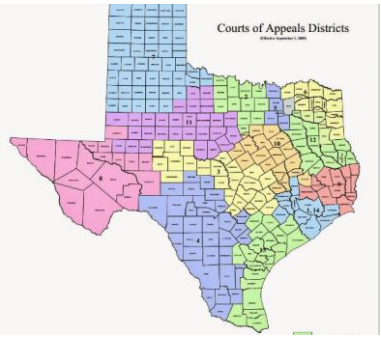

RECENT STATE CASES OF INTEREST TO CITIES

Presented to:
TEXAS CITY ATTORNEYS ASSOCIATION
SUMMER CONFERENCE
Bastrop
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Laura, originally from Yukon, Oklahoma, graduated summa cum laude from the University of Oklahoma in 2001 with a liberal arts degree. She attended the University of Texas School of Law, and worked as a law clerk for TML and as an intern for the Travis County Juvenile Public Defender's Office while there. After graduating with honors in 2004, Laura clerked for the Supreme Court of Texas. She joined the TML legal staff as legal counsel in November 2006. Laura became Assistant General Counsel in November 2010. Laura became an associate of the Bojorquez Law Firm in April 2016. Laura specializes in employment law, sign regulation, and open government. Besides serving Texas cities, Laura also enjoys spending time with her husband Chris, her two sons, Johnathon and Joshua, and her daughter, Emma.

TML LEGAL DEPARTMENT
Austin, Texas

The TML Legal Department is a ragtag group of attorneys brought together for one purpose, to give city officials general legal information without knowing anything about the controlling facts, city ordinances, or city charter. This advice often conflicts with that given by a city's own attorney (who does have the pertinent information), but the legal department is free so we must be right. From its ivory tower in northeast Austin, the legal department also moonlights as a therapist for city officials and city attorneys. The TML Legal Department also likes to take great papers written by city attorneys and place them on their Web site. Every two years the legal department emerges from its northeastern home to travel to the state legislature to repeat the information given to them by TML lobbyists, like the puppets they are.

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We would like to give a shout out to Ryan Henry, whose timely summaries on all cases of interest to cities makes everyone's job just a little bit easier. If you have not had a chance to sign up to be placed on his free email list for case summaries, you should check it out at www.rshlawfirm.com.

Table of Authorities

RECENT STATE CASES

ELECTIONS

***Parker v. Wilson*, No. 01-15-00687-CV, 2016 WL 921404 (Tex. App.— Houston [1st Dist.] March 10, 2016) (mem. op.).** This is a mandamus case involving a referendum and whether the city secretary had a duty to count signatures or certify a number. In 2015, Wilson conducted a petition drive with the stated purpose of amending Article II, Section 22 of the City of Houston City Charter which prohibited the city from using sexual preference as a factor in employment or in defining gender identification. Wilson filed his original petition for writ of mandamus alleging the city secretary failed to perform her ministerial duty under the city charter to count the number of signatures on the petition and certify the petition to the city council. Wilson alleged that if the city secretary did not count the signatures and certify the petition, "the Charter Amendment cannot be placed on the ballot in November 2015," resulting in irreparable harm. After a hearing the trial court granted Wilson's mandamus petition and ordered the city secretary to count and certify the petition. The city filed an interlocutory appeal. A flurry of motions and emergency motions were filed. Ultimately, the petition issues were not placed on the November ballot.

An appellate court is prohibited from deciding a moot controversy or rendering an advisory opinion. After analyzing all of the motions and original proceedings filed by Wilson, the court determined Wilson's objective was to have his proposed amendment placed on the November 2015 ballot. Because the deadline and election have passed the case is moot. A case may be dismissed as moot at any stage of the proceedings, including on appeal.

***State of Texas v. Wilson*, No. 01–14–00783–CV, 2016 WL 796999 (Tex. App.—Houston [1st Dist.] March 1, 2016)**. This case discusses residency for purposes of candidacy under the Election Code. The state filed a quo warranto proceeding against David Wilson when he tried to run for office in Houston, Texas. The state argued that his residency was not within the boundaries of the specific district to which he was seeking election because the apartment he claimed to live in was actually a warehouse which had been red-tagged for residential purposes, because his wife lived in a house outside the district, and because he paid taxes on the house outside the district as a homestead. Wilson was registered to vote at the warehouse and claimed that he lived in an apartment on the second floor of the warehouse which he considered his residence. The trial court held in favor of Mr. Wilson and the state appealed.

First, the court of appeals held that it is irrelevant that a person moved just to run for office in that district. The court next held that where someone's "homestead" is for tax purposes is relevant, but not conclusive in establishing residency. Other factors include: (1) record of voting; (2) where a person sleeps; (3) where a person stores personal possessions; (4) where a person performs day-to-day activities; and (5) the residence the individual chooses and to which the individual intends to return. In this case, Wilson paid taxes on the house outside the district as a homestead, the apartment he claimed to live in was red-tagged by the city as inappropriate for residential purposes. The apartment was actually owned by someone else and Wilson had no lease and paid no rent. Wilson stated that he does live at the apartment during the week and wants it to be his residence where he always intends to return. The court of appeals held that there was sufficient

evidence that the apartment within the district was Wilson's residence to affirm the trial court jury's fact ruling that Wilson's residence was at the apartment. The court of appeals held that none of the evidence presented by the state was conclusive of residence sufficient to negate a jury's fact finding.

***In re Perez,* No. 08-15-00381-CV, 2016 WL 116178 (Tex. App.—El Paso Jan. 11, 2016, orig. proceeding).** This is a candidate eligibility case. A candidate may be declared ineligible administratively under Election Code Section 145.003 only if: (1) the information on the candidate's application shows the candidate to be ineligible; or (2) facts indicating that the candidate is ineligible are conclusively established by another public record. In this case, Perez requests the court to issue a writ of mandamus to make certain officials remove Quintanilla from the March 1, 2016 Democratic Primary ballot for County Commissioner Precinct 3 because he does not meet the voter registration requirement imposed by Texas Election Code Section 141.001(a)(6). [Effective September 1, 2015, HB 484 amended Election Code Section 141.001 to provide a new general rule (for most offices) that a candidate must be a registered voter of the territory elected from as of the filing deadline (unless outside law conflicts).] Perez argues that Election Code Section 141.001(a)(6)'s requirement that a candidate be registered to vote "in the territory from which the office is elected" means that, in this case, Quintanilla must be a registered voter in Precinct 3 rather than all of El Paso County. The court agrees.

Perez also argues that reading Subsections 141.001 (a)(5) (residency requirement) and (a)(6) together requires that Quintanilla be registered to vote in Precinct 3 for six months before the filing deadline. The court disagrees with the argument that the requirement to be a registered voter is tied to the required length of residence in (a)(5).

Finally, the court considers whether a public record conclusively established that Quintanilla was not a registered voter in Precinct 3 on the filing date. The court concludes that the answer is yes. Public records show that Quintanilla was a registered voter in Precinct 2 prior to December 7, when he submitted an address change form. Quintanilla's voter registration for Precinct 3 was not effective until 30 days after he submitted his address change (Jan 6). Thus, the court holds Quintanilla was ineligible to be a candidate in Precinct 3 because he wasn't a registered voter on the filing date, should have been declared ineligible administratively, and must be removed from the ballot.

***Weiderman v. City of Arlington,* No. 02-15-00120-CV, 2015 WL 5461516 (Tex. App.—Fort Worth Sept. 17, 2015) (mem. op.).** The City of Arlington had red light cameras in place and contracted with American Traffic Solutions to provide the red light cameras. The citizens of Arlington filed a petition to ban the red light cameras pursuant to the city's charter. Once the petition was verified, the city council voted to have an election on the issue of the red light cameras. The issue in this case is whether the issue of red light cameras can be voted on by the citizens or is an issue over which the city council has total discretion under state law. Before the case arrived at the Fort Worth Court of Appeals, the election had occurred and the voters of Arlington voted to ban red light cameras in the city through its charter. The question became whether Weiderman, as a city resident, had standing to challenge the election procedures. The court of appeals held that Weiderman did not have standing because he could show no distinct injury related to the removal of the red light cameras and voter or resident status alone is not enough for standing.

ETHICS

***Ex parte Perry*, No. PD-1067-15, 2016 WL 738237 (Tex. Crim. App. Feb. 24, 2016).** The question in this case is whether an "abuse of official capacity" charge can be held against a government official for threatening another member of the same governing body. In this widely publicized case, then Governor Rick Perry threatened to veto, and then did veto, the budget of the Public Integrity Unit of the Travis County District Attorney's Office after the district attorney refused to resign following a driving while intoxicated arrest. The Travis County grand jury brought two indictments against Perry: (1) abuse of official capacity; and (2) coercion of a public servant (the district attorney) by threatening to veto her funds if she did not resign.

Texas Penal Code Section 39.02 makes it an offense for a public servant, with intent to harm another, to misuse government property. The person harmed was alleged to be the district attorney and the misused government property was the public integrity funds. Texas Penal Code Section 36.03 provides the coercion of a public servant offense occurs when a person attempts to influence a public servant to violate the public servant's known legal duty. The allegation against Perry was that he attempted to influence the district attorney to stop performing her job of district attorney. Perry argued that the indictments, and the underlying statutes, were unconstitutional as applied to his actions in this case. The trial court denied the requested relief. Perry appealed. The court of appeals sustained Perry's constitutional challenge to the coercion of a public servant charge as being overbroad as related to the First Amendment, but allowed the charge of abuse of official capacity to go forward. Perry again appealed and argued that the charge of abuse of official capacity violates the separation of powers doctrine because the governor has constitutional authority to veto legislation. The Court of Criminal Appeals looked at other states that have held that a governor's veto power is absolute when exercised within the state constitution and that motives behind such vetoes cannot be second-guessed. The Court of Criminal Appeals agreed, dismissing the charge, and holding that "The governor's power to exercise a veto may not be circumscribed by the Legislature, by the courts, or by district attorneys (who are members of the judicial branch)."

The Court of Criminal Appeals also held that the second charge of coercion of a public servant was overbroad as applied under the First Amendment, describing various instances where speech would fall under the prohibited conduct of the statute, but be protected by the constitution. The case was remanded back to the district court, ordering the district court to dismiss the indictment.

GOVERNMENT IMMUNITY

***Houston Belt & Terminal Ry. Co. v. City of Houston*, No. 14-0459, 2016 WL 1312910 (Tex. Apr. 1, 2016)**. This is an ultra-vires case where the Texas Supreme Court holds acts can be ultra-vires and without legal authority even if they involve some level of discretion.

The City of Houston enacted a drainage-fee ordinance. Charges are calculated based on a specified rate per "square [foot] of impervious surface on each benefitted property." The ordinance gives the city's director of public works—in this case, Daniel Krueger—authority to administer its provisions, subject to the terms of the ordinance itself. Petitioners (collectively the Railroads) received notices of proposed charges of about $3 million annually based on Krueger's determination that all of the railroads' properties within the city were "benefitted" and that the surfaces of nearly all of those properties were also "impervious." Krueger made his determination based upon aerial images—looking to see if the properties appeared green or brown—rather than digital map data. Generally, under this method, if the property appeared brown, Krueger determined it was impervious; if it appeared green, he determined it was pervious. The railroads filed suit alleging ultra vires claims against Krueger and seeking prospective injunctive relief. The city and Krueger filed a plea to the jurisdiction which the trial court granted. The court of appeals affirmed in part and reversed in part. The parties cross-appealed.

The parties dispute the meaning of "exercise of discretion" and "without legal authority" as used in *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex.2009) for ultra vires determinations. To the city, "exercise of discretion" means any decision made in which the officer has the authority to use his personal judgment, and "a mistake in exercising his judgment is not an ultra vires act." The railroads assert discretion means absolute discretion—discretion where no specific, substantive, or objective standards govern the exercise of judgment. Heinrich's claim was against the officers for acting pursuant to, yet outside the limits of, a statutory grant of authority. Heinrich alleged that the officers, making the type of determination which they had authority to make, made that determination in a way the law did not allow. That is the proper standard. The court then analyzed several cases since *Heinrich* and determined none could be read to shield unlawful action simple because the action was discretionary. And while "the protections of governmental immunity remain robust, they are not absolute." Accordingly, "the principle arising out of *Heinrich* and its progeny is that governmental immunity bars suits complaining of an exercise of absolute discretion but not suits complaining of either an officer's failure to perform a ministerial act or an officer's exercise of judgment or limited discretion without reference to or in conflict with the constraints of the law authorizing the official to act. Only when such absolute discretion—free decision-making without any constraints—is granted are ultra vires suits absolutely barred." And, as a general rule, "a public officer has no discretion or authority to misinterpret the law." However the court emphasized that this opinion is not to be interpreted as a way "to allow a new vehicle for suit to masquerade as an ultra vires claim" and that the exception still remains extremely narrow in application.

The court then analyzed the ordinance in question and determined Krueger's determinations did not meet the definitions found in the ordinance. The railroad properties are not "benefitted properties" under the ordinance's definition and while Krueger may have some authority with respect to determining which properties are benefitted, he does not have authority to make that determination in a way that conflicts with other provisions of the ordinance, including its definition and usage of "benefitted property." Further, "impervious surface" is defined and Krueger's determinations did not meet the ordinance definitions either. And while he may rely on "reliable data" to make a determination, the data must be similar to the types of data described in the ordinance. The railroads properly alleged an ultra vires claim so the case is remanded for further proceedings.

***Hagelskaer v. Texas Dep't of Transp*., No. 09-15-00279-CV, 2016 WL 1600342 (Tex. App.—Beaumont Apr. 21, 2016)**. This is an appeal from the granting of Texas Department of Transportation's (TxDOT) plea to the jurisdiction where the Beaumont Court of Appeals modified the judgment, but affirmed the granting of the plea. This is a personal injury case where a bicyclist was in a TxDOT detour lane and was hit by oncoming traffic when TxDOT employees accidentally let both directions of traffic into the same lane.

TxDOT repaired the northbound shoulder of a two-lane roadway. In the course of its repairs, TxDOT closed the northbound lane of FM 1486, and allowed traffic on the road to alternate the use of the southbound lane. TxDOT stationed flaggers at each end of the project to control the use of the southbound lane who utilized radios to coordinate traffic. Hagelskaer, travelling south, approached the construction zone on her bicycle with a group of other cyclists. As the cyclists were passing through the construction zone, Hagelskaer managed to safely pass one northbound vehicle but she encountered a second, injuring her. Hagelskaer sued asserting, among other things, that TxDOT allowed both directions of traffic to share the same land and the equipment in the closed lane prevented the second vehicle from being able to safely pass her (essentially creating a bottleneck effect). The trial court granted TxDOT's plea to the jurisdiction, which she appealed.

The court first held the Texas Tort Claims Act (TTCA) does not waive immunity for the negligent handling of traffic flow. There was also no nexus between TxDOT's "maintainer" equipment which was off to the side of the roadway and the accident. The evidence before the court demonstrated that Hagelskaer and the truck driver's shared use of a single lane of traffic by accident caused Hagelskaer's injuries, not the lanes of travel created by TxDOT's equipment. The maintainer merely furnished the condition that made the accident possible. Hagelskaer never alleged that the maintainer being used in the northbound lane was being operated in a negligent manner. TxDOT's equipment was in the closed lane, and did not protrude into the southbound lane being used by the traffic. Hagelskaer has also not shown that the TTCA contains a waiver for activity that is based on decisions involving a lane closure and decisions by government employees that allowed commuter traffic to share a single lane. Next, under a premise defect theory, Hagelskaer alleged TxDOT was aware of the danger it created and did not warn her of the dangers present in her lane of travel. However, the court held such facts cannot be classified as a premise or special defect. The defect on which Hagelskaer premises her claim concerns the existence of equipment and vehicles on a lane of the road closed for construction which is merely a detour. Additionally, the existence of oncoming traffic in a single lane was not unexpected from Hagelskaer's point of view. Further, even if the condition were a premise defect, TxDOT had no duty to warn her of a condition of which she was already aware (i.e. she avoided the first vehicle in the lane). TxDOT cross-appealed noting the dismissal should be with prejudice. After going through the pleading record, the court agreed Hagelskaer had an opportunity to replead and chose not to do so. As a result, the court should have granted the plea with prejudice.

***Harris Cnty. v. Baker*, No. 01-15-00930-CV, 2016 WL 1600819 (Tex. App.—Houston [1st Dist.] Apr. 21, 2016) (mem. op.)**. This is a negligence case based on injuries allegedly incurred during an arrest. The First District Court of Appeals reversed the denial of the county's plea to the jurisdiction and dismissed the case.

A deputy with the Harris County Sheriff's Office arrested Baker for the offense of possession of a controlled substance. Baker was handcuffed and transported to the county jail. The county asserts

the deputies had difficulty fingerprinting Baker because she was intoxicated, was cursing at the deputies, and had trouble balancing. Fearing that Baker might assault him, "[The deputy] raised his arm in an attempt to stop her and to maintain distance from him. Due to her intoxicated state[,] [Baker] lost balance and fell down on her left side between the concrete benches." The report reflects that Baker was seen by a jail nurse for a bump on the side of her forehead. Baker alleges her injuries were caused by the deputy's negligent use of property, specifically, the handcuffs, concrete benches, "and other tangible personal property in the booking area." Further, Baker testified the deputy hit her head on the concrete bench intentionally. The county filed a plea to the jurisdiction which was denied. The county appealed.

Baker testified in her deposition her injuries were the result of the deputy assaulting her, pulling and breaking her wrist, and slamming her head into the bench. After the county filed its plea to the jurisdiction, she amended her pleadings indicating there was no intentional assault, and that her injuries were the result of unintentional but negligent acts of using the handcuffs and bench. She asserted in her pleadings that when the deputy put his hands up she fell and received injuries due to property located in the booking room and/or the restraints that were being improperly used. The county asserted her pleadings ". . . carefully deleted all references to violence and slamming and assault by the deputies[,] but the amended pleading does not delete or diminish the actual sworn testimony of Plaintiff Stefanie Jo Baker herself" in which she described the deputy's intentional and violent conduct. Baker claims that she testified in her deposition that, due to her injuries, she did not have a clear memory of the events that occurred during her arrest and detention at the jail. Her current claim on appeal that the cited testimony indicates that she does not remember what happened at the jail does not comport with her sworn testimony, given in the same deposition, in which she stated that the deputy intentionally assaulted her. No waiver of immunity exists for intentional acts. However, even if the court were to look only at the county's version of events, an act or omission is a cause-in-fact of the injury if it is a substantial factor in causing the injury without which the injury would have not occurred. Section 101.021(2) of the Tort Claims Act's waiver of immunity requires more than the property's mere involvement. No nexus exists between the use of the handcuffs or bench and her alleged injuries. As a result, the plea should have been granted.

