RECENT STATE CASES
TEXAS CITY ATTORNEYS ASSOCIATION
2014 FALL CONFERENCE
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HOUSTON, TEXAS

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I. Governmental Immunity

Texas Supreme Court holds lease for marina use is not a contract for services waiving immunity

LUBBOCK COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT et al v. CHURCH & AKIN, 12-1039 (Tex. July 3, 2014).

This is an interlocutory appeal from the denial of a plea to the jurisdiction regarding whether a lease prohibiting a leasee from using property for anything other than a marina is a "contract for goods or services" for which sovereign immunity is waived. The Texas Supreme Court holds it is not.

The Lubbock County Water Control & Improvement District ("LCWCID") operates the Buffalo Springs Lake and leased the City's marina to Church & Akin to continue its operation as a marina. While in a renewed term of the lease LCWCID terminated and Church & Akin sued for breach of contract. LCWCID filed a plea to the jurisdiction asserting the lease was not a contract for goods or services but the trial court denied the plea and the court of appeals affirmed. LCWCID filed a petition for review.

The Texas Supreme Court first noted that merely labeling a contract a "lease" does not end the analysis and the court must examine the essential terms of the lease to determine if providing goods or services are contained therein and that such need not be the primary purpose of the agreement. Church & Akin argued that the "use" under the lease is so limited it amounts to providing services of operating the marina for the City. However, the Supreme Court disagreed noting that the lease did not require Church & Akin to operate a marina. It merely noted that if they chose to use the property, the only use is that of a marina without written consent for another use. That is not the obligatory providing of services. If Church & Akin chose not to use the property, the City would have no recourse under the contract to require the marina use. Additionally, even if such a use were obligatory, it is not something provided *to* the LCWCID. The marina services are provided to the patrons, not the property owner, even though the property owner indirectly benefited. Finally, Chapter 271 limits the waiver of immunity only to the balance due under the contract and LCWCID never agreed to pay Church & Akin.

The dissent argued that Church & Akin were required to operate a marina under the language of the lease since it specifically stated they could not abandon any use and therefore it was a contract for services. The dissent also noted the catering ticket language required Church & Akin to issue tickets and it would have been a breach for them to refuse to issue such tickets. Justice Willett also reasoned that the services were provided to LCWCID just as the building of a roadway is a service to a city even though its intended users are general motorists.

If you would like to read this opinion click here. Opinion by Justice Boyd. Dissent by Justice Willett found here. The attorneys listed for Church and Akin are Gary M. Bellair, Ryan Bigbee, and Elizabeth G. Hill. The attorneys listed for LCWCID are Mr. Brian Benitez and Mr. Jody Dewayne Jenkins.

Texas Supreme Court holds merely following a trespasser is not enough to establish gross negligence

BOERJAN, et al v. J. JESUS RODRIGUEZ et al., 12-0838 (Tex. June 27, 2014)
This Texas Supreme Court case does not involve a local governmental entity, but does involved premise defect and vehicle pursuit claims and a holding which could affect governmental entities.

After being confronted by a ranch hand working on the ranch, a trespasser fled the area and the ranch hand pursued. The trespasser was a "coyote" transporting families from Mexico into the U.S. While fleeing, the trespasser vehicle rolled over killing the occupants. The family sued the ranch and the workers. The trial court granted the various summary judgments for everyone on all claims, but the court of appeals reversed. The "Ranch" defendants appealed.

The Texas Supreme Court first held the comparative responsibility scheme under Chapter 33 of the Texas Civil Practice and Remedies Code abrogated the unlawful acts doctrine. However, the court noted the court of appeals ignored its well settlement holding that the "only duty the premises owner or occupier owes a trespasser is not to injure him wilfully, wantonly, or through gross negligence." This standard applies to many premise defects for cities, especially under the Recreational Use statute. Additionally, the "gross negligence" standard can apply in vehicle pursuit claims or emergency responder claims. The Court analyzed the evidence submitted for summary judgment and held it was insufficient to support the breach of a duty to a trespasser. To establish gross negligence requires two elements 1) an objective extreme degree of risk and 2) a subjective awareness of the risk. While the Plaintiffs argued the ranch hands "chased" the coyote at high speeds, the evidence merely demonstrated the ranch vehicle only came up behind the coyote. No evidence was presented on whether the Ranch vehicle made any aggressive moves, how closely it followed the coyote, or how fast it was traveling. Simply following a trespasser's truck is a far cry from the sort of objective risk that would give rise to gross negligence. As a result, it was proper to grant the no-evidence summary judgments.

If you would like to read this opinion click here. Per Curium opinion. The attorneys for all parties can be found here.

El Paso Court of Appeals weighs in with split among the courts and holds no proprietary functions exist in contract claims

CHRISTOPHER L. GAY and STEVEN L. CARROLL v. THE CITY of WICHITA FALLS, 08-13-00028-CV (Tex. App. – El Paso, August 13, 2014).
This is a contractual immunity case involving the payment of disability benefit premiums for City police officers. The El Paso Court of Appeals joins the San Antonio Court in a split amongst the Circuits on whether the proprietary/governmental dichotomy exists in contract claims.

Gay and Carroll were police officers for the City of Wichita Falls. The City created a trust to obtain group insurance. Once obtained, the City paid the premiums for its employees. After their retirement in 2011, Gay and Carroll filed claims for disability benefits. Sun Insurance denied their claims.

They filed suit against the City for breach of contract, promissory estoppel and a host of other causes of action. The City filed a plea to the jurisdiction asserting it does not administer the policy and makes no decisions regarding benefits. It merely pays the premiums. It also does not have a contract with Sun Insurance, the trust does. The trial court granted the plea and the Plaintiffs appealed.

The court first addressed the Plaintiffs primary argument, which is the providing of insurance benefits is a proprietary function and so they can bring a breach of contract claim without triggering immunity. The El Paso Court of Appeals addressed the split in the courts of appeals on this subject, where the Third Court believes the proprietary/governmental dichotomy exists in contract claims and the Fourth and several others hold it does not. After a lengthy analysis, the El Paso Court agreed with the San Antonio Court and held the dichotomy does not exist in a contract context. And since Chapter 271 does not waive immunity for unwritten contracts or promises, (the contract was between the trust and Sun Insurance only) no waiver of immunity exists.

If you would like to read this opinion click here. Panel: Chief Justice McClure, Justice Rivera, and Justice Rodriguez. Opinion by Chief Justice McClure. The attorneys listed for the City are Jennifer W. Decurtis, Miles Risley, William Andrew Messer, and Julia M. Vasquez. The attorneys listed for Gay and Carroll are Jason Hungerford and Ken Slavin.

City immune from breach of community development agreement

REBECCA SCHOFFSTALL v. CITY OF CORPUS CHRISTI, 13-13-00531-CV (Tex. App. – Corpus Christi, August 25, 2014).
This is a contractual immunity case involving a community development program. The 13th Court of Appeals affirmed the granting of the City's plea to the jurisdiction.

Schoffstall is the daughter and executrix of Hortensia Hernandez, the party involved in the underlying suit. Hernandez received an interest free loan from the City to finance the demolition and construction of a new home as part of the City's community development program. Bodine was a builder Hernandez hired for the work, but Hernandez and Bodine had a disagreement resulting in a suit. The City withdrew its loan resulting in Hernandez and Bodine suing the City. The City filed a plea to the jurisdiction asserting governmental immunity, which the trial court granted and Hernandez' estate appealed.

The court first noted community development is a governmental function. A community development agreement for a no interest loan is not a contract for providing goods or services "to" the City, so Chapter 271 of the Local Government Code does not waive immunity. References in the deed of trust accompanying the agreement which references the FTC Rule (placing the holder in the shoes of the seller) is likewise not a waiver, since only the legislature can waive immunity. And since the City has not obtained any benefits from the zero-interest loan, equitable estoppel and waiver-by-conduct do not apply, even if all other conditions of these exceptions existed.

Finally, given the facts, there is no way to replead to establish a waiver, so no opportunity to replead is required. The trial court's dismissal of Hernandez' claims was affirmed.

If you would like to read this opinion click here. Panel: Justice Rodriguez, Justice Garza and Justice Benavides. Memorandum Opinion by Justice Garza. The attorneys listed for the City are Neely Balko, John B. Martinez and Marion M. Reilly. The attorney listed for Schoffstall is Thomas M. Schumacher

City retains immunity for possession and use agreement involved in condemnation suit says 4th Court of Appeals

CITY OF SAN ANTONIO v. ALAMO AIRCRAFT SUPPLY, INC. et al, 04-14-00057-CV (Tex. App. – San Antonio, August 13, 2014.)

As part of a street widening project, the City filed a condemnation suit in probate court against certain adjoining property owners. Afterwards the parties entered into a possession and use agreement ("PUA"). While the condemnation suit was still pending the property owners filed a separate suit against the City asserting breach of the PUA. The City file a plea to the jurisdiction claiming governmental immunity from such a breach claim. The trial court denied the plea and the City appealed.

The crux of the suit is a disagreement on the nature of the PUA, specifically whether it is a settlement of the condemnation suit over which the Plaintiffs can sue under a *Lawson* theory. Under the PUA, the City deposited certain funds into the court's registry. In return, it received immediate possession subject to specified conditions. The parties agreed the only remaining issues to be litigated were (1) the amount of money each landowner was due and (2) the City's right to take portions of their properties. As part of the project the contractor ended up obstructing access to the properties and required relocation of property. Plaintiffs sued for breach and asserted immunity is waived because the City initiated suit against them first. It also settled the claims for which immunity was waived, therefore they could sue to enforce the settlement.

The City agreed immunity for the condemnation dispute is waived under the Texas Constitution, but not for any breach of a PUA, which is only a temporary document to control while the overall dispute is going on. The court noted the express language within the PUA states the agreement does not prejudice in any way the outcome of the condemnation issues. It expressly disavows either the amount of adequate compensation or the City's right to take the properties. As a result, it does not settle a claim for which immunity is already waived and the City retains immunity from suit.

If you would like to read this opinion click here. Panel: Chief Justice Stone, Justice Barnard, and Justice Alvarez. Opinion by Justice Alvarez. The attorney's listed for the City are Joe R. Hinojosa, Paul D. Barkhurst, and Daniel Pozza. The attorney's listed for Alamo Aircraft are S. Mark Murray, Melanie H. Phipps, and Daniel O. Kustoff.

Falling television was premise defect claim, not tangible personal property claim says Dallas Court of Appeals

DALLAS COUNTY HOSPITAL DISTRICT v. LAURA CONSTANTINO, 05-13-01084-CV (Tex. App. – Dallas, August 7, 2014).
This is an interlocutory appeal from the denial of a plea to the jurisdiction in a Texas Tort Claims Act ("TTCA") case where the Dallas Court of Appeals reversed the denial of a plea to the jurisdiction in a premise defect case, but remanded to allow the Plaintiff an opportunity to replead.

Dallas County Hospital District ("Parkland Hospital" or "Parkland") provides televisions in patient rooms secured to the wall by a mount. Constantino's shoulder was injured when a television detached from the mount and fell on her. No one was using the television at the time. Parkland had received no reports of prior injuries or any potential dangers presented by this television. Constantino sued alleging the negligent use of tangible personal property (i.e. a non-locking nut installed instead of a locking nut and no lock washer). She also alleged the television, in such a state, constituted an unreasonably dangerous condition. Parkland filed a plea to the jurisdiction. The trial court granted the plea as to the premise defect claims, but denied it as to the negligent use of tangible personal property. Parkland appealed.

Constantino asserts her primary claims center on Parkland providing defective equipment, which fall under the negligent use of tangible personal property waiver, not the premise defect waiver in the TTCA. However, the court held her claims do not center on the negligent "use" of the property, but on the condition the property was in causing it to fall. Further, it went through an analysis of the pleadings holding that under the tangible personal property waiver of immunity, Constantino must also establish a private person would be liable. Her claims that a private person may be liable all center on her status as an invitee on the premises. As a result, her claims are those of a premise defect. However, her petition and the evidence presented does not affirmatively negate the ability to cure the defect. As a result, the case is remanded to allow Constaintino to replead.

If you would like to read this opinion click here. Panel: Justice Moseley, Justice Lang, and Justice Brown. Memorandum Opinion by Justice Brown. The attorneys listed for Parkland are Helena Venturini and David Luningham. The attorney listed for Constantino is Gene Stuart Hagood.

No recasting of premise defect claims as general negligence claims; circumstantial evidence not enough to create fact issue on actual knowledge

THE UNIVERSITY OF TEXAS at AUSTIN v. JOHN SAMPSON, 03-12-00265-CV (Tex. App. – Austin, August 8, 2014).
This is an interlocutory appeal from the denial of jurisdictional motions in a Texas Tort Claims Act ("TTCA") case. The Austin Court of Appeals reversed the denial and dismissed Sampson's claims.

Sampson, professor at UT Austin, tripped over an extension cord strung across a pedestrian walkway and sustained injuries. He sued the University under the Texas Tort Claims Act. The University filed a plea to the jurisdiction, motion to dismiss,

and motion for summary judgment accompanied by evidence. The University established through its evidence that it contracted with Austin World of Rentals (AWR) to assist with the setup for a "tailgate party." AWR employees installed lights in the trees, while the University was responsible for getting power from an electrical outlet to the area. The University presented evidence that none of its extension cords were in the area and it received no prior reports of extension cord problems. Either way, it was not the University who ran the cord. Sampson presented evidence the University often provides cords for such third party events, but no evidence that directly tied a University employee to placing or controlling the cord. The trial court denied the jurisdictional motions and the University appealed.

The court first held that once a premise defect is identified, a plaintiff cannot rely or bring a general negligence claim, such as failing to tape down or secure the cord. To do otherwise would remove the heightened pleading standard of actual notice associated with the TTCA section on premise defects. The court then analyzed whether the condition constituted a special defect, but held the evidence established the walkway and cord were not adjacent to a roadway, but went across University grounds. To be a special defect under the TTCA, it must be related to a street or roadway and therefore the cord constituted a premise defect. Sampson did not present evidence to create a fact issue the University had actual knowledge the cord was there or posed an unreasonable risk of harm. The fact employees regularly walk the areas to double-check the lighting systems does not establish a fact issue on actual knowledge and is nothing more than "mere suspicion." As a result, the University's plea should have been granted.

Chief Justice Jones dissents asserting the evidence established University employees were intricately involved in the electrical work for the party. The circumstantial evidence, in his view, was sufficient to create a fact issue on whether it was a University employee who place the cord, and therefore had knowledge of its existence. He also stated there is no question in his mind that an electric line running unsecured over a walkway creates an unreasonable risk by default.

