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City ends USFilter contract

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The Facts

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ANGLETON — City officials terminated the contract with USFilter at 7:30 Tuesday morning, taking over the city's wastewater treatment and street maintenance for the first time since 1996.

The city contends USFilter breached its contract by not hiring enough employees to run the plants and maintain streets, not submitting annual capital project reports and improperly charging expenses to the maintenance and repair budget.

USFilter officials said politics, not performance, is driving the city's action. The company denies any breach of contract, and promises to go to court.

The two sides met Friday after the city extended its Jan. 5 deadline at USFilter's request.

"We met for, I'd say, about 14 minutes and they offered us nothing," Angleton Mayor Matt Sebesta said. "The negotiations were fruitless and we updated council on that (Monday) night."

Council already had given Sebesta authority to terminate the contract at a Jan. 3 emergency meeting. Council took no action at Monday's meeting.

City Administrator Michael Stoldt said USFilter officials gave the city three options at Friday's meeting: To allow the current contract to run its course, to have the city take over street repairs without the company paying the \$400,000 the city claims it would be owed, or to go to court.

"It seemed like negotiations were fruitless," Stoldt said. "We are prepared to defend our actions."

Stoldt said the city audited the company's invoices in 2001 and found the improper expenses, including improper billing for electric costs.

"After the city began reconciling the USFilter maintenance and repair bill, their expenses decreased by an average of more than \$75,000 annually," the city's news release states.

USFilter spokeswoman Christie Kaluza said the charges to the maintenance budget were nominal and the issue was resolved with previous City Administrator Ruth Hertel.

"It was a (\$25) gift card to an employee who received no lost time for safety," Kaluza said. "The candy is actually laughable. It was a bag of peppermints that would be placed in a candy bowl in the reception area."

Kaluza said the city was happy enough with the company's work to renew the original contract in 2001 after resolving the electricity charges.

"When the city first notified the company in November 2003 of its allegations of breach of contract, we immediately addressed these unfounded allegations with the city, knowing that each claim against USFilter was false," Kaluza said. "The company values its relationship with the city and hoped to work through this issue — an issue obviously driven by city politics and not USFilter performance."

The company had 16 people working in Angleton. The city contends the contract calls for 19.

Stoldt said just three of the employees on duty Tuesday morning declined the city's offer to keep them on the payroll.

Stoldt said the city's offer remains open until the positions are filled.

"Just because you walk out today doesn't mean you can't come back tomorrow," Stoldt said he told the employees.

Stoldt said the transfer hasn't affected operations.

Angleton isn't the only city having problems with USFilter.

Mike Velsely, who works for the New Orleans Sewage and Water Board, said the company also has failed to properly staff its treatment plants there and has made improper charges to the board's maintenance and repair budget.

"They're going to try to sweet talk you and then they're going to try to threaten you," he said.

Kaluza said USFilter is proud of its record in New Orleans.

Michael Wright covers the city of Angleton for The Facts. Contact him at (979) 237-0151.

Texas Case Law

CITY OF ANGLETON v. US FILTER OP SVCS, 14-04-00603-CV (TexApp [14th] 2004)

CITY OF ANGLETON, TEXAS, Appellant v. US FILTER OPERATING SERVICES, INC.,
Appellee.

No. 14-04-00603-CV

Court of Appeals of Texas, Fourteenth District, Houston.

Memorandum Opinion filed December 23, 2004.

Case Number: 14-04-00603-CV

02/10/2005 M/E/T to file Petition for Review D/O Granted

08/01/2005 MO/Extension of Time (Remarks) Granted

09/29/2005 MO/Extension of Time (Remarks) Granted

On Appeal from the 149th District Court, Brazoria County,
Texas, Trial Court Cause No. 27373.

Affirmed.

Panel consists of Justices YATES, EDELMAN, and GUZMAN.

MEMORANDUM OPINION

LESLIE BROCK YATES, Justice.

Appellant the City of Angleton appeals the trial court's denial of its plea to the jurisdiction on the basis of governmental immunity. Appellee USFilter Operating Services, Inc. contends that governmental immunity has been waived. We affirm.

