

DISMISS; DENY and Opinion Filed July 16, 2020



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-19-00614-CV

**LINEBARGER GOGGAN BLAIR & SAMPSON, LLP, Appellant/Relator
V.
TINSTAR TITLE INC. D/B/A TINSTAR LITIGATION SUPPORT AND
TITLE, Appellee/Real Party in Interest**

**On Appeal and Original Proceeding from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-10455**

MEMORANDUM OPINION

**Before Justices Whitehill, Schenck, and Evans
Opinion by Justice Evans**

Linebarger Goggan Blair & Sampson, LLP filed this consolidated interlocutory appeal/petition for writ of mandamus challenging the trial court's order denying its plea to the jurisdiction in the lawsuit filed against it by TinStar Title Inc. d/b/a TinStar Litigation Support and Title.¹ In the trial court and in this Court, Linebarger generally argues the trial court erred in denying the plea because governmental immunity bars TinStar's suit. Additionally, Linebarger asserts not all

¹ We consolidated the original proceeding into the interlocutory appeal by order dated June 12, 2019.

of TinStar's claims are ripe for adjudication and complains it was not allowed to present live testimony or additional evidence before the trial court ruled on the plea. For the reasons that follow, we conclude this Court lacks subject matter jurisdiction over Linebarger's interlocutory appeal, but has mandamus jurisdiction to review Linebarger's complaints. We further conclude that, based on the record before us, the trial court did not abuse its discretion in denying the plea or ruling on it without an evidentiary hearing. Accordingly, we dismiss Linebarger's appeal for want of jurisdiction and deny its petition for writ of mandamus.

BACKGROUND

This matter arises out of a dispute between Linebarger, a private law firm, and TinStar, a company that performs title abstracting services. According to TinStar's live pleading, Linebarger performs collection services for delinquent tax accounts for Dallas County, Texas and other Dallas taxing entities as an independent contractor. TinStar, in turn, "has had a long-term continuing contractual relationship" with Linebarger, performing title abstract services that Linebarger uses in its delinquent tax collection work. TinStar's petition also reveals it is paid for its abstracting work on a case only if the case settles or a judgment is rendered for unpaid taxes and costs. TinStar then receives \$350 per property from the courts or the property owner. TinStar alleges that after a dispute arose between it and Linebarger regarding the preparation and notarization of cost affidavits filed with the court for the abstract work, Linebarger has (1) refused to submit TinStar's cost

affidavits, effectively preventing it from being paid for its title work, and (2) improperly seized funds due and owing to TinStar. In its petition, TinStar asserts various causes of action against Linebarger in its private capacity, including breach of partnership, breach of contract, tortious interference with contractual rights, breach of express warranty, breach of fiduciary duty, fraud, and quantum meruit.²

In response to TinStar's lawsuit, Linebarger filed its first amended plea to the jurisdiction seeking dismissal of TinStar's claims. Linebarger argued governmental immunity barred the lawsuit and some of TinStar's claims were not ripe for adjudication because they were contingent on the result of the underlying collection lawsuits that were still pending. The trial court denied the plea. Among other things, the trial court determined Linebarger was not a governmental entity and was acting as an independent contractor for the County when it subcontracted for TinStar's abstract title services. Linebarger filed this petition for writ of mandamus and interlocutory appeal challenging the trial court's order.

ANALYSIS

A. Interlocutory Appeal or Petition for Writ of Mandamus

We begin our discussion by determining the proper procedural vehicle for addressing Linebarger's complaints. As noted above, Linebarger has brought both

² Before filing its original petition in August 2018, TinStar filed a petition for pre-suit discovery under Texas Rule of Civil Procedure 202. Linebarger also filed a plea to the jurisdiction in the Rule 202 petition based on governmental immunity asserting the same arguments as in this case. The trial court denied the plea in July 2018. The two matters were later consolidated in the trial court.

a mandamus petition and an interlocutory appeal challenging the trial court’s denial of it plea to the jurisdiction.³ Because the trial court’s denial of Linebarger’s plea to the jurisdiction is an interlocutory order rather than a final judgment, Linebarger must have statutory authority for proceeding by interlocutory appeal. *See Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund, LLC*, 552 S.W.3d 297, 305 (Tex. App.—Dallas 2018, pet. granted) (“*ERCOT*”) (absent statute authorizing interlocutory appeal, we generally only have jurisdiction over final judgments).