***City of Dallas v. Groden*, No. 05-15-00033-CV, 2016 WL 1367380 (Tex. App.—Dallas Apr. 6, 2016) (mem. op.).** This is an interlocutory appeal from the denial of a plea to the jurisdiction in a malicious prosecution case. The Dallas Court of Appeals reversed the denial and dismissed the plaintiff's claims.

Robert Groden operated a business from a portable table in the park selling his writings on the assassination of President John F. Kennedy. The park manager received complaints about vendors in the park, and Groden was arrested for violating a city ordinance on vendor activity in the park. The municipal court dismissed the charges. Groden sued various city officials for malicious prosecution and declaratory relief, then later added the city. The city and its officials filed a plea to the jurisdiction, which was denied. They appealed.

Groden first argued the court's interlocutory appellate jurisdiction does not exist for officials sued in their individual capacity. The court held employees could utilize the interlocutory authority for appeals, regardless of capacity. The court then held that while Groden did not dismiss the city, he filed an amended petition asserting he was not suing the city for damages or torts. The court

interpreted that pleading as dismissing his claims against the city so the trial court erred by not granting the city's plea removing it from the lawsuit in name. Additionally, the declaratory judgment claims against the city (which Groden did expressly bring) do not challenge the validity of an ordinance but complain about the arrest. The city retains its immunity from claims seeking interpretations of ordinances or declarations that city employees violated the law. Additionally, Groden's claim for injunctive relief against the city for its "unconstitutional practices" is likewise barred by immunity. Next, Groden alleged that Golbeck's and Worden's actions (assistant police chief and parks manager) in having him arrested and prosecuted were ultra vires and outside the scope of their employment with the city. To the extent Groden sought a declaration that Section 101.106(f) violates the open courts provision of the Texas Constitution the claims are not viable. Subsection (f) of the election-of-remedies provision states that claims asserted against an employee must be dismissed if the complained-of conduct was within the general scope of employment and the plaintiff could have sued the government. An official acts within the scope of his authority if he is discharging the duties generally assigned to him. An assistant police chief has the general duty to enforce city laws and ordinances and arrest those who violate them. Worden presented evidence that his duties as parks manager included directing complaints or issues related to the parks to the appropriate city official. Both officials were acting within the course and scope of their employment. And while the city would be immune from intentional torts, the claims he brings against the officials fall within the definitions of Section 101.106(f). Therefore, under the election of remedies provision of the Tort Claims Act, the officials are entitled to dismissal. The denial was reversed and judgment rendered for the City of Dallas.

***City of Pearland v. Contreras*, No. 01-15-00345-CV, 2016 WL 358612 (Tex. App.—Houston [1st Dist.] Jan. 28, 2016) (mem. op.).** This is a premise defect/Texas Tort Claims Act (TTCA) case involving actual knowledge of a dangerous defect in which the First Court of Appeals reversed the denial of a plea to the jurisdiction.

In early 2010, the Texas Department of Transportation (TxDOT) expanded SH 35 requiring the city to move its utilities along the highway. At one point, the city received an environmental report funded by TxDOT that stated there was some gasoline contamination at the site, and modified its new water line to further protect from contamination. One year later, workers were installing a traffic light pole at the same location as the contaminants when welders inside the hole accidentally ignited fumes. Contreras was burned. After the accident, the Texas Commission on Environmental Quality investigated and noted one possible explanation is methane gas accumulated in nearby storm sewer drains. Contreras sued RMJ Miller, the owner of nearby underground storage tanks, the city, and TxDOT for negligence and premises defect. The city filed a plea to the jurisdiction which was denied.

The city first argued that while it owns the sewer lines within the utility easement, the storm sewers are TxDOT lines. Further, the city noted that the environmental report it received expressly held "exposure to contaminated soil or groundwater within the TxDOT [right of way] should not pose a threat to construction workers since none of the detected contaminant concentrations exceeded the applicable standards for construction worker exposure." As a result, the city asserts the report is not actual notice of a dangerous condition, even if the city did control the sewers. The court of appeals first held a fact question exists as to the city's control of the sewers. However, that does not end the inquiry. Any liability against the city must be related to a premises defect associated

with the storm sewers themselves. The court held because the alleged buildup of flammable gas within an existing storm sewer is not a roadway excavation or obstruction, the alleged premises defect is not a special defect. Therefore, Contreras must establish the city had actual knowledge of the danger. There is no evidence in the record the city knew that its storm sewers contained a flammable gas (methane) or even anything that would cause gas to build up. The soil contaminants are a different issue than methane gas build up. As a result, the plea was improperly denied.

Ultra Vires: *Cameron Cty. Appraisal Dist. v. Rourk*, No. 13-15-00026-CV, 2016 WL 380309 (Tex. App.—Corpus Christi Jan. 28, 2016) (mem. op.). This is primarily a Uniform Declaratory Judgment Act (UDJA)/ultra vires case but with the underlying claim asserting an illegal tax on travel trailers and recreational vehicles (RVs).

Rourk filed a UDJA suit to hold the appraisal district's tax on travel trailers and RVs is an unauthorized tax under the Texas Constitution and Texas Tax Code Section 11.14. Rourk sued the appraisal district and the chief appraiser, Frutoso Gomez. In a prior opinion (Rourk II), the court held certain travel trailers and RVs were exempt from taxation, but remanded on the issue of attorney's fees. In another opinion, Rourk III, the appellate court held the district retained immunity from attorney's fees. However, the Thirteenth Court of Appeals allowed Rourk to amend to sue an individual official. On remand, Rourk amended the pleading to add Gomez. The trial court held Gomez acted in an ultra vires manner in assessing the tax. The trial court then awarded attorney's fees to Rourk. The district and Gomez appealed.

An ultra vires suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer either acted without legal authority or failed to perform a purely ministerial act. An agency determination that is wrongly decided does not render that decision outside the agency's authority. Further, an incorrect agency determination rendered pursuant to the agency's authority is not a determination made outside that authority. The court of appeals noted that, in Rourk III, the plaintiffs "are not challenging the validity of a provision of the tax code; instead, they are challenging [the appraisal district's] actions under it[.]" "Likewise, we conclude that the substance of Rourk's amended allegations are complaints about Gomez's interpretation of the Tax Code, not that he acted illegally or without controlling authority." Such is not an act exceeding authority. Applying the Tax Code's exemptions requires discretion. The tax appraiser must determine whether the property is a manufactured home, a mobile home, or a recreational vehicle based on the facts at hand. As a result, it is not a ministerial act and there is no waiver of immunity and the plea should have been granted.

The concurring and dissenting opinion divided the issues up into three groups of plaintiffs. The concurring portion agreed the groups who did not have exempt property or those who were added later were not entitled to relief. However, the dissent believes the Plaintiffs who had exempt property and were parties in Rourk II, should be entitled to attorney's fees under the ultra vires exception.

***University of Tex. M.D. Anderson Cancer Ctr. v. Jones*, No. 14-15-00266-CV, 2016 WL 269160 (Tex. App.—Houston [14th Dist.] Jan. 21, 2016)**. This is a negligent use of tangible personal property case where the Fourteenth Court of Appeals held that dispensing prescribed medications to a patient waives sovereign/governmental immunity.

Karen Jones was a smoker who participated in a blind study of a drug combination expected to help people stop smoking. Jones notified the study's candidate screener of her depression and her adverse reaction to Chantix (one of the two drugs in the combinations) when she applied for the study. In the study, Jones was placed in a partial control group; she was prescribed Chantix and a placebo of the second drug. Afterwards, Jones attempted suicide. She survived but with permanent injuries. She sued the University of Texas M.D. Anderson Cancer Center (UTMDA) alleging it negligently prescribed and dispensed the drug to her, which is what caused her depressed state and suicide attempt. UTMDA filed a plea to the jurisdiction which was denied. UTMDA appealed.

The court first noted the negligent use of information is not a waiver of immunity. However, UTMDA physically handed Jones the drugs, which are tangible personal property. The court then held dispensing the drug into Jones' possession is a "use" of the drug. Next, the court noted that for immunity to be waived the requirement of causation by tangible personal property is more than mere involvement. However, Jones alleged and offered expert evidence that her suicide attempt was "proximately caused by the use of tangible personal property, namely the [Chantix] that was prescribed and dispensed" by UTMDA. The court rejected the argument that it must be the "direct" cause of the injury. The court determined "evidence show a nexus between UTMDA's prescribing and dispensing Chantix and the injuries the drug allegedly caused Jones." Therefore, the panel concluded the pleadings indicate sufficient jurisdiction that a waiver of immunity exists.

***Tavira v. Texas Dep't of Criminal Justice*, No. 07-14-00046-CV, 2016 WL 736062 (Tex. App.—Amarillo Feb. 24, 2016) (mem. op.).** This is a Texas Tort Claims Act (Act) case where an inmate was injured by a lift machine when performing acts as part of the prison's community service squad.

Tavira was an inmate incarcerated in Childress County. He was on the community service squad and was assisting with installing netting to prevent foul balls from hitting spectators. He was instructed by guards to retrieve ties to hold the netting which were located on the opposite side of a boom on the lift machine. While retrieving the ties, the machine tipped forward, striking and pinning him. As a result, he is a paraplegic paralyzed from waist down. Tavira sued the Texas Department of Criminal Justice (TDCJ) alleging various acts of negligence. The TDCJ filed a plea to the jurisdiction which was granted. Tavira appealed.

Under the Texas Tort Claims Act, the TDCJ can be liable for the negligent operation of motor driven equipment (i.e., the lift machine) by an employee. It is undisputed that inmate Altamira was operating the telehandler when Tavira was injured. Tavira alleged Altamira was the TDCJ's "agent." The court found no case law indicating that an inmate on work detail meets the Act's definition of an employee. In 1995, the Legislature added Section 101.029, which provides a waiver of the TDCJ's immunity for damage or injury caused under some circumstances by the negligence of a prison inmate not applicable here. However, this addition would be unnecessary if inmates qualified as "employees." The guard's direction, alone, is also insufficient to establish the negligent operation of the lifter qualifying as a waiver as there is no waiver for negligent supervision. Further, nothing indicates Tavira was provided property which lacked an integral safety component. The failure to provide a helmet to perform work is different than providing

property which is defective. No waiver exists and more detailed pleadings would not cure the defects. As a result, the plea was properly granted.

***Jefferson Cnty. v. Akins*, No. 09-14-00017-CV, 2016 WL 747477 (Tex. App.—Beaumont Feb. 25, 2016).** This is a Texas Tort Claims Act slip and fall case in a county jail. The jury awarded Akins damages and Beaumont Court of Appeals affirmed.

Akins, a Mid-State Services, Inc. employee working at the Jefferson County Jail, slipped and fell while leaving the jail after her shift ended. She was in control of the kitchen area of the jail and supervised between eight and twenty-two inmates in food preparation. When inmates took prepared food down the hall on trays, sometimes water would spill down the cart and onto the floor. After her shift was over and she was leaving, Akin noticed a county employee mopping the floor some ways away. Akins testified that she spoke to the employee as she walked through the doorway and then her foot hit something slippery on the floor. She fell and was injured. The mop bucket had a sign noting the floor area was slippery. Witnesses said the floor appeared damp and wet but the employee who was supervising the mopping testified the floor where Akins fell was not wet. After a jury returned a verdict for Akins, the county filed a motion for judgment notwithstanding the verdict which was denied. The county appealed.

The county argues the evidence is legally and factually insufficient to support the jury's findings. In evaluating a factual sufficiency (insufficient evidence) challenge, courts consider and weigh all of the evidence, not just the evidence that supports the finding. Akins alleged and argued at trial that the county failed to warn her of a dangerous condition that created an unreasonable risk of which the county was aware and she was not. A number of Texas courts have found that indoor wet floors can pose an unreasonably dangerous condition. While the parties dispute whether there was water on the floor, sufficient evidence exists for a reasonable trier of fact to conclude water existed and was the cause of Akin's fall. The jury could also have disbelieved the employee's statement of knowledge and sufficient evidence exists for a reasonable jury to believe the county crew had mopped the area and knew of the dangerous condition. Next, a jury could have reasonably concluded Akins did not have knowledge of the slippery area prior to her fall and had no proportionate responsibility for the injuries. Finally, the damages were proper.

The dissent asserts the evidence is legally insufficient to establish the county had actual knowledge of a dangerous condition. Proximity to a defect is not knowledge of the defect or that it is dangerous. Further, the county is under no obligation to warn a plaintiff of a condition they are responsible for; Akin testified part of her responsibilities included ensuring clean-up of spills while delivering food.

***City of San Antonio v. Tenorio*, No. 04-15-00259-CV, 2016 WL 328073 (Tex. App.—San Antonio Jan. 27, 2016) (mem. op.).** This is a high-speed chase/Texas Tort Claims Act case, where the Fourth Court of Appeals denied a plea to the jurisdiction holding a fact question exists as to actual notice. San Antonio Police Department (SAPD) was involved in a high speed pursuit wherein the fleeing suspect entered a freeway going the wrong way. On entry onto the freeway, SAPD stopped pursuit; however, the suspect continued driving and struck Roxana and Pedro Tenorio. The plaintiffs sued the city which filed a plea to the jurisdiction asserting it failed to receive notice under the city's charter. The trial court denied the plea and the city appealed. The

majority held the police investigative report determined that the pursuit by police was a contributing factor to the Tenorios' injuries. As a result, there was evidence of a fact issue as to whether the SAPD was subjectively aware that it played a role in producing or contributing to the plaintiffs' injuries. The majority held the crash report need not indicate that SAPD acted unreasonably, but must only provide a "subjective signal" to the city "that there might be a claim, even if unfounded, at issue." In a dissenting opinion, Justice Pulliam noted that to raise a fact issue regarding a city's subjective awareness of its potential fault the evidence must at least imply or provide some indication of fault. The dissent found that because the police officers ceased pursuit of the fleeing suspect and because case law holds "pursuit alone is insufficient to place a City on actual notice" the trial court lacked jurisdiction.

***City of El Paso v. Collins*, No. 08-14-00319-CV, 2016 WL 240882 (Tex. App.—El Paso Jan. 20, 2016).** In this case, plaintiffs brought a premises liability and negligent use action against the city after their child suffered injuries at a city swimming pool. The trial court denied the city's plea to the jurisdiction and the city appealed.

In this case (the second interlocutory appeal), the court held that plaintiffs sufficiently alleged that the city had subjective knowledge that dangerous conditions existed at the pool on the day of the accident, as would be required under the Recreational Use Statute. The court also held that the alleged condition of the pool (a malfunctioning drain) constituted a hidden defect capable of supporting a determination that the city had a duty to warn or rectify thus, potentially precluding the city's plea to the jurisdiction as to the premises liability claim, and that claim was dismissed for lack of jurisdiction. Finally, the court held that the parent's negligent use claim under the Tort Claims Act was not a separate, valid claim from the plaintiffs' premises liability claim. The case was affirmed in part, reversed in part, and remanded for further proceeding on the premises liability claim.

***City of San Antonio v. Tenorio*, No. 04-15-00259-CV, 2016 WL 328073 (Tex. App.—San Antonio Jan. 27, 2016) (mem. op.).** This is a high-speed chase/Texas Tort Claims Act case, where the Fourth Court of Appeals denied a plea to the jurisdiction holding a fact question exists as to actual notice. San Antonio Police Department (SAPD) was involved in a high speed pursuit wherein the fleeing suspect entered a freeway going the wrong way. On entry onto the freeway, SAPD stopped pursuit; however, the suspect continued driving and struck Roxana and Pedro Tenorio. The plaintiffs sued the city which filed a plea to the jurisdiction asserting it failed to receive notice under the city's charter. The trial court denied the plea and the city appealed. The majority held the police investigative report determined that the pursuit by police was a contributing factor to the Tenorios' injuries. As a result, there was evidence of a fact issue as to whether the SAPD was subjectively aware that it played a role in producing or contributing to the plaintiffs' injuries. The majority held the crash report need not indicate that SAPD acted unreasonably, but must only provide a "subjective signal" to the city "that there might be a claim, even if unfounded, at issue." In a dissenting opinion, Justice Pulliam noted that to raise a fact issue regarding a city's subjective awareness of its potential fault the evidence must at least imply or provide some indication of fault. The dissent found because the police officers ceased pursuit of the fleeing suspect and because case law holds "pursuit alone is insufficient to place a City on actual notice" the trial court lacked jurisdiction.*

***City of San Antonio v. Casey Indus., Inc*., No. 04-14-00429-CV, 2016 WL 320504 (Tex. App.—San Antonio Jan. 27, 2016) (mem. op.).** In this opinion, the San Antonio Court of Appeal withdraws its original opinion and judgment of July 1, 2015, and substitutes this opinion and judgment. In 2014, the City Public Service Board of San Antonio (CPS Energy) contracted with Casey Industrial, Inc. (Casey) and Wheelabrator Air Pollution Control, Inc. to add pollution control systems to their power stations. After a dispute between the parties, Casey sued CPS Energy for various causes of action, including breach of contract. The trial court granted Casey's motion for partial summary judgment, which this Court of Appeals heard and then remanded back to the trial court. After remand, CPS Energy filed a motion to dismiss, asserting that Casey's breach of contract claim is outside the contract and the breach of contract claim must be dismissed. The trial court denied the motion, and CPS Energy filed this appeal. The San Antonio Court of Appeals cited *Zachry Const. Corp. v. Port of Houston,* 449 S.W.3d 98 (Tex. 2014), in noting that CPS Energy's waiver of immunity does not depend on whether Casey will prevail on its claim. Further, the court states that because Casey was able to show a substantial claim that meets the Local Government Contract Claims Act, Local Government Code Chapter 271, the trial court properly denied CPS Energy's motion to dismiss. The court affirmed the trial court's judgment.

