LEXSEE

MCKINNEY & MOORE, INC., Appellant v. CITY OF LONGVIEW, TEXAS, Appellee

NO. 14-08-00628-CV

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

2009 Tex. App. LEXIS 9299

December 8, 2009, Memorandum Opinion Filed

PRIOR HISTORY: [*1]

On Appeal from the 188th District Court, Gregg County, Texas. Trial Court Cause No. 2004-243-A.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant contractor sought review of a judgment from the 188th District Court, Gregg County (Texas), which granted both a plea to the jurisdiction based on governmental immunity and a summary judgment on the merits to appellee city on the contractor's claims for additional sums allegedly due on a construction contract.

OVERVIEW: Unexpected difficulties occurred during construction, including high rainfall and a layer of iron ore rock that had not been revealed in the city's report on the project site. The contract provided that the contractor could rely on the report; that the contractor could recover damages caused by the act, neglect, omission, mistake, or default of the city; and that acceptance of final payment was a bar to claims. After being denied an adjustment to compensate it for additional costs, the contractor accepted payment of the contract balance. The court held that immunity from suit had been waived under Tex. Loc. Gov't Code Ann. § 271.152 and Tex. Gov't Code Ann. § 311.034 as to the allegedly deficient report because the contractor's claims were not based in negligence but arose under the contract. Immunity was not waived as to claims relating to high rainfall. The damages attributable to the undetected iron ore layer were encompassed by Tex. Loc. Gov't Code § 271.153(a)(1) because the contract language contemplated such damages, thus rendering them direct and not consequential damages. The city was entitled to summary judgment, however, because the contractor had accepted final payment.

OUTCOME: The court affirmed the trial court's judgment as modified to deny the city's plea to the jurisdiction in regard to the contractor's claims concerning the undetected layer of iron ore. The court further modified the grant of summary judgment to apply only to the claims pertaining to the iron ore layer.

COUNSEL: For appellants: Paul H. Sanderford, Brian Keith Carroll, Calvin Lloyd Cowan, Temple, TX.

For appellees: Bradley R. Echols, Longview, TX.

JUDGES: Panel consists of Chief Justice Hedges, and Justices Seymore and Sullivan.

OPINION BY: Adele Hedges

OPINION

MEMORANDUM OPINION

McKinney & Moore, Inc. ("MMI") appeals from the trial court's grant of both a plea to the jurisdiction based on governmental immunity and a summary judgment on the merits favoring the City of Longview, Texas. Longview had awarded MMI, a general contractor, the contract to construct the Lake O' the Pines Raw Water Intake Structure. After MMI completed work on the project, and Longview made what it considered final payment on the contract, MMI sued for additional sums

allegedly due. In two issues, MMI attacks the trial court's grant of the jurisdictional plea and the summary judgment on the merits. We reverse in part the trial court's holding on the plea to the jurisdiction, affirm the summary judgment, and affirm the judgment as modified.

I. Background

In November 2000, Longview opened bidding for construction of the Lake O' the Pines Raw Water Intake Structure. Prior to the bidding, Longview had hired an engineering firm who then hired a subcontractor, URS Grenier Woodward Clyde, to perform [*2] a subsurface investigation of the project site, including taking samples from four bore holes. URS produced a geotechnical report dated May 1999, which was made available to the contract bidders. The introductory section of the report warned that the report might "not be adequate for construction planning, cost estimating or design of temporary works." There is no evidence in the record that MMI performed any subsurface investigation on its own either prior to bidding or after being awarded the contract.

