

IN THE SUPREME COURT OF TEXAS

=====
No. 95-1014
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THE CITY OF TYLER, PETITIONER

v.

ADELINE LIKES, RESPONDENT

=====
ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE TWELFTH DISTRICT OF TEXAS
=====

Argued on September 3, 1996

JUSTICE SPECTOR, dissenting.

Today the majority holds that the City of Tyler is entitled to sovereign immunity from Adeline Likes's claims based on the negligent maintenance and operation of the City's storm sewers before 1986. Because this application of the Tort Claims Act violates the Texas Constitution's prohibition on retroactive laws, I dissent.

I.

As the majority recognizes, the operation of a municipality's storm sewers was a proprietary function for which a municipality could not claim a defense of sovereign immunity at common law. ___ S.W.2d at ___; *see Dilley v. City of Houston*, 222 S.W.2d 992, 995 (Tex. 1949); *see also City of Tyler v. Fowler Furniture*, 831 S.W.2d 399, 402 (Tex. App.--Tyler 1992, writ denied). In 1987, however, the Legislature exercised its express constitutional authority to reclassify a municipality's operation of storm sewers as a governmental function, effectively requiring a party damaged by a city's storm sewer operations to state a claim within the Tort Claims Act's waiver of immunity to obtain any recovery. *See* Act of June 16, 1987, 70th Leg., 1st C.S., ch. 2, § 3.02, 1987 Tex. Gen. Laws 37, 48 (codified at TEX. CIV. PRAC. & REM. CODE § 101.0215(a)(9)); TEX. CONST. art. XI, § 13. The 1987 legislation applies to suits filed after its effective date of September 2, 1987. Act of June 16, 1987, § 4.05(a), 1987 Tex. Gen. Laws at 51.

The flood that gave rise to Adeline Likes's suit occurred on April 5, 1986, over a year before the Legislature passed the reclassifying legislation. Likes filed this suit on March 31, 1988, within the limitations period for her claims but six months after the reclassifying legislation took effect. She argues that as applied to her suit, the Legislature's reclassification of the City's storm sewer operations as a governmental function within the scope of the City's sovereign immunity violates article I, section 16 of the Texas Constitution. I agree.

II.

Article I, section 16 of our Constitution provides, "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." A law is unconstitutionally retroactive if it takes away or impairs rights that have already accrued under existing laws. *See Railroad Comm'n v. Pend Oreille Oil & Gas Co.*, 817 S.W.2d 36, 47 (Tex. 1991); *McCain v. Yost*, 284 S.W.2d 898, 900 (Tex. 1955). A cause of action generally accrues at the time when facts come into existence that authorize a claimant to seek a judicial remedy. *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 100 (Tex. 1994).

Likes's cause of action vested on April 5, 1986, the date of Likes's injuries, when any right of action based on negligence accrued. *See Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 262 (Tex. 1994). Under the law in effect on that date, Likes could recover legally cognizable damages resulting from the City's negligence in constructing or maintaining its storm sewers. By expanding the City's sovereign immunity, however, the 1987 amendment barred all recovery for the property damages Likes allegedly sustained because of the City's negligence. The amendment did not simply affect Likes's remedy — it deprived her of her entire cause of action.

This Court has traditionally interpreted section 16 to forbid modification of the substantive rights of litigants whose claims or defenses have already accrued at the time a law is enacted, treating those claims or defenses as "vested" for purposes of article I, section 16. *See Cathey v. Weaver*, 242 S.W. 447, 453 (Tex. 1922) (holding that when the statute of limitations runs on a claim, the limitations defense vests and the Legislature may not retroactively lengthen the limitations period

for those claims); *Middleton v. Texas Power & Light Co.*, 185 S.W. 556, 560 (Tex. 1916) (holding that the worker's compensation sys-law rules to the extent that it did not interfere with vested property rights in accrued causes of action); *Mellinger v. City of Houston*, 3 S.W. 249, 253 (Tex. 1887) ("When . . . such a state of facts exists as the law declares shall entitle a plaintiff to relief in a court of justice . . . then it must be said that a right exists, has become fixed or vested, and is beyond the reach of retroactive legislation.").

Today, however, the Court holds that the 1987 amendment did not violate article I, section 16 because Likes had no vested right and had a reasonable time in which to assert her rights before the amendment took effect. The majority opinion disregards this Court's previous understanding of vested rights, and relies on cases holding that the Legislature can alter *non-vested* substantive rights or shorten the limitations period for an accrued cause of action without violating article I, section 16, if it gives the claimant a reasonable time to assert rights under the former law or if the amendment does not bar all remedy. ___ S.W.2d at ___ (citing *Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 649 (Tex. 1971); *Mellinger*, 3 S.W. at 254-55)). The majority notes that Likes had "more than two months" after the Legislature passed the amendment in which to file suit under the old law, and that the new law took effect seventeen months after Likes's claim accrued. ___ S.W.2d ___.

