Opinion issued August 30, 2012

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00240-CV

THE CITY OF HOUSTON, Appellant

V.

ATSER, L.P., Appellee

On Appeal from the 334th Judicial District Court
Harris County, Texas
Trial Court Case No. 2008-48039

OPINION ON REHEARING

Appellant, the City of Houston ("the City"), moved for rehearing of our April 5, 2012 opinion. We grant the motion for rehearing, withdraw our April 5, 2012 opinion and judgment, and issue this opinion and judgment in their stead.

Our disposition remains the same. We dismiss the City's May 21, 2012 motion for en banc reconsideration as moot.[1]

This is a case stemming from an alleged breach of a contract between the City and appellee, ATSER, L.P. ("ATSER"). The City appeals from an interlocutory order denying its no-evidence and traditional motion for partial summary judgment against ATSER in which the City states it asserted challenges to the trial court's jurisdiction. In two issues, the City contends that: (1) ATSER's breach of contract allegations do not fall within the limited waiver of immunity set forth in Texas Local Government Code Chapter 271; and (2) ATSER's allegations of failure-to-use services, allegedly causing it lost profits of $250,000, are not actionable under Chapter 271, Subchapter I of the Code.[2]

We dismiss the City's appeal as to its first issue for lack of jurisdiction, and we affirm the trial court's order as to the City's second issue.

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1 *See Brookshire Bros., Inc. v. Smith*, 176 S.W.3d 30, 40 & n.2 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

2 On page seven of its appellate brief, the City lists four "issues presented." These "issues," however, differ from the issues listed in the Table of Contents and are not briefed by the City. Accordingly, we confine our opinion to the issues actually briefed by the City. *See* TEX. R. APP. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.").

Background

In 1999, the City and ATSER entered into a construction contract (the "1999 Contract") which required ATSER to provide the labor, materials, and supervision necessary to complete various construction projects. In 2003, the parties amended the contract to require ATSER to implement a computerized "Project Management System" for the construction projects (the "2003 Amendments"). In 2006, the parties entered into a contract for software technical support and programming services (the "2006 Contract").

Eventually, the City and ATSER disagreed about the parties' duties under these contracts. Their disagreements initially centered around a former ATSER employee who had come to work for the City. ATSER believed that this employee had misappropriated trade secret information and had begun using the information to ATSER's detriment and the City's benefit. ATSER brought suit against this employee. ATSER later substituted the City as a defendant and pled claims for breach of the 1999 Contract, the 2003 Amendments, and the 2006 Contract, as well as claims for quantum meruit and unjust enrichment. ATSER alleged that the trial court had jurisdiction over its claims pursuant to Texas Local Government Code Chapter 271.

The City answered ATSER's petition and pled, among other defenses, immunity from both suit and liability. The City then filed two sets of special

exceptions to ATSER's claims. In its first set of special exceptions, the City claimed that Local Government Code Chapter 271 waived immunity only for breach of contract claims and that, therefore, the City was immune from claims such as quantum meruit or unjust enrichment. It also claimed that, under the facts pled by ATSER, section 271.152 of the Code did not waive the City's immunity from suit for breach of contract. In response, ATSER filed a second amended petition. The City then filed special exceptions to ATSER's second amended petition. In those special exceptions, the City claimed that ATSER's pleadings were so devoid of facts as to deny the City fair notice of ATSER's claims, and it claimed that ATSER had failed to adequately plead jurisdiction, despite being given the opportunity to do so. The City also argued that ATSER failed to plead the maximum amount of damages sought, failed to plead special damages, and failed to prove that the damages sought were recoverable under Local Government Code section 271.153(b). ATSER then amended its pleading again and dropped its equitable claims, leaving only its breach of contract claims.

In its third amended petition, ATSER claimed that: (1) it has valid, enforceable contracts with the City; (2) it has standing to sue the City; (3) the City has waived its sovereign immunity pursuant to section 271.152; (4) its claims are for an adjudication of the City's breach of contract; (5) it has performed, tendered performance, or was excused from performing its contractual obligations, and it

has provided all goods, services, and materials as requested by the City and required by the terms of the contracts; and (6) the City breached the contracts by "failing to meet its payment obligations and other duties under these contracts. Specifically it has not fully compensated Plaintiff pursuant to the terms of the contracts."

