AFFIRM in Part, and REVERSE and RENDER in Part; Opinion Filed November 27, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00152-CV

NORTH TEXAS MUNICIPAL WATER DISTRICT, Appellant
V.
JUSTIN A. JINRIGHT, MICHEL C. MCCHESNEY, AND CAMERON PARKER, Appellees

On Appeal from the 429th Judicial District Court
Collin County, Texas
Trial Court Cause No. 429-02373-2016

MEMORANDUM OPINION

Before Justices Stoddart, Whitehill, and Boatright
Opinion by Justice Boatright

This lawsuit arises from the North Texas Municipal Water District's alleged violation of an easement granted to it by three property owners, the plaintiffs in the suit below. The District filed a plea to the jurisdiction, which the trial court granted in part and denied in part. The District appeals the portion of the court's order denying its plea. We affirm in part and reverse and render in part.

BACKGROUND

In April 2013, appellees Justin Jinright, Michel McChesney, and Cameron Parker purchased a parcel of land in Fairview, Texas, with the intent of building three homes. Four months later, the District requested an easement through the property so that it could build an underground

water pipeline. The District conducted tree surveys that identified which trees on the property would be preserved and which trees would be removed or replaced.

In a November 12, 2013 letter from the District's Real Estate Manager, Bentley Powell, the District offered to pay the landowners $151,210 for settlement of the easement. This offer included sums for (i) the District's removal of 373 trees, as identified in the tree surveys, and (ii) the landowners' removal of a fence and the installation of a gate on the property so that the District could access the easement. Following their receipt of Powell's letter, the landowners expressed concerns regarding the District's obligations in the event it damaged their property while working in the easement. To address these concerns, the District's Land Agent, Jennifer Flippo, forwarded two pages from its "contractor specs." Among other provisions, the specs stated that the "Contractor" assumed full responsibility for any damage to the property. They also required the "Contractor" to "clear all trees within the . . . easement unless otherwise specifically noted on the plans or in the easement documents." In addition, they described the "Contractor['s]" obligations to replace, or to compensate the "Owner" for, any trees that were removed without the "Owner's" consent.

The landowners claim that the District intentionally withheld the portion of the specs that defined the terms "Owner" and "Contractor," and they were therefore misled into believing that they were the "Owners" who were owed obligations by the "Contractor," who in their view was the District. They allege that, in reality, the omitted portion of the specs defined the "Owner" as the District and the "Contractor" as S.J. Louis Construction of Texas, Ltd. The landowners allege that they detrimentally relied on the District's purported misrepresentations in agreeing to the easement. They claim that Flippo knew at the time that the District would disregard its tree surveys.

The parties signed the easement on December 2, 2013.[1] The District commenced construction of the pipeline in the spring of 2014. The landowners claim that the project was rife with problems, including damage to their fence, damage to trees that had not been slated for removal, and off-easement use of the property for equipment storage. They also contend that "what was once a lush green area has now been turned into a concrete road; a thick layer of Caliche and backfill rock was simply dumped on the easement path above the pipe, leaving the easement tract weedborne and barren."

The landowners filed suit in June 2016 and asserted six causes of action: breach of contract, inverse condemnation, trespass, unjust enrichment, reformation of instrument, and mandamus relief. The District filed a plea to the jurisdiction that sought to dismiss the suit for lack of subject matter jurisdiction based on the District's governmental immunity. On January 24, 2018, following a hearing held six days earlier, the trial court signed an order that granted the District's plea with respect to the landowners' claims for trespass, unjust enrichment, and mandamus relief. The court's order denied the plea as to the landowners' remaining claims. The District then filed this interlocutory appeal.

ANALYSIS

In its sole issue, the District contends that the trial court erred in denying its plea with respect to the landowners' claims for breach of contract, inverse condemnation, and reformation of instrument. We review a trial court's decision about whether it has jurisdiction de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004).

The District's plea urged that the landowners' petition failed to allege any basis on which the District's immunity has been waived. "Generally, immunity from suit implicates subject-matter jurisdiction and is properly asserted in a plea to the jurisdiction." *City of Magnolia 4A Econ. Dev.*

[1] The record lacks a signed copy of the easement, but the parties do not dispute that it was signed on December 2.

