Texas Appellate Courts Are Likely to Find Waivers of Sovereign Immunity of State Agencies in Anti-Retaliation Claims Under the State Applications Act

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I. INTRODUCTION

The State of Texas, its agencies, and political subdivisions enjoy immunity from suit and liability unless the Texas Legislature (“Legislature”) expressly waives sovereign immunity.1 The Texas Anti-Retaliation Law, found in Chapter 451 of the Texas Labor Code, forbids a person from discharging or otherwise discriminating against an employee who in good faith files a workers’ compensation claim.2 This law applies to private employers as well as the State’s agencies and political subdivisions.3 When an anti-retaliation claim is filed against a state agency, that agency does not have the same protection under Texas law to invoke sovereign immunity as does a municipality or other governmental subdivision, even though the two governmental entities are governed by similar statutes—the State Applications Act and the Political Subdivisions Law, respectively.4 This article will consider whether a state agency’s sovereign immunity is waived under the State Applications Act as a result of the Legislature’s 2001 enactment of Section 311.034 of the Code Construction Act. Section 311.034 requires a statute to contain clear and unambiguous language to effectuate a waiver.5 This article will

1 Kerrville State Hosp. v. Fernandez, 28 S.W.3d 1, 3 (Tex. 2000); City of LaPorte v. Barfield, 898 S.W.2d 288 (Tex. 1995).
2 Anti-Retaliation Law:
A person may not discharge or in any other manner discriminate against an employee because the employee has: (1) filed a workers’ compensation claim in good faith; (2) hired a lawyer to represent the employee in a claim; (3) instituted or caused to be instituted in a good faith a proceeding under Subtitle A; or (4) testified or is about to testify in a proceeding under Subtitle A. TEX. LAB. CODE ANN. §451 (West 2006).
3 See Fernandez, 28 S.W.3d at 4; Barfield, 898 S.W.2d at 295.
5 TEX. GOV’T CODE ANN. §311.034 (West Supp. 2011) (Section 311.034 of the Code Construction Act provides: In order to preserve the legislature’s interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language. In a statute, the use of “person,” as defined by Section 311.005 to include governmental
examine the issue by presenting information in the following order: Part II discusses the differences between sovereign immunity and governmental immunity as well as the historical background of the relevant sections of the Political Subdivisions Law, State Applications Act, and Code Construction Act. Next, Part III focuses on the analysis and discussion of the two principal cases (City of LaPorte v. Barfield and Kerrville State Hospital v. Fernandez). Finally, Part IV provides emphasis on two recent cases (Travis Central Appraisal District v. Norman and Texas Department of Aging and Disability Services v. Beltran) that raise the same controversial issue, which the Texas Supreme Court should consider, given the amended language of the Code Construction Act.

II. HISTORICAL BACKGROUND OF RELEVANT STATUTORY PROVISIONS

A. Common law concepts of sovereign immunity and governmental immunity

In 1847, the Texas Supreme Court held, “no State can be sued in her own courts without her consent, and then only in the manner indicated by that consent.” Sovereign immunity and governmental immunity are firmly established common-law doctrines, but Texas courts have traditionally been reticent and “deferred their waiver to the Legislature, assuming it to be ‘better suited to balance the conflicting policy issues associated with waiving immunity.'” The Legislature is never presumed to do a useless or foolish act. In Texas jurisprudence, “most sovereigns abandoned the fiction that governments and their officials can ‘do no wrong’”; therefore, Texas courts “have occasionally abrogated sovereign immunity by judicial decree.”

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6 Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 695 (Tex. 2003) (quoting Hosner v. De Young, 1 Tex. 764, 769 (1847)).
7 Norman, 342 S.W.3d at 54, 58 (quoting Taylor, 106 S.W.3d at 695).
9 Taylor, 106 S.W.3d at 695.
10 Id.
Although Texas courts often use the terms sovereign immunity and governmental immunity interchangeably to describe the two related common-law concepts, they provide protection to different types of governmental entities.\(^{11}\) Sovereign immunity protects the state and its divisions (e.g., agencies, boards, hospitals, and universities) from suit and liability for the performance of governmental functions, while governmental immunity provides protection to political subdivisions of the State, such as counties, cities, and school districts.\(^{12}\)

Moreover, governmental immunity and sovereign immunity involve two distinct principles: immunity from suit and immunity from liability.\(^{13}\) “First, the State retains immunity from suit, without legislative consent, even if the State’s liability is not disputed.”\(^{14}\) Put succinctly, immunity from suit “deprives a court of subject-matter jurisdiction while immunity from liability is an affirmative defense which cannot be raised by a plea to the jurisdiction.”\(^{15}\) As a result, immunity from suit “bars an action against the state unless the state expressly consents to the suit,”\(^{16}\) “even when the State acknowledges liability on a claim.”\(^{17}\) “Second, the State retains immunity from liability though the Legislature has granted consent to the suit.”\(^{18}\)

B. Texas Political Subdivisions Law

In 1973, the Legislature enacted the Political Subdivisions Law as chapter 504 of the Texas Labor Code, which required cities to provide workers compensation benefits to their employees. The Legislature later amended the Political Subdivisions Law in 1981 to adopt the Anti-Retaliation Law.\(^{19}\) The 1981 version of the Political Subdivisions Law waived political

\(^{11}\) Id. at 694.
\(^{12}\) Id.
\(^{13}\) Tex. Dep’t of Parks and Wildlife v. Miranda, 133 S.W.3d 217, 224 (Tex. 2004).
\(^{15}\) Beltran, 350 S.W.3d at 413.
\(^{16}\) Tex. Dep’t of Transp. V. Jones, 8 S.W.3d 636, 638 (Tex. 1999).
\(^{17}\) Beltran, 350 S.W.3d at 413.
\(^{18}\) Missouri Pac. R., 453 S.W.2d at 813.
\(^{19}\) Barfield, 898 S.W.2d at 295 (citing the 1981 Political Subdivisions Law which provides:
subdivisions’ governmental immunity in anti-retaliation claims inasmuch as the statute allowed for reinstatement and back pay. In 1989, the Legislature further amended the Political Subdivisions Law without substantive change. The 1989 version of the Political Subdivisions Law was recodified in the Labor Code in 1993. Both of the 1989 and 1993 revised versions included a new election-of-remedies provision, which provided, “a person may not bring an action for wrongful discharge under both [the Anti-Retaliation Law] and [the Whistleblower Act].” The Texas Supreme Court concluded, however, that the 1989 and 1993 versions of the Political Subdivisions Law did not waive governmental immunity for liability imposed by the Anti-Retaliation Law completely because the statute was subject to the limitations in the Tort

