

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-09-00062-CV**

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**EVADALE WATER CONTROL AND  
IMPROVEMENT DISTRICT NO. 1, Appellant**

**V.**

**J&D CONSTRUCTION, Appellee**

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**On Appeal from the 1st District Court  
Jasper County, Texas  
Trial Cause No. 26436**

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**MEMORANDUM OPINION**

J&D Construction (J&D), a partnership, sued Evadale Water Control and Improvement District No. 1 (“WCD”) for damages arising from WCD’s breach of a construction contract. WCD asserted that as a governmental entity, it was immune from J&D’s suit. WCD also argued that J&D failed to comply with several conditions precedent to its obligation to remit final payment. A jury determined that WCD owed

J&D an additional \$231,447<sup>1</sup> under the terms of the contract. The trial court rendered a judgment favoring J&D based on the jury's findings.

Because the evidence fails to establish that a net balance was due and owing under the contract's terms, we reverse and render judgment, ordering that J&D recover nothing.

### Background

In September 2001, WCD awarded J&D a contract to construct a sanitary sewer collection system for the sum of \$2,487,781. The parties subsequently agreed to changes in the project, as reflected in two change orders that were executed before the construction on the project began. These two change orders reduced the value of the total contract price to \$2,070,732.

Over the course of J&D's work, WCD and J&D executed five additional change orders, increasing the value of the contract to \$2,197,638. In February 2004, J&D submitted change order eight, reflecting a claim for additional work in the amount of \$40,787. WCD refused to approve it. Including all eight of the change orders, the value of J&D's contract was \$2,238,425.

J&D received progress payments during the project. During the trial, one of the exhibits introduced by J&D reflects that it received progress payments of \$1,813,367. After J&D rested, WCD produced several checks that J&D had deposited to its account that were not included in J&D's summary. WCD's evidence demonstrates that it made

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<sup>1</sup>For simplicity, we have rounded all monetary figures to whole numbers.

payments of an additional \$368,297 that J&D did not include in its summary of payments.

In addition to proving that it paid J&D \$2,181,664, WCD disputed that J&D had completed its work. WCD also asserted an offset claim for liquidated damages of \$300 per day due to J&D's construction delays. WCD also claimed an offset for the expenses it incurred to correct J&D's work.

At the conclusion of the trial, the jury found (1) WCD had breached the contract, (2) J&D had not, (3) WCD owed an additional \$231,447 under the parties' contract, and (4) WCD was entitled to nothing on its offset claims.

#### Issues

WCD raises five issues in its appeal. Issue one asserts that WCD, as a governmental entity, is immune from J&D's suit. Issues two and three argue that J&D failed to prove that it had fulfilled the conditions precedent to its right to receive final payment. Issue four contends that the jury's damage award is not supported by legally or factually sufficient evidence. Issue five challenges the jury's finding that WCD was not entitled to any offset.

#### Sovereign Immunity

Immunity from suit deprives a trial court of subject-matter jurisdiction unless the state has consented to the suit. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004); *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). "A

party may establish consent by statute or legislative resolution.” *Travis County v. Pelzel & Associates, Inc.*, 77 S.W.3d 246, 248 (Tex. 2002).

A water control and improvement district is a creature of statute. TEX. WATER CODE ANN. § 51.011 (Vernon 2008). Water control and improvement districts are governmental agencies. TEX. CONST. art. XVI, § 59(b) (Vernon Supp. 2009). J&D does not dispute that WCD is a political subdivision nor does it dispute that absent a waiver of governmental immunity, WCD is immune from suit.

J&D asserts that section 271.152 of the Local Government Code waives a water control district’s immunity for breach of contract claims. *See* TEX. LOC. GOV’T CODE ANN. §§ 271.151(3)(C) (defining “[l]ocal governmental entity” to include a water control and improvement district), 271.152 (Vernon 2005) (providing a waiver of sovereign immunity by local government entities to suits brought for “the purpose of adjudicating a clam for breach of the contract . . . .”). J&D’s petition alleges that Section 271.152 of the Local Government Code waives WCD’s immunity and allows it to sue for breach of contract. Under the charge, J&D recovered the amount the jury determined to be the balance then “due and owing J&D Construction under the Written Contract[.]”