Corp. v. Smedley, 533 S.W.3d 297, 299 (Tex. 2017) (per curiam). We must determine if the landowners "alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause," construing the pleadings liberally in favor of the landowners and considering their intent. *Miranda*, 133 S.W.3d at 226. The landowners' response to the District's plea also attached evidence. We may consider this evidence and must do so when necessary to resolve the jurisdictional issues. *Vernco Constr., Inc. v. Nelson*, 460 S.W.3d 145, 149 (Tex. 2015) (per curiam). Accordingly, to the extent the landowners' pleadings do not affirmatively demonstrate, or affirmatively negate, the existence of jurisdiction, we will consider the evidence that they submitted in their response to the District's plea. We will also consider this evidence to the extent the District relies upon it in this appeal.

The landowners' brief also refers to evidence that they did not attach to their response to the plea. For example, prior to filing its plea, the District filed a motion for summary judgment, which the landowners opposed. Their summary-judgment opposition attached the Powell letter, among other evidence. As a general rule, we will not consider evidence that is not before the trial court at the hearing on the plea. *City of Dallas v. Prado*, 373 S.W.3d 848, 852 n.1 (Tex. App.—Dallas 2012, no pet.). In this case, the landowners' counsel relied on the Powell letter in his argument during the hearing on the District's plea. Counsel also stated that the letter had already been "entered into evidence," apparently referring to the landowners' previously filed summary-judgment opposition. We conclude that the Powell letter was before the court at the plea hearing even though the landowners' summary-judgment evidence was not listed in the court's order as among the documents that the court considered in ruling on the plea. We will next examine the subject claims through the lens of the foregoing standard and scope of review.

Breach of Contract

Governmental/proprietary dichotomy

"'Sovereign immunity' protects the State and state-level governmental entities, while 'governmental immunity' protects political subdivisions of the State" such as the District in this case. *Lubbock Cty. Water Control and Improvement Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 300 n.4 (Tex. 2014). "The two doctrines are otherwise the same, and courts often use the terms interchangeably." *Id.*

Governmental immunity protects a governmental unit from suits based on its performance of a governmental function but not a proprietary function. *Wasson Interests, Ltd. v. City of Jacksonville,* ___ S.W.3d ___, No. 17-0198, 2018 WL 4838309, at *2 (Tex. Oct. 5, 2018) ("*Wasson II*"). The trial court concluded that the landowners' contract claim was not barred by immunity because the subject contract was a proprietary function of the District. However, the District urges that the governmental/proprietary dichotomy applies only to municipalities, *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 430 n.3 (Tex. 2016) ("*Wasson I"*), whereas the District is a water conservation and reclamation district created under the authority of the Texas Constitution, TEX. CONST. art. XVI, § 59, and pursuant to a statute, Act of Apr. 4, 1951, 52nd Leg., R.S., ch. 62, § 1, 1951 Tex. Gen. Laws 96. A water conservation district is a political subdivision of the State and performs only governmental functions. *Bexar Metro. Water Dist. v. Educ. & Econ. Dev. Joint Venture*, 220 S.W.3d 25, 28 (Tex. App.—San Antonio 2006, pet. dism'd). For this reason, the court's conclusion that the District exercised a proprietary function was erroneous.

Equitable estoppel

The court also concluded that the doctrine of equitable estoppel waived the District's immunity with respect to the landowners' breach of contract claim. The District contends otherwise, citing the Texas Supreme Court's decision in *Sharyland Water Supply Corp. v. City of*

Alton. 354 S.W.3d 407, 414 (Tex. 2011), among others. We agree with the District, given that this Court has "decline[d] to establish a waiver-by-conduct exception to sovereign immunity for any cause of action, whether based on a breach of contract or not." *Gentilello v. Univ. of Tex. Sw. Health Sys.*, No. 05-13-00149-CV, 2014 WL 1225160, at *5 (Tex. App.—Dallas Mar. 22, 2014, pet. denied) (mem. op.). We therefore conclude that the trial court erred in determining that the District was estopped from asserting its immunity.