(a) The following laws as amended or as they may hereafter be amended are adopted except to the extent that they are inconsistent with this article: …(5) (the Anti-Retaliation Law), except that if the city provides by Charter or ordinance for ultimate access to the district court for wrongful discharge, [the Anti-Retaliation Law] is not applicable; …(b) Provided that whenever in the above adoption laws the words “association,” “subscriber,” or “employer,” or their equivalents appear, they shall be construed to and shall mean “a political subdivision.”

(TEX. LAB. CODE ANN. §§ 504.002-003 (Vernon 1996 & Supp. 2001)).

20 Barfield, 898 S.W.2d at 297.

21 Id. at 297-98 (citing the 1989 Political Subdivisions Law in pertinent part:

(a) The following provisions of the Texas Workers’ Compensation Act … are adopted except to the extent that they are inconsistent with this article.…

(b) Provided that whenever in the above adopted law the word “employer” appears, it shall be construed to and shall mean “a political subdivision.”

(c) (The Anti-Retaliation Law) is adopted except to the extent it is inconsistent with this article.

(d) A person may not bring an action for wrongful discharge under both (the Anti-Retaliation Law) and (the Whistleblower Act).

(e) Nothing in this Act or the Texas Workers’ Compensation Act … shall be construed to authorize causes of action or damages against a political subdivision or employee of a political subdivision beyond the actions and damages authorized by the Texas Tort Claims Act.…

(TEX. LAB. CODE ANN. § 504.002 (Vernon Supp. 2001)).

22 Barfield, 898 S.W.2d at 297-98 (providing the 1993 Political Subdivisions Law as follows:

Sec. 504.002. APPLICATION OF GENERAL WORKERS’ COMPENSTATION LAWS; LIMIT ON ACTIONS AND DAMAGES.

(a) The following provisions … apply to and are included in this chapter except to the extent that they are inconsistent with this chapter: …

(8) Chapter 451 (the Anti-Retaliation Law).

(b) For purpose of applying the provisions listed by Subsection (a) to this chapter, “employer” means “political subdivision.”

(c) Neither this chapter nor (the Workers’ Compensation Act) authorizes a cause of action or damages against a political subdivision or an employee of a political subdivision beyond the actions and damages authorized by (the Tort Claims Act).

Sec. 504.003. ELECTION OF REMEDIES. A person may not bring an action for wrongful discharge under both (the Anti-Retaliation Law) and (the Whistleblower Act).

(codified at TEX. LAB. CODE ANN. §§ 504.002-003 (Vernon 1996 & Supp. 2001)).

23 Barfield, 898 S.W.2d at 298.
Claims Act.\textsuperscript{24} Then in 2005, the Texas Supreme Court decided that the Political Subdivisions Law no longer clearly and unambiguously waived governmental immunity of the State’s political subdivisions because the Legislature added a non-waiver provision to the 2005 version of the law.\textsuperscript{25} In fact, the 2005 revised Political Subdivisions Law clearly and unambiguously preserves political subdivisions’ governmental immunity from liability in anti-retaliation claims.\textsuperscript{26}

\textbf{C. Texas State Applications Act}

At the same time, the State Applications Act (also known as chapter 501 of the Texas Labor Code), enacted in 1973, “is one of several statutes that require governmental entities to provide workers’ compensation insurance coverage to their employees.”\textsuperscript{27} The 1973 version of the statute did not waive immunity for anti-retaliation claims against state agencies because it had not imposed the requirements of the Anti-Retaliation Law on them.\textsuperscript{28} In 1981, however, the Legislature revised the State Applications Act to incorporate the Anti-Retaliation Law, and made it applicable to state agencies in anti-retaliation claims.\textsuperscript{29} The State Applications Act was again amended in 1989.\textsuperscript{30} Despite the limitations on damages contained in the Texas Tort Claims Act, the Texas Supreme Court concluded that the 1989 version of the State Applications Act waived

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\textsuperscript{24} Id.
\textsuperscript{25} \textit{Norman}, 342 S.W.3d at 58.
\textsuperscript{26} See id.
\textsuperscript{27} \textit{Fernandez}, 28 S.W.3d at 4.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id. (providing the 1989 State Applications Act as follows: (a) The following provisions of the Texas Workers’ Compensation Act … are adopted except to the extent that they are inconsistent with this Act: (1) Article 1, except the definition of “employee” under Section 1.03…..(b) (The Anti-Retaliation Law) is adopted except to the extent it is inconsistent with this article. For purposes of that Act, the individual agency shall be considered the employer. (c) Nothing in this Act or the Texas Workers’ Compensation Act … shall be construed to authorize causes of action or damages against the state or any agency, institution, board, department, commission, or employee of the state beyond the actions and damages authorized by the Texas Tort Claims Act…..(d) Wherever the word “insurer” or “employer” is used in the adopted law, the word “state,” “division” or “director,” whichever is applicable, is substituted for the purposes of this article. (codified at T\textsc{ex.} L\textsc{ab.} C\textsc{ode} A\textsc{nn.} § 501.002 (Vernon Supp. 2001)
agencies’ sovereign immunity completely in anti-retaliation claims because interpreting the statute otherwise would render it meaningless.31

D. Texas Code Construction Act

While the clear and unambiguous standard had been enunciated by the courts for years, the Legislature actually codified the clear language requirements to effectuate a waiver of sovereign immunity in 2001 in section 311.034 of the Code Construction Act, which provides:32

