Affirmed in Part, Reversed and Remanded in Part, and Majority and Dissenting Opinions filed May 1, 2012.

In The

Fourteenth Court of Appeals

NO. 14-11-00004-CV

CAJUN CONSTRUCTORS, INC., Appellant

V.

VELASCO DRAINAGE DISTRICT, Appellee

On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Cause No. 61420

M A J O R I T Y O P I N I O N

In this contract dispute, Cajun Constructors, Inc. appeals from the trial court's summary judgment in favor of Velasco Drainage District and a jury's subsequent award of attorney's fees to Velasco. Cajun asserts that the trial court erred in granting summary judgment to Velasco because (1) Cajun complied with the notice requirements in the contract between the parties or at least a fact issue exists with regard to notice, (2) the notice provisions in the contract are legally void, and (3) Cajun's quantum meruit claim was improperly dismissed. Cajun further contends that the trial court erred in awarding attorney's fees to Velasco based on the jury's verdict because Velasco did not recover

any actual damages and failed to properly segregate recoverable fees from nonrecoverable fees. We affirm in part and reverse and remand in part.

I. BACKGROUND

In September 2005, Velasco contracted[1] with Cajun to provide labor and materials for the expansion of a pump station located in Brazoria County, Texas. The original contract price was $12,974,000. Velasco concurrently contracted with Patterson Pump Company to provide pumps, pump shafts, coupling nuts, and other materials for Cajun to install at the project. Patterson Pump also supplied instructions for Cajun's installation of the equipment. Cajun subcontracted its installation responsibilities to Louisiana Crane Company, L.L.C.

Under the contract between Cajun and Velasco, if Cajun failed to complete the project by a specified date, it would be responsible for liquidated damages of $750 per day. The contract further mandated certain dispute resolution procedures:

> 10.05 Claims and Disputes
>
> A. Notice: Written notice stating the general nature of each Claim, dispute, or other matter shall be delivered by the claimant to ENGINEER and the other party to the Contract promptly (but in no event later than 30 days) after the start of the event giving rise thereto. Notice of the amount or extent of the Claim, dispute, or other matter with supporting data shall be delivered to the ENGINEER and the other party to the Contract within 60 days after the start of such event (unless ENGINEER allows additional time for claimant to submit additional or more accurate data in support of such Claim, dispute, or other matter).[2] A Claim for an adjustment in Contract price shall be prepared in accordance with the provisions of paragraph 12.01.B. A Claim for an adjustment in Contract Time shall be prepared in accordance with the provisions of paragraph 12.02.B. Each claim shall be accompanied by claimant's written statement that the adjustment claimed is the entire adjustment to which the claimant believes it is entitled as a result of said event. The opposing party shall submit any response to

[1] Among the Contract Documents which comprise the agreement between Velasco and Cajun were the Standard General Conditions of the Construction Contract. All contract citations herein are to the General Conditions.

[2] We construe the Engineer's authority to grant extra time as relating to the 60-day deadline only.

ENGINEER and the claimant within 30 days after receipt of the claimant's last submittal (unless ENGINEER allows additional time).

B. ENGINEER'S Decision: ENGINEER will render a formal decision in writing within 30 days after receipt of the last submittal of the claimant or the last submittal of the opposing party, if any. ENGINEER's written decision on such Claim, dispute, or other matter will be final and binding upon OWNER and CONTRACTOR unless:

1. An appeal from ENGINEER's decision is taken within the time and in accordance with the dispute resolution procedures set forth in Article 16; or

2. If no such dispute resolution procedures have been set forth in Article 16,[3] a written notice of intention to appeal from ENGINEER's written decision is delivered by OWNER or CONTRACTOR to the other and to ENGINEER within 30 days after the date of such decision, and a formal proceeding is instituted by the appealing party in a forum of competent jurisdiction within 60 days after the date of such decision or within 60 days after Substantial Completion, whichever is later (unless otherwise agreed in writing by OWNER and CONTRACTOR), to exercise such rights or remedies as the appealing party may have with respect to such Claim, dispute, or other matter in accordance with applicable Laws and Regulations.

C. If ENGINEER does not render a formal decision in writing within the time stated in paragraph 10.05.B, a decision denying the Claim in its entirety shall be deemed to have been issued 31 days after receipt of the last submittal of the claimant or the last submittal of the opposing party, if any.

D. No claim for an adjustment in Contract Price or Contract Times (or Milestones) will be valid if not submitted in accordance with this paragraph 10.05.

On May 16, 2008, Cajun filed what it identified as "Claim #1 – 96" Pump Sole Plate Grout Removal and Replacement," a claim for an adjustment in contract price of $139,157.00. On July 2, 2008, Cajun filed "Claim #2 – Coupling Nut Removal and

[3] Article 16, entitled "Dispute Resolution," states:

Dispute resolution methods and procedures, if any, shall be as set forth in the Supplementary Conditions. If no method and procedure has been set forth, and subject to the provisions of paragraphs 9.09 and 10.05, OWNER and CONTRACTOR may exercise such rights or remedies as either may otherwise have under the Contract Documents or by Laws or Regulations in respect of any dispute.

