

Affirmed and Opinion filed April 7, 2026.



In the

Fourteenth Court of Appeals

NO. 14-24-00793-CV

**HARRIS COUNTY DEPARTMENT OF EDUCATION PUBLIC FACILITY
CORPORATION, Appellant**

V.

PARADIGM CONSTRUCTION, LLC, Appellee

**On Appeal from the 11th District Court
Harris County, Texas
Trial Court Cause No. 2022-69690**

O P I N I O N

In this breach-of-contract case under the Local Government Contract Claims Act,¹ contractor Paradigm Construction, LLC, sued the Harris County Department of Education Public Facility Corporation (HCDE), alleging that HCDE caused various delays that increased Paradigm's cost to construct an adult-education center.

¹ TEX. LOC. GOV'T CODE §§ 271.151–.160.

HCDE contends that Paradigm’s claim for delay damages do not fall within the Act’s waiver of immunity and brings this interlocutory appeal challenging the trial court’s denial of its plea to the jurisdiction. We affirm.

I. BACKGROUND

Harris County Department of Education Public Facility Corporation (HCDE) hired contractor Paradigm to construct an adult-education center. Their contract began on November 18, 2021. By December 1, 2021, HCDE still had not obtained a building permit, so HCDE’s program manager Charles Scheibe of Lockwood, Andrews & Newnam, Inc., issued Paradigm a “limited notice to proceed” with “abatement, demolition, submittals and purchasing of materials,” but not construction.

By February 21, 2022, Paradigm could proceed no further without a building permit. Paradigm’s bid for the work had relied on prices quoted by its subcontractors, but according to Paradigm, construction costs were experiencing an unprecedented rise, and the subcontractors refused to execute subcontracts, lock in prices, or commit resources to the project without confirmation of the date their work would commence.

On April 5, 2022, Paradigm sent Scheibe a notice of claim for delay damages, and two days later, the City of Houston issued HCDE a building permit. Paradigm alleges that HCDE’s construction drawings had been rejected at least thirty times before HCDE finally obtained the permit.

Paradigm alleges other delays occurred as well. Paradigm contends that on January 17, 2023, it submitted to HCDE a particular document it needed HCDE to execute to obtain an easement required for the installation of a water meter, but HCDE did not sign it until February 28, 2023. A week later, the City of Houston

rejected the easement request due to design errors by HCDE's architect "cre8 Architects." Paradigm contends that these issues concerning the water meter delayed the project for a further nine weeks. Paradigm attributes additional delays to HCDE's failure to provide owner-purchased materials, HCDE's design modifications to the lobby staircase, and HCDE's and its architect's failure to timely obtain a permit for installation of sidewalks.

Paradigm sued HCDE for breach of contract and for violations of the Prompt Payment Act. HCDE filed a motion combining a plea to the jurisdiction with a hybrid no-evidence and traditional motion for summary judgment on the merits. In the part of the document challenging the trial court's jurisdiction, HCDE asserted that Paradigm's claims for delay damages do not fall within the limited waiver of governmental immunity of Texas Local Government Code Section 271.153. The trial court denied all relief, but this interlocutory appeal is limited to the trial court's denial of HCDE's plea to the jurisdiction concerning Paradigm's claims for delay damages.

II. STANDARD OF REVIEW

The state generally has sovereign immunity from suit and liability. *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 429–30 (Tex. 2016). When political subdivisions of the state act in a governmental capacity, they share in the state's immunity, which is then referred to as governmental immunity. *Id.* Unless waived, governmental immunity from suit defeats a trial court's subject-matter jurisdiction. *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004).

A trial court's subject-matter jurisdiction is properly challenged in a plea to the jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). The movant may challenge whether the plaintiff has pleaded facts sufficient to show the trial court's jurisdiction; alternatively, the movant may

challenge the existence of the pleaded jurisdictional facts. *Id.* at 226–27. We review the trial court’s ruling on the jurisdictional challenge de novo. *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 8 (Tex. 2015).

If the movant challenges the plaintiff’s pleading, we look to the plaintiff’s intent and construe the pleading liberally in the plaintiff’s favor to determine whether the facts alleged affirmatively demonstrate the trial court’s jurisdiction to hear the matter. *Id.* We presume that the claimant’s unchallenged factual allegations are correct, but if the plaintiff’s factual allegations are insufficient to affirmatively demonstrate either the existence of, or incurable defects in, the trial court’s jurisdiction, then the plaintiff is afforded the opportunity to amend. *Miranda*, 133 S.W.3d at 226–27.