The City filed a plea to the jurisdiction concerning this third amended petition. The City alleged that the only exception to governmental immunity that ATSER could plead was provided by Local Government Code section 271.152 and that ATSER's claim did not fall within the parameters of that section, and it asked the trial court to dismiss ATSER's claim for lack of jurisdiction. The trial court denied the plea to the jurisdiction.

Discovery proceeded in the lawsuit and ended in January 2010. The City then filed a "No-Evidence and Traditional Motion for Partial Summary Judgment" ("Partial Motion for Summary Judgment"). The "no-evidence" section of the Partial Motion for Summary Judgment asserted that ATSER had presented no evidence of one or more essential elements of its claim for breach of contract. The "traditional" part of the Partial Motion for Summary Judgment argued that the City was entitled to judgment as a matter of law on ATSER's breach of contract claim. Within this Partial Motion for Summary Judgment, the City also claimed that one portion of ATSER's breach of contract claim "fails as a matter of law because the

Legislature did not waive the City's immunity for the types of damages ATSER seeks."

The trial court denied the Partial Motion for Summary Judgment. The City filed a notice of appeal from the denial of its Partial Motion for Summary Judgment as an accelerated appeal. As there has been no final judgment in this case, we gave the City notice that the appeal might be involuntarily dismissed for want of jurisdiction, and we gave the parties the opportunity to provide further briefing on the jurisdictional issue, which the City did.

The City's Interlocutory Appeal of Partial Motion for Summary Judgment

The City claims that, despite the fact that there is no final judgment or order in this case, it can appeal the interlocutory denial of its Partial Motion for Summary Judgment on the basis that this motion was actually a challenge to the trial court's subject matter jurisdiction.

A. Interlocutory Appeal of Pleas to the Jurisdiction

As a general rule, appeals may be taken only from final judgments or orders. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 2011); *Qwest Commc'ns Corp. v. AT&T Corp.*, 24 S.W.3d 334, 336 (Tex. 2000). An exception to this rule, however, is found in Civil Practice and Remedies Code section 51.014(a)(8). This section allows an appeal from an interlocutory order that "grants or denies a plea to the jurisdiction by a governmental unit as that term is

defined in Section 101.001." TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8). An interlocutory appeal may be had when a trial court denies a governmental unit's challenge to subject matter jurisdiction, "irrespective of the procedural vehicle used." *Thomas v. Long*, 207 S.W.3d 334, 339 (Tex. 2006). The availability of an interlocutory appeal will not be decided by the form or caption of a pleading but will be determined by the substance of the motion to determine the relief sought. *Myers Corp. v. Abel*, 997 S.W.2d 598, 601 (Tex. 1999).

In order for a party to be entitled to an interlocutory appeal, section 51.014(a)(8) requires the denial of a jurisdictional challenge. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8); *Thomas*, 207 S.W.3d at 339. Even in the absence of an explicit denial of a jurisdictional challenge, however, if a trial court rules on the merits of an issue without explicitly rejecting an asserted jurisdictional attack, it has implicitly denied the jurisdictional challenge. *Thomas*, 207 S.W.3d at 339–40. This implicit denial satisfies section 51.014(a)(8) and gives the court of appeals jurisdiction to consider an otherwise impermissible interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8); TEX. R. APP. P. 33.1(a)(2)(A); *Thomas*, 207 S.W.3d at 340. Moreover, the appellate court always has jurisdiction to consider a party's claim that the trial court lacks subject matter jurisdiction over a claim or a cause of action. Subject matter jurisdiction is essential to the authority of the courts to decide a case. *Tex. Ass'n of Bus. v. Tex.*

Air Control Bd., 852 S.W.2d 440, 443 (Tex. 1993). It is never presumed and cannot be waived, even when uncontested. *Id.* at 443–44. Subject matter jurisdiction may be raised at any time, even for the first time on appeal. *Id.* at 445.