Statutory waiver of immunity

The landowners assert that the District's immunity was waived under sections 271.151 and .152 of the Local Government Code. TEX. LOC. GOV'T CODE ANN. §§ 271.151–.152. Under this statute, "[a] local government entity 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." TEX. LOC. GOV'T CODE ANN. § 271.152. A "[c]ontract subject to this subchapter" includes "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." TEX. LOC. GOV'T CODE ANN. § 271.151(2)(A). A waiver of governmental immunity must be clear and unambiguous. TEX. GOV'T CODE ANN. § 311.034; *Oncor Elec. Delivery Co. LLC v. Dallas Area Rapid Transit*, 369 S.W.3d 845, 849 (Tex. 2012). We must defer to the Legislature's decision to waive, or not to waive, such immunity. *Wasson I*, 489 S.W.3d at 434–45.

The District notes that the landowners previously asserted, in their response to the District's plea, that the subject easement involved the transfer of real property interests, not the provision of goods or services. Nevertheless, the landowners' counsel urged at the plea hearing that the portion of the Powell letter related to fence removal and gate installation qualified as a contract for goods and services under the Local Government Code. This argument relates to jurisdiction, and we must

consider it here. *Cf. Manbeck v. Austin Indep. Sch. Dist.*, 381 S.W.3d 528, 530 (Tex. 2012) (per curiam) (noting that sovereign immunity from suit may be raised for the first time on appeal).

Turning to the merits of the landowners' argument, they urge that the Powell letter should be considered part of the easement agreement. Under the letter's terms, the District offered to pay the landowners $11,285 in exchange for their agreement to "remove the sections of fence and build and install gates on the property" for the District to "access across the easement." The landowners rely on *City of New Braunfels v. Carowest Land, Ltd.*, in which the Austin Court of Appeals concluded that a deed was a component of a letter agreement, which in turn was part of a contract "'for providing goods [or] services'" to the city. 432 S.W.3d 501, 528–29 (Tex. App.—Austin 2014, no pet.) (quoting TEX. LOC. GOV'T CODE ANN. § 271.151(2)(A)). They contend that the Powell letter, as incorporated into the easement agreement, obligated them to provide "services" to the District. They also urge that Chapter 271 of the Local Government Code applies contract by contract, not clause by clause, citing *Ben Bolt–Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self–Ins. Fund*, 212 S.W.3d 320, 327 (Tex. 2006), among other decisions. In the landowners' view, the foregoing terms in the Powell letter triggered a waiver of immunity under the Local Government Code.

The District responds that the doctrine of merger precludes our consideration of the Powell letter, because the terms of a sales contract for land are merged into the subsequently accepted deed. *Coria v. Ogidan*, No. 05-16-00313-CV, 2017 WL 769875, *3 (Tex. App.—Dallas Feb. 28, 2017, no pet.) (mem. op.). It contends that, as a result, the landowners have not established a written contract stating the "essential terms" of an agreement to provide "goods or services," as is required for the statutory waiver to apply. In reply to the District, the landowners urge that the easement contains no integration clause and that there is a fact question regarding whether the

parties intended the agreement to be an integrated instrument. In their view, this question relates to the merits, not jurisdiction, and therefore it cannot be resolved at this stage of the litigation.

Even if the easement were construed to include the foregoing terms from the Powell letter, we are persuaded by the District's argument that the landowners do not seek contract damages to which a waiver of immunity extends. Section 271.152 is "subject to the terms and conditions of this subchapter," TEX. LOC. GOV'T CODE ANN. § 271.152, and such "terms and conditions" incorporate the limitations set forth in section 271.153, TEX. LOC. GOV'T CODE ANN. § 271.153; *Zachry Constr. Corp. v. Port of Houston Auth. of Harris Cty.*, 449 S.W.3d 98, 108–109 (Tex. 2014). In other words, section 271.152's waiver of immunity from suit does not extend to claims for damages not recoverable under section 271.153. *Zachry*, 449 S.W.3d at 110.

