

2020 WL 7365452

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR  
DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, San Antonio.

The CITY OF MASON, TEXAS, Appellant

v.

BLUE OAK ENGINEERING, LLC, Appellee

No. 04-20-00227-CV

|

Delivered and Filed: December 16, 2020

From the 452nd District Court, Mason County, Texas

Trial Court No. 195900

Honorable Robert Rey Hofmann, Judge Presiding

#### Attorneys and Law Firms

Scott M. Tschirhart, Lowell F. Denton, Charles E. Zech,  
Denton Navarro Rocha Bernal & Zech, P.C., Austin, for  
Appellant.

David W. Showalter, James P. Pennington, Showalter Law  
Firm, Richmond, for Appellee.

Sitting: Rebeca C. Martinez, Justice

Irene Rios, Justice

Liza A. Rodriguez, Justice

#### MEMORANDUM OPINION

Opinion by: Rebeca C. Martinez, Justice

\*1 AFFIRMED





The trial court denied the City of Mason, Texas's plea to the jurisdiction, and the City appealed. We affirm the trial court's order.

#### BACKGROUND

The relevant facts are largely undisputed. The City of Mason, Texas and Blue Oak Engineering, LLC entered into a contract in 2015, related to a landfill permit. The contract provided for a total estimated compensation due to Blue Oak of \$142,130. In 2017, Blue Oak advised the City that it would be unable to obtain the specific landfill permit stated in the contract but would pursue another landfill permit. Blue Oak continued its work, and the City paid it approximately \$300,000. Blue Oak then billed the City approximately \$62,000 more, but the City refused to pay. Blue Oak sued the City for breach of contract and *quantum meruit* to recover the unpaid amount.<sup>1</sup>

The City responded by filing a plea to the jurisdiction. The City argued in its plea that the trial court lacked subject matter jurisdiction because the City had not waived immunity from suit. Blue Oak agreed with respect to the *quantum meruit* claim and agreed to amend its petition to remove the claim.<sup>2</sup> Blue Oak asserted, as to the breach-of-contract claim, that the City waived immunity pursuant to Section 271.152 of the Texas Local Government Code. See TEX. LOCAL GOV'T CODE ANN. § 271.152. The trial court denied the City's plea, and this interlocutory appeal followed.

#### STANDARD OF REVIEW

We review a trial court's ruling on a plea to the jurisdiction de novo.  *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). If the plea challenges the pleadings, we liberally construe the pleadings, accept all factual allegations as true, and look to the plaintiff's intent.  *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012). If the plea challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, taking as true all evidence favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in the nonmovant's favor.  *Miranda*, 133 S.W.3d at 227–28. This standard generally mirrors that of a traditional summary judgment.  *Id.* at 228; see TEX. R. CIV. P. 166a(c). “Thus, the burden is on the governmental

The CITY OF MASON, TEXAS, Appellant v. BLUE OAK..., Not Reported in S.W....

entity, as the movant, to present evidence establishing the trial court lacks jurisdiction as a matter of law. Thereafter, the burden shifts to the plaintiff to demonstrate a disputed issue of material fact exists regarding the jurisdictional issue.” *City of Shavano Park v. Ard Mor, Inc.*, No. 04-14-00781-CV, 2015 WL 6510544, at \*3 (Tex. App.—San Antonio Oct. 28, 2015, no pet.) (mem. op.) (citing *Miranda*, 133 S.W.3d at 228). If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue must be resolved by the factfinder. *Miranda*, 133 S.W.3d at 227–28. If, however, the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228.

### GOVERNMENTAL IMMUNITY<sup>3</sup>

\*2 Texas governmental units, including cities, are immune from suit unless the state consents. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018); *Reata Construction Corporation v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). An assertion of governmental immunity implicates the trial court's subject matter jurisdiction and is properly asserted in a plea to the jurisdiction. *Tarrant Reg'l Water Dist. v. Johnson*, 572 S.W.3d 658, 664 (Tex. 2019); *Alamo Heights*, 544 S.W.3d at 770. Whether a trial court has subject matter jurisdiction is a legal question that we review de novo. *Miranda*, 133 S.W.3d at 226.