If the movant produces evidence controverting the plaintiff’s allegations of jurisdictional facts, we take as true all evidence favorable to the plaintiff, indulging every reasonable inference and resolving any doubts in the plaintiff’s favor. *Id.* at 227–28. If the evidence creates a fact question about jurisdiction, the trial court cannot grant the plea. *Id.*

III. GOVERNING LAW

The Local Government Contract Claims Act waives a local governmental entity’s immunity from suit and liability in certain breach-of-contract suits for “the balance due and owed by the local governmental entity under the contract as it may have been amended, *including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration.*” TEX. LOC. GOV’T CODE § 271.153(a)(1) (emphasis added); *see id.* § 271.152 (waiving immunity from suit for breach of contract, “subject to the terms and

conditions of this subchapter”).² Paradigm’s position is that Section 271.153(a)(1) waives HCDE’s immunity from suit and liability for Paradigm’s claims for delay damages.

Immunity implicates a trial court’s subject-matter jurisdiction over pending claims. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012). Because subject-matter jurisdiction can be challenged for the first time on appeal, the appellate court has jurisdiction to consider a governmental defendant’s new governmental-immunity arguments raised for the first time on appeal. *Id.*

Appellate review of new immunity arguments has the practical benefit of increasing “efficiency of the judicial process,” for if the appellate court could not address the new issues, the governmental defendant would have to repeat them on remand to the trial court in a second plea to the jurisdiction. *Id.* at 96. If denied and appealed, the same issues would reappear before the appellate court for review at a later time. *Id.*

On the other hand, the plaintiff may not have had a fair opportunity to amend its pleadings or develop the record in response to new jurisdictional issues raised for the first time on appeal. *Id.* To safeguard the plaintiff against that possibility, the Supreme Court of Texas instructs reviewing courts to remand the case without addressing the new jurisdictional issues unless the proponent “conclusively establishes” that (1) the plaintiff’s pleading or the record negates jurisdiction; (2) the plaintiff had a full and fair opportunity in the trial court to develop the record and amend its pleadings to show jurisdiction but failed to do so; or (3) if the plaintiff did not have such an opportunity, the plaintiff would be unable to show jurisdiction even

² The statute also waives immunity for “the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract,” as well as for reasonable and necessary attorney’s fees and interest. *Id.* § 271.153(a)(2)–(4).

if the case were remanded to the trial court and the plaintiff were given the opportunity to develop the jurisdictional record and amend its pleadings. *Id.* at 100; *see also Pepper Lawson Horizon Int'l Grp.*, 669 S.W.3d 205, 212–13 (Tex. 2023) (per curiam) (declining to consider a new argument that the plaintiff lacked standing to invoke a waiver of immunity because the proponent did not conclusively establish that an exception applied).

The net result is that, for each jurisdictional challenge presented on appeal, we first identify the jurisdictional fact that the governmental entity contends was insufficiently pleaded or is controverted by the evidence. If the jurisdictional fact was first challenged on appeal, we then determine whether the governmental entity has conclusively established the existence of one of the three circumstances identified in *Rusk State Hospital*. If so, then we address the merits of the jurisdictional challenge, and if not, we remand the issue to the trial court so that the plaintiff is not deprived of the opportunity to cure curable defects and to rebut the governmental entity's evidence.

But what if the new challenge to the jurisdiction is directed to the pleading or evidence of a fact that is not actually jurisdictional but instead goes only to the merits of the claim?

This is a threshold issue, because an appellate court has an affirmative obligation to assess its own jurisdiction,³ and in an interlocutory appeal of a governmental entity's plea to the jurisdiction, the reviewing court has jurisdiction only to consider jurisdictional issues. *See* Act of May 27, 1997, 75th Leg., R.S., ch. 1296, § 1, sec. 51.014(a)(8), 1997 TEX. GEN. LAWS 4936, 4937 (amended 2025) (authorizing an interlocutory appeal from a governmental unit's plea to the

³ *City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013) (per curiam).

jurisdiction); *Brazoria Civic Club v. Brazoria Cnty. Appraisal Dist.*, 694 S.W.3d 854, 871 (Tex. App.—Houston [14th Dist.] 2024, no pet.) (“Our appellate jurisdiction in this interlocutory appeal is limited to issues of subject-matter jurisdiction, and we may not address the merits of the [plaintiff’s] claims.”). If new issues challenge facts that truly are jurisdictional, then those issues must be addressed on the merits or remanded as *Rusk State Hospital* dictates, even if the same facts also implicate the merits. But if the new issues go solely to the merits of the plaintiff’s claims, then the reviewing court lacks jurisdiction over them and can neither review them on the merits nor remand them.