In order to preserve the legislature’s interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language. In a statute, the use of “person,” as defined by Section 311.005 to include governmental entities, does not indicate legislative intent to waive sovereign immunity unless the context of the statute indicates no other reasonable construction.33

In terms of clear and unambiguous, Texas courts had traditionally looked for “magic words” in order to evidence a waiver, such as “Governmental immunity to suit is waived and abolished only to the extent of the liability created by Subsection (B).”34 Texas courts subsequently changed their traditional interpretation of clear and unambiguous to the finding of legislative intent when a waiver was not clearly stated.35 Since the codification of Section 311.034 of the Government Code (also known as the Code Construction Act), the Texas Supreme Court has not addressed whether violations of the Anti-Retaliation Law, when applied through the State Applications Act, changes the manner in which the courts approach the meaning of the clear-and-unambiguous standard.36

III. PRINCIPAL CASES BEFORE THE LEGISLATURE ADDED SECTION 311.034

31 Id. at 5, 9.
35 Id. at 943.
A. *Barfield*: Political Subdivisions Law evidenced “reasonable intent” of a waiver of governmental immunity

In 1995, Texas Supreme Court considered, in the *Barfield* case, whether political subdivisions’ immunity from liability for their actions had been waived for violations of the Anti-Retaliation Law.\(^37\) The *Barfield* court decided the 1989 and 1993 versions of the Political Subdivisions Law waived governmental immunity from liability for actual damages as well as for reinstatement and back pay to the extent allowed by the Texas Tort Claims Act.\(^38\) The *Barfield* case illustrated how absent an explicit waiver of governmental immunity, the court nevertheless reached a waiver based on “reasonable intent” instead of the traditional “clear and unambiguous” waiver.\(^39\)

1. Case Background

In *Barfield*, William Barfield had been employed by the City of La Porte (“La Porte”) as a paint-and-body repairman.\(^40\) Barfield had suffered a work-related injury in 1983 and received workers’ compensation benefits for his claim.\(^41\) His injury was aggravated in 1986, and he again filed for workers’ compensation benefits.\(^42\) Fourteen months later, in early 1988, La Porte terminated his employment.\(^43\) As a result, Barfield sued La Porte for wrongful discharge; he asserted that La Porte had retaliated against him for filing a workers’ compensation claim.\(^44\) La Porte argued, on the other hand, “Barfield was terminated because he was permanently disabled from doing his job, and that he was employed under a contract which provided for termination in

\(^{37}\) *Barfield*, 898 S.W.2d at 290.
\(^{38}\) *Id.* at 298-99.
\(^{39}\) See *id.* at 297.
\(^{40}\) *Id.* at 290.
\(^{41}\) *Id.*
\(^{42}\) *Id.*
\(^{43}\) *Id.*
\(^{44}\) *Id.*
such circumstances.”

La Porte also argued it was protected from liability for such claims by governmental immunity because the hiring and firing of employees is a governmental function.

The trial court granted La Porte’s motion for summary judgment, but the court of appeals reversed, holding that immunity had been waived by the Political Subdivisions Law.

Likewise, Allen Ray Prince, whose case had been consolidated with Barfield’s, had been employed by the City of La Porte as a sewer lift-station operator. He, too, was injured in 1983 and filed for workers’ compensation benefits, which the La Porte’s carrier had denied. Before Prince was released to return to work, his department superintendent fired him on the basis of incapacity and misconduct toward other employees. Prince sued La Porte for discharge in retaliation for filing a workers’ compensation claim. The trial court rendered judgment against La Porte. A divided court of appeals affirmed, holding that La Porte’s immunity had been waived.

2. Barfield’s decision changed the traditional meaning of clear and unambiguous

Before analyzing the two cases from La Porte, the Texas Supreme Court explained, “a city is immune from liability for its governmental actions, unless that immunity is waived.” It is the Legislature’s prerogative to expressly waive governmental immunity by clear and unambiguous language. Thus, the court had to decide whether the Legislature had affirmatively, by clear and unambiguous language, waived municipal immunity for retaliatory

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45 Id. at 291.
46 Id.
47 Id.
48 Id.
49 Id.
50 Id.
51 Id.
52 Id.
53 Id.
54 Id.
55 See id.; also Fernandez, 28 S.W.3d at 3.
termination claims made in these cases; otherwise, La Porte was entitled to prevail.\textsuperscript{56} By clear and unambiguous language, the court was not simply looking for “magic words” leading to a waiver of immunity; rather, the court reasoned, “Legislative intent remains the polestar of statutory construction.”\textsuperscript{57} In addition, the court admonished, “the rule requiring a waiver of governmental immunity to be clear and unambiguous cannot be applied so rigidly that the almost certain intent of the Legislature is disregarded” because the Legislature seldom provides unmistakable language in a waiver.\textsuperscript{58} Thus, the court utilized cannons of construction to aid in construing an alleged waiver of governmental immunity.\textsuperscript{59}

3. \textit{Barfield}'s Anti-Retaliation Law analysis

In deciding \textit{Barfield}, the court began with the Anti-Retaliation Law. The Anti-Retaliation Law provides, “[a] person may not discharge or in any other way may discriminate against an employee.”\textsuperscript{60} Barfield and Prince contended the anti-retaliation statute waived governmental immunity because the word “person” included governmental entities.\textsuperscript{61} The court, however, examined the statute and concluded that since the Anti-Retaliation Law was originally passed in 1971, two years before cities were required to provide workers’ compensation insurance to employees, the Legislature could not have been intended to include governmental entities within the scope of the Anti-Retaliation Law.\textsuperscript{62} Moreover, the court conceded, “while the argument against including political subdivisions as ‘persons’ within the meaning of the 1971

\textsuperscript{56} \textit{Barfield}, 898 S.W.2d at 291.
\textsuperscript{57} See id.; Miller, \textit{supra} note 28, at 941.
\textsuperscript{58} \textit{Barfield}, 898 S.W.2d at 291.
\textsuperscript{59} See Texas Dept. of Aging and Disability Svcs. v. Beltran, 2010 WL 1986283, at *8 (Tex. App.—El Paso) (appellant’s brief); Miller, \textit{supra} note 28, at 959.
\textsuperscript{60} Tex. Lab. Code Ann. §451 (West 2006).
\textsuperscript{61} \textit{Barfield}, 898 S.W.2d at 293.
\textsuperscript{62} Id.
Anti-Retaliation Law is not conclusive, the argument for doing so does not approach the standard that a waiver of governmental immunity be clear and unambiguous.”