MMI was awarded the contract. Among the provisions of the contract of interest in this case are the following:

> . **Section SP-27** states that subsurface and soils information is furnished for "information only" and without any representation as to "accuracy or adequacy." It also advises prospective bidders to make their own investigations "as they deem necessary."
>
> . **Section SP-33** permits the contractor to rely on the "subsurface soil investigations[,] soil boring logs and test result" contained in the URS report. It further states that "Contractor recognizes that the technical data listed reflect only the conditions for the day the data was collected and reflects [sic] only conditions existing [*3] at the exact location of Samples."
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> . **Section 3.03** makes the owner "responsible for the adequacy of the design, sufficiency of the Contract Documents, the safety of the structure, and the practicability of the operations of the completed project," provided the contractor has complied with all requirements.
>
> . **Section 3.08**, labeled "DAMAGES," states that if the contractor is damaged during work on the project "by the act, neglect, omission, mistake or default" of the owner or other entity employed by the owner, the owner will reimburse the contractor for the loss.
>
> . **Section 6.04** mandates that "acceptance by the CONTRACTOR of final payment shall be a bar to any claims . . . except where noted otherwise in the Contract Documents."

During performance of the contract, MMI reportedly encountered unexpected difficulties, including: (1) high rainfall which led to unprecedented lake levels, and (2) a layer of iron ore rock which had not been revealed in the URS report. The contract called for a completion date of November 30, 2001. Due to the unexpected events, MMI requested three change orders, under procedures set forth in the contract, to extend the project's scheduled completion date. On October [*4] 18, 2001, after the first change order was granted but prior to the granting of the other two, the president of MMI, George McKinney, wrote a letter to Longview, suggesting that his company would absorb the added expense associated with the unexpected difficulties in exchange for granting of the time extensions for completion of the work. Such extensions allowed MMI to avoid paying liquidated damages for failure to timely complete the project.

On March 20, 2003, near completion of the project, MMI submitted a Request for Equitable Adjustment seeking the additional costs it had incurred due to the unexpected difficulties. Longview denied the request in July 2003. On December 12, 2003, after project completion, MMI submitted to Longview a payment request, signed by McKinney and notarized, showing that with the requested payment, the amount due on the contract would be paid in full. This request was apparently transmitted to Longview along with a cover letter suggesting that MMI still sought an equitable adjustment for additional amounts as presented in the March 20 Request for Equitable Adjustment.

Subsequently, on January 14, 2004, MMI prepared a revised payment request, adding an additional [*5] $ 2,040 to the amount allegedly due under the contract. Longview, however, ultimately paid only the amount contained in the original final payment request, a total of $ 4,128,668.25. MMI accepted that payment.

MMI then sued Longview, seeking recovery of the additional expenses MMI had incurred due to the unexpected difficulties encountered during construction. In response, Longview filed a plea to the jurisdiction based on governmental immunity. Specifically, Longview argued that although in section 271.152 of the Local Government Code, the Texas Legislature waived immunity for municipalities for breach of contract claims, MMI's claims (1) were based in tort principles not breach of contract, and (2) sought consequential damages, which were barred in such suits by section 271.153 of the Local Government Code. Tex. Loc. Gov't Code §§ 271.152, 271.153. Longview also filed a motion for summary judgment on the merits, arguing, among other things, that as a matter of law: (1) it did not breach the contract, (2) MMI was estopped from seeking additional sums based on statements it made in its requests for additional time to complete construction, (3) governmental immunity had not been waived [*6] for MMI's claims, and (4) MMI's acceptance of final payment barred it from seeking additional sums pursuant to section 6.04 of the contract. The trial court granted both the plea to the jurisdiction and the summary judgment on the merits without stating the grounds therefor.

