

The image features a wooden gavel resting on a wooden surface, with a blurred Texas state flag in the background. The text is overlaid on the image in a white serif font.

Texas Supreme Court Update

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Statutory and Constitutional Interpretation: Legislative history and other commentary cannot be used to alter the meaning of plain, definite and unambiguous constitutional or statutory text,

Employment Law: Constitutional prohibition against reducing certain local government employee retirement only applies to accrued benefits, not to the formula for calculating future benefits.

[Texas Constitution article XVI](#), §66(d), generally provides that under certain circumstances “a change in [certain] benefits of a [local] retirement system may not reduce or otherwise impair benefits accrued by a person” The same section further specifies that “[b]enefits granted to a retiree or other annuitant ... in effect [when §66 became effective] may not be reduced or otherwise impaired. §66(e). The plaintiffs in [Eddington v. Dallas Police and Fire Pension System](#) sued alleging that a reduction in the guaranteed interest rate on a deferred retirement option plan violated these guarantees. This suit challenged the Fifth Circuit’s reasoning in [Van Houten v. City of Fort Worth](#), 827 F.3d 530 (5th Cir. 2016) that the “benefits” protected by §66 only included the accrued right to the payments themselves, not the formula by which future payments were calculated.

Writing for a unanimous court, Chief Justice Hecht agreed and ruled that the reducing future interest that would be paid under Dallas’s deferred retirement option plan did not violate article XVI, §66. The court’s analysis began with an overview of the dissatisfaction with the lack of protection for retirement benefits dating back to the Great Depression that culminated in the 2003 adoption of §66. Against this backdrop, the court predictably relied on the text of the provision itself to conclude that §66’s references to “benefits accrued” and “benefits granted” only protected the payments themselves as they fell due. It did not bind the pension plan in perpetuity to future payments for those who elected to participate in the plan while that previous formula was in effect.

The [Eddington](#) decision is another triumph of textualism over extrinsic commentary in determining the meaning of definite and unambiguous language. The opinion upheld the trial court’s refusal to consider evidence about what those who supported adoption of §66 intended when the constitutional amendment was being considered. Deeming the text of §66 plain and unambiguous, the opinion deemed it impermissible to consider evidence that the amendment’s sponsors may intended differently. The court also agreed with the Fifth Circuit that an Attorney General opinion that §66 protected both payment and formula was neither correct nor binding. Likewise, the court rejected the persuasive value of other states’ decisions supporting the plaintiffs’ arguments that similar provisions protected the formula, not just the amount of the payments due under the plan.

Sovereign Immunity from Suit: Nonprofit economic development corporations created under the Texas Development Corporation Act enjoy no sovereign immunity from suit.

The [Texas Development Corporation Act](#) (“TDCA”) empowers the state’s political subdivisions to create nonprofit development corporations to undertake projects to spur economic growth and reduce unemployment. The TDCA

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specifies that these development corporations are not political subdivisions and municipalities may delegate no sovereignty attributes to them. However, the TDCA mandates that these nonprofits be treated as a governmental unit entitled to the Tort Claims Act's protections limiting the waiver of immunity from liability for tort damages. Damages liability immunity can be waived if not pleaded affirmatively. Immunity from suit, in contrast, is jurisdictional and cannot be waived. A ruling on a governmental unit's plea of immunity from suit can be reviewed immediately by interlocutory appeal under [Texas Civil Practice & Remedies Code §51.014\(a\)\(8\)](#).

[Rosenberg Development Corp. v. Imperial Performing Arts, Inc.](#), arose from just such an interlocutory appeal. The case involved a contractual dispute arising from the planned development of a performing arts center. In *Rosenberg*, the court was asked to decide for the first time whether the development corporation enjoyed sovereign immunity from being sued altogether. Before reaching that question, however, the court first tackled whether the TDCA nonprofit was a "governmental unit" entitled to the interlocutory appeal allowed for entities that qualified as "governmental units" under the [Tort Claims Act](#). Though TDCA non-profits are not mentioned explicitly in the Tort Claims Act's definition of what is a "governmental unit," the Legislature specifically declared them as such in TDCA [§505.106\(b\)](#). Justice Guzman, who authored the opinion for the majority, was convinced of the development corporation's "governmental unit" status and entitled to pursue an interlocutory appeal.

