

**ORAL ARGUMENT – 11/28/01**  
**01-0036**  
**TRAVIS CO. V. PELZEL**

CLARK: The court below incorrectly held that §89.004 of the Tex Local Gov't code absent any other waiver of immunity confers a right to sue Texas counties.

This court resolved the question in *Essenburg v. Dallas Co*, when it held the presentment statute is concerned with promoting settlement and is not a jurisdictional statute.

Since the *Essenburg* opinion, CA's in Houston, Eastland, Corpus Christi and Amarillo have held likewise.

HANKINSON: I understand *Essenburg* had two aspects to it. One saying that it was a notice statute. But to the extent that it said it was a jurisdictional statute, it wasn't addressing the question of subject matter jurisdiction in the context of a waiver of sovereign immunity. And subject matter jurisdiction can arise in numerous context. And there the question had to do with whether or not the exhaustion of administrative remedies was required for a court to guess jurisdiction. So *Essenburg* doesn't answer the question presented here. And that's not your position is it in terms of whether there's a waiver?

CLARK: There is no question that the *Essenburg* opinion does not address sovereign immunity. However, we think the holding below implicates a necessity that immunity from suit necessarily is a jurisdictional question. A subject matter jurisdictional question.

If you conduct a survey of the 150 years of jurisprudence dealing with this statute and its predecessors, what you will find uniformly is that in each case involving counties there has been some other basis for the court to have jurisdiction. Either in those cases the matter isn't discussed, or the courts may say this is may present a bar to the plaintiff's claim or it may not. But invariably there is some other basis apparent on the face of each of those cases.

The other basis generally concern issues of land, condemnation, trespass to \_\_\_\_\_ title, nuisance cases, statutorily required pay or constitutional required payments, warrants, where once a warrant is issued by a county it both represents the liability of the county, and consent to the claim, and finally counterclaims, where it's generally regarded that if a governmental entity pursues its own rights in court, then it will be subject to counterclaims.

Additionally, the clear and unambiguous waiver requirement is not met. And I might point out that this most recent legislature amended the Code Construction Act to codify that requirement. The language in this statute provides no discussion of immunity, and certainly cannot qualify under this court's precedent with regard to what language is sufficient to constitute a waiver.

HANKINSON: To what extent is there precedent that it's inconsistent with the position that we would take \_\_\_\_\_?

CLARK: I don't believe there is any except perhaps Jensen out of Dallas county. And I think the foundation of that case is very shaky indeed.

HANKINSON: So we would have to overrule part of Jensen if we rule in your favor \_\_\_\_\_?

CLARK: I think that Jensen has been largely overruled, and I think that may be why writ wasn't granted in that case, because the court did abrogate Boles(?) v. Wade(?) upon which it relied heavily on.

Obviously we think the history does indicate that the intent of the statute and where the courts have addressed \_\_\_\_\_ settlement and not infer jurisdiction. In 1896 in Presidio County v. Jeff Davis County, the court held that a condition precedent is intended to save taxpayers money and allow commissioners to pass on a claim and allow everything the plaintiff could obtain by a suit. Well our argument is supported by that in that we're saying a plaintiff may obtain what they could otherwise obtain by suit if allowance is made for waiver of sovereign immunity. In other words, this statute is clearly a condition precedent of going forward, but it's not a waiver of immunity.

HECHT: Assume that's right. What about whether you're liable under some other theory absence of the application of 2260, waiver by a conduct?

CLARK: 2260, we think, does show the legislature's intent to address the issue of waiver by conduct. And in fact, they specifically address that counties and other governmental entities would not be covered by this provision. So we think 1) they are clearly contemplating