

Piney Point Homes, LLC

v.

JP Morgan Chase Bank, N.A., et al.

Harris County District Clerk Marilyn
Burgess' Official-Capacity Plea to the
Jurisdiction and Motion to Dismiss

The District Clerk has no personal liability.

- (1) The clerk hasn't been sued in her personal capacity and has no personal connection to this case. There are no facts alleged to suggest she had anything to do with returning court registry funds to Berleth.
- (2) She was sued in her official capacity, which is actually a suit against the State. However, neither the State nor Harris County have been named.

There is no subject matter jurisdiction.

A trial court should determine at the earliest opportunity whether it has jurisdiction. A court does not have jurisdiction in cases against public entities or employees unless a plaintiff can prove the Legislature waived sovereign immunity in that type of case.

Tex. Dep't of Parks & Wildlife v. Miranda,
133 S.W.3d 217 (Tex. 2004).

Piney Point has three active claims:

(1) Chapter 117 of the Texas Local Government Code.
(Brief at 9-13; Reply Brief at 4-10.)

(2) Texas Civ. Prac. & Rem. Code § 7.001 & § 7.002.

(3) An *ultra vires* claim.

In 2001, the Legislature passed Tex. Gov't Code § 311.034 to require “magic words” to waive immunity.

The Legislature understood that some of its older statutes could be mistaken for waiving immunity so it passed Tex. Gov't Code § 311.034 to clarify that immunity is never waived unless the Legislature uses “magic words” to make its intentions clear and unambiguous.

In 2001, the Legislature passed Tex. Gov't Code § 311.034 to require “magic words” to waive immunity.

“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**. . . . Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.”

Three rules to analyze statutes for immunity:

- (1) A statute must waive immunity “beyond doubt.”
- (2) Any ambiguity requires a court to find no waiver of immunity.
- (3) If a statute waives immunity, it should also have “simultaneous measures to insulate public resources from the reach of judgment creditors” (objective cap on damages).

Wichita Falls State Hospital v. Taylor, 106 S.W.3d 692, 697 (Tex. 2003);
Tooke v. City of Mexica, 197 S.W.3d 325, 330 (Tex. 2006).


Examples of the “magic words” required to waive immunity:

(1) “Sovereign immunity to suit is waived” and


(2) A party “may file suit.”

Wichita Falls State Hospital v. Taylor,
106 S.W.3d 692, 696-697 (Tex. 2003).

Examples of objective damages caps.



The Texas Tort Claims Act waives immunity because it uses “magic language” and limits damages against counties to “\$100,000 per each single occurrence for injury to or destruction of property.”
Tex. Civ. Prac. & Rem. Code § 101.023.



Chapter 554 of Texas Government Code waives immunity because it uses “magic language” and limits recovery to \$250,000.

Chapter 117 of the Texas Local Government Code does not waive immunity or create a private right of action.

Piney Point contends § 117.124 waives immunity and allows it to sue simply because it says that a “clerk is responsible for... a loss of funds resulting from the clerk’s official misconduct, negligence, or misappropriation of the funds.”

But that’s not enough. The Government Code allocates “responsibility” throughout the government without giving plaintiffs the power to sue.

Piney Point admits Chapter 117 does not have the “magic words” needed to waive immunity.



Piney Point admits on page 5 of its Response: “there is no explicit language or ‘magic words’ waiving immunity from suit in Section 117.124...”



There is no “right to sue” language.



There is no objective cap on damages.



The Legislature later passed § 311.034 to prevent courts from mistakenly finding a waiver of immunity.

The Fourteenth Court of Appeals directly holds that Chapter 117 does not waive immunity or create a private right of action.

The language in Chapter 117 “does not mean that immunity from suit is waived.”

Scarver v. Waller County, 346 S.W.3d 212, 214 (Tex. App.—Houston [14th Dist.]).

Piney Point has three active claims:

(1) Chapter 117 of the Texas Local Government Code.

(2) Texas Civ. Prac. & Rem. Code § 7.001 & § 7.002.
(Brief at 14-16; Reply Brief at 11-12.)

(3) An *ultra vires* claim.

Civil Practices & Remedies Code §§ 7.001 & 7.002 do not waive immunity or create a cause of action in this case.

✘ Piney Point doesn't show that Burgess had any personal involvement with the transaction.

✘ Piney Point doesn't show that Burgess did something that the law "plainly enjoined" her from doing.

Civil Practices & Remedies Code §§ 7.001 & 7.002 do not waive immunity or create a cause of action in this case.

✘ Section 7.001 only applies when an officer “neglects or refuses to perform a duty.” Piney Point doesn’t allege that and doesn’t plead facts to overcome the strong presumption that officials do perform their duties.

✘ Section 7.001 also requires that the neglected duty arise “under the Texas Rules of Civil Procedure” or the Texas Civil Practices & Remedies Code. Piney Point doesn’t allege this either.

Piney Point has three active claims:

(1) Chapter 117 of the Texas Local Government Code.

(2) Texas Civ. Prac. & Rem. Code § 7.001 & § 7.002.
(Brief at 14-16; Reply Brief at 11-12.)

(3) *An ultra vires claim*
(Brief at 18-20; Reply Brief at 12-14.)

This is not an *ultra vires* claim.



Piney Point doesn't show that Burgess had any personal involvement with the transaction.



Piney Point doesn't show how the District Clerk's actions were in the "complete absence of any legal authority." The District Clerk's Office was presented with competing instructions and had a basis to honor Berleth's final notarized wiring instructions, which is *prima facie* evidence of the District Clerk's good faith.

This is not an *ultra vires* claim.



Piney Point doesn't plead how Burgess violated a ministerial duty. A ministerial duty must be defined "with such precision and certainty as to leave nothing to the exercise of discretion or judgment." Even when a statute tells an official to do something, the official often has discretion in how to do it. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653-54 (Tex. 1994).

Piney Point's petition never uses the word "ministerial" and admits the Clerk's duties were not clear because there were competing sets of wiring instructions, which Piney Point calls "*conflicting*" and containing "*glaring inconsistencies and irregularities.*" Piney Point asserts this "*should have given pause and concern.*"

This is not an *ultra vires* claim.



Piney Point pleads the opposite of the “precision and certainty” required for an *ultra vires* claim. *Phillips v. McNeill*, 635 S.W.3d at 628.



Can only be for future injunction — not money damages.

Example: If the District Clerk refused to accept a person’s filing without any basis, that might be *ultra vires*.

If there’s any doubt, an act is not *ultra vires*.