4. Barfield’s Code Construction Act analysis

The court then considered whether the Code Construction Act affected the application of the Anti-Retaliation Law to governmental entities. “The Code Construction Act, adopted by the Legislature in 1985, provide[d] that in codes adopted by the 60th or a subsequent Legislature, the word ‘person’ include[d] governmental entities.” The court, however, dismissed the possibility that the Anti-Retaliation Law could waive governmental immunity since the Legislature intended the recodification of the Anti-Retaliation Law to be “without substantive change.” As a result, the court reasoned to interpret the statute differently would constitute a “very significant change.”


The Texas Supreme Court next examined the 1981 version of the Political Subdivisions Law. Section 3 of the 1981 Political Subdivisions Law was ambiguous, as it did not authorize actions against governmental entities for violations of the Anti-Retaliation Law. Instead, section 3 adopted the Anti-Retaliation Law with a provision providing that a political subdivision should be interpreted to mean “employer” in the Anti-Retaliation Law. The critical problem with this provision is that the Anti-Retaliation Law does not mention or define “employer.”

63 Id.
64 Id. at 294.
65 Id. (explaining TEX. GOV’T CODE ANN. §§ 311.002, 311.005(2) (Vernon 1988) provides that the word “person” to include governmental entities).
66 Id.
67 Id.
68 Id. at 295.
69 Id.
70 Id.
71 Id.
Likewise, the operative word “person” in the Anti-Retaliation Law was not defined by section 3(b) to include political subdivisions. In short, the court concluded that section 3(b) of the 1981 version of the Political Subdivisions Law was insufficient to evidence a clear intent to waive immunity for violations of the Anti-Retaliation Law. Barfield and Prince, nevertheless, argued that section 3(b) of the 1981 version of the Political Subdivisions Law served no statutory purpose absent waiver of governmental immunity. Notwithstanding their argument, the court held that the adoption of a provision of one statute into another did not clearly and unambiguously waive immunity.

While Section 3(b) failed to express a waiver, the court was puzzled by section 3(a)(5) of the Political Subdivisions Law, which afforded relief available by “ultimate access to the district court for wrongful discharge.” The court discerned that this election-of-recourse was necessarily intended as a waiver of immunity because it illustrated the Legislature was contemplating that city employees would at least be entitled to a minimal remedy for wrongful discharge, such as reinstatement and back pay.


The court then analyzed the 1989 version of the Political Subdivisions Law, which had been recodified in 1993 as chapter 504 of the Labor Code. In particular, the 1989 and the 1993 revised versions of the Political Subdivisions Law had deleted the election-of-recourse provision and added choices of remedies between an action for a violation of the Anti-Retaliation Law and

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72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.* at 296.
76 *Id.*
77 *Id.* at 298.
an action for a violation of the Whistleblower Act. The court reasoned that by including the
election of remedies, the Legislature must have anticipated an action against political
subdivisions for violations of the Anti-Retaliation Law, because the Whistleblower Act barred
immunity. As such, the court concluded that the 1989 version of the statute, as recodified in
1993, unequivocally waived political subdivisions’ governmental immunity or the statute, as a
whole, would otherwise serve no purpose. In addition, the court was constrained to conclude
that the 1989 and 1993 versions of the Political Subdivisions Law did not waive governmental
immunity completely because the Legislature had added a provision that limited the amount of
damages authorized by the Texas Tort Claims Act.

B. Fernandez: State Applications Act waived sovereign immunity based on
“reasonableness,” not “clear and unambiguous language”

In 2000, two cases were consolidated in Fernandez on the issue of whether state agencies
were liable for violations of the Anti-Retaliation Law under the State Applications Act. The
Texas Supreme Court decided, in the Fernandez case, that the State Applications Act clearly and
unambiguously waived agencies’ sovereign immunity completely in anti-retaliation claims.
The court’s decision in Fernandez further demonstrated its departure from the traditional
meaning of “clear and unambiguous” to “reasonableness” in finding a waiver of sovereign
immunity.

1. Case Background

78 Id.
79 Id.
80 Id.
81 Id. at 298-99.
82 Fernandez, 28 S.W.3d at 2.
83 Id. at 9.
84 Id. at 14.
Rose Fernandez worked at Kerrville State Hospital (“Hospital”) as a nurse’s aide.\textsuperscript{85} She sustained on-the-job injuries and filed for workers’ compensation with the Texas Workers’ Compensation Commission (TWCC).\textsuperscript{86} On April 5, 1992, she received a lump-sum settlement of her workers’ compensation claim.\textsuperscript{87} On April 22, 1992, the Hospital terminated her employment because she failed to return to work with a full-duty release after the settlement.\textsuperscript{88} Fernandez filed a lawsuit against the Hospital, alleging that it had wrongfully discharged her in retaliation for filing a workers’ compensation claim.\textsuperscript{89} The trial court granted the Hospital’s plea to the jurisdiction based on sovereign immunity.\textsuperscript{90} The Fourth Court of Appeals reversed, holding that sections 15(b) and (c) of the State Applications Act waived the Hospital’s immunity.\textsuperscript{91}