Here, Linebarger contends that section 51.014(a)(8) of the civil practice and remedies code, which authorizes interlocutory appeals from orders granting or denying a plea to the jurisdiction by a governmental unit as that term is defined in section 101.001 of the Texas Tort Claims Act, provides us with jurisdiction to review the trial court’s ruling. *See* TEX. CIV. PRAC. & REM. CODE § 51.014 (a)(8). Section 101.001(3) of the Tort Claims Act, in turn, defines “governmental unit” as “(A) this state and all the several agencies of government that collectively constitute the government of this state . . . ; (B) a political subdivision of the state . . . ; (C) an emergency service organization; and (D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of

³ In footnote 6 in its petition for writ of mandamus, Linebarger reveals it believes mandamus is the proper vehicle based on this Court’s precedent, but filed an interlocutory appeal “out of an abundance of caution.”

Texas or from laws passed by the legislature under the constitution.” CIV. PRAC. & REM. CODE § 101.001(3). Relying heavily on *University of the Incarnate Word v. Redus*, 518 S.W.3d 905 (Tex. 2017), Linebarger argues it is a governmental unit under section 101.001 because it was performing the governmental function of collecting taxes pursuant to the property tax code section 6.30(c)⁴ in its dealings with TinStar. But *Redus* does not support Linebarger’s position. In *Redus*, the university claimed it was a governmental unit for purposes of an interlocutory appeal under section 51.014(a)(8) because it was defending the actions of its police department created pursuant to laws passed by the legislature that allow private universities to commission and deploy peace officers to enforce criminal laws. *See id.* at 906–07. The supreme court agreed, reasoning (1) the legislature had given the university the power to operate a police department like that of any other city, (2) the university was required to follow the same state promulgated rules followed by its public counterparts, (3) it also was required to make certain records available for public review as its police department is a governmental entity under the Public Information Act, and (4) the legislature has given private universities limited immunity when their officers act pursuant to mutual assistance agreement with local police departments. *Id.* at 910–11. The critical inquiry was whether the university police department was part of the state’s larger law enforcement system. *Id.*

⁴ The governing body of a taxing unit may contract with any competent attorney to represent the unit to enforce the collection of delinquent taxes. PROP. CODE § 6.30(c).

In contrast, although the legislature has authorized *the governing body of a taxing unit* to contract with a competent attorney to represent the unit to enforce the collection of delinquent taxes, this is notably different from *Redus* where the legislature had authorized *private universities* to employ and commission peace officers. In the case before us, the legislature has merely provided the taxing unit with the ability to retain a private law firm to represent it in delinquent tax collection cases. Linebarger has not demonstrated how its representation of the taxing units in the context of this suit makes it a governmental unit under section 101.001(3) of the Torts Claims Act. TinStar's lawsuit does not involve a matter of delinquent tax collection brought by a property owner or taxpayer but is instead a private dispute between Linebarger and one of its vendors providing title work to assist in collection work on behalf of its clients. In this context, we conclude that Linebarger is not a governmental unit for purposes of 101.001(3) of the Tort Claims Act. Accordingly, Linebarger is not entitled to an interlocutory appeal pursuant to section 51.014(a)(8) and we must dismiss its interlocutory appeal for want of jurisdiction.