***United Healthcare Choice Plus Plan for City of Austin Employees v. Lesniak*, No. 03-15-00309-CV, 2015 WL 7951630 (Tex. App.—Austin, Dec. 1, 2015) (mem. op.).** In this interlocutory appeal, the City of Austin and its self-funded employee health-insurance plan challenged the trial court's order denying their plea to the jurisdiction asserting governmental immunity. The underlying controversy stems for a denial of benefits to a city employee named Charles Lesniak. After the denial, Lesniak sued the city and the plan alleging the denial was improper, and the city filed a plea to the jurisdiction. The trial court denied the plea to the jurisdiction, and the City of Austin filed this appeal.

Lesniak argued that the city does not have governmental immunity in this case because the case involves a proprietary function of the city. The court of appeals concluded that in light of Government Code Chapter 2259's pronouncement that the provision of self-insurance funds is a governmental function that does not waive immunity and the holding in *Ben Bolt–Palito Blanco Consol. Indep. Sch. Dist. v. Texas Political Subdivisions Prop./Cas. Joint Self–Ins. Fund*, 212 S.W.3d 320, 325–26 (Tex. 2006), the City of Austin is immune from the lawsuit absent legislative waiver. The court reversed the trial court's order and rendered judgment dismissing Lesniak's claims.

***Texas Mun. League Joint Self-Ins. Fund v. Housing Auth. of the City of Alice, No.* 04-15-00069-CV, *2015 WL 5964182* (Tex. App.—San Antonio Oct. 14, 2015) (mem. op.)**. The housing authority is a member of a joint self-insurance pool called the Texas Municipal League Joint Self-Insurance Fund (pool), the purpose of which is to provide liability and property self-insurance coverage to political subdivisions. Under the pool's coverage documents, if the member and pool cannot agree on the amount of a loss under a covered claim, each shall select an appraiser. The appraisers shall select a disinterested umpire. If the appraisers do not timely select an umpire, one may be appointed by a judge in a court of record. The housing authority reported a claim for hail damage to its property. The housing authority felt the pool's evaluation of the amount of loss was insufficient and initiated suit to appoint an umpire. The pool filed a plea to the jurisdiction asserting it maintained immunity from any suit. The housing authority asserted that since this was not a

"suit" but merely a request for an appointment, immunity is not implicated. The trial court signed an order naming an umpire, which it termed as a final order. The pool appealed. The selection of an umpire by a judge in accordance with the terms of the property coverage document does not require the filing of a lawsuit or invoke the subject matter jurisdiction of a court. However, the housing authority did not merely ask a judge to select an umpire. It filed a lawsuit. The "Housing Authority sought and obtained an *order* of the district *court* that it now asks this court to affirm." Whether the pool is entitled to immunity or not, the mechanism and relief sought by the housing authority demonstrates a complete lack of jurisdiction of the court. There is no case-or-controversy in the relief sought. As a result, the district court's order is void.

***City of San Antonio v. Peralta,* No. 04–15–00254–CV, 2015 WL 5438910 (Tex. App.—San Antonio Sept. 16, 2015).** Osvaldo Peralta rode his bicycle to work along the San Antonio River Walk when his bicycle crashed into a sanitary and storm sewer drainage facility. Peralta was thrown off of his bicycle and suffered injuries. He sued the City of San Antonio and San Antonio River Authority (SARA) for damages. Peralta alleged that the city's immunity was waived under the premises defect and special defect liability provisions of the Texas Torts Claims Act. The city, though, argued that the recreational use statute applied.

Peralta argued that he was bicycling to commute to work, not for recreation, so the recreational use statute did not apply. The court recognized that Peralta's subjective intent with respect to the activity does not control. Instead, the activity he was engaging in when he was injured is what controls. Since he was bicycling when he was injured, the court concluded he was engaged in recreation and the recreational uses statute applied. Because the recreational use statute applied, the city owed a duty to Peralta to not injure him by gross negligence. The court concluded that Peralta alleged facts showing the city's gross negligence. Thus, the burden shifted to the city. Because the city failed to meet its summary judgment standard of proof, the trial court properly denied the city's pleas.

***Hale v. City of Bonham,* No. 06–15–00021–CV, 2015 WL 5577681 (Tex. App.—Texarkana Sept. 23, 2015).** Sidney Hale leased a hangar from the City of Bonham. After a large ice storm, the hangar's roof collapsed and caused damage to Hale's property. Hale sent a demand letter to the city requesting damages. After receiving the letter, the city filed a suit for declaratory judgment requesting a finding that Hale's claims were barred by governmental immunity. Hale filed counterclaims against the city. The city filed a motion for summary judgment that was granted by the trial court, and based on the motions for summary judgment, the trial court entered an order of dismissal of the suit. Hale appealed.

The court noted that operation and maintenance of an airport is among the list of governmental functions in the Texas Tort Claims Act (TTCA). The court then concluded that Hale's lawsuit for property damages alleged neither (1) that his damage resulted from the negligent operation or use of a motor-driven vehicle or piece of equipment nor (2) that it was a suit to recover damages for personal injury or death. Thus, the TTCA does not waive governmental immunity for Hale's claims.

The court also concluded that Hale's claims do not fall under the contract waiver provisions of Local Government Code Chapter 271. Since Hale did not show that by virtue of the lease agreement he was obligated to perform any service for the city or that he was to provide any goods,

the immunity waiver of Chapter 271 does not apply. Thus, the court affirmed the trial court's dismissal of the case.

***Riddle v. City of Abilene,* No. 11-14-00146-CV (Tex. App.—Eastland Oct. 1, 2015)**. This is a premise defect/Texas Tort Claims Act (TTCA) case where the Eastland Court of Appeals affirmed the granting of a plea to the jurisdiction for the city.

Riddle worked for the recreational league operated by the Abilene Slowpitch Softball Association. While working for the association, Riddle was at Nelson Park which is owned by the city. She went to turn off a score booth light and stepped on the plywood floor in the booth which collapsed. She sued the city for a premise defect. The city filed a plea to the jurisdiction which the trial court granted. Riddle appealed.

Riddle presented the affidavit of a carpenter as an expert who opined the score booth floor was improperly constructed. The joists underneath the floor were too far apart and since no weather stripping had been installed, the floor had been soaked by various rains. Riddle presented affidavits from other people stating the city had stored equipment under the booth so would have seen the spacing of the joists and the leaking from the rains. The city presented evidence that it neither designed nor constructed the booth or flooring. No one at the city was aware the floors had developed or posed problems and no prior incidents had been reported. The city performs maintenance on an "as-needed" basis at the parks and had no prior knowledge of defects. Under the premise defect waiver of immunity in the TTCA, the city is only liable if it had actual knowledge of a dangerous defect. This requires the city to know that the dangerous condition existed at the time of the accident and not merely of the possibility that a dangerous condition could develop over time. "A plaintiff cannot establish an owner's actual knowledge by piling inference upon inference." Riddle did not present any evidence that someone had made the city aware that the flooring was rotten or improperly constructed. All she presented was the possibility of a danger and an argument the city should have known it was there. That is insufficient. The plea was properly granted.

***City of Beaumont v. Garrett,* No. 09-15-00093-CV, 2015 WL 8468510 (Tex. App.—Beamont Dec. 10, 2015).** This is an interlocutory appeal from the denial of a plea to the jurisdiction in a Texas Tort Claims Act (TTCA) case in which the appellate court affirmed the trial court.

Garrett and Gates were driving separate cars that collided in an intersection in which a traffic light was out. The city admitted having received notice that the light was out approximately 30 to 90 minutes before the accident. Under the TTCA, a city is liable for operating and maintaining traffic signals only if the malfunction is not corrected within a reasonable time after notice. The city tried to argue that its duty was equivalent to that owed a licensee—the duty to use ordinary care to reduce or eliminate an unreasonable risk of harm after being notified. The city also tried to argue that the degree of hazard posed by the light malfunction was not unreasonable. The court rejected these arguments. Because there was no evidence about the nature of the problem with the light or how long it should have reasonably taken the city to correct the problem, the appellate court affirmed.

***City of Houston v. Kelley Street Assoc., L.L.C.*, No. 14-14-00818-CV, 2015 WL 7739754 (Tex. App.—Houston [14th Dist.] Nov. 30, 2015) (mem. op.).** This is an interlocutory appeal from the denial of a plea to the jurisdiction in a Texas Tort Claims Act (TTCA) case in which the Fourteenth Court of Appeals reversed and dismissed the plaintiff's claims.

Two water utility workers were dispatched to an area to deal with a flooded street. They utilized a backhoe to lift up a slab of concrete sidewalk to get to a valve and replaced it using various hand tools. Kelley sued the city alleging its office building was damaged by flooding after the city repaired a water meter and valves in front of its office building. Essentially, Kelley alleges that in using the backhoe (i.e. motor driven equipment), the workers loosened debris which entered the piping system rupturing the plumbing in its building, causing flooding and damage. The city filed a plea to the jurisdiction which was denied. The city appealed.

The Supreme Court of Texas has "consistently required a nexus between the operation or use of the motor-driven vehicle or equipment and a plaintiff's injuries" under the Texas Tort Claims Act. The city contends there was no nexus between the city's use of the backhoe and Kelley's alleged flooding because the backhoe was used only to remove the concrete sidewalk for access, was then shut down, and hand tools were used to open the pipe. For liability to attach, the use of motor-driven equipment must have actually caused the injury. After analyzing the facts, the court held the operation of the backhoe did no more than furnish a condition making the alleged damages possible. The court focused on the fact hand tools were used primarily to get at the pipe and valve and the backhoe simply lifted the sidewalk to allow access. Even if the backhoe dislodged rocks, dirt, and debris, the operation and use of the backhoe did not cause the debris to enter the open pipe. When the city's workers ceased using the backhoe, the wheel valve had not yet been removed and the pipe had not yet been exposed for any rocks or debris to enter. Use of the hand tools exposed the pipe and created an opportunity for entry of rocks or debris. As a result, there is no waiver of immunity and the claims were dismissed.

***Sides v. Texas Dep't of Criminal Justice*, No. 01-15-00004-CV, 2015 WL 6692136 (Tex. App. —Houston [1st Dist.] Nov. 3, 2015) (mem. op.).** This is a Texas Tort Claims Act (TTCA)–inmate suicide case in which the First Court of Appeals affirmed the granting of the Texas Department of Criminal Justice's (TDCJ) plea to the jurisdiction. Thomas Middleton (Sides' son) was an inmate housed in TDCJ's psychiatric facility. During an afternoon check of a recreational dayroom restroom, TDCJ guards discovered that Middleton had committed suicide by hanging. Sides alleges that TDCJ was negligent in: (1) constructing a privacy wall around the restroom area of the dayroom that was too high; (2) providing him with a hooded sweatshirt with a drawstring; and (3) failing to modify the toilet handrail to prevent suicides. The TDCJ filed a plea to the jurisdiction which the trial court granted. Sides appealed.

Under the TTCA, a governmental entity does not "use" property by allowing someone else to use it and nothing more. Nor does the non-use of property waive immunity. *Texas Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583 (Tex. 2001). And while Sides is correct that the lack of an integral safety component in government property that causes a plaintiff's injuries can be sufficient to allege a waiver of immunity, the allegation must be one in which the plaintiff put the property to its intended and ordinary use. The draw string was not used for its intended use, as its ordinary use is not to hang oneself. When a drawstring and handrail are used in their intended manner, they

do not present the risk associated with Middleton's death. Additionally, being no dispute as to the cause of death and facts, Sides was not entitled to an ability to amend. Finally, the Supreme Court of Texas has declined to recognize the existence of a "constitutional tort" remedy, so Sides' declaratory judgment claim seeking a declaration of a deprivation of a constitutional right is not supportable. No future conduct can be enjoined for Sides. As a result, the plea was properly granted.

GOVERNMENT IMMUNITY – CONTRACT

***Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, No. 15-0029, 2016 WL 1514542 (Tex. April 15, 2016)**. This Supreme Court of Texas proprietary/governmental dichotomy case regarding contracts holds that a public utility contract at issue is a proprietary function not protected by immunity.

This is the Supreme Court's opinion designed to put to rest several interpretations and varying courts of appeals' opinions on the subject of proprietary/governmental aspects in contracts. This case follows on the heels of *Wasson Interests, Ltd. v. City of Jacksonville*, No. 14-0645, 2016 WL 1267697 (Tex. Apr. 1, 2016) where the court held the proprietary/governmental dichotomy does exist in contract cases. Wheelabrator Air Pollution Control, Casey Industrial, Inc., and CPS Energy (the City of San Antonio's electrical utility board), entered into a contract for the design and construction of part of a coal-fired power station owned and operated by CPS Energy. Wheelabrator completed all portions of its work but CPS Energy notified Wheelabrator that it was withholding the retainage because of a dispute between Casey Industrial and CPS Energy. Wheelabrator filed suit against CPS Energy alleging breach of contract. After going up and down the appellate chain, with several opinions on the subject, the appellate courts ultimately decided the trial courts had jurisdiction for the claims. CPS Energy then filed a plea to the jurisdiction arguing there is no waiver of immunity for attorney's fees. Wheelabrator argued CPS Energy was performing a proprietary function under the contract. The trial court granted CPS Energy's plea to the jurisdiction and dismissed with prejudice Casey Industrial's and Wheelabrator's claims for attorney's fees. Wheelabrator sought interlocutory review and the case ended up with the Supreme Court.

The Court started out by stating "[t]his contract-claims case requires us to determine whether a claim for attorney's fees for breach of a contract to install pollution control equipment at a power plant is proprietary or governmental in nature." The court noted its own precedent has held that a city's operation of its own public utility is a proprietary function. *San Antonio Indep. Sch. Dist. v. City of San Antonio*, 550 S.W.2d 262, 264 (Tex. 1976). Furthermore, the Texas Tort Claims Act (TTCA), which the Court has previously deferred to when classifying functions in contract disputes, lists operation of a public utility as a proprietary function. *See* TEX. CIV. PRAC. & REM. CODE § 101.0215(b)(1). CPS Energy is a municipally-owned electric and gas utility. It executed the agreement under which Wheelabrator would provide goods and services for the design and construction of pollution control equipment for a coal-fired power station that CPS Energy owns and operates. Both the common-law precedent and the TTCA have classified a city's operation and maintenance of a public utility as a proprietary function. Under these facts, the court concluded that CPS Energy is not shielded by governmental immunity. Here, the attorney's fees claim stems directly from *Wheelabrator*'s breach-of-contract action. As a result, no immunity is triggered.

***Wasson Interests, Ltd. v. City of Jacksonville*, No. 14-0645, 2016 WL 1267697 (Tex. Apr. 1, 2016)**. This is a proprietary-governmental dichotomy in contracts case where the Texas Supreme Court ruled the dichotomy does exist within the context of breach of contract disputes.

In the 1990s, the Wassons assumed an existing 99-year lease of lakefront property owned by the City of Jacksonville. The lease specifies, among other things, that the property is to be used for residential purposes only. After living on the property for several years, the Wassons moved and conveyed their interest in the lease to Wasson Interests, Ltd. (WIL). WIL then began renting the property for terms of less than one week, which the city asserted violated the terms of the lease. After the city and WIL entered into a settlement lease (restricting rentals to families for more than 30 days) the dispute was abated. However, in 2011, the city asserted WIL violated the lease and sent an eviction letter. WIL sued for breach of contract, seeking injunctive and declaratory relief. The city moved for summary judgment on governmental immunity grounds which the trial court granted. Following the San Antonio Court of Appeals opinion in *City of San Antonio v. Wheelabrator Air Pollution Control, Inc.*, 381 S.W.3d 597 (Tex. App.—San Antonio 2012, pet. denied), the Tyler court rejected WIL's argument the lease contract was a proprietary function not entitled to immunity protection. WIL appealed.

The court began by going back to the time Texas first joined the union and recognized sovereign immunity as a concept. It tracked immunity through the years and the changing policy reasons for it. It recognized a city is not a freestanding sovereign with its own inherent immunity, but only acts which are governmental in nature are immune. It likened the proprietary element to that of ultra vires acts, which are acts not authorized for governmental purposes or under the law. Additionally, the court utilized a two-step process for determining immunity's attachment: 1) the judiciary determines the applicability of immunity and delineates its boundaries, and if immunity applies then 2) the judiciary defers to the legislature to waive that immunity. In other words, governmental immunity is a creature of common law and the courts define when it applies. Once the courts defined where immunity applies, then the legislature decides if it is waived. The courts previously determined immunity applies to governmental functions only and not to proprietary functions. A city's immunity can extend as far as the state's immunity but no further. The state cannot perform proprietary functions, but a city can. By definition, proprietary functions are not those performed for the benefit of the people. This divergence exists regardless of whether one is talking about a tort or contract. Chapter 271 of the Local Government Code (waiving immunity for municipalities in certain contractual contexts) does not abrogate the common-law dichotomy. It merely waives immunity for certain contracts where immunity already exists. However, the trial court never considered whether the lease was proprietary or not. Therefore, the case is remanded to make that consideration.

***City of El Paso v. Waterblasting Techs., Inc.*, No. 08-15-00130-CV, 2016 WL 1465691 (Tex. App.—El Paso Apr. 13, 2016)**. This is an appeal from the denial of a city's plea to the jurisdiction where the Beaumont Court of Appeals reversed the lower court. In this case, an unsuccessful bidder, Waterblasting Technologies, Inc., (WTI) and a city resident, Thomas G. Wicker, Jr., (Wicker) sought a declaration that a bid contract awarded by the city was void and an injunction to prevent performance of the contract.

WTI and Wicker claimed that the city awarded a contract for a "water blasting unit" to remove paint and rubber deposits from airport runways in violation of the competitive sealed bidding

requirements in Chapter 252, Local Government Code. They argued governmental immunity was waived by Local Government Code Section 252.061 and that city council representatives were not entitled to immunity because they had committed an ultra vires act in voting to award the contract. The city filed a plea to the jurisdiction arguing, among other things, that the claims were moot; it was denied by the trial court and this appeal followed.