The Supplementary Conditions of the Contract do not set forth any dispute methods and procedures.

Installation," seeking an adjustment in the contract price of $163,540.00. Baker Lockwood JV, the Engineer referenced in the contract, denied both of these claims on September 5, 2008. On August 5, 2008, Cajun submitted a revised "Claim #3 – Fabrication Problems with the Patterson Pump Equipment," seeking contract adjustment of $68,164.00.[4] The Engineer rejected part of this claim on September 10, 2008, but recommended that Velasco approve an adjustment in contract price of $5,387.00 for this claim. On July 2, 2008, Cajun submitted "Claim #4 – Time Impact Analysis," a claim for an adjustment in contract time of an additional 373 calendar days. The Engineer also rejected the bulk of this claim on September 10, but recommended that Velasco approve an adjustment in contract time of 30 days.

The project was substantially completed on May 23, 2008, which was 275 days past the contract deadline.[5] After final completion, Velasco withheld $206,250 (275 days x $750/day) from the final contract payment as liquidated damages.

In February 2008, Cajun initiated the present lawsuit by filing suit against Louisiana Crane for breach of contract and negligence. Cajun subsequently added claims against Patterson Pump for negligence. The trial court dismissed Louisiana Crane due to a forum selection clause in the contract between Cajun and Louisiana Crane. On October 10, 2008, Cajun amended its petition to add Velasco as a defendant, seeking the money Velasco had withheld from Cajun's final contract payment under theories of breach of contract and quantum meruit. Velasco answered Cajun's petition, asserting *inter alia* the following affirmative defenses: (a) Cajun's quantum meruit claim is barred by the existence of a contract between the parties, and (b) Cajun's contract claims are barred by its own prior material breach of the contract. Velasco further alleged that Cajun had failed to perform all conditions precedent to suit, including failing to comply with the notice and claim requirements and procedures contained within the contract. Velasco stated that because it is a governmental entity, Cajun's damage claims are limited to those

[4] The record reflects that Claim #3 originally was filed on July 2, 2008.

[5] Cajun had been granted 62 extra days to complete the project.

statutorily authorized by the Local Government Code. Finally, Velasco counterclaimed for breach of contract against Cajun.

Velasco filed a summary judgment motion, but Cajun amended its petition on October 2, 2009 to include additional claims that Velasco breached its contract by failing to pay for the four claims described above that Cajun submitted to Velasco. In the amended pleading, Cajun specified $406,000.00 as damages for Claim No. 4, which was the claim for extension of the contract deadline.

In April 2010, Velasco filed an amended motion for summary judgment. The amended motion addressed all of Cajun's claims against Velasco and sought severance of those claims. In the motion, Velasco alleged that Cajun failed to follow the general conditions notice provisions, excerpted above, in seeking to recover on its claims. Specifically, it asserted that Cajun failed to meet all three of the deadlines provided by the contract, including the requisite written notification of a claim within 30 days of the event, notice of the amount or extent of the claim with supporting data within 60 days after the start of the event, and written notice of its intent to appeal from the Engineer's final written decision within 30 days. Velasco relied primarily on the affidavit of its chairman, George Kidwell, in making these assertions. Velasco further contended that it was entitled to summary judgment on Cajun's quantum meruit claim because there was a contract between the parties which governed their relationship. Velasco also requested attorney's fees as the "prevailing party" on a contract action and severance of Cajun's claims against Velasco if the motion were granted.

In responding to Velasco's summary judgment motion, Cajun stated that the only condition precedent to filing suit under the contract was conformance with article 9, section 9.09.B, which provides:

> The rendering of a decision by ENGINEER pursuant to paragraph 9.09 with respect to any such Claim, dispute, or other matter . . . will be a condition precedent to any exercise by OWNER OR CONTRACTOR of such rights or remedies as either may otherwise have under the Contract

> Documents or by Law or Regulations in respect of any such claim, dispute, or other matter.

Cajun asserted that it had complied with this contract term because it waited until the Engineer had denied its claims before filing suit. Cajun asserted that failure to comply with any notice provision of section 10.05.A would not bar its breach of contract action against Velasco because it brought its claim within the statute of limitations for a contract action and it met the condition precedent of section 9.09.B. Cajun further alleged that even if the notice provisions were conditions precedent, there was at least a fact issue in regards to each type of notice precluding summary judgment.

On August 10, 2010, the trial court issued a partial summary judgment, granting Velasco's first amended summary judgment motion except as to the request for attorney's fees. At a conclusion of a trial on the attorney's fees, a jury found that a reasonable fee for the necessary services of Velasco's attorneys for preparation and trial was $225,000, and also found specific sums as reasonable fees in the event of an appeal. On December 22, 2010, the trial court signed a final judgment in which it granted Velasco's prior motion for severance, ordered that Velasco was entitled to retain the unpaid contract balance in the sum of $206,250, ordered that Velasco was entitled to recover attorney's fees under Chapter 38 of the Civil Practice and Remedies Code in the amounts found by the jury as reasonable, and awarded Velasco costs of court and post-judgment interest. This appeal timely followed.

