IN THE SUPREME COURT OF TEXAS

NO. 07-0284

CITY OF DALLAS, PETITIONER,

v.

KENNETH E. ALBERT ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

JUSTICE HECHT, joined by CHIEF JUSTICE JEFFERSON, concurring in part and dissenting in part.

I join in all but Part II-B of the Court's opinion.

In *Reata Construction Corp. v. City of Dallas*, we held that the government's immunity from suit on a claim for damages does not extend to a claim asserted as an offset to a claim on which the government itself has sued and that is "germane to, connected with and properly defensive to" the government's claim.[1] Thus, for example, when the government is sued for damages and asserts a counterclaim, it is not immune from the plaintiff's suit to the extent his claim is defensive and offsetting. The counterclaim does not waive immunity; that would contradict the rule that waiver of immunity is generally a legislative matter.[2] Rather, the assertion of the counterclaim gives the

[1] 197 S.W.3d 371, 377 (Tex. 2006).

[2] *Id.* at 375.

plaintiff's claim a different character; it becomes defensive and offsetting, when it was not before. In my view, when the counterclaim is nonsuited or lost, the plaintiff's claim is no longer defensive and offsetting and is therefore barred by immunity. Just as the assertion of the counterclaim gave the plaintiff's claim a different character, when the counterclaim is gone, the plaintiff's claim loses that character. Immunity is not "reinstated" — the word the Court uses. The government is simply not immune from suit on defensive, offsetting damage claims, but is immune from damage claims that are not defensive and offsetting.

The Court rejects this simple approach for two reasons. First, it argues, the government cannot create immunity by its own actions.[3] I agree. We have held, for example, that when the government is sued on a claim for which immunity is waived, it cannot gain immunity by settling and then refusing to perform its obligations under the settlement agreement.[4] But nonsuiting a counterclaim, thereby leaving the plaintiff with a claim that is non-defensive, does not create immunity. Suppose the plaintiff, too, nonsuits, then refiles the same claim. If his claim is not barred, then only the government's nonsuit has consequences. But if the plaintiff's claim is barred, as it surely is, it is not because he has re-created immunity by nonsuiting; it is because he does not have a defensive, offsetting claim.

The second reason the Court rejects my simple approach is that it offers "no benefit".[5] Even if the government is no longer immune from the plaintiff's suit after nonsuiting its counterclaim, the

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[3] *Ante* at ___.

[4] *Tex. A&M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002).

[5] *Ante* at ___.

most the plaintiff can achieve is an offset against the government's recovery, and the government no longer has a claim. Of course, as the Court notes, the government can assert immunity by a plea to the jurisdiction and immediately appeal an adverse ruling, and to defeat the plaintiff's claim on the merits, it must move for summary judgment and wait to appeal an adverse ruling until the end of the case. This, the Court admits, "might take a little longer . . . and result in more attorney's fees", but the government should lie in the bed it has made. Perhaps so, but that seems to me to be a policy choice the Legislature should make. There is, in fact, *some* benefit to the government in being relieved of the additional burden, as the Court itself admits.

The Court holds instead that the result of the government's nonsuiting a counterclaim is extremely convoluted. In this case, when the City filed a counterclaim to the officers' damage claims,

> each officer had two possible categories of money damages claims pending. The first category consisted of claims that would offset, in whole or in part, any recovery by the City and that were germane to, connected with, and properly defensive to the City's claims. The second category consisted of (1) claims for amounts over and above the amount that would offset the City's claim but were nevertheless germane to, connected with, and properly defensive to the City's claims; and (2) claims that were not germane to, connected with, or properly defensive to the City's claim. The City had immunity from suit as to both types of claims in the second category, but it did not have immunity from suit as to claims in the first category. Because the City did not have immunity from suit as to claims in the first category once it filed its counterclaim, it could not "reinstate" such immunity by nonsuiting.[6]

Maybe a chart will help. This, I think, illustrates the passage just quoted:

[6] *Ante* at ___.

		germane to, connected with, and properly defensive to counterclaim	
		YES	NO
OFFSETTING	YES	Category 1 no immunity	Category 2(2) immunity
	NO	Category 2(1) immunity	

In the Court's view, the City's dismissal of its counterclaim could not and did not alter these categories. So the City has lost its immunity from offsetting claims but retained it from non-offsetting claims. The problem is, with no counterclaim, there is no way to determine which of the plaintiffs' claims are offsetting and which are non-offsetting, because the counterclaim will never be adjudicated. The determination is important because the City can still assert immunity to non-offsetting claims by a plea to the jurisdiction and immediately appeal an adverse ruling. Since the determination is impossible to make, it is not clear whether the City can still assert immunity or is left to attack the officers' claims on the merits.

Immunity for Category 2(1) claims is critical to the Court's position. Its loss by nonsuiting the councerclaim would offend the rule that has driven the Court to this monstrosity in the first place: that the government cannot waive or create immunity by its litigation conduct. Yet the survival of such immunity makes the Court's position unworkable.

The Court seems intent on punishing the government for asserting and then nonsuiting a counterclaim, but this is a classic example of cutting off the nose to spite the face. There are now two different ways for the government to establish non-liability, one by assertion of immunity and the other by challenging the merits of the plaintiff's claim; two different vehicles for raising the issue; and two different kinds of appeals. Actually, there are probably now three different kinds of appellate review: immediate, interlocutory appeal, appeal from a final judgment, and mandamus, to substitute for the interlocutory appeal the Court has denied the government after the counterclaim is nonsuited. Let the litigation and confusion begin. Appellate courts running out of something to do will regard today's ruling as good news.

I repeat: when the government abandons or loses its claim, an opposing claim is no longer defensive and offsetting and should therefore be held to be barred by immunity, employing the usual procedures, just as if the counterclaim had not been asserted. From the Court's contrary view, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: August 26, 2011