The landowners do not seek recovery of any "balance due and owed" by the District as payment for the landowners' fence removal and gate installation services, nor do they dispute the District's contention that it has already paid this amount. TEX. LOC. GOV'T CODE ANN. § 271.153(a)(1); *see Zachry*, 449 S.W.3d at 111 (construing "balance due and owed" as "simply the amount of damages for breach of contract payable and unpaid"). The landowners also do not seek any "amount owed" for change orders or additional work directed by the District. TEX. LOC. GOV'T CODE ANN. § 271.153(a)(2). Their petition instead seeks damages for the restoration of the property necessitated by the District's actions and for delays in the construction of appellee Parker's home as a result of such actions. These damages lack the required nexus to the purported breach upon which the landowners base their claim that the District's immunity has been waived. They are consequential damages—"damages that result naturally, but not necessarily, from the defendant's wrongful acts." *Basic Capital Mgmt., Inc. v. Dynex Commercial, Inc.*, 348 S.W.3d 894, 901 (Tex. 2011) (citation and internal quotation marks omitted). Such damages are not recoverable under section 271.153 barring an exception not applicable here. TEX. LOC. GOV'T

CODE ANN. § 271.153(b)(1);[2] *cf. Zachry*, 449 S.W.3d at 111 (noting that direct damages for breach—"the necessary and usual result of the defendant's wrongful act"—are recoverable under the statute) (citation and internal quotation marks omitted). In addition, while section 271.153 permits an award of reasonable attorney's fees, TEX. LOC. GOV'T CODE ANN. § 271.153(a)(3), and interest as allowed by law, *id.* § 271.153(a)(4), these sums cannot be recovered here given that the landowners do not allege damages recoverable under section 271.153. *See Sharyland*, 354 S.W.3d at 424 (agreeing with court of appeals that plaintiff could not recover attorney's fees for city's breach of contract because plaintiff's damages were not recoverable under section 271.153).

In sum, section 271.152 incorporates section 271.153 to further define whether immunity has been waived. *Zachry*, 449 S.W.3d at 110. The landowners' breach of contract damages, and the fees and interest related to these damages, are not recoverable under section 271.153. Accordingly, the trial court erred in denying the District's plea with respect to this claim.

Inverse Condemnation

We next consider the District's complaint that the trial court erred in denying its jurisdictional challenge to the landowners' inverse-condemnation claim. Article I, section 17 of the Texas Constitution provides that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person." TEX. CONST. art. I, § 17. To establish an inverse condemnation claim, the landowners must prove that "(1) the State intentionally performed certain acts, (2) that resulted in a 'taking' of property, (3) for public use." *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001), *disapproved on other grounds by Miranda*, 133 S.W.3d at 224 n.4. Sovereign

[2] Section 271.153(b)(1) prohibits recovery of consequential damages "except as expressly allowed under Subsection (a)(1)." *Id*. Subsection (a)(1), in turn, defines the "balance due and owed" to include "any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration." *Id.* § 271.153(a)(1). In this case, "the work" at issue was the landowners' provision of fence and gate services, not the construction of Parker's home. Accordingly, the increased costs, if any, to Parker from delays in constructing his home were not recoverable under subsection (a)(1).

immunity from suit does not protect the State from a claim under the takings clause. *State v. Brownlow*, 319 S.W.3d 649, 652 (Tex. 2010). Stated conversely, "[a] trial court lacks jurisdiction and should grant a plea to the jurisdiction where a plaintiff cannot establish a viable takings claim." *Tex. Dept. of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 166 (Tex. 2013) (citation and internal quotations omitted). Whether particular facts are sufficient to constitute a taking is a question of law. *Little-Tex*, 39 S.W.3d at 598.