II. Standards of Review

We review a trial court's summary judgment *de novo*. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). In reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, indulging every reasonable inference, and we resolve any doubts in the nonmovant's favor. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 549 (Tex. 1985). Where, as here, the trial court grants the judgment without specifying the grounds, we affirm the summary judgment if any of the grounds presented are meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872–873

(Tex. 2000). "Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." Tex. R. Civ. P. 166a(c). In a traditional motion for summary judgment, if the movant's motion and summary judgment evidence facially establish its right to judgment as a matter of law, the burden shifts to the nonmovant to raise a genuine, material fact issue sufficient to defeat summary judgment. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000).

Finally, the law in regard to contract interpretation is clear and well-settled. The interpretation of an unambiguous contract is a question of law, which is reviewed *de novo*. *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 650–51 (Tex. 1999). With these principles in mind, we turn to the trial court's partial summary judgment on Cajun's breach of contract and quantum meruit claims.

III. Analysis

Cajun challenges the partial summary judgment in three issues, contending: (1) it complied with all contractual notice requirements or, at a minimum, raised a fact issue regarding whether it complied with the notice provisions; (2) the contractual notice provisions are void pursuant to section 16.071 of the Texas Civil Practice and Remedies Code; and (3) Cajun's quantum meruit claim was improperly dismissed on summary judgment. We will discuss each issue in turn.

A. Compliance with Contractual Notice Provisions

As excerpted above, the contract contains three notice requirements. First, a party must provide written notice—to the Engineer and the other party—stating the general nature of any claim or dispute no later than 30 days after the start of the event giving rise to the claim. Second, notice of the amount or extent of the claim or dispute with supporting data must be delivered to the Engineer and other party within 60 days after the start of the event, unless the Engineer provides additional time for the claimant to submit additional or more accurate data in support of the claim or dispute. And third, after the

Engineer renders a formal written decision regarding the claim or dispute, the party who intends to appeal the Engineer's decision must file a written notice of intent to appeal to the Engineer and the other party within 30 days after the date of the Engineer's decision. Under its first issue, Cajun makes initial arguments concerning whether the notice provisions were conditions precedent to suit on the contract and then makes specific evidentiary arguments concerning whether it satisfied each of the notice provisions on each of its four identified claims.

1. General Arguments Regarding Notice

Cajun initially asserts that these notice provisions are not conditions precedent to suit. Instead, it contends that the only condition precedent to suit is a formal written decision by the Engineer as stated in section 9.09.B of the general provisions, excerpted above. A condition precedent may be either a condition to the formation of a contract or to an obligation to perform an existing agreement. *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976). Conditions may, therefore, relate to either the formation of contracts or to liability under them. *Id.* Conditions precedent to an obligation to perform are those acts or events which occur subsequent to the making of a contract and which must occur before there is a right to immediate performance and before there is a breach of a contractual duty. *Id.* If the condition is not fulfilled, the contract or obligation attached to the condition cannot be enforced. *CDI Eng'g Grp., Inc. v. Admin. Exch., Inc.*, 222 S.W.3d 544, 548 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). In other words, a party seeking to recover under a contract bears the burden of proving that all conditions precedent have been satisfied. *Assoc. Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 283 (Tex. 1998).

Conditions precedent are disfavored such that courts will not construe a contract provision as a condition precedent unless compelled to do so by language that may be construed no other way. *See Criswell v. European Crossroads Shopping Ctr.*, 792 S.W.2d 945, 948 (Tex. 1992). The term "condition precedent," which is used in section 9.09.B, is not used in subsection 10.05.D, which states: "No claim for an adjustment in

Contract Price or Contract Times (or Milestones) will be valid if not submitted in accordance with this paragraph 10.05." Nevertheless, we conclude that this language constitutes a condition precedent. *See id.* (explaining that terms such as '"if,' 'provided that,' 'on condition that,' or some similar phrase of conditional language must normally be included" to create a condition precedent). To construe this clause as anything other than a condition precedent would be to ignore its plain language. *Cf. T.F.W. Mgmt., Inc. v. Westwood Shores Prop. Owners Ass'n*, 162 S.W.3d 564, 570 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (noting that although conditions precedent are harsh in operation, court cannot ignore plain language of a contract to avoid such harshness).[6] Accordingly, we reject Cajun's initial argument that the notice provisions in the contract were not conditions precedent to suit on the contract.

