

Reversed in Part and Dismissed, Affirmed in Part and Remanded, and Majority and Dissenting Opinions filed February 25, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00571-CV

HARRIS COUNTY FLOOD CONTROL DISTRICT, Appellant

V.

GREAT AMERICAN INSURANCE COMPANY, Appellee

**On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 2008-19859**

DISSENTING OPINION

I respectfully dissent, in part.

I agree with the Majority's disposition of issue one dealing with quantum meruit. However, I disagree with the Majority's disposition of issue two dealing with attorney's fees.

We all agree that Section 271.152 of the Local Government Code waives governmental "immunity from suit" for breach of contract. *See City of Houston v.*

Petroleum Traders Corp., 261 S.W.3d 350, 359 (Tex. App.-Houston [14th Dist.] 2008, rule 53.7(f) motion granted). “Breach of contract” is a “cause of action”. In contrast, a claim for attorney’s fees is not a “cause of action”; rather it is a remedy arising out of a cause of action. With regard to attorney’s fees, the only immunity issue would be whether the governmental entity is “immune from liability” for attorney’s fees. The present case only involves issues of “immunity from suit”, not “immunity from liability”. If a governmental entity can be sued for breach of contract, as here, then it can be sued for damages; the types of damages that can be recovered from the governmental entity, such as attorney’s fees, depends on whether the entity has waived “immunity from liability” for such damages.

I agree with the reasoning of the Court, regarding claims for attorney’s fees, in *State v. Mid-South Pavers, Inc.*, 246 S.W. 3d 711, 729-30 (Tex. App.—Austin 2007, no pet.). I disagree with *McMahon Contracting, L.P. v. City of Carrollton*, 277 S.W.3d 458, 465-66 (Tex. App. –Dallas 2009, no pet.), to the extent *McMahon* conflicts with *Mid-South*.

I would sustain appellant’s issue one, and overrule appellant’s issue two. Accordingly, I would reverse the trial court’s denial of appellant’s Plea to the Jurisdiction on appellee’s quantum meruit cause of action, I would affirm the trial court’s denial of appellant’s Plea to the Jurisdiction regarding attorney’s fees, and I would remand the case for further proceedings.

/s/

Margaret Garner Mirabal
Senior Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Mirabal.¹ (Hedges, CJ. majority.)

¹ Senior Justice Margaret Garner Mirabal sitting by assignment.