II. Plea to the Jurisdiction

In its first issue, MMI attacks the trial court's grant of Longview's plea to the jurisdiction based on governmental immunity. A plea to the jurisdiction based on governmental immunity challenges a trial court's subject matter jurisdiction. *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007). We consider a trial court's ruling on a plea to the jurisdiction under a de novo standard. *Id*. Generally, a plaintiff bears the burden to plead facts affirmatively demonstrating subject matter jurisdiction. *Id*. A plea to the jurisdiction can challenge either the sufficiency of the plaintiff's pleadings or the existence of jurisdictional facts. *Tex. Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004). When a plea attacks the pleadings, the issue turns on whether the pleader has alleged sufficient facts to demonstrate subject matter jurisdiction. *Id*. In such cases, we construe the [*7] pleadings liberally in the plaintiff's favor and look for the pleader's intent. *City of Carrollton v. Singer*, 232 S.W.3d 790, 795 (Tex. App.--Fort Worth 2007, pet. denied). When the pleadings neither allege sufficient facts nor demonstrate incurable defects, the plaintiff should usually be afforded an opportunity to amend. *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). However, if the pleadings affirmatively negate jurisdiction, then the plea to the jurisdiction may be granted without leave to amend. *Id*. When a plea to the jurisdiction challenges the existence of jurisdictional facts, a court may consider evidence in addressing the jurisdictional issues. *Miranda*, 133 S.W.3d at 227. If the evidence reveals a question of fact on the jurisdictional issue, the trial court cannot grant the plea, and the issue must be resolved by a factfinder. *Id*. at 227-28.

Governmental immunity encompasses two components: immunity from liability and immunity from suit. *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). When a governmental entity enters into a contract, it waives immunity from liability under the terms of the contract; however, entering a contract does not also act as [*8] a waiver of immunity from suit. *Id*. A waiver of immunity from suit may occur, even in the breach of contract context, only if the legislature has waived such immunity by clear and unambiguous language. *See* Tex. Gov't Code § 311.034; *Tooke*, 197 S.W.3d at 332-33.

Longview acknowledges that (1) it waived immunity from liability by entering the contract with MMI; and (2) in Local Government Code § 271.152, the Texas Legislature waived immunity from suit for municipalities in regards to breach of contract causes of action. Tex. Loc. Gov't Code § 271.152. In its plea, however, Longview asserted that MMI's claims in the present lawsuit are, in actuality, barred by operation of sections 271.152 and 271.153 of the code. According to Longview, MMI's claims (1) do not in fact sound in contract, but instead are grounded in tort theories of recovery, in violation of section 271.152; and (2) impermissibly seek consequential damages, rather than direct contract damages, in violation of section 271.153. The sections in question provide in full as follows:

> **§ 271.152. Waiver of Immunity to Suit for Certain Claims**
>
> A local governmental entity that is authorized by statute or the constitution to

enter into [*9] 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.

§ 271.153. Limitations on Adjudication Awards

(a) The total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter is limited to the following:

(1) 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;

(2) 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; and

(3) interest as allowed by law.

(b) Damages awarded in an adjudication brought against a local governmental entity arising under a contract subject to this subchapter may not include:

(1) consequential damages, except as expressly allowed under Subsection (a)(1);

(2) exemplary damages; or

(3) damages for unabsorbed home office overhead.

Id. [*10] §§ 271.152, 271.153. We will discuss each basis for the plea to the jurisdiction in turn.

A. Tort or Breach of Contract

As stated, Longview initially contends that MMI's claims sound in tort instead of breach of contract, and thus, immunity from suit has not been waived under section 271.152. MMI, on the other hand, insists that its cause of action is based on the contract, and thus, governmental immunity is waived for this suit by section 271.152.

We begin our analysis by examining the claims raised in MMI's live petition. In the "Background Facts" section of its Second Amended Original Petition, MMI explained the basics of the contract between it and Longview for construction of the Lake O' the Pines Raw Water Intake Structure, as well as the unexpected difficulties which led to additional costs of construction. In a section entitled "Damages" and subtitled "Breach of Contract Against the City of Longview," MMI asserted that Longview's refusal to pay the additional costs breached the contract and resulted in damages. [1]

1 The actual language of this allegation is as follows: "Defendant's failure and refusal to pay MMI for its completed contractual and extra work on the Project constitutes [*11] a breach of contract and has resulted in damages to MMI in the amount of at least $ 410,651.50 inclusive of overhead and profit, for which amount MMI now sues." As stated above, in this context, we must construe pleadings liberally in the plaintiff's favor. *See Singer*, 232 S.W.3d at 795.

This single statement is the only language in the petition stating a cause of action. Thus, on the face of its petition, MMI asserts only a breach of contract cause of action.

