Supreme Court opinion is “unpublished” after it has been published in the Texas Supreme Court Journal but is awaiting publication in the South Western Reporter.

suit bars a suit against the State unless the Legislature expressly gives consent to sue. *Id.*³ Immunity from suit thus defeats a trial court’s subject matter jurisdiction. *Texas Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 637-38 (Tex. 1999).

A party may establish legislative consent to sue the State by referencing a statute or a resolution granting express legislative permission to sue. *Little-Tex*, 39 S.W.3d at 594. Such consent must be expressed in clear and unambiguous language. *Id.* When the State contracts, it is liable on contracts made for its benefit as if it were a private person. *Id.* Consequently, when the State contracts with private citizens, it waives immunity from liability, but does not thereby waive immunity from suit. *Id.* Legislative consent to sue is still necessary. *Id.* In this case, legislative consent to sue on the contracts could have been sought under Chapter 107 of the Texas Civil Practice and Remedies Code (“CPRC”), which allows parties to petition the Legislature for consent. *Id.*⁴ Sustaining Gulf’s position in this case would require us to recognize a waiver-by-conduct exception to sovereign immunity whereby a party can sue the State without first obtaining express legislative consent by statute or resolution. *See Little-Tex.*, 39 S.W.3d at 597. Historically, the Texas Supreme Court (the “Court”) has: (1) recognized that the Tort Claims Act⁵ establishes the scope of the limited waiver of sovereign immunity;⁶ (2) left it to the Legislature to determine whether to waive sovereign immunity otherwise;⁷ and thus, (3) so far expressly declined to adopt a waiver-by-conduct exception to the requirement that consent be obtained from the

³ Although not at issue in this case, immunity from liability protects the State from judgments even if the Legislature has expressly given consent to sue. *See Little-Tex*, 39 S.W.3d at 594. Unlike immunity from suit, immunity from liability does not affect a court’s jurisdiction over a case. *See Texas Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999).

⁴ For contracts executed or awarded after August 30, 1999, Chapter 2260 of the Texas Government Code expressly provides that its procedures are a prerequisite to suit under CPRC Chapter 107. TEX. GOV’T CODE ANN. § 2260.005 (Vernon 2000); *See Little-Tex*, 39 S.W.3d at 597. It is undisputed in this case that Gulf has not sought Legislative consent to sue in any manner.

⁵ *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.025 (Vernon 1997).

⁶ *See Miller*, 51 S.W.3d at 587 (noting that the Tort Claims Act establishes the scope of the limited waiver of sovereign immunity).

⁷ *Little-Tex*, 39 S.W.3d at 595.

Legislature,⁸ particularly based on the mere act of entering into a contract with a private citizen. However, without adopting a waiver-by-conduct exception, the Court has nevertheless recognized that there may be circumstances in which the State could waive its immunity from suit by conduct other than simply executing a contract.⁹ It thereby expressly left open the question of whether the State's conduct may waive its immunity from suit.¹⁰

Some other courts of appeals have thus adopted a waiver-by-conduct exception, which applies where the State has accepted the benefits under a contract. *Little-Tex*, 39 S.W.3d at 595. Moreover, in a case currently pending and recently argued before the Court, it requested the parties to submit additional briefing on whether sovereign immunity should be waivable by conduct or by contract, including coverage of the law in other jurisdictions.¹¹

Despite the presently unsettled nature of the law in this area, we are nevertheless called upon to render a decision in this case that, like all of our other decisions, is subject to change upon further developments. Because the Texas Supreme Court has so far consistently declined to adopt a waiver-by-conduct exception, and because it can obviously not be predicted under what circumstances, if any, the Court might recognize such an exception, we decline to do so in this case. Accordingly, we hold that the trial court did not err in failing to recognize a waiver-by-conduct exception to the State's immunity from suit, and Gulf's first issue is overruled.

Unreasonable Action by Legislature

Gulf's second issue challenges the dismissal of its suit based upon sovereign immunity because the Legislature acted unreasonably when it failed to establish any meaningful legislative remedy for contract disputes with the State. Gulf points out that the Legislature

⁸ *Id.* at 597, 598.

⁹ *Fed. Sign v. Texas S. Univ.*, 951 S.W.2d 401, 408 n.1 (Tex. 1997).

¹⁰ *Little-Tex*, 39 S.W.3d at 595.

¹¹ *See Texas Natural Res. Conservation Comm'n v. IT-Davy*, 998 S.W.2d 898 (Tex. App.—Austin 1999, pet. granted) (letter from the Texas Supreme Court to Julie Caruthers Parsley and William Richard Thompson, Office of the Attorney General, and Bob E. Shannon, Baker & Botts (Sept. 7, 2001) (copy on file with the Fourteenth Court of Appeals)).

may waive sovereign immunity by either enacting a law that generally permits suit against the State or by allowing a specific entity to sue the State on a particular contract pursuant to a specific legislative resolution.¹² Gulf complains that, by passing only 15 such resolutions in the preceding three years, the Legislature has limited relief to only the most rich and influential entities, and thereby taken private property from the others contracting with the State without due process or compensation. Gulf further asserts that there is no rational basis for the Legislature to have waived immunity from suit by statute only as against the University of Houston and the University of Texas at Tyler but not other state universities.