The District challenges element (1) above. It urges that the landowners failed to allege an intentional taking. As an initial matter, the landowners' petition claims that "[t]he District knew harm was substantially certain to result from its actions." This allegation is consistent with the definition of intent in the context of a constitutional taking claim. *See City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004) ("[I]f the government knows that specific damage is substantially certain to result from its conduct, then takings liability may arise even when the government did not particularly desire the property to be damaged."). However, the District contends that it acted pursuant to its colorable contract rights. "The State, in acting within a color of right to take or withhold property in a contractual situation, is acting akin to a private citizen and not under any sovereign powers." *Little-Tex*, 39 S.W.3d at 599. "In this situation, the State does not have the intent to take under its eminent domain powers; the State only has an intent to act within the scope of the contract." *Id.*

Applying this principle, the Texas Supreme Court in *State v. Holland* held that the plaintiff in that case could not state a takings claim for the State's allegedly unlawful use of the plaintiff's patent, and therefore the State was entitled to immunity from suit. 221 S.W.3d 639, 641, 643–44 (Tex. 2007). The *Holland* court concluded that the State had accepted the plaintiff's product and his services under the color of its contracts with two companies managed by the plaintiff, not pursuant its power of eminent domain. *Id.* at 644. The District also relies on *Texas Southern*

University v. State Street Bank & Trust Co., which involved a dispute arising from a lease/purchase agreement. 212 S.W.3d 893, 910–11 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Our sister court held that the defendant, a public university, did not take the subject equipment under its power of eminent domain given that the plaintiff had voluntarily delivered the equipment pursuant to a contract with the university. *Id.* Based on the foregoing authorities, the District views the landowners' takings claim as a recasting of their breach of contract claim to which immunity from suit applies.

The landowners respond that, in instances where the ownership rights in a parcel of real property are divided between the government and a private individual, the governmental appropriation of some or all of the private party's property rights is an inverse condemnation. As support for this position, the landowners cite decisions by our sister courts in similar cases. *See Thornton v. Ne. Harris Cnty. MUD 1*, 447 S.W.3d 23, 36–37 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (holding that plaintiffs sufficiently alleged facts to show that municipal drainage easement holder knew that its introduction of lead-contaminated soil onto plaintiffs' property would damage or destroy such property); *City of Edinburg v. A.P.I. Pipe & Supply, LLC*, 328 S.W.3d 82, 93–95 (Tex. App.—Corpus Christi 2010), *rev'd on other grounds*, 397 S.W.3d 162 (Tex. 2013) (rejecting city's claim of immunity in suit alleging that city exceeded scope of easement by keeping soil removed from such easement); *Koch v. Tex. Gen. Land Office*, 273 S.W.3d 451, 453–54, 460 (Tex. App.—Austin 2008, pet. denied) (holding that State's removal of limestone from property gave rise to potential takings claim, notwithstanding that it owned mineral estate in such property, given surface owner's allegation that limestone belonged to surface estate).

We begin by considering whether the "color of right" analysis from *Holland* and *Little-Tex* applies here. The property interests at issue in those cases arose from contracts with the government. *Holland*, 221 S.W.3d at 641; *Little-Tex*, 39 S.W.3d at 599. In contrast, this case

involves a fee interest that predates any contract with the government. Under similar facts, the *Brownlow* court did not apply a "color of right" analysis. 319 S.W.3d at 652–56. That case involved an easement whose express terms allowed it to be used for "opening, constructing, and maintaining" a mitigation pond. *Id.* at 653. The State built the pond and used most of the excavated dirt for highway construction purposes at another location. *Id.* at 651. In determining whether the landowner had stated a valid inverse condemnation claim for the excavated fill, the supreme court looked to the "easement's express terms, interpreted according to their generally accepted meaning," which "delineate the purposes for which the easement holder may use the property." *Id.* at 652 (citation and internal quotation marks omitted). "An easement does not transfer rights by implication except what is reasonably necessary to fairly enjoy the rights expressly granted." *Id.* (citation and internal quotation marks omitted). The court concluded that the plaintiff stated a valid takings claim because the State "exercised a right neither granted by the easement nor reasonably necessary for the State to fully enjoy the easement for the purpose it was granted." *Id.* at 656. We will apply the analysis in *Brownlow* to the landowners' takings allegations here.