2. Evidentiary Analysis

We now turn to consideration of the parties' evidentiary contentions regarding notice under the 30-day and 60-day notice provisions for each of Cajun's four claims. For reasons discussed below in our analysis of issue two, we do not address any evidentiary arguments pertaining to the provision requiring notice of appeal from the Engineer's decision.

a. Claim No. 1

In Claim No. 1, Cajun sought recovery of additional costs that it claimed resulted from having to remove existing grout for several pump sole plates, re-level the plates, and then re-grout. According to Cajun, the plates were originally installed on March 21, 2007, and at that time, a technician from Patterson Pump confirmed that they were within

[6] Language in Article 16 of the contract, "Dispute Resolution," further supports interpreting the notice provisions in paragraph 10.05 as conditions precedent. Article 16 provides that "[i]f no [dispute resolution] method and procedure has been set forth, *and subject to the provisions of paragraphs 9.09 and 10.05*, OWNER and CONTRACTOR may exercise such rights or remedies as either may otherwise have under the Contract Documents or by Laws or Regulations in respect of any dispute." (Emphasis added.) This language reflects that before a party to the contract could pursue its legal rights, such as filing suit on the contract, it had to have fulfilled the notice requirements of paragraph 10.05 if those requirements pertained to the particular rights asserted.

specified tolerances. Subsequently, Velasco hired a third party to check the level, and the plates were found to be outside of tolerance. Velasco directed Cajun to remove the grout, re-level, and re-grout, resulting in additional costs and a claimed delay of 92 days.

In its motion for summary judgment, Velasco contended that Cajun failed to provide either "[w]ritten notice of the general nature of [the] Claim, dispute, or other matter" within 30 days "after the start of the event giving rise thereto," or "[n]otice of the amount or extent of the Claim, dispute, or other matter with supporting data" within 60 days as required by the contract. We will discuss each of these notice requirements.

i. 30-Days Notice

Velasco relied primarily on George Kidwell's affidavit in asserting that the "event giving rise" to Claim No. 1 occurred on March 30, 2007.[7] In his affidavit, Kidwell additionally averred, *inter alia*, that (1) he is the Velasco chairman, (2) the statements made in the affidavit are within his personal knowledge, and (3) Cajun "failed to timely provide written notice . . . of its . . . claims on or before the deadline dates."

In response, Cajun cited an email from Cajun employee David Caldwell to the designated Engineer for the project, Doug Harris, with a copy to Velasco's superintendent. In that email, dated April 16, 2007, Caldwell stated that Cajun wanted to set up a meeting "with Patterson Pump to discuss the pump installation and what steps need to be taken to level the sole plate." In his deposition testimony, Kidwell acknowledged that this email at least touched upon the general nature of Claim No. 1.

In its appellate brief, Velasco insists that the email fails as proper notice because it does not expressly state that Cajun would later be submitting an actual claim, apparently meaning for some type of compensation or concession. The contract itself, however, does not require such specificity at this initial stage, requiring only "[w]ritten notice of the general nature of [the] Claim, dispute, or other matter." Indeed, before Cajun learned

[7] Cajun disputes that the date provided by Kidwell was the actual date of the event at issue but concedes the issue only for the sake of argument in this appeal.

what steps would be necessary to correct the issue with the sole plates, it would have been difficult to provide specifics regarding any compensation or concessions to be requested. We find that the April 16 email was sufficient to satisfy the 30-day notice requirement; it was clearly provided within 30-days of the event as identified by Velasco.

ii. 60-Days Notice

Velasco additionally asserted as a ground for summary judgment on Claim No. 1 that Cajun failed to provide "[n]otice of the amount or extent of the Claim, dispute, or other matter with supporting data" within 60 days of the event giving rise thereto. In its motion, however, Velasco did not reference any supporting documentation for this assertion.[8] More importantly, as Cajun points out, the Engineer had authority to extend the deadline for notice of the amount or extent of the claim and to submit additional supporting data. The Engineer implicitly did so here because he clearly referenced and considered the merits of Cajun's amount and extent arguments as well as its supporting data. Although Velasco argues otherwise, it does not offer any evidence to establish that the Engineer did not extend the deadlines. No precise method or timetable for granting a time extension is required under the contract.[9] Accordingly, we find that Velasco failed to conclusively prove a right to summary judgment against Cajun's Claim No. 1. We sustain Velasco's first issue with regard to that claim.

[8] Velasco cited Kidwell's affidavit regarding the 30-day notice requirement but not the 60-day notice requirement. It is unclear whether this was intentional. Kidwell stated generally in his affidavit that "Cajun failed to timely provide written notice . . . on or before the deadline dates." Although, in a chart, he provided dates on which he claims Cajun gave its notice of the amount or extent of its claims, he does not provide any information regarding how these dates were derived. The dates offered appear to be the same dates as for claim letters Cajun sent that were denied by the Engineer. However, it is not clear from those letters whether prior notices had been sent; several of the letters in fact reference prior communication on the claims.