However, because Linebarger has also filed a mandamus petition challenging the trial court's ruling on its plea to the jurisdiction, we may review Linebarger's complaints under our original proceeding jurisdiction. *See ERCOT*, 552 S.W.2d at 319–20 (conditionally granting mandamus relief directing the trial court to vacate order denying plea to jurisdiction). Mandamus is an extraordinary remedy granted only when the relator establishes an abuse of discretion by the trial court and an

inadequate appellate remedy. *In re N. Cypress Med. Ctr. Operating Co.*, 559 S.W.3d 128, 130 (Tex. 2018) (orig. proceeding). It is with this stringent mandamus standard in mind that we review the trial court's order denying Linebarger's plea to the jurisdiction.

B. Plea to the Jurisdiction

A plea to the jurisdiction is a challenge to the trial court's subject matter jurisdiction and the trial court's disposition of the plea is a question of law we review de novo. *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 8 (Tex. 2015). We consider both pleadings and factual assertions, in addition to any relevant evidence in the record regarding the jurisdictional issue. *Id.* (citing *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 625 (Tex. 2010)). We also construe pleadings liberally in favor of jurisdiction with a view to the pleader's intent to ascertain facts that have been alleged affirmatively demonstrating the court's jurisdiction to consider the subject matter. *Id.* Where a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider whether evidence in the record raises a fact issue. *See Vernco Constr., Inc. v. Nelson*, 460 S.W.3d 145, 149 (Tex. 2015). But unless the jurisdictional issue is inextricably intertwined with the merits of the claims, disputed fact issues are resolved by the court not the fact-finder. *See id.* We first address whether the trial court abused its discretion in denying Linebarger's plea to the jurisdiction based on the grounds of governmental immunity.

1. Governmental Immunity

In its first five issues, Linebarger generally contends its jurisdictional plea should have been granted because TinStar's claims arose in connection with Linebarger's tax collection activities as an agent of the Dallas County taxing entities and was under Dallas County's direction and control at the time of the complained-of conduct. Specifically, Linebarger argues that because the actions for which it is being sued were taken in connection with the government function of tax collection, TinStar's lawsuit is barred by governmental immunity.

Governmental immunity is an extension of a state's sovereign immunity⁵ and protects political subdivisions from lawsuits when they are performing governmental functions as agents of the state. *See Rosenberg Dev. Corp.*, 571 S.W.3d at 741. The question here is whether Linebarger, a private law firm, is entitled to governmental immunity from TinStar's damages lawsuit, which is based on actions Linebarger took regarding the title abstract work that TinStar performed for it in its tax collection business. Citing sections 101.0215(26) and 101.055 the Tort Claims Act, Linebarger contends that because it acts as the government when collecting taxes, it is entitled to governmental immunity.

⁵ The sovereign immunity doctrine prohibits suits against the state and its agencies from lawsuits for damages without the state's consent. *See Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc.*, 571 S.W.3d 738, 740 (Tex. 2019).

The parties do not dispute that TinStar's title abstract work is used by Linebarger in its work to collect delinquent taxes.⁶ Linebarger contends, however, that it is entitled to governmental immunity because TinStar's lawsuit seeks to recover for actions Linebarger took in connection with its tax collection efforts on behalf of the governmental taxing authorities. Linebarger specifically argues it is a governmental unit or agent performing the governmental function of tax collection in procuring the title work and is therefore immune from suit. *See* TEX. CIV. PRAC. & REM. CODE § 101.055(1) (Tort Claims Act does not apply to claim arising in connection with the assessment or collection of taxes by a governmental unit). Linebarger also relies on its contract with Dallas County requiring it to obtain a real property title abstract and authorizing it to subcontract the title work. Linebarger asserts that under its contract with Dallas County, the County retains legal control over Linebarger's work and its work may be reviewed by the district attorney as needed. Additionally, the contract requires Linebarger to ensure all persons who perform services under the contract are qualified and competent.

