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City Estopped from Asserting Failure to Comply with Charter Requirement of Notice Due to Reasonable Reliance upon Conduct of Unauthorized City Officials.

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the legislative branch. Henceforth, individuals or groups seeking a judicial resolution of difficulties considered by them to be a result of administrative agency action will be faced with more strenuous requirements in pleadings and proof. Such increased demands will undoubtedly decrease the number of persons securing access to challenge agency actions; if so, the apparent goal of the Court would be accomplished.

Larry Hayes

MUNICIPAL CORPORATIONS—Notice of Tort Claim—City Estopped from Asserting Failure To Comply with Charter Requirement of Notice Due To Reasonable Reliance upon Conduct of Unauthorized City Officials

Roberts v. Haltom City,
543 S.W.2d 75 (Tex. 1976).

On May 3, 1973, Audrey Roberts sustained injuries when she tripped and fell on a street maintained by the municipal corporation of Haltom City. After a ten-day hospital visit, Mrs. Roberts began to inquire about recovering damages from the city for her injuries and contacted the offices of several city officials. The chief of police assured her that "everything would be taken care of," and the assistant to the city manager informed her that the responsibility rested with private contractors, not with the city. Mrs. Roberts subsequently discovered that the street work which led to her injury was performed by the city, not by an outside contractor. In the interim, however, the thirty-day period for written notice of tort claims, as set forth in the city charter,[1] expired. Despite failure to comply with the charter requirements, plaintiff filed suit against the city to recover damages for her injuries. The city moved for summary judgment asserting plaintiff's failure to comply with the written notice of claim provision. The trial court granted the motion,

1. The Haltom City charter provides in part:
Before the City shall be liable to damage claim or suit for personal injury or damage to property, the person who is injured or whose property is damaged, or someone in his behalf, *shall give the Mayor or the City Secretary notice in writing duly verified within thirty days after the occurring of the alleged injury* or damage, stating specifically in such notice when, where and how the injury or damage was sustained, and setting forth the extent of the injury or damage as accurately as possible, and giving the names and addresses of all witnesses and upon whose testimony such person is relying to establish the injury or damage.
Roberts v. Haltom City, 543 S.W.2d 75 (Tex. 1976) (emphasis added).

and the court of civil appeals affirmed.[2] On appeal plaintiff contended that the city was estopped by the conduct of its officials from asserting failure to comply with the notice of claim requirement.[3] Held—*Reversed and remanded.* A municipal corporation will be estopped from demanding compliance with a notice of claim requirement where officials, unauthorized by the city charter to receive notice of a tort claim, have, by their conduct, caused an injured party to reasonably rely on their representations and thereby dispense with the filing of written notice.[4]

The doctrine of governmental immunity from tort claims came under heavy attack by the American judiciary in the early 19th century, when the courts developed the distinction between governmental and proprietary functions in an attempt to mitigate the harshness of the immunity concept.[5] A city was no longer held to be immune from liability for the performance of proprietary functions,[6] but continued to be sheltered in the performance of governmental functions.[7] Both national and state legislatures have joined the judiciary in the general disdain for the inequities caused by sovereign immunity and as a result have enacted tort claim statutes[8] providing relief for the individual injured as a consequence of the performance of certain governmental functions.[9]

Notice of claim requirements are indicative of a municipality's attempt to restrict its tort liability.[10] Statutory notice of claim provisions generally set forth multiple requirements for written notice;[11] compliance is mandatory and

2. Roberts v. City of Haltom, 529 S.W.2d 296, 298 (Tex. Civ. App.—Fort Worth 1975), *rev'd*, 543 S.W.2d 75 (Tex. 1976).

3. Roberts v. Haltom City, 543 S.W.2d 75, 76 (Tex. 1976) (estoppel specifically claimed for the first time in motion for new trial).

4. *Id.* at 80.

5. Bailey v. Mayor of New York, 15 N.Y. 674, 677 (1842) (making early distinction between acts in the government and private sectors); *see* Greenhill & Murto, *Governmental Immunity*, 49 TEXAS L. REV. 462, 463 (1971).