If you would like to read this opinion click here. Panel: Chief Justice Jones, Justice Rose, and Justice Goodwin. Majority Memorandum Opinion by Justice Goodwin. Dissent by Chief Justice Jones. The attorney for UT is Ms. Nichelle A. Cobb. The attorneys listed for Sampson are Mr. Eugene W. Brees II, Ms. Michelle M. Cheng, Mr. William O. Whitehurst.

Plaintiff did not plead jurisdiction but did not negate it either so can replead says 13th Court of Appeals

MARK BERNHARD v. CITY OF ARANSAS PASS, TEXAS 13-13-00354-CV (Tex. App. — Corpus Christi, July 17, 2014).

This is a Texas Tort Claims Act/Recreational Use Statute case in which the 13th Court of Appeals reversed the granting of the City's plea to the jurisdiction and remanded.

The City operated a water amusement park, which Bernhard frequented. After going down a water slide, the lifeguard on duty allowed a second patron to follow even though Bernhard had not exited the landing

zone. The second patron collided with Bernhard resulting in a fractured neck. He sued, but the trial court dismissed his suit by granting the City's plea to the jurisdiction based on the Texas Recreational Use Statute. Bernhard appealed.

The 13th Court of Appeals first noted that Chapter 75 of the Recreational Use Statute applies and establishes the City owed Bernhard only the duty owed a trespasser. However, "although Bernhard's current allegations are insufficient to invoke the trial court's jurisdiction, his pleadings do not affirmatively demonstrate incurable jurisdictional defects to require dismissal." Finally, the court did reject the argument that different standards and duties apply to different types of trespassers noting the Texas Supreme Court rejected the argument in 2006.
If you would like to read this opinion click here. Panel: Justice Rodriguez, Justice Garza, and Justice Benavides. Memorandum opinion by Justice Benavides. The listed for Bernhard is Robert Sigler. The attorneys listed for the City are Carlos Villarreal and Lane Jarvis.

12th Court joins 4th Court holding no proprietary-governmental dichotomy exists in contracts

WASSON INTERESTS, LTD. v. CITY OF JACKSONVILLE, TEXAS; Cause No. 12-13-00262-CV (Tex. App. –Tyler, July 9, 2014)
In this case the Tyler court of appeals joins the Fourth Court of Appeals in a split in the courts regarding whether the proprietary-governmental dichotomy exists in contracts. The Tyler Court of Appeals agrees no such dichotomy exists and immunity is the default.

Wasson was the successor in interest of a 99 year lease of property specified for residential use. Wasson began leasing the property for one week at a time. The City sent an eviction notice holding the weekly tenancy constituted a commercial use of the property in violation of the lease. After attempts at clarifying through an amended lease failed, Wasson sued the City for breach of contract. The City filed a traditional and no-evidence summary judgment which the trial court granted and Wasson appealed.

Wasson cited the Austin Court of Appeals arguing proprietary distinction exists in contracts and that the lease was a proprietary function of the City. The Tyler Court of Appeals analyzed the split in the courts of appeals and agreed with San Antonio's holding no proprietary distinction exists in contracts. And since property leases are not contracts for which the waiver found in §271.152 of the Texas Local Government Code apply, the City maintains immunity in this case.

If you would like to read this opinion, click here. Panel: Justice Worthen, Justice Griffith and Justice Hoyle. Opinion issued by Justice Worthen. Attorney for Appellant Wasson Interests, Ltd. is Jeffrey Pruitt. Attorneys for Appellee City of Jacksonville are David Brewer and Steven Guy.

Board members can be sued individually for giving contracts to campaign contributors says 13th Court of Appeals

LA JOYA INDEPENDENT SCHOOL DISTRICT, ET AL v. RUTH VILLARREAL, 13-13-00325-CV (Tex. App. – Corpus Christi, July 3, 2014).

In 2005 the District and American Administrative Group, Inc. ("AAG") entered into a contract where AAG would be the third-party administrator of the District's employee health plan and Villarreal was the broker entitled to commission for setting up the deal. In 2012 the Individual Defendants ran for the school board and openly expressed their intent to award contracts exclusively to campaign supporters. After winning the election, the District replaced Villarreal with Trevino, an acknowledged campaign supporter. Villarreal brought suit against the District for breach of contract and sued the Individual Defendants for tortious interference with a contract and civil conspiracy. The Defendants filed a plea to the jurisdiction which the trial court denied and the Defendants appealed.

The court first held the District and AAG (later renamed HBS) are the only contracting parties, so Villarreal is not a party to the contract. The court noted that Chapter 271 of the Texas Local Government Code can encompass claims brought by third-party beneficiaries, and since Villarreal is named as the broker entitled to commission within the contract, she qualifies and has the ability to sue. The court also noted that the failure to plead recoverable damages is not a jurisdictional defect.

The individual Defendants asserted they were immune under §22.0511 of the Texas Education Code, which provides immunity "for any act that is incident to or within the scope of duties" of the Individual Defendants' professional positions. However, the court agreed with Villarreal's claims the Individual Defendants, aware of Villarreal's existing contract rights, planned and decided to target her contract rights in satisfaction of an accepted bribe—conduct that would not fall within or incident to the Individual Defendants' statutory duties. The court also noted Villarreal was not required to exhaust statutory administrative remedies because the tort claims were against the individuals, not the District, and not for their acts within their official duties. As a result, the trial court properly denied the plea.

If you would like to read this opinion click here. Panel: Justice Benavides, Justice Perkes, and Justice Longoria. Memorandum Opinion by Justice Perkes. The attorneys listed for Villarreal are Craig M. Sico, Clif Alexander, and Javier Pena. The attorneys listed for LJISD are Elena P. Serna, Miguel Alberto Saldana, and Jaime J. Munoz.

City failed to establish responding to a reckless driver is an emergency for immunity purposes says 14th Court of Appeals

PAULA COLLINS v. CITY OF HOUSTON, TEXAS, 14-13-00533-CV (Tex. App. – Houston [14th Dist.], July 3, 2014)

Houston PD Officer Brown responded to a call of a reckless motorcyclist (not Collins) and proceeded to respond. While en route, Collin's vehicle moved in front of Brown, who proceeded to pass Collins. Brown collided with Collins when she moved back into the left lane and abruptly stopped. Brown was suspended for three days in connection with the accident. Collins sued the City but it filed a plea to the jurisdiction noting Brown was responding to an emergency situation and was also entitled to official immunity. The trial court granted the plea and Collins appealed.

The court first analyzed Brown's official immunity claim. While Brown was not sued, if he is entitled to official immunity,

the City is not liable either since it is only liable if the employee is liable. The court noted that operation of a vehicle is discretionary in some special situations (such as a high-speed chase) but absent such special circumstances, an officer performs a ministerial act by simply driving a car in a non-emergency situation. In this case, Brown was not required to respond but evaluated the situation and concluded he was closer to the area. The court agreed this was a discretionary function. However, the City was required to demonstrate that a reasonably prudent officer could conclude that the need to respond to a speeding motorcyclist driving recklessly outweighed the risk to the public caused by the officer's action in exceeding the speed limit while responding. The court held the offered testimony by the City to establish good faith did not analyze or examine this balance in Brown's specific fact situation, so the City failed to establish for plea purposes, that Brown acted in good faith. Brown may be able to do so once the record is developed, but not on the present record.

With regards to the emergency response situation, the court held that while the City presented evidence its officers consider responding to a call for assistance for evading arrest an emergency, the evidence did not show the motorcyclist was evading arrest, only driving recklessly. And since the City failed to present evidence that responding to a reckless driver is an emergency, it failed to establish its entitlement to immunity.

If you would like to read this opinion click here. Panel: Justice Boyce, Justice Christopher, and Justice Brown. Memorandum Opinion by Justice Boyce. The attorneys listed for Collins are William R. Edwards, III and Les Cochran. The attorneys listed for the City are Patricia Horsak and Mary Stevenson.

Library's suit is really one attempting to control discretionary governmental functions for which no waiver of sovereign immunity exists says 13th Court of Appeals

TEXAS MUSIC LIBRARY and RESEARCH CENTER v. TEXAS DEPARTMENT OF TRANSPORTATION and PHIL WILSON, EXECUTIVE DIRECTOR, Cause No. 13-13-00600-CV (Tex. App.- Corpus Christi, July 31, 2014)

This is mainly an agency dispute over the providing of grants. However, the important piece for local governments to get out of this opinion relate to the arguments an individual cannot sue to control governmental body functions through declaratory judgment or injunction.

TxDOT approved a project from the Texas Music Library and Research Center ("Library") for funding to build a Music History Museum consistent with legislative directives. After the Library expended funds as part of preparing the project, TxDOT changed its mind and advised it intended to divert the funds elsewhere. The Library sued under a variety of claims, but mainly sought to stop TxDOT's divergence of funds and to force it to change its allocations. TxDOT filed a plea to the jurisdiction which was granted and the Library appealed.

The 13th Court of Appeals first held that the Library's claims under the Administrative Procedures Act allow it to challenge a rule of the agency; however, that is not what it is doing in this case. The Library is challenging a decision to divert funds or do

away with a project which has not been finally approved. As such, issuing an opinion on TxDOT's rules does not resolve their dispute and therefore they lack standing to bring such a challenge. This claim is "one involving a government officer's action or inaction." To succeed under its declaratory judgment claims the Library must establish TxDOT's executive director "acted without legal authority or failed to perform a purely ministerial act." Even assuming the Library's assertions were true—that TxDOT's director has no authority to withhold funds—it would not establish that TxDOT's executive director has an obligation to make federal funds available to the Library. The relief requested by the Library would not resolve the actual controversy between the parties because it would not establish whether the Library has a statutory or constitutional entitlement to payment. Further, nothing in the record shows TxDOT received the federal funds. The alleged duty not to divert federal funds away from the Library's project is not actual, but rather, hypothetical and contingent and not proper for declaratory relief. The Library has no right to receive federal funds or recoup "sunk costs that were voluntarily incurred in pursuit of governmental funding." The fact the Library voluntarily prepared the proposal, spent funds on it, and submitted "trade secret" information to TxDOT in order to obtain the funding does not entitle it to any due process or taking claims. Finally, TxDOT's director has no ministerial duty to fund the project so no mandamus action is proper. The court held that in its view, the "real substance" of the Library's suit "is an attempt to control state action by seeking to establish the existence and validity of a contract between TxDOT and the FHWA for the Library's project, enforce performance thereunder, and thereby impose liability on the state." No waiver of immunity exists. In a single paragraph the court also notes that to the extent TxDOT made inducing representations, there is no waiver of immunity by conduct.

If you would like to read this opinion, click here. Opinion by Justice Longoria. Attorneys for Appellees Texas Dept. of Transportation and Executive Director Phil Wilson are Betsy Johnson and Richard Farrer. Attorney for Appellant Texas Music Library and Research Center is Jennifer Riggs.

School District and P.E. instructor immune from injuries sustained by alleged excessive exercising of student with known medical condition

S.W., as NEXT FRIEND of A.W. v. ARLINGTON INDEPENDENT SCHOOL DISTRICT and LINDSEY FOSTER, 02-13-00280-CV(Tex. App. – Fort Worth, June 12, 2014).

This is an appeal from the grant of a plea to the jurisdiction arising from the injuries sustained by a child after being subjected to exercise which complicated a known medical condition.

Foster taught physical education classes for AISD. A.W. was a child with a known condition of inflammation of the anterior chest wall. Foster required students to perform high intensity exercises which resulted in extreme pain, the inability to sit, sleep, move and blood in the urine of A.W. She was diagnosed with an acute, potentially fatal disease of skeletal muscle injuries allegedly due to the force exercises. The AISD and Foster filed pleas to the jurisdiction which the trial court granted. S.W. appealed.

The court first analyzed and determined the Foster was entitled to dismissal under Tex. Civ. Prac. & Rem. Code Ann. §101.106(e) which is an election of remedies when suit is brought against an employee and an entity. After a pleading analysis, the court then determined the only remaining claim was a promissory estoppel claim against the AISD based on statements in the hospital by AISD officials that they would take care of the situation. S.W. argued this implyed payment of medical expenses. However, estoppel does not apply against a governmental entity and waiver-by-conduct has been rejected. Further school districts can never perform proprietary functions. As a result, the AISD retains immunity from all claims.

If you would like to read this opinion click here. Panel Justice Livingston, Justice Gardner, Justice McCoy. Opinion by Justice Livingston. The attorney listed for AISD is Dennis J. Eichelbaum. The attorney listed for White is J. D. Milks and the attorney listed for Foster is Andrea Mooney.

City no longer "used" property under Tort Claims Act after it loaded contents into truck for transport

WILLIAM BOATMAN v. CITY OF GARLAND, 05-13-01232-CV (Tex. App. – Dallas, June 12, 2014).
This is an appeal from the grant of a plea to the jurisdiction in a Texas Tort Claims Act ("TTCA") case. The Dallas Court of Appeals affirmed the dismissal of all claims.

Boatman picked up a load of recycling carts from the City's Transfer Station for transport to Houston. Upon arriving and opening the back of the truck, the contents fell on him. He alleged the City's employees loaded the contents and therefore negligently used tangible personal property resulting in his injuries. The City filed a plea to the jurisdiction which the trial court granted and Boatman appealed.

The court first analyzed the term "use" of personal property under the TTCA and held that a governmental unit does not use property by merely allowing someone else to use it. Additionally, it is the use which must cause the injury, not merely the existence of personal property. Once the contents were loaded into the truck and Boatman drove to Houston, the City was no longer "using" the property. Further, the injuries he sustained were "distant geographically, temporally, and causally" from the loading of the contents. As a result, the trial court properly determined the City retained immunity. The court then analyzed whether Boatman should have been given the opportunity to appeal and held that the pleadings negated the existence of jurisdiction and remanding the case to amend would serve no legitimate purpose since the defects could not be cured.

If you would like to read this opinion click here. Panel: Justice Bridges, Justice Francis, and Justice Lang-Miers. Memorandum Opinion by Justice Francis. The attorneys listed for the City are Matthew Durham, Kurt C. Banowsky and Ronald Bradford Neighbor. The attorney for Boatman is listed as Scott Robelen.

Texas Supreme Court holds City is immune for officer's negligent use of handcuffs

THE CITY OF WATAUGA v. RUSSELL GORDON, 13-0012 (Tex. June 6, 2014).

This is an interlocutory appeal in a Texas Tort Claims Act ("TTCA") case where the question is whether the improper use of handcuffs during an arrest states a claim for battery as opposed to negligent use of tangible personal property. The Court determined the underlying claim is one for battery for which the City maintains immunity.

Watauga police officers stopped Russell Gordon on suspicion of drunk driving. He was handcuffed upon arrest and again at the jail, both times complaining the cuffs were too tight. Later he sued for injuries sustained by the "negligent use" of the cuffs during the arrest. The City responded with a plea to the jurisdiction which the trial court denied and the court of appeals affirmed.