B. Standard of Review of Jurisdictional Pleas

We review de novo a trial court's ruling on a jurisdictional plea. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). When reviewing a trial court's ruling on a plea, "we first look to the pleadings to determine if jurisdiction is proper, construing them liberally in favor of the plaintiffs and looking to the pleader's intent," and "we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised." *City of Waco v. Kirwan*, 298 S.W.3d 618, 621–22 (Tex. 2009). In considering this evidence, we "take as true all evidence favorable to the nonmovant" and "indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Id.* at 622. We do not adjudicate the substance of the case but instead determine whether a court has the power to reach the merits of the claim. *City of Houston v. S. Elec. Servs., Inc.*, 273 S.W.3d 739, 744 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (citing *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000)). If the pleadings affirmatively negate the existence of jurisdiction, a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Miranda*, 133 S.W.3d at 227. However, if a plea to the jurisdiction

challenges the existence of jurisdictional facts, the court will consider relevant evidence presented by the parties when necessary to resolve the jurisdictional issues. *Id.* If the relevant evidence is undisputed or fails to raise a fact issue as to jurisdiction, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228. The standard generally mirrors that of summary judgment under Texas Rule of Civil Procedure 166a(c). *Id.*

C. The City's Partial Motion for Summary Judgment on ATSER's Contract Claims on Grounds of Immunity

In its first issue, the City contends that ATSER's breach of contract allegations do not fall within the limited waiver of immunity for contract claims set forth in Local Government Code Chapter 271, and, therefore, the trial court erred in denying its Partial Motion for Summary Judgment on those claims.

Governmental immunity protects political subdivisions of the State, including cities, from lawsuits for money damages, unless their immunity has been waived. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). Governmental immunity, like sovereign immunity, involves both immunity from suit and immunity from liability. *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009). Immunity from suit is jurisdictional and bars the suit, whereas immunity from liability does not bar the suit but protects political subdivisions from judgments. *See id.* Governmental immunity is waived only by

clear and unambiguous language indicating the Legislature's intent to do so. *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 838 (Tex. 2010).

Local Government Code section 271.152, which waives a local governmental entity's immunity from suit for certain contract claims, 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 (Vernon 2005). The Local Government Code defines a "[c]ontract subject to this subchapter" as "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) (Vernon 2005); *see also City of Houston v. Williams*, 353 S.W.3d 128, 135 (Tex. 2011) ("Section 271.151(2) effectively states five elements a contract must meet in order for it to be a contract subject to section 271.152's waiver of immunity . . . ."). The total amount of money which may be awarded under section 271.152 is "the balance due and owed by the local government entity under the contract," any amount owed for change orders or additional work the governmental entity directed it to perform, and interest as allowed by law. TEX. LOC. GOV'T CODE ANN. § 271.153(a) (Vernon Supp. 2011). The purpose of this section is to "limit the amount due by a governmental agency on a contract once

liability has been established, not to foreclose the determination of whether liability exists." *Kirby Lake*, 320 S.W.3d at 840.

The jurisdictional elements for waiver of immunity to a claim based on section 271.152 are as follows: (1) the party against whom the waiver is asserted must be a "local governmental entity"; (2) the entity must be authorized by statute or the Constitution to enter into contracts; and (3) the entity must in fact have entered into a contract that is "subject to this subchapter." *Williams*, 353 S.W.3d at 134.

The City's Partial Motion for Summary Judgment on ATSER's contract claims on grounds of immunity is divided into two sections: (1) the no-evidence section and (2) the traditional section. We address each in turn to determine whether they present jurisdictional challenges that may be heard and decided on interlocutory appeal.

1. Denial of No-Evidence Partial Motion for Summary Judgment

In the no-evidence section of its Partial Motion for Summary Judgment on ATSER's contract claims, the City listed the elements of a breach of contract claim as (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff from the breach. *Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1997, no writ). The City claimed that there was no

evidence to support any of the elements of ATSER's breach of contract claim. However, it did not challenge the trial court's subject matter jurisdiction on grounds of immunity or otherwise in any way in this section. We, therefore, have no jurisdiction over the City's appeal from the denial of the no-evidence portion of its Partial Motion for Summary Judgment. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8); *Thomas*, 207 S.W.3d at 339. We dismiss this portion of the City's interlocutory appeal.

