

breach-of-contract suits, wholly ignores established law that a suit for breach of a settlement agreement is independent of the settled claim, and erroneously concludes that the University may not assert immunity. Because the plurality defies precedent to impose a judicial waiver of sovereign immunity on an ordinary breach-of-contract claim, I respectfully dissent.

Lawson sued the University for allegedly violating the terms of a settlement agreement they executed to finally resolve Lawson's previous suit against the University for various wrongful termination claims. Although the contract at issue is a settlement agreement, the Legislature and this Court have clearly established that a settlement agreement is nevertheless a contract and is treated the same as any other written contract. *See* TEX. CIV. PRAC. & REM. CODE § 154.071(a) (“[A settlement] agreement is enforceable in the same manner as any other written contract.”); *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658-59 (Tex. 1996) (holding that a suit to enforce a settlement agreement is a separate breach-of-contract action). Lawson asserts only a claim for breach of contract, and he alleges that the University failed to satisfy its contractual obligations under the terms of the settlement agreement. He alleges no facts that differentiate his suit from an ordinary breach-of-contract claim for which the State retains its sovereign immunity. His only allegations concerning immunity are that the University waived immunity by entering and partially breaching the contract. But that does not waive sovereign immunity. *See Travis County v. Pelzel & Assocs., Inc.*, ___ S.W.3d ___, ___ (Tex. 2002); *see also Tex. Natural Res. Conservation Comm'n v. IT-Davy*, ___ S.W.3d ___, ___ (Tex. 2002). Accordingly, the University has sovereign immunity from Lawson's suit.

Despite this settled law, the plurality concludes that because the Legislature waived immunity for Lawson's Whistleblower Act claim in his wrongful termination suit, that waiver somehow applies to the current, independent breach-of-contract suit, for which the Legislature has not waived immunity. To reach its result, the plurality ignores well-established law that once the trial court's plenary jurisdiction expires, a suit to enforce a settlement agreement is a separate breach-of-contract action. *See Mantas*, 925 S.W.2d at 658-59. The claim must be proved as any other breach-of-contract claim, and is independent of the underlying claim, which the agreement necessarily supersedes. Here, the trial court did not expressly retain any continuing jurisdiction, and its plenary power over Lawson's wrongful termination suit had long expired. Thus, Lawson's suit for breach of the settlement agreement is independent of his wrongful termination claims.

The plurality frames the issue as being: "If a government entity agrees to settle a lawsuit from which it is not immune, can it claim immunity from suit for breach of the settlement agreement?" But that is not the issue presented in this case. Rather, the issue here is whether the State may assert sovereign immunity in an ordinary breach-of-contract case, and the answer to that question is decidedly "yes." Lawson asserted a breach-of-contract claim against the University, and the State has sovereign immunity on that claim. When Lawson settled, he traded in his wrongful termination claims for a settlement contract, and, in addition to accepting \$62,000, he accepted the risk that the State could assert immunity if it breached the contract, just as all people who contract with the State accept that risk. Although such a risk might discourage some parties from contracting with the State, that risk has not daunted the Court before. *See Pelzel*, ___ S.W.3d at ___; *IT-Davy*, ___ S.W.3d at ___; *Fed. Sign*, 951 S.W.2d at 408. Moreover,

those who settle for cash and receive payment before dismissing their suit take no risk that the State will assert immunity. Thus, contrary to the plurality's fears, only a handful of settlements in which the private party insists on executory provisions rather than only a cash settlement would be discouraged.

Rather than deferring to the Legislature to decide whether to waive sovereign immunity for claims asserting breaches of settlement agreements when immunity is waived on a settled claim, the plurality creates its own judicial waiver. The plurality claims that it is merely applying the Legislature's waiver of immunity on the Whistleblower Act claim, consistent with the Legislature's policy choices. But the plurality's extension of the waiver of sovereign immunity on the Whistleblower Act claim to the independent breach-of-contract claim does not satisfy the requirement that legislative consent to sue the State must be expressed in "clear and unambiguous language." *Pelzel*, ___ S.W.3d at ___; *Univ. of Tex. Med. Branch v. York*, 871 S.W.2d 175, 177 (Tex. 1994); *see also* TEX. GOV'T CODE § 311.034. If the Legislature intended the waiver of sovereign immunity to apply to settlement agreements for which sovereign immunity was waived on the underlying claim, it could say so expressly, but it has not. The Legislature has made a policy decision that government entities should not be immune from suit for Whistleblower Act violations, but the Legislature has not made such a policy choice for ordinary breach-of-contract claims such as Lawson's.

In grafting the Legislature's sovereign immunity waiver for the Whistleblower Act claim onto Lawson's independent breach-of-contract claim, the plurality disregards the fact that the conduct involved here — allegedly failing to represent that Lawson was employed as an assistant professor instead of an instructor — is different from that at issue in the wrongful termination suit and simply has nothing to do with

the Whistleblower Act. Indeed, the fact that the Court was not even informed that one of Lawson's claims in the wrongful termination suit was a Whistleblower Act claim until the University filed additional briefing after oral argument demonstrates the settled claims' irrelevance in determining whether immunity was waived in the current breach-of-contract suit.

This is nothing more than an ordinary contract dispute. Unless waived, the State retains its immunity from suit on a contract, whether the contract is for goods and services or a settlement agreement. We have repeatedly held that sovereign immunity in ordinary contract claims is an area best left to legislative judgment. *See York*, 871 S.W.2d at 177 (“[T]he waiver of governmental immunity is a matter addressed to the Legislature.”). Deference to the Legislature to determine sovereign immunity in ordinary breach-of-contract cases claiming waiver by conduct is founded on sound policy. *See Fed. Sign*, 951 S.W.2d at 413 (Hecht, J., concurring) (“There are compelling reasons for this Court to continue to defer to the Legislature.”). Yet today the plurality overrides those compelling reasons and concludes that although the Legislature has not chosen to waive sovereign immunity for this breach-of-contract claim, the University simply “may not” claim immunity in this case.

The plurality says, “Once the Legislature has decided to waive immunity for a class of claims, the inclusion of settlements within the waiver is consistent with that decision.” ___ S.W.3d at ___. The plurality makes this leap on faith alone, because it is certainly inconsistent with this Court's previous decisions. *See Pelzel*, ___ S.W.3d at ___ (“Express consent is required to show that immunity from suit has been waived. . . . The consent must be expressed by “clear and unambiguous language.”) (citing TEX. GOV'T CODE §

311.034 and *Fed. Sign*, 951 S.W.2d at 405, 408); *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001) (same).

I would apply settled law, hold that the Legislature has not waived immunity from suit for Lawson's breach-of-contract claim, and dismiss the case for want of jurisdiction. Accordingly, I dissent.

XAVIER RODRIGUEZ
JUSTICE

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