The burden was on Linebarger to demonstrate as a matter of law its entitlement to governmental immunity. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004) (after State asserts and supports with

⁶ According to Linebarger, a detailed abstract of the property is necessary to ensure that it had the correct property owner and to determine if there were lienholders who needed to be contacted prior to instituting the foreclosure and potential sheriff's sale of the property subject to the delinquent taxes. *See* TEX. TAX CODE § 33.43(a)(8) (petition in suit to collect delinquent property tax is sufficient if it alleges the person sued owns the property when the suit is filed if suit seeks to foreclose tax lien).

evidence that the trial court lacks subject matter jurisdiction, plaintiff must show there is a disputed material fact regarding jurisdictional issue).

Citing *City of Houston v. First City*, 827 S.W.2d 462 (Tex. App.—Houston [1st Dist.] 1992, writ denied), Linebarger argues that the governmental immunity afforded to the taxing authorities must also apply to it derivatively because it was acting as the taxing authority’s agent when it hired and then discontinued using TinStar for the title abstracts used in connection with its tax collection work. Linebarger also asserts the cases of *Ross v. Linebarger, Goggan, Blair & Sampson, L.L.P.*, 333 S.W.3d 736, 745 (Tex. App.—Houston [1st Dist.] 2010, no pet.), *Vick v. Floresville Indep. Sch. Dist.*, 505 S.W.3d 24, 30 (Tex. App.—San Antonio 2016, pet. denied), and *Guajardo v. Linebarger Goggan Blair & Sampson, L.L.P.*, No. 04-04-00211-CV, 2005 WL 954321 (Tex. App.—San Antonio Apr. 27, 2005, pet. denied) (mem. op) support its position. We do not agree that these cases support the granting of Linebarger’s plea to the jurisdiction.

As the Texas Supreme Court stated in *Rosenberg*, a private entity merely engaging in an act that serves a public purpose “does not ipso facto equate to status as a governmental entity for governmental immunity purposes.” *Rosenberg*, 571 S.W.3d at 750. In fact, an activity may constitute a governmental function for one type of political subdivision but not another. *See id.* n. 86 (citing *Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 814–15 (Tex. 1993)). Although the supreme court has contemplated a private entity performing governmental functions might share a

political subdivision's immunity derivatively, it has never so held. *See Univ. of Incarnate Word v. Redus*, No. 18-0351, 2020 WL 2601602, at *1 (Tex. May 22, 2020) (citing *Rosenberg*, 571 S.W.3d at 751) (hereinafter *Redus II*). The supreme court has held, however, that *the absence* of any governmental control over a private contractor's work affirmatively precludes derivative immunity. *See Brown and Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 121, 127 (Tex. 2015) (rejecting private contractor's assertion of governmental immunity solely because toll authority was authorized by statute to hire contractor and would have been immune had authority performed the services itself). As the supreme court indicated in *Brown and Gay Engineering*, if immunity is available to a private entity government contractor at all, it arises when the alleged cause of injury was not the private entity's independent action but the action taken "by the government through the [private entity]." 461 S.W.3d at 125.

In the case before us, the record reveals that paragraph XVIII of the contract between the County and Linebarger specifically permitted Linebarger to use subcontractors:

. . . including but not limited to attorneys and abstractors . . . in the performance of this Contract, and LINEBARGER HEARD recognizes that in each such instance LINEBARGER HEARD remains prime contractor directly responsible to the County for the performance of this contract. In performing services under this Contract, LINEBARGER HEARD acts and is an independent contractor, and no provision of the Contract shall be construed as making LINEBARGER HEARD the agent, servant, or employee of [sic] County.

Moreover, in a June 2018 hearing, even Linebarger’s own capital partner testified that Linebarger is a contractor to the taxing authorities in a “quasi-independent contractor arrangement.” She admitted the taxing entity did not tell the firm whom to hire to do the title work and that the firm had total independent contractor status with respect to hiring and firing abstractors without any input from the taxing authority.

