JOINT ENTERPRISE LIABILITY
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CHAPTER 13

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ARTICLES & PRESENTATIONS

A Bank's Right to Offset after Service of Writ of Garnishment - A Reconciliation of San Filepe National Bank v. Canton, 54 Tex. Bar Journal 368 (1991)
Dallas Bar Association Legal Ethics Opinion No. 1991-2, Dallas Bar Association Headnotes, Vol. 15, No. 5 pp. 12-13 (May 1991) (dealing with lawyers tape recording telephone conversations)

The Ability to Practice Law Pro Hac Vice in the State Courts of Texas, 56 Tex. Bar Journal 348 (1993)

When Plaintiffs Sue for Excessive Force - How to Get Out of Court Quickly, 36 Municipal Attorney 6 (1995); republished, 44 Texas Police Journal 14 (1996)

Interlocutory Appeals in State and Federal Court, Texas City Attorneys Association, Semi-Annual Conference, South Padre Island, June 12-13, 1998

Defending Federal Tort Claims, Texas Public Risk Managers Association, Grapevine, March 12, 1999

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JOINT ENTERPRISE LIABILITY

By trying, we can easily learn to endure adversity.
Another man's, I mean.
Mark Twain, Following the Equator, 1897, vol. 2, ch. 3

I. THE INTRODUCTION

Three years ago, the Texas Supreme Court held for the first time in *Texas Dep't of Transp. v. Able*, 35 S.W.3d 608, 610 (Tex. 2000) that a non-negligent governmental entity could be subject to liability for a joint enterprise claim. The purpose of this article is, very simply, to explain the current status and to clarify the recent developments regarding joint enterprise liability against governmental entities. The article also discusses current ways to defend against joint enterprise claims. Appropriately interspersed throughout the article is the wit and wisdom, by topic, of the great American philosopher Samuel Langhorne Clemens better known as Mark Twain.

II. THE BACKGROUND

JUSTICE: *In this world the real penalty, the sharp one, the lasting one, never falls otherwise than on the wrong person.* – attributed to Mark Twain, Neider, Autobiography, 1959, ch. 39.

To better understand the claim of joint enterprise, it is first important to understand the foundation and parameters of the claim. The current Texas joint enterprise analysis draws from a somewhat murky and muddled past. Texas courts have often used the terms "joint enterprise" and "joint venture" in the same context, although they relate to different situations. As an example of this confusion, two courts of appeals have stated that "(i)f a joint venture exists, one joint venturer has the authority to bind other joint venturers by contract made in furtherance of the joint enterprise." *Ely v. Gen. Motors Corp.*, 927 S.W.2d 774, 779 n.4 (Tex. App. – Texarakana 1996, writ denied), *quoting*, *R.L. Lipsey Inc. v. Panama-Williams Inc.*, 611 S.W.2d 917, 920 (Tex. Civ. App. – Houston [14th Dist.] 1981, writ ref'd n.r.e.). *See also, St. Joseph Hospital v. Wolff*, 999 S.W.2d 579, 590 (Tex. App. – Austin 1999), *rev'd on other grounds*, 94 S.W.3d 513 (Tex. 2002)(noting that "(i)"n *Drennan*, the [Amarillo] court of appeals analyzed allegations of a joint enterprise by mistakenly applying the elements of a joint venture."). The doctrines of partnership, joint venture, and joint enterprise are closely related and those doctrines spring from the roots of partnership law. *Shoemaker v. Estate of Whistler*, 513 S.W.2d 10, 14 (Tex. 1974). The *Shoemaker* court described the distinction between a partnership, a joint venture, and a joint enterprise as follows:

> By way of history, we know that the law of partnership and principles of agency serves a foundation for the doctrine of joint enterprise. A step away from partnership is joint venture, a concept that is generally more limited in time and in purpose than a partnership. While a joint venture encompasses fewer objectives than a partnership, both exist in a business or commercial setting. Joint enterprise, which may be considered a third stage of development, is an (sic) unique creation of American jurisprudence. American courts have applied this doctrine almost solely in the field of automobile law; in interpreting joint enterprise, some courts have retained the business character of joint venture as a requirement, while others have manifested a broader view of the doctrine. The pecuniary interest requirement has been most often imposed in the context of imputed contributory negligence and it has been said that this is the direction toward which the courts are tending to move.