[9] The notice provisions in the contract appear to be aimed at insuring that any problems or concerns can be investigated and remedied in a timely fashion. Once the Engineer has been notified about an issue, he had considerable discretion to extend the time for the notice requirement regarding the amount and extent of any claims. The evidence suggests that in this case, the true extent of the alleged damages did not become clear for months after the event giving rise thereto; thus, it apparently made sense for the Engineer to offer wide latitude on the amount/extent notice requirement. Velasco does not contend that Cajun never gave such notice on any of its four claims.

b. Claim No. 2

In Claim No. 2, Cajun sought recovery of additional costs incurred when it had to remove and reinstall two coupling nuts that had galled on the pump shafts. Cajun claims that this problem was caused by poor machining of the shaft threads by Patterson Pump; Velasco claims that the problem was improper installation by Cajun. In its motion, Velasco again contended that Cajun failed to provide either the requisite 30-day or 60-day notice for this claim; however, because we find that Velasco conclusively proved that Cajun failed to provide the initial 30-day notice, we need not consider the parties' arguments regarding the 60-day notice.

It is uncontested that the coupling nuts galled on the pump shafts on August 17, 2007. Kidwell stated in his affidavit, and Cajun does not dispute, that no "[w]ritten notice of the general nature of [the] Claim, dispute, or other matter" was provided within 30-days of this event.

Cajun asserts, however, that the nuts galling on the shaft was not the "event giving rise" to Claim No. 2. Cajun instead urges that the event giving rise to the claim was the commencement of the Engineer's investigation of the coupling nut incident, which ultimately determined that Cajun was at fault. In support, Cajun points to emails and letters sent in October 2007 between its employees and the Engineer discussing the investigation. However, these messages appear to reference a dispute or matter that had already arisen, not one that the Engineer had just discovered as Cajun suggests. Indeed, in a letter dated October 30, Cajun indicated that it was already expending time and money to resolve the problem. Furthermore, Cajun's own claim document belies its assertion. In its Claim No. 2 letter, dated July 2, 2008, Cajun repeatedly identified the basis of its claim as the seizing of the coupling nuts to the pump shafts and not once mentions any investigation by the Engineer.

Cajun additionally points to a letter from the Engineer, dated November 29, 2007, in which the Engineer stated that Cajun had provided notice of seven delays Cajun believed were occasioned by "Patterson's failings." The Engineer makes clear in the

letter, however, that he is responding therein to a November 13 letter from Cajun. In Cajun's letter, it indeed referenced seven delays it blamed on Patterson Pump, none of which involved the coupling nuts galling on the pump shafts. Furthermore, even if Cajun's letter did reference the issue with the coupling nuts, it was dated more than 30 days after August 17, and thus would not fulfill the 30-day notice requirement.

In his November letter, the Engineer concluded that it would not be appropriate to comment until Cajun provided a basis for the claims along with supporting data. Cajun also suggests that since the Engineer ultimately considered the merits of Claim No. 2, he must have extended the deadlines in regards to that claim. However, while the contract authorized the Engineer to extend the 60-day deadline, it did not authorize him to extend the initial 30-day deadline. Therefore, neither the Engineer's November 29 letter nor his ultimate consideration of the merits of Claim No. 2 can be interpreted as extending both deadlines.

Next, Cajun cites to a Work Change Directive issued on January 29, 2008, which instructed Cajun to complete the pump installation with Patterson Pump present. In the directive, it is noted that it was "Unknown" whether the directive would result in a contract price increase or decrease. Cajun interprets this as "necessarily reserv[ing] the issue of whether the owner and engineer were going to dispute a request for increase in contract price for a future date." However, regardless of what this notation might indicate on the Work Change Directive Form, it does not constitute evidence that written notice of the general nature of the claim was provided within 30-days of the event giving rise thereto.

Cajun further suggests that Velasco may have waived the 30-day notice requirement because it had actual knowledge of the event giving rise to Claim No. 2. As Velasco notes in its reply, however, Cajun did not plead waiver and thus cannot use it to defeat Velasco's motion for summary judgment alleging failure of a condition precedent. *See* Tex. R. Civ. P. 94; *see also Am. Petrofina, Inc. v. Allen*, 887 S.W.2d 829, 830 (Tex. 1994) (indicating that to use an affirmative defense to defeat a defendant's motion for

summary judgment, a plaintiff is required to plead and present evidence of that affirmative defense); *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991) (applying rules governing unpleaded claims and defenses to issues raised in summary judgment context).

Cajun has failed to raise a material issue of fact in response to Velasco's proof that Cajun did not provide the requisite 30-day notice concerning Claim No. 2. Accordingly, we overrule Cajun's first issue as it pertains to that claim.

c. Claims No. 3 and No. 4

In Claim No. 3, Cajun sought recovery of extra labor costs that it attributed to "Fabrication Problems with the Patterson Pump Equipment." In Claim No. 4, it requested that 373 days be added to the scheduled completion date of the contract so that its penalty for missing that date would be reduced. It based this request on six specified periods of delay, which encompassed some of the same events as were included in Claims 1, 2, and 3.[10] Once again, in its motion, Velasco asserted that Cajun failed to timely provide notice meeting either the initial 30-day or the 60-day requirements of the contract.