Like the university in *Redus II*, Linebarger is a private entity and consequently, the extent to which the government exercises control over the activities it characterizes as governmental functions is relevant. *See* 2020 WL 2601602, at *6. Here, the evidence is undisputed the County did not hire, fire, or control in any way how Linebarger used title abstractors to perform its contract with the County. Moreover, there is nothing to suggest the conduct of which TinStar complains in its petition was action taken by the government taxing entities rather than independent action taken by Linebarger. *See Brown & Gay Eng’g*, 461 S.W.3d at 125. Extending governmental immunity to Linebarger in this lawsuit would also do nothing to further the immunity doctrine’s dual purpose of preserving the separation of government power and protecting the public treasury. *Id.* at 121. Simply stated, without a legislative directive, governmental immunity “does not exist as a judicial assist for private actors to accomplish the common good.” *Redus II*, 2020 WL 2601602, at *8.

In reaching this conclusion, we necessarily reject Linebarger's argument that its attorney-client relationship with the County conclusively establishes it was an agent of the County and therefore entitled to governmental immunity. Once again, Linebarger asserts *Ross*, *Vick*, and *First City* support its position, but we conclude those cases are inapposite as they all involve taxpayers asserting claims for actions taken by the taxing authority through Linebarger as its agent. See *Ross*, 333 S.W.3d at 742 (taxpayer sued law firm as a governmental agent in its official capacity); *Vick*, 505 S.W.3d at 30 (taxpayer's pleadings alleged attorney advised governmental units to contact Bank of America to seek repayment of the delinquent taxes); and *First City*, 827 S.W.2d at 479–81 (city made decision to accept check and ignore instructions regarding application of proceeds). These case are easily distinguished from the case before us where a vendor is simply complaining of a government contractor's independent actions. Likewise, because we conclude that Linebarger is not a governmental unit for purposes of TinStar's lawsuit, we need not address the issue of whether it was performing a governmental function in its dealings with TinStar under *Wasson Interest, Ltd v. City of Jacksonville*, 559 S.W.3d 142 (Tex. 2018).

2. Ripeness

A second ground for Linebarger's plea to the jurisdiction was based on the ripeness doctrine. Linebarger argues that because TinStar is paid for abstract work only if a case settles or proceeds to judgment, any claims based on underlying cases

that are still pending are not ripe and should be dismissed for want of jurisdiction. The ripeness doctrine seeks to prevent premature adjudication and focuses on whether the facts are sufficiently developed to establish an injury has occurred or is likely to occur rather than being remote or contingent on future events. *See Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998). Here, although the precise amount of TinStar’s damages may depend on whether certain cases for which TinStar provided abstract work either settle or proceed to judgment, the injury, if any, resulting from Linebarger’s alleged actions has occurred or is imminent in that TinStar claims that Linebarger has interfered with or precluded its ability to get paid on these cases. Linebarger’s argument goes to the extent of TinStar’s damages rather than whether an injury has or will occur. *See Great Sw Reg. Ctr, LLC v. ACSWD, LP*, No. 14-18-00679-CV, 2020 WL 205993, at *6 (Tex. App.—Houston [14th Dist.] Jan. 14, 2020, no pet.) (mem. op.) (“[R]ipeness examines whether the facts involved show that an *injury* has occurred or is likely to occur — not whether all damages may be definitively ascertained.”). Because TinStar alleged that it had performed abstract work for Linebarger pursuant to the parties’ agreement and Linebarger has allegedly interfered with TinStar’s ability to be paid for the work it performed, TinStar’s claims are ripe. Accordingly, the trial court did not abuse its discretion in denying the plea to the jurisdiction on this ground.

