**In The**

# *Court of Appeals*

## *Ninth District of Texas at Beaumont*

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**NO. 09-10-00306-CV**

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**JAMES DOTY, KELVIN L. BROWN, CORNELIOUS THOMAS, JUSTIN BROWN, DERECK HADNOT, JERRY GAGE, BRANDON MCKENNEY, LARRY E. LEWIS, REGINALD DEAN, JARDELL RESEAN ELAM, ADAM GUILLOT, STEPHEN RIVERO, ROBERT DARDEN, MATT FAUL, HERMAN JOSEPH, DAVID R. DIE, JR., ANGELA POLK, DUSTIN SHARP, AND STEPHEN SHULTZ, Appellants**

**V.**

**BEAUMONT INDEPENDENT SCHOOL DISTRICT AND PORT ARTHUR INDEPENDENT SCHOOL DISTRICT, Appellees**

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**On Appeal from the 172nd District Court**
**Jefferson County, Texas**
**Trial Cause No. E-185,886**

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## MEMORANDUM OPINION

The issue in this interlocutory appeal is whether the Beaumont Independent School District ("BISD") and the Port Arthur Independent School District ("PAISD") are immune from various claims made by construction workers that arose from each school district's omission of prevailing-wage language in two of their construction contracts.

James Doty, Kelvin L. Brown, Cornelious Thomas, Justin Brown, Dereck Hadnot, Jerry Gage, Brandon McKenney, Larry E. Lewis, Reginald Dean, Jardell Resean Elam, Adam Guillot, Stephen Rivero, Robert Darden, Matt Faul, Herman Joseph, David R. Die, Jr., Angela Polk, Dustin Sharp, and Stephen Shultz (the "appellants") sued the BISD and the PAISD, asserting that the BISD and the PAISD violated chapter 2258 of the Texas Government Code. *See* Tex. Gov't Code Ann. §§ 2258.001-.058 (West 2008) (requiring political subdivisions to include prevailing-wage provisions in contracts for public works). The appellants sought both retroactive and prospective relief from the districts' omissions of prevailing-wage rate language in the contracts at issue. We conclude the trial court did not err by dismissing the appellants' claims for lack of subject matter jurisdiction.

## Statutory Requirements

When a political subdivision enters into a public works project, "the public body shall determine the general prevailing rate of per diem wages in the locality in which the public work is to be performed for each craft or type of worker" that will be working on the project. *Id.* § 2258.022(a). After the prevailing-wage rates are determined, the prevailing-wage rates are then required to be included in the call for bids and in the contract. *Id.* § 2258.022(d). The contractor or subcontractor awarded work under the contract is then required to pay any worker performing work on the project at least the prevailing-wage rate. *Id.* § 2258.023(a). However, "[a] contractor or subcontractor does

not violate [section 2258.023] if a public body awarding a contract does not determine the prevailing wage rates and specify the rates in the contract as provided by [s]ection 2258.022." *Id.* at § 2258.023(c).

If a public body receives notice of an alleged violation of section 2258.023, the public body "shall make an initial determination as to whether good cause exists to believe that the violation occurred." *Id.* § 2258.052(a). Unresolved issues relating to alleged violations of section 2258.023 shall be submitted to binding arbitration, but a "public body is not a party in the arbitration." *Id.* § 2258.053(a), (c).

Background

In 2009, the appellants worked for various companies on public works projects under contracts containing no wage rate specifications. *See id.* § 2258.022(d). That same year, the International Brotherhood of Electrical Workers Local 479 ("IBEW") sent a letter to the BISD notifying it of wage rate violations and requesting that the BISD make an "initial determination as to whether good cause exists to believe that [a] violation" of section 2258.023 had occurred. *See id.* § 2258.052. Subsequently, the BISD informed counsel for the IBEW that "there is not good cause to believe that a violation of [section] 2258.001, et seq., of the Texas Government Code occurred." A similar letter from the IBEW resulted in a similar determination by the PAISD that no violations had occurred.

In 2010, the appellants filed suit against the BISD and the PAISD. Plaintiffs' Second Amended Petition, the appellants' live pleading, advances three claims against

the BISD and the PAISD: (1) a claim that the school districts specify wage rates in future contracts after making prevailing-wage determinations, as required by chapter 2258 of the Texas Government Code; (2) a claim asking the trial court to require the school districts to determine the prevailing wages for the appellants; and (3) a claim asking the trial court to require the school districts to issue initial determinations that violations of section 2258.023 had occurred.