The Court first determined that it had interlocutory jurisdiction. It then examined the concepts of assault and battery and determined the City relies on the definition of "battery" in its arguments since no harm was intended by the use of the cuffs but only offensive bodily contact. The Court spend some time explaining away the court of appeal's reasoning that Gordon consented to the arrest and therefore negated a claim for battery, leaving only negligent use. The use of handcuffs is by nature "offensive contact" and a battery. Gordon's pleadings assert that he protested repeatedly that the handcuffs were too tight and causing him pain. And while the officers involved did not intent to injure, intent to injure is not an essential element. The gravamen of Gordon's complaint against the City is that its police officers used excessive force in effecting his arrest. Claims of excessive force in the context of a lawful arrest arise out of a battery rather than negligence, whether the excessive force was intended or not. The officers certainly meant to apply the cuffs and apply offensive contact, but are privileged to do so as enforcers of the law. A police officer's mistaken or accidental use of more force than reasonably necessary to make an arrest still "arises out of" the battery claim. And since the TTCA does not waive immunity for intentional torts like battery, the City maintains immunity.

If you would like to read this opinion click here. Opinion by Justice Devine. The attorney for the City of Watauga is listed as Mr. Joe C. Tooley. The attorney listed for the Texas Municipal League (Amicus) is Mr. Ramon G. Viada III. The attorney listed for Gordon is Mr. Kenneth Peter Trosclair.

First accident scene not a special defect which caused second accident says 11th Court of Appeals

TEXAS DEPARTMENT OF TRANSPORTATION v. TERESA RENEE ABILA LOPEZ, et al., 11-13-00064-CV (Tex. App. — Eastland, May 22, 2014). This is an interlocutory appeal from the denial of a jurisdictional summary judgment in a Texas Tort Claims Act ("TTCA") case involving a vehicle collision. The Eastland Court of Appeals affirmed in part, reversed in part, and remanded.

Lopez worked for a tow-truck company dispatched to an accident scene in a TxDOT construction zone. TxDOT crews placed cones and funneled traffic into an outside lane away from the accident and placed a TxDOT vehicle with flashing lights warning of the closing lane. During the scene cleanup, another driver, Walker, lost control of her vehicle and struck Lopez, killing him. The DPS investigation reporte noted Sibley (driver of first vehicle in the first accident scene) had hit a pothole and lost

control. Apparently, TxDOT crews filled the pothole but other aspects of the construction area, including a drop-off of several inches, may have contributed to Walker's loss of control. Plaintiffs alleged TxDOT was negligent in how it implemented traffic control and warning devices and several premise defects. They also allege the pothole, a steep drop-off, and the first accident itself were special defects.

The 11th Court of Appeals first held the act regarding the design of the construction project and the use of traffic control and warning devices for both the project and the accident clean-up are discretionary actions retaining TxDOT's immunity. The court then examined the special and premise defect claims holding the alleged pothole was, at best, a premise defect and no evidence of actual knowledge exists to waive immunity. The court also held the first accident scene was not a special defect and TxDOT had no duty to warn or make safe in connection with the wreck site. However, the court then held a fact question existed as to whether a drop-off was present and its depth, which are necessary to determine a special defect or premise defect standard (as well as causation). In short, the only claim that can go forward is the claim alleging a drop-off caused Walker to lose control.
If you would like to read this opinion click here. Panel: Chief Justice Wright, Justice Willson, and Justice Bailey. Memorandum opinion by Chief Justice Wright. The attorneys listed for TxDOT are Mark Dyer, Levon G. Hovnatanian, and George L. Lankford. The attorneys listed for Lopez are Suzanne Bass and Burt L. Burnett.

City not liable for takings, but may be for proprietary acts causing electrical line fire says Austin Court of Appeals

THE CITY OF AUSTIN d/b/a AUSTIN ENERGY v. LIBERTY MUTUAL INSURANCE, et al 03-13-00551-CV (Tex. App. – Austin, May 16, 2014).
This is an interlocutory appeal in an inverse-condemnation and TTCA case where the trial court denied the City's Rule 91a motion (Rule allowing dismissal for baseless claims). Since the City's asserted entitlement to a "baseless" challenge is jurisdiction, the appellate court has interlocutory jurisdiction. The Austin Court of Appeals affirmed in part and reversed in part.

A wildfire damaged numerous homes and caused injuries. The owners and insurance companies (through subrogation) brought a suit alleging essentially that the City started the fire when the electric utility's overhead distribution lines came in contact with each other during high winds. They brought inverse-condemnation, negligence, and trespass. The factual allegations center on the City's decision, for cost savings, to go from a regular inspection of lines to a repair-as-needed policy. The City filed a Rule 91a motion for baseless claims. The City asserted the petitions did not sufficiently allege the "intent" and "public use" elements required for a taking, their actions were governmental not proprietary, no proper charter notice was provided and it retains immunity. The trial court denied the motion and the City appealed.

The appellate court noted in a footnote that this is a plea to the jurisdiction at heart and it would analyze the case as such. Under a takings analysis a party must allege that the

governmental entity intended the resulting damage, or at least knew that the damage was substantially certain to occur, not merely it intended the act. This is a question of law. The court concluded the pleadings do not reasonably support a conclusion the fire and damage was substantially certain to occur. The facts, at best, show "that the City's conduct furnished a condition that made property damage a substantial risk. That is far different, however, from being the substantial certainty required for a valid takings claim." It also noted the pleadings do not support a conclusion the property was damaged for "public use." The court then analyzed the City's immunity under the Texas Tort Claims Act ("TTCA") for the activities alleged. The City asserted that while a public utility operation is proprietary, its sub-acts of fire prevention and engineering decisions are still protected and attempted to establish this by using the TTCA chapter architecture. After analyzing the arguments and TTCA, the court determined the activities complained of were proprietary so no governmental immunity applies.

With regards to charter notice, the court held if the City had immunity from suit, the notice is jurisdictional. If it does not, then the charter notice cannot confer immunity from suit and is nothing more than a liability defense.

If you would like to read this opinion click here. Panel: Chief Justice Jones, Justice Pemberton, and Justice Rose. Opinion by Chief Justice Jones. The attorneys listed for the numerous parties can be found on the docket page located here.

Accident report, crash report, and verbal statements insufficient to establish actual notice under TTCA says 14th Court of Appeals

THE CITY OF HOUSTON v. MARY MCGOWEN, 14-13-00415-CV (Tex. App. – Houston [14th Dist.], May 15, 2014).

This is an interlocutory appeal from the denial of a plea to the jurisdiction in a vehicle accident case under the Texas Tort Claims Act ("TTCA"). The 14th Court of Appeals reversed the denial due to a lack of actual or formal notice of claim.

McGowen was allegedly involved in a vehicle accident with a City public works vehicle and brought suit. The City filed a plea to the jurisdiction asserting no notice of claim within the charter time period. McGowen asserted the City had actual notice through a driver's crash report and verbal statements. The trial court denied the plea and the City appealed.

After going through the facts, the court noted none of the investigative reports (police or supervisor accident report) reflect the City was at fault for the accident, or that McGowen was a passenger or even present. The driver of vehicle McGowen was allegedly a passenger in was noted at fault. McGowen asserted she told a purported City employee (Russell) at the hospital that she believed the City was at fault. She also asserts that she drafted a crash report and mailed it to Russell (which turned out to be mailed to the Texas Transportation Department, not the City). Additionally, the report produced as evidence noted several significant differences with the facts of the case including the individuals involved, location

of the accident, as well as contradicted McGowen's own testimony. McGowen acknowledged during her deposition that she did not tell Russell her full name and address, claim that the City was at fault in the accident, or identify either of the drivers involved in the accident. The court stated accident reports are often insufficient, standing alone, to establish actual notice and the fact these did not even mention McGowen was involved at all is telling. The court held there was no evidence to establish a fact issue existed the City had subjective awareness of its alleged fault or of McGowen's injuries and therefore no actual notice exists. As a result, the plea should have been granted. The court reversed and rendered.

If you would like to read this opinion click here. Panel: Chief Justice Frost, Justice Jamison and Justice Wise. Memorandum opinion by Chief Justice Frost. The attorney listed for the City is John B. Wallace. The attorney listed for McGowen is Craig W. Saunders.

Actual notice under Tort Claims Act requires more than a bad result, but a subjective signal of fault says Houston Court of Appeals

THE UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER at HOUSTON v. TERESA MCQUEEN, et al. 14-13-00605-CV (Tex. App. – Houston [14th Dist.], May 6, 2014).

This is a Texas Tort Claims Act case where the primary issue is whether the entity had actual notice of a claim since the Plaintiff failed to provide written notice within statutory time period. The 14th District Court of Appeals held the Hospital did not have subjective awareness necessary for actual notice of the claim, reversed the denial of the plea to the jurisdiction and dismissed the claims.

Teresa Queen underwent a hysterectomy at the hands of doctors from the University of Texas Health Science Center at Houston ("UTHSCH.") Afterwards she discovered a perforated bowel which apparently resulted from the surgery and brought suit. Queen did not file a formal written notice of the claim within the statutory 6 month period so UTHSCH filed a plea to the jurisdiction which the trial court denied.

Queen asserted no written notice was required since UTHSCH had actual notice of the claim by receiving medical records from her bowel perforation after the surgery and provided notice to one of the doctors (Dr. Schneider) under Tex. Civ. Prac. & Rem Code §74.051 (medical malpractice statutory notice provision) within six months. UTHSCH asserts it had no subjective awareness of UTHSCH's fault. The court noted the key question is whether the medical records and Dr. Schneider's knowledge, assuming it is properly to be imputed to UTHSCH, constitute the requisite level of "subjective awareness" to put UTHSCH on actual notice of its fault. The court went through the facts, noting the numerous mentions that the actual cause was unknown and that bowel perforation was a complication of this type of surgery which does not indicate a standard of care failure. Schneider did not know what caused the perforation and did not attribute it in any way to anything she or anyone else particularly did or failed to do. "While we acknowledge that 'an unqualified confession of fault' is not required, and that 'a government cannot evade the determination [of liability] by subjectively refuting fault,' we conclude there must exist something in

the circumstances to provide a subjective signal to the governmental unit within the six-month period that there might be a claim, even if unfounded, at issue. There must be something more than the mere fact of a 'bad result,' even one that perhaps a prudent person or physician would have investigated." In short, the record does not support actual knowledge on the part of UTHSCH, so the trial court lack jurisdiction.

The dissent felt UTHSCH did not negate actual knowledge as alleged in the complaint. Based on the evidence, Justice Christopher believed Queen raised a genuine issue of material fact precluding the grant of the plea.

If you would like to read this opinion click here. If you would like to read the dissent click here. Panel: Justice Boyce, Justice Christopher, and Justice Brown. Opinion by Justice Brown, dissent by Justice Christopher. The attorney listed for UTHSCH is Bridget Lynn McKinley. The attorney listed for the Queens is Joseph Michael Gourrie.

Parties cannot contract to reinstate immunity waived under Chapter 271 of Local Government Code

CITY OF WILLOW PARK, TEXAS v. E.S. & C.M., INC., 02-13-00272-CV (Tex. App. – Fort Worth, February 6, 2014)
This is an interlocutory appeal from the denial of a plea to the jurisdiction in a breach of contract case where the Fort Worth Court of Appeals reversed in part and affirmed in part.

E.S. & C.M, Inc. is an engineering firm which contracted with the City for services (feasibility reports on water development) and asserted the contract obligated the City to pay approximately $1.1M in installments which the City failed to do. The City asserted it had pending lawsuits against it and could not fund the project as anticipated because the Texas Water Development Board would not fund the treatment plant while lawsuits existed. E.S. & C.M. brought breach of contract and quantum meruit claims. The City countersued alleging E.S. & C.M. falsely represented they could obtain funding. The City filed a plea to the jurisdiction which the trial court denied.

The Fort Worth Court of Appeals held that regardless of the fact the contract expressly states the parties agree the City does not waive any immunity, Tex. Loc. Gov't Code Ann. § 271.152 does and the contract cannot override the waiver. As to the issue of attorney's fees, while §271.153 currently allows for such fees, it did not in 2008 when the contract was executed. The issue of attorney's fees is jurisdictional so the plea should have been granted as to such fees. Finally, regardless of Chapter 271, the City retains immunity from all quantum meruit claims so the plea should have been granted as to those claims.

If you would like to read this opinion click here. Panel: LIVINGSTON, C.J.; DAUPHINOT and WALKER. Opinion by Chief Justice Livingston. The attorney listed for the City is David L. Pratt, II. The attorney listed for E.C. & C.M. is John R. DeVoss.

II. Constitutional Law

Constitutional "hold over" provision controls over "resign to run" rule says 13th Court of Appeals

RICHARD BIANCHI v. THE STATE OF TEXAS, 13-14-00303-CV (Tex. App. – Corpus Christi, August 21, 2014) This is a *quo warranto* case where the central issue is the interaction between the "resign to run" rule under the Texas Constitution and the constitutional "hold over" provision. The 13th Court of Appeals held the "hold over" provision controls regardless of the automatic nature of the "resign to run" rule. Bianchi was the County Attorney for Aransas County who was elected to office. He announced to the County Commissioner's Court that he was running for County Judge and that this means he was automatically resigning his position under TEX. CONST. art. XVI, §65(b). While the Commissioner's Court had the right and power to appoint his successor, they chose not to do so, stating in depositions that he was doing a good job. Bianchi stated on numerous occasions in the record that he did resign but was obligated under the Texas Constitutional "hold over" provision to continue with his office until his replacement is appointed. TEX. CONST. art. XVI, §§ 17. The District Attorney believed the automatic nature of the "resign to run" rule in the Constitution trumped the hold over provision and that the resignation was automatic in all respects. He brought suit on behalf of the State of Texas via *quo warranto* against Bianchi for illegally holding office. The trial court issue an order removing Bianchi and issued findings of facts and conclusions of law. Bianchi appealed. This is a 31 page opinion where a large part of the opinion is the reciting of evidence, testimony, and findings of the trial court. The bottom line is the Commissioner's Court could have appointed a replacement but chose not to do so. This left Bianchi in the position of County Attorney as a hold over while running for another office. The trial court started the legal analysis noting the ancient nature of a *quo warranto* proceeding then went into the nature of the two constitutional provisions, then statutory construction principles. In the end the court held the resign to run rule is subject to the hold over provision and since the Commissioner's Court has made the express decision not to appoint a replacement, Bianchi is still lawfully holding office. That decision is not subject to collateral attack in court as it is in the sole discretion of the Commissioner's Court. The State did not sue the Commissioner's Court, only Bianchi, so their decision cannot be attacked as arbitrary. As a result, the trial court order is reversed and judgment is rendered for Bianchi to remain in office until a successor is appointed. The court went on to cite to another reason for its opinion, holding "[a]s well intentioned and diligently reasoned as it was, the district court's decision would have uprooted a firmly founded and widely accepted understanding of a critical aspect of Texas constitutional law that is of vital importance to certain public officials. . . The Texas *quo warranto* statute was never intended to allow for judicial second-guessing of decisions committed to the sound discretion of the County Judge and Commissioners Court. Such decisions are best left to locally-elected public officials who are in the best position to judge the needs of these particular issues and to exercise sound discretion in addressing them. We will not disturb the orderly balance of powers as expressed by the will of the people…" If you would like to read this opinion click here. Panel: Chief Justice Valdez, Justice Perkes, and Justice Longoria. Opinion by Chief Justice Valdez.