Using the Supreme Court of Texas's four-prong analysis in *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp*., 283 S.W.3d 838, 842 (Tex. 2009), the appellate court held that Section 252.061, Local Government Code, does "waive governmental immunity of a municipality for a party with standing under the statute to sue the municipality for declaratory relief that the contract is void and injunctive relief to prevent enforcement of a void contract and to prevent payment of money under that void contract." The court explained that two classes of plaintiffs have standing to sue under Section 252.061: "(1) any property tax paying resident of the municipality; or (2) a person who submitted a bid for a contract for which the competitive sealed bidding requirement applies, regardless of residence, if the contract is for the construction of public works." In this case, the court held that Wicker had standing as a property taxpaying resident, rejecting the city's argument that Wicker had no standing because the funds used for the water blasting unit were not tax dollars but revenue from the airport enterprise fund. And after discussing the meaning of the phrase "construction of a public work," the court held that WTI did not have standing because this contract involves the procurement of equipment and is not for the construction of a public work.

The court then concluded that the plaintiffs' claims for declaratory relief and injunction are moot because the contract in question has been fully performed. As for plaintiffs' request that any payments made by the city should be refunded, the court notes that such relief is not available under Section 252.061.

Finally, the court takes up plaintiffs' ultra vires claims against the mayor and city council. In an ultra vires action, a plaintiff may not seek money damages and may seek only prospective rather than retrospective remedies. Here, the contract has been fully performed so the city officials are not committing any ongoing violations of Chapter 252. The only thing plaintiffs could ask at this time is a declaration that an already-performed contract is void, a remedy the court says is both moot and retrospective and thus, not permitted in an ultra vires action. The court dismissed the claims against the city officials. The trial court's order denying the city's plea to the jurisdiction is reversed and the claims against the city officials are dismissed with prejudice.

***City of San Antonio v. Tommy Harral Const., Inc.*, No. 04-15-00286-CV, 2016 WL 327886 (Tex. App.—San Antonio Jan. 27, 2016).** In this interlocutory appeal, the City of San Antonio challenges the trial court's denial of its motion for summary judgment. The court discusses Section 51.014(d) of the Texas Civil Practices and Remedies Code and the rule that appellate courts generally only have jurisdiction over final judgments unless a statute provides otherwise. Additionally, the court notes that to invoke the court's permissive-appeal jurisdiction, the trial court is required to make a substantive ruling on the controlling legal issue to be appealed. The court of appeals recognizes that the court is being asked to determine a different legal question than the legal question that the trial court could have determined through their ruling on the city's summary judgment. Therefore, the San Antonio Court of Appeals concluded that the appeal must be dismissed for lack of jurisdiction because the trial court's order denying the motion does not

affirmatively state the trial court's substantive ruling on the specific legal issue presented, and the court of appeals cannot infer the trial court's substantive ruling from the record.

***Texas Transp. Comm'n v. City of Jersey Village*, No. 14-14-00823-CV, 2015 WL 6081972 (Tex. App.—Houston [14th Dist] Oct. 15, 2015).** The Texas Department of Transportation is widening U.S. Highway 290 to include additional lanes which requires the acquisition of public right-of-ways. The improvement project likely will require the relocation of two additional utility lines owned by the City of Jersey Village. Texas Transportation Code Section 203.092(a) provides, in relevant part, that the state shall pay for the relocation of a utility facility if the relocation is required by improvement of any segment of the state highway system and the utility "has a compensable property interest in the land occupied by the facility to be relocated." Because the city contends that it has a compensable property interest in its utility easements, it requested the department to pay for the relocation of its utility lines. While the parties entered into a partial settlement for removal of the lines, the department refused to agree to pay for the costs of obtaining new easements for placement of new lines. The city sued. The department filed a plea to the jurisdiction which was denied. The trial court granted summary judgment for the city.

The city's "request for declaratory relief" is nothing more than an *ultra vires* claim contending that the Texas Transportation Commission, a state agency, and Houghton, a state official, have refused to perform a ministerial act by refusing to pay certain relocation costs that the city contends are owed. The commission is immune from *ultra vires* claims. The court then turned to statutory construction principles to determine if Houghton failed to follow a ministerial duty under Section 203.092. The dispute centers on whether the city has a compensable property interest in its easements, and whether replacement easements are costs that are "properly attributable to the relocation." The court first held that the city does have a compensable property interest in the easements. Thus, the city is entitled to costs, but only those properly attributable to the relocation. After analyzing the text, the court held the costs for replacement easements are not costs "properly attributable to the relocation." As a result, Houghton did not fail to perform a ministerial act and is not required to reimburse the city for replacement easements.

***J.R.'s Landscaping & Sprinkler Sys., Inc. v. City of Crosbyton*, No. 07-14-00019-CV, 2015 WL 5560002 (Tex. App.—Amarillo Sept. 21, 2015) (mem. op.).** J.R.'s Landscaping and Sprinkler Systems, Inc. (J.R.'s) was hired by the city to construct some sidewalks, curbs, and related facilities. The city was dissatisfied with the work and disagreed with the engineer ("owner's representative") that the work was substantially complete. The city never formally accepted the work or paid the final amount owed on the contract. J.R.'s brought suit against the city alleging breach of construction contract. The city brought a counterclaim asserting failure to perform. Each sought damages. The trial court awarded the city its damages for the cost of completion of the project. J.R.'s appealed.

J.R.'s argues that acceptance of the project by the owner's representative was conclusive and binding on the city. The court rejected this as the only reading of the contract, pointing out that one portion of the contract provides that final payment was to be made "[a]fter final inspection and acceptance by the Owner." And another section of the contract indicates that the owner's representative will *recommend* action to the owner. J.R.'s also argues that there is no evidence that it materially breached the contract and relies on the evidence that the owner's representative

concluded the work was substantially complete. Having rejected the assertion that the owner's representative had final and binding authority over the quality of the work, the issue is overruled. The trial court's judgment for the city is affirmed.

LAND USE

***Town of Lakewood Village v. Bizios*, No. 15-0106, (Tex. May 27, 2016).** The Supreme Court of Texas was presented with the question of whether a general law, type A city, has authority under state law to impose building codes in the ETJ. The Court held that general law cities do not have this authority.

The Town of Lakewood Village ("Town") is a general law type A city whose building code ordinance extended to its extraterritorial jurisdiction ("ETJ"). Bizios wanted to build a home in the Town's ETJ and received the necessary approval from the county. The Town told Bizios he had to meet the Town's building code as well when building his home. Bizios objected to the Town's enforcement of its building code against his property. The Town filed suit against Bizios when he refused to stop construction on his home pursuant to the Town's order. The Town prevailed in the trial court, but the court of appeals held against the Town. The Town filed a Petition for Review in the Supreme Court of Texas, and the Court granted the petition. Multiple cities and the Texas Municipal League wrote briefs in support of the Town's authority arguing that the Town has the authority under state statute, as well as policy arguments including that cities need the right to impose building codes in the ETJ to protect the property values within the city as well as the safety of those who live right outside city limits. Multiple developers groups filed briefs arguing that cities do not have this authority and that such an imposition of building codes was just a money grab.

The Court reviewed the statutory arguments for authority, and read each statute as not giving general law cities the authority to regulate building in the ETJ. First, the Court discussed the difference between a home rule city's and a general law city's authority in the standard way. Home rule cities receive their authority from the Texas Constitution and can do anything unless limited by state law or themselves. General law cities may only do what they have express or implied authority to do under state statute. The Court held:

Section 214.212[1] (Building Codes)	Authority to enforce building codes in the city limits, but not the ETJ. P. 5[2]
Section 212.002 and 212.003 (Plats and Subdivisions)	"[t]he terms "plat" and "subdivision" to refer to the division and development of land, not to the subsequent construction of buildings on such land." P. 9
Sections 214.904 and 233.153	While these statutes indicate that some cities have this authority, "they do not expressly grant such authority themselves, and the Town

[1] Each reference in this chart is to the Texas Local Government Code unless otherwise noted.

[2] Page number references are to the slip opinion available at http://www.txcourts.gov/media/1378446/150106.pdf.

	does not rely on any other statutes." P. 11 Also, "the mere reference to "municipalities" does not qualify as an independent grant of authority to all types of municipalities, but instead only refers to municipalities of any type that otherwise have such authority." P. 12
Section 42.001 (Creation and Purpose of ETJs)	While this statute does give cities the authority to regulate for the health and welfare of residents of the city and the city's ETJ, allowing the enforcement of building codes in the ETJ were not "necessary" or "indispensable" to their other authority. P. 13

The Court spoke of the implied powers of general law municipalities in very narrow terms. It held that general law cities had two types of regulatory authority: (1) express powers; and (2) implied powers that were necessary and indispensable to their express powers. And when trying to assuage the fears of cities that they were losing all of their power in the ETJ the Court held:

> Our holding does not affect any "long-recognized powers in the Local Government Code," and whether general-law municipalities have such powers depends on whether the Code expressly grants such municipalities those powers.

The Court was referring to specific statutes that give cities express authority in this quote, but the Court's direction is a bit ominous for cities attempting to argue "implied" authority in the future. The Court also talked about some of the public policy arguments raised by both sides, but stated it was sticking to its statutory interpretation. The Court affirmed the court of appeal's judgment that the Town has no authority to regulate building codes in the ETJ.

Coyote Lake Ranch, LLC v. City of Lubbock, **No. 14-0572 (Tex., May 27 2016).** The Supreme Court of Texas reviewed whether the doctrine of accommodation, typically used in oil and gas extraction, apply to groundwater extraction. The Court also held that the injunction imposed by the trial court was too broad and an abuse of discretion.

The Court held that the doctrince of accommodation does apply to groundwater extraction because of its similarity to oil and gas extraction. The City of Lubbock (City) purchased groundwater from Coyote Lake Ranch (Ranch) and the Ranch deeded its groundwater to the City for domestic use, ranching operations, oil and gas operations, and agriculture. The deed stated that the City had "the rights to use all that part of [the Ranch] necessary or incidental to the taking, production, treating, transmission, and delivery of… water". In 2012, the City announced plans to add 60 additional water wells; the Ranch objected that the proposed drilling program would "increase erosion and injure the surface unnecessarily". The City argued that it was acting within the "broad rights granted by the deed". The Ranch argued that the City had a common law responsibility to use only the amount necessary to its operations and a duty to conduct its operations with regard to the surface owner. The trial court initially granted an injunction for the Ranch, protecting the Ranch from City drilling for water without consulting plaintiffs first. The injunction was reversed by the Court of Appeals, 7th District.

In Texas, a land owner can separate the mineral estate from the surface estate and allows for the owner to lease it or transfer it separately. The new owner or lessee of the mineral estate can utilize as much of the surface estate as reasonably necessary to produce the minerals, recognizing that the mineral estate was *dominant* and the surface estate is *servient*. However, the Common Law Accommodation Doctrine calls for the owner of the mineral estate to use the surface estate while exercising regard for the landowner's rights. Given that the rights to access groundwater is very similar to accessing minerals (the owner of the groundwater rights can access the surface estate as necessary), the Accommodation Doctrine was extended to the use of groundwater. Hence, the City has to exercise its right to access the groundwater with regard to the Ranch's use of the surface estate.

***Board of Adjustment of the City of San Antonio v. Hayes*, No. 04-15-00021-CV, 2016 WL 929220 (Tex. App.—San Antonio Feb. 24, 2016) (mem. op.)**. This is a board of adjustment (BOA) case where the Fourth Court of Appeals held the BOA had jurisdiction to hear a second, but materially different, appeal regarding a fence.

Director of the city's development services department revoked a permit issued for the construction of a metal railing citing the permit was issued in error because the BOA previously determined the railing would be a sports court/tennis court fence subject to a 20 foot setback requirement. The homeowner, Torres, appealed to the BOA which unanimously rescinded the revocation and permitted the fence without the 20 foot setback. Hayes, Torres' neighbor, sued the BOA asserting it lacked authority to permit the fence without the setback because he had won the previous BOA appeal holding the fence was part of a sport's court. The trial court held the BOA lacked jurisdiction over the appeal and reversed the BOA decision allowing the fence. The BOA appealed.

Judicial review of a BOA decision is by filing a writ of certiorari asserting the decision by the BOA is illegal. However, a BOA decision can be collaterally attacked by asserting the BOA lacked jurisdiction in the first place. The court interpreted the Hayes judicial review as a collateral attack because Torres failed to appeal the original decision in the trial court. However, although the second application for the railing was essentially the same as the first application, Torres amended the second application during the course of the BOA's proceeding altering its design. As a result, it became materially different than the first application and the trial court errored in concluding the BOA did not have jurisdiction to hear the change.

***City of Anahuac v. Morris*, No. 14-15-00283-CV, 2015 WL 9249830 (Tex. App.—Houston [14th Dist] Dec. 17, 2015, pet. filed)**. The City of Anahuac adopted an ordinance that regulates the placement of mobile homes and manufactured homes. Among other things, the ordinance prohibited a manufactured home that did not meet Wind Zone III specifications from being located in the city limits, and required the owner of a manufactured home complying with Wind Zone III specifications to receive a permit from the city to locate in the city limits. In 2013, Wayne Morris placed a manufactured home on his property without a permit. The city informed Morris that he had violated the city's ordinance, and did not issue a permit due to unspecified deficiencies that Morris was unable to cure.

Morris filed suit seeking a declaration that the ordinance was preempted by state statute. The court rendered a declaratory judgment in favor of Morris that stated the following: "It is therefore

ordered and declared that the language 'Zone 3 or better specifications' of [the ordinance] is invalid, illegal, and unconstitutional." The city appealed.

On appeal, the city argued that the trial court erred because there was no justiciable controversy since nothing in the record established either the standard under which Morris' manufactured home was constructed or the age of the home. The court disagreed, concluding that the city's enforcement of the ordinance created a justiciable controversy and Morris' suit sought to resolve the controversy.

In addition, the city argued that the trial court erred by granting Morris' declaratory judgment because the ordinance is valid and not preempted by state statute. Morris' preemption argument relied on Texas Occupations Code Section 1201.256(c), which provides: "A manufactured home constructed before September 1, 1997, may be installed in a Wind Zone I or II county without restriction." The city is located in Chambers County, which is considered to be a Wind Zone II county under Occupations Code Section 1201.256(a). Because the manufactured home in question was constructed in 1996 and Chambers County is a Wind Zone II county, the court held that there is a direct conflict between the city's ordinance and Section 1201.256. Further, the court stated that the city's use of its police powers cannot supplant or take supremacy over a contrary act of the state legislature. The court concluded that Morris carried his burden of showing that the city's ordinance is preempted as to his manufactured home.

Nevertheless, the court also held that the trial court's declaratory judgment was overbroad. The court modified the trial court's judgment to state that the city's ordinance is preempted and unenforceable as to a manufactured home constructed before September 1, 1997.

***Board of Adjustments of the City of Spring Valley Vill. v. Sumner*, No. 01-14-00888-CV, 2015 WL 6163066 (Tex. App.—Houston [1st Dist.] Oct. 20, 2015) (mem. op.)**. Sumner sued the city and its board of adjustment based on a variance decision made by the board of adjustment and various code enforcement decisions made by the city.

Sumner's neighbors built an addition to their home which Sumner argued violated city ordinances. The neighbors applied for and received a variance but Sumner found additional things wrong with their property. Sumner filed various suits in federal court against the city and his neighbors, which were disposed of. In this suit he argues that: (1) the variance was based on insufficient evidence; (2) the board was incorrect in upholding the building official's grant of a certificate of occupancy to his neighbors; (3) his constitutional rights were violated because he was not able to participate fully in the board's hearing; and (4) his due process rights were violated by various ordinances adopted by the city. Finally, Sumner argued that the trial court did not issue a final judgment because it did not address all of his claims.

First, the court of appeals held that the trial court's grant of the motion for summary judgment and plea to the jurisdiction addressed all claims and parties. As to the variance decision, the court of appeals upheld the board's variance grant based on Section 211.009 of the Local Government Code and the city's variance ordinance, both of which give the board broad discretion in granting a variance. Sumner's claim on the certificate of occupancy also failed because he failed to exhaust his administrative remedies by not going before the board to protest the city's grant of the

certificate of occupancy to the neighbors before heading to court. For his claim of a property interest in the enforcement of zoning ordinances against his neighbors, the court of appeals quoted the federal court judge who stated that "an individual has no protected property interest in the continued use of his property for a particular purpose just because such use has commenced or an initial zoning classification has been made." *Sumner v. Board of Adjustments of the City of Spring Valley Vill.*, No. H-12-2551, 2013 WL 1336604 (S.D. Tex. Mar. 29, 2013). Finally, the court held that Sumner's constitutional claims against the city's adoption of various zoning ordinances were invalid because the city's ordinances are not capricious, arbitrary, or unreasonable. The court of appeals affirmed the trial court's judgment in favor the city.

OPEN GOVERNMENT

***The Austin Bulldog v. Leffingwell*, No. 03-13-00604-CV, 2016 WL 1407818 (Tex. App.—Austin Apr. 8, 2016)**. The Austin Bulldog filed Public Information Act (PIA) requests with the City of Austin requesting public information contained in emails between the mayor, council members, and the city manager. The broad requests encompassed all emails involving city business whether transmitted on a city or personal device and/or email address. The city produced some of the requested information and sought an attorney general ruling on some of the documents. After receiving an attorney general ruling that the documents be produced, the city redacted the personal email addresses of the city officials and produced the documents. The city cited the attorney general's letter ruling's instruction that it do so based on Section 552.137, Government Code, which excepts from disclosure the "email address of a member of the public . . . unless the member of the public consents to its release."

The Austin Bulldog filed suit in Travis County District Court seeking a declaratory judgment that the personal email addresses of the city officials were not protected from disclosure by this exception. The parties filed cross-motions for summary judgment, with the city arguing that city officials are "members of the public." The district court granted summary judgment in favor of the City of Austin.