The development corporation fared less well, however, when it came to whether it enjoyed sovereign immunity from suit. If the statute shows the Legislature intended for an entity to have "the 'nature, purposes, and powers' of an 'arm of the State government,' that entity is a government unit" entitled to assert immunity to extent it performs governmental functions. The opinion points out that the TDCA explicitly denies development corporations political subdivision status or "any ... attributes of sovereignty" and thereby concludes that this provision demonstrates the Legislature did not intend to make development corporations immune from suit. Merely serving a public purpose is not enough. The projects these entities undertake may "have a governmental flair, but not so uniquely or so definitively that only a governmental entity would engage in [them]."

Sovereign immunity is a judicial doctrine and its application is constrained by its underlying justifications and rationale, not simply legislative declaration. To be entitled to immunity from suit, the Legislature must grant the entity the responsibility for essential governmental functions and the governmental power necessary to perform it. In the TDCA, the Legislature did not do so and the development corporation was not immune from suit.

While joining the majority opinion, Chief Justice Hecht concurred separately to emphasize his view that the *tort* liability of development corporations – an issue not directly presented in *Rosenberg* – would necessarily arise from government functions. For those functions and any resulting *tort* liability, the development corporations would enjoy immunity from suit and liability except to the extent that the Tort Claims Act waives governmental immunity.

Interlocutory Appeals: The statute permitting an interlocutory appeal from an order denying a summary judgment motion based on the right of free expression authorizes the appellate court to review the entire order, not just the ruling relating to the right of free expression.

Defamation: Statements that are true or are non-verifiable matters of subjective opinion will not support a defamation claim.

After being discharged by the Dallas Symphony Ass'n ("DSA") a volunteer sued it for defamation and tortious interference with the volunteer's "day job" when he was fired shortly after publication of the allegedly defamatory statement of the reasons for the severance of the volunteer's relationship with the DSA. The DSA moved for summary judgment claiming that its statement was protected free speech. The trial court denied DSA's motion.

[Texas Civil Practice & Remedies Code §51.014\(a\)\(6\)](#) permits an appeal from "an interlocutory order" that "denies a motion for summary judgment ... [involving a defense by a member of the media] based in whole or in part ... arising under the free speech or free press clause[s] of the" state or federal constitutions or [Civil Practice and Remedies Code chapter 73](#). The court of appeals reversed the trial court's denial of the DSA's motion concerning the defamation claim, but denied consideration of the ruling on the tortious interference claim. The court of appeals ruled that §51.014 did not confer jurisdiction to entertain portions of the summary judgment order not based the free speech defense or other grounds enumerated in the statute.

Writing for a unanimous court, Chief Justice Hecht in [*Dallas Symphony Ass'n v. Reyes*](#) ruled that so long as the appeal was statutorily authorized for any part of the interlocutory order, the appellate court was vested with jurisdiction to address the *entire* order. The opinion begins by rejecting mantras such as “broad” or “strict” interpretation because the objective is to obtain a “fair” reading of the statute. The opinion acknowledges that interlocutory appeals have historically been disfavored and, therefore, disallowed unless clearly authorized. According to the opinion, however, the days of presumptions against allowing interlocutory appeals are over because “the statute has expanded [and] a fair reading [is required to] ... give effect to all its provisions.”

The opinion then analyzes the details of §51.014 to illustrate that both grammatical structure and summary judgment practice make clear that when an order was eligible for interlocutory appellate review, the entire order – not just the grounds that qualified it for interlocutory review – was subject to correction.

In this case, the “order” disposing of the summary judgment motion was actually two separate instruments. The opinion dismissed as “tortured” the argument that one order was reviewable while the other was not. After all, both orders were addressed to a single motion and the fair reading of §51.014 showed that it authorized review of the disposition of entire motions, not particular orders that both addressed that motion. Moreover, the factual underpinnings of the other claims were the same as those on which the defamation claim was based. The opinion did not indicate, however, that the outcome would have been any different if this had not been the case.