We conclude that section 271.152 of the Local Government Code operates to waive WCD’s immunity from J&D’s suit for breaching the parties’ written contract. *See id.* § 271.152. Issue one is without merit and is overruled.

## Legal and Factual Sufficiency

In response to question one, the jury found that J&D complied with the parties' written contract. In response to question two, the jury found that WCD had failed to comply with the written contract. WCD's second and third issues challenge the legal and factual sufficiency of the evidence to support these findings.

When analyzing a challenge to the legal sufficiency of the evidence supporting a jury's verdict, we view the evidence in the light most favorable to the prevailing party, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005). Since J&D prevailed at trial, we view the evidence in the light most favorable to its claims. *See id.* The evidence is legally sufficient if it enables "reasonable and fair-minded people to reach the verdict under review." *Id.* at 827. In determining the factual sufficiency of the evidence, courts of appeals must weigh all the evidence, both for and against the finding. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). In reviewing a factual sufficiency challenge to a finding for which the appellee had the burden of proof, we "set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (citations omitted); *Royce Homes, L.P. v. Humphrey*, 244 S.W.3d 570, 575 (Tex. App.—Beaumont 2008, pet. denied).

In issues two and three, WCD argues the evidence is not legally sufficient to support the jury's findings that J&D complied with the contract or that WCD failed to comply with the contract. In its petition, J&D asserted that WCD breached the contract by failing to pay it "pursuant to the [contract's] terms[.]" At the conclusion of the trial, the jury agreed that WCD breached the parties' contract, and the jury then determined the balance owed based on the terms of the parties' contract.

On appeal, WCD argues that it did not breach the contract because the evidence before the jury conclusively established that J&D failed to fulfill five conditions precedent<sup>2</sup> to its right to receive final payment. Specifically, WCD asserts that J&D did not satisfy contract conditions requiring that it (1) complete the project, (2) submit a correct request for final payment to WCD, (3) submit a release of claims to WCD, (4) obtain authorization from the Texas Water Development Board<sup>3</sup> (TWDB) authorizing WCD to release the funds that WCD had retained from J&D's progress payments, and (5) obtain WCD's acceptance of J&D's work.

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<sup>2</sup>"A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation." *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992). Bryan Garner provides a similar definition: "A *condition precedent* is something that must occur before something else can occur." BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 197 (2d ed. 1995).

<sup>3</sup>The Texas Water Development Board is "the state agency primarily responsible for water planning and for administering water financing for the state." TEX. WATER CODE ANN. § 6.011 (Vernon 2008).

Conditions precedent are addressed by Rule 54 of the Texas Rules of Civil Procedure, which provides:

In pleading the performance or occurrence of conditions precedent, it shall be sufficient to aver generally that all conditions precedent have been performed or have occurred. When such performances or occurrences have been so [pled], the party so pleading same shall be required to prove only such of them as are specifically denied by the opposite party.

TEX. R. CIV. P. 54. In its petition, J&D alleged that “[a]ll conditions precedent have been performed or have occurred.” WCD’s answer, with respect to conditions precedent, states:

[WCD] denies that [J&D] has performed all conditions precedent specifically and including the “Agreement” Part 5.2, the “Texas Water Development Board Contract Conditions” Parts 4 and 11, Supplementary Conditions 2.1, 4.2, 13.1, 13.2, “General Conditions” 6.14.1 and 6.14.2, and “Sanitary Sewer Conditions” 3.3.4.