IV. ISSUES PRESENTED

Nearly all of HCDE’s appellate arguments focus on Section 8.3.1 of the contract’s “general conditions” document, which includes the following language:

Any provision of the Contract Documents to the contrary notwithstanding, it is expressly agreed that the extension of the Contract Time shall be Contractor’s sole remedy for any delay unless the same shall have been caused by acts constituting interference by the Owner which materially interfere with Contractor’s performance of the Work, and then only to the extent that such acts continue after Contractor’s reasonable prior written notice to Owner of such interference.⁴

According to HCDE, it retains its governmental immunity from suit because Paradigm is not seeking damages ‘due and owed’ under the contract inasmuch as (1) Section 8.3.1 “explicitly excludes delay damages”; (2) Section 8.3.1 limits delay damages to compensation for those delays caused by the Owner’s interference with Paradigm’s work, and Paradigm did not plead that HCDE committed such acts of

⁴ In discussing the notice requirement, HCDE quotes Section 8.3.1, but Paradigm quotes Section 8.3.7, which differs from Section 8.3.1 in two respects. First, it omits the word *materially* in the expression, “which materially interfere with Contractor’s performance of the Work.” Second, it refers only to “written notice,” rather than to “*reasonable prior* written notice.” The parties do not address these differences.

interference; (3) even for delays caused by HCDE's interference, Section 8.3.1 allows Paradigm to recover only for delays caused by the Owner's acts of interference that continued after written notice, and Paradigm did not plead or produce evidence of HCDE's post-notice interference; and (4) even if Paradigm's April 5, 2022, notice of claim for delay damages could be construed as fulfilling Section 8.3.1's requirement for written notice of interference, Paradigm produced no evidence that its delay damages accrued in the two days between its notice of claim and the issuance of the building permit. In an argument that does not rely on Section 8.3.1, HCDE asserts in its fifth issue that Paradigm assumed the risk of delay by entering into the contract knowing that the building permit had not yet been issued.

None of the foregoing were raised in HCDE's plea to the jurisdiction. The only argument raised both in HCDE's plea and in its appellate briefing is the assertion, "*Paradigm's claim* is that it was prevented from commencing work due to the amount of time it took for cre8 (HCDE's architect) to secure the building permit." We address this assertion before turning to the matters raised for the first time on appeal.

V. PARADIGM PLEADED FOR COMPENSATION FOR OWNER-CAUSED DELAYS.

Subject to certain conditions, the Texas Local Government Contract Claims Act waives a local governmental entity's immunity from suit for the purpose of adjudicating a claim for breach of a properly executed written contract stating the essential terms for providing goods or services to the entity. TEX. LOC. GOV'T CODE § 271.151–.152. But the Act's waiver of immunity from suit applies only to claims for relief available under the Act. *See Zachry Constr. Corp. v. Port of Houston Auth. of Harris Cnty.*, 449 S.W.3d 98, 110 (Tex. 2014) ("We conclude that the Act does not waive immunity from suit on a claim for damages not recoverable under Section

271.153.”). And as previously mentioned, the Act waives the local governmental entity’s immunity from liability for, among other things, “the balance due and owed by the local governmental entity under the contract as it may have been amended, including 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).

On appeal, HCDE argues that “Paradigm’s claim is that it was prevented from commencing work due to the amount of time it took for cre8 (HCDE’s architect) to secure the building permit,” and that HCDE has already provided the only remedy the contract permits for delays caused by the architect: an extension of Paradigm’s time for performance. This argument appears to be a restatement of a challenge to the pleadings that HCDE raised in the trial court, in which HCDE wrote, “Paradigm’s ‘delay’ damages are in no way a ‘direct result’ of any HCDE-caused delay, for as is *admitted in Paradigm’s live pleading*, cre8 (the architect, as design submission for permitting was not HCDE’s contractual obligation) submitted designs to the City ‘at least thirty (30) times.’”⁵

Because the Act’s waiver of immunity from delay-damages claims applies only to increases in costs “as a direct result of owner-caused delays or acceleration,” HCDE’s characterization of Paradigm’s delay-damages claims as claims for delays caused by the architect challenges whether Paradigm pleaded a claim for “owner-caused delays.”

