

08-19-00272-CV

No. 08-19-00272-CV

**IN THE COURT OF APPEALS FOR THE
EIGHTH JUDICIAL DISTRICT
EL PASO, TEXAS**

FILED IN
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EL PASO, TEXAS
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ELIZABETH G. FLORES
Clerk

MAX GROSSMAN,

Appellant,

v.

CITY OF EL PASO,

Appellee.

Consolidated Interlocutory Appeal arising out of the
384th Judicial District Court, El Paso County, Texas
Cause No. 2017-DCV2528

CITY OF EL PASO'S REPLY BRIEF

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REPLY SUPPORTING CROSS-POINT

I. Subject matter jurisdiction cannot be conceded.

Grossman's sole basis for contending the trial court has jurisdiction is §191.173(a) of the Antiquities Code (the "Statute") which he contends provides a waiver of governmental immunity. In his responsive brief, without citing any authority, Grossman first asserts that the City has conceded that the Statute waives governmental immunity. Appellee's Combined Reply and Cross Brief, at 24. In effect Grossman is arguing that the City is somehow barred by law from challenging subject-matter jurisdiction now because of the City's previous challenge of subject-matter jurisdiction made in an earlier stage of the case. Yet, Texas law plainly permits the City to dispute subject-matter jurisdiction at any time, which is why Grossman cites no authority for his contention.

Grossman references the City's prior pleadings and briefing related to an earlier interlocutory appeal in this case. The context of that earlier interlocutory appeal was different. Previously Grossman complained that the City had not given a particular notice to the Texas Historical Commission (the "THC") and the City argued it was not required to give the relevant notice at that time because it did not own the property related to the notice. While the earlier interlocutory appeal was pending, the City moved to dismiss the appeal because it had subsequently acquired

the relevant property and thereafter it gave the required notice to the THC mooting the issues in that appeal.

Neither subject-matter jurisdiction nor governmental immunity can be waived or conceded. Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel. *See Bustamante v. Miranda & Maldonado, P.C.*, 569 S.W.3d 852, 863 (Tex. App.—El Paso 2019, no pet.) (holding “subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel at any time.”). In fact, the City could have waited until this appeal to first raise governmental immunity. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 91 (Tex. 2012); *El Paso I.S.D. v. McIntyre*, 584 S.W.3d 185, 196 (Tex. App.—El Paso 2018, no pet.).

In 2019, the Austin Court of Appeals rendered its decision in *Grossman v. Wolfe*, 578 S.W.3d 250 (Tex. App.—Austin 2019, pet. denied), that the Statute does not waive governmental immunity. There is no bar to the City raising the issue of subject matter jurisdiction and governmental immunity before the trial court or in this appeal in reliance on that decision.

II. The Statute does not contain an express waiver of governmental immunity.

In order to waive immunity, a statute must do so clearly and unambiguously. *Bacon v. Tex. Historical Comm’n*, 411 S.W.2d 161, 171 (Tex. App.—Austin 2013, no pet.). If the Legislature intended the Statute to waive governmental immunity it would have done so clearly and unequivocally. *See Tex. Nat. Res. Conservation*

Comm'n v. IT-Davy, 74 S.W.3d 849, 854 (Tex. 2002). One need only compare the Statute with other statutes which have clear and unequivocal waivers to see that no waiver exists. *See* Tex. Nat. Res. Code Ann. § 33.171(a) (“[a] littoral owner whose rights may be affected by any action of the board under this chapter may bring suit for a declaratory judgment against the State of Texas in a district court in Travis County to try the issues”). No similar language is found in the Statute for a claim brought by a private citizen against the State of Texas or one of its political subdivisions. Grossman does not even argue that the Statute contains an express, clear and unambiguous waiver of immunity. Conceding that fact, he argues such a waiver should be implied. Appellee’s Combined Reply and Cross Brief, at 25.

III. Because the Statute is not meaningless without a waiver, there is no basis for implying a waiver of governmental immunity.

A waiver of governmental immunity may not be implied in this case because the Statute is not meaningless without one. Grossman acknowledges that under Texas law, a waiver of immunity will only be implied if a statute is meaningless without it; that is, where one can discern no other reasonable intent in a statute’s provisions. Appellee’s Combined Reply and Cross Brief, at 25. Yet as the City pointed out in its Brief on the Merits (at 45), many applications of the Statute do not involve an action against the State. The Antiquities Code applies throughout the State, and in no way limits its jurisdiction to governmental actors or to projects occurring on public land or for the benefit of governmental entities. Tex. Nat. Res.

Code Ann. §191.002. That is clear from a plain reading of provisions of the Antiquities Code which provide for enforcement actions against private individuals.¹ Tellingly, in his Combined Reply and Cross Brief, Grossman never addresses the issue of, or contests the fact that, the Statute has numerous applications that do not include an action against the State. Grossman’s argument is that the Statute would have broader application if a waiver of governmental immunity was implied. That, however, is not the relevant issue. A waiver is implied only if a statute would have no meaning without it. In this case, the Statute has applications and, therefore meaning, without an implied waiver, a fact Grossman does not contest. Therefore, there is no basis for implying a waiver under Texas law.