The Austin Court of Appeals discussed the purposes, goals, and structure of the Public Information Act in its analysis, noting that the PIA "generally obligates the government to make public information reasonably available to whomever properly requests it." The court noted that "member of the public" is not defined by the PIA, so the court must look at its plain and common meaning. The court provided several examples in federal case law and state statute showing that when "member of the public" is used in relation to another group, it means anyone who is not a part of the other group. In the email-address exception, "member of the public" is used with "governmental body." Therefore, "member of the public" in Government Code Section 552.137 does not include a person who is part of the governmental body. The court reversed the district court's summary judgment and rendered judgment in favor of the Austin Bulldog.

***City of Carrollton v. Paxton*, No. 03-13-00571-CV, 2016 WL 1305196 (Tex. App.—Austin Mar. 31, 2016)**. This is a Public Information Act (PIA) case where the Austin Court of Appeals agreed that substantially all of the documents are protected from disclosure.

This case stems from a succession of ten PIA requests made to the City of Carrollton over a period of approximately four months by Steven Benzer. Most of the requests dealt with police response information. The information sought to be withheld included notes generated within a computer-aided dispatch (CAD) system that the city's police department utilizes. The city timely requested an opinion from the attorney general who opined the "basic information" contained within the documents was subject to release. Following a hearing, the district court denied the city's summary-judgment motion and granted the attorney general's motion, declaring specifically that "basic information within a requested computer-aided dispatch (CAD) report is not excepted from disclosure."

The court held the Texas Legislature has notably excepted from release information created by law-enforcement under Government Code Section 552.108. Benzer had been incarcerated for engaging in violent, threatening, and retributory behavior toward various neighbors. The liberal instructions within the PIA do not authorize the attorney general to "construe" the PIA in derogation of the statutory text the legislature has actually used. The court agreed that when records deal with law enforcement investigations that do not result in convictions, they are excepted. The release of records which would interfere with investigation or prosecution are also excepted. The two sections are exclusive and the attorney general has no discretion to decline to credit either claim, even if raised in the alternative in the same brief. The attorney general's construction of Section 552.108 is not reasonable or consistent with the statutory text.

Further, the term "basic information" refers to information about an arrested person, an arrest, or a crime. The court explained what "basic information" is intended to be and its history after its creation in *Houston Chronicle v. City of Houston*, 531 S.W.2d 177, 185 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd per curiam*, 536 S.W.2d 559 (Tex. 1976). The court noted that "[d]espite these somewhat shaky jurisprudential origins, the concept of a constitutional right of public access to certain 'basic information' otherwise protected by the law-enforcement exception quickly became enshrined in Attorney General open-records decisions. And subsequent decisions also expanded the concept's scope and application beyond the parameters originally addressed in *Houston Chronicle*." But since the legislature defined "basic information" for purposes of Subsection (c), there is no basic information beyond that which is defined. The "Legislature has explicitly limited the potential scope of 'basic information' subject to disclosure under Subsection (c) solely to that which is 'about' (i.e., on the subject of or concerning) either 'an arrested person,' 'an arrest,' or 'a crime.'" If law enforcement neither makes an arrest nor determines a crime was committed, no basic information can be at issue by definition. This holding disposed of 9 out of the 10 requests.

One request did clearly indicate a crime and contained basic information about the crime. The proper focus when applying the physical-safety exception is "whether disclosure of the particular information at issue would create a substantial threat that the information could be used to accomplish physical harm." And while the city offered evidence of Benzer's violent criminal history, that alone does not demonstrate disclosure will create a substantial threat of physical harm to his neighbors. The city failed to establish the threat and also failed to establish the elements of the informer's privilege. However, since 9 out of 10 requests were reversed as to release, the issue of attorney's fees was reversed and remanded to the court to reconsider.

***City of Houston v. Paxton*, No. 03-15-00093-CV, 2016 WL 767755 (Tex. App.—Austin Feb. 23, 2016) (mem. op.).** This is a Public Information Act (PIA) case where the Austin Court of Appeals affirmed the order requiring the release of the documents at issue.

The mayor of the City of Houston issued executive order 1-39 which created the Office of Inspector General (OIG) within the city which was charged with investigating employee misconduct. During an investigation an OIG attorney interviewed several witnesses, including the employees accuse of wrongdoing in a particular case. The documents at issue in this lawsuit are two of the sworn statements by employees. An attorney representing a different employee requested the investigations under the PIA. The city filed a request for an attorney general ruling to withhold the documents. The attorney general opined most of the information was protected by the attorney/client privilege and excepted from disclosure, but the two employee statements were not and must be released. The city filed suit, but the trial court ruled in favor of the attorney general holding the documents must be released. The city appealed.

Relevant to the circumstances here, the PIA provides that a completed investigation made by or for a governmental body is public information and not exempted from disclosure unless it is expressly confidential under other law. TEX. GOV'T CODE § 552.022. Texas Rule of Evidence 503(b)(1) provides: "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . between the client or a representative of the client and the client's lawyer or a representative of the lawyer." TEX. R. EVID. 503(b)(1). The privilege extends to a "representative of the client" only if the representative is "a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client," or is "any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client." TEX. R. EVID. 503(a)(2). After analyzing the explanations provided by the city, the court held the city failed to meet its burden under the PIA that the documents fell under the privilege. The statements contained an admonition page noting the employees were not to share the information with anyone other than their own lawyers. The OIG's purpose was not the rendition of legal services to these employees, but to investigate them. There is no evidence that the employees at issue knew their statements to the OIG investigator were for the purpose of the attorney effectuating legal representation for the city. As a result, they are not protected by the attorney/client privilege and are subject to disclosure.

***Terrell v. Pampa Indep. Sch. Dist.*, No. 07-14-00014-CV, 2016 WL 398893 (Tex. App.—Amarillo Feb. 1, 2016) (mem. op.)**. This is a Texas Open Meetings Act (TOMA) case where the Amarillo Court of Appeals withdrew its October 29, 2015, opinion and replaced it with this one. This is actually the second appeal in the case. The trial court originally granted the school district's summary judgment. The first appeal resulted in the court remanding the case back to the trial court by holding a fact issue existed on a proper TOMA internet posting. However, the court did not affirm or deny the other summary judgment claims. Upon remand, the trial court only allowed the plaintiffs to try the internet posting allegations. The trial court issued a take nothing judgment on that issue. In the withdrawn opinion, the court held it did not have jurisdiction for the appeal because the judgment was not final and did not dispose of all issues. In this new opinion, the court reconsidered its original holding and noted that the judgment said it was final, is therefore

presumed to be final, and the court therefore had jurisdiction to hear the appeal. However, the court then determined that since the trial court improperly limited the plaintiffs to only the internet posting allegations (not all of the allegations they properly brought) the case should be remanded for a new trial.

***Hilburn v. City of Houston*, No. 07-15-00158-CV, 2016 WL 269164 (Tex. App.—Amarillo Jan. 21, 2016) (mem. op.)**. This is a Public Information Act (PIA) case involving promotional examination documentation. The city conducted the Houston Fire Department Senior Captain Examination. Included within this examination, for the first time, were two new exercises: the Subordinate/Organizational Problem Exercise (SP) and the Oral Tactical Exercise (OT). The SP and OT exercises were video recorded and reviewed by anonymous assessors. The city received a PIA request for various information, including the SP and OT videos. After going through the administrative process, the attorney general determined some of the testing information was subject to release. The city filed suit under the PIA to withhold the information. Hilburn intervened. The city and Hilburn filed opposing summary judgments. The trial court granted the city's motion and denied Hilburn's.

The court first determined the city complied with Texas Government Code Section 552.3221, allowing the filing of responsive documents *in camera*. It also noted that such filing is permissive, not mandatory, so failing to follow this provision does not equate to a waiver of arguments. The court then determined the city properly raised the Section 552.101 exception and did not waive any arguments. Texas Local Government Code Section 174.006 states the city's collective bargaining agreement supersedes the civil service statute. The city's collective bargaining agreement specifically noted that video exams were permitted; therefore, Texas Local Government Code Section 143.032 (which makes it a criminal offense to knowingly or intentionally reveal part of a promotional examination) was properly raised. The court then held that properly raising the exceptions does not automatically equate to entitlement. The court held that even though the attorney general determined the video portions were not a "written" exam entitled to protection, the record clearly indicates video exams were intended to be confidential under the collective bargaining agreement. Further, Section 552.122 excepts test questions developed by a licensing agency from public disclosure. However, the assessor's names do not fall under any of the designated exceptions to disclosure, so neither do the rating forms. In the end, the questions and videos were excepted, but the rating forms of anonymous assessors were not.

Harris Cty. Appraisal Dist. v. Integrity Title Co., L.L.C., No. 01-15-00145-CV, 2015 WL 8945574 (Tex. App.—Houston [1st Dist.] Dec. 15, 2015). The title company sued the appraisal district after the district refused to release certain property information that the district had received from a third party vendor. After the company requested the information from the district, the district asked the office of attorney general (AG) for a ruling that the information was excepted from disclosure. The AG issued an open records ruling that the information was excepted from disclosure and the district used that as the basis to refuse to release the information. The title company sued the district and won at the trial level. The district appealed, arguing that the trial court did not have jurisdiction because the district had only refused to release information that the AG had already ruled to be excepted from disclosure. The court of appeals held that the court does have jurisdiction to review whether information is public information—even if the AG has already ruled that it is not public. Under *Kallinen v. City of Houston*, 462 S.W.3d 25 (Tex. 2015), the Supreme Court of Texas ruled that a court has jurisdiction to consider whether information is

public regardless of whether the AG has ruled. The court of appeals also held that the information was public information under Chapter 552 of the Government Code because the information was generated by a public entity, the county clerk, and that the information had just been manipulated by a private entity. The court of appeals also held that the AG's open record decision in this case did not have persuasive value because the district did not give all the pertinent facts to the AG.

Terrell v. Pampa Indep. Sch. Dist., No. 07-14-00014-CV, 2015 WL 6689494 (Tex. App.—Amarillo Oct. 29, 2015) (mem. op.). This is a Texas Open Meetings Act (TOMA) case where the Amarillo Court of Appeals held the judgment for the school district at the trial court was not yet final since the trial court did not try all of the claims at the bench trial like it should have. This is the second court of appeals opinion (and possibly not the last) regarding the non-renewal of Terrell's employment contract as a first grade teacher with the Pampa Independent School District (PISD).

Terrell and her husband essentially alleged the PISD violated TOMA when it terminated her employment. The first opinion, found at 345 S.W.3d 641, reversed the trial court's order granting the PISD's summary judgment motion and remanding back to the trial court. The remand was based on a fact issue of whether the PISD was entitled to the good faith exception for attempts to timely post a TOMA agenda notice on the internet. The parties held a trial to the bench, however, the court limited the entire trial to the attempted internet posting and did not allow Terrell to present any evidence of other TOMA violations. The trial court held for PISD on the merits and Terrell appealed. The live pleadings claim that PISD violated TOMA by: (1) failing to post meetings on its internet website; (2) failing to post physical notice on the bulletin board in its central administrative office; (3) not having notices posted for the statutorily required period of 72 hours before meetings; (4) not specifying the place of meetings in its notices; (5) not following the proper process to close the March 26, 2009, meeting; and (6) having notices signed by a person not designated or authorized to sign the notices. While the original appeals opinion held a fact question existed as to the internet posting, the court held that ruling was dispositive of the appeal and not a limitation on Terrell's claims. Nothing in the opinion affirmed the trial court's granting of the motion for summary judgment on the other five claims. As a result, the judgment issued on remand did not address all claims by all parties and was, therefore, not final for purposes of appeal. The court of appeals dismissed the appeal, but essentially ruled the case is still active at the trial court.*

PERSONNEL

***McMillen v. Texas Health & Human Svs. Comm'n*, No. 15-0147, 2016 WL 766799 (Tex. Feb. 26, 2016) (per curiam)**. This is a Texas Whistleblower Act case where the Supreme Court of Texas remanded the case back to the trial court holding McMillen made a report to a proper law enforcement authority – his own.

Michael McMillen, an attorney, served as deputy counsel for the Texas Health and Human Service Commission's Office of the Inspector General (OIG). McMillen was asked to research the legality of the Commission's practice of obtaining payments from certain recipients of Medicaid benefits. McMillen prepared a memorandum concluding the Commission's actions lacked legal justification. His memorandum, however, cited neither statutes nor case law. He submitted the memo to an OIG supervisor, the internal affairs division, and the executive commissioner. Several months later McMillen was terminated. He brought suit under the Texas Whistleblower Act. The

Texas Health and Human Services Commission (commission) filed a plea to the jurisdiction which the trial court denied but the court of appeals reversed holding McMillen did not report to a proper law enforcement authority.

To be a report in "good faith," an employee's belief about the reported-to authority's powers must be "reasonable in light of the employee's training and experience." *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 321 (Tex. 2002). An authority's power to discipline its own or investigate internally does not support a good-faith belief. To qualify the authority must have outward-looking powers. Under 42 U.S.C. Section 1396p(b)(1) any "adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan," with limited exceptions under which "the State shall seek adjustment or recovery" is prohibited. Based on the record, the court held the report qualifies as a report under this section. And since the commission, "through [its] office of inspector general, is responsible for the investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services" McMillen's report was to the proper law enforcement agency. This authority extends far beyond the commission itself. If someone is to make such a report, it would be to the OIG. To the extent other Texas agencies violate Section 1396p(b), the OIG also has power to enforce the law. The fact it was an internal investigation does not change the fact the OIG is the proper authority to make any such report and the OIG is the agency with power to enforce such laws.

***Ward v. Lamar Univ.*, No. 14-14-00097-CV, 2016 WL 145817 (Tex. App.—Houston [14th Dist.] Jan. 12, 2016)**. This is a Texas Whistleblower case. The panel previously issued an opinion, but after a motion for rehearing, withdrew that opinion and issued a new one addressing an additional argument of mootness. However, the end result was still the trial court's order being affirmed in part, reversed in part, and remanded.

Without restating most of the facts and holdings, this summary will simply list the differences from the prior opinion. However, for ease of reference, the general facts are simply that Ward worked in the finance department of the University System and noticed what she termed suspicious financial transactions. Her report on the subject was provided to the media and law enforcement. Afterwards, Ward's duties were rearranged and she lost the ability to approve and review certain documents. She remained employed but resigned after the appeal was filed.

The original panel opinion noted a fact issue existed as to the adverse personnel action regarding the employer (Lamar) but the System is a different entity. The majority chided the trial court for sua sponte dismissing the constitutional claims; however, the dissent asserts Ward did not challenge the dismissal on appeal and the majority reversed an unassigned error. Lamar and the System argue for the first time on rehearing that Ward's free speech retaliation claim under the Uniform Declaratory Judgments Act and the Texas Constitution became moot because she resigned before appellate briefing was filed. The majority was not happy Lamar and the System did not address this argument in its original brief. The majority held that the claims were not technically moot because Ward sought attorney's fees. A party does not need to "win" to get attorney's fees under the Uniform Declaratory Judgment Act, and therefore the claims are not moot.

***El Paso Cnty. v. Vasquez*, No. 08-15-00086-CV, 2016 WL 2620115 (Tex. App.—El Paso May 5, 2016)**. This is an employment discrimination/retaliation case where the El Paso Court of Appeals reversed in part and affirmed in part the denial of the county's plea to the jurisdiction.

Vasquez was a collection specialist with the El Paso County's Bond Forfeiture Unit. Vasquez suffered a heart attack at home and had a quintuple bypass heart surgery. While at the hospital, she contracted tuberculosis (TB). Vasquez took an employer-approved leave of absence from work. When Vasquez returned to work, she was able to perform her job as a collection specialist with reasonable accommodation. Nevertheless, she was involuntarily transferred to a new position in the "hot checks" unit of the county attorney's office. According to Vasquez, one of the assistant county attorneys informed her she was not permitted to return to her position because one or more employees had threatened to either walk off the job or sue the County if she returned to work and they acquired TB. Vasquez filed a charge of discrimination (the original charge) in which she alleged the county discriminated against her based on age and disability. She later filed an amended charge for retaliation, being "regarded as" disabled, and for the unauthorized disclosure of a medical condition. However, she did not sign that charge under oath or penalty of perjury. The county filed a series of pleas to the jurisdiction but they were ultimately denied.

Because of the amended charge, the county asserted the retaliation claim and "regarded as" claims are not ripe since Vasquez did not exhaust her administrative remedies for those claims. The county asserted (1) the original charge did not raise retaliation; (2) the amended charge raising retaliation was not signed under oath; and (3) Vasquez failed to file her retaliation claim with the Texas Workforce Commission (TWC). Vasquez responded that her amended charge relates back to her original charge and that she dually-filed her charge with both the Equal Employment Opportunity Commission and TWC. Generally, amendments that raise a new legal theory of discrimination do not relate back to the initial charge of discrimination, unless the facts supporting both the amendment and the initial charge are essentially the same. Courts will not construe the charge to include facts that were initially omitted. The charge must contain an adequate factual basis to put the employer on notice of the existence and nature of the claims against it. A lawsuit under the Texas Commission on Human Rights Act will be limited in scope to only those claims that were included in a timely administrative charge and to factually related claims that could reasonably be expected to grow out of the agency's investigation. Here, there are no factual allegations contained in Vasquez' original charge to implicate a claim for retaliation. Rather, her amendment raised a new legal theory, separate and distinct from her disability and age claims, thereby negating the application of the relation back doctrine. The plea should have been granted as to the retaliation charge. However, the "regarded as" claim naturally flows from the original "actual disability" claim, so the plea was properly denied as to it under a failure to exhaust challenge. But, the court held Vasquez failed to properly plead sufficient facts to establish a prima facie case of disability discrimination. Instead, she has affirmatively established that she cannot prove a crucial element of her disability claim—that she suffered from a disability at the time of the county's alleged adverse actions. Not only had she recovered from her heart attack, government health officials had released her to resume work because she successfully completed her course of treatment for TB. Finally, no actual cause of action exists in an employment context for release of confidential medical information for a non-covered entity. So the plea should have been granted as to that claim. In the end, the "regarded as" claim is the only one to survive and is remanded. All others are dismissed.

***City of Pearsall v. Tobias*, No. 04-15-00302-CV, 2016 WL 1588400 (Tex. App.—San Antonio Apr. 20, 2016) (mem. op.)**. This is an employment case where the San Antonio Court of Appeals reversed a trial court judgment awarding the former city manager severance damages.