On appeal, MMI cites to sections 3.03 and 3.08 of the contract in support of its assertion that its pleadings raised a breach of contract cause of action and not a tort cause of action. As explained above, section 3.03 makes Longview "responsible for the adequacy of the design, sufficiency of the Contract Documents, the safety of the structure, and the practicability of the operations of the completed project," provided that MMI has complied with all contract requirements. Nothing in this section suggests that MMI as contractor would be entitled to money damages should any of the referenced items be deemed inadequate, insufficient, unsafe, or impractical. Section 3.08, on the other hand, specifically gives MMI a right to recover [*12] monetary damages from Longview under certain circumstances. Specifically, section 3.08 provides that if MMI is damaged during work on the

project "by the act, neglect, omission, mistake or default" of Longview, or any entity employed by Longview, Longview must reimburse MMI for its loss.

It is important at this juncture to differentiate between the two unexpected construction difficulties that MMI maintains caused its damages: unprecedentedly high lake levels and the undisclosed layer of iron ore rock. MMI failed to demonstrate that any damages relating to lake levels were the result of Longview's breaching the contract. Consequently, the trial court did not err in granting the plea to the jurisdiction on claims pertaining to lake levels.

In regards to the iron ore layer, MMI contends that (1) its damages (*i.e.*, increased costs of construction) resulted from the "act, neglect, omission, mistake or default" of Longview's subcontractor URS, in that the latter failed to detect and report upon the layer's existence, and (2) Longview therefore breached the contract by refusing to pay damages under section 3.08 of the contract. In response, Longview argues that because MMI's claims ultimately [*13] rest on the assertion that URS *negligently* conducted or interpreted the soil borings, MMI's claims in this lawsuit sounded in tort (negligence) rather than in breach of contract.

Longview's argument, however, ignores the fact that section SP-33 of the contract permitted MMI to rely on the "subsurface soil investigations[,] soil boring logs and test result" contained in the URS report. [2] As set forth in this provision, MMI's ability to rely on the URS report was part of the benefit of the bargain struck in the contract. Thus, MMI's claims--that it was damaged because the URS report was deficient, and consequently, Longview breached the contract by not compensating MMI for those damages--are firmly grounded in the contract. We therefore reject Longview's argument in its plea to the jurisdiction that MMI's claims sound in tort instead of breach of contract, and thus, immunity has not been waived under section 271.152 for the iron-ore-layer claims.

2 In its motion for summary judgment, Longview asserted that MMI was prohibited from relying on the URS report by section SP-27 of the contract, which provided that subsurface and soils information was being furnished for "information only" and [*14] without any representation as to "accuracy or adequacy," and also advised prospective bidders to make their own investigations "as they deem necessary." As MMI points out, however, this general provision of the contract must give way to section SP-33, which specifically permitted MMI to rely on the "subsurface soil investigations[,] soil boring logs and test result" contained in the URS report. *See Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133-34 (Tex. 1994) (stating that in interpreting a contract, each part should be given effect, and a more specific provision must be read as controlling, when applicable, over a more general provision).

Longview additionally asserted in its motion for summary judgment that section SP-33 itself also provided limitations on any reliance on the URS report where it cautioned that "the technical data listed reflect only the conditions for the day the data was collected and reflects [sic] only conditions existing at the exact location of Samples." In the summary judgment record, there is evidence on both sides of the issue of whether, in light of this language, MMI reasonably relied on the URS report in this case. However, this issue goes to the merits [*15] of MMI's claims and not to the question of whether the trial court has jurisdiction over those claims.

B. Consequential Damages

Longview additionally asserted in its plea to the jurisdiction that MMI's cause of action sought consequential damages in violation of section 271.153(b)(1) of the Local Government Code. [3] Longview insists that it has paid the amount actually due on the contract itself, as evidenced by MMI's submission of a final pay request, and thus any additional sums sought would be consequential damages. We disagree.

3 In its plea, Longview actually asserted that MMI sought "compensatory damages." They corrected this misnomer in their appellate briefing to "consequential damages."