IV. The decision in *Grossman v. Wolfe* should be followed.

The Austin Court of Appeals held in *Grossman v. Wolfe* that the Statute does not contain a waiver of governmental immunity. 578 S.W.3d at 261. Grossman

¹ Section 191.093 makes all shipwrecks and their contents, including treasures imbedded in the earth, and all other historical artifacts that are found on land belonging to the State, or its political subdivisions, “the sole property of the State of Texas,” and prohibits their removal, altering, damaging, or excavating without a proper contract or permit from the Texas Historical Commission. State landmarks, regardless of whether they are located on private or public land, are protected and may not be “taken, altered, damaged, destroyed . . . or excavated” without a proper permit or in violation of the terms of an issued permit. *Id.* §191.095. The Antiquities Code also proscribes the defacing or damaging of certain artifacts, monuments, and historical structures, and of American Indian or aboriginal paintings, hieroglyphics, or other marks or carvings on rocks or elsewhere. *Id.* §§ 191.132 and 191.133.

urges this Court not to follow *Grossman v. Wolfe*—a case that he lost—by arguing that the opinion is based on “flawed reasoning” from another case. Appellee’s Combined Reply and Cross Brief, at 27. Yet it is Grossman’s reasoning that is flawed.

First, Grossman offers nothing new to this Court that was not presented to and carefully considered by the court in *Grossman v. Wolfe*. One need only review Grossman’s appellate brief filed in *Grossman v. Wolfe*, to see that he presents no new reason here to depart from that decision. See Grossman’s Brief of Appellant, filed in *Grossman v. Wolfe*.² The text in his prior brief mirrors what Grossman offers to this Court, beginning on page 24 of his Combined Reply and Cross Brief.

In *Grossman v. Wolfe*, the Austin Court of Appeals based its decision in part on the holding of *Bacon v. Texas Historical Commission*, which found no waiver of sovereign immunity under the Antiquities Code for a claim brought against the THC. *Bacon*, 411 S.W.3d 161, 179-180 (Tex. App.—Austin 2013, no pet.). Grossman criticizes the *Bacon* decision as “poorly reasoned,” but fails to articulate any problem with that opinion’s reasoning. Grossman also attempts to distinguish the application

² Brief of Appellant in 03-19-00002-CV, beginning at 22, available online at <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=57cf91de-e238-40b9-acdd-2cbe10793231&coa=coa03&DT=Brief&MediaID=9f3662fd-2835-4c2e-af03-4f4f4f310e17>.

of *Bacon* because it concerned a different statute. Appellee’s Combined Reply and Cross Brief at 27.

Bacon involved Tex. Gov’t Code Ann. §442.012(a), the enabling statute upon which the THC—the agency entrusted with enforcement of the Antiquities Code—is based, and which is practically a mirror image of the Statute, §191.173(a). As the *Grossman v. Wolfe* opinion correctly recognized, the statutory language that Grossman alleges to waive governmental immunity here is “virtually identical” to the statute in the Texas Government Code that *Bacon* held did not waive governmental immunity. 578 S.W.3d at 261.

Tex. Gov’t Code Ann. Section 442.012(a) reads:

The attorney general or any resident of this state may file suit in district court to restrain and enjoin a violation or threatened violation of this chapter or Chapter 191, Natural Resources Code, to recover on behalf of the state a civil penalty provided by this chapter, including a civil penalty provided for a violation of Chapter 191, Natural Resources Code, or for both injunctive relief and a civil penalty.

Tex. Nat. Res. Code Ann. §191.173(a) reads:

A citizen of the State of Texas may bring an action in any court of competent jurisdiction for restraining orders and injunctive relief to restrain and enjoin violations or threatened violations of this chapter, and for the return of items taken in violation of the provisions of this chapter.

The challenger in *Bacon* asserted the same type of citizenry claim which Grossman alleges here—i.e., the Antiquities Code, like the Government Code, confers jurisdiction upon Texas citizens to protect items of historical significance.

Bacon, 411 S.W.3d at 177. However, in *Bacon*, the court held that the grant of jurisdiction does not extend to claims against governmental entities. *Id.* at 179. Similarly, in *Grossman v. Wolfe*, the court held the Statute does not contain a waiver of governmental immunity. 578 S.W.3d at 261. As demonstrated above, there is no reason for this Court not to follow that holding.

V. Grossman’s claims are barred by governmental immunity because they are an attempt to control state action.

In its pleadings and in its argument at the hearing before the trial court, the City raised the fact that Grossman’s claims are an attempt to control state action and therefore are barred by governmental immunity. 7 CR 3738-41; 3 RR 99. Even if it had not done so, however, the issue could be raised for the first time on appeal because it concerns whether the trial court had subject matter jurisdiction. *See supra*, at 2.

Grossman argues the THC is not a party to this action and he claims he is asking nothing of the THC. Rather, he claims he wants the City to be ordered to require Moore (the City’s archeological consultant) to do additional research, revise its research design and revise its scope of work, and then finally proceed only under that revised scope of work. However, the Antiquities Code requires the City and Moore to act only in accordance with the Permit issued by the THC. In addition, the THC has already considered and rejected Grossman’s requests. The City and Moore have no alternative but to follow the decision of the THC. Grossman’s attempt to

require the City and Moore to do otherwise, regardless of how it is framed, is an effort to control state action, and is barred by governmental immunity.

PRAYER

WHEREFORE, the City requests that the Court affirm the trial court's denial of Grossman's request for a temporary injunction and reverse the trial court's decision denying the City's plea to the jurisdiction, and render judgment that Grossman's claims are dismissed in their entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Based on a word count run in Word 2010, this brief contains 2,018 words, excluding the portions of the brief exempt from the word count under Rule 9.4(i)(1).

/s/ Mark N. Osborn
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CERTIFICATE OF SERVICE

I certify that on February 27, 2020, a copy of the foregoing was delivered via the court's electronic efile service to the following:

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