Rogelio Gonzalez worked for the Texas Parks and Wildlife Department (“TP&W”). On July 27, 1990, he incurred serious injuries on his back, for which he sought medical attention.\textsuperscript{92} Gonzalez claimed he never did file a workers’ compensation claim because both times he requested permission from his superiors to do so, they either discouraged him not to or denied his request.\textsuperscript{93} On September 12, 1991, TP&W placed Gonzalez on leave without pay for one year and declined him light duty work altogether by February 1992.\textsuperscript{94} Gonzalez sued TP&W and one of his immediate supervisors, Hartnett; he asserted their retaliatory conduct had violated the

\textsuperscript{85} Id. at 2.  
\textsuperscript{86} Id.  
\textsuperscript{87} Id.  
\textsuperscript{88} Id.  
\textsuperscript{89} Id.  
\textsuperscript{90} Id.  
\textsuperscript{91} Id.  
\textsuperscript{92} Id. at 3.  
\textsuperscript{93} Id.  
\textsuperscript{94} Id.
Anti-Retaliation Law. The trial court severed the claims and rendered judgment in favor of the Department. On appeal, the Fourth Court of Appeals reversed the trial’s court decision.

2. Fernandez followed Barfield’s clear and unambiguous approach

The Fernandez court explained that agencies, like political subdivisions, are immune from liability in Texas unless the Legislature has explicitly waived that immunity. “The clear and unambiguous requirement is not an end in itself, but merely a method to guarantee that the courts adhere to legislative intent.” It was clear the Barfield court had departed from its traditional clear and unambiguous standard and was no longer seeking “magic words” that would entail an explicit waiver; rather a court “will not read statutory language to be pointless if it is reasonably susceptible of another construction.”

The Texas Supreme Court also clarified that the absence of the election-of-remedies and election-of-recourse provisions in the State Applications Act did not necessarily suggest the Legislature had lacked intent to waive state agencies’ immunity. Although some courts of appeals had interpreted the election-of-remedies and election-of-recourse in Barfield to be the dispositive factor, the Texas Supreme Court explained that doing so was inconsistent with the actual reasoning in Barfield— “[the court] could not ‘discern [any] sensible construction’ of those provisions unless immunity had been waived.” “Instead, both in Barfield and here, [the court] must look at whether a statute makes any sense if immunity is not waived.”

3. Fernandez: State Applications Act did not waive sovereign immunity when first enacted

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95 Id.
96 Id.
97 Id.
98 Id. at 2; accord Barfield, 898 S.W.2d at 291.
99 Fernandez, 28 S.W.3d at 2.
100 See id.; Miller, supra note 28, at 932-40.
101 Fernandez, 28 S.W.3d at 6.
102 Id.
103 Id.
When the State Applications Act was originally passed in 1973, it had not incorporated the Anti-Retaliation Law; a 1981 legislative amendment did incorporate it.\textsuperscript{104} Accordingly, the court held that the Legislature could not have intended for the State Applications Act to waive immunity for violations of the Anti-Retaliation Law.\textsuperscript{105} The State Applications Act was amended again in 1989.\textsuperscript{106} In particular, the court examined sections 15(b) and 15(c) of the 1989 version of the State Applications Act.\textsuperscript{107}

4. Court of appeals’ 1989 State Applications Act analysis

The Texas Supreme Court agreed with the court of appeals “that the mere incorporation of the Anti-Retaliation Law in the first sentence of Section 15(b) and the general definitions provision, Section 15(d), did not waive immunity.”\textsuperscript{108} The court of appeals, however, had stated that a waiver was explicitly intended by the language in the second sentence of Section 15(b) and Section 15(c) of the State Applications Act, which left the court of appeals with no other reasonable interpretation.\textsuperscript{109} The court of appeals in Fernandez had determined that Section 15(b) of the State Applications Act identified the individual agency, not the state as a whole, as the employer of a state employee.\textsuperscript{110} The court of appeals then had asked: “Why would the Legislature specify the proper defendant in an Anti-Retaliation Law suit if it did not intend to waive the covered state agencies’ immunity from this type of suit?”\textsuperscript{111} In addition, the court of appeals had asked: “If the Legislature did not intend to waive immunity to Anti-Retaliation suits, why would it have included [Section 15(c) to limit] an employee’s actions and damages to those

\textsuperscript{104} Id. at 4.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 5.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
contained in the Tort Claims Act?”

Therefore, the court of appeals had concluded it could not reasonably construe sections 15(b) and (c) to mean otherwise because doing so would render those two sections meaningless.

5. *Fernandez*: section 15(b) waived sovereign immunity completely

In an in-depth analysis, the Texas Supreme Court explained that section 15(b) did not merely incorporate the Anti-Retaliation Law, but the second sentence of section 15(b) provides “the individual agency shall be considered the employer.” Compared to the mere incorporation of one provision into another statute, as had occurred in the 1981 version of the Political Subdivisions Law in *Barfield*, the court held that section 15(b) presented a clearer expression of intent to waive immunity. Likewise, the court declared that section 15(b) evidenced axiomatic intent to waive immunity because section 15(b) contemplated that the individual agency could be a necessary party to an anti-retaliation suit. The court explained that the structure of the Anti-Retaliation Law supported this sensible inference because the Anti-Retaliation Law was intended to protect employees from being wrongfully discharged or otherwise retaliated against for filing a workers’ compensation claim. It was self-evident that the Anti-Retaliation Law applied to private employers, but the court found the State Applications Act is one of several statutes that also make the Anti-Retaliation Law applicable to governmental entities (e.g., the State and its divisions). The court declared that “an individual is only an ‘employee’ with respect to his employer.” Because the statutory language of section 15(b)
clearly indicated the individual agency was amenable to Anti-Retaliation Law claims, the court held section 15(b) waived state agencies’ immunity without limitations.120

6. Fernandez: Section 15(c) is not a clear expression of waiver

Relying on Barfield, the Texas Supreme Court concluded that section 15(c) of the State Applications Act, which mentioned the limitations under the Texas Tort Claims Act, was not a clear expression of waiver.121 In particular, the court compared section 15(c) of the State Applications Act to that of section 3(c) of the Political Subdivisions Law where the court stated “literal reading of that section would not allow an action under the Anti-Retaliation Law or, for that matter, under the Workers’ Compensation Act.”122 Nevertheless, the court did not overlook section 3(c) of the Political Subdivisions Law and held that section 15(c) of the State Applications Act, in accordance with Barfield, subjected state agencies to liability when they violated the Anti-Retaliation Law to the limits set forth in the Texas Tort Claims Act.123