We must first determine whether the contract provisions upon which WCD relies create conditions precedent to WCD’s contractual obligation to remit final payment. *See Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976) (explaining that “whether a certain contractual provision is a condition, rather than a promise, must be gathered from the contract as a whole and from the intent of the parties”). In *Hohenberg*, the Texas Supreme Court noted that because conditions operate as forfeitures, interpreting a contract provision as a condition rather than as a covenant is disfavored. *Id.* (citing *Henshaw v. Tex. Natural Res. Found.*, 147 Tex. 436, 216 S.W.2d

566, 570 (1949) (“If the terms of a contract are fairly susceptible of an interpretation which will prevent a forfeiture, they will be so construed.”)).

To determine whether a provision is a condition precedent, the Texas Supreme Court explains:

In order to make performance specifically conditional, a term such as “if”, “provided that,” “on condition that”, or some similar phrase of conditional language must normally be included. If no such language is used, the terms will be construed as a covenant in order to prevent a forfeiture. While there is no requirement that such phrases be utilized, their absence is probative of the parties['] intention that a promise be made, rather than a condition imposed.

*Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990) (citations omitted). Therefore, we look to the parties’ contract to determine whether they used the type of language indicating a promise rather than a condition.

As to the conditions precedent that it pleaded, WCD’s answer refers to part 4 of a document titled “TWDB CONTRACT CONDITIONS.” Condition 4 in that document is titled “PAYMENTS TO CONTRACTOR,” and it contains a specific provision addressing J&D’s right to final payment. Condition 4(d)(3) of the TWDB Contract Conditions provides:

(d) Final Payment.

.....

(3) The retainage and its interest earnings, if any, shall not be paid to the Contractor until the TWDB has authorized a reduction in, or release of, retainage on the contract work.



During the trial, J&D included the TWDB Contract Conditions in the exhibit it identified as the parties' contract. On appeal, J&D does not dispute that the TWDB Contract Conditions are included among the terms of the parties' contract.

In evaluating whether TWDB's authorization to release the retainage is a condition precedent to final payment, we note that the language is in a section of the contract referred to as conditions. Next, by employing the word "until" in Condition 4(d)(3), the parties used conditional language similar to the types of phrases identified in *Criswell*. Here, the word "until" functions as the equivalent of the terms "if," "provided that," or "on condition that." *Id.* We conclude that Condition 4(d)(3) is a provision that requires something to occur before something else could occur, and is therefore a condition precedent to WCD's obligation to remit final payment.

Having determined that the TWDB's authorizing payment of the retention has a condition precedent to WCD's obligation to make final payment, we review the evidence in the light most favorable to J&D to determine whether any evidence supports a reasonable conclusion that the TWDB authorized WCD's release of the retainage. We find no evidence in the record that the TWDB authorized WCD to release the funds that WCD had retained. Viewing the evidence in the light most favorable to J&D, the prevailing party, reasonable and fair-minded jurors could not have determined that WCD breached the contract by failing to pay the agreed retention amounts, nor could

reasonable and fair minded jurors have determined that the retention was due and owing as of the date of the trial. *See City of Keller*, 168 S.W.3d at 827.

Based on the evidence in the record, WCD demonstrated that it did not breach the parties' contract by withholding as much as \$95,440<sup>4</sup> from J&D for retainage. Because J&D did not reduce its claim by the retention, but instead included the retention amount in its claim, the jury's award included \$95,440 that was not yet due under the parties' contract. We sustain issues two and three to the extent that these two issues concern WCD's payment of the retention. Because the other arguments raised in issues two and three would not result in greater relief, it is not necessary that we address them. TEX. R. APP. P. 47.1.

#### Legal Sufficiency - Damages

In answer to question three, the jury found that J&D was entitled to recover the sum of \$231,447. The charge instructed the jury that, in determining the balance due and owing under the written contract, to consider only "[t]he amount of labor and materials actually installed as specified in the written contract less the amount previously paid by [WCD]." In issue four, WCD contends that based upon J&D's own records, "J&D had been paid all it was due."