The attorney listed for the State is Michael E. Welborn. The attorneys listed for Bianchi are Audrey Mullert Vicknair and C.M. Henkel, III

City could not use zoning regulation to deny sign registration says Austin Court of Appeals

NATIONAL MEDIA CORPORATION and ANCHOR EQUITIES, LTD. v. CITY OF AUSTIN, 03-12-00188-CV (Tex. App. – Austin, August 27, 2014).
This is a board of adjustment case involving a sign permit. The Austin Court of Appeals reversed the granting of the City's summary judgment motion and remanded.

National Media Corporation and Anchor Equities ("Plaintiffs") contend the City's zoning code regarding "abandonment of non-conforming use" was improperly used to deny a sign registration permit and the Board of Adjustment abused its discretion when it affirmed the denial. The trial court granted the City's summary judgment motion and the Plaintiffs appealed.

The court noted that an entity acts arbitrary and capriciously when it acts in a way or enforces regulations that do not give a party the ability to "know what is expected of them in the administrative process." Based on the City's previous history of using the sections and the wording of the various codes the panel simply states the Plaintiffs could not have known or expected the City to use that zoning provision to deny the sign registration application. In other words, the panel thought the City's use of that section was a stretch to try and apply. The court then stated that under statutory construction principles, the code sections are not related to each other or have the same general purpose so should not be interpreted together. The zoning regulations and the sign ordinance were not designed to interconnect. The sign regulations are specific in nature designed to regulate signs and their usage/placement while the zoning regulation being argued is general and makes no reference to signs. As a result, the specific controls over the general and the more recent controls over the older. The City applied the wrong ordinance and the City and Board abused its discretion in denying the application. The summary judgment is reversed and the case is remanded.

If you would like to read this opinion click here. Panel: Chief Justice Jones, Justice Puryear and Justice Goodwin. Memorandum Opinion by Justice Puryear. The attorneys listed for the appellants are Mr. Kurt H. Kuhn, Mr. Eric B. Storm, and Ms. Lisa Bowlin Hobbs. The attorney listed for the City is Ms. Chris Edwards.

Fact question on whether trooper slowed before intersection precluded plea to the jurisdiction says El Paso Court of Appeals

TEXAS DEPARTMENT OF PUBLIC SAFETY v. MERARDO BONILLA, 08-13-00117-CV (Tex. App. – El Paso, May 30, 2014).
This is an interlocutory appeal from the denial of a plea to the jurisdiction in vehicle accident case under the Texas Tort Claims Act ("TTCA"). The El Paso Court of Appeals affirmed the denial.

Trooper Cruz, with lights on but no sirens, ran a red light while pursuing a speeder and struck Bonilla's vehicle. DPS asserted governmental and official immunity as well as evidentiary objections. The trial court denied the plea and DPS appealed.

The first third of the opinion is dedicated to an evidence dispute where Bonilla attached a report from a DPS reconstruction team which was unfavorable to DPS. The report was created by an internal investigative arm of DPS to explain to itself what happened to Trooper Cruz in a state vehicle. Its statements were party-opponent admissions and the refusal to stipulate to its own teams expert qualifications was not a challenge to their qualifications. Next, DPS argued Trooper Cruz was pursuing a speeding driver who was making multiple lane changes, disobeying traffic control devices and therefore triggered the emergency exception under the TTCA. While the court agreed the situation qualified an emergency, Tex. Transp. Code §546.001 sets a standard of care for emergency vehicles requiring a slowing as necessary for safe operation. A fact question exists as to whether Cruz slowed before entering the intersection. And while DPS could have taken advantage of any official immunity granted to Cruz, a fact question exists as to whether the officer's need to chase the speeder outweighed the need to slow (or whatever he did) before entering the intersection. Since DPS did not provide evidence Cruz actually considered and weighed options, his good faith cannot be considered at this time. The trial court properly denied the plea.

If you would like to read this opinion click here. Panel: Chief Justice McClure, Justice Rivera, and Justice Rodriguez. Memorandum opinion by Chief Justice McClure. The attorney listed for DPS is Elsa Nava. The attorney listed for Bonilla is Nataliya Kharmats Tipton.

Driver should expect 2″ dip in roadways says Fort Worth Court of Appeals

RICHARD BRUMFIELD v. TEXAS DEPARTMENT OF TRANSPORTATION, 02-13-00175-CV (Tex. App. – Fort Worth, May 29, 2014) This is an appeal from the granting of TxDOT's plea to the jurisdiction arising from a motorcycle accident where the Plaintiff alleges he crashed due to TxDOT's "milling out" of the roadway. The Fort Worth Court of Appeals affirmed the dismissal.

TxDOT milled out—or removed—the surface layer of a road on June 22 and 23 and completed the overlay—or packing of asphaltic material into the milled area—on July 6 and 7. In between the mill out and overlay, Brumfield drove his motorcycle onto the roadway, lost control and crashed. He sued for special and premise defects. TxDOT filed a plea to the jurisdiction which the trial court granted and Brumfield appealed.

After going through the evidence presented in the plea, the court determined the evidence was uncontested the mill out was approximately two inches deep. Such depth does not constitute a special defect. While Brumfield argued a fact question existed as to the actual depth, no evidence to counter the two inch depth was presented. The fact TxDOT had called the mill out an "excavation" (a type of special defect) is immaterial as it is the legal definition which governs, not the "term is uttered in the colloquial sense." As a premise defect, no evidence existed TxDOT had actual

knowledge the condition was "unreasonably dangerous." The court determined Brumfield, as an ordinary user of the roadway should expect minor changes in the roadway like a two inch dip.

If you would like to read this opinion click here. Justice Dauphinot, Justice Gardner, and Justice Meier. Memorandum Opinion by Justice Meier. The attorneys listed for TxDOT are Lisa Marie McClain and Ronald E. Garner. The attorneys listed for Brumfield are Rosalyn R. Tippett and Amy Witherite.

Takings claim can be heard in appeal from demolition order says Waco Court of Appeals

CITY OF BRYAN/BUILDING AND STANDARDS COMMISSION v. KENNETH CAVITT, 10-13-00259-CV (Tex. App. – Waco, May 8, 2014).
This is an interlocutory appeal from the denial of a plea to the jurisdiction in a structural standards case. The Waco Court of Appeals affirmed the denial.

The City determined the Cavitt property was dilapidated, hazardous, and a public nuisance. In numerous public meetings Cavitt requested the ability to bring the property up to code. The Building and Standards Commission ("BSC") issued a repair schedule and ordered the Plaintiff to attend each BSC meeting to demonstrate compliance with the schedule. When Cavitt failed to comply with the schedule without adequate explanation, the BSC ordered its demolition. Cavitt appealed the order to district court. In his appeal, he also brought a takings claim. The City filed a plea to the jurisdiction arguing no taking could occur since it was declared a public nuisance. The trial court denied the plea and the City appealed.

The 10th Court of Appeals held that this type of lawsuit is fundamentally a constitutional one and, pursuant to *City of Dallas v. Stewart, 361 S.W.3d 562 (Tex. 2012)*, the determination of a nuisance ultimately must be determined by a court, not a commission. Before a nuisance determination will act as a bar to a takings claim, the determination must be reviewed *de novo* by a court. As a result, the trial court retained jurisdiction. Both the appeal from the demolition order and the takings claims can be heard.

If you would like to read this opinion click here. Panel: Chief Justice Gray, Justice Davis, Justice Scoggins. Memorandum Opinion by Justice Scroggins. The attorneys listed for the City are Danielle Craig and William W. Krueger III. The attorney listed for Cavitt is Neeley C. Lewis.

Religious freedom plaintiffs' claims are moot after ISD altered policy says Beaumont Court of Appeals.

KOUNTZE INDEPENDENT SCHOOL DISTRICT v. COTI MATTHEWS, 09-13-00251-CV (Tex. App. — Beaumont, May 8, 2014).
This is a religious freedom case brought to the court of appeals as an interlocutory appeal from the denial of a plea to the jurisdiction. The parents of several cheerleaders ("Parents") brought suit after the school prohibited the cheerleaders from including religious-theme messages on the run-through banners. The trial court denied Kountze Independent School District's ("KISD") plea to the jurisdiction and

granted, in part, the Parent's motion for summary judgment. The KISD appealed.

The cheerleaders would normally create run-through banners which the team would run through and destroy as it entered the field. In 2012 the squad decided to include biblical messages to provide a positive message of encouragement for the team and fans. Afterwards, the superintendent received a complaint from the Freedom from Religion Foundation complaining about the practice, which promptly resulted in the ban. The Parents asserted the "ban on banners" violated Chapter 106 (discrimination in governmental programs) and Chapter 110 (TxRFRA). While going through the factual background the court, in a foot note, held that due to the procedural history of the case and evidence presented, the Parents could not maintain a clam for any damages, including nominal. Only prospective relief is permissible.

KISD asserts the Parents' claims are moot because after the lawsuit was filed, the KISD board initiated legislative proceedings to examine the issue and obtain community information resulting in the passage of a resolution holding the ban on religious banners is not required under the law as long as the messages are displaying fleeting expressions of community sentiment, even if the source is of a religious nature. Under Texas Supreme Court precedent, a challenge to a policy or official action can become moot if the statute, policy, or action is repealed or fundamentally altered. After a lengthy examination of this precedent, the court held the new resolution addressed the Parents' concerns and rendered the challenge moot. The court determined the alleged wrongful acts are not likely to be repetitious and no collateral consequences are apparent. As a result, the trial court erred in denying the plea. However, under the Uniform Declaratory Judgment Act, the Parents may still be entitled to attorney's fees since their actions resulted in the new Resolution. The claim of attorney's fees was therefore remanded.

If you would like to read this opinion click here. Panel: Chief Justice McKeithen, Justice Kreger, and Justice Horton. Memorandum opinion by Justice Kreger. The main attorneys listed for the Parents are Prerak Shah, David W. Starnes, and James Ho. The main attorneys listed for KISD are Joshua Alan Skinner and Tom Brandt. A listing of all attorneys and amici can be found on the docket page of the case here.

III. Employment

Texas Supreme Court holds reporting to supervisor is not reporting to "appropriate law-enforcement authority" even when entity has prosecution division and trained to report - Dissent believes training qualifies

TEXAS DEPARTMENT OF HUMAN SERVICES v OKOLI, 10-0567 (Tex. August 22, 2014)

This is a Texas Whistleblower Case where the court held reporting a violation of law to a supervisor is not a report to an "appropriate law-enforcement authority" which is not something new. However, the reason this opinion generated a dissent is because the employer had a law-enforcement division with prosecutorial authority. The employee was trained to report to a supervisor and the supervisor can report to that division. This is closer to the

hypothetical situation the Court held in *Gentilello* would qualify as protected where the supervisor is a law-enforcement authority.

Okoli was an employee of the Texas Department of Human Services ("TDHS") administering welfare programs. An internal rule prohibited false documentation. Certain violations can carry criminal penalties. The Office of Inspector General ("OIG") falls under the TDHS and is responsible for investigating and prosecuting violations of fraud, waste, and abuse of the health and safety services of the State. Okoli reported his new supervisor to the above supervisor for making and/or supporting falsified documentation. He continued to complain up the chain of command consistent with his training manual. Okoli was eventually terminated and sued. The TDHS filed a plea to the jurisdiction which the trial court denied and the court of appeals affirmed. The Supreme Court granted the Petition for Review.

A good portion of the opinion deals with Okoli's training, noting he was trained to report up the chain of command exactly as he did. The dissent asserts this training goes to his good faith belief that he was following the proper procedure for reporting with the expectation it would reach the OIG which is part of the TDHS. There appears to be no dispute that the OIG is an appropriate law-enforcement authority. The majority reasoned that the training make it clear to Okoli that to reach the OIG, the supervisors must provide it to them. They rejected that reporting to a supervisor is sufficient to form a good-faith belief when the supervisor must refer to someone else who qualifies as an appropriate law-enforcement agency. A supervisor is no more likely to pass on a report to the OIG than a supervisor would report to a law-enforcement agency which is outside of the entity involved. However, the Court expressly held reporting to a supervisor can, in certain situations, constitute a proper reporting, such as a police officer reporting a criminal violation to his supervisor who is also a police officer (the same hypo used in *Gentilello*). The Court held in summary that for a report to a supervisor to count, it must be a report to an individual person who has law-enforcement powers or directly to the specific investigatory division, such as a police intake clerk. The dissent focused on the training creating the good-faith belief in Okoli's mind to qualify, even if the individual supervisor has not law-enforcement authority.

If you would like to read this opinion click here. 6-9 Opinion. Justice Brown issued the opinion of the Court. Justice Devine wrote the dissent. Numerous lawyers are listed on the docket sheet so here is the sheet for reference.

Texas Supreme Court holds firefighter who cannot fight fires is not "disabled"

CITY OF HOUSTON v. SHAYN A. PROLER, 12-1006, –S.W.3d — (Tex. June 6, 2014)

This is a disability discrimination case where the Court held that a firefighter who refuses to fight fires does not have a "disability" under either state or federal law.

Shayn Proler was a captain firefighter with the Houston fire department. At two fire locations, Proler became disoriented and had to be relieved. He was later diagnosed with "global transient amnesia" and reassigned to the fire academy. He contested the reassignment under the terms of a collective bargaining agreement and on administrative

appeal won. The City appealed to district court. Proler counterclaimed for disability discrimination under state and federal law. The case went to trial and a jury found for Proler. The court of appeals reversed in part and affirmed in part, but essentially left the jury verdict alone. The City appealed, but essentially only the disability discrimination challenges remained for the Supreme Court.

The Court first held "[a]t the outset, we note that the law prohibiting disability discrimination does not protect every person who desires employment but lacks the skills required to adequately perform the particular job. Lacking the required mental, physical, or experiential skill set is not necessarily a disability. Were the law otherwise, any person who, for instance, wishes to be a ballerina or professional basketball player could routinely sue for disability discrimination if the Bolshoi or the San Antonio Spurs declined employment."