In its motion, Velasco relies exclusively on Cajun's Claim No. 4 letter, dated July 2, 2008, to establish the event start dates on which notice deadlines should be based for both Claim No. 3 and Claim No. 4. This letter, however, does not say anything specific about any claim event dates. For each of the six items listed in the letter,[11] it gives a range of dates and then a calculation of the number of "calendar days" between those dates. No explanation is given in the letter as to why the particular dates were chosen.

[10] The delay costs alleged under Claim No. 4 are not based on the exact same facts as the additional costs sought under claims 1, 2, and 3. For example, in Claim No. 3 Cajun alleged numerous problems arose from fabrication errors by Patterson Pump, but Claim No. 4 only mentions a problem with "gear drives" as being related to Claim No. 3. Also, in regards to Claim No. 1, Claim No. 4 includes 130 claimed days of delay; whereas, under Claim No. 1 itself, Cajun alleged a delay of only 92 days.

[11] The items listed are as follows: (1) "Curtain Walls," (2) "Grout removal and installation (See Claim #1)," (3) "Gear drives (See Claim # 3)," (4) "Coupling Nuts (See Claim #2)," (5) "Electrical conduit & layout," and (6) "Control problems w/ Patterson Pumps."

Velasco speculates that the first date given for each range is the date on which the event occurred causing the alleged extra costs or delays. Velasco provides no support for this reading. The July 2 letter does not establish the event start dates as a matter of law.[12]

To demonstrate that Cajun did not satisfy the 30-day notice requirement, Velasco relies on Kidwell's affidavit, wherein he stated that Cajun "failed to timely provide written notice . . . of its . . . claims on or before the deadline dates following the specified event dates referenced above." The "event dates referenced above" are in the form of a table listing event start dates and deadlines for "Notice of Events" for each claim. The only specific basis Kidwell offers for the event start dates he provides is a reference to the July 2 letter, which was attached to his affidavit as an exhibit.[13] As discussed above, that letter by itself is not an appropriate basis for conclusively determining the event start dates.[14]

In its appellate brief, Velasco additionally argues that the event start dates were conclusively established by errata sheets submitted as corrections to Kidwell's deposition transcript as well as by his chart in the affidavit.[15] Apart from his reference to Cajun's July 2 letter in his affidavit, Kidwell provides no basis for his statement of the event start dates. It is possible that he based these dates on his own personal knowledge apart from the July 2 letter. However, if that is the case, a material issue of fact arises because

[12] It is interesting to note that (1) the combined calendar days listed for the items total 672 days of alleged delays, and (2) the total number of days on which delays occurred (taking into account that some periods of alleged delay overlapped) is 408, but (3) Cajun only requested that an additional 373 days be added to the contract completion date. This uncertainty adds to the level of ambiguity surrounding the dates in the letter.

[13] Kidwell states in the affidavit that the letter sets "forth Cajun's asserted start dates for events allegedly justifying time extensions."

[14] It is also worth noting that some, but not all, of the start dates listed in Kidwell's chart are not the same as those in the July 2 letter. Nonetheless, Velasco attempts to support Kidwell's dates by comparing them to the dates in the letter, saying they "are nearly identical."

[15] Cajun urges this court to overturn the trial court's overruling of Cajun's objection to the errata sheets as summary judgment evidence. Because of our resolution of the summary judgment issues on claims 3 and 4, we need not directly address this subissue.

Kidwell's statements in the errata sheets are inconsistent with those in the deposition itself.

In his deposition, Kidwell gave his opinion regarding the start dates for the events giving rise to claims 1 and 2. Cajun's counsel then asked, "Do you have an opinion as to the start of the event giving rise to Claim No. 3?" Kidwell responded "no." Counsel then asked the same question regarding Claim No. 4, and Kidwell gave the same answer. In his errata sheets, dated seventeen days after the deposition, Kidwell offered new answers for each of the questions, changing "No" to "No because claim number 3 [and 4 have] multiple items, each with a different date of the event giving rise thereto." He then went on in each response to give specific event start dates that mostly match the ones in his affidavit chart filed several months afterwards.[16] Velasco further suggests in its brief that Kidwell was confused by the fact that counsel's questions referenced a singular event as opposed to multiple events, when Kidwell believed that claims 3 and 4 arose from multiple events.

Velasco's explanation for the errata sheet changes, however, does not bear scrutiny. Kidwell stated under oath in his deposition that he had no opinion regarding the event start dates for claims 3 and 4. Even if he was confused by counsel's question because he believed that there were multiple event start dates, a correct answer to the question would not have been "no," if he had personal knowledge of those start dates. He could have said "yes" to each of the questions, and then when asked for his opinion, he could have provided the dates or explained that there were multiple dates. Or when asked if he had an opinion, he could have said "I don't understand the question" or "I cannot answer the question." Kidwell's "no" response could be taken as an indication that he did not have an opinion at that time regarding the event start dates for claims 3 and 4. Certainly a witness can change his opinion on a matter, but he is always subject to being cross-examined with his prior inconsistent statement. *See, e.g., Birchfield v. Texarkana*

[16] In his errata sheets, Kidwell provides a March 27, 2007 date for one of the items in Claim No. 4, but this date does not appear in his affidavit chart.