C. Live Testimony/Additional Evidence

In its final issue, Linebarger complains the trial court erred when it denied Linebarger's request to put on live testimony/additional evidence in support of its plea.⁷ As the trial court noted in its order denying the plea, "The court has reviewed

⁷ In its petition for writ of mandamus, Linebarger specifically references the following proposed evidence:

- The policy behind the privatization of tax collection—to fix disparate collection rates in poorer counties by providing them access to outsourced collection;
- Evidence regarding the disbursement of funds that shows that, upon successful settlement or judgment, TinStar was always paid by the clerk and only if funds remained did Linebarger receive any fees;
- An explanation of the various contractual provisions from Linebarger's contract with Dallas County;
- Evidence regarding specific instances in which Linebarger has been overruled by the District Attorney on questions of law;
- Dallas County's actual exercise of control over Linebarger;
- How and why Linebarger utilizes [minority/women-owned business] vendors;
- The practical concerns implicated by TinStar's loss of [minority/women-owned business] status;
- Evidence regarding the number of unripe cases;
- Proof that TinStar's claims are unripe that showed TinStar has received more than \$100,000 of its alleged damages through the regular payment of court costs by Dallas County since this case was filed; and
- Cross-examination of TinStar's witnesses regarding their claims that Dallas County will be required to reopen thousands of foreclosure cases.

Linebarger, however, did not proffer any of this proposed evidence in its request for an evidentiary hearing, nor does it explain how the trial court abused its discretion in ruling on the jurisdictional plea by submission. Moreover, Linebarger does not explain to this Court how the "omitted" evidence would have required the trial court to grant the plea in light of the evidence that was already before the trial court.

extensively the pleadings, briefing, arguments, and authorities filed and has been provided no additional basis for the need of unidentified testimony or the existence of additional evidence to support the plea to the jurisdiction that has not already been presented.”⁸ Moreover, none of Linebarger’s “additional evidence” specifically addresses the critical issues of whether the County exercised control over the conduct TinStar complains of in its petition or how the evidence would affect the trial court’s ruling on whether TinStar’s claims were ripe. A trial court can rule on a jurisdictional plea by submission or after an evidentiary hearing when necessary to resolve the jurisdictional issue. *See Vernco Constr., Inc.*, 460 S.W.3d at 149. Based on the record before us, we conclude the trial court did not abuse its discretion in ruling on Linebarger’s plea to the jurisdiction without an additional evidentiary hearing. Accordingly, we resolve this final issue against Linebarger.

CONCLUSION

Because we conclude the proper procedural vehicle to challenge the trial court’s ruling on Linebarger’s plea to the jurisdiction is by petition for writ of mandamus, we dismiss Linebarger’s interlocutory appeal for want of jurisdiction. Having further concluded that the trial court did not abuse its discretion in considering the plea by submission or by denying the plea, we deny Linebarger’s

⁸ In its order denying the plea, the trial court noted it examined the plea to the jurisdiction, the amended plea to the jurisdiction and TinStar’s opposition to the plea and amended plea to the jurisdiction, as well as the contents of the court’s file, including the brief in support of Linebarger’s request for a hearing, the consolidated Rule 202 proceeding together with authorities cited and previous testimony and arguments of counsel.

petition for writ of mandamus. *See* TEX. R. APP. P. 52.8(a) (the court must deny petition if the court determines relator not entitled to relief sought).

/David Evans/

DAVID EVANS
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

LINEBARGER GOGGAN BLAIR
& SAMPSON, LLP, Appellant

No. 05-19-00614-CV V.

TINSTAR TITLE INC. D/B/A
TINSTAR LITIGATION SUPPORT
AND TITLE, Appellee

On Appeal from the 44th Judicial
District Court, Dallas County, Texas
Trial Court Cause No. DC-18-10455.
Opinion delivered by Justice Evans,
Justices Whitehill and Schenck
participating.

In accordance with this Court's opinion of this date, the appeal is
DISMISSED for want of jurisdiction.

It is **ORDERED** that appellee TinStar Title Inc. D/B/A TinStar Litigation
Support and Title recover its costs of this appeal from appellant Linebarger
Goggan Blair & Sampson, LLP.

Judgment entered July 16, 2020.