Under a legal sufficiency challenge, the Court agreed with the City that no evidence existed of a disability. In determining disability, the issue is whether Proler was "unable to perform the variety of tasks central to most people's daily lives," not whether he was "unable to perform the tasks associated with [his] specific job." "Again, if one considers the NBA, the capacity to play professional basketball is an ability; the rest of us do not suffer from a disability because we cannot play at that level. A job skill required for a specific job is not a disability if most people lack that skill." The evidence solely indicated Proler was removed from a front-line firefighting position only because City decision-makers had received information that Proler had frozen at two fires, and he was therefore perceived to be unable to do his particular job as captain of a firefighting crew. Fighting fires is not a major life activity; it is a job requiring highly specialized skills, unique training, and a special disposition. A reluctance to charge into a burning building is not a mental impairment at all; it is the normal human response. Such a reluctance cannot be characterized as an "impairment," much less an impairment that substantially limits a major life activity. Essentially, the only evidence was that Proler could not perform his job, not that he could not perform a major life activity. All of Proler's evidence that he was psychologically intact worked against him since being so meant he was not limited in any major life activity. The record shows that Proler was reassigned because the City perceived him as unable to perform his specific job as a captain of a firefighting crew, nothing more.

If you would like to read this opinion click here. Opinion by Justice Willett. Attorneys listed for the City of Houston are Mr. David M. Feldman, Ms. Judith Lee Ramsey, Mr. Donald J. Fleming, Mr. John B. Wallace, Mr. Timothy J. Higley, and Ms. Lynette Fons. The attorney listed for Proler is Mr. David T. Lopez

Hiring someone more qualified is a legitimate non-discriminatory reason says 4th Court of Appeals

FRED BEEBE v. CITY OF SAN ANTONIO, Through its agent, CITY PUBLIC SERVICE BOARD OF SAN ANTONIO d/b/a CPS ENERGY, 04-13-00134-CV (Tex. App. – San Antonio, September 10, 2014)

This is an employment discrimination/retaliation case based on race, color and age. The San Antonio Court of Appeals affirmed the trial court's granting of CPS Energy's summary judgment.

Beebe, and African American male over forty, was an account manager for CPS Energy ("CPS"). At CPS there were two types of account managers, a BAM for mid-market accounts and an ESM for larger commercial accounts. Although BAMs and ESMs had similar duties, the level of responsibility between the two positions varied greatly. ESMs made higher salaries than BAMS due to the greater responsibilities. When a BAMS position was advertised, a female candidate named Read applied. CPS discovered she had skills and experience better suiting her for the ESM position than BAMs and when an ESM position became available, she was given the job. Beebe sued alleging discrimination and retaliation but the trial court dismissed his claims on summary judgment. Beebe appealed.

The court first held that selecting a more qualified applicant generally constitutes a legitimate, non-discriminatory reason for failing to hire/promote. Directly comparing Beebe and Read demonstrates she is easily more qualified than Beebe. The only evidence and argument Beebe presented to establish a pretext was the fact CPS did not post the ESM position but simply offered it to Read. However, the fact CPS managers feared they would lose Read to another company if they did not offer her the job without posting does not create a fact issue of pretext (i.e. that the offered non-discriminatory reason is not true or not worthy of credence.) As a result, Beebe failed to meet his burden to establish pretext after CPS established Read was more qualified. The summary judgment was affirmed.

If you would like to read this opinion click here. Panel: Justice Angelini, Justice Alvarez and Justice Chapa. Memorandum Opinion by Justice Angelini. The attorneys for CPS are listed as Justin Barbour and Christine Elaine Reinhard. The attorney listed for Beebe is Samuel Beale

District judge not an "appropriate law enforcement authority" under Whistleblower Act says Austin Court of Appeals

HUNT COUNTY COMMUNITY SUPERVISION and CORRECTIONS DEPARTMENT v. CHRISTINA GASTON, 03-13-00189-CV (Tex. App. – Austin, August 6, 2014).

This is an interlocutory appeal from the denial of a plea to the jurisdiction in a Texas Whistleblower Act lawsuit. A majority panel of the Third Court of Appeals in Austin reversed the denial. Chief Justice Jones dissented.

Warning: this is a long summary simply due to the factual history and analysis which could not be condensed any further. However, the case is helpful to anyone who deals with Whistleblower Act violations.

Gaston worked for Hunt County Community Supervision and Corrections Department ("HCCSCD") as a probation officer of sorts. Her job duties required her to assist trial courts with probation related matters. Community supervision and corrections departments ("CSCDs") like the HCCSCD serve the district courts and county courts at law handling criminal cases within judicial districts, including probation. Oversight of a CSCD is a committee on which sits the presiding judge of the district, however the legislature has specifically stated CSCDs are distinct entities unto themselves and employees of the CSCDs are not employees

of the County, district or judge. The committee appoints a director who possesses sole direct authority over employment issues, in this case McKenzie. In 2011 a new presiding judge — —the Hon. Stephen Tittle–assumed the role on the committee for HCCSCD. Judge Tittle and Gaston had formed a personal friendship during Tittle's earlier years as a prosecutor. Gaston was later found to have represented an ability to influence Judge Tittle's decisions due to her friendship and threatened a defense attorney who had angered her with a blacklisting from court appointments. When McKinzie discovered the threats after an internal investigation, he terminated Gaston. Gaston asserts she was terminated for reporting to Judge Tittle the director and other HCCSCD personnel had violated various laws in their administration of the program. Judge Tittle asserted that he discovered certain local nonprofit contract agencies such as the local food bank had accepted money from probationers in exchange for reduced community hours. Judge Tittle informed McKinzie (the same day McKinzie advised Judge about the results of internal investigation of Gason) of his concerns this violated the law. However in a Texas Attorney General Opinion (GA-0593 (2008), the AG noted an exception existed if donations are made to food banks/pantries. Gaston sued under the Texas Whistleblower Act. HCCSCD filed a plea to the jurisdiction which the trial court denied and it appealed.

The majority court first stated with numerous references that the analysis must start with the assumption that immunity bars Gason's. The court then analyzed whether Judge Tittle was an "appropriate law enforcement authority" under the Act. It started the analysis by emphasizing the Act states that the person receiving the report of illegal conduct must be part of a qualifying "entity." In short, Gason must have a good faith belief the 196th District Court is empowered to "regulate under or enforce" cited criminal provisions or to "investigate or prosecute" criminal offenses as those terms are used in the Whistleblower Act. Gason's live pleadings allege no facts to support such a good faith belief, only "a bare conclusion parroting" of the Act but one which focused on the Judge being the entity, not the district court. Given that Judge Tittle had oversight power over McKinzie due to his committee position, reporting to Judge Tittle is the same as reporting to a supervisor. However, the court was still required to analyze whether the 196th was an appropriate entity to make such a report. Citing prior cases and distinguishing others, the court held "appropriate law enforcement authority" denotes "an investigative or executive function" that "[t]he judicial branch does not perform." The court also went into a separation of powers argument as to why a court cannot perform such executive actions. Gaston argued under chapter 52 of the Code of Criminal Procedure a district court may appoint a Court of Inquiry to investigate criminal activity. However, the evidence and pleadings to not indicate a subjective belief on Gaston's part her report was meant to trigger a court of inquiry. Further, chapter 52 is not the sort of "free-standing regulatory, enforcement, or crime-fighting authority" that has been held to characterize an "appropriate law enforcement authority." Therefore the plea should have been granted. Finally, the majority held the defects are incurable so no remand is appropriate.

The dissent began by examining chapter 52 and that evidence existed demonstrating Gaston had an honest belief Judge Tittle was the appropriate person to provide a report. It is also objectively reasonable to believe a

district judge has authority to investigate allegations of criminal misconduct under chapter 52. Further, judges often have administrative functions which could qualify them as appropriate law enforcement authorities. The dissent went through its analysis for each opinion, but this summary is already long enough.

If you would like to read this opinion click here. Panel: Justice Puryear, Justice Henson, and Justice Goodwin. Opinion by Justice Pemberton. Dissent by Chief Justice Jones found here. The attorney for the County is listed as Eric L. Vinson. The attorneys listed for Gaston are Colin Walsh, Robert J. Wiley, Stacey Cho.

Petty slights, minor annoyances, and simple lack of good manners insufficient for adverse employment action or causal connection to pass-over of promotion

APRIL DUPREE ADESHILE v. METROPOLITAN TRANSIT AUTHORITY of HRRIS COUNTY, TEXAS, 14-12-00980-CV (Tex. App. – Houston [14th dist.], July 24, 2014).
This is a sex discrimination employment lawsuit where the panel withdrew its opinion issued on January 16, 2014 and substituted this opinion. The court upheld the trial court's dismissal of Adeshile's claims.

Adeshile worked as a bus driver for Metropolitan Transit Authority of Harris County, Texas ("METRO"). Adeshile filed a federal sex discrimination against METRO in 2006 which was later dismissed. In 2010 she was given a verbal counseling for excessive sick leave and in response, filed this retaliation charge alleging unwarranted write-ups and denying her a promotion. The trial court issued a directed verdict for Metro at trial and Adeshile appealed.

The court first held Adeshile presented no probative evidence of an adverse employment action. Petty slights, minor annoyances, and simple lack of good manners do not qualify. The trial court record contains no evidence Adeshile was given an adverse write-up. Adeshile did not present evidence raising a fact issue on whether the verbal counseling was a material adverse employment action. Further, she presented no causal evidence she was denied her promotion due to her former federal lawsuit. Despite her "colorful descriptions" of prior sexual harassment, those alleged events went to the merits of her federal claim, not her retaliation claim. This opinion's analysis is a good one to review when deciding whether a particular action is an adverse employment action or whether a causal connection exists, as the court goes through an evidentiary analysis of what occurred and why it did not qualify. The trial court upheld the directed verdict.

If you would like to read this opinion click here. Panel: Justice Boyce, Justice Christopher and Justice Brown. Memorandum opinion by Justice Brown. The attorney listed for the METRO is Hao Pham Le. The attorney listed for Adeshile is April Dupree Adeshile.

Fire Fighter suspension upheld – Court holds violating state civil service rule sufficient even though no local rule violation was found

CHRISTOPHER JENKINS v. CITY OF CEDAR PARK, TEXAS, 03-13-00215-CV (Tex. App. – Austin, July 24, 2014).
This is a Chapter 143 civil service appeal from an indefinite suspension of a fire fighter where the Austin Court of Appeals affirmed the City's plea to the jurisdiction.

Jenkins was employed as a fire fighter with the Cedar Park Fire Department. He received a charge for DWI and the Fire Chief indefinitely suspended him. Jenkins appealed to a hearing examiner who upheld the suspension. Jenkins sued in district court, but the City filed a plea to the jurisdiction arguing Jenkins' assertions were not that the examiner exceeded his jurisdiction, but that he disagreed with the result. The trial court granted the plea and Jenkins appealed.

The hearing examiner found Jenkins violated Tex. Loc. Gov't Code §143.051 (listing grounds for removal or suspension commission rules may involve) in upholding the suspension but not any department local rule. Jenkins argued that section does not provide any grounds for removal or suspension of a fire fighter but merely sets the parameters for the rules that a local commission may adopt. The question for the court was whether a fire fighter could be suspended for violating §143.051 or whether he could only be suspended for violating a local rule adopted under that section. The court held Jenkins' distinction is form over substance and that §143.051 is a "civil service rule" which can be the basis for discipline, even if no local rule adopts it or is found to be violated by the hearing examiner. The court examined the policy considerations and "absurd results" Jenkins' reading would create and provided examples. Court found it important to note the notice letter to Jenkins specifically listed §143.051 and Jenkins did not argue he was unaware he was being charged with that as a violation.

The dissent argues a fire fighter can only be disciplined for violating a local rule, not a state statute. Citing statutory construction principles, the dissent reasoned that the statute is not ambiguous so the court should not resort to extra-textual assistance in its interpretation. And since a fire fighter can only be disciplined for violating local rules, and no local rule violation was found, the hearing examiner exceeded his authority.

If you would like to read this opinion click here. Dissenting opinion click here. Panel: Justice Puryear, Justice Goodwin, and Justice Field. Majority memorandum opinion by Justice Goodwin. Dissent by Justice Field. The attorneys listed for the City are Ms. Julia Gannaway, Ms. Bettye Lynn, Ms. Melissa H. Cranford, and Mr. Charles Rowland. The attorneys listed for Jenkins are Mr. Matt Bachop and Mr. B. Craig Deats.

Policy stating entity will forward reports of fraud to law enforcement insufficient to trigger Whistleblower Act

THE UNIVERSITY OF HOUSTON v. JOHN CASEY, 01-13-00684-CV (Tex. App. – Houston [1st Dist.], July 3, 2014_
This is an interlocutory appeal from the denial of a plea to the jurisdiction in a Texas

Whistleblower Act case. The 1st District Court of Appeals reversed and dismissed the suit.

Casey is a tenured professor at the University and began serving as the Chairman of the Department of Earth and Atmospheric Sciences in 1999. In 2011 the Dean of the College of Natural Sciences and Mathematics removed Casey noting he had an autocratic and abusive leadership style. While still chair, Janok Bhattacharya, another professor in the department, told Casey that he had the opportunity to visit Venezuela as a paid consultant. Casey felt the trip violated University policy, but the Dean approved the trip. After removal as chair, Casey sued alleging the removal was in retaliation for reporting Bhattacharya's trip to the Vice President of Legal Affairs and Chief Auditor as fraud. The University filed a plea to the jurisdiction noting Casey failed to establish a good faith report to a law enforcement authority. The trial court denied the plea and the University appealed.
Under the Whistleblower Act, an employee "must have believed he was reporting conduct that constituted a violation of law and his belief must have been reasonable based on his training and experience." Under Texas law, "a whistleblower cannot reasonably believe his supervisor is an appropriate law-enforcement authority if the supervisor's power extends no further than ensuring the governmental body itself complies with the law." Casey may have produced evidence of a subject belief, but such a belief was not objective. Even though the University issued policy memoranda that it would forward reports of fraud to law enforcement that did not authorize the Vice President and Chief Auditor to investigate or prosecute against third parties. After analyzing the facts and evidence, the court determined Casey failed to raise a material fact issue regarding whether he had a reasonable belief, based on his training and experience, that the Vice President and Chief Auditor were an appropriate law enforcement authority. As a result, the trial court should have granted the plea.

If you would like to read this opinion click here. Panel: Justice Keyes, Justice Sharp, and Justice Huddle. Opinion by Justice Huddle. The attorney listed for Casey is David Tang. The attorney listed for the University is Darren Gibson.