In 2013, Robert Tobias entered into an employment contract for the city manager position. The term was for two years but had a severance package of one year's salary if he was involuntarily terminated or suspended. Within 6 months of being hired, the city council voted to terminate him. When the city refused to provide him the year of severance, Tobias sued. Tobias filed a "motion for declaratory judgment" regarding his rights under the contract. The trial court granted the motion and awarded him $80,400.00 "pursuant to the terms of the severance provision of the employment contract." The city appealed the final judgment in the case asserting the trial court lacked jurisdiction.

The Uniform Declaratory Judgments Act (UDJA) "does not enlarge a court's jurisdiction; it is a procedural device for deciding cases already within a court's jurisdiction." Although the UDJA contains a waiver of immunity from suit, the waiver is limited to claims challenging the validity of ordinances or statutes. Plaintiffs cannot circumvent immunity by characterizing a suit for money damages, such as a contract dispute, as a declaratory judgment claim. Immunity is not waived for declaratory judgment claims seeking to establish a contract's validity, to enforce performance under a contract, or to impose contractual liabilities. Tobias concedes that his declaratory judgment claim is simply a recasting of his breach of contract claim, but asserts immunity is waived under Texas Local Government Code Section 271.152 (waiver of immunity in contracts for goods or services). However, citing to *Lower Colorado River Auth. v. City of Boerne*, 422 S.W.3d 60, 66- 67 (Tex. App.—San Antonio 2014, pet. dism'd), the panel determined Chapter 271 only waives immunity for suits that seek the remedies specifically set out in the statute. Determining rights of the parties in a contract do not fall under Chapter 271. As a result, no waiver exists for a declaratory judgment claim relating to a breach of contract cause.

***City of Austin Firefighters' & Police Officers' Civil Serv. Comm'n v. Stewart*, No. 03-15-00591-CV, 2016 WL 1566772 (Tex. App.—Austin Apr. 14, 2016) (mem. op.)**. This is a civil service employment dispute where the Austin Court of Appeals reversed the denial of the city's plea to the jurisdiction and dismissed the plaintiff's claims.

William Stewart was a police officer employed by the City of Austin's police department (APD). APD conducted an internal investigation and determined Stewart violated various policies. Rather than appeal, Stewart (while represented by an attorney) entered into a last chance agreement for a sixty-day suspension and probation for a year. Almost 11 months later, Stewart was indefinitely suspended after Austin Police Chief Arturo Acevedo determined that Stewart had committed similar acts of misconduct after his sixty-day suspension. Stewart attempted to appeal but was told he waived the right to appeal in the Last Chance Agreement. Stewart sued the city attempting to compel a hearing. The city filed a plea to the jurisdiction, which the trial court denied. The city appealed.

The only question the court determined it must answer is whether the civil service director committed an ultra vires act in refusing to forward Stewart's appeal to a hearing examiner. If Stewart waived his right to appeal, the director did not act ultra vires, and the trial court lacked jurisdiction over the claim. The city had entered into a meet and confer agreement (M&C) with the bargaining unit. Under the M&C, if an officer is subject to indefinite suspension, the police

chief and the officer may enter into a last chance agreement; if the officer agrees to such an agreement but then commits a same or similar act of misconduct within the agreed probationary period, the officer "will be indefinitely suspended without right of appeal." The applicable section does not refer to a third-party fact-finder having any authority to make a determination of same or similar misconduct. The court held "the parties did not intend that an officer given a last chance after committing misconduct serious enough to warrant immediate termination should be able to appeal if it was later and again determined that he should be terminated." Allowing an officer who enters into a last chance agreement as an alternative to immediate termination to "unwaive" his right to appeal would defeat the purpose of the waiver language. Thus, the director did not commit an ultra vires act in refusing to process Stewart's notice of appeal.

***City of Houston v. Proler*, No. 14-16-00030-CV, 2016 WL 1047889 (Tex. App.—Houston [14th Dist.] Mar. 15, 2016) (mem. op.)**. This is the second suit by Proler, a certified fire fighter, regarding the city's reassignment of him and ultimate termination for his failure to fight fires. Proler's original suit resulted in the Texas Supreme Court holding that a fire fighter who could not fight fires was not disabled. That was an interlocutory ruling which was remanded but only involved a transfer, not termination.

Proler filed this second suit asserting that the city discovered he suffered from depression and discriminated against him by terminating his employment. Five years after "his original problem," Proler had difficulty in responding to an emergency call regarding a traffic accident on a freeway. Proler appeared to be asleep on the fire truck even with a loud siren sounding. Proler also appeared to be unconscious at the scene and could not be aroused; he remained in that condition until the truck returned to the station. After proper administrative hearings, Proler was terminated. After he filed suit, the city sought to exclude from evidence any mention of his prior suit for discrimination, including all medical records. The trial court denied the motion but allowed a permissive interlocutory appeal.

Section 51.014(d) is not intended to relieve the trial court of its role in deciding substantive issues of law properly presented to it. The trial court first must make a substantive ruling on the controlling legal question as to which there is a substantial ground for difference of opinion before a permissive interlocutory appeal is possible. The trial court did not rule that any of this evidence was admissible at trial in this suit; rather, the trial court determined that the city's objections to the evidence based on res judicata and collateral estoppel lacked merit. Thus, the trial court did not rule on the issue of whether, "the evidence previously adjudged and the related proceedings [may] be presented…" Because the record does not show that the trial court ruled on the purported controlling question of law identified by the trial court, the court held it could not grant the city's petition for permissive interlocutory appeal.

***Butcher v. City of San Antonio*, No. 04-15-00338-CV, 2016 WL 889306 (Tex. App.—San Antonio Mar. 9, 2016) (mem. op.).** This is a race discrimination case where the San Antonio Court of Appeals affirmed the dismissal of the plaintiff's claims based on lack of pretext.
Butcher was employed by CPS Energy, the city's electric utility. Butcher was not assigned to the Energy Development Department, but applied for a manager position within the department. Due to a hiring freeze and pursuant to policy, CPS only promoted from within the department so Butcher was not eligible. Further, the position was eliminated after budget concerns. Butcher sued

for discrimination. The trial court granted CPS Energy's traditional and no evidence summary judgment motions. The only claims Butcher appealed were discrimination based on race and color.

The court went through the burden shifting analysis for employment discrimination cases. It assumed, without deciding, that Butcher established his prima facie case. The only issue to address was whether CPS Energy's offered legitimate, non-discriminatory reason for its employment action was a mere pretext to discrimination. CPS Energy listed and established budgetary adjustments eliminating certain positions and its hiring freeze. Further CPS Energy offered the policy that the manager position could only be filled from within the department. All qualify as legitimate non-discriminatory reasons for not promoting Butcher. Butcher did not offer any legitimate evidence the reasons were pretextual. His only evidence was a remark in the operations and maintenance budget analysis that the position is in the staffing budget. However, Butcher ignored the language on "the form preceding the remark which stated the position would be filled through an internal posting so that it would not result in an increased headcount. Thus, reading the language of the form as a whole, the inference Butcher attempts to draw from the isolated remark is not reasonable." As a result the trial court properly granted summary judgment.

***Johnson v. City of Houston*, No. 14-15-00176-CV, 2016 WL 1237859 (Tex. App.—Houston [14th Dist.] Mar. 29, 2016) (mem. op.).** This is a wrongful death action for an officer killed in the line of duty where the Fourteenth Court of Appeals affirmed the granting of a plea to the jurisdiction.

This is the second opinion in this case with the factual background being explained in the first opinion. Essentially City of Houston police officer Rodney Johnson was patrolling alone in his patrol car when he stopped Juan Leonardo Quintero–Perez for speeding. Quintero–Perez killed Johnson after Johnson placed him in the backseat of the patrol car. Johnson's widow, Joslyn Johnson (also a HPD officer), sued for a variety of claims. The initial court of appeals opinion dismissed her exemplary damages claims. The case went up and down to federal court with multiple amendments. Upon returning to state district court the city argued, among other things, that Johnson "cannot recast her claims to avoid an immunity bar," and that recovery of workers' compensation benefits was her exclusive remedy against the city for Rodney's death. In the same document, the city also sought traditional summary judgment on the grounds of res judicata, the law of the case, and the exclusive remedy provisions of the Texas Workers' Compensation Act. The trial court granted the city's plea to the jurisdiction and in the alternative, granted the city's motion for summary judgment.

Johnson argues that the City of Houston Police Department General Order No. 500-05 violates federal law, and that this alleged violation of federal law was a producing or proximate cause of Rodney's death. The general order permitted officers to contact federal immigration authorities only regarding a person arrested on a separate criminal charge other than a class C misdemeanor, and only if the officer knew that the person was in the country illegally. Since Quintero–Perez was illegally in the country but stopped for a class C misdemeanor, Johnson would not have known of his immigration status. However, that does not state a cause of action for which immunity is waived. Further, Johnson admits that she received workers' compensation benefits. Under the Texas Workers' Compensation Act, recovery of workers' compensation benefits is a legal beneficiary's exclusive remedy against a governmental employer for the death of a covered

employee on the job. Nothing in Joslyn Johnson's pleadings state a claim against the city. As a result, the plea was properly granted.

***Williams v. Metropolitan Transit Auth*., No. 01-15-00299-CV, 2016 WL 1128120 (Tex. App.—Houston [1st Dist.] Mar. 22, 2016) (mem. op.).** This is a Texas Whistleblower Act (Act) case where the First District Court of Appeals reversed the granting of a plea to the jurisdiction by the Metropolitan Transit Authority (Metro).

Williams alleged that he worked for Metro for nine years as a maintenance worker. Williams claimed that another Metro employee, R. Ratcliff, requested him to be complicit in carrying out criminal acts while on the job. No further explanation of what they are was mentioned in the opinion. Williams claimed, among other things, that Metro employees retaliated against him by alleging that Williams had assaulted them. Ultimately Williams was terminated. Williams sued under the Act. Metro filed a plea to the jurisdiction which the trial court granted. Williams appealed.

Part of the case turns on whether Williams reported his claim to an appropriate law enforcement authority. Part of the case is procedural as the trial court granted the plea, but before notice of the order, Williams filed a Third Amended Petition and amended response asserting he reported claims to two Metro police officers. After analyzing the procedural history, the court held Williams did not need to file a motion for new trial in order to amend his pleadings and supplement his response to the plea. "Texas Courts have signaled a preference for allowing a plaintiff an opportunity to amend before dismissing a suit in response to a plea to the jurisdiction." And while Williams could have waived the preference by not acting (as many others have done), Williams did act by filing the amended petition and response the same day as the hearing. Williams should be permitted to return to the trial court, so the order granting the plea is reversed.

***Beaumont Indep. Sch. Dist. v. Thomas*, No. 09-15-00029-CV, 2016 WL 348949 (Tex. App.—Beaumont Jan. 28, 2016) (mem. op.)**. This is a Texas Whistleblower Act case where the Ninth Court of Appeals affirmed in part and reversed in part the denial of a plea to the jurisdiction filed by the Beaumont Independent School District (BISD). Thomas was an In School Suspension (ISS) teacher at BISD. The principal had informed Thomas that he was on the payroll until the summer, but that is when the new directives were given. Thomas asserts he was told to not have ISS students sign in at the classroom, but he ignored that instruction and continued to require a sign-in sheet. Thomas asserts he reported the order to require a different type of sign-in process to the Texas Education Agency (TEA) and local law enforcement as a form of attendance fraud. Thomas asserts in the fall term he was told he was not on the payroll for that term. BISD filed a plea to the jurisdiction asserting Thomas does not hold a teaching certificate, was an employee at will, and it was entitled to immunity. Further Thomas' claims were barred by the statute of limitations. The trial court denied the plea and BISD appealed. The court first held Thomas' *Sabine Pilot* claims for wrongful-discharge are barred by governmental immunity. Second, the Texas Whistleblower Act requires an employee seeking relief under the Act to file suit no later than the 90th day after the date on which the alleged violation either occurred or is discovered, however the employee must complete any grievance procedure first. "Reading sections 554.005 and 554.006 together, the time used by the plaintiff in following the grievance procedures is tolled and excluded from the ninety-day time limit to bring a suit." Therefore, Thomas did not file outside the statute of

limitations. Further, the court held the statute of limitations is an affirmative defense, not proper in a plea. Finally, the court held that given the lack of a response from Thomas and his assertion he was not given notice of the plea hearing to know he should file a response, it is reasonable for the trial court to deny the plea to allow the record to be developed and a proper hearing notice provided. As a result, the plea should be granted in part and denied in part at this time.

***Texas Dep't of Ins. v. Green*, No. 01-15-00321-CV, 2015 WL 9311430 (Tex. App.—Houston [1st Dist.] Dec. 22, 2015) (mem. op.)**. The plaintiff sued the Texas Department of Insurance, Division of Workers Compensation (division) and the insurance company paying her workers compensation claim after the division terminated her benefits. The division found that she had engaged in "injurious practices" and the insurance company stopped paying her claim. The plaintiff asked the trial court to review whether the "injurious practices" defense was still available to workers compensation payees. The division argued that the trial court should have granted the department's plea to the jurisdiction because the court lacked jurisdiction over the plaintiff's declaratory judgment action. The court of appeals held that the division is protected by sovereign immunity from the plaintiff's claim because the claim relates to the interpretation of a statute (which is more like an *ultra vires* claim that can only be against an official), it does not ask that the whole workers compensation statute be declared void. *See City of El Paso v. Heinrich,* 284 S.W.3d 366 (Tex. 2009).

***City of Dallas v. Giles*, No. 05-15-00370-CV, 2016 WL 25744 (Tex. App.—Dallas Jan. 4, 2016) (mem. op.)**. This is one of several employment disputes filed by Officer Giles. The Fifth Court of Appeals reversed the denial of the city's plea to the jurisdiction and rendered judgment for the city. Giles is a police officer for the City of Dallas Police Department. Giles filed a separate lawsuit in federal court against the city for employment discrimination. That case has since been dismissed; however, afterwards, the police department's internal affairs division received a complaint against Giles from a citizen and started an investigation. Giles, while working off duty, allegedly confronted the citizen and pushed him against a car while making inappropriate comments. Giles denies the incident. After an investigation, the complaint was listed as "not sustained." Giles was later reassigned from the communications division to the patrol division as a result of a problem in the dispatch center. Several managers in the communications division were reassigned as a result of the dispatch incident. Giles's rank, pay, days off, and working hours did not change. In this lawsuit, Giles alleges both of these actions were taken to retaliate against him for filing his federal court lawsuit. The city filed a plea to the jurisdiction which was denied. The city appealed. After analyzing the standards and facts alleged, the court of appeals held Giles failed to properly establish that he suffered a materially adverse personnel action. Citing *Gumpert v. ABF Freight Sys., Inc.*, 293 S.W.3d 256 (Tex. App.—Dallas 2009, pet. denied), the panel noted that conducting an investigation which ultimately lead to no disciplinary action was not a materially adverse action. The complaint was of the "type [of] minor annoyances that are not protected by the TCHRA." And was not the "type of significant harm that needs to be redressed in court." Giles also failed to establish working in patrol was an objectively "less desirable" position than communications. "Giles's subjective preference to remain in Communications is insufficient to make the transfer materially adverse." Further, nearly every manager in the communications division was reassigned, which demonstrates it was not retaliatory. The plea should have been granted by the trial court. The panel reversed and rendered.

***Loer v. City of Nixon*, No. 13-14-00582-CV, 2015 WL 9257031 (Tex. App.—Corpus Christi Dec. 17, 2015) (mem. op.)**. During a two year period of employment with the City of Nixon Police Department, Jimmy Loer reported several violations of law regarding the police chief to the police chief himself and to city councilmembers. Loer was ultimately terminated, and he filed suit under the Whistleblower Act asserting that he was terminated for reporting violations of the law. The city asserted that Loer failed to bring a proper whistleblower suit because he did not report violations to the appropriate law enforcement authority. The trial court granted the city's plea to the jurisdiction and Loer appealed.

On appeal, Loer argued that the court erred in granting the city's plea to the jurisdiction because he established the elements of a whistleblower claim. More specifically, the primary issue before the court of appeals was whether it was appropriate to report a police chief's violations of law to the police chief under the Whistleblower Act. Relying on a handful of decisions from other appellate courts, the court concluded that an experienced peace officer could not reasonably believe that the wrongdoer receiving such a report would investigate or prosecute his own violations of the law. Consequently, Loer failed to establish that his report was made in good faith to the appropriate law enforcement authority, and the trial court did not err in granting the city's plea to the jurisdiction.

***City of Lubbock v. Walck*, No. 07-15-00078-CV, 2015 WL 7231027 (Tex. App.—Amarillo Nov. 16, 2015) (mem. op.)**. This is an interlocutory appeal in a Texas Whistleblower Act case where the Amarillo Court of Appeals reversed and rendered in part, dismissed in part, and affirmed in part the denial of the city's plea to the jurisdiction. Walck was a detective in the city's police department. During 2013, while enrolled in a masters-degree program at Texas Tech University, Walck sought an interview with the city manager as part of a class project, unrelated to his work as a police officer. The city manager notified the city's chief of police of the request. Walck received an email notifying him that he was not to contact the city manager without first seeking permission from his supervisors. Walck responded by sending emails to the city council and mayor complaining about the situation. Afterwards, Walck was transferred from his position of burglary-unit detective to administrative assistant pending a formal internal affairs investigation. His permission to obtain outside employment as a security officer was also revoked. Walck filed a grievance. The city manager, after a hearing, reinstated the outside employment permit. Later, the internal affairs investigation revealed Walck violated city policy by conducting school activities while on duty and using city equipment. However, after a grievance hearing the assistant city manager rescinded the reprimand. After he was moved back into his detective position, Walck's attorney demanded compensation for Walck and threatened litigation. Afterwards, Walck filed suit. The city answered and filed a plea to the jurisdiction with supporting evidence. The trial court denied the plea and the city appealed. The court first held suit based on the suspension of Walck's outside work permit as an adverse personnel action is barred by 90 day limitations. TEX. GOV'T CODE § 554.005. Viewing the record in his favor, the continuing violation doctrine cannot aid Walck since the work permit issue was a discrete and individualized act. The plea should have been granted as to the outside work permit claim. Next, the court held the initiation of the grievance procedure under Government Code Section 554.006(a) is a jurisdictional requirement for the filing of suit. However, Walck neither refused to fully participate in the process nor did he represent to the assistant city manager he was satisfied with the relief he had received. As a result, the fact he was reinstated and accepted the reinstatement is not dispositive and jurisdiction exists. Finally,

while the plaintiff's prayer states it seeks civil penalty not to exceed $15,000 against Chief Roger Ellis, individually, Chief Ellis was not a party and was not sued. Because Chief Ellis is not before the trial court, resolving whether Government Code Section 554.008 properly can be read as granting Walck a private right of action against Chief Ellis would amount only to an advisory opinion. That issue was therefore dismissed.