In response, the school districts challenged the trial court's exercise of subject matter jurisdiction over the appellants' claims by filing pleas to the jurisdiction, asserting the districts had not waived their right to governmental immunity. After both parties filed briefs addressing whether the trial court could exercise subject matter jurisdiction over the appellants' claims, the trial court dismissed the appellants' claims for lack of jurisdiction. The trial court did not further explain its ruling through findings of fact or conclusions of law. This appeal followed.[1]

Standard of Review

"Whether a court has subject matter jurisdiction is a question of law." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Additionally, whether a petition alleges facts sufficient to affirmatively demonstrate a trial court possesses

[1]The trial court also granted the pleas to the jurisdiction of various companies that had employed the appellants on the public work projects that were subject to the contracts at issue. When the appellants failed to identity a jurisdictional basis for our exercise over their interlocutory appeals, we dismissed those appeals without prejudice. *See James Doty v. Beaumont Indep. Sch. Dist.*, No. 09-10-00306-CV, 2010 Tex. App. LEXIS 8924, at ** 2-3 (Tex. App.—Beaumont Nov. 10, 2010, no pet.).

subject matter jurisdiction over the controversy is a question of law that is reviewed *de novo*. *Id*. In conducting a *de novo* review, courts "may not weigh the claims' merits but must consider only the plaintiffs' pleadings and the evidence pertinent to the jurisdictional inquiry." *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). When the governmental entity's plea to the jurisdiction challenges the sufficiency of the plaintiff's pleadings, the appeals court determines whether the plaintiff's pleadings allege "facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *Miranda*, 133 S.W.3d at 226.

To determine the sufficiency of the plaintiff's pleadings, courts construe the pleadings in the plaintiff's favor and look to the plaintiff's intent. *Id.* If the pleadings do not allege facts sufficient to allow the court to determine whether it has jurisdiction, "the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend." *Id.* at 226-27. Additionally, "[i]n a suit against a governmental unit, the plaintiff must affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity." *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003).

Where the plaintiff's pleadings affirmatively negate the existence of jurisdiction, "then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend." *Miranda*, 133 S.W.3d at 227. Stated another way, when a court determines that the plaintiff's pleadings are deficient and that the deficiency can be cured, the plaintiff "deserves 'a reasonable opportunity to amend' unless the pleadings

affirmatively negate the existence of jurisdiction." *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 839 (Tex. 2007) (quoting *Harris County v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004)); *Miranda*, 133 S.W.3d at 226-27; *Brown*, 80 S.W.3d at 555.

Analysis

First, we evaluate whether the Legislature has waived a school district's immunity from suit with respect to the appellants' second and third claims, which are their claims for retrospective relief under the contracts at issue. Generally, the doctrine of governmental immunity protects political subdivisions, such as school districts, from suit and liability. *See Sykes*, 136 S.W.3d at 638; *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). Immunity from suit, as distinguished from immunity from liability, deprives a trial court of subject matter jurisdiction unless the government has consented to being sued. *Miranda*, 133 S.W.3d at 224; *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). The governmental entity's consent to suit allows the trial court to exercise jurisdiction over the lawsuit. *Jones*, 8 S.W.3d at 638. In a suit against a governmental entity, the plaintiff bears the burden to establish the government consented to suit, "which may be alleged either by reference to a statute or to express legislative permission." *Id.*

With respect to the appellants' complaints alleging the districts should be required to determine the prevailing-wage rates for the contracts at issue and to issue initial determinations that violations of section 2258.023 occurred, the appellants' petition and

brief on appeal refer solely to chapter 2258 of the Texas Government Code. *See* Tex. Gov't Code Ann. §§ 2258.001-.058. In their pleas to the jurisdiction, the BISD and the PAISD assert that chapter 2258 "contains no general waiver of the school district[s'] immunity from suit."

When considering whether the Legislature has enacted a statute that waives a governmental entity's immunity, it is settled that the statute "must contain a clear and unambiguous expression of the Legislature's waiver of immunity." *Taylor*, 106 S.W.3d at 696; *see also* Tex. Gov't Code Ann. § 311.034 (West Supp. 2010) (requiring waivers of governmental immunity to be "effected by clear and unambiguous language"). After reviewing chapter 2258 with respect to claims that seek retrospective relief from a public entity's failure to include wage rate specifications in its bid package and contract documents for contracts that have been performed, we conclude that no provisions in chapter 2258 operate to waive a district's immunity from suit. *See* Tex. Gov't Code Ann. §§ 2258.001-.058.