2. Denial of Traditional Partial Motion for Summary Judgment

In the traditional section of its Partial Motion for Summary Judgment, the City claimed that it was entitled to summary judgment as a matter of law on ATSER's breach of contract claim. It divided ATSER's breach of contract pleading into three claims: one for $5 million, one for $250,000, and one for $2,000. The City then re-categorized ATSER's contract claims.

ATSER's third amended petition, unlike the City's description of it, makes no division of its claims according to three categories of damages. It alleges a single breach of contract and an aggregate amount of damages, which ATSER claims is the combination of the balance due and owed by the City under the contracts, the amount owed for additional work ATSER performed at the City's request, and interest. The City apparently makes its divisions of the damages from breach of contract based on ATSER's response to discovery in this suit and not

based on the language of ATSER's petition itself. To determine the jurisdictional issue, however, we look only to the City's motion to see if it appropriately challenges subject matter jurisdiction.

In its traditional motion, the City contended that ATSER's $5,000,000 contract claim was actually a disguised tort claim. It stated:

> In essence, Atser's $5M Claim is nothing more than a tort or quasi-contract claim. Indeed, Atser has already termed it as such. In fact, Atser still maintains that it is an "option" that its former employee stole the software and gave it to the City. But the City is immune from these types of claims because chapter 271 of the TEXAS LOCAL GOVERNMENT CODE, the only statutory waiver of the City's governmental immunity from suit claimed by Atser, contains a limited waiver of immunity from suit only "for the purpose of adjudicating a claim for breach of contract," not for any other claims in law or equity. Therefore, in response to the City's Pleas to the Jurisdiction, Atser attempts in its Third Amended Petition to recast un-waived tort/quasi-contract claims as a breach of contract claim.

(Internal citations omitted.)

However, in its Partial Motion for Summary Judgment, the City made no argument and cited no authority for its contention that ATSER's contract claims were actually tort claims for which its sovereign immunity had not been waived. Rather, concerning what it calls the "$5M Claim," the City asserted that two alleged admissions by ATSER defeated the second element of a breach of contract claim, namely, performance or tendered performance by the plaintiff. *See Wright*, 950 S.W.2d at 412. The motion presented evidence of those alleged admissions and cited the City's summary judgment evidence. Although the traditional part of

the City's motion cited the governmental immunity statute, it concluded with the following:

> In sum, Atser's admissions, as well as the January 8, 2008 Letter, conclusively establish that Atser failed to perform or tender performance, and that even if it had, such performance would not give rise to any contractual obligation for the City to pay for the "core technology" source code because the City never agreed pursuant to the "Supplemental Activities" provision of the 1999 Contract to pay for this "supplemental" product. As there is no evidence to the contrary, and there is no disputed issue of material fact, summary judgment in favor of the City on Atser's $5M Claim is appropriate.

Thus, although the City announced that the "$5M Claim" was "nothing more than a tort or a quasi-contract claim" and that "the City is immune from these types of claims," the City did not seek summary judgment on this basis. Instead, it asked the trial court to render summary judgment in its favor because the evidence established that ATSER could not prove an element of its breach of contract claim as a matter of law.

We conclude that when the trial court denied the City's Partial Motion for Summary Judgment concerning the "$5M Claim," it did not implicitly or explicitly deny a challenge to the trial court's jurisdiction over that claim. *See Thomas*, 207 S.W.3d at 339. Thus, as the substance of the motion on that point was a traditional motion for summary judgment challenging the evidence to support the elements of ATSER's breach of contract claim, and not a challenge to the trial court's subject

matter jurisdiction, we hold that we have no jurisdiction to hear an interlocutory appeal on this issue. *See Myers Corp.*, 997 S.W.2d at 601.

We overrule the City's first issue and dismiss this portion of the City's interlocutory appeal for lack of jurisdiction.

D. ATSER's Allegations of Failure to Use Services

In its second issue, the City claims that ATSER's allegations of the City's failure to use its services, allegedly causing ATSER lost "profits" of $250,000, are not actionable under Local Government Code Chapter 271, Subchapter I, for which the City's immunity from certain contract claims is statutorily waived. Likewise, in its Partial Motion for Summary Judgment, the City asked the trial court to rule that ATSER's claim for losses due to the City's failure to use its services failed as a matter of law "because the Legislature did not waive the City's immunity for the types of damages Atser seeks." We therefore review the City's second issue as the denial of a jurisdictional challenge to ATSER's claims.