On the merits, there was no evidence that DSA willfully and intentionally interfered with the plaintiff’s job with his regular employer. DSA communicated with the employer for clarification of whether plaintiff was speaking privately or on behalf of the employer when plaintiff responded to the DSA’s public notice of plaintiff’s termination as a DSA volunteer. The opinion deemed this inquiry reasonable under the circumstances and no evidence of an effort to encourage the termination of plaintiff’s job with the employer. Because there was no tortious interference, DSA was entitled to take-nothing summary judgment on the employee’s claim that it conspired to tortiously interfere. Further, the opinion noted that all of the DSA’s allegedly defamatory statements were either true or non-verifiable matters of subjective opinion which fail to support a defamation claim.

Sovereign Immunity from Suit: When the governmental entity initiates litigation, it is not immune from suit on claims against it by opposing parties. The governmental entity is also not immune from suits to enforce settlement agreements if those agreements if the governmental entity was not immune from the underlying suit.

According to the plurality opinion in *Texas A&M University–Kingsville v. Lawson*, 87 S.W.3d 518, 522-23 (Tex. 2002), a governmental entity cannot assert immunity in a suit to enforce the settlement agreement if it was not immune from liability for the settled claim. In *Charles H. Hughes v. Tom Green County*, the court rejected attempts to distinguish *Lawson* and applied its rationale.

A benefactor left his home and book collection to the county for use as a branch library and bequeathed an oil and gas interest to SMU to endow a chair in its English Department. After the proceeds of these bequests accomplished these objectives these purposes, the beneficiaries, SMU and the county, sought to remove the use restrictions.

The benefactor’s heir joined the suit seeking instead to cancel the bequest and have the interest returned to the estate and its heirs. In the course of that litigation, the heirs and the county resolved their dispute by agreeing to share equally any proceeds obtained as a result of defeating SMU’s attempts to retain the bequest sans use restrictions. Under this agreement, the county promised to name the main library after the benefactor *if* the county’s recovery was “substantial enough.” Under the agreement, the county ultimately recovered \$500,000 from the SMU litigation’s settlement.

The county ultimately named the main library to honor a different benefactor who contributed six times the amount the county received under the agreement with the benefactor’s heirs. The trial court upheld the county’s jurisdictional plea based on governmental immunity. In overturning this ruling, the 6:3:0 majority opinion by Justice Devine began by describing the justification for governmental immunity. It prevents government from being so paralyzed by litigation that it must “abandon all but the bare essentials of a public government” unless the Legislature decides to allow resources to be shifted from intended purposes to defending lawsuits and paying judgments. These doctrinal justifications only apply, however, when the government is an unwilling litigant; not

when the government *initiates* litigation. When it does, the government must participate in the litigation process as an ordinary litigant so that the judiciary can apply justice even handedly.

When the county intervened in the SMU litigation to assert its claim under the will's residuary clause, it volunteered for the litigation and ceased to be immune from opposing claims under the holding in *Reata Construction Co. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006). Because there is no immunity when the government elects to prosecute its own claim, there is no immunity for the Legislature to waive. No statute required.

The opinion rejected efforts to distinguish *Lawson* on the ground that the agreement between the heirs and the county to share equally any proceeds was not a settlement because it did not finally resolve the dispute. The agreement conditionally resolved the dispute between the parties. Notwithstanding boilerplate that the agreement was not intended to "eliminate or reduce" the heirs' causes of action, the agreement was a "settlement" for purposes of *Lawson*. Of course, this ruling was redundant in light of the opinion's previous ruling that the county was a voluntary litigant who did not enjoy immunity on related claims.

Justice Boyd joined by Justices Lehrmann and Brown concurred in this result because they viewed *Reata* as irrelevant. They reasoned that *Reata* only applied to a counterclaim that offset a claim by the government. Here, the claims were not against the county, but rather was a competing *in rem* claim seeking to recover from the same "pot" as the county. In the view of the concurring Justices, there was never any question of governmental immunity.

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