Nonetheless, governmental immunity does not generally act as a bar to suits seeking a declaration of a party's rights under a statute or ordinance. *See Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994) (holding that governmental immunity did not bar claim for declaratory relief in suit challenging construction of a compulsory school-attendance law by state officials). While appellants' claims for retrospective relief include a claim couched in terms of declaratory relief, we conclude

that the appellants are not seeking a statutory interpretation of chapter 2258; instead, the appellants' claims seek relief to compel the school districts to determine the prevailing-wage rates for the public works projects on which the appellants worked and to issue initial determinations that good cause exists to show the appellants were not paid the prevailing wage.

With respect to claims for declaratory relief, we observe that the Uniform Declaratory Judgments Act is a remedial statute designed "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations[.]" Tex. Civ. Prac. & Rem. Code Ann. § 37.002(b) (West 2008); *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). The Act provides:

> A person interested under a . . . written contract . . . or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Tex. Civ. Prac. & Rem. Code Ann. § 37.004(a) (West 2008). Seeking declaratory relief does not alter the underlying nature of a suit or confer jurisdiction on a court where none otherwise exists. *IT-Davy*, 74 S.W.3d at 855.

With respect to appellants' claims under the contracts that were issued by the school districts, we note that private parties may not circumvent a governmental entity's immunity from suit by characterizing a suit that seeks money damages as a declaratory-judgment claim. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 371 (Tex. 2009); *IT-*

*Davy*, 74 S.W.3d at 856. The Texas Supreme Court held that "we distinguish suits to determine a party's rights against the State from suits seeking damages." *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 404 (Tex. 1997). Cases of the first type seek a declaration that state officers acted without legal or statutory authority and seek to compel conduct conforming to the law and are usually not barred by governmental immunity. *See IT-Davy*, 74 S.W.3d at 855; *Potter Cnty. v. Tuckness*, 308 S.W.3d 425, 429 (Tex. App.—Amarillo 2010, no pet.). "Cases of the second type seek declarations establishing contract validity, enforcing contract performance, or imposing contractual liabilities. Claims of this nature are unenforceable because their attempted effect is control of state action by imposing liability on the State." *Potter Cnty.*, 308 S.W.3d at 429 (citing *IT-Davy*, 74 S.W.3d at 855-56)).

Here, even though the appellants do not seek monetary damages against the school districts, they are seeking to impose a contractual liability on the respective districts' contractors. Stated another way, the appellants' claims, which ask the trial court to direct the districts to determine the prevailing-wage rates for the public works projects at issue and to issue initial determinations, seek to impose a contractual obligation on the districts' contractors for the contractors' failure to pay the prevailing wage.[2] Nonetheless, immunity from suit is not waived simply because the appellants have couched their claims in terms seeking equitable forms of relief. *See IT-Davy*, 74 S.W.3d at 860.

[2]We note that section 2258.023(c) states that contractors and subcontractors do not violate section 2258.023 if the public body does not specify the rates in the contracts. *See* Tex. Gov't Code Ann. § 2258.023(c) (West 2008).

Additionally, the appellants' claims for retrospective relief cannot arise from the breach of a term of the contracts at issue, as there is no dispute that the prevailing-wage provisions were not included in those contracts. Therefore, appellants could not amend their petition to assert a claim against the districts based on the waiver provisions that apply to suits for breach of contract. *See generally* Tex. Loc. Gov't Code Ann. § 271.152 (West 2005). We conclude that the appellants' pleadings affirmatively negate the existence of jurisdiction with respect to the appellants' claims for retrospective relief. *See Miranda,* 133 S.W.3d at 227.

Next, we consider the appellants' complaint concerning the trial court's dismissal of their claim for prospective relief, which consists of the appellants' request that the trial court require the school districts to include prevailing-wage determinations in all future contracts. First, we note that appellants' claim for prospective relief was made against the governmental entities, not the individuals with the authority to direct what is to be included in the respective districts' future contracts. *See Heinrich*, 284 S.W.3d at 372-73 (holding that "suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity"). "[A]s a technical matter, the governmental entities themselves--as opposed to their officers in their official capacity--remain immune from suit." *Id.* Because the appellants' suit named only the districts rather than the individuals responsible for entering contracts on behalf of the districts, we conclude that the school districts retained their sovereign immunity from the appellants'

claim asking the trial court to require the districts to include prevailing-wage rate provisions in their respective future contracts. *See id.*

We conclude that the BISD and the PAISD are immune from being sued on the claims the appellants assert in their second amended petition, and we overrule the appellants' issues. We affirm the trial court's orders dismissing the appellants' claims against the BISD and the PAISD with prejudice.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on February 10, 2011
Opinion Delivered March 31, 2011
Before McKeithen, C.J., Kreger and Horton, JJ.