



Caution

As of: April 23, 2014 11:35 AM EDT

PKG Contr., Inc. v. City of Mesquite

Supreme Court of Texas
June 30, 2006, Opinion Delivered
NO. 04-1139

Reporter: 197 S.W.3d 388; 2006 Tex. LEXIS 647; 49 Tex. Sup. J. 906

PKG CONTRACTING, INC., PETITIONER, v. CITY OF MESQUITE, RESPONDENT

Subsequent History: [**1] Released for Publication August 18, 2006.

Subsequent appeal at [City of Mesquite v. PKG Contr., Inc., 2008 Tex. App. LEXIS 5095 \(Tex. App. Dallas, July 9, 2008\)](#)

Prior History: ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS.

[City of Mesquite v. PKG Contr., Inc., 148 S.W.3d 209, 2004 Tex. App. LEXIS 8798 \(Tex. App. Dallas, 2004\)](#)

Core Terms

waived, City's, municipality's, immunity from suit, court of appeals, governmental capacity, waive immunity, trial court, charter, governmental function, storm drainage system, tort liability, storm sewer, common law, contractor, construct, immunity, sanitary, local government entity, proprietary capacity, breach of contract, contract claim, classification, contracted, Sections, purposes, further proceedings, reversing judgment, sovereign immunity, quantum meruit

Case Summary

Procedural Posture

Petitioner contractor appealed a judgment from the Court of Appeals for the Fifth District (Texas), which reversed the trial court's overruling of respondent city's plea to the jurisdiction based on immunity from suit and dismissed the contractor's action for breach of contract, quantum meruit, negligence, and estoppel.

Overview

A dispute arose regarding a contract to construct a storm drainage system. The court of appeals held that the city had immunity for the tort claims and that its immunity was not waived for the contract claims by [Tex. Loc. Gov't Code Ann. § 51.075](#) or by a charter provision that authorized the city to sue and be sued. The contractor argued that the

city's immunity for the contract claims was waived because it acted in a proprietary capacity rather than a governmental capacity. The court, observing that [Tex. Civ. Prac. & Rem. Code Ann. § 101.0215\(a\)\(9\)](#) included sanitary and storm sewers among a municipality's governmental functions for purposes of tort liability and that the classification would not be different under the common law, concluded that the city was acting in its governmental capacity. The court noted that [Tex. Loc. Gov't Code Ann. §§ 271.151-271.160](#), enacted while the case was pending on appeal, waived immunity from suit for certain claims against local governmental entities, including municipalities. Accordingly, the contractor should have the opportunity to argue in the trial court that the city's immunity from suit was waived by the newly enacted provisions.

Outcome

The court reversed the judgment of the court of appeals and remanded to the trial court for further proceedings.

LexisNexis® Headnotes

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN1 The legislature has statutorily included sanitary and storm sewers among a municipality's governmental functions for purposes of tort liability, [Tex. Civ. Prac. & Rem. Code Ann. § 101.0215\(a\)\(9\)](#), and there is no reason to think that the classification would be different under the common law.

Governments > Local Governments > Claims By & Against

Public Contracts Law > Governmental Immunities > Sovereign Immunity

HN2 [Tex. Loc. Gov't Code Ann. §§ 271.151-271.160](#) waive immunity from suit for certain claims against local governmental entities, including municipalities. Sections 271.152-271.154 apply to a claim that arises under a contract executed before September 1, 2005 if sovereign immunity has not been waived with respect to the claim before that date. 2005 Tex. Gen. Laws 1548, 1549.

Counsel: For PETITIONER: Mr. E. John Gorman, ATTORNEY at LAW, Mr. Bradford Wald Irelan, IRELAN & HARGIS, P.L.L.C., Houston, TX.

For RESPONDENT: Mr. James R. Jordan, SHANNON GRACEY RATLIFF & MILLER, L.L.P., Dallas, TX.

For AMICUS CURIAE: Ms. Christina Stone, GAUGHAN & STONE, Houston, TX.

Judges: JUSTICE WILLETT did not participate in this decision.

Opinion

[*388] PER CURIAM

PKG Contracting, Inc. sued the City of Mesquite for breach of a contract to construct a storm drainage system and for *quantum meruit*, negligence, and estoppel. The trial court overruled the City's plea to the jurisdiction based on immunity from suit, and the City took an interlocutory appeal. The court of appeals reversed and dismissed the case, holding that the City's immunity was not waived for PKG's tort claims and was not waived for PKG's contract claims by [section 51.075 of the Local Government Code](#) or by a provision in the City's charter that authorizes it to "sue and be sued; ...contract and be contracted with; implead and be impleaded in all courts". ¹[148 S.W.3d 209 \(Tex. App.--Dallas 2004\)](#). PKG argues in this Court that the City's immunity from suit for breach of contract was also waived because the City was acting in a proprietary capacity rather than a governmental capacity. PKG does **[**2]** not argue in this Court that the City's immunity from tort liability has been waived.

Because **HNI** the Legislature has statutorily included "sanitary and storm sewers" among a municipality's governmental functions for purposes of tort liability, **[*389]** [TEX. CIV. PRAC. & REM. CODE § 101.0215\(a\)\(9\)](#), and we see no reason to think that the classification would be different under the common law, we conclude that the City was acting in its governmental capacity when it contracted with PKG to construct a storm drainage system. For the reasons explained today in [Tooke v. City of Mexia, 197 S.W.3d 325, 2006 Tex. LEXIS 654, 49 Tex. Sup. Ct. J. 819 \(Tex. 2006\)](#), we agree with the court of appeals that [section 51.075](#) and the City's charter provision are not a clear and unambiguous waiver of immunity. We do not reach the question whether a municipality *may* waive immunity from suit; we hold only that the charter text is not such a waiver.

While this case **[**3]** has been pending on appeal, the Legislature has enacted **HN2** [sections 271.151-.160 of the Local Government Code](#), which waive immunity from suit for certain claims against local governmental entities, including municipalities. [Sections 271.152-.154](#) "apply to a claim that arises under a contract executed before [September 1, 2005] ...if sovereign immunity has not been waived with respect to the claim" before that date. Act of May 23, 2005, 79th Leg., R. S., ch. 604, § 2, 2005 Tex. Gen. Laws 1548, 1549. PKG should have the opportunity to argue in the trial court that the City's immunity from suit is waived by these provisions.

Accordingly, we grant PKG's petition for review, and without hearing oral argument, [TEX. R. APP. P. 59.1](#), we reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings.

¹ MESQUITE, TEX., CITY CHARTER art. III, § 1.