Former asst. chief's claims dismissed after he was forced to resign

ARNOLD OCHOA v. THE CITY OF PALMVIEW, 13-14-00021-CV (Tex. App. – Corpus Christi, January 19, 2014)
This is an interlocutory appeal from the granting of a plea to the jurisdiction in an employment context.

Ochoa was an assistant police chief with the City. He also was an incumbent on the school board. When a parent of a City council member ran for Ochoa's school board position, he alleges he was pressured to resign from the race or suffer a demotion. Ochoa lost the school board race and was immediately under investigation for misuse of City property, causing him to resign. Ochoa filed suit under a variety of causes of action, but the trial court granted the City's plea. Ochoa appealed.

The court first determined the facts, as alleged, do not support any claim for violations of the Texas Open Meetings Act. While Ochoa may suspect a meeting occurred, he had no evidence a meeting occurred in violation of TOMA. Further he

was not challenging an ordinance but seeking a declaration of his rights that TOMA was violated. The City maintains immunity for such declaratory judgment actions. Next Ochoa did not properly allege an *ultra vires* claims as he was seeking affirmative, retrospective relief through reinstatement. Further he sued the council in their individual, not official, capacities. The City retains sovereign immunity for Ochoa's *Sabine Pilot* claims. Ochoa did not allege a proper breach of contract or promissory estoppel claim. Finally, all of this claims have incurable defects and therefore cannot be cured by repleading. The trial court proper granted the plea.

If you would like to read this opinion click here. Panel: Justice Rodriguez, Justice Garza, and Justice Benavides. Opinion by Justice Garza. The attorneys listed for the City are J. Arnold Aguilar and Jaime J. Munoz. The attorneys for Ochoa are listed as Javier Pena and David H. Jones

AG's policy obligating division head to report crimes to Special Investigation Division makes them "appropriate law enforcement authorities" under Whistleblower Act

OFFICE OF THE ATTORNEY GENERAL v. GINGER WEATHERSPOON, 05-13-00632-CV (Tex. App. – Dallas, June 16, 2014).
This is a Texas Whistleblower Act case in which the trial court denied the plea to the jurisdiction filed by the Texas Attorney General ("AG") and the Dallas Court of Appeals affirmed.

Weatherspoon was an assistant AG in the Child Support Division. The AG's office allegedly ordered Weatherspoon to sign an affidavit detailing a conversation she had with a district judge as the AG wanted to use the affidavit to have the judge recused. She refused stating it mischaracterized the conversation, tone, and various facts. She offered to revise it but was ordered not to. Weatherspoon reported the pressure to sign the affidavit to her division head. She asserted her supervisor was violating the Texas Penal Code under abuse of official capacity and official oppression by trying to force her to sign a false affidavit. The AG's office has a written policy stating all potential criminal violations are to be reported to the division head who then was obligated to refer them to the Special Investigations Division of the AG and under no circumstances shall a report be made to an outside law enforcement authority. After her report in compliance with the policy, she was terminated. After exhausting her administrative remedies she filed suit. The AG filed a plea to the jurisdiction which the trial court denied.

The AG argued Weatherspoon failed to make a report to an appropriate law enforcement authority under the Whistleblower Act. The court held that while normally compliance with internal complaints is not sufficient, it is a different story if the entity also has the power to enforce, investigate, or prosecute violations of the law allegedly being reported. And while Weatherspoon only reported the incident to her division head in Child Support (which does not investigate official oppression or abuse of office), the division is part of the AG's office. The AG office, through its Office of Special Investigations, has the authority to investigate not only internal fraud and corruption but also fraud and corruption of third parties. Furthermore, the AG has concurrent jurisdiction to prosecute abuses of official capacity and official oppression by third parties. Pursuant

to the AG's own policies and procedures, Weatherspoon's division head was required to refer the report to the AG's Office of Special Investigations. The court focused on the AG's policies noting the policy required Weatherspoon to report to her division head (which she did) and the division head had an obligation to provide the report to the SI division. While normally reporting to a supervisor believing the supervisor will forward to an appropriate law enforcement agency is insufficient, the AG's office policy created a situation making the supervisor the appropriate person to whom reports of such criminal acts must be made. As a result, the trial court properly denied the AG's plea.

If you would like to read this opinion click here. Panel: Justice O'Neill, Justice Lang-Miers and Justice Evans. Opinion by Justice Evans. The attorneys listed for Weatherspoon are Carla S. Hatcher and Steven B. Thorpe. The attorneys listed for the AG are Amanda Cochran-McCall, James B. Eccles, Shelley Alisa Dahlberg, Daniel T. Hodge, Greg Abbott, William T. Deane and David C. Mattax.

Fire fighter properly demoted when position filled by formerly suspended lieutenant

CHAD THOMPSON v. CITY OF WACO, TEXAS and Fire Chief JOHN D. JOHNSTON, 04-13-00460-CV (Tex. App. – San Antonio, May 30, 2014)(transferred from 10th COA pursuant to Supreme Court Order 13-9097).

This is a civil service dispute where the trial court ruled against a fire fighter challenging his demotion. The court of appeals affirmed. Thompson was a fire equipment engineer who was promoted to lieutenant when an existing lieutenant was indefinitely suspended. The City had 35 lieutenants by ordinance. After a hearing examiner reinstated the former lieutenant, Thompson was demoted back to his prior position. When the City refused his request to be reinstated as a lieutenant, he sued. Thompson and the City filed competing summary judgment motions. The trial court ruled for the City and Thompson appealed.

The analysis is a good walkthrough of various civil service provisions. However, besides reading this summary, the entire case can be summed up on page 4 of the opinion. Once the position was vacated by indefinite suspension, the City was required to fill it. Once reinstated the Chief has "a predicament." However, only the City Council can increase the number of positions and adopting Thompson's reading would equate to the hearing examiner having the ability to increase positions from 35 to 36. The fire chief interpreted the situation as requiring a force reduction under the Civil Service Act (which he followed) and retained the senior employee (not Thompson). As a result, the trial court properly ruled for the City.

If you would like to read this opinion click here. Panel: Chief Justice Stone, Justice Barnard, and Justice Alvarez. Opinion by Justice Alvarez. The attorneys listed for the City and fire chief are Lu Pham and Judith N. Benton. The attorney for Thompson is listed as R. John Cullar.

Written charges against police officer need not be contained within a single document holds 7th Court of Appeals.

CITY OF LUBBOCK, TEXAS v. CHRISTOPHER HENNSLEY, 07-12-00325-CV (Tex. App. – Amarillo, September 12, 2013).

This is a police employment dispute under Tex. Gov't Code §614.023 (or possibly §143.052) where the City appealed a hearing examiner decision and the trial court granted the police officer's plea to the jurisdiction. The Amarillo Court of Appeals reversed holding the hearing examiner exceeded his authority by picking and choosing which alleged actions of wrongdoing to consider.

Chapter 614 essentially applies to non-civil service cities and states an officer cannot be disciplined without a written complaint being filed, being given the complaint, and an opportunity to respond. Officer Hennsley received a notice from his captain describing an incident of possible excessive force. During the investigation into it, Hennsley received a second letter with additional charges. He was given the opportunity to respond to both before being terminated. However, the hearing examiner expressly stated he was only considering the certain charges. The hearing examiner reversed the termination and modified the disciplinary action to a 15 day suspension. The City appealed noting Chapter 614 was inapplicable, and 143.057(j) of the Texas Local Government Code was the proper standard (dealing with civil service agreements). The trial court granted Hennsley's plea to the jurisdiction (although the opinion is unclear as to the basis of the plea other than simply no jurisdiction exists). The court noted in a footnote that because of its ultimate decision, it need not address whether Chapters 614 or 143 should have been used.

The court noted that Hennsley was given both charges in writing and an opportunity to respond before any disciplinary action was taken. Adopting *City of Houston v. Wilburn*, No. 01-12-00913-CV, 2013 WL 3354182, 2013 Tex. App. LEXIS 8091 (Tex. App.–Houston [1st Dist.] July 2, 2013, no pet. h.) the court held charges of wrongdoing need not be contained within a single document. A hearing examiner's jurisdiction is very narrow and the examiner has no jurisdiction to rule in a manner not authorized by statute. Nothing provided the "examiner any type of discretion to pick and choose which accusations to review." By doing so he implemented his own procedural rules "regarding the quantum of prior notice that should be afforded, applied it retroactively to the situation at hand, and concluded that the quantum of notice was not enough." Such is unauthorized and not within a hearing examiner's discretion. Since there exists evidence the hearing examiner exceeded his authority, the plea was improperly granted. The court reversed and remanded.

If you would like to read this opinion click here.

IV. Annexation

Property owner's annexation dispute must go back to trial court to determine res judicata application says 10th Court of Appeals

KAREN HALL v CITY OF BRYAN, TEXAS, 10-12-00248-CV (Tex. App. – Waco, July 24, 2014).

This is an annexation dispute and the third time Hall sued for disannexation. The 10th Court of Appeals affirmed in part and reversed in part the trial court's grant of the City's plea to the jurisdiction.

It is important to note up front this is not a challenge to the City's ability to annexation (which is typical for annexation challenges) but a challenge for the lack of providing services under an annexation service plan, which is authorized by statute. In 1999 the City unilaterally annexed property owned by Hall as part of a larger annexation plan. Hall's first suit challenged the City's ability to annex the property but was dismissed upon the City's summary judgment motion and affirmed by the 10th Court. Her second suit challenged the City's ability to provide services under the plan and alleged a lack of services. The City filed a plea to the jurisdiction and summary judgment which were granted and affirmed. Hall's third suit asserts the City failed to provide services "in good faith" consistent with the Local Government Code. The City filed a plea to the jurisdiction which was granted and Hall appealed.

Hall's claims center around Tex. Loc. Gov't Code Ann. §43.141(b) (West 2008), which states in part that a registered voter can bring suit for disannexation after several years if the "municipality failed to perform its obligations in accordance with the service plan or failed to perform in good faith." The Waco Court of Appeals held that the City's arguments of *res judicata*, collateral estoppel and statute of limitations cannot be raised in a plea to the jurisdiction as they are affirmative defenses. So all of the City's arguments centered on those defenses are not considered in this appeal. The court next held that Hall's complaints about the adequacy of the service plan and that the plan should have provided for additional services are not ones she has standing to pursue as those relate to the annexation process, which can only be challenge via a *quo warranto* suit by the state. The court explained that Hall's arguments of failing to perform "in good faith" are not separate from providing services under the service plan and not an independent basis for challenge. The statute can only mean the failure to perform under the service plan in good faith, not other good faith challenges to other parts of the annexation statute. Further, since the service plan did not provide for water or sewer services paid for by the City, Hall cannot challenge the adequacy of providing a service not in the plan. However, the plan does specifically state the City would provide police protection with routine preventative patrols. Hall alleges the police presence in the area is far less than those in the rest of the City. And while this issue was addressed in her prior suits, a plea to the jurisdiction is not the proper place to raise prior rulings on the issue. Hall properly alleges a cause of action for failing to provide sufficient police protection and the City must go back to the trial court to establish whether that issue is barred by *res judicata*. As a result, the court affirmed in part and reversed in part the trial court's judgment and remanded.

If you would like to read this opinion click here. Panel: Chief Justice Gray, Justice Davis, and Justice Scoggins. Memorandum opinion by Chief Justice Gray. Karen Hall was pro se. The attorneys listed for the City are Ryan Henry and Janis Hampton.

13th Court of Appeals holds determination of City boundaries is a political question that courts have no jurisdiction to hear

CITY OF CORPUS CHRISTI, TEXAS v. CITY OF INGLESIDE, 13-13-00088-CV (Tex. App. – Corpus Christi, May 29, 2014). This is a dispute between two cities and their municipal boundaries where the definition of "shoreline" in their ordinances became critical. The trial court denied Corpus Christi's plea to the jurisdiction in the declaratory judgment action for interpretation, but the 13th Court of Appeals reversed.

Ingleside filed a declaratory judgment suit against Corpus Christi to construe a boundary definition of "shoreline." Ingleside claimed the definition allowed for double taxation. Corpus Christi filed a plea to the jurisdiction on numerous grounds including that only the City can define its boundaries, sovereign immunity barred Ingleside's claims and the subject matter was a political question within the sole purview of the legislative body. The trial court denied the plea and Corpus Christi appealed.

The Corpus Christi Court of Appeals started by addressing the political question argument. It quickly held that "If Ingleside is seeking the determination of a political subdivision's boundary, its suit, whether for declaratory relief or not, is barred as a political question that the legislature must decide." The dispute states the resolution will settle where geographic areas lie and in which city. Each city's ordinance defined the boundary between the cities as the "shoreline" so there is no dispute that is the boundary. Having the court redefine the term will result in an alteration of the boundary line and Ingleside presented no evidence the term "shoreline" was not understood by both cities. As a result, the relief sought requests the court to venture into a political question over which it has no jurisdiction. The court reversed the denial of the plea and dismissed Ingleside's claims.

If you would like to read this opinion click here. Panel: Chief Justice Valdez, Justice Rodriguez, and Justice Longoria. Memorandum Opinion by Chief Justice Valdez. The attorneys listed for the City of Corpus Christi are Carlos Valdez and Jody D. Leake. The attorneys listed for the City of Ingleside are John C. Holmgreen, Jr., Shirley Selz an d Michael Morris.

V. Condemnation

County's expansion of project sufficient for "public use" requirement under condemnation law

FARABI, INC. v. HARRIS COUNTY. TEXAS, 14-13-00443-CV (Tex. App. – Houston [14th dist.], July 24, 2014).
This is a condemnation suit where the property owner, Farabi, appealed the trial court's grant of the County's summary judgment motion and jury verdict.

The County created a pedestrian and bicycle trail project and attempted to negotiate an easement for the federally funded project on part of Farabi's land. The City decided that since it needed the easement for the trial, it should acquire the entire property for a pocket park and trailhead. After a condemnation hearing Farabi was awarded $88,000 which the County agreed to pay. Farabi objected to the award and argued the County had no right to take the entire

property since the County failed to establish public necessity for the entire tract. After partial summary judgment was granted for the County on its right to take the entire tract, a jury awarded Farabi $176,000. Farabi appealed.

The two components of "public use" are the County must intend a use for the property that constitutes a "public use" and the condemnation is a "public necessity." As the appealing party Farabi must negate any reasonable basis for determining what and how much land to condemn. The County not only established the property as a critical component of the trail project, the entire Farabi property was an ideal location for a pocket park as it was located across from a school and at the front entrance to a neighborhood, or for a trailhead where joggers or bicyclists could exercise. The court does not require an express statement of the condemnation's necessity within an official resolution, order, or minutes. The court considers all the evidence to determine whether the County in fact determined that the condemnation was a necessity. The fact the County initially was only interested in a 30 foot easement, but later moved to condemn the entire property after Farabi refused to negotiate is not a basis for an arbitrary and capricious holding. Finally, the court held Farabi failed to object and preserve his evidentiary challenges on appeal. As a result, the trial court ruling is sustained.