The City bases its assertion that the Legislature did not waive its immunity for the type of damages that ATSER seeks not on the language of ATSER's third amended petition, which asks only for damages within the confines of Local Government Code section 271.153(a), but on ATSER's discovery responses, in which ATSER stated that "it has been damaged in the amount of $250,000 by Defendant's refusal to use ATSER pursuant to the 2006 Contract." The City

argues that it had no contractual duty to use ATSER's services and, thus, that there can be no amount "due and owed" by it to ATSER. The City also claims that ATSER's alleged request for consequential damages seeks damages outside the scope allowed by section 271.153. These arguments, however, do not challenge the trial court's subject matter jurisdiction over ATSER's claims of failure to use services but instead address the merits of ATSER's claim.

Our determination of subject matter jurisdiction is not to be based on the substance of the case, but on whether a court has the power to reach the merits of the claim. *S. Elec. Servs.*, 273 S.W.3d at 744. In this regard, we consider relevant evidence presented by the parties insofar as necessary to resolve the jurisdictional issues only, and we rule on those issues as a matter of law. *See Miranda*, 133 S.W.3d at 227, 228.

As noted above, the jurisdictional elements for a claim of waiver of immunity based on section 271.152 are: (1) the party against whom the waiver is asserted must be a "local governmental entity"; (2) the entity must be authorized by statute or the Constitution to enter into contracts; and (3) the entity must in fact have entered into a contract that is "subject to this subchapter." *Williams*, 353 S.W.3d at 134. For a contract to be a contract "subject to this subchapter," the contract must (1) 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. TEX. LOC. GOV'T CODE ANN. § 271.151(2); *Williams*, 353 S.W.3d at 135.

Here, ATSER has pled all of the jurisdictional elements required for statutory waiver of the City's immunity to its contract. Specifically, in its third amended petition, ATSER pled breach of the pertinent contracts and asked for damages based on (1) the balance due and owed by the City, (2) the amount owed for additional work performed at the City's direction, and (3) interest as allowed by law. These are precisely the damages the statute allows when immunity is waived by section 271.152. *See* TEX. LOC. GOV'T CODE ANN. § 271.153.

The City's challenge to the trial court's jurisdiction is not based on what ATSER pled, but on its own incorrect construction of ATSER's pleadings. The City, in essence, asks that we find that ATSER's claim lacks merit and that ATSER asks for improper damages. This is not the proper function of a challenge to the jurisdiction. *See S. Elec. Servs.*, 273 S.W.3d at 744 (holding that appellate court's duty in reviewing challenge to jurisdiction is not to adjudicate substance of claim, but to determine whether trial court has power to reach merits). First, this is a request that we adjudicate the merits of ATSER's contract claims for damages at the appellate level and find them to be without merit, which we cannot do. *See Bland Indep. Sch. Dist.*, 34 S.W.3d at 554. Second, "[A]n 'adjudication' of such a

claim is exactly what the Legislature allows in Section 271.152." *S. Elec. Servs.*, 273 S.W.3d at 744.

Section 271.153, the damages section of the statute, does not retract the waiver of immunity granted in section 271.152 and withdraw subject matter jurisdiction to adjudicate a plaintiff's claims for breach of contract "if a plaintiff alleges facts to support such a claim and seeks recovery only of damages to the extent allowed." *Id.*; *see also City of Mesquite v. PKG Contracting, Inc.*, 263 S.W.3d 444, 448 (Tex. App.—Dallas 2008, pet. denied) (holding that statutory limitations on contractor's recoverable damages imposed by section 271.152 did not deprive trial court of subject matter jurisdiction to adjudicate breach of contract claim); *City of N. Richland Hills v. Home Town Urban Partners, Ltd.*, 340 S.W.3d 900, 910 (Tex. App.—Fort Worth 2011, no pet.) ("We decline to adjudicate Appellee's damage claims by applying Section 271.153 within the procedural context of the City's pleas to the jurisdiction.").

