

acknowledgment that a governmental unit can waive its immunity by conduct.³ This case demonstrates that the Court will never conclude that such a waiver actually occurred. I therefore dissent once again.

In this case, Collins answered the County's advertised request for bids to purchase property, tendering a \$5,000 earnest money check. The County specifically accepted the bid and cashed the check. Collins deposited the remaining purchase price plus closing costs — \$2,554,961.72 — with a title company. The County sent Collins a warranty deed and an affidavit for the closing, which Collins executed and returned to the County. Then, ostensibly through a "vote" of the county commissioners, the County refused to authorize the warranty deed's execution by the county judge. As a result, Collins brought suit for breach of contract and specific performance.

Accepting the Court's position that mere execution of a contract does not waive immunity from suit, this case is most surely a waiver by conduct. The County cashed and used the \$5,000 earnest money deposit, even though it had no intention of executing the warranty deed. This fact distinguishes this case from every other case that the Court has considered where the governmental unit "failed" to comply with the contract because, in those cases, the governmental unit defended from the beginning on whether it owed the money.⁴ But here, the County never asserted that Collins breached the contract; the County just said it wasn't bound to honor the contract, *and* it kept Collins' earnest money deposit.

³ *See id.* at ___; *Fed. Sign*, 951 S.W.2d at 408 n.1.

⁴ *See, e.g., Pelzel & Assocs., Inc.*, 77 S.W.3d at 251-52; *IT-Davy*, 74 S.W.3d at 851-52.

The Court, squarely faced with this blatant conduct, runs from its position by noting that the County eventually returned Collins' \$5,000, though years later and after the suit had progressed to the summary judgment stage.⁵ The Court concludes that this renders moot any relief Collins might have been entitled to had the County retained the deposit.⁶ But of course, the controversy wasn't over just \$5,000. The controversy was over the contract of sale of the real estate, as a part of which the County took Catalina's earnest money deposit. The controversy is hardly moot. Interestingly, the Court ignores one of the most settled principles in our jurisprudence: once a court acquires jurisdiction, it does not lose jurisdiction by the subsequent unilateral action of a party.⁷

By taking the earnest money and treating it as its own, the County waived its right to assert that it could not be sued on the purchase contract. And once the trial court acquired jurisdiction over the case, that jurisdiction was not lost when the County finally gave the money back to Collins. When the trial court obtained jurisdiction, which it did when Collins filed suit, it had the authority to decide the merits of the entire controversy.

Concerning the merits, the Court concludes that the bidding statute⁸ shows that the County had no obligation to close the sale.⁹ That's a dangerous holding. Assuming the Court is correct in its interpretation

⁵ ___ S.W.3d at ___.

⁶ *Id.* at ___.

⁷ See *Flynt v. Garcia*, 587 S.W.2d 109, 109-10 (Tex. 1979) (per curiam); *Isbell v. Kenyon-Warner Dredging Co.*, 261 S.W. 762, 763 (Tex. 1924).

⁸ TEX. LOC. GOV'T CODE § 272.001(d).

⁹ ___ S.W.3d at ___.

of the bidding statute, that statute simply provides a defense for the County to raise in the underlying proceeding.¹⁰ It does not mean that the County is entitled to summary judgment on its immunity defense — a defense wholly unrelated to whether the County had an obligation to close the sale under the statute.

But more importantly, the bidding statute authorizes a governmental unit not “to accept any bid or to complete a sale or exchange”¹¹ if the other contracting party has not completed the necessary prerequisites to completing a sale. I would not read the statute to allow a governmental unit to decide unilaterally not to complete a sale when it accepted a bid, kept the earnest money deposit, and the successful bidder already fully performed. Presumably when the county commissioners accepted Collins’ bid, agreed to sell the property, and cashed the check, they decided that the deal was in their constituency’s best interest. Simply because the county commissioners’ membership subsequently changed, that should not render the County immune from liability for failing to perform the obligations it had agreed to perform, especially when the County kept Collins’ \$5,000 deposit until years after Collins filed suit.

I would reverse the court of appeals’ judgment and remand the case to the trial court for proceedings on the merits. Because the Court does otherwise, I dissent. I add this case to the ever-growing “List” of cases in which the Court slams shut the courthouse doors on parties contracting with a

¹⁰ See TEX. LOC. GOV’T CODE § 272.001(d).

¹¹ *Id.*

governmental unit no matter how egregious the unit's conduct.¹²

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Craig T. Enoch
Justice

¹² See *Catalina Dev., Inc. v. County of El Paso*, ___ S.W.3d ___ (Tex. 2003); *Jones Bros. Dirt & Paving Contractors, Inc.*, 92 S.W.3d at 485; *Pelzel & Assocs., Inc.*, 77 S.W.3d at 252; *IT-Davy*, 74 S.W.3d at 863; *Little-Tex Insulation Co.*, 39 S.W.3d at 600; *Aer-Aerotron, Inc.*, 39 S.W.3d at 221; *Fed. Sign*, 951 S.W.2d at 408; see also *City of Houston v. Northwood Mun. Util. Dist. No. 1*, 73 S.W.3d 304, 313 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); *Gendreau v. Med. Arts Hosp.*, 54 S.W.3d 877, 879 (Tex. App.—Eastland 2001, pet. denied); *Denver City Indep. Sch. Dist. v. Moses*, 51 S.W.3d 386, 393 (Tex. App.—Amarillo 2001, no pet.); *Tex. Dep't of Pub. Safety v. Int'l Capital Corp.*, 40 S.W.3d 687, 690 (Tex. App.—Austin 2001, no pet.); *Tex. Dep't of Pub. Safety v. Rivera*, No. 13-01-446-CV, 2001 Tex. App. LEXIS 7681, at *3 (Corpus Christi Nov. 15, 2001, pet. denied) (not designated for publication); *Landry's Crab Shack v. Bd. of Regents*, No. 03-00-00690-CV, 2001 Tex. App. LEXIS 6948, at *8-9 (Austin Oct. 18, 2001, no pet.) (not designated for publication); *Ondemir v. Bexar County Clerk*, No. 04-00-00497-CV, 2001 Tex. App. LEXIS 6488, at *6 (San Antonio Sept. 26, 2001, pet. denied) (not designated for publication); *O'Dell v. Perry*, No. 03-00-00603-CV, 2001 Tex. App. LEXIS 4367, at *2-3 (Austin June 29, 2001, no pet.) (not designated for publication); *Tex. A & M Univ. Sys. v. AFEX Corp.*, No. 03-00-00222-CV, 2001 Tex. App. LEXIS 1266, at *4-5 (Austin Feb. 28, 2001, no pet.) (not designated for publication).