6. Proprietary functions are those powers which are voluntarily assumed in order to provide private advantage for the locality and its inhabitants. *See* Smith v. City of Dallas, 78 S.W.2d 301, 304 (Tex. Civ. App.—El Paso 1935, no writ) (operation of public hospital a proprietary function).

7. Governmental functions are powers the purpose of which is essentially public. Smith v. City of Dallas, 78 S.W.2d 301, 304 (Tex. Civ. App.—El Paso 1935, no writ). *See generally* Greenhill & Murto, *Governmental Immunity*, 49 TEXAS L. REV. 462, 463 (1971) (police and fire protection).

8. Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1970), *as amended*, 28 U.S.C. § 2680 (Supp. V, 1975); TEX. REV. CIV. STAT. ANN. art. 6252-19 (1970), *as amended*, TEX. REV. CIV. STAT. ANN. art. 6252-19 (Supp. 1976). *See generally* 1A C. ANTIEAU, MUNICIPAL CORPORATION LAW §§ 11A.00-.13 (1974) (discussing tort claim legislation passed in numerous states).

9. The Texas Tort Claims Act provides waiver of immunity in three specific areas: Injuries resulting from conditions or use of tangible real or personal property, and motor vehicles used for public purpose. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 3 (Supp. 1976).

10. *See* note 1 *supra* and accompanying text.

11. Notice of claim provisions generally require that notice be given to a designated

is a condition precedent to the right of the injured party to bring an action.[12] Failure to file the required notice will deprive the party of his right to sue.[13]

The Texas Legislature has provided home rule municipal corporations with a statutory right to create rules and regulations governing the liability of the governmental unit for tort claims.[14] Traditionally, Texas has required strict compliance with notice provisions.[15] The current trend, however, has allowed substantial compliance to fulfill the notice of claim mandates, thus abrogating the obvious inequities which the requirement of strict compliance can create.[16]

In addition to substantial compliance, the courts have applied the legal doctrine of equitable estoppel to mitigate the harshness of notice requirements.[17] Estoppel is appropriate where municipal representatives lull the in-

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official, in a verified written instrument, within a specific time, period stating specifically when, how, and where the accident occurred. 18 E. McQUILLAN, MUNICIPAL CORPORATIONS § 53.164, at 593-94 (3d ed. rev. 1970). For example of such a charter see note 1 *supra*.

12. City of Terrell v. Howard, 130 Tex. 459, 460, 111 S.W.2d 692, 693 (1938); Phillips v. City of Abilene, 195 S.W.2d 147, 149 (Tex. Civ. App.—Eastland 1946, writ ref'd).

13. Brantley v. City of Dallas, 498 S.W.2d 452, 453 (Tex. Civ. App.—Eastland 1973, writ ref'd n.r.e.), *cert. denied*, 415 U.S. 983 (1974); Wagstaff v. City of Groves, 419 S.W.2d 441, 442 (Tex. Civ. App.—Beaumont 1967, writ ref'd n.r.e.); Phillips v. City of Abilene, 195 S.W.2d 147, 148-49 (Tex. Civ. App.—Eastland 1946, writ ref'd). *See generally* 1A C. ANTIEAU, MUNICIPAL CORPORATION LAW § 11.185, at 11-223 (1974).

14. TEX. REV. CIV. STAT. ANN. art. 1175 (1963), *as amended*, TEX. REV. CIV. STAT. ANN. art. 1175 (Supp. 1976). Texas law authorizes cities "to provide for the exemption from liability on account of any claim for any damages to any person or property, or to fix such rules and regulations governing the city's liability as may be deemed advisable." *Id.*

15. *See* City of Terrell v. Howard, 130 Tex. 459, 460, 111 S.W.2d 692, 693 (1938) (notice given 44 days after period elapsed); Phillips v. City of Abilene, 195 S.W.2d 147, 149 (Tex. Civ. App.—Eastland 1946, writ ref'd) (oral notice to designated official insufficient).