Gulf has not cited, and we are not aware of, any authority allowing us to review actions or inactions by the Legislature in any manner other than a party's challenge to the constitutionality of an enacted statute or urging of the adoption of a new common law remedy. As discussed in the preceding section, we decline to adopt a common law exception to overcome any failure by the Legislature to provide Gulf an adequate remedy in this case, and, as discussed in the following sections, we find no merit in Gulf's constitutional challenges. Accordingly, issue two is overruled.

Constitutional Claims

Taking Under United States Constitution

Gulf's third issue asserts that the dismissal of its action constituted a taking without just compensation, and, thus, a violation of the due process clause of the Fourteenth Amendment of the United States Constitution.¹³ Gulf argues that it had a valuable property interest in the contracts which the State has taken by enacting a legislative scheme which makes it impossible for Gulf, and others similarly situated, to obtain legislative relief for breach of the contracts.

The State's immunity from suit is, purely as a matter of sovereignty, impervious to due process concerns. *Fed. Sign v. Texas S. Univ.*, 951 S.W.2d 401, 411 (Tex. 1997). Moreover,

¹² See HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. H.B. 2741, 76th Leg., R. S. (1999).

¹³ See U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of property, without due process of law").

a party contracting with the State is not denied *all* process, or even *due* process, but only *judicial* process. *Id.* In addition, it is axiomatic that there can be no governmental taking from a citizen of something which the citizen never owned or possessed. The State’s immunity from suit for contract actions has been recognized by the Court since at least 1925. *See id. at 408.* Thus to whatever extent Gulf has a property interest in the contracts, that interest has always been subject to the State’s immunity from suit for any breach of the contracts. Because Gulf has never had a right to sue the State for breach of contract without its consent, no such right has been taken from it. Accordingly, it has suffered no deprivation of due process, and the due process challenge of its third issue is overruled.

Equal Protection

Gulf’s third issue also contends that its constitutional equal protection rights¹⁴ were violated when the Legislature arbitrarily decided to waive sovereign immunity for suits against the University of Houston and University of Texas at Tyler but not for similar suits against other state universities. Gulf claims that these laws purposefully and intentionally discriminate against persons and entities situated similarly to Gulf, without offering any rational basis for such discrimination.

Where a classification does not impinge on a fundamental right, or distinguish between persons on a suspect basis, such as race or national origin, the classification is valid as long as it is rationally related to a legitimate state purpose. *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 451 (Tex. 2000). Moreover, the State need not articulate its reasoning for the classification. *Bd. of Tr. of Univ. of Ala. v. Garrett*, 121 S.Ct. 955, 964 (2000). Rather, the burden is upon the challenging party to negate any reasonably conceivable state of facts that could provide a rational basis for the classification. *Id.*

In this case, Gulf questions what possible justification the Legislature could have had in consenting to suit against only two universities, but has wholly failed to negate any rational basis for that decision. Therefore, its equal protection challenge, and thus the remainder of its third issue, is overruled.

¹⁴ *See* U.S. CONST. amend. XIV, § 1 (“No State shall...deny to any person within its jurisdiction the equal protection of the laws”).

Open Courts

Gulf's fourth issue challenges the dismissal of its case on the ground that the legislative scheme for obtaining consent to sue violates the "open courts" provision of the Texas Constitution in that Gulf is precluded from recovering on its well-recognized common law breach of contract claim because the Legislature's consent to sue the State is impossible to obtain.

The Open Courts provision states that "[a]ll courts shall be open, and every person for any injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13. This means that the Legislature may not abrogate the right to assert a well-established common law cause of action. *Fed. Sign*, 951 S.W.2d at 410. However, the Open Courts provision "applies only to statutory restrictions of a cognizable common law cause of action." *Id.*

As noted above in discussing the third issue, Gulf's right to assert a common law cause of action for breach of contract against the State has always been subject to a requirement to obtain legislative consent. Therefore, it has never possessed a common law cause of action that did not include that requirement, and the legislative scheme for obtaining consent does not deprive it of any common law cause of action that it ever possessed. Accordingly, the open courts challenge in Gulf's fourth issue is overruled.

Taking Under Texas Constitution

Gulf's fourth issue further asserts that the dismissal of its takings claim under the Texas Constitution was erroneous because a waiver of sovereign immunity is not a prerequisite to assert that claim. For purposes of this issue, Gulf contends that the "taking" consisted of UT's refusal to pay the amount Gulf alleges it is due under the contracts.

The "takings clause" of the Texas Constitution provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person." TEX. CONST. art. I, § 17. Although sovereign immunity bars Gulf's breach-of-contract claims, the doctrine does not shield the State from an action for compensation under the takings clause. *Little-Tex*, 39

S.W.3d at 598. Whether particular facts are enough to constitute a taking is a question of law. *Id.*

A takings claim exists only if: (1) the State intentionally performed certain acts, (2) that resulted in a "taking" of property, (3) for public use. *Id.* The State does not have the requisite intent for a taking when it withholds property or money from an entity in a contract dispute. *Id.* at 598-99. Rather the State is acting within a color of right under the contract and not under its eminent domain powers. *Id.* at 599. In this case, because UT was acting under colorable contract rights in refusing to pay Gulf under the contracts, it lacked the requisite intent for that refusal to constitute a taking under the Texas Constitution. Accordingly, its takings challenge and fourth issue are overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed March 28, 2002.

Panel consists of Justices Yates, Edelman, and Wittig.¹⁵

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¹⁵ Senior Justice Don Wittig sitting by assignment.