If you would like to read this opinion click here. Panel: Justice Boyce, Justice Christopher, Justice Brown. Memorandum opinion by Justice Brown. The attorney listed for the County is Bruce S. Powers. The attorney listed for Farabi is Charles B. McFarland.

VI. Land Use

City had legitimate reasons to deny zoning request so no inverse condemnation occurred

APPALOSSA DEVELOPMENT, LP and LUBBOCK WATER RAMPAGE v. CITY OF LUBBOCK, TEXAS, 07-13-00290-CV (Tex. App. – Amarillo, August 11, 2014).
This is an inverse condemnation case where the Amarillo Court of Appeals affirmed a take nothing judgment against the Plaintiffs.

Appaloosa is a partnership which buys land for commercial development. Water Rampage is a waterpark but had several acres of undeveloped land Appaloosa purchased. After the purchase, Appaloosa applied for a zoning change to allow commercial development. While the P&Z recommended approval, the City Council denied the application. Appaloosa brought suit for inverse condemnation. After a bench trial, the trial court ruled in favor of the City and dismissed Appaloosa's claims. Appaloosa appealed.

The court first determined there was no negative economic impact because the property could still be used for single family, the use permitted when Appaloosa purchased the property. While the value of the land would have increased if zoning changed, the proper standard is the value comparison of before the regulation and after. The City's regulation remained the same in this case. The court then noted that the "character of governmental action" was removed from the analysis under U.S. Supreme Court's decision in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005). However, since the Texas Supreme Court has not provided guidance, the court analyzed that factor as well. The City had legitimate reasons to keep the zoned uses since it received several objections to the

rezoning application for neighbors based on increased noise, traffic, and crime in their neighborhood; decreased property values; and ill effects from increased urbanization. The court determined the City did not target Appaloosa since it did not initiate a regulation, but merely kept the zoning exactly the same. Appaloosa failed to establish the City somehow sought an unfair advantage to its own projects by denying the request. The evidence was factually sufficient to support legitimate governmental purposes for keeping the zoning the same. As a result, the trial court judgment was affirmed.

If you would like to read this opinion click here. Panel: Justice Campbell, Justice Hancock and Justice Pirtle. Memorandum Opinion by Justice Hancock. The attorney listed for the City is Jeff Hartsell. The attorney listed for Lubbock Water Rampage and Appaloosa Development is Robert W. St. Clair.

Developer's second permit application merely attempted to relabel aspects of first application, so no timely appeal

JAY ANTHONY v. THE BOARD OF ADJUSTMENT of the CITY OF STEPHENVILLE, TEXAS; Cause No. 11-12-00159-CV (Tex. App. Eastland, July 10, 2014).
This is a Board of Adjustment appeal from the denial of a permit to operate a convenience store.

Anthony wanted to create a convenience store with two enclosed drive-through lanes but such a store was not a classified use. The City placed a proposed zoning amendment on the P&Z Commission agenda to clarify the use and allow the construction. The P&Z did not approve the amendment. The City Council essentially kept referring the matter back to the P&Z every time it was presented. Anthony did not appeal this back and forth. However, he then attempted to get building permits on two separate occasions listing the business as "Cowboy's Convenience Store" which were denied each time. The City Attorney noting the use was not permitted and the issue was already ruled upon. Finally, Anthony appealed the denial of the second building permit to the BOA which denied the appeal and Anthony appealed to district court. The BOA filed a plea to the jurisdiction and summary judgment. The trial court granted the plea and denied the MSJ. Anthony appealed.

The dispositive issue addressed by the court is whether the second building permit was materially different than the first since Anthony never appealed the first denial. Anthony argued the second application was different because even though the name was the same (minus the "s" in Cowboys), it listed the business as "retail store other than listed" and second that the drive through lanes in the first application were listed as "covered parking" in the second. The court determined the distinctions listed by Anthony are merely the relabeling of the same information in an attempt to resubmit the same application. The footprint is the same, the store structure is substantially similar, and the covered parking could easily act as a drive through. The second application did not materially change the nature of the case under the zoning ordinance. Since Anthony did not appeal the denial of the first application, he failed to exhaust his administrative remedies and the trial court lacked jurisdiction over the appeal.

If you would like to read this opinion, click here. Panel: Justice Wright, Justice Willson and Justice Bailey. Opinion issued by Justice Wright. Attorney for Appellant Jay Anthony is Arthur Anderson. Attorneys for Appellee City of Stephenville are Wayne Olson and Frederick Quast.

VII. Litigation/Procedure

No-evidence summary judgment is improper vehicle to make jurisdictional challenge says 14th Court of Appeals

FRANK and SHELLEY THORNTON v. NORTHEAST HARRIS COUNTY MUD 1, 14-13-00890-CV (Tex. App. – Houston [14thdist.], July 24, 2014).

This is an interlocutory appeal in a condemnation case where the property owner filed counter-claims. The Houston Court of Appeals for 14th District reversed in part the summary judgment motions granted for the MUD and affirmed in part with a remand.

After discovering during a project that the MUD did not have a recorded easement on certain land, the MUD filed an eminent domain suit to acquire part of a drainage easement on the Thorntons' land. The special commissioners awarded Thorntons $2300 in damages. Thorntons objected to the award and refused to allow the MUDs contractors onto his property to complete the project already underway. The trial court granted the MUDs partial summary judgment motion regarding its "right to take." Thorntons filed counterclaims for inverse condemnation, trespass, negligent trespass and nuisance. The MUD filed a plea to the jurisdiction and summary judgment as to the counterclaims. The trial court granted the MUD's summary judgments and did not rule on the plea. The Thorntons filed an interlocutory appeal but the MUD argued that since the plea was not ruled upon, there was no right to interlocutory appeal.

The court first determined that the MUD's traditional and no-evidence summary judgments made sovereign immunity arguments essentially the same as their plea and therefore the Thorntons had the right of interlocutory appeal from the ruling on sovereign immunity. The court next spent some time discussing the "negligent trespass" claim. After a detailed analysis the court determined the MUD maintained immunity for such a claim. Essentially, the only basis for waiver of governmental immunity the Thorntons alleged in their petition was article I, section 17, of the Texas Constitution. Because the Thorntons asserted no other grounds for a waiver of MUD's governmental immunity, and a claim for constitutional taking cannot be based on mere negligence, the Thorntons' pleadings failed to invoke and affirmatively negated the trial court's jurisdiction. However, as to the inverse condemnation, trespass and nuisance, the Thorntons established jurisdiction through their pleadings. The MUD entered onto their property (presumably because it incorrectly believed it had a recorded easement) and began excavations and project development. The MUD had knowledge that its excavation process could lead to lead-contaminated soil which could destroy the property for purposes other than a drainage easement. As a result, the inverse condemnation element of intent was satisfied. Since the project was for a necessary drainage easement, the Thornton's satisfied the "public use" requirement.

However, the most significant holding was when the court determined that it was improper to make a jurisdictional ruling based on a no-evidence motion for summary judgment. Adopting the reasoning of the 1st District's holding in *Green Tree Servicing, LLC v. Woods*, 388 S.W.3d 785 (Tex. App.—Houston [1st Dist.] 2012, no pet.) it held allowing defendants to challenge subject matter jurisdiction by way of no-evidence motion would force plaintiffs to "put on their case simply to establish jurisdiction" and would eliminate any burden on the defendant other than to identify the specific ground he believes to be lacking evidentiary support. The defendant cannot simply deny the existence of jurisdictional facts and force the plaintiff to raise a fact issue. Without analyzing whether the evidence submitted was sufficient, the court summarily determined the no-evidence summary judgment motion is simply improper to use. As a result, the "negligent trespass" claims are dismissed and the remaining claims are remanded for trial.

If you would like to read this opinion click here. Panel: Justice Boyce, Justice Christopher and Justice Brown. Memorandum Opinion by Justice Brown. The attorneys listed for Thornton are Jonathan Scott Stoger and J. Marcus Hill. The attorney listed for the MUD is Charles Black McFarland

Appellant did not submit court records, so waived takings and structural standards appeal

SAMUEL T. RUSSEL v. CITY OF DALLAS, 05-13-00061-CV (Tex. App. – Dallas, May 16, 2014).

This is a substandard building case where Russell challenged the demolition of a building on his property and brought a takings claim against the City. The trial court issued a judgment for the City and the Dallas Court of Appeals affirmed.

The City sought and received a demolition order for a building on the property from its municipal court of record. Russell filed suit asserting that since acquiring the property he had brought it up to code (or close enough), it was no longer an urban nuisance under the City's Code, and he brought a takings claim. The trial court entered a temporary order requiring Russell to do certain actions and make the property available for inspection. However, after a trial to the court, the court ordered the building demolished and Russell appealed.

This holding is not of great significance because the court never really gets to the heart of the matter. It first notes that since Russell did not present a reporter's record of the trial or request findings of fact, the appellate court must assume the record supports the judgment. Russell failed to properly preserve for appeal his challenge to the requirement of a verified pleading (because it can be waived). His takings claim focused on unpled claims and without a proper record to show otherwise, Russell waived this claim as well. The trial judgment was affirmed.

If you would like to read this opinion click here. Panel: Justice FitzGerald, Justice Fillmore, and Justice Evans. Memorandum Opinion by Justice Fillmore. The attorneys listed for the City are Thomas P. Perkins Jr., Barbara E. Rosenberg, Christopher J. Caso, and Andrew M. Gilbert. The attorneys for Russell are Samuel T. Russell and Timothy E. Baker.

Statute of limitations defense proper in a plea to the jurisdiction says 4th Court of Appeals

DEMAGALONI v BEXAR COUNTY HOSPITAL DISTRICT, No. 04-12-00691-CV (Tex. App. – San Antonio, September 11, 2013).

This case will be of primary interest to litigators given the procedural aspects but helpful to general counsel regarding timeframes. This is an employment discrimination case where the primary issue is whether a statute of limitations defense (historically an affirmative defense not subject to jurisdictional challenge) can be raised in a plea to the jurisdiction or only via summary judgment motion. The San Antonio Court of Appeals held it could be raised in a plea.

DeMagaloni worked for the University Health System and was discharged. She sued University Health System Foundation for discrimination by accident, which does not own the hospital she worked at. She later sued the Bexar County Hospital District d/b/a as University Health System. The District filed a plea to the jurisdiction alleging no waiver of sovereign immunity existed which the trial court granted and she appealed. On appeal she asserts a statute of limitations defense is an affirmative defense which is not appropriate for a jurisdictional challenge.

The Fourth Court of Appeals first cited to TEX.GOV'T CODE ANN. § 311.034 (West 2013) (Code Construction Act) which notes statutory prerequisites are jurisdictional when dealing with a governmental entity. Section 21.256 of the Texas Labor Code is a statute of limitations; however reading both sections together results in a jurisdictional bar to missing the statute of limitations. As a result, a statute of limitations defense may be raised in a plea to the jurisdiction.

If you would like to read this opinion click here.

VIII. Official/Qualified Immunity

Deputy's detailed analysis of the need to drive a high rate of speed equated to his entitlement to official immunity

HARRIS COUNTY, TEXAS v. SOUTHERN COUNTY MUTUAL INSURANCE COMPANY, 01-13-00870-CV (Tex. App. – Houston [1st Dist.], August 26, 2014)

This is an interlocutory appeal from the denial of a summary judgment with jurisdictional challenges in a Texas Tort Claims Act automobile accident case. The 1st District Court of Appeals reversed the denial and dismissed the claims.

County Sheriff's Deputy Hudson allegedly caused his patrol vehicle to collide with a parked car owned by Franeschi (Southern County Mutual's insured). The County asserted Deputy Hudson was entitled to official immunity because he was responding to a life-threatening situation (attempted suicide in progress). And since the County is only liable if the deputy is liable, the County can take advantage of Hudson's official immunity. The trial court denied the County's summary judgment and the County appealed.

The Texas Supreme Court articulated a standard of objective legal reasonableness for the measurement of a government official's good faith, without regard to the official's subjective state of mind. The

Plaintiff must meet a heightened burden to establish that no reasonably prudent officer could have made the same call. To qualify, the officer must balance the need to perform the action (driving 80 mph in a 30 mph zone) with the risks. The County attached detailed evidence and testimony where Deputy Hudson explained that he took into account the time of day, lighting, weather, traffic, the rural nature of the area along the roadway, familiarity with the roadway, and experience of driving at high speeds as well as the training provided for responding to attempted suicides in determining that the need for that level of speed outweighed the potential harm. In other words, the deputy explained exactly why the need outweighed the risk and all of the factors considered in coming to that conclusion. The fact the deputy was reprimanded by the County for causing the accident does not negate his analysis at the time. Based on that very detailed and specific information, the court held he was entitled to official immunity and therefore the County was immune.

If you would like to read this opinion click here. Panel: Justice Jennings, Justice Higley and Justice Sharp. Memorandum Opinion by Justice Jennings. The attorneys listed for the County are Vince Ryan and Stephen A. Smith. The attorneys listed for Southern Country are Christopher A. Fusselman and Jason E. Wells.

Texas Supreme Court says sheriff's deputies entitled to dismissal under election-of-remedies

Posted on June 12, 2014 by Ryan Henry

DEPUTY COREY ALEXANDER AND SERGEANT JIMMIE COOK v. APRIL WALKER, 11-0606, — S.W.3d. – (Tex. June 6, 2014).

This is an interlocutory appeal in a Texas Tort Claims Act ("TTCA") case where the election of remedies to sue an employee and the County come into play. The Court determined the officers were entitled to dismissal under Tex. Civ. Prac. & Rem. Code §101.06(f). The TTCA's election of remedies provision often give attorneys headaches due to the appearance of conflicts amongst the subsections or an appearance of circular arguments. The Court attempted to provide guidance on how various sections are supposed to operate.

Walker filed suit against two sheriff's deputies in state court and a separate case against the Sheriff and County in federal court arising from two arrests. In the state court action the deputies moved for summary judgment under various subsections of §101.106, which the trial court denied and the court of appeals affirmed. The deputies appealed.