16. *See* Ostrewich v. City of Houston, 419 S.W.2d 247, 249 (Tex. Civ. App.—Houston [14th Dist.] 1967, no writ) (letter setting forth essential facts substantially complied with written notice requirement); City of Wichita Falls v. Williams, 342 S.W.2d 588, 589 (Tex. Civ. App.—Fort Worth 1961, no writ) (description of accident scene sufficient to enable city to locate defective water meter).

17. *See* Dias v. City of San Antonio, 488 S.W.2d 522, 523-24 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.); City of Denison v. Fulce, 437 S.W.2d 277, 284 (Tex. Civ. App.—Texarkana 1969, writ ref'd n.r.e.); City of Waco v. Thralls, 172 S.W.2d 142, 145 (Tex. Civ. App.—Waco 1943, writ ref'd w.o.m.). Another equitable device that is employed to avoid dismissing a tort claim for failure to comply with notice requirements is waiver. The right which may be intentionally or impliedly waived is the statutory right of the municipal corporation to demand literal compliance with notice of claim requirements. It is generally accepted that a municipal corporation may waive strict compliance with notice provisions, but such waiver must occur during the period prescribed for the filing of notice. City of Brownsville v. Galvan, 139 Tex. 128, 130, 162 S.W.2d 98, 100 (1942). The defense of waiver may not be validly raised if the party who allegedly relinquished the municipality's right to strict compliance with

jured party into a sense of security by leading him to believe that further action is unnecessary and thereby cause him to subsequently fail to comply with notice provisions. The application of equitable estoppel against a municipal corporation requires that there be conduct amounting to concealment or false representation of material facts, intention or expectation of reliance, and actual or constructive knowledge of the true facts.[18] Equitable estoppel has been applied in Texas against a municipal corporation where injustice would occur if the courts required strict compliance with notice of claim provisions.[19]

The injured party seeking to use estoppel as a defense must prove that he lacked knowledge or means to acquire knowledge of the questioned facts. He must also prove he relied upon the acts or conduct of municipal officials and suffered a prejudicial change in position because of such reasonable reliance.[20] Traditionally, Texas courts have not allowed estoppel as a defense where the misrepresentations leading to reasonable reliance have been made by an unauthorized agent of the municipality.[21]

In *Roberts v. Haltom City*,[22] however, the Texas Supreme Court reasoned that estoppel could be applied against a municipal corporation where an injured party was misled by officials of the city, even though such officials were unauthorized, if a reasonably prudent person would have so relied.[23] The city was estopped to assert the injured party's failure to comply with notice requirements where its unauthorized officials misled the plaintiff, thereby causing her to dispense with the filing of written notice.[24] Several equitable policies guided the court's decision. First, notice requirements may become traps for the unwary and produce harsh results.[25] In addition, the doctrine of estoppel is intended to prevent injustice.[26] Finally, the rule requiring authorization of municipal agents before estoppel applies is unjust because it permits cities to benefit from the misleading conduct of their unauthorized agents, thereby avoiding valid tort claims.[27] The rule developed by

notice requirements was not authorized to do so. City of Waco v. Thralls, 172 S.W.2d 142, 145 (Tex. Civ. App.—Waco 1943, writ ref'd w.o.m.).

18. Callahan v. Town of Middleton, 292 S.W.2d 501, 508 (Tenn. Ct. App. 1954), *discussed in* 2 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 16A.02, at 16A-6 (1973).

19. *See* cases cited note 17 *supra*.

20. *E.g.*, Board of County Comm'rs v. Snellgrove, 428 P.2d 272, 276 (Okla. 1967); Wheeler v. Brockmeier Co., 418 P.2d 693, 695 (Okla. 1966); Callahan v. Town of Middleton, 292 S.W.2d 501, 508 (Tenn. Ct. App. 1954).

21. City of Houston v. Hruska, 155 Tex. 139, 142, 283 S.W.2d 739, 741 (1955); Phillips v. City of Abilene, 195 S.W.2d 147, 150 (Tex. Civ. App.—Eastland 1946, writ ref'd); Hallman v. City of Pampa, 147 S.W.2d 543, 546 (Tex. Civ. App.—Amarillo 1941, writ ref'd).