7. Concurring and dissenting opinions

In a concurring opinion, Justice Owen pointed out while the majority was convinced the Legislature intended to waive sovereign immunity in the State Applications Act based on Section 15(b), “the dissent ably expose[d] the flaws in the Court’s reasoning today” because the court had previously decided in the Barfield case that the absence of an equation to show the word “employer” exists in the Anti-Retaliation Law is insufficient to demonstrate a waiver.124 As a result, Justice Owen explained the court’s ruling in Barfield could not be reconciled with its holding in this case.125

120 Id.
121 Id. at 9-10.
122 Id. at 9-10.
123 Id. at 10.
124 Id.
125 Id.
The dissent, likewise, argued that the Texas Supreme Court erred in ruling Section 504.002(b) of the Political Subdivisions Law (provides “‘employers’ means ‘political subdivision’”), as adopted in 1989, did not clearly and unambiguously waive governmental immunity while holding Section 15(b) of the State Applications Act (provides “individual agency shall be considered the employer”) clearly and unambiguously waived sovereign immunity, which is inconsistent with its decision in Barfield unless the court “[disavows] a part of the reasoning of Barfield.” In fact, the dissent explained that the Barfield court concluded that the Legislature intended to waive political subdivision’s governmental immunity based on the election-of-remedies provision, which the State Applications Act does not have. Moreover, the dissent was adamant that the requirement for a clear and unambiguous waiver of immunity is not hard to meet. “The Legislature routinely uses language that leaves no doubt about its intent to waive immunity.” For that reason, it was uncharacteristic for the court to lower the bar by holding that Section 15(b) of the State Applications Act waived immunity based on reasonableness for which the court would not otherwise hold in Barfield concerning section 504.002(b). As noted by the dissent, “[r]easonable’ is simply not the equivalent of ‘clear and unambiguous.’” The court also “has no right to tax words with meanings they cannot bear.”

IV. RECENT CASES AFTER THE LEGISLATURE HAD ADDED SECTION 311.034

A. Norman: 2005 version of the Political Subdivisions Law is “too internally inconsistent”

In 2005, the Texas Supreme Court revisited the issue whether political subdivisions’ governmental immunity was waived in anti-retaliation claims after the Legislature had added a
non-waiver provision to the Political Subdivisions Law. The court ruled the revised Political Subdivisions Law is “too internally inconsistent” to evidence an express waiver; therefore, the non-waiver provision preserved governmental immunity for the State’s political subdivisions in anti-retaliation claims. The Norman case illustrates that Texas courts will not necessarily retain a waiver when the Legislature acts in an ambiguous way.

1. Case Background

In Norman, Diane Lee Norman was employed by the Travis Central Appraisal District (“TCAD”) as a probationary employee in January 2006. She was terminated shortly after filing a workers’ compensation claim. Norman brought suit against TCAD, alleging TCAD had violated Chapter 451 of the Labor Code for retaliatory conduct against her for filing a workers’ compensation claim in. TCAD generally denied Norman’s allegations and moved for dismissal of the case. Both the trial court and the court of appeals conformed to the decision in Barfield; therefore, they denied TCAD’s motion to dismiss.

2. Norman’s 2005 Political Subdivisions Law analysis

In deciding this case, the court revisited its ruling in Barfield and held that Barfield was not the controlling authority in Norman due to a significant legislative amendment in 2005. The Anti-Retaliation Law, codified as Chapter 451 of the Labor Code, creates a cause of action against a “person” who wrongfully discharges an employee for filing a workers’ compensation

134 See id. at 59.
135 See id.
136 Id. at 55.
137 Id.
138 Id.
139 Id.
140 Id.
141 See id.
claim in good faith. Since the *Barfield* court concluded that Chapter 451 did not explicitly waive immunity against Anti-Retaliation Law claims, the court then considered the Code Construction Act in order to determine the meaning of the word “person” vis-à-vis to governmental entities. Nonetheless, the *Barfield* court had determined that the definition found in the Code Construction Act was inapplicable to the Anti-Retaliation Law because construing the statute to mean otherwise would go against legislative intent for a recodification to be “without substantive change.” When the court considered the 1981 and 1989 versions of the Political Subdivisions Law, it had held that the 1981 version authorized “at least a minimal remedy for wrongful discharge” while the 1989 version also clearly and unambiguously waived governmental immunity, but restricted to the limitations prescribed by the Tort Claims Act.

In 2005, the Legislature further complicated the Political Subdivisions Law by adding a provision that states, “Nothing in this chapter waives sovereign immunity or creates a new cause of action.” The court conceded that this “provision plainly purports to apply to the entire chapter,” and thus complicated the ruling in *Barfield*. Although the court had declared in *Barfield* that the Political Subdivisions Law had unequivocally waived governmental immunity for political subdivisions, the addition of the no-waiver provision clouded the entire chapter 451. As a result, the court held that the 2005 revised version of Political Subdivisions Law no longer waived governmental immunity for violations of the Anti-Retaliation Law because it “is too internally inconsistent to satisfy [the clear and unambiguous] standard.”