Section 271.152 of the Texas Local Government Code provides:

A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of

the contract, subject to the terms and conditions of this subchapter.

TEX. LOC. GOV'T CODE ANN. § 271.152. Section 271.151(2) provides that a “contract subject to this chapter” means: “a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity[.]” *Id.* § 271.151(2)(A). Under section 271.151(2)(A), a contract must meet five elements in order for it to be a contract subject to Section 271.152's waiver of immunity: (1) the contract must be in writing, (2) state the essential terms of the agreement, (3) provide for goods or services, (4) to the local governmental entity, and (5) be executed on behalf of the local governmental entity. *City of Houston v. Williams*, 353 S.W.3d 128, 135 (Tex. 2011).

### DISCUSSION

The City disputes whether Blue Oak's breach of contract claim arises out of the 2015 contract. Section 271.151(2)(A) requires that a contract subject to subchapter 271 state the “essential terms” of the agreement between the parties. See TEX. LOC. GOV'T CODE ANN. § 271.151(2)(A); *Williams*, 353 S.W.3d at 135. According to the City, the essential terms of the 2015 contract limit its scope to the particular landfill permit stated for the estimated payment stated in the contract. According to the City, because of this limited scope, the work for which Blue Oak now seeks repayment, which involves a different permit type and a payment amount beyond the estimate, cannot fall within the scope of the contract. Therefore, according to the City, the claim is an extra-contractual claim for *quantum meruit*. Blue Oak responds that its work was within the scope of the 2015 contract and, in any event, the dispute goes to the merits and cannot be resolved through a plea to the jurisdiction.

We agree with Blue Oak that the dispute does not implicate jurisdiction. Blue Oak's petition asserts a claim for breach of the 2015 contract, and the City does not contest that this contract is subject to Texas Local Government Code subchapter 271. Under these circumstances, the requirements of section 271.152 are satisfied. Section 271.152 provides that

The CITY OF MASON, TEXAS, Appellant v. BLUE OAK..., Not Reported in S.W....

a local governmental entity that enters into a contract subject to subchapter 271 “waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract.” See [TEX. LOC. GOV'T CODE ANN. § 271.152](#). “Once the trial court determines whether the contract falls within the provisions of [section 271.152](#), it need not parse further the pleadings or the contract to determine whether the legislature has waived immunity for breach of contract claims.” [Roma Indep. Sch. Dist. v. Ewing Const. Co.](#), No. 04-12-00035-CV, 2012 WL 3025927, at \*3 (Tex. App.—San Antonio July 25, 2012, pet. denied) (quoting [City of Mesquite v. PKG Contracting, Inc.](#), 263 S.W.3d 444, 447 (Tex. App.—Dallas 2008, pet. denied); see also [Bland Ind. Sch. Dist. v. Blue](#), 34 S.W.3d 547, 554 (Tex. 2000) (A plea to the jurisdiction “does not authorize an inquiry so far into the substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction.”). Here, because we undisputedly have a contract that falls within the provisions of [section 271.152](#), and because Blue Oak sues for breach of that contract, we need not further parse Blue Oak's petition or the contract to determine the trial court's jurisdiction. See [TEX. LOC. GOV'T CODE ANN. § 271.152](#); [Roma Indep. Sch. Dist.](#), 2012 WL 3025927, at \*3; see also [Clear Creek Indep. Sch. Dist. v. Cotton Commercial USA, Inc.](#), 529 S.W.3d 569, 585 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (rejecting a school district's argument that the limited scope of a contract deprived the trial court of jurisdiction over a breach-of-contract claim for work arguably done outside the scope of the contract because, once a contract comes “within the meaning of [section 271.152](#), ... immunity is waived to the extent of adjudicating a claim for breach of the agreement, and that is the end of the jurisdictional inquiry” (citation omitted)).