The Court first noted when suit is brought against a government employee for conduct within the general scope of his employment, and suit could have been brought under the TTCA against the government, §101.106(f) provides that the suit is considered to be against the employee in the employee's official capacity only and the individual employee is entitled to dismissal. However, since such a suit is against the employee in his official capacity, it is not a suit against the "employee" and therefore does not bar a suit against the entity under subsection (b). In contrast, subsection (a) contemplates a bar against the individual employee if the governmental entity is sued. The analysis of all subsections working together essentially turns on whether the employees were acting within the course and scope of their employment and whether the entity could have been sued under the TTCA for such official acts. In this case, Walker's

allegations stem from alleged improper conduct in the course of his arrest. Additionally, the allegations were nearly identical to those brought against the County in the federal case. As a result, the officers were acting within the course and scope of their employment. The Court then reiterated its holding that, barring an independent statutory waiver of immunity, tort claims against the government are brought "under this chapter [the TTCA]" for subsection (f) purposes even when the TTCA does not waive immunity for those claims. As a result, subsection (f) requires the court to hold the officers were sued in their official capacity only and are entitled to dismissal on any individual basis.

If you would like to read this opinion click here. Per Curium opinion. The attorneys listed for Alexander are Mr. Bruce S. Powers, Mr. Fred A. Keys Jr., and Mr. Vincent Reed Ryan Jr. The attorney listed for Walker is Mr. Lloyd E. Kelley.

IX. Public Information Act/Texas Open Meetings Act

Ticket law firm not entitled to immediate access to court records says Fifth Circuit

SULLO AND BOBBITT, P.L.L.C. v. MILNER, No. 13-10869 (5th Cir. August 6, 2014).

This is a constitutional and public information case involving a ticket law firm which sought immediate access to misdemeanor citations through declaratory judgment. The Fifth Circuit affirmed the dismissal of such claims.

Sullo & Bobbitt, P.L.L.C. is a law firm in Dallas that advertises legal representation for misdemeanor offenses. It filed suit against various Texas officials challenging the constitutionality of Texas laws and municipal procedures asserting they interfered with the attorney's right to represent their clients. They claim federal law and the U.S. Constitution require "quick access" to court records to mean near immediate access without having to go through Rule 12 or the Texas Public Information Act. Sullo & Bobbitt offered to pay for the installation of computer systems to make the docket and ticket information available online or, in the alternative, to manually send an employee to the court on a daily basis. However their request was refused. They filed a declaratory judgment seeking to compel access within one business day of the date of a citation. The trial court dismissed the claims and Sullo & Bobbitt appealed.

The U.S. Supreme Court adopted a two-part "experience and logic" test to determine right of access to court records. The 5th Circuit first held Sullo & Bobbitt failed to argue the test should not apply at the trial court level, instead arguing that their pleadings satisfy the test. While the law firm argued several courts in Texas have given such electronic access, they failed to establish a national trend to provide such access in the "next business day" manner. As a result, the law firm failed to establish it satisfied the Supreme Court test which would have required such a national trend. The trial court's order of dismissal was affirmed.

If you would like to read this opinion click here. Panel: Justices DAVIS, SMITH, and CLEMENT. Per Curiam opinion. The attorney listed for Sullo & Bobbitt is Lawrence S. Fischman. The attorney listed for the City and court is Robert Harris Fugate.

Denial of incarcerated individual's PIA request is discretionary, so mandamus improper says 3rd Court of Appeals

STEVIE LYNN DAVIS v. TEXAS DEPARTMENT OF PUBLIC SAFETY, 03-13-00199-CV (Tex. App. – Austin, August 12, 2014).

This is a Texas Public Information Act ("PIA") case and a short one at that. Davis filed a mandamus action to compel DPS to turn over certain information relating to him under the PIA. However, Davis is an incarcerated inmate serving a 35 year sentence and he was seeking information relating to his offense. Pursuant to §552.028 of the PIA, an entity need not respond to PIA requests made by incarcerated individuals. He also sought to hold that provision of the PIA unconstitutional under the 6th Amendment right to self-representation. The trial court denied the request and Davis appealed.

The court first held §552.028 gives DPS discretion to withhold information even if it otherwise would need to be released under the PIA. Since it is discretionary not ministerial, mandamus is improper. Further, §552.028 has previously been held constitutional and an incarcerated individual has no protected rights to information under the PIA. As a result, Davis' clams were dismissed.

If you would like to read this opinion click here. Panel: Justice Puryear, Justice Rose, and Justice Goodwin. Memorandum Opinion by Justice Goodwin. Davis appeared pro se. The attorney listed for DPS is Ms. Shanna Elizabeth Molinare.

Under PIA, City need only ask holders of private email accounts for responsive information in order to properly comply says 3rd Court of Appeals

CITY OF EL PASO, TEXAS v. GREG ABBOTT, ATTORNEY GENERAL OF TEXAS and STEPHANIE TOWNSEND ALLALA, 03-13-00820-CV, (Tex. App. – Austin, August 1, 2014).

This is an interlocutory appeal from the denial of a plea to the jurisdiction in a Texas Public Information Act ("PIA") case. The subject matter of the request were messages between council members which occurred on private email accounts. The original request and suit were before the legislature changed the law making such information very clearly public.

The City originally filed suit under the PIA to withhold documents from disclosure. Allala intervened with a writ of mandamus to compel disclosure. After the legislature changed the law, the City complied with full disclosure and dismissed its claims; however, Allala continued to pursue the mandamus. The City filed a plea to the jurisdiction, which the AG did not oppose but Allala did, asserting that since it complied in full, the trial court lacked jurisdiction to issue a mandamus. After two hearings on the subject, the trial court denied the plea and the City appealed.

Allala asserted that she should be permitted to depose individuals, including council members, to ascertain whether the City fully complied with the PIA request. Allala objected to the affidavits of the City attesting to the City performing a diligent search for records and turning over all

responsive information found. The court went through the detailed affidavits of what the City did in order to comply and held "the City's jurisdictional evidence established that the City searched extensively for responsive documents, officially requested responsive documents from the individuals named in the request, and then ultimately produced to Allala all the documents that it had been able to locate." Allala did not produce evidence to counter the City's assertion it had complied in full. The court then held that Tex. Gov't Code § 552.321(a), which grants requestors the right to file mandamus actions, requires that the City "refuse" to follow the PIA by an expressing a positive unwillingness to do comply. The City's evidence established it was not "refusing" to comply. Allala's arguments deal with a situation where the City, even though making reasonable efforts to comply, may have not discovered a possible responsive document. The PIA does not authorize requestors to sue in such a situation.

Additionally, the court held that its review of the PIA "reveals no methods by which the City could compel the disclosure of public-information emails located on private email accounts" other than requesting the information from the private email holders. Additionally, the court addressed Allala's arguments under the state's record retention laws (a growing argument in PIA circles) noting that all records, regardless of location, are public and belong to the City. However, while Tex. Loc. Gov't Code §202.005 provides the City a method to force someone wrongfully withholding its records by petitioning the district court, the City would not have the ability to do so within the "short turnaround time demanded by the PIA." To force the City to utilize that provision would "result in the expansion of the PIA's specific waiver of sovereign immunity by grafting a discretionary Local Government Code provision that does not waive, or even concern, sovereign immunity." The court held "[w]e are not authorized or willing to do this." As a result, the trial court was without jurisdiction to hear Allala's mandamus claims and the plea should have been granted.

If you would like to read this opinion click here. Panel: Chief Justice Jones, Justice Pemberton, Justice Rose. Opinion by Justice Rose. The attorneys listed for the City of El Paso are Mr. George E. Hyde, Mr. Lowell F. Denton, and Mr. Scott M. Tschirhart. The attorney for General Abbott is listed as Ms. Kimberly L. Fuchs. The attorney for Allala is listed as Mr. Bill Aleshire.

County Commissioner Adkisson emails on personal account "public" under PIA says Austin Court of Appeals

TOMMY ADKISSON v. GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, 03-12-00535-CV (Tex. App. – Austin, June 13, 2014).

This is a Public Information Act ("PIA") case where Bexar County Commissioner Adkisson sought to withhold County emails sent to him on his personal email account. This PIA request and suit was brought prior to the 2013 amendments to the PIA making public all emails regarding public business, regardless of whether they are on personal or entity email accounts.

Hearst Newspapers, LLC, sought correspondence from Commissioner Adkisson's personal e-mail accounts related to his official capacity as a county commissioner or as chairman of the San Antonio-Bexar County Metropolitan

Planning Organization, or both. The Texas Attorney General opined the emails were public and must be released. Adkisson filed suit in district court to withhold the emails, but the trial court granted the Newspaper's and AG's summary judgment motions holding the emails were public. Adkisson appealed.

Adkisson argued the emails in his personal e-mail accounts, regardless of thier content, are not public information as defined by the PIA because they were not either collected, assembled, or maintained by the governmental body or prepared on behalf of the governmental body and the governmental body did not have a right of access to the correspondence [old statutory definition prior to amendment]. Adkisson further argued that the County could not search his personal email accounts as he had an expectation of privacy and a constitutional right not to be subject to a search without probable cause [mainly because the AG is also the enforcement arm for various violations]. The court went through the former language of the PIA and determined the "official-capacity emails" were emails created in Adkisson's role with the County and Metro Planning Organization and the emails were part of his transactions for the entities. The court then examined the records management laws and County retention policies, noting that no employee has a right privacy in any public document. Further, the Bexar County policy specifically stated that all documents *created or received* by the office or any of its officers or employees in the transaction of public business were to be retained as public records.

Most significantly, though, the court held that the Commissioner, as an elected Bexar County officer, "is the officer for public information and the custodian, as defined by Section 201.003, Local Government Code, of the information created or received by that county officer's office." This provision applies to county commissioners, but not to other forms of governmental officials like city council members. However, as the County Commissioner, Adkisson is statutorily charged with the duty of acting for the County as the custodian of records for the County for his precinct. "In other words, as Commissioner, he is responsible for maintaining public information created or received by him or by his employees or his office—no matter where that information is physically created or received—for the *County*." As a result, the emails in his personal account are owned by the County under his statutory obligation and subject to the PIA. The court was careful to qualify that the emails were owned by the County only under these specific circumstances. The court then examined Adkisson's privacy interests but dismissed the arguments stating the Commissioner never articulated the scope of privacy interest at issue. When elected, he relinquished some, but not all, of his privacy interests, at least with regards to his work as a Commissioner. Finally, the trial court did not abuse its discretion in awarding attorney's fees.

If you would like to read this opinion click here. Panel: Justice Puryear, Justice Rose and Justice Goodwin. Opinion by Justice Puryear. The attorney listed for the AG is Ms. Pat Tulinski. The attorneys listed for Adkinsson are Ms. Erin A. Higginbotham, Mr. George E. Hyde and Ms. Jennafer G. Tallant. The attorneys listed for the newspaper are Mr. Ravi Sitwala and Mr. Jonathan Donnellan.

All records "relating to" auto-accidents resulting in injury, not just accident report, are privileged under PIA says Austin Court of Appeals

THE CITY OF SAN ANTONIO v. GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, 03-11-00668-CV (Tex. App. - Austin, April 10, 2014)

This is a Public Information Act case where the City of San Antonio withheld information contained within its call-for-service and dispatch logs as privileged. The Texas Attorney General ("AG") opined the records must be released and the City appealed. The Austin Court of Appeals agreed with the City and held the records could be withheld.

The City asserted that it's call-for-service logs relating to motor vehicle accident reports were excepted from disclosure under Tex. Transp. Code § 550.065 (relating to releasing accident information only under certain circumstances and required redactions). Section 550.065 provides that information that "relates to a motor vehicle accident reported under . . . [C]hapter [550]" is privileged and for the confidential use by the City. Chapter 550 reports are required when an accident resulted in injury to or the death of a person or damage to the property of any one person to the apparent extent of $ 1,000 or more. The City may release the report if a requestor can provide two of three sets of information which only a party to the accident should know. It is undisputed that the requestor, the Texas Weekly Advocate, did not provide two of the three required pieces of information instead seeking information about all accidents or all calls for service on a given day. The requested call-for-service and dispatch logs contain two of the pieces of information required. The AG opined that the exception to disclosure applies only to the accident report itself and not information that may simply relate to it, such as dispatch logs. The City appealed the opinion to District Court which agreed with the AG. The City appealed.

The Austin Court of Appeals held the Legislature's use of the phrase, "information that . . . relates to a motor vehicle accident" reported under Chapter 550 , has the effect of broadening the scope of Section 550.065 to render more than the actual accident reports confidential. In this case, the City provided evidence at trial that when an accident is one which is required to be reported under Chapter 550, the report is linked within the City's computer system with all other data gathered, including the initial call for service. As a result, all of the link information "relates to" the accident and is confidential. The trial court erred in ordering its release so the Austin Court reversed and rendered.

If you would like to read this opinion, click here. Panel: Justice Puryear, Justic Goodwin and Justice Field. Opinion by Justice Puryear. The attorney listed for the City is Shawn Fitzpatrick. The attorney listed for the AG is Kimberly Fuchs.

City's agenda posting sufficient under Texas Open Meetings Act says 5th Court of Appeals

MARK BAKER v. THE CITY OF FARMERS BRANCH, TEXAS, et al. Cause No. 05-13-01174-CV (Tex. App. –Dallas, July 15, 2014)

This is a Texas Open Meetings Act ("TOMA") case where the Plaintiff sued to compel compliance of TOMA.

The City settled a Voting Rights Act lawsuit styled *Fabela v City of Farmers Branch*. The City posted it would discuss the *Fabela* lawsuit in executive session. When the Council reconvened after the executive session it approved the settlement. Baker filed suit alleging the agenda posting was insufficient under TOMA and sought an injunction. After an injunction hearing, the trial court determined the notice was sufficient and dismissed Baker's claims with prejudice. Baker appealed.

The Dallas court of appeals noted the agenda specifically listed an executive session, specifically identified §551.071 to discuss pending litigation with Fabela and listed the cause number. The court disagreed with Baker's argument the agenda should have listed the City was considering settling the matter, dismissing the appeal, and paying Fabela a lump sum. It held the City properly identified the specific lawsuit and alerted the public to discussions regarding that lawsuit. The law does not require the notice to disclose strategies that might be discussed in the closed session or every consequence which may result from the discussion. To require the specificity argued by Baker would defeat the purpose of the provision which authorizes private consultations between the governmental body and its attorney. Baker's argument that the City had already reached the decision to settle and merely "rubberstamped" the decision in open session. However, even given the City Manager's statement that the City had an agreement in principle prior to the meeting, Baker failed to establish how any statement establishes the City Council met outside of its posted meeting. The Open Meetings Act does not prohibit the council members from expressing in a closed session how they intend to vote when they go back into open session. As a result, Baker failed to establish any TOMA violation occurred. The trial court properly dismissed his claims.

If you would like to read this opinion, click here. Panel: Justice Lang-Miers, Justice Bridges and Justice Francis. Opinion by Justice Lang-Miers. Attorneys for Appellant Mark Baker are Mitchell Madden, Melissa Johnson and Thomas Murto, III. Attorneys for Appellee City of Farmers Branch, Texas are Victoria Thomas and Peter Smith.