



RECENT STATE CASES OF INTEREST TO CITIES

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Presented by:
LAURA MUELLER, ASSOCIATE
BOJORQUEZ LAW FIRM

Paper by:
TML LEGAL DEPARTMENT
Ryan Henry, Law Offices of Ryan Henry
Laura Mueller, Associate, Bojorquez Law Firm



LAURA MUELLER
ASSOCIATE
Nicolas Lopez, Law Clerk
The Bojorquez Law Firm, P.C.

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.



RYAN HENRY
Law Offices of Ryan Henry, PLLC
1380 Pantheon Way, Suite 215
San Antonio, Texas 78232
Phone: 210-257-6357 • Fax: 210-569-6494
www.rshlawfirm.com

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.

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RECENT STATE CASES

APPRAISALS

***City of Austin v. Travis Cent. Appraisal Dist.*, No. 03-16-00038-CV, 2016 WL 6677937 (Tex. App.—Austin Nov. 10, 2016).** This is an appraisal case involving vacant land and commercial real property where the city sought to declare parts of the Texas Tax Code unconstitutional. The Austin Court of Appeals affirmed the trial court’s dismissal of the suit. The city filed a petition challenging the Travis Central Appraisal District’s appraisals for the 2015 tax year on certain categories of real property. The city challenged certain Tax Code provisions which “have incentivized taxpayer protests and led to widespread diminution of appraised property values to a ‘median value’ that is below market value.” According to the city, the reduction in appraised values to median values “has resulted in unequal taxation in violation of the