***City of Killeen v. Gonzales,* No. 03–14–00384–CV, 2015 WL 6830599 (Tex. App.—Austin Nov. 3, 2015) (mem. op.)**. This is a Texas Whistleblower Act case where the Austin Court of Appeals reversed the denial of the city's plea to the jurisdiction based on a lack of jurisdictional evidence. Barbara Gonzales was the Director of Finance for the City of Killeen until her termination by the City Manager, Glenn Morrison. Gonzales asserts she reported the City of Killeen Fleet Services Department to the police chief for various alleged violations, including improper expenditure of city funds, unlawful pay raises granted to certain employees, and improper claims for car allowances by other employees. Morrison terminated Gonzales's employment in December 2012, a few weeks after the Killeen Police Department finished a criminal and internal investigation of fleet services, a city department that Gonzales directly supervised. Lieutenant Jeff Donohue led the investigation and issued a report in late November in which he concluded that Gonzales had lied, was insubordinate, and had ignored the orders of Police Chief Baldwin not to return to fleet services while the investigation was underway. Morrison's stated reasons for Gonzales's termination were: (1) her failure to properly manage fleet services; (2) her insubordination by attempting to interfere with the criminal and internal investigations; and (3) her untruthfulness about whether she had followed direct orders concerning the investigations.

The city filed a plea to the jurisdiction based on a lack of evidence of causation. The trial court denied the plea and the city appealed. To show causation, the employee must demonstrate that the person who took the adverse employment action knew of the employee's report of illegal conduct and took action because of it. Gonzales presented no direct evidence that Morrison had any knowledge of her reports to Police Chief Baldwin or other officers with the City of Killeen Police Department. Morrison knew of the investigation after it had started, but nothing indicated she knew Gonzales had made the reports. Instead, the court stated that she relied on circumstantial evidence in an attempt to create a material fact issue. After going through the record, the court held Gonzales did not present more than a scintilla of evidence that the reports were a basis for her termination. Knowledge of a report and a negative attitude towards the reports were not enough under *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 67 (Tex. 2000). The city's plea should have been granted.

PROCEDURAL

***Silva v. City of Pasadena*, No. 14-15-00062-CV, 2016 WL 1043135 (Tex. App.—Houston [14th Dist.] Mar. 15, 2016) (mem. op.).** This is a personal injury lawsuit where the Houston Court of Appeals affirmed the granting of the city's plea to the jurisdiction. This is more of a procedural case than anything else.

Irene and David Silva were crossing an apartment complex's parking lot when a City of Pasadena police officer struck Irene Silva with his patrol car. The city filed a plea to the jurisdiction asserting that since the officer was entitled to official immunity, the city was likewise immune from suit. The city set the plea to be heard on September 12, 2014, thirty-one days before the case was to be

tried. The Silvas failed to timely respond. The plea remained pending until the docket call when the trial court signed the order granting the city's plea. The Silvas appealed.

The Silvas assert the plea was really a motion for summary judgment and they did not get 21 days' notice of the hearing at which it would be considered. Despite their insistence that the plea was actually a summary-judgment motion, the Silvas offer no authority, evidence, or even argument to support that position. A party may challenge the trial court's subject-matter jurisdiction using either procedural vehicle. Here, the city filed a plea so the 21-day notice provision does not apply. Further, even if it did apply, the record does not show any basis to allow a reversal since the hearing was set 31 days out. As a result, the court, based on the record, sustained the plea.

***City of Rio Grande City v. BFI Waste Services of Texas, L.P.*, No. 04-15-00729-CV, 2016 WL 1298117 (Tex. App.—San Antonio Apr. 4, 2016).** This is an interlocutory appeal case where the central issues are procedural issues regarding an order of injunction and an automatic stay of proceedings. This is not the final opinion, but a ruling on a motion. The Fourth Court of Appeals held the city officials must abide by the temporary injunction order even though the case is on appeal.

While the order does not go into facts, the underlying case is essentially a contract dispute for garbage collection services. In September 2015, the city voted to terminate the contract with BFI/Allied Waste (BFI). BFI asserted the termination was not authorized under the terms of the contract. The city began negotiating a new contract with Grande Garbage (Grande). BFI received a temporary restraining order (TRO) then a temporary injunction prohibiting the city from cancelling the contract or awarding a contract to Grande. The TRO was obtained in federal court but the case was remanded to state court afterwards. The city and its officials filed an interlocutory appeal of the injunction order. The injunction applied to the city as well as to city officials individually and in their official capacities. While the appeal was pending, a question arose as to whether the city and its officials were still under the injunction due to an automatic supersedes without security which applies to a city, whether an automatic stay applies to the underlying proceedings during the appeal, and whether the injunction was a de facto denial of the city's plea.

The court first noted BFI did not get properly served with the plea to the jurisdiction at the time of the injunction hearing. The city argued that by proceeding with the injunction hearing the trial court denied the plea. The Fourth Court held the injunction was not a determination implicating the merits so it was not a denial of the plea. The plea could therefore not be addressed on appeal. And since the automatic stay of trial court proceedings under Section 51.014 (interlocutory appeals) does not apply to injunction appeals, no automatic stay is in place. Next, Texas Civil Practice and Remedies Code Section 6.002 states security for costs to obtain a supersedes of a trial court order is not necessary for a city. However, that applies only to the city and its officials in their official capacity. The individuals cannot utilize that section to avoid paying the security for the supersedes and it is not automatic. Further, the supersedes is not absolute. Neither the applicable statute, Section 6.002, nor Texas Rule of Appellate Procedure 29 removes the trial court's historical "discretion to prevent the State's automatic suspension of an adverse non-money judgment." As a result, the injunction stands and must be obeyed. No stay exists in the trial court.

***The Burrescia Family Revocable Living Trust v. City of Dallas*, No. 05-14-01311-CV, 2016 WL 1393989 (Tex. App.—Dallas Apr. 7, 2016) (mem. op.)**. In this appeal, the Burrescia Family Revocable Trust (Trust) asserts that that trial court erred in admitting testimony of one of the city's expert witnesses. The City of Dallas sought to acquire title to a tract of real property owned by the Trust. When it became clear that the Trust and the city could not agree on a purchase price, the city filed a condemnation proceeding in the trial court. The trial court assessed damages for the taking of the tract, and the Trust filed an objection to the award.

At the subsequent trial to determine the Trust's adequate compensation for the taking of its property, the jury found the fair market value of the tract was less than the amount of the award the city had deposited with the registry of the trial court. Therefore, the trial court signed a judgment in favor of the city for the difference. The Trust then appealed.

One of the city's expert witnesses, Steve Parker, a licensed professional engineer, testified on the tract's location in the floodplain, which refuted the Trust's appraiser expert's testimony on comparable tract's located in the floodplain. Following the jury's verdict, the Trust filed a motion for a new trial alleging that the city had not disclosed Parker's opinion as required under its request for disclosure under Rule of Civil Procedure 194.2(f). The trial court denied the motion for a new trial.

The Dallas Court of Appeals found that Parker's testimony was harmless given that other witnesses testified regarding the location in the floodplain. Further, the jury's determination of market value of the tract did not appear to have turned on Parker's testimony, as it was exactly the value indicated in the Dallas Central Appraisal District's records, which the city offered into evidence. The court affirmed the trial court's judgment.

***City of Beaumont v. Armstead*, No. 09-15-00480-CV, 2016 WL 1053953 (Tex. App.—Beaumont Mar. 17, 2016) (mem. op.)**. This is an interlocutory appeal from the denial of the city's plea to the jurisdiction in an automobile accident suit where the issue centered on statutory notice. The Beaumont Court of Appeals reversed the denial and dismissed the plaintiff's claims.

Armstead alleged that she was a passenger in a motor vehicle which collided with a city vehicle. The police report indicated a two-vehicle accident where Armstead was a passenger. The officer narrative indicates the vehicles collided at a curve turn where lane markers appeared to stop. The collision resulted in little damage and only an ambiguous reference to a uniform injury to all drivers and passengers. Armstead's attorney sent letters advising he represented Artmstead regarding a car accident which occurred on a specific date and that she was injured in some fashion. No further information was provided in the attorney letter. When he did not receive any response from the city, he filed suit. The city filed a plea to the jurisdiction (among other things) asserting it was not provided proper notice of the claim. Attached to the city's plea was a report from the driver of the original city vehicle describing the accident as one so minor he was not even sure damage occurred. The trial court denied the plea and the city appealed.

Formal statutory notice requires that the notice reasonably describe: "(1) the damage or injury claimed; (2) the time and place of the incident; and (3) the incident." Actual notice requires "knowledge of (1) a death, injury, or property damage; (2) the governmental unit's alleged fault

producing or contributing to the death, injury, or property damage; and (3) the identity of the parties involved." The Beaumont Court of Appeals analyzed several cases on statutory and actual notice in this opinion. The court held the letters sent by Armstead's attorney failed to do anything other than provide a name of the claimant. While there is a reference to an accident date, the letter fails to provide any time or description of the incident or the place of the incident. As a result, they were insufficient. As far as actual notice goes, the city reports do not "imply let alone expressly state, that the City was at fault." Rather, the reports establish that Armstead was a passenger in a different vehicle, that there was another driver, and that the police officer concluded that the other driver hit the city's vehicle. Nothing more. As a result, Armstead failed to establish the city was provided proper statutory or charter notice.

***Texas West End, Inc. v. City of Dallas*, No. 05-11-00582-CV, 2016 WL 890883 (Tex. App.—Dallas Mar. 9, 2016)**. This is a civil enforcement case which is on remand from the Supreme Court of Texas. After analyzing the case based on the Supreme Court's order, the Dallas Court of Appeals switched its prior holding and upheld the award of civil penalties issued by the trial court. This is a long case with a lot of statutory construction involved. The main thing to take away is that the city can receive civil penalties for non-compliance with zoning ordinances such as those applicable in a historic overlay district.

The central issue is whether the City of Dallas may recover civil penalties from TCI West End, Inc. based on TCI's demolition of the MKT Freight Station without prior approval. According to the city, prior approval of the landmark commission was required by city ordinance. The Dallas Court of Appeals original opinion held, among other things, the civil penalty provision for health and safety violations did not apply to zoning ordinances. The Supreme Court disagreed, holding that the penalty provision could be applied.

TCI attempted to avoid enforcement in a variety of ways and arguments, mostly of technical challenges to ordinance wording. TCI would have the court read the cited case law "to mean that every requirement pertaining to ordinances, regardless of the language used in the requirement, must be rigidly performed or the ordinance is invalid." The court expressly declined to do so. The fact the city did not file a structure list with the county before enforcing the ordinance does not mean the ordinance is not effective. Using statutory construction principles, the court held the express language of the ordinance does not make enforceability contingent upon such a filing. TCI next contended the ordinance does not require landmark commission approval for demolition unless the building sought to be demolished is a "contributing structure." TCI's construction of the ordinances is incorrect. Whether a building is a "contributing structure" determines which of two application processes the property owner must follow. The property owner must obtain the approval of the landmark commission before demolishing a building under either process. Next, the court held the general rule is that when a statute is adopted by reference, the adoption takes the statute as it exists at that time, and the subsequent amendment of the statute is not incorporated into the terms of the adopting act. The phrase "as amended" has been found to incorporate future amendments to statutes adopted by reference. However, such amendments apply to the sections referenced, in this case only to demolition and removal procedures. "The clear intent was that ordinance 22158 was to work in conjunction with the city development code. To hold that future amendments to the development code were not incorporated into section 7.1 would lead to unnecessary confusion in the application process and make it even more difficult for those seeking

demolition or removal permits to determine what is required of them." Having concluded that the jury properly found that TCI violated the ordinances, the court then examined once again whether the city was entitled to recover a civil penalty. The city's only burden under the instruction given was to show that, after TCI was notified of its violation, TCI either committed acts in violation of the ordinances or took no action to comply with the ordinances. TCI argued that since it had already demolished the building when it received notice it could not do anything to cure or come into compliance. "Impossibility is a plea in avoidance on which the party making the plea bears the burden of pleading and proof." Since TCI did not plead the defense at trial, the award cannot be reviewed based on the doctrine of impossibility. The $750,000 penalty in the trial court's judgment does not hold TCI liable for the demolition itself, but for TCI's post-demolition failure to take action to comply with the ordinance. This is an ongoing violation until TCI takes the required action. Because TCI never submitted an application to the landmark commission, (even after demolition) the possible daily penalty continued to accrue. Accordingly, the jury could have awarded over $1 million in penalties, but chose to award $750,000. The court of appeals appeared reluctant to accept the Supreme Court's interpretation, but it sustained the civil penalty award in the end.

***Thornton v. City of Plano,* No. 05–14–01120–CV, 2015 WL 6665124 (Tex. App.—Dallas Nov. 2, 2015) (mem. op.)**. *In t*his gender discrimination/retaliation case, the Dallas Court of Appeals affirmed the order granting the city's plea to the jurisdiction. Erin Thornton was a City of Plano police officer who complained her supervisor made gender-based comments towards her. The police department conducted an administrative inquiry, but the inquiry was closed without findings or resolution upon the transfer of Thornton's supervisor from her chain of command. A year later, Thornton filed a written complaint against her former supervisor for actions that occurred prior to his transfer. The police department conducted another investigation, exonerated the supervisor on two claims, and determined the remaining claim could not be sustained or declared unfounded. Later, Thornton received a written reprimand relating to her involvement and implications with an unrelated event between two other officers. Thornton asserted the reprimand was retaliation for her gender-based claims. After the administrative phase, Thornton filed suit against the city.

The city filed a plea to the jurisdiction along with a motion for summary judgment. The court granted the plea. In her first two issues, Thornton complains of inadequate notice of the basis for the city's plea to the jurisdiction and the hearing on same. Thornton's complaints regarding notice are based on the fact the city filed its plea to the jurisdiction with its motion for summary judgment, asserting a lack of 21 days of notice before the hearing. However, the notice received specifically noted only the plea to the jurisdiction would be heard, not the summary judgment motion. After reviewing the record, the court held it was not an abuse of discretion to hear the plea with 15 days of notice and the notice provided was sufficient. Thornton also did not preserve her objections to the evidence attached to the plea. Finally, no pleading amendments could rectify the lack of jurisdictional elements and the city was not required to file special exceptions. Thornton was not entitled to replead. As a result, the plea was properly granted.

TAKINGS

***Ambrose v. City of Brownsville*, No. 13-15-00039-CV, 2016 WL 1732194 (Tex. App.—Corpus Christi Apr. 28, 2016) (mem.op.)**. Dennis Ambrose sued the City of Brownsville and the

Brownsville Public Utility Board (city) after the city dredged and restored a resaca (channel) abutting Ambrose's property. Ambrose claimed that by entering the property with the dredging equipment, the city violated his rights under Article I, Section 19 of the Texas Constitution, 42 U.S.C. Sec. 1983, the Private Real Property Rights Preservation Act, and Texas Water Code Section 11.035. The court granted the city's plea to the jurisdiction and dismissed all of Ambrose's claims. He appealed, arguing that the trial court erred in granting the city's plea to the jurisdiction.

On appeal, the court affirmed the trial court's judgment in favor of the city. In its opinion, the court of appeals went through each of Ambrose's arguments to demonstrate why the court lacked subject matter jurisdiction. On his "due course of law" claim under Article I, Section 19 of the Texas Constitution, the court held that because the due process provisions of the Texas Constitution do not provide a cause of action for monetary damages, and Ambrose sought monetary damages, that the trial court did not have jurisdiction. On his Section 1983 claim, the court held that because Ambrose failed to bring an inverse condemnation claim under the Texas Constitution, his Section 1983 claim was not ripe. With regard to the Private Real Property Rights Preservation Act, the court held that Ambrose did not comply with the jurisdictional 180-day filing deadline. And finally, the court held that Ambrose's claims under the Texas Property Code and Texas Water Code were without merit because neither provision cited by Ambrose waives government immunity for the city.

***City of McKinney v. Eldorado Land Co.*, No. 05-15-00067-CV, 2016 WL 2349371 (Tex. App.—Dallas May 3, 2016) (mem. op.)**. This is a takings case regarding a dedication of property with a possibility of reverter where the Dallas Court of Appeals reversed the grant of summary judgment and ruled in favor of the city.

Eldorado Land Company (Eldorado) conveyed the property to the City of McKinney with a reverter stating the property had to be used as a community park. In the event the property was not used as a community park, Eldorado had the first option to buy back the property at a set price. Eldorado asserted that, instead of developing the property as a park, the city built a library on part of the land. Eldorado filed suit asserting a taking of the reversionary interest when the city refused to sell the property back at the listed price. Interlocutory opinions exist in this case ultimately holding that a reversionary interest can be the basis of a taking claim, so jurisdiction exists to try the case as pled. Both parties submitted summary judgment motions where the primary arguments and evidence centered on whether the activities and operation at the library also qualify as a community park. The trial court granted a motion for partial summary judgment as to liability in favor of Eldorado. The trial court then held a jury trial on damages.

The court first held the deed defines "community park" in its four corners to mean "a park and recreational facility." Based on the uncontested set of facts, "[u]nlike a research library, this library truly offers recreation, including story time and music classes for preschoolers, evening computer classes for adults, a glassed-in play area for children, and a large community meeting room for adults." Further, the deed restriction does not require that every portion of the property must be both a "park" and a "recreational facility," but rather, "part of it can be park and part can be recreational facility." Eldorado does not challenge that the rest of the property is used as a park and only challenges the section holding the library. After using various statutory construction canons and references to the record, the court determined the library meets the definition of

"recreational facility" under the deed restriction. Therefore, the trial court erred when it granted Eldorado's summary judgment. It should have granted the city's motion.