Paradigm did. Contrary to HCDE’s characterization of Paradigm’s live pleading, Paradigm actually alleged that “*HCDE’s* delay in completing the design necessary to obtain the building permit prevented Paradigm from executing the work

⁵ Emphasis added.

in accordance with the Contract.” Paradigm further pleaded that its increased costs of construction were “solely attributable to HCDE’s own delay.”

Because Paradigm sufficiently pleaded that its increased costs were the direct result of owner-caused delays, we overrule this issue.

VI. HCDE’S REMAINING ARGUMENTS ARE NON-JURISDICTIONAL.

With the exception of HCDE’s contention that Paradigm assumed the risk of delay damages, all of HCDE’s remaining arguments rely on Section 8.3.1 of the contract’s “general conditions.” We address the arguments relying on Section 8.3.1 together before returning to HCDE’s assumption-of-risk argument.

A. Section 8.3.1 Does Not Modify the Statutory Waiver of Immunity.

Section 8.3.1 contains contractual limitations of liability that are more restrictive than the statutory limitations on the Act’s waiver of immunity. Under Section 271.153, the scope of the Act’s waiver of immunity includes breach-of-contract claims for delay damages that are the “direct result of owner-caused delays,” but the Act does not limit the waiver of immunity to claims in which the delay is the result of “interference,” or in which the plaintiff provided written notice of interference, or in which the governmental entity continued its interfering conduct after written notice. Indeed, when faced with similar arguments that amounts are not “due and owed” because of contractual provisions limiting liability, the Supreme Court of Texas has stated on more than one occasion, “The purpose of section 271.153 is to limit the amount due by a governmental agency on a contract once liability has been established, not to foreclose the determination of whether liability exists.” *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 840 (Tex. 2010); *see also Zachry Constr. Corp.*, 449 S.W.3d at 109 (quoting this sentence).

The problem is that all of HCDE’s arguments relying on Section 8.3.1 rest on the premise that Section 8.3.1’s limitation of liability similarly limits the legislature’s waiver of immunity. The fundamental flaw in that premise is that only the legislature can waive immunity from suit in a breach-of-contract claim. *Tex. Nat. Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 858 (Tex. 2002). Because the legislature alone determines the scope of that waiver, parties cannot, by agreement or implication, undo the legislature’s work by reinstating some or all of the immunity the legislature has waived. *See City of Willow Park v. E.S.*, 424 S.W.3d 702, 709 (Tex. App.—Fort Worth 2014, pet. denied) (“If parties to a contract cannot, between themselves, voluntarily choose to waive an entity’s sovereign or governmental immunity because the legislature has sole province over such matters, we cannot conclude that parties may collectively and voluntarily abrogate the legislature’s intention to waive such immunity.”); *see also Jubilee Acad. Ctr., Inc. v. Sch. Model Support, LLC*, No. 04-21-00237-CV, 2022 WL 1479039, at *7–10 (Tex. App.—San Antonio May 11, 2022, pet. denied) (agreeing with argument that immunity that has been statutorily waived by the Texas Local Government Contract Claims Act “cannot be contractually ‘reinstated’”).

Of course, the legislature can, if it chooses, specify that a waiver of immunity incorporates a contractual limitation on liability. For example, just as the legislature waived local governmental entities’ immunity from breach-of-contract claims “subject to the terms and conditions” of the Texas Local Government Contract Claims Act, the legislature similarly waived the immunity of state agencies from breach-of-contract claims, “subject to the terms and conditions” of Texas Civil Practice & Remedies Code Chapter 114. *Compare* TEX. LOC. GOV’T CODE § 271.152 (local governmental entities) *with* TEX. CIV. PRAC. & REM. CODE § 114.003 (state agencies). Both statutes also waive immunity for claims for “any

amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration.” TEX. LOC. GOV’T CODE § 271.153; TEX. CIV. PRAC. & REM. CODE § 114.004(a)(1). But in suits against state agencies, the legislature added the qualifier, “if the contract expressly provides for that compensation.” TEX. CIV. PRAC. & REM. CODE § 114.004(a)(1). Thus, in suits against state agencies, the legislature expressly allows the terms of the parties’ contract to determine whether immunity for delay damages has been waived.