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142 See TEX. LAB. CODE ANN. § 451 (West 2006).
143 *Norman*, 342 S.W.3d at 56.
144 *Id.*
145 *Id.* at 57.
146 See TEX. LAB. CODE ANN. § 504.053 (West 2006).
147 *Norman*, 342 S.W.3d at 57.
148 *Id.* at 58.
149 *Id.* at 59.
The implication in *Norman* was that the Texas Supreme Court did not overrule its decision in *Barfield*, but rather it stated that *Barfield* was not controlling because it preceded the statutory amendment.\(^{150}\) In other words, *Norman* will be the controlling authority for all causes of action against governmental subdivisions arising after 2005, but grandfathers all causes of actions that arose prior to 2005—suggesting *Barfield* to be controlling.\(^{151}\) Undoubtedly, the Legislature could have removed the ambiguity by eliminating or changing the election-of-remedies provision. Instead, the Legislature added a non-waiver provision to represent its rejection of the *Barfield* court’s suggestion that the clear and unambiguous requirement can be met with reasonable legislative intent.\(^{152}\)

Furthermore, the issue with this holding is that the state should conform its immunity principles to its public policy priorities. If the state wants to allow private litigants to assist in enforcing the law through a whistleblower statute—or protect employees caught in a job where illegalities occur—the state should create a clear waiver of immunity for whistleblower cases, for example. Instead, Texas obsesses with immunity as if it were a freestanding question without policy implications and as if protecting units of government from suit and liability trumped all other public policy.

**B. Beltran: bound by stare decisis, courts of appeals have submitted to Texas Supreme Court’s decision in Fernandez**

Shortly after the Texas Supreme Court’s decision in *Norman*, the issue of whether an agency’s sovereign immunity is waived under the State Applications Act reemerged in the *Beltran* case.\(^{153}\) Although the court of appeals decided, in the *Beltran* case, that the State Applications Act waived sovereign immunity in line with the Texas Supreme Court’s ruling in

\(^{150}\) See id. at 55, 58.
\(^{151}\) See id.
\(^{152}\) Beltran, 2010 WL 1986283 at *10.
\(^{153}\) Beltran, 350 S.W.3d at 414.
Fernandez, the court of appeals noted that its decision was in adherence to the principle of *stare decisis*.154

1. Case Background

Rosa Maria Beltran (Beltran), an employee of the Texas Department of Aging and Disability Services (“DADS”) since 1990, claimed that she sustained on-the-job injuries and thereafter filed a workers’ compensation claim for her injuries.155 DADS terminated her employment in 2008, shortly after she had filed a claim.156 Beltran filed a lawsuit against DADS, alleging DADS’s conduct was retaliatory in violation of the Anti-Retaliation Law.157 DADS asserted entitlement to sovereign immunity and filed a plea to the jurisdiction on the basis that immunity had not been clearly and unambiguously waived.158 The trial court denied the DADS’s plea to the jurisdiction and DADS appealed.159

2. *DADS*’s appellate brief

In the appellant’s brief, DADS acknowledged that Texas jurisprudence has long recognized the Legislature decides the scope of any waiver of immunity by “clear and unambiguous language;” nevertheless, the court has found a waiver in some occasions when the language is not unmistakably clear, “suggesting that ‘[t]he rule requiring a waiver of governmental immunity to be clear and unambiguous cannot be applied so rigidly that the almost certain intent of the Legislature is disregarded.’”160

a. The Legislature’s directive in Section 311.034 is clear: sovereign immunity is waived only by clear and unambiguous statutory language

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154 Id. at 416.
155 Id. at 412.
156 Id.
157 Id.
158 Id.
159 Id.
160 Beltran, 2010 WL 1986283 at *5.
DADS argued that the codification of the clear and ambiguous requirement in Section 311.034 of the Texas Government Code should have resolved this legislative conundrum because specific statutory requirements should have preceded canons of construction.\(^\text{161}\)

“[Section 311.034] mandates that clear and unambiguous statutory language-not merely legislative intent-must be present in order for a statute to waive sovereign immunity.”\(^\text{162}\)

Specifically, DADS contended that the Texas Supreme Court’s application of the four “aids” in order to “guide [the Court’s] analysis in determining whether the Legislature has clearly and unambiguously waived sovereign immunity’ when the language of the statute is unclear” is inconsistent with the Code Construction Act.\(^\text{163}\) In light of the changing landscape of immunity law, DADS explained the first two factors contravene with the Legislature’s directive in Section 311.034, “the waiver is effected by clear and unambiguous language.”\(^\text{164}\) The first factor finds a “waiver when the provision in question would be meaningless unless immunity were waived,”\(^\text{165}\) suggesting that legislative intent, rather than statutory language, controls in discerning a waiver. The second factor, at the same time, “states that sometimes an ambiguous statute waives immunity: ‘when construing a statute that purportedly waives sovereign immunity, we generally resolved ambiguities by retaining immunity.’”\(^\text{166}\) DADS argued, under Section 311.034, the application of the second factor does not conform because “ambiguities in statutes should always be resolved in favor of retaining immunity.”\(^\text{167}\) DADS then stated that the last two factors might appear consistent with Section 311.034, even though they still ask courts

\(^{161}\) Id. at *6.

\(^{162}\) Id.

\(^{163}\) Id. at *7.

\(^{164}\) Id.

\(^{165}\) Id. (quoting Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 697 (Tex. 2003)).

\(^{166}\) Id. (quoting Wichita Falls, 106 S.W.3d at 697 with emphasis added).

\(^{167}\) Id.
to look beyond statutory language to determine a waiver. The third factor suggests that if the Legislature makes a state entity a necessary party to a lawsuit, then the Legislature has intentionally waived immunity (although immunity is not necessarily waived completely). Finally, the fourth factor suggests that if the statute requires an objective limitation (such as the Texas Tort Claims Act) on the State’s potential liability, the Legislature has waived immunity. DADS asserted that “neither of these two factors requires the clear and unambiguous language that the Legislature knows how to use, for example, ‘Sovereign immunity to suit is waived and abolished to the extent liability created by this chapter.’”