Mem'l Hosp., 747 S.W.2d 361, 366 (Tex. 1987) (holding witnesses' prior statements which contradicted trial testimony were admissible); *Hampden Corp. v. Remark, Inc.*, 331 S.W.3d 489, 499 (Tex. App.—Dallas 2010, pet. denied) (holding trial court erred in granting party's post-trial pleading amendment because opponent was denied opportunity to cross examine party with prior inconsistent statement on added claim); *Thomas v. Int'l Ins. Co.*, 527 S.W.2d 813, 819–20 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.) (holding trial court should have permitted party to impeach opponent's interrogatory answers with prior inconsistent answers); 1 Steven Goode, et al., Texas Practice Series: Guide to the Texas Rules of Evidence § 613.4 (3d ed. 2002) (analyzing requirements for impeachment with prior inconsistent statements).[17]

Velasco failed to conclusively establish the event start dates for claims 3 and 4. Because its evidence regarding the initial 30-day and 60-day notice provisions under the contract was premised on certain event start dates, it failed to conclusively establish that Cajun did not meet these conditions precedent under the contract. Accordingly, we sustain Cajun's first issue as it pertains to claims 3 and 4.

B. Texas Civil Practice & Remedies Code Section 16.071(a)

In its second issue, Cajun contends that the contractual notice provisions were void because they violated subsection 16.071(a) of the Texas Civil Practice & Remedies Code.[18] Subsection 16.071(a) provides, "A contract stipulation that requires a claimant to give notice of a claim for damages as a condition precedent to the right to sue on the contract is not valid unless the stipulation is reasonable. A stipulation that requires notification within less than 90 days is void." Tex. Civ. Prac. & Rem. Code § 16.071(a).

[17] Contrary to Cajun's suggestion, this case does not present a violation of the sham affidavit doctrine. Under that doctrine, a nonmovant is not permitted to file an affidavit inconsistent with prior testimony without explaining the change in testimony and solely for the purpose of creating a fact issue to defeat summary judgment. *E.g.*, *Farroux* v. *Denny's Rests., Inc.,* 962 S.W.2d 108, 111 (Tex. App.—Houston [1st Dist.] 1997, no pet.). Here, Velasco was the movant. As explained in the preceding text, the inconsistent statements in fact created a fact issue defeating summary judgment.

[18] Because Cajun failed to assert this ground in its summary-judgment response, we consider it only to the extent that Velasco established its entitlement to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c).

As discussed above, section 10.05, entitled "Claims and Disputes," contains three notice provisions. The first two appear in subsection 10.05.A, entitled "Notice," and require written notice of (1) the general nature of a claim within 30 days of the start of the event giving rise to the claim, and (2) the amount or extent of the claim with supporting data within 60 days of the start of the event. The third notice provision appears in subsection 10.05(B), which is entitled "ENGINEER's Decision." Under that subsection, the designated engineer's written decision on the claim becomes final and binding on the parties unless (1) written notice of the claimant's intent to appeal from the decision is delivered within 30 days of the decision, and (2) a formal proceeding is instituted by the appealing party in a forum of competent jurisdiction within 60 days to exercise such rights or remedies as the appealing party may have with respect to such claim in accordance with applicable law.

Texas courts have held that section 16.071(a) does not apply to provisions requiring notice to an insurer of potential claims where the insurer would otherwise be unaware of the substance of the claims. Such a claim against the insured by a third person is "a mere possibility more remote than a separate and previous cause of action" and is not reasonably within section 16.071(a). *See Citizens' Guar. State Bank v. Nat'l Sur. Co.*, 258 S.W. 468, 470 (Tex. Comm'n App. 1924, judgm't adopted); *see also Commercial Standard Ins. Co. v. Harper*, 103 S.W.2d 143, 145 (Tex. Comm'n App. 1937) (construing predecessor statute) ("[Notice that an automobile had been stolen] is only notice of the happening of an event upon which liability may or may not result . . ."); *Komatsu v. U.S. Fire Ins. Co.*, 806 S.W.2d 603, 607 (Tex. App.—Fort Worth 1991, writ denied) (analyzing *Citizens' Guaranty*).

In *American Airlines Employees Federal Credit Union v. Martin*, an accountholder did not notify his credit union of unauthorized transactions made by an unknown third person on his account within 60 days of his receipt of the account statement where the transactions were reflected, as required by his deposit agreement. 29 S.W.3d 86, 97–98 (Tex. 2000). The *American Airlines* court held that section 16.071(a) did

not apply because the notice was not of a claim for damages, but of unauthorized transactions. The contractual notice requirements served the purpose of preventing further unauthorized transactions from occurring and allowing the credit union to attempt to recover the funds. *See id.*[19]

As was true in *American Airlines*, the first and second provisions in the Velasco contract require notice of an event that may or may not ripen into a claim for damages; such notice allows the contracting parties to investigate and settle disputes while construction continues. However, notice of the intent to appeal and of filing suit, at issue in the third notice provision, is effectively a requirement that notice be given before a claim for damages is alleged in court.[20] While the first two notice provisions are for an "event" that could lead to a claim for damages, the third notice is for a claim for damages and is void pursuant to section 16.071(a). In other words, the first and second notice provisions concern claims for adjustment that allow the contracting parties to investigate and settle disputes; however, the third provision—requiring the claimant to submit a notice of appeal within 30 days and file suit within 60 days—restricts a claim for damages and is subject to section 16.071(a).