22. Roberts v. Haltom City, 543 S.W.2d 75 (Tex. 1976).

23. *Id.* at 80.

24. *Id.* at 80.

25. *Id.* at 80.

26. *Id.* at 80.

27. *Id.* at 81.

the *Roberts* court from these premises was designed to allow a broader application of the equitable rule of estoppel in order to "curtail misuse of notice requirements."[28] Such misuse, the court reasoned, created "substantial obstacles to the assertion of damage claims against cities" that could not be "justified by the purposes that notice of claim requirements are intended to serve."[29]

The *Roberts* decision effectively overrules a previously accepted and uncriticized line of Texas cases which maintained the rule that a claimant may not depend upon the doctrine of equitable estoppel when he has relied upon the false representations of an unauthorized agent of the municipal corporation.[30] The court's adoption of the broader rule, however, extends the doctrine to acts of unauthorized city officials in order to prevent injustice through the misuse of notice requirements by the municipal corporation.[31]

Viewed from the standpoint of municipal tort liability claims, the *Roberts* decision constitutes a radical change. No longer will municipal corporations be able to assert the claimant's failure to give notice to designated city officials if the injured party claimant can meet the reasonably prudent man test.[32] If the claimant acted in a manner consistent with that test in relying on the false representations of the unauthorized agent, then he may successfully assert equitable estoppel against the municipality.[33]

The reasonably prudent man test is a less strenuous test of compliance than either strict or substantial compliance standards. The previous tests did not take into consideration the claimant's knowledge of notice requirements,[34] but instead the injured party was presumed to know the notice requirements and comply accordingly as a condition precedent to his right to sue.[35] The reasonably prudent man test, on the other hand, establishes the extent of knowledge required of each claimant and is the standard that is determinative of whether his reliance and consequent failure to comply with the notice provisions will entitle him to invoke the defense of equitable estoppel.[36] Each

28. *Id.* at 81.
29. *Id.* at 80-81.
30. *See* note 21 *supra* and accompanying text.
31. Roberts v. Haltom City, 543 S.W.2d 75, 81 (Tex. 1976).
32. The reasonably prudent man test is a basic torts concept. *See* Vaughn v. Menlove, 132 Eng. Rep. 490 (1837) (first case to adopt the test of a "reasonable man of ordinary prudence"); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 149-66 (4th ed. 1971).
33. Roberts v. Haltom City, 543 S.W.2d 75, 80 (Tex. 1976).
34. *Ignorantia legis neminem excusiat* is accepted in both courts of equity and law, otherwise "there would be no limit to the excuse of ignorance, no safety to society . . . ." Moreland v. Atchison, 19 Tex. 303, 308 (1857).
35. Brantley v. City of Dallas, 498 S.W.2d 452, 453 (Tex. Civ. App.—Eastland 1973, writ ref'd n.r.e.), *cert. denied*, 415 U.S. 983 (1974); Wagstaff v. City of Groves, 419 S.W.2d 441, 442 (Tex. Civ. App.—Beaumont 1967, writ ref'd n.r.e.).
36. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 157 (4th ed. 1971) (delineating standard of knowledge in reasonable prudent man test).

claimant's knowledge of notice of claim provisions must be compared with that of the reasonably prudent man. Presumably, if the reasonable prudent man would not know the notice requirements and would have relied upon the false representations of the unauthorized municipal officials, then so may the injured claimant. Obviously, such an objective test is more difficult to apply than the strict or substantial compliance standards.[37]

The extension of the reasonably prudent man criterion to compliance with written notice of claim ordinances may abrogate the requirements altogether. Mr. Justice Pope, dissenting in the *Roberts* case, reasoned that the court's adoption of this new rule of compliance eliminates the need for such ordinances.[38] Although such a view is undeniably broad, it is not without merit. Notice of claim requirements have been judicially disfavored in other jurisdictions,[39] but unlike those courts the *Roberts* court resorted to equitable rather than constitutional principles in reaching its conclusion.[40]