It is not clear from section 271.153 itself whether its terms are meant to simply be a limitation on the damages available in breach of contract actions against local governmental entities, or whether its terms are jurisdictional, *i.e.*, that governmental immunity is not waived to the extent the party suing the governmental entity

seeks damages prohibited by the section. Despite repeatedly referring to the section as "limiting damages," the Texas Supreme Court held in *Tooke* that the provisions of section 271.153 [*16] are jurisdictional. 197 S.W.3d at 344-46.

Although section 271.153 does not define "consequential damages," the phrase is typically used, in the breach of contract context, to describe damages that resulted naturally, but not necessarily, from a breach. *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997). Such damages are not recoverable unless the parties are found to have contemplated, at the time of contract formation, that the damages in question would be a probable result of breach. *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 687 (Tex. 1981). In other words, to be recoverable, consequential damages must be foreseeable and directly traceable to the breach and, indeed, be a result of the breach. *Stuart v. Bayless*, 964 S.W.2d 920, 921 (Tex. 1998). The phrase "consequential damages" is also often contrasted with the phrase "direct damages," which denotes damages that are the necessary and usual result of a breach, *i.e.*, that flow naturally and necessarily from the breach. *Boyer, Inc. v. Trinity River Auth. of Tex.*, 279 S.W.3d 354, 358 (Tex. App.--Fort Worth 2008, pet. denied). Therefore, by definition, if particular damages are specifically accounted for [*17] in the contract, they are direct, not consequential, in nature. *See id.*

Here, damages such as those alleged by MMI were clearly contemplated in the contract. As discussed above, section 3.08 of the contract provides that if MMI is damaged during work on the project "by the act, neglect, omission, mistake or default" of Longview or any entity Longview employed, Longview must reimburse MMI for that loss. Thus, under the terms of section 271.153, such reimbursement is a "balance due and owed by the local governmental entity under the contract." *See* Tex. Loc. Gov't Code § 271.153(a)(1). The fact that the contract language contemplates these damages renders them direct and not consequential damages. We therefore reject Longview's consequential damages argument made in its plea to the jurisdiction. [4] Based on the foregoing analysis, we sustain MMI's first issue in part and hold that the trial court had jurisdiction to consider the merits of MMI's claim relating to the undetected iron ore layer.

4 Longview does not make any other argument based on the limitations on awards found in section 271.153. In its plea, Longview asserted that section 271.153 does not permit an award of "equitable damages," [*18] but Longview further acknowledged that MMI did not appear to be seeking such damages. We agree that MMI's pleadings seek direct contract damages pursuant to section 3.08 of the contract.

III. Summary Judgment

In its second issue, MMI attacks the trial court's grant of summary judgment favoring Longview. We address Longview's traditional grounds for summary judgment. [5] We review a grant of traditional summary judgment under a de novo standard. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). We take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Where, as here, a trial court grants summary judgment without specifying the grounds therefore, we must affirm the judgment if any of the grounds presented in the motion is meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872-73 (Tex. 2000).

5 Although Longview stated that it was raising both no-evidence and traditional grounds for summary judgment, Longview failed in its motion to identify the element or elements of MMI's cause of action on [*19] which there was allegedly no-evidence, as required by Rule 166a(i) of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 166a(i); *McConnell v. Southside I.S.D.*, 858 S.W.2d 337, 342 (Tex. 1993). Furthermore, we need not address the merits of the no-evidence grounds because we find one of the traditional grounds to be dispositive of this appeal.

In its motion, Longview argued, among other things, that as a matter of law: (1) it did not breach the contract, (2) MMI was estopped from seeking additional sums based on statements it made in its requests for additional time to complete construction, (3) governmental immunity had not been waived for MMI's claims, and (4) MMI's acceptance of final payment barred it from seeking additional sums pursuant to section 6.04 of the contract. We begin by addressing the last of these grounds, pertaining to acceptance of final payment as a bar.