Taking of trees

The landowners' petition does not set forth the easement's express terms regarding tree removal, though their opposition to the District's plea attached a copy of the easement itself. The terms in question permitted the District "to trim or cut down or eliminate trees or shrubbery . . . in [its] reasonable judgment . . . as may be necessary to prevent possible interference with the installation and operation of [the] pipeline and to remove possible hazards thereto." The landowners contend that whether the District exercised reasonable judgment must be considered in light of the tree surveys' restriction that the District remove only 373 specific trees. They claim that over 400 trees were lost, some of which were identified as "Preserve and Protect." Even assuming the District removed more trees than permitted by the surveys, the landowners do not

allege facts demonstrating that the District could not have reasonably believed, notwithstanding the surveys, that the removal of such trees was necessary to prevent interference with the pipeline. For example, the landowners do not allege the location of the additionally removed trees in proximity to the pipeline. Nor do they allege facts demonstrating why removal of the additional trees was unnecessary. Absent such allegations, the landowners' petition does not state an inverse condemnation claim regarding the taking of their trees. Since the trial court's jurisdiction over this claim hinges on the existence of a valid claim, *A.P.I. Pipe & Supply*, 397 S.W.3d at 166, the landowners have not alleged facts that demonstrate the court's jurisdiction. We will consider below whether the landowners should be permitted another opportunity to allege a valid takings claim related to their trees.

Other takings

Turning to the other takings alleged here, the landowners claim that the easement obligated the District to, "insofar as practicable, restore the ground disturbed" by the installation of the pipeline and to "separate the topsoil during construction by double-drilling" so as to "restore said topsoil within the easement." In addition, the easement required the District to "leave the surface as nearly as reasonably possible as it was prior to the construction of the pipeline," including restoring any fences or other improvements damaged through the District's use, and reseeding the easement once the pipeline's construction was complete. The petition alleges numerous acts by the District that violated the foregoing terms. According to the landowners, the District did not repair or replace fencing that it removed while working on the property. It also did not return the native topsoil removed from the easement, thereby damaging the property by altering its gradation. Moreover, the District stored its equipment off easement and used what was supposed to be a temporary road through the property as a main thoroughfare to access an adjacent subdivision in which the District was constructing another section of the pipeline. Assuming these allegations to

be true, the landowners have alleged facts establishing that the District "exercised a right neither granted by the easement nor reasonably necessary" for the District "to fully enjoy the easement for the purpose it was granted." *Brownlow,* 319 S.W.3d at 656. These allegations demonstrate the court's jurisdiction to hear the landowners' takings claim regarding the foregoing harms. Accordingly, the trial court did not err in denying the District's plea with respect to this portion of the claim.

Reformation of Instrument

The landowners allege that they were induced to sign the easement based on Powell's letter and based on the contractor specs attached to Flippo's e-mail. They claim that these documents contain terms negotiated between the parties, and they seek to reform the easement to include these additional terms.

Even if the easement were reformed to include the foregoing additional terms, the landowners do not allege any contract damages covered by the waiver of immunity applicable to contract claims. TEX. LOC. GOV'T CODE ANN. § 271.153; *Zachry,* 449 S.W.3d at 110. The absence of such a waiver renders unnecessary any reformation of the easement for the purpose of establishing a breach of contract claim. *See Black v. Jackson*, 82 S.W.3d 44, 51–52 (Tex. App.—Tyler 2002, no pet.) ("Once a case or claim is determined to be moot, a court lacks subject matter jurisdiction to decide the issues."). Moreover, even if the easement were reformed to include the tree surveys as had been incorporated into the Powell letter and the contractor specs, the petition does not allege facts establishing that the District violated the terms permitting it to remove trees that it reasonably deemed necessary to prevent interference with the pipeline. The absence of such facts renders unnecessary any reformation of the easement for the purpose of establishing an inverse condemnation with respect to the taking of trees. For these reasons, the trial court lacks jurisdiction to hear the landowners' reformation claim.

Leave to Amend

Summarizing our holdings above, the landowners have alleged facts establishing the court's jurisdiction to hear their inverse condemnation claim predicated on their property taken other than their trees. However, they do not allege facts establishing the court's jurisdiction over their remaining claims. We next consider whether they should be given an opportunity to cure the defects with respect to these claims.