Shoemaker, 513 S.W.32d at 16. After making this distinction, the *Shoemaker* court went on to adopt the commercial characterization of joint enterprise set forth in the Restatement (Second) of Torts, effectively limiting the traditional broad application of joint enterprise liability to enterprises having a business or pecuniary purpose. *Id.* at 17.

III. THE SEMINAL CASE

IGNORANCE: *His ignorance covered the whole earth like a blanket, and there was hardly a hole in it anywhere.* – Attributed to Mark Twain, DeVoto, Mark Twain in Eruption, 1940, p. 180

Against this backdrop, almost out of nowhere, came Texas Dep't of Transp. v. Able, 35 S.W.3d 608, 610 (Tex. 2000). For the first time, the Supreme Court in Able addressed whether a governmental entity, normally entitled to sovereign immunity from suit and liability, could be held liable for the torts of another entity based simply on a claim of joint enterprise.

A. The Facts

Dr. Luke Able and his wife were traveling outbound from Houston in a high occupancy vehicle (HOV) lane on Highway 290. *Texas Dep't of Transp. v. Able*, 35 S.W.3d 608, 610 (Tex. 2000). They collided head-on with a pickup truck driven by Jerry Huebner, which was traveling along the HOV lane in the wrong direction and with no headlights on. Mrs.

members of a joint enterprise because the State generally has a superior right of control over its political subdivisions and TxDOT had a superior right of control over Metro. *Id.* at 619-620. Finally, the dissent concluded that the State had no pecuniary interest in the common purpose of a venture:

> In the case before the Court today, the purpose of the Operations and Maintenance Agreement is to provide streets and highways for the citizens of Houston and of this State. While the State and Metro spend millions of dollars providing that service, they have no pecuniary interest in the purpose of the enterprise. They do not provide the service in order to benefit financially. They are providing a core governmental function. Their public service is no different from the public service that was at issue in *Shoemaker*, which was a civil air patrol. *Id.* at 620.

IV. THE ELEMENTS

REASONING: *Man is the reasoning animal. Such is the claim. I think it is open to dispute.* – Mark Twain, The Lowest Animal, 1897 essay

Prior to and since *Able* was decided, the appellate courts have expounded on and interpreted the elements of a joint enterprise. Element-by-element, these decisions will be reviewed, with special emphasis given to the elements that were most contested in the *Able* decision – the community of pecuniary interest and the equal right of control.

1. An Agreement

The Fort Worth court of appeals addressed the first element, the required "agreement", in *Fuller v. Flanagan*, 468 S.W.2d 171, 176 (Tex. Civ. App. – Fort Worth 1971, writ ref'd n.r.e.). The *Fuller* case involved the attempted use of the joint enterprise doctrine to prevent the plaintiffs/ passengers in an automobile collision from recovering by imputing the driver's negligence to them. The court, in interpreting the doctrine of joint enterprise, noted that "(t)he 'joint enterprise' doctrine is ex contractu. It must be based on an agreement, either express or implied." *Id.* at 176. While this case is pre-*Shoemaker* in its application of the joint enterprise elements, the *Shoemaker* court retained this requirement of an agreement for joint enterprise liability when setting the new standard in this area of law. Because this first element is an extremely straightforward element (it is usually not difficult to ascertain whether an agreement exists or not), few cases have devoted much time to this element of the doctrine. The first element is satisfied if the court can examine the evidence and find that the parties' relationship was based on some express or implied agreement, a fairly simple standard to satisfy.

2. A Common Purpose

The second element, the common purpose element, was discussed in *Blount v. Bordens*, 892 S.W.2d 932 (Tex. App. – Houston [1st Dist.] 1994), *rev'd on other grounds*, 910 S.W.2d 931 (Tex. 1995). The *Blount* case involved a fatal traffic accident where the joint enterprise doctrine was again used by a defendant to prevent the plaintiffs from recovering because of the imputed negligence of a driver. The court, in discussing the requirements for a joint enterprise, noted that a required "element of joint enterprise is that there be 'a common purpose to be carried out by the group.'" *Id.* at 942. The court then found that the parties to the alleged joint enterprise had a common purpose, which was to pick up and deliver racehorses.

Again, like the agreement requirement, there is little discussion in Texas case law about the common purpose requirement. The reason for this lack of coverage is that the common purpose is often the foundation of the alleged joint enterprise relationship. A common purpose is usually what drives two parties to work together. The cases in this area arise because two parties agree to pursue the same course of action together – thus the agreement and common purpose requirements are met. The trouble in interpreting the joint enterprise relationship arises with the last two requirements.

3. An equal right of control

The equal right of control is an essential element of a joint enterprise. *See Triplex Communications Inc. v. Riley*, 900 S.W.2d 716 (Tex. 1995). The equal-right-to-control element of a joint enterprise means "that each [participant] must have an authoritative voice or, ... must have some voice and right to be heard." *Shoemaker v. Estate of Whistler*, 513 S.W.2d at 15. Properly, the inquiry is not whether the government had a right to control the entire enterprise, but whether the government had the right to control the specific culpable act. The Supreme Court addressed whether to take a shotgun approach or a rifle approach to joint enterprise claims in *Triplex Communications Inc. v. Riley*, 900 S.W.2d 716, 718 (Tex. 1995), a case involving two police officers who were injured by a drunk driver. The police officers sued both the bar at which the driver had been served an excessive amount of alcohol and the radio station that collaborated with the bar on a promotional event at the bar, arguing the radio station should be held liable under the joint enterprise doctrine. The radio station and the bar had worked closely together one night every week for a

In *Blount v. Bordens Inc.*, 910 S.W.2d 931 (Tex. 1995), the Supreme Court analyzed the community of pecuniary interest element. *Blount* involved a wrongful death action arising out of an automobile accident that occurred while the plaintiffs' decedents were returning to Texas with racehorses from New Mexico. The jury found that the decedents had been involved in a joint enterprise, and thus, all of the plaintiffs' claims were barred because of the imputed liability. In determining whether the relationship satisfied the requirements for joint enterprise liability, the Court noted:

The Defendants offered the following testimony by Blount's father as evidence of Blount's pecuniary interest in the [car trip]:

> Q (by defense counsel): The trip that [Blount] was going on with [the other decent], as I understand it, was to go get some racehorses and bring them back to town. Is that right?
> A (by Blount's father): That's – excuse me. That's what I understood.
> Q: Did [Blount] give you the indication that when he would be back, that he would be able to pay some bills?
> * * *
> A: [H]e did have an insurance payment coming up on his car, and I was concerned about him being able to make that payment. And he told me, he said, "Daddy, I'll be able to take care of that when I get back."

Id. at 933. The Supreme Court held that "this evidence constitutes no evidence of a community of pecuniary interest," and thus, there was no joint enterprise.

No requirement to show sharing of profits and losses. Although the Supreme Court has required the plaintiff to demonstrate a community of pecuniary interest, the sharing of profits and losses is not listed as one of the essential elements of a joint enterprise. *Blackburn v. Columbia Medical Center of Arlington*, 58 S.W.3d 263, 273 (Tex. App. – Fort Worth 2001, no pet.). While the sharing of profits and losses is an essential element of a joint venture, *Coastal Plains Dev. Corp. v. Micrea Inc.*, 572 S.W.2d 285, 287 (Tex. 1978), a joint enterprise is not the same as a joint venture and is not governed by the same rules applicable to joint ventures. *Blackburn*, 58 S.W.3d at 273. The Supreme Court has established a separate set of elements for joint enterprise that are similar to, but different from, the elements of a joint venture.[1] Sharing of profits and losses is not listed as one of the essential elements of joint enterprise. The court of appeals decision in *Able*, affirmed by the Supreme Court, noted that "the elements required to establish a joint enterprise, as distinguished from a joint venture, do not require proof of the sharing of profits and losses." *TxDOT v. Able*, 981 S.W.2d 765, 769 (Tex. App. – Houston [1st Dist.] 1998), *aff'd*, 35 S.W.3d 608 (Tex. 2000). While there may be no agreement between the defendants to share profits and losses, the lack of such an agreement is not fatal to the theory of joint enterprise and does not preclude suit against a governmental entity as a matter of law. *Blackburn*, 58 S.W.3d at 274.

Independent contractors cannot be part of a joint enterprise. In *TxDOT v. City of Floresville Electric Power & Light System*, 53 S.W.3d 447 (Tex. App. – San Antonio 2001, no pet.), the San Antonio court of appeals held that TxDOT could not be liable to indemnify an independent contractor for negligence under a theory of joint enterprise liability. As background, TxDOT had entered into a contract with Payne Electronic Service Company ("PES") which agreed to perform maintenance repairs on TxDOT traffic signals in multiple Texas counties. PES was paid by the number of poles it completed. The contract provided the PES was an independent contractor of TxDOT. A PES employee was electrocuted when the City of Floresville Electric Light & Power System ("FELPS") was not notified that work was to be performed on the power line and failed to de-energize the power line. The representative of the decedent's minor son sued FELPS, which filed a cross-claim for indemnity against TxDOT. On interlocutory appeal, the San Antonio court of appeals distinguished the Supreme Court's decision in *Able*:

> In *Able*, the Texas Supreme Court relied upon evidence that the state highway had been a joint effort between Metro and TxDOT using federal, state, and local funds. The project involved substantial sums of money and contemplated a sharing of resources in order to make better use of the money. The evidence demonstrated a substantial economic gain from the pooling of resources through monetary and personnel savings.
>
> In the instant case, TxDOT hired PES to perform maintenance on its traffic signal poles. PES was paid by the number of poles it completed. There was no pooling of resources or pooling of efforts. TxDOT

[1] To establish a joint enture, a party must establish (1) a community of interest in the venture; (2) an agreement to share profits; (3) an agreement to share losses; and (4) a mutual right of control or management of the enterprise. *Coastal Plains Dev. Corp. v. Micrea Inc.*, 572 S.W.2d 285, 287 (Tex. 1978); *Blackburn*, 58 S.W.3d at 273.

(Tex. Civ. App. – Waco 1979, no writ);*Gendreau v. Medical Arts Hosp.*, 54 S.W.3d 877, 878 (Tex. App. – Eastland 2001 , pet. denied); *City of Dallas v. Reatta Construction*, 83 S.W.3d 392, 399 (Tex. App. – Dallas 2002, pet. pending). Indeed, this principle was set forth in Texas law nearly 150 years ago. *Rose v. Governor*, 24 Tex. 496, 504 (Tex. 1859). And ambiguities in a statute are generally resolved by retaining immunity. *Wichita Falls State Hospital v. Taylor*, 2002 WL 32029019 at *3.

The Supreme Court in *Able* for the first time found a waiver of immunity for joint enterprise claims. The waiver was clear and unequivocal, said the Supreme Court, because the Tort Claims Act § 101.021(2) "makes no exception for joint enterprise liability." *Able*, 35 S.W.3d at 616. Not one word in Section 101.021(2) mentions a waiver of immunity for joint enterprise claims. If the Legislature had intended to waive immunity in the Tort Claims Act for joint enterprise claims, it certainly could have drafted the statute to so indicate. It did not. There is no indication in the Tort Claims Act that immunity is waived for joint enterprise claims. The phrase "joint enterprise" is nowhere to be found in the Tort Claims Act. Reduced to its simplest form, the *Able* court holds that Section 101.021(2) is an implied waiver of immunity for joint enterprise claims. Not only does this conclusion contradict nearly 150 years of Supreme Court precedent, but it violates the Texas Legislature's recent codification that waivers of immunity must be clear and unambiguous. It could be argued that the *Able* decision conflicts with the more recent codification of Texas Government Code § 311.034, and the codification is controlling on the issue. Otherwise, in allowing claimants to sue for joint enterprise liability the courts necessarily have to find an express waiver of immunity by *sheer implication*.

VI. THE PURSUIT OF SUMMARY JUDGMENT

FACTS: Get your facts first, and then you can distort them as much as you please. Quoted in Kipling, Sea to Shining Sea, 1899 Letter 37

Whether the elements of a joint enterprise exist is frequently a question for the jury. The Restatement 2d of Torts § 491 cmt. c (1965); *St. Joseph Hospital v. Wolff*, 94 S.W.3d at 526.

VII. THE APPLICATION OF THE TORT CLAIMS ACT

LAWSUIT: *"I can't do no literary work the rest of this year because I'm mediating another lawsuit and looking around for a defendant."* – Mark Twain wrote to a friend

Section 101.021(2) use-of-tangible property claims? The *Able* case was a premises liability case; yet, the Supreme Court did not restrict the joint enterprise theory to premises liability claims. It held that "a governmental unit that enters into a joint enterprise can be liable under the waiver of sovereign immunity found in the Tort Claims Act. See TEX. CIV. PRAC. & REM. CODE § 101.021(2)." *Able*, 35 S.W.3d at 610. Consequently, plaintiffs can sue the government "for personal injury and death so caused by a condition or use of tangible personal property," which is a separate claim from a premises liability claim under TEX. CIV. PRAC. & REM. CODE § 101.021(2). Although Section 101.021(2) does not include the word "employee" as part of its terms, this type of claim, however, is necessarily dependent on the involvement of a government employee using tangible personal property to cause the injury. *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30, 33 (Tex. 1983): *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976); *Lamar University v. Doe*, 971 S.W.2d 191, 196 (Tex. App. – Beaumont 1998, no writ)(interpreting "so caused" to mean that "[t]he proximate cause of the damages for death or personal injury *must* be the negligence or wrongful act or omission of the officer or employee acting within the scope of his employment or office"). If a use-of-property claim waives immunity based only the acts of its employee, then there can be no joint enterprise liability. The government is not be liable for acts in its behalf of a person who is not a paid government employee. *Thomas v. Harris County*, 30 S.W.3d 51, 53 (Tex. App. – Houston [1st Dist.] 2000, no pet.). By definition, an "employee" is defined as:

> [A] person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control.

TEX. CIV. PRAC. & REM. Code § 101.001(2). The Legislature, thus, specifically refused to waive the immunity of governmental entities for acts of independent contractors and employees of other entities. Only paid employees of the culpable governmental entity can trigger a Section 101.021(2) use-of-tangible-property claim. *Cf, Harris County v. Dillard*, 883 S.W.2d 166, 167 (Tex. 1994)(a volunteer reserve deputy sheriff did not fall within the definition of "employee" under Tort Claims Act § 101.021(1) because he was not paid by the county, and therefore, the county was not liable for the deputy's negligence).

Subchapter C exceptions and exclusions. Although the joint enterprise claim may be a limited

constitutes a limited waiver of sovereign immunity and vests the court with subject matter jurisdiction. *Vincent v. West Texas State University*, 895 S.W.2d at 472 n.3. Thus, to invoke the trial court's jurisdiction, the plaintiff must plead a cause of action within the express terms of the Tort Claims Act. *City of El Paso v. W.E.B. Investments*, 950 S.W.2d 166k, 169 (Tex. App. -- El Paso 1997, writ denied); *Wyse v. Department of Public Safety*, 733 S.W.2d 224, 228 (Tex. App. – Waco 1986, no writ). Mere reference to the Tort Claims Act is not sufficient; the plaintiff must factually state a claim within a specific provision of the Tort Claims Act. *McCain v. University of Texas Health Center at Tyler*, 2002 WL 31323472 (Tex. App. – Tyler 2002, pet. pending).

LIES: *The history of our race, and each individual's experience, are sown thick with evidence that a truth is not hard to kill and that a lie told well is immortal.* – Mark Twain, "Advice to Youth" speech, 1892

The Procedure. Given the law regarding jurisdiction, from a defense perspective I recommend a 3-step process to defeat a claim of joint enterprise (or, for that matter, any claim under the Texas Tort Claims Act). Aside from saving the court time and the client money, this strategy gives the governmental entity a decided procedural advantage to help defeat the plaintiff's claim. The 3 steps are listed in sequential order:

1. Contest the trial court's jurisdiction

The plaintiff is the master of his claim. If the plaintiff has made bald assertions without alleging which section of the Tort Claims Act constitutes a waiver of immunity and/or has not alleged facts to demonstrate a *prima facie* case under that specific section of the Tort Claims Act, file an answer and a plea to the jurisdiction asserting immunity from suit under the Tort Claims Act provisions. Set the plea to the jurisdiction for hearing at the earliest opportunity available by the court. An early hearing is not only helpful to curtail the plaintiff's ability to conduct discovery, but it is also required by the interlocutory appeal statute. See TEX. CIV. PRAC. & REM. CODE §51.014(c).

2. Seek protection from the plaintiff's discovery

Most plaintiffs' counsel will attempt to seek discovery from the governmental entity after suit is filed. Do not allow discovery to happen. Timely file a motion for protective order seeking to quash all plaintiffs' discovery, and at the same time, respond to the plaintiffs' discovery by asserting any other objections to each discovery question. A court must not act without first determining that it has subject matter jurisdiction. *Bland ISD v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). "For a court to act, it must have jurisdiction to do so. This is fundamental." *In re: Rubio*, 55 S.W.3d 238, 241 (Tex. App. – Corpus Christi, orig. proc.). Subject matter jurisdiction is never presumed and cannot be waived. *Continental Coffee Products v. Cazarez*, 937 S.W.2d 444, 448-49 n.2 (Tex. 1996). A court does not have the ability to bind parties or act as a court if it lacks jurisdiction over the subject matter. *State Bar of Texas v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). Governmental entities should seek the trial court's protection until the plaintiffs have properly invoked the trial court's jurisdiction. Until the trial court's jurisdiction has been invoked by the plaintiff, discovery is improper. *City of Galveston v. Gray*, 93 S.W.3d 587, 591-92 (Tex. App. – Houston [14th Dist.] 2002, pet. denied).

3. The plea to the jurisdiction hearing

If the plaintiff has failed to plead (1) a specific waiver of immunity in the Tort Claims Act and/or (2) specific facts regarding every element of his cause of action under the Tort Claims Act, the plea should be granted without the governmental entity having to provide any facts or evidence. Without discovery, the plaintiff may have a difficult time discovering and pleading specific facts to demonstrate a joint enterprise claim (or, for that matter, any claim under the Tort Claims Act).

If a Tort Claims Act, subchapter C exception or exclusion applies to the plaintiff's claim, consider filing supporting evidence prior to the hearing. Unlike the summary judgment standards in TRCP 166a, there are no time deadlines for filing evidence supporting a plea to the jurisdiction. Theoretically, evidence can be filed and witnesses called to take the stand on the day of the hearing. Even if the plaintiff is able to plead facts to demonstrate a joint enterprise claim under Tort Claims Act § 101.021(2), any exception or exclusion of the Tort Claims Act, subchapter C overrides the waivers contained in Tort Claims Act § 101.021(2). *See City of El Paso v. Segura*, 2003 WL 1090661 (Tex. App. – El Paso, March 13, 2003, n.p.h.)(mem. op.)(emergency exception of TTCA 101.055 trumped any joint enterprise claim under TTCA 101.021 and .022).

X. THE CONCLUSION

LEARNING: *Now let that teach you a lesson – I don't know just what it is.* – Mark Twain, "Memories"speech, 1906

The Supreme Court now allows recovery against governmental entities based on a joint enterprise claim. While the *Able* decision does leave a blueprint for