\*3 In its brief, the City cites cases that are inapposite because the dispute in each of the cases cited hinged on whether there

existed a contract subject to subchapter 271. In those cases, the plaintiff sought to recover based upon a purported new contract or contract amendment. See [Fort Worth Indep. Sch. Dist. v. City of Fort Worth](#), 22 S.W.3d 831, 846 (Tex. 2000) (holding that a letter that left open material matters to future adjustment was a nonbinding “agreement to agree” and did not waive immunity pursuant to [section 271.152](#)); [City of Oak Ridge N. v. Mendes](#), 339 S.W.3d 222, 231 (Tex. App.—Beaumont 2011, no pet.) (approving dismissal of a plaintiff's claim for incentive pay that was based on oral statements made during a city council meeting, which did not amount to a contract under subsection 271); see also [Sharyland Water Supply Corp. v. City of Alton](#), 354 S.W.3d 407, 414 (Tex. 2011) (rejecting a waiver-by-conduct exception to governmental immunity). In none of the cases was it undisputed, as here, that the contract sued upon was subject to subchapter 271.

Ultimately, whether, the 2015 contract allows for recovery is a merits question that does not implicate the trial court's jurisdiction. See [TEX. LOC. GOV'T CODE ANN. § 271.152](#); see also [Clear Creek Indep. Sch. Dist.](#), 529 S.W.3d at 584–85 (holding that the issue of whether certain work performed fell within the scope of a contract was a merits question that could not be decided through a plea to the jurisdiction).<sup>4</sup>

## CONCLUSION

We affirm the trial court's order denying the City's plea to the jurisdiction.<sup>5</sup>

### All Citations

Not Reported in S.W. Rptr., 2020 WL 7365452

## Footnotes

- 1 Blue Oak alleges that the City breached two contracts; however, only one of the contracts is relevant to this appeal. The City did not contest that it had waived immunity as to the second contract.
- 2 Blue Oak stated that it had abandoned its *quantum meruit* claim at the hearing on the City's plea to the jurisdiction, and it did not address the claim in its appellate brief. However, Blue Oak has not yet filed an

The CITY OF MASON, TEXAS, Appellant v. BLUE OAK..., Not Reported in S.W....

---

amended petition. “[O]ut of an abundance of caution,” the City addressed the *quantum meruit* claim in its appellate brief. On this record, we determine there is nothing for us to review as to the *quantum meruit* claim because it is clear from the record that Blue Oak abandoned its *quantum meruit* claim and that the trial court’s order denying the plea to the jurisdiction does not address the claim. See *Fuentes v. Tex. Employers’ Ins. Ass’n*, 757 S.W.2d 31, 32 (Tex. App.—San Antonio 1988, no writ) (not reaching an issue regarding whether a party could bring a cause of action because the party abandoned the claim in the trial court).

3 For convenience, we use the terms governmental immunity and sovereign immunity interchangeably; however, the terms involve distinct concepts. Sovereign immunity refers to the state’s immunity from suit and liability, while governmental immunity protects political subdivisions of the state. See *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 747 n.1 (Tex. 2017); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003).

4 Section 271.153 of the Texas Local Government Code limits recovery in a breach-of-contract suit against a governmental entity to “the balance due and owed” under the contract. See TEX. LOCAL GOV’T CODE ANN. § 271.153(a)(1). The parties dispute whether any amount is “due and owed” under the 2015 contract. As with the issue of scope, the issue of the amount, if anything, that is “due and owed” under the 2015 contract goes to the merits and does not implicate jurisdiction. See *City of El Paso*, 442 S.W.3d at 672 (“The City’s argument that High Ridge cannot maintain its breach of contract claim for damages in excess of the \$600,000 contractual cap unless there is a properly executed written amendment is in reality an argument that the contract claim will fail on the merits.”).

5 The City also argues that the trial court erred by denying the City’s requests to strike affidavit testimony that Blue Oak included with its response to the City’s plea. The testimony concerns the purported scope of the 2015 contract, which, as discussed above, is a merits issue that does not implicate jurisdiction. Accordingly, the City cannot establish harm for the trial court’s failure to strike the testimony prior to ruling on the plea, and we overrule the City’s issues as to this testimony. See TEX. R. APP. P. 44.1(a) (“No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of ... probably caused the rendition of an improper judgment[.]”).