The crux of DADS’s argument was that despite the enactment of Section 311.034, the Texas Supreme Court has been applying the clear and unambiguous standard in contravention to the statutory mandate of section 311.034 that should have been controlling when interpreting purported waivers of immunity.

b. State Applications Act does not satisfy statutory clear and unambiguous language requirements

DADS also argued that the Fernandez court ultimately relied on legislative history in finding a waiver of sovereign immunity, which the later enacted Section 311.034 forecloses interpreting the State Applications Act as a waiver of immunity for Anti-Retaliation Law claims. In the Fernandez case, the Texas Supreme Court explained that Section 15(b) of the State Applications Act “is a clearer expression of intent than mere in corporation” simply because Section 15(b) identifies the agency as the employer. The dissent correctly pointed out that the court’s reasoning was flawed since the court had previously reached a different

168 Id.
169 Id.
170 Id.
171 Id. (quoting TEX. CIV. PRAC. & REM. CODE ANN. §101.025(a) (West 2011)).
172 See id. at *6-7.
173 Id. at *13-14.
174 Fernandez, 28 S.W.3d at 6.
While the *Fernandez* court had reached a conclusion that there is no significance in the Legislature’s use of “employer” rather than “person” in the State Applications Act, Section 311.034 clearly states the use of the word “person,” to include governmental entities, does not indicate a waiver of sovereign immunity. Hence, the designation of the word “employer” to mean “person,” vice versa, is insufficient and not indicative of a waiver of immunity under Section 311.034.

3. *Beltran*: enactment of Section 311.034 does not change the ruling in *Fernandez*

In *Beltran*, the issue before the court of appeals was whether DADS’s sovereign immunity had been clearly and unambiguously waived under the Anti-Retaliation Law and State Applications Act since the 2001 enactment of Section 311.034 of the Code Construction Act. Before delving into the discussion of that issue, the court set out waiver of sovereign immunity as follows:

The State of Texas and its agencies, such as [DADS], are immune from suit and from liability unless the Legislature expressly waives sovereign immunity. Consent to suit, which is pivotal to a waiver of sovereign immunity, must ordinarily rest in a constitutional provision or legislative enactment. When the text and history of a statute leaves room to doubt the Legislature’s intent to waive immunity from suit, we are less likely to find a waiver and will resolve any ambiguities by retaining immunity.

This case involved an amended statute, the 2001 revised version of the Code Construction Act, which codified the courts’ clear-and-unambiguous language requirement for waiver of sovereign immunity. The Code Construction Act provides that a waiver of sovereign immunity is only “effected by clear and unambiguous language.” Likewise, the

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175 See *id.* at 12-13.
177 *Id.*
178 *Beltran*, 350 S.W.3d at 412.
179 *Id.* at 413 (citations omitted).
180 See *id.*
181 TEX. GOV’T CODE ANN. § 311.034.
Code Construction Act specifies that the word “person” shall include “governmental entities,” and “does not indicate legislative intent to waive sovereign immunity unless the context of the statute indicates no other reasonable construction.”

Like *Fernandez*, the *Beltran* court questioned whether the Legislature clearly and unambiguously waived sovereign immunity concerning violations of the Anti-Retaliation Law as applied through the State Applications Act, only this time that the clear and unambiguous standard had been codified by the Legislature. The court clarified that although the Political Subdivisions Law and the State Applications Act are “kindred in origin,” they are not identical. The court reasoned that although the 1989 version of the State Applications Act was at issue in *Fernandez*, it had not been relevantly amended since to generate doubt as to its meaning. Additionally, the clear and unambiguous standard, as now codified in the Code Construction Act, is “merely a method to guarantee that courts adhere to legislative intent and that the doctrine should not be applied mechanically to defeat the true purpose of the law.”

Put simply, the Code Construction Act does not alter the manner in which the courts approach the clear and unambiguous standard—that is, if there are no traditional “magic words” to indicate a waiver then courts will supplement a sensible construction, rather than leave the statute to be rendered meaningless.

In any case, the El Paso Court of Appeals concluded that despite the enactment of Section 311.034 of the Code Construction Act, state agencies’ sovereign immunity had been waived under the State Applications Act. The court of appeals further explained that the Texas

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182 Id.
183 Id.
184 Id. at 416.
185 Id. at 415.
186 Id. at 414.
187 See *Fernandez*, 28 S.W.3d at 8; *Miller*, supra note 28, at 937; *Barfield*, 898 S.W.2d at 292.
188 *Beltran*, 350 S.W.3d at 416.
Supreme Court has not overruled *Fernandez* since the addition of Section 311.034; the doctrine of *stare decisis* does not place the court of appeals in the position to abolish or modify an established precedent.\(^{189}\)

V. CONCLUSION

In conclusion, Texas appellate courts are likely to find waivers of sovereign immunity of state agencies in anti-retaliation claims under the State Applications Act until the Texas Legislature provides a clear non-waiver provision in the State Applications Act. Despite the Legislature’s successive attempts to clarify what language must be present to waive immunity, the inconsistency in statutory drafting exacerbates the problem. Normal rules of construction dictate that a court should first look for the plain meaning of the statute and only resort to principles of construction when an ambiguity arises. While the overriding purpose is to give effect to legislative intent, the legislature is never presumed to perform a useless act. The courts that were struggling with the waiver question found themselves caught between the answer they got when they applied principles of construction versus the answer they got when they applied the legislature’s categorical rule rejecting a waiver of immunity absent the clear and unambiguous language. The Legislature could either draft statutes containing the magic language, or it could allow courts to do what they are institutionally competent to do, which is to interpret statutes. Had the Legislature wanted to remove the ambiguity in the Political Subdivision Law, it could have done so by eliminating or changing the election-of-remedies without adding a non-waiver provision. Rather, the Legislature added a non-waiver in the Political Subdivision Law, while leaving the election-of-remedies intact to show: 1) ambiguity in a statute is insufficient to evidence a waiver, and 2) the Legislature’s rejection of the *Barfield* court’s suggestion that the rule requiring a waiver of governmental to be clear and unambiguous

\(^{189}\) *Id.*
cannot be applied so rigidly. Likewise, the Legislature’s enactment of Section 311.034 suggests that it recognized the Texas Supreme Court had strayed from the traditional interpretation of clear and unambiguous standard. Therefore, the Texas Supreme Court should reconsider its holdings in *Barfield* and *Fernandez* in order to reconcile the fact that Section 311.034 is dispositive of legislative intent.