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<sup>4</sup>We have derived this figure, representing the total amount WCD was entitled to withhold under the contract for retention, from J&D's summary of progress payments. J&D's summary acknowledges its receipt of progress payments totaling \$1,813,367. We have calculated the amount WCD retained as follows:  $(\$1,813,367 \times 5\%) \times 95\% = \$95,440$ .

During the trial, WCD established that J&D's summary of payments failed to reflect \$368,297 that J&D received in progress payments. Copies of the checks not included in J&D's payment summary were introduced and admitted before the jury. These additional checks, each of which was endorsed by J&D, together with WCD's other payments, showed that J&D had been paid \$2,181,664. Curtis Hall, J&D's principal witness, never disputed that J&D had received payments totaling \$2,181,664 on the project. We conclude that the evidence conclusively established that WCD's contract payments totaled \$2,181,664.

To explain the jury's damage award, J&D argues that the jury's award is based on a draft copy of a certificate of construction completion sent to WCD's board president on February 17, 2004, by Jerod Morris, the engineer working on the project. The draft copy was not signed by Morris, and there were blanks left on the form for WCD to complete. WCD never completed the certificate of construction completion. The unexecuted certificate of completion contains a line showing the "Present Amount of Contract" as \$2,238,425,<sup>5</sup> and a line showing the "Less Previous Payments" as \$1,813,366. The draft certificate of completion also has a line labeled "Less Previously Reported Work Completed" which contains the figure \$2,006,956. J&D contends that the jury answered

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<sup>5</sup>This amount includes the disputed change order eight, which was never signed by WCD. We need not resolve whether change order eight should have been included by the jury in its analysis, but we assume, without deciding, that the jury properly included it in determining the value of the contract for purposes of resolving the issues in the appeal. J&D's final change order number eight, even though never approved by WCD, increased the total contract price to \$2,238,425.

question three by subtracting \$2,006,956 from \$2,238,425, which yields a difference of \$231,469. Although this figure does not exactly match the jury's award of \$231,447, J&D's explanation is the only rational explanation of the jury's damage award. We further note that the maximum value of the contract, including disputed change order eight, is \$2,238,425.<sup>6</sup>

If the value of the entire contract was \$2,238,425, we have already explained that WCD conclusively established its right to a credit for payments in the amount of \$2,181,664. Thus, even if the entire balance was actually due, J&D's evidence viewed in the light most favorable to J&D demonstrates that it was owed \$56,761.<sup>7</sup>

As we have already explained, Condition 4(a)(3) of the parties' contract allowed WCD to withhold five percent of progress payment as "retainage." Even if WCD might be obligated to pay the entire balance at some point in time, WCD's final payment in the amount of \$56,761 was not yet "due and owing" as of the date of the trial.

Because WCD was entitled to withhold a sum greater than the maximum amount the evidence supports as J&D's contract damages, we conclude that J&D failed to establish as a matter of law that additional amounts were "due and owing" under the

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<sup>6</sup>We have assumed the maximum contract value that was in evidence because the evidence is reviewed in the light most favorable to the prevailing party, but we expressly do not resolve whether the jury should have increased the contract's value based on a change order that WCD never signed.

<sup>7</sup>Maximum contract value of \$2,238,425 minus the Undisputed Payments of \$2,181,664 equals the maximum damage award of \$56,761.

terms of the contract. Because WCD was entitled to withhold more than the maximum amount that J&D proved it was owed, we hold that J&D is entitled to no net recovery.

#### Conclusion

We hold that no evidence supports the jury's determination that WCD breached the parties' contract by failing to remit final payment. We further hold that no evidence supports the jury's finding that a balance was "due and owing" under the terms of the contract. We reverse and render the judgment the trial court should have rendered, and we order that J&D recover nothing on its claims. We further award WCD taxable costs.

REVERSED AND RENDERED.

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HOLLIS HORTON  
Justice

Submitted on June 2, 2010  
Opinion Delivered September 9, 2010  
Before McKeithen, C.J., Gaultney and Horton, JJ.