In *Citizens' Guaranty*, the court held that requiring the bank to give notice of employee theft within 90 days to the surety of its employee theft bond violated section 16.071(a) where such malfeasance was the very subject of the contract. 258 S.W. at 469–70. The surety argued that notice of a claim of "loss," as required under the contract, was not a claim for "damages" proscribed by the statute. The court, construing the predecessor statute to 16.071(a), reasoned that the statute must be construed liberally in favor of the common law right of redress and strictly against contractual infringements of that right. *Id.* It is not necessary to use the words "notice of claim for damages" for a provision to relate to notice of a claim for damages. *See id.*

[19] Presumably, the accountholder could still pursue a claim for damages if the credit union had notice of an unauthorized transaction but did not pay it.

[20] Appealing an Engineer's decision and filing suit during construction would not facilitate the purpose of the construction contract.

Here, the third provision requires that notice be given regarding a claim or dispute of which the parties would already be well aware. The claim is brought not by a third person, but by a party to the contract. The claim concerns the very subject of the contract. The dispute resolution system, which has the salutatory purpose of settling disputes while allowing construction of the project to proceed, has been exhausted. This third notice requirement, in conjunction with the requirement that an actual appeal be brought, is effectively a requirement that notice be given before a cause of action is brought in a competent jurisdiction. Construing the statute liberally in favor of Cajun's common law right of redress, the requirement that such notice be given within 30 days or 60 days of the Engineer's formal decision is void pursuant to section 16.071(a).

The trial court erred to the extent it granted summary judgment favoring Velasco based on Cajun's failure to satisfy the third notice provision for any of its four designated claims. We sustain Cajun's second issue to this extent.

C. Quantum Meruit

In its third issue, Cajun asserts that summary judgment was improper on its quantum meruit claim because while generally a party may not recover under quantum meruit when there is an express contract covering the services or materials furnished, construction contracts are an exception to this rule. *See Murray v. Crest Constr., Inc.*, 900 S.W.2d 342, 345 (Tex. 1995). Velasco responds in its brief that the trial court does not have subject matter jurisdiction over these claims because the waiver of governmental immunity to suit provided by section 271.152 of the Texas Local Government Code does not extend to quantum meruit claims. *See Harris Cnty. Flood Control Dist. v. Great Am. Ins. Co.*, 309 S.W.3d 614, 617 (Tex. App.—Houston [14th Dist.] 2010, no pet.).[21]

[21] This section 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 § 271.152.

Immunity from suit deprives a trial court of subject matter jurisdiction over a claim. *See id.* at 616 (citing *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006)). Subject-matter jurisdiction is essential to the authority of a court to decide a case, cannot be waived, and may be raised for the first time on appeal. *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000). A court may lack subject-matter jurisdiction over some claims, but retain subject-matter jurisdiction over others. *See Thomas v. Long*, 207 S.W.3d 334, 338–39 (Tex. 2006). Here, the trial court lacked subject-matter jurisdiction over Cajun's quantum meruit claim. *See Harris Cnty. Flood Control Dist.*, 309 S.W.3d at 617. Hence, summary judgment on this claim was proper, even though subject-matter jurisdiction was not raised in Velasco's summary-judgment motion. Accordingly, we overrule Cajun's third issue.

D. Attorney's Fees

In its fourth and fifth issues, Cajun challenges the trial court's award of attorney's fees based respectively on the assertion that Velasco was not awarded any damages under chapter 37 or 38 of the Civil Practice & Remedies Code and the allegation that Velasco failed to properly segregate recoverable fees from nonrecoverable fees. Because we reverse and remand on certain substantive issues, we also reverse and remand the award of attorney's fees irrespective of the merits of Cajun's fourth and fifth issues. *See Hamrick v. Ward*, 359 S.W.3d 770, 787 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.). Consequently, we overrule Cajun's fourth and fifth issues.

IV. Conclusion

The trial court erred in granting summary judgment against Cajun's breach of contract claims designated claims 1, 3, and 4. Accordingly, we reverse the summary judgment on these claims and remand them to the trial court for further proceedings. We also reverse and remand the award of attorney's fees contained in the judgment. The trial court did not err in granting summary judgment against Cajun's Claim No. 2 or its claim based on quantum meruit. We affirm judgment against these claims.

/s/ Martha Hill Jamison
Justice

Panel consists of Chief Justice Hedges and Justices Christopher and Jamison (Hedges, C.J., dissenting).