But the Texas Local Government Contract Claims Act contains no such qualifier, and we cannot add by implication a condition that would have been void if the parties had added it by express language. *See San Antonio River Auth. v. Austin Bridge & Rd., L.P.*, 601 S.W.3d 616, 627, 631 (Tex. 2020) (dispute whether the contract in fact requires the governmental entity to pay the damages claimed goes to the merits). A local governmental entity’s immunity from a breach-of-contract-claim for delay damages is waived if the claim falls within the terms of the statute, regardless of whether the terms of the contract would foreclose liability. *See, e.g., ISI Contracting, Inc. v. Metro. Transit Auth. of Harris Cnty.*, 720 S.W.3d 767, 776 (Tex. App.—Houston [14th Dist.] 2025, no pet.) (“The waiver of governmental immunity in the Act does not depend on ultimate liability on a claim.”); *Garland Indep. Sch. Dist. v. Reeder Gen. Contractors, Inc.*, No. 05-22-00855-CV, 2024 WL 1208304, at *8 (Tex. App.—Dallas Mar. 21, 2024, pet. denied) (mem. op. on reh’g) (concluding that school district’s argument that delay damages are not due and owing because the contract allows delay damages only for delays caused by “interference” is an argument going only to liability and not to immunity).

We conclude that, in arguing that Paradigm’s delay-damages claims are not claims for amounts “due and owed” under the contract because the claims do not satisfy the requirements of Section 8.3.1 of the contract’s general conditions, HCDE

is asserting arguments that go only to the merits of Paradigm’s claims rather than to the trial court’s jurisdiction. *See Zachry*, 449 S.W.3d at 111 (“balance due and owed” is “simply the amount of damages for breach of contract payable and unpaid”); *A Status Constr. LLC v. City of Bellaire*, No. 01-21-00326-CV, 2022 WL 2919934, at *4 (Tex. App.—Houston [1st Dist.] July 26, 2022, no pet.) (mem. op.) (immunity is waived for breach-of-contract claim seeking damages recoverable under Section 271.153, regardless of ultimate liability); *City of Mason v. Blue Oak Eng’g, LLC*, No. 04-20-00227-CV, 2020 WL 7365452, at *3 n.4 (Tex. App.—San Antonio Dec. 16, 2020, pet. denied) (mem. op.) (whether any amount is “due and owed” as those terms are used in Section 271.153 “goes to the merits and does not implicate jurisdiction”). We therefore lack jurisdiction to address them further.

B. HCDE’s Assumption-of-Risk Argument Does Not Address a Jurisdictional Fact.

In HCDE’s last argument, it asserts that Paradigm assumed the risk of delay by signing the contract knowing that HCDE had not yet obtained a building permit. But in making this argument, HCDE does not identify any jurisdictional fact that Paradigm failed to plead or for which HCDE offered controverting evidence. Nor is it apparent which jurisdictional fact this argument is intended to call into question: Paradigm seeks delay damages for breach of contract, but before the common-law doctrine of implied assumption of risk was abolished,⁶ it was an affirmative defense to a negligence claim.

⁶ *See Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 209–10 & n.16 (Tex. 2015) (stating that the common-law affirmative defense of implied assumption of risk “no longer exist[s] under Texas law”); *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 517–18 (Tex. 1978) (recognizing that the voluntary assumption-of-risk doctrine was “abolished . . . in its entirety” in 1975). We assume that HCDE relies on assumption-of-risk under the common law because HCDE identifies no contractual provision or statute that allocates the risk of delay to the contractor.

As best we can tell, HCDE characterizes this as a jurisdictional argument based on the assumption that if HCDE has a defense to liability for delay damages, then for the purposes of waiver of immunity, those amounts are not “due and owed” as those terms are used in Section 271.153 of the Act. But, for the reasons previously addressed, such arguments go only to the merits of Paradigm’s claims, not to the trial court’s jurisdiction. We therefore lack jurisdiction to address them. *See Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002) (“In deciding a plea to the jurisdiction, a court may not weigh the claims’ merits but must consider only the plaintiffs’ pleadings and the evidence pertinent to the jurisdictional inquiry.”).

VII. CONCLUSION

We conclude that (a) the trial court did not err in rejecting HCDE’s argument that Paradigm failed to plead that its increased costs were caused by HCDE, and (b) HCDE’s remaining arguments go solely to the merits of Paradigm’s claims for delay damages rather than to the trial court’s jurisdiction. Thus, we affirm the trial court’s denial of HCDE’s plea to the jurisdiction.

/s/ Tracy Christopher
 Chief Justice

Panel consists of Chief Justice Christopher and Justices Wilson and Bridges.