If a plaintiff's petition affirmatively negates the existence of jurisdiction, the plea may be granted and the suit dismissed without allowing the plaintiff an opportunity to amend. *Miranda*, 133 S.W.3d at 227. We conclude that this description applies to the landowners' breach of contract claim and to their reformation claim to the extent it is alleged as a basis for establishing the contract claim. Even assuming a reformation of the easement, the landowners do not dispute that the District has already paid the "balance due and owed" with respect to the subject contract. TEX. LOC. GOV'T CODE ANN. § 271.153(a)(1). Accordingly, the foregoing claims suffer from an incurable jurisdictional defect and should be dismissal with prejudice.

If a plaintiff's petition does not allege sufficient facts that affirmatively demonstrate jurisdiction but also do not affirmatively demonstrate incurable defects in jurisdiction, "the issue is one of pleading sufficiency." *Id*. at 226–27. We conclude that this description applies to the portion of the landowners' inverse condemnation claim predicated on the taking of their trees. While the landowners do not allege facts affirmatively establishing that the District's removal of extra trees violated the terms of the easement, their petition also does not affirmatively negate the existence of such facts. Therefore, this jurisdictional defect is potentially curable.

A plaintiff is permitted to amend its pleadings to cure insufficiently pled jurisdictional allegations. *Id*. However, this right has its limits. "If a plaintiff has been provided a reasonable opportunity to amend after a governmental entity files its plea to the jurisdiction, and the plaintiff's

amended pleading still does not allege facts that would constitute a waiver of immunity, then the trial court should dismiss the plaintiff's action." *Harris Cty. v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004). Here, the landowners' second amended petition was the pleading on file when the District filed its plea. This petition included the three claims at issue in this appeal. The District's plea urged that the landowners' petition failed to assert any basis upon which the District's immunity had been waived. Approximately three weeks later, prior to the hearing on the plea, the landowners filed their response to the District's plea. They also filed their third amended petition, which is their current live pleading. Among other additions, the third amended petition revised the landowners' inverse condemnation claim to allege that the District acted beyond the scope of the easement. However, as described above, the landowners did not allege facts affirmatively demonstrating that the District's removal of trees exceeded the easement's scope. We conclude that they should not be permitted to amend their petition to cure this defect since they already had an opportunity to do so. *Sykes*, 136 S.W.3d at 639. Accordingly, we dismiss the inverse condemnation claim with prejudice to the extent it is based on the taking of the landowners' trees.

CONCLUSION

We affirm the denial of the District's plea with respect to the landowners' inverse condemnation claim to the extent such claim relates to takings other than the taking of trees. We reverse the denial of the plea regarding the inverse condemnation claim to the extent such claim relates to the taking of trees, and we render judgment dismissing this portion of the claim with prejudice. We also reverse the denial of the plea with respect to the breach of contract and reformation of instrument claims, and we render judgment dismissing these claims with prejudice.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

NORTH TEXAS MUNICIPAL WATER DISTRICT, Appellant

No. 05-18-00152-CV V.

JUSTIN A. JINRIGHT, MICHEL C. MCCHESNEY, AND CAMERON PARKER, Appellees

On Appeal from the 429th Judicial District Court, Collin County, Texas
Trial Court Cause No. 429-02373-2016.
Opinion delivered by Justice Boatright.
Justices Stoddart and Whitehill participating.

In accordance with this Court's opinion of this date, we **AFFIRM** the denial of the appellant's plea to the jurisdiction with respect to the appellees' inverse condemnation claim to the extent such claim relates to takings other than the taking of trees. We **REVERSE** the denial of the plea regarding the inverse condemnation claim to the extent such claim relates to the taking of trees, and we **RENDER** judgment dismissing this portion of the claim with prejudice. We also reverse the denial of the plea with respect to the appellees' breach of contract and reformation of instrument claims, and we render judgment dismissing these claims with prejudice.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 27th day of November, 2018.