***City of Friendswood v. Horn*, No. 01-15-00436-CV, 2016 WL 638471 (Tex. App.—Houston [1st Dist.] Feb. 11, 2016)**. In this case, property owners adjacent to city property sued the city for inverse condemnation and nuisance when the city changed the residential property it owned into a park. After Tropical Storm Allison destroyed the Imperial Estates Section One subdivision, the City of Friendswood acquired most of the subdivision's 42 lots through a federally-subsidized flooding mitigation program from Federal Emergency Management Agency (FEMA). The program required the city to leave the lots open for flood control, but the lots could be used for specific purposes, including a park. Four property owners did not sell and rebuilt their homes. Ten years later, the city decided to develop the lots into a park (consistent with federal guidelines) and the home owners sued asserting the park was inconsistent with deed restrictions, was an inverse condemnation, and a nuisance. The trial court denied the city's plea to the jurisdiction and the city appealed.

The 1958 deed restrictions dictated that lots were dedicated "for residential purposes only." Since the city owned 38 lots, it had the ability to amend the restrictions under the express terms of the deeds and did so through a properly posted meeting. The city's actions were in furtherance of flood control and public park development, which are governmental functions as a matter of law, not proprietary. As a result, immunity applies. Under the takings analysis, the court determined the city did not enter onto the plaintiff's property, but merely moved forward with developing the lots it already owns. The homeowners' live pleadings do not allege that any diminution in the value of their lots occurred when the city acquired the lots in 2001. Rather, the homeowners allege that the city's decision to place a park adjacent to their property 10 years later impairs the peaceable use and enjoyment of their property. These allegations cannot support an inverse condemnation claim for compensation. The court stated that "increased traffic and noise to a community do not give rise to a compensable taking."

***Savering v. City of Mansfield*, No. 02-15-00034-CV, 2016 WL 299638 (Tex. App.—Fort Worth Jan. 21, 2016)**. This is an interlocutory appeal from the denial of a temporary injunction.

The plaintiffs are property owners in a neighborhood. After the city built a bridge over the creek to connect the property at issue to a public park, the plaintiffs sued their homeowners' association (HOA) and the city, seeking a declaratory judgment that the HOA owned the property and seeking to quiet title to the property. They also brought claims against the city for trespass, for breach of restrictive covenants, and for inverse condemnation. The plaintiffs sought an injunction to place a barricade preventing park people from using the property, prohibit people from entering the property at issue, and place a "no trespass" sign on the property. After a hearing the trial court denied the temporary injunctive relief.

Testimony essentially established the bridge opened up property adjacent to the property owners to ingress and egress, which has previously been limited due to the creek. The property owners felt it diminished their sense of privacy since no fencing could be erected in the floodway. However, the property owners knew of the walking trail allowing public passage which ran through the area and was also accessible through another entryway. Under a temporary injunction standard of review, the trial court had the discretion to believe or disbelieve any of the testimony, to determine

that the additional pedestrian access provided by the bridge did not constitute irreparable injury or extreme hardship, and to conclude that the plaintiffs had not made a clear and compelling presentation of extreme necessity or hardship. The holding was not an abuse of discretion given the testimony and therefore the injunction was properly denied.

***Babaria v. City of Southlake*, No. 02-14-00068-CV, 2016 WL 287523 (Tex. App.—Fort Worth Jan. 14, 2016) (mem. op.)**. This is a condemnation case where the Fort Worth Court of Appeals affirmed the condemnation award issued by the trial court. This is a long opinion. This opinion describes what information a city needs to properly compile for a condemnation proceeding to be upheld. This case also has to deal with admission of evidence.

The city planned to convert the road that runs in front of the Babarias' property from a two-lane road into a four-lane divided road. The special commissioner's court awarded $97,000. The Babarias objected, noting it was not sufficient. They appealed to district court. After a jury trial, the jury awarded $7,000 less than the commissioners, bringing the total to $90,000. The Babarias again objected and brought this appeal, primarily complaining of the admission of evidence by the city.

The Babarias' appraiser, Hawkins, testified the property taken was worth $167,000. Mainly, his testimony centered around the part taken not being its own economic unit, but that given city regulations on lot size, the Babarias would lose the ability to plat off and sell a separate part of their property to use as a residential home. Southlake called city engineer Cheryl Taylor and appraisal expert Charles Stearman. The Babarias' attorney objected to Taylor asserting she was not an expert. The court sustained in part and overruled in part, essentially holding Taylor could testify that a portion of the property was previously dedicated, but not whether the subdivision ordinance would require a future platting. The Babarias then objected to Stearman asserting he never supplemented his report, which was out of date in reference to the time of taking (essentially not taking into account alleged market changes). After a chiding of the Babarias' attorney for interrupting the court, the objection to testimony was overruled.

After analyzing the discovery provided to the Babarias, the court held the date of Stearman's report did not make it inadmissible. As a general rule, sales occurring within five years before the taking are not too remote to be admissible. Further, Stearman's testimony that the report is reliable only as to its issue date was intended as a method to prevent unauthorized use of the report for some other purpose. It was not an assertion that the market was in flux. "This is no different from any other expert's testimony at trial based upon a report completed before trial." After a detailed analysis, the court held his methodology was also proper. After analyzing Taylor's testimony, the court held it was not error for Taylor to testify as a fact witness regarding the Babarias' dedication of portions of the land. The "testimony on that point was not an opinion about how the ordinance might hypothetically apply in the future, it was an assertion of fact about something that had already happened." As a result, the testimony was permissible. The Babarias' issues are overruled and the jury finding is affirmed.

***City of Carrollton v. Hamrla*, No. 02–15–00119–CV, 2016 WL 93031 (Tex. App.—Fort Worth Jan. 7, 2016) (mem. op.)**. This case is about whether the city is liable for a takings based on flooding damage caused by the city's non-repair of a retaining wall. The plaintiffs sued the city

for either takings or negligence regarding the flood damage. The city filed a plea to the jurisdiction based on its governmental immunity and the trial court denied it. The city appealed, arguing that it retained governmental immunity on both the takings and the Tort Claims Act negligence claims. The court of appeals agreed with the city and held that city retained immunity for both claims. For the takings claim, the court held that the plaintiff had failed to prove that the city knew or should have known that its actions would cause flood damage. The court also dismissed the plaintiff's tort claim because the plaintiff's claim did not prove a nexus between the use of motor-driven equipment and the damage, which is required to waive immunity under the Texas Tort Claims Act.

***Schrock v. City of Baytown*, No. 01-13-00618-CV, 2015 WL 8486504 (Tex. App.—Houston [1st Dist.] Dec. 10, 2015) (mem. op. on motion for rehearing)**. Schrock, a landlord, sued the city for refusing to provide utility services to his rental property after he refused to pay delinquent utility bills associated with the rental property and caused by its tenants. Schrock argued that refusing to provide utilities is a regulatory taking of all economic value of his rental property because he cannot rent it without utility services. Also, Schrock claimed that the city had notice that the property was a rental property and therefore cannot hold him responsible for the delinquent utility bills under Section 552.0025 of the Local Government Code. He filed a declaratory judgment action as well, arguing that the city's ordinance requiring "a declaration in writing" of the rental status of a piece of property was in conflict with Section 552.0025. The city argued that the value of the property remains the same despite the lack of utilities and that the city did not have adequate notification that the property was a rental property pursuant to its ordinance's requirement of a "declaration." The trial court granted the city's motion for summary judgment on governmental immunity as to the takings claim and the declaratory judgment claim. The court of appeals reversed in favor of Schrock, holding that he had produced sufficient evidence of a regulatory taking and the possible illegality of the city's ordinance to allow his case to survive the city's summary judgment motion. The court of appeals remanded the case to the trial court.

***1707 New York Ave., L.L.C., v. City of Arlington*, No. 02-14-00259-CV, 2015 WL 6457569 (Tex. App.—Fort Worth Oct. 22, 2015) (mem. op.)**. In this case, the owner of an apartment complex sued the city for a taking after it filed a notice of demolition against the apartments, which the city determined to be substandard. The owner was not the original owner of the apartments, and was not the owner when the demolition notice was filed. Also, the owner of the property when the demolition order was filed did not appeal the municipal court's order authorizing demolition. Because neither the plaintiff owner, nor the previous owner, appealed the municipal court order, they lost the right to attack the order in district court.

TAXES

***Haider v. Jefferson Cnty. Appraisal Dist.*, No. 09-14-00311-CV, 2016 WL 1468757 (Tex. App.—Beaumont Apr. 14, 2016) (mem. op.)**. The main issue in this case is whether the City of Beaumont is entitled to collect taxes from parties who own mineral interests associated with a tract that lies outside the city's tax boundary. More specifically, the question is whether the pooling of mineral interest resulted in the owners of the tract at issue owning minerals that lie within the city's tax boundary. The trial court denied the mineral interest owners' summary judgment and granted a summary judgment in favor of the city, holding that the city did have the right to collect ad valorem taxes on the minerals. The owners of the mineral interest appealed.

The Tax Code and related case law require that property lie within the city's tax boundary before the property can be subjected to ad valorem taxes. And under Texas law, the effect of pooling on the question of whether the leaseholders who have agreed to pool their minerals acquire a legal interest in the minerals located elsewhere in the pool depends on the language found in the lease. As a general matter, if the lease language affects a cross-conveyance among the owners of minerals of the various tracts placed in the pool, the owners of the pooled leases "all own undivided interests under the unitized tract in the proportion their contribution bears to the unitized tract." Because the relevant mineral lease wasn't filed in support of either party's summary judgment motion, the trial court should have denied both the motions. The court remands the case back to the trial court for further proceeding.

The appellate court also reverses the lower court's ruling in relation to two matters. First, the court holds that by accepting royalties on the production from the pooled unit, the owners of the mineral interest have not necessarily taken positions that are inconsistent with their claims. Thus, the doctrine of quasi-estoppel does not apply to prevent them from challenging the city's assessment of an ad valorem tax on their minerals. Second, the court holds that the mineral interest owners did not forfeit their right to contest the assessment for the tax year 2012 by failing to pay the 2012 assessment before it became delinquent.

MISCELLANEOUS

***BCCA Appeal Group, Inc. v. City of Houston*, No. 13-0768, 2016 WL 1719182 (Tex. Apr. 29, 2016)**. This is essentially a preemption case where the court determined whether the Texas Clean Air Act (Act) and the Act's enforcement mechanisms in the Texas Water Code preempt a City of Houston air-quality ordinance. The court held the city ordinance invalid.

The Act is found in Texas Health and Safety Code Chapter 382. In 1992, the City of Houston enacted an air-quality ordinance to regulate air pollution from facilities that were not already regulated under the Act. Initially, the city contracted and cooperated with the Texas Commission on Environmental Quality (TCEQ) to ensure that TCEQ-permitted emissions sources within the city's borders complied with state law. The city's contract with the TCEQ ended in 2005, as did its cooperative arrangement with the TCEQ, because the city desired to enforce the Act and TCEQ rules on its own "due to what it perceive[d] to be TCEQ's lax enforcement efforts." In 2007, the city amended the 1992 ordinance to establish its own air-quality regulatory-compliance program and adopted a fee schedule to fund the program. BCCA Appeal Group's (BCCA) members operate integrated chemical manufacturing plants and refineries in the Houston area. Those plants are extensively regulated by the TCEQ pursuant to the Act. BCCA filed suit to declare the ordinance (and its amendments) invalid. The trial court granted BCCA's motion for summary judgment holding the ordinance void but the court of appeals reversed and rendered judgment for the city. BCCA appealed.

The Supreme Court of Texas first noted the ordinance has a severability clause, so any sections which are preempted do not affect the remainder. BCCA argues that the ordinance is expressly preempted by Section 382.113(b) of the Act and is implicitly preempted by the comprehensive structure of the Act and its Water Code enforcement provisions. The court analyzed the comprehensive structure of the Act and went through all the enforcement variations possible under the Act, including the TCEQ's policy of first seeking voluntary compliance, seeking criminal

penalties, civil penalties, and the authority to decline to enforce even after a violation is found. The statute mandates administrative and civil remedies whenever possible, and the TCEQ is charged with the discretion to make that determination before any criminal proceeding may move forward. The Act limits a city's power to enact any ordinance only to those subjects which are consistent with the Act and limited the city's ability to enforce air-quality standards criminally. The way the ordinance is written, any enforcement of the ordinance violations is also subject to enforcement under state law. However, Water Code Section 7.203 requires that a permit-holder's alleged violation must be reported in writing to the TCEQ before referral to a prosecuting attorney for criminal prosecution. The statute grants the TCEQ forty-five days to determine whether a violation actually exists and whether administrative or civil remedies would be adequate, which the ordinance countermines. Further, prosecution under the ordinance results in a "criminal conviction, which require[s] the prosecutor to prove a culpable mental state," therefore escalating the violation to a "major violation" in the site's compliance history even when the violation is not listed as "major" by the TCEQ. The legislature expressed its clear intent to have the TCEQ determine the appropriate remedy in every case. Further, the city's requirement that a facility must register to operate lawfully effectively moots the effect of a TCEQ permit that has been issued and allows a facility to operate lawfully. Given the Act's very specific limitation on a city's ability to regulate only certain portions of air-quality control, this registration requirement is inconsistent with the Act. The ordinance is therefore preempted.

Next, the court analyzed whether the language in the non-preempted sections (dealing with adopting TCEQ rules) is unconstitutional simply because it references an automatic adoption of any TCEQ rule future amendments. BCCA argues the auto-adoption language unconstitutionally delegates core lawmaking from the city council to the TCEQ. However, a home-rule city's power comes from the Texas Constitution. No statutory or constitutional provision limits the city's power to incorporate TCEQ rules. Therefore, when the city adopted the TCEQ rules as they currently exist and as they may be amended, the ordinance complied with the Act's mandate that any ordinance must not be inconsistent with the TCEQ's rules and ensured that consistency be maintained on an ongoing basis.

The dissent argued the majority deviated from precedent, noting it should attempt reasonable construction to allow two laws to co-exist without preemption. Chiding the majority for not specifying the language and noting the ordinance "provides only for criminal prosecution without TCEQ involvement . . ." Justice Boyd used statutory construction principles to conclude the ordinance does incorporate TCEQ involvement prior to prosecution. However, the majority disagreed with that analysis.

***Ex parte Poe*, No. 09-15-00373-CR, 2016 WL 1600607 (Tex. App.—Beaumont Apr. 20, 2016)**. This is a criminal prosecution in which the defendant, Poe, was charged with disorderly conduct. Poe filed an application for pretrial writ of habeas corpus, asserting that the disorderly conduct statute was facially unconstitutional. The trial court denied the application, and defendant appealed.

The state asserts that three days after Christmas 2013, during evening hours when the Parkdale Mall was crowded, Poe harnessed and shouldered an assault rifle and began walking around the mall. Both mall patrons and workers called 911. When police officers approached Poe, he allegedly became belligerent, but eventually gave the rifle to the police officers, after explaining

that he was carrying the gun to exercise his Second Amendment Rights. The state charged Poe with "intentionally and knowingly display[ing] a deadly weapon, namely a firearm, in a public place and in a manner calculated to alarm" in violation of Section 42.01(a)(8) of the Penal Code. Poe argued in his application for pretrial writ of habeas corpus that the statute is unconstitutionally vague, overbroad, and violates his constitutional rights to free speech and to bear arms.

The court determined that the statute punishes conduct rather than just speech and thus, should not be analyzed under the strict scrutiny standard of review. The court then concluded that the statute describes the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited (i.e., provides fair notice of the prohibited conduct) and that it is reasonably related to the state's legitimate interest in protecting the public from harm. In overruling Poe's issues, the court observes that "there is no constitutionally protected right to display a firearm in a public place in a manner that is calculated to alarm" and that Poe's own evidence shows the statute is rarely employed against protestors and has not resulted in the conviction of any protestors exercising their First and Second Amendment rights. The trial court's order denying Poe's application for writ of habeas corpus is affirmed.

***In Re State*, No. 07-16-00052-CR, 2016 WL 1072504 (Tex. App.—Amarillo Mar. 16, 2016).** This is a writ of mandamus case of interest mainly to municipal prosecutors. It holds that on appeal, a county court judge cannot provide for deferred disposition any more than a municipal judge or justice of the peace can.

Relator, the State of Texas, acting by and through the Potter County Attorney's Office, seeks a writ of mandamus to compel a county court at law judge from issuing deferred dispositions for commercial driver's license (CDL) holders, in particular, real party in interest, Jimmie White. White was originally convicted in Justice of the Peace Court, Precinct 3, of Potter County of the misdemeanor offense of speeding. Under Article 45 of the Code of Criminal Procedure, a justice of the peace and municipal court judge are prohibited from providing deferred disposition to CDL holders. On appeal, the county court judge issued deferred disposition to White, which would potentially keep the conviction off his driving record upon completion. The county attorney's office objected to the deferred order and sought mandamus to compel the withdrawal of the order.

Texas Code of Criminal Procedure article 42.111 authorizes the deferral of proceeding in cases appealed from a justice of the peace or municipal court to county court. The court of appeals analyzed article 42.111. It provides, among other things, that "[i]f the defendant enters a plea of guilty or nolo contendere, the court may defer further proceedings without entering an adjudication of guilt in the same manner as provided for the deferral of proceedings in justice or municipal court under Article 45.051 of this code." The second part of the sentence is pivotal for the court. It provides the county court may defer "adjudication of guilt in the same manner" as justice or municipal court. White argues the word "manner" has many meanings, including "a mode of procedure" and "a customary mode of acting." After utilizing statutory construction principles, the court held it was "imminently logical" that if the justice of the peace and municipal courts did not have jurisdiction to offer deferred disposition to CDL holders, a driver could not simply circumvent that by appealing to county court. As a result, the court issued a directive to the county court judge to withdraw her opinion or a mandamus would be issued to compel such compliance.