We hold that ATSER has pled sufficient facts to establish that its suit falls within the scope of the waiver of immunity for contract claims set out in Local Government Code Chapter 271. Thus, the City has no immunity from suit over ATSER's contract claims, and the trial court has jurisdiction to adjudicate those claims. *See S. Elec. Servs.*, 273 S.W.3d at 744 (stating that if pleadings themselves "allege sufficient facts to qualify the case as a waiver of sovereign immunity as

granted by statute, by alleging facts to support their claim that the City has not paid 'the balance due and owed under the contract,'" then challenge to jurisdiction of trial court must fail); *see also Miranda*, 133 S.W.3d at 227–28.

On rehearing, the City argues, additionally, that ATSER's $250,000 claim for damages for the City's failure to use its services does not fall within section 271.152's waiver of immunity because that section requires that the contract at issue "provide for goods or services" and ATSER's "failure to use services" claim is a claim for "services not provided." In making this argument, the City ignores the language in the 2006 Contract that provides for ATSER to perform "software technical support and programming services" to the City, which is the basis for ATSER's $250,000 claim. It also ignores ATSER's allegation that, by failing to use its programming services, the City breached the 2006 Contract and caused $250,000 in damages.

In its Partial Motion for Summary Judgment, the City disputed that it was under a contractual duty to use ATSER's programming services, but that is not the relevant inquiry for determining whether the City waived its immunity. The relevant inquiry, instead, is whether the underlying contract at issue "provide[s] for goods or services" and thus states a claim within the scope of the statute. *See* TEX. LOC. GOV'T CODE ANN. § 271.151(2) (defining "contract subject to this subchapter"); *Williams*, 353 S.W.3d at 135 (stating elements contract must satisfy

to qualify as "contract subject to this subchapter"). Here, the 2006 Contract clearly contemplates that ATSER is to perform "software technical support and programming services" to the City. *See Williams*, 353 S.W.3d at 139 ("We have previously held that 'services' under section 271.151(2) encompass a wide array of activities, generally including any act performed for the benefit of another.") (citing *Kirby Lake*, 320 S.W.3d at 839). *Contra E. Houston Estate Apartments, L.L.C. v. City of Houston*, 294 S.W.3d 723, 736 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (holding that contract at issue did not fall within section 271.152's waiver because, under particular contract, "[t]he City was . . . a conduit of federal funds and a facilitator of the project, but no services were provided directly to the City"). A contract to provide and use "software technical support and programming services" is plainly a contract within the scope of Chapter 271's waiver of governmental immunity from suit.

Whether the City had and breached a contractual duty to use ATSER's services, as ATSER contends, is a question beyond the scope of the jurisdictional waiver of immunity inquiry. It goes, instead, to interpretation of the contract under which ATSER brings its claims and breach of contractual duties. This is a substantive issue that cannot properly be brought before this Court for determination as a jurisdictional matter. *See Miranda*, 133 S.W.3d at 228; *Bland Indep. Sch. Dist.*, 34 S.W.3d at 554. Thus, although ATSER alleges that the City

failed to use its services, as it allegedly should have done under the 2006 Contract, ATSER's ultimate contention remains that, by this failure, the City breached a contract "to provide for goods or services." We have held that ATSER has alleged a breach of contract claim against the City that falls within section 271.152's waiver of immunity. *See* TEX. LOC. GOV'T CODE ANN. § 271.151(2). The City's "loss of services" argument does not change our conclusion.

We hold that ATSER's third amended petition alleges sufficient facts to demonstrate that its claims against the City fall within the waiver of sovereign immunity for contract claims against a governmental entity as granted by statute. We overrule the City's second issue and affirm that portion of the trial court's judgment that denied the City's jurisdictional challenge to ATSER's claim for losses due to the City's alleged failure to use ATSER's services.

Conclusion

We affirm the trial court's order denying the City's Partial Motion for Summary Judgment on ATSER's failure-to-use-services claim on the grounds of failure to state a claim for which immunity was waived, which we construe as a challenge to the jurisdiction of the trial court to adjudicate ATSER's claim. We dismiss the remainder of this interlocutory appeal of the trial court's denial of the City's Partial Motion for Summary Judgment on ATSER's contract claims for lack of jurisdiction.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.

Justice Massengale, concurring in the judgment in part and dissenting from the judgment in part.