As set forth above, section 6.04 of the contract provides that "acceptance by the CONTRACTOR of the final payment shall be a bar to any claims . . . except where noted otherwise in the Contract Documents." In its motion, Longview asserted that this section barred MMI's breach of contract claims because the evidence [*20] conclusively established that MMI accepted Longview's final payment. In response to this ground, MMI made two arguments. First, MMI asserted that the reservation of rights letter submitted by MMI at the same time as the pay request permitted MMI to receive this "last payment" without making it a "final payment" under section 6.04. Second, MMI asserted that a second, revised final payment request, adding $ 2,040 to the total, rendered the initial final pay request not truly a final pay request for purposes of section 6.04. In a reply to MMI's response, Longview contended that the reservation of rights letter on which MMI relied was an impermissible attempt to unilaterally change the contract, *i.e.*, to permit MMI to both accept final payment and preserve its claim for additional sums under the contract. [6]

6 Longview's unilateral change argument was based on the fact that MMI acknowledged that (1) it made a final pay request, (2) Longview paid the amount requested, and (3) MMI accepted that payment. Longview argues that under the express waiver of claims language in section 6.04, MMI cannot accept payment of a final pay request while attempting to reserve additional claims; thus, according [*21] to Longview, the reservation of additional claims while accepting final payment was an attempt to unilaterally alter the contract. MMI does not address this argument in its briefing.

We find MMI's arguments to be without merit. Although the phrase "final payment" is not defined in section 6.04, other sections of the contract illuminate the intended meaning. Section 5.04 explains that Longview was to make "partial payments" to MMI each month based on the value of the work completed, minus an amount to be retained until "final payment." Section 5.07, entitled "Final Payment," further explains that once the work had been certified as completed, Longview was obligated to pay MMI (between the 30th and 35th days after certification) "the balance due [MMI] under the terms of [the] contract." Such payment was termed the "final payment."

In what MMI acknowledges was a request for final payment, MMI indicated that with the requested payment, "100%" of the balance due under the contract would be paid. It is undisputed that in response to the request for final payment, Longview paid the full amount requested and specified as 100% of the contract balance. Thus, pursuant to section 5.07, this payment [*22] was a "final payment."

Upon receiving the final payment, MMI had the election to either refuse the payment and assert its claims for additional costs of construction (both those referenced in the reservation of rights letter and those subsequently added to the revised final payment request), or accept the payment and, under section 6.04, waive its claims for additional amounts. It is undisputed that MMI accepted the payment in question. [7] Because the evidence conclusively demonstrated that MMI's claim was barred by operation of section 6.04, the trial court did not err in granting summary judgment on that basis. [8] We overrule MMI's second issue.

7 In his deposition, George McKinney acknowledged that he signed the final pay request thereby swearing that the percentage of the balance reflected therein was 100%. He further agreed that Longview made the requested payment and he accepted it.

8 MMI argues neither (1) that the claim bar of section 6.04 does not apply to MMI's claim in this lawsuit, nor (2) that any other section of the contract preserves its claim from application of section 6.04. In regards to another ground for summary judgment, MMI argued that the notification requirement contained [*23] in section 6.04 applied only to "extra work" claims discussed in part 6 of the contract. As stated, MMI does not make a similar argument regarding the claim-bar portion of section 6.04. The language of section 6.04 does not express any intent to limit its application to "extra work" claims under part 6. Additionally, the claim bar contained in section 6.04 works both ways, *i.e.*, final acceptance of the work by Longview and acceptance of final payment by MMI acts as a "bar to any claims by either party." Because part 6 of the contract does not discuss any claims that could have been made by Longview, it would appear that the claim bar contained in section 6.04 was not intended to be limited in application to

part 6 of the contract; otherwise, a portion of it would be rendered meaningless. *See generally* *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006) (stating that when construing a contract, a court should harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless).

Based on our foregoing holdings, we modify the trial court's judgment to remove the grant of Longview's plea to the jurisdiction in regards to [*24] MMI's claims concerning the undetected layer of iron ore. We further modify the grant of summary judgment to apply only to the claims pertaining to the iron ore layer. We affirm the judgment as modified.

/s/ Chief Justice Adele Hedges