The 1987 amendment did not alter the statute of limitations for common law negligence claims or for the particular claims Likes asserts, but actually deprived Likes of a *vested* right in her cause of action. The precedent cited by the majority is thus inapposite. Even if that precedent did apply to the facts here, Likes reasonably relied on the two-year limitations period for her claims. *See* TEX. CIV. PRAC. & REM. CODE § 16.003. The two-and-a-half-month period after the governor signed the new law is not a reasonable time in which to expect Likes (who still had nine months to file her claim within the limitations period) to become aware of the amendment to the Tort Claims Act (which was previously irrelevant to her claims), realize that it could preclude her recovery from the City, and file her suit. A two-and-a-half-month period is the blink of an eye in relation to the nine-

year life of this lawsuit and far shorter than the periods this Court has previously found reasonable for purposes of article I, section 16. *See Wright*, 464 S.W.2d at 649 (nine-and-a-half years); *Boon v. Chamberlain*, 18 S.W. 655, 656 (Tex. 1891) (seven years). The 1987 amendment violated article I, section 16 as applied to Likes's cause of action.

The City argues that article XI, section 13 of the Texas Constitution exempts the reclassifying legislation from the constitutional prohibition on retroactive laws. Article XI, section 13, added in 1987, expressly authorizes the Legislature to modify the common-law rules governing the scope of sovereign immunity:

Sec. 13. (a) Notwithstanding any other provision of this constitution, the legislature may by law define for all purposes those functions that are to be considered governmental and those that are proprietary, including reclassifying a function's classification assigned under prior statute or common law.

(b) This section applies to laws enacted by the 70th Legislature, Regular Session, 1987, and to all subsequent regular or special sessions of the legislature.

TEX. CONST. art. XI, § 13. According to the City, the first clause in section 13(a), which protects the newly created legislative power from constitutional provisions that would otherwise stop the Legislature from altering the common-law boundaries of sovereign immunity, also goes so far as to place that power beyond the reach of general constitutional regulations on the process of lawmaking, such as the prohibition on retroactive laws.

The presumption against retroactivity is a strong and enduring principle in our legal tradition. *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1993); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Cox v. Robison*, 150 S.W. 1149, 1156 (Tex. 1912); *Grigsby v. Peak*, 57 Tex. 142, 144 (1882). This Court has always construed legislation and the Texas Constitution to operate prospectively absent a clear indication of legislative intent to the contrary, even when the Constitution would not otherwise prohibit a law from having retroactive effects. *See Coastal Indus. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916, 918 (Tex. 1978); *Government Personnel Mut. Life Ins. Co. v. Wear*, 251 S.W.2d 525, 529 (Tex. 1952); *State v.*

Humble Oil & Ref. Co., 169 S.W.2d 707, 708 (Tex. 1943); *Cox*, 150 S.W. at 1156; *Grigsby*, 57 Tex. at 144; *Piedmont & Arlington Life Ins. Co. v. Ray*, 50 Tex. 511, 519 (1878). The Legislature, too, has adopted the presumption against retroactivity in the Code Construction Act. TEX. GOV'T CODE § 311.022.

Article XI, section 13 does not expressly authorize the Legislature to change the substantive law in previously vested causes of action. The legislative history of section 13 indicates that this provision originated as a means to validate the reclassifying legislation in the face of a potential “open courts” challenge. *See, e.g.*, HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. S.J. Res. 26, 70th Leg., 1st C.S. (1987). Senator John Montford, the author of section 13, explained that unlike an earlier version which expressly applied to accrued causes of action, the provision ultimately added to our Constitution does not reach the is6, 1987) (tape available from Senate Staff Services Office). In short, there is no indication that Texans intended article XI, section 13 to authorize the Legislature to eliminate previously vested rights in the course of reclassifying certain municipal functions as governmental functions. I would therefore conclude that Likes is entitled to sue under the law in effect when her claims accrued.

III.

I do not believe that the Legislature could constitutionally amend the law of sovereign immunity to protect the City from liability for the event that gave rise to Likes’s suit. Instead of applying the Legislature’s after-the-fact extension of sovereign immunity to preclude Likes’s cause of action, I would allow her suit to proceed under the law in effect when her claims accrued. I dissent.

Rose Spector
Justice

OPINION DELIVERED: December 11, 1997