Whether or not the judiciary or the legislature is the proper branch to modify statutory notice provisions is a question which must be examined in determining the future validity of the reasonably prudent man test. Mr. Justice Pope states in his dissent in *Roberts* that the legislature created the notice rules and is therefore the proper body to develop rules such as the majority's reasonably prudent man test.[41] The legislative-judicial conflict raised by the dissent is not a novel concept to written notice of claim requirement disputes.[42] The trend indicates, however, that unless the Texas Legislature moves affirmatively to abrogate the harshness of notice of claim requirements the judiciary will, in cases similar to *Roberts*, continue to apply equitable remedies to prevent injustice through the misuse of notice rules.[43]

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37. *Id.* § 32, at 166 (application of the reasonable prudent man standard is as "wide as all human behavior").

38. Roberts v. Haltom City, 543 S.W.2d 75, 81 (Tex. 1976) (dissenting opinion). (dissenting opinion).

39. Reich v. State Highway Dep't, 194 N.W.2d 700, 703 (Mich. 1972) (equal protection); Turner v. Staggs, 510 P.2d 879, 882 (Nev. 1973), *cert. denied*, 414 U.S. 1079, 1082 (1974) (unconstitutional deprivation of equal protection). *See also* Note, *Notice of Claim Provisions: An Equal Protection Perspective*, 60 CORNELL L. REV. 417 (1975).

40. *See* Roberts v. Haltom City, 543 S.W.2d 75 (Tex. 1976).

41. *Id.* at 81.

42. *See* Greenhill, *Should Governmental Immunity for Torts Be Re-Examined, and, If So, By Whom?*, 31 TEX. B.J. 1036, 1069-70 (1968); Note, *Preserving Meritorious Claims Against Public Corporations: Easing the Harshness of Notice of Claim Requirements*, 3 HOFSTRA L. REV. 449, 450-52 (1975).

43. The judicial movement has been from the strict compliance standard of City of Terrell v. Howard, 130 Tex. 459, 464, 111 S.W.2d 692, 694 (1938), to the substantial compliance concept, Ostrewich v. City of Houston, 419 S.W.2d 247, 249 (Tex. Civ. App.—Houston [14th Dist.] 1967, no writ), and has culminated in the reasonably prudent man-equitable estoppel test of Roberts v. Haltom City, 543 S.W.2d 75, 81 (Tex. 1976).

The sweeping judicial extension of the equitable remedy of estoppel in the instant case[44] may prove too unwieldy when applied to tort claims against the larger municipalities of Texas. The new rule allowing an unauthorized agent to bind the city upon estoppel if the claimant meets the reasonably prudent man test could effectively prolong claims for indefinite periods of time.[45] Additionally, the practical effect of the new rule is to eliminate the need, and probably the purposes, for such written notice requirements.[46] While the designated officials of a municipality as small as Haltom City will likely learn of a claim actually or constructively in a short time due to the small number of municipal officials, it is conceivable that in a large municipality the designated officials might never learn of the claim until suit is filed. Therefore, the population of the city may be an important factor in determining whether the reasonably prudent man test practically eliminates the necessity for compliance with notice requirements.

The *Roberts* court has developed a broad new rule of law to determine municipal tort liability. The total import of the decision will become evident in subsequent cases where the rule may create an extended controversy based on a rationale similar to that advocated by the dissent, calling for legislative relief.[47] In spite of the potential problems advanced by the *Roberts* decision, it signals an advancement of legal thinking in Texas to a position of actively attacking the remaining vestiges of sovereign immunity—vestiges which are exemplified in notice of claim requirements that have been unjustly utilized by municipal corporations to avoid valid claims, thereby producing inequitably harsh results.

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44. Roberts v. Haltom City, 543 S.W.2d 75, 81 (Tex. 1976).
45. *Id.* at 81 (dissenting opinion).
46. *Id.* at 81 (needs for written notice); *see* notes 16-18 *supra* and accompanying text (discussing purposes for written notice).
47. Roberts v. Haltom City, 543 S.W.2d 75, 81 (1976) (dissenting opinion).