This dispute arises out of the City's cancellation of a service contract with USFilter. After cancelling the contract, the City retained certain property until ownership could be determined. Believing that it owned the property, USFilter filed suit for breach of contract and sought a writ of sequestration. The City counterclaimed for breach of contract and fraud. The parties subsequently signed an agreed order whereby the City would return the disputed property in exchange for USFilter posting a \$53,600 bond with the trial court, to be released only upon order of the court.

The service contract between the parties contained an arbitration clause covering in pertinent part any "dispute between the parties other than one . . . requiring equitable relief." USFilter moved to compel arbitration, asserting that the City's counterclaims sought non-equitable relief and therefore must be arbitrated. The parties entered into a Rule 11 agreement to stay all arbitration deadlines until the trial court ruled on USFilter's motion to compel. Shortly before the hearing, the City nonsuited its counterclaims and filed a plea to the jurisdiction, asserting that immunity barred USFilter's breach of contract claim. The trial court denied the City's plea, and this

accelerated appeal followed.

In Texas, sovereign immunity protects the state against lawsuits for damages unless the state has consented to suit. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). Cities, as political subdivisions of the state, are entitled to immunity unless it has been waived. *San Antonio Indep. Sch. Dist. v. McKinney*, 936 S.W.2d 279, 283 (Tex. 1996). Sovereign immunity encompasses two distinct principles: immunity from suit and immunity from liability. *Miranda*, 133 S.W.3d at 224. While immunity from liability is an affirmative defense, immunity from suit deprives a court of subject matter jurisdiction. *Id.* Because it affects the court's jurisdiction, immunity from suit, unlike immunity from liability, is properly raised in a plea to the jurisdiction. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003).

USFilter argues that, by its conduct invoking the jurisdiction of the trial court, the City has waived its immunity from suit. We agree. The Texas Supreme Court has recently held that a city waives its immunity from suit by intervening in a lawsuit to assert claims for affirmative relief. *Reata Constr. Corp. v. City of Dallas*, No. 02-1031, ___ S.W.3d ___, 2004 WL 726906, at *1 (Tex. Apr. 2, 2004, reh'g granted). "When the City filed its plea in intervention against Reata, it subjected itself to the jurisdiction of the trial court and waived its governmental immunity from suit with regard to Reata's claims germane to the matter in controversy." *Id.* at *3. At least three other courts have applied Reata's reasoning in concluding that when a city files a counterclaim and thereby invokes the jurisdiction of the court, it waives its immunity from suit. See *Ray Ferguson Interests, Inc. v. Harris County Sports & Convention Corp.*, No. 01-04-00568-CV, ___ S.W.3d ___, 2004 WL 2250930, at *5 (Tex.App.-Houston [1st Dist.] Oct. 7, 2004, no pet. h.); *City of Dallas v. Martin*, 140 S.W.3d 924, 926 (Tex.App.-Dallas 2004, reh'g granted); *City of Dallas v. Albert*, 140 S.W.3d 920, 923 (Tex.App.-Dallas 2004, reh'g granted); *Port Neches-Groves Indep. Sch. Dist. v. Pyramid Constructors, L.L.P.*, 140 S.W.3d 440, 442-43 (Tex.App.-Beaumont 2004, pet. filed). This is true whether or not the counterclaims are compulsory or permissive and even when a city later dismisses its counterclaims. See *Ray Ferguson Interests*, 2004 WL 2250930, at *5-6; *Martin*, 140 S.W.3d at 926-27; *Albert*, 140 S.W.3d at 923. We agree with this analysis and join these courts in holding that the City's filing of counterclaims in this case waived its immunity from suit.

Because we determine that the City waived its immunity from suit by filing counterclaims, we need not also determine whether the City's immunity from suit is waived by either language in its charter that it may "sue and be sued" and may "implead and be impleaded" or by Texas Local Government Code section 51.075 providing that a municipality "may plead and be impleaded in any court." See *City of Houston v. Clear Channel Outdoor, Inc.*, No. 14-03-00022-CV, ___ S.W.3d ___, 2004 WL 63561 (Tex.App.-Houston [14th Dist.] Jan. 15, 2004, pet. filed). We affirm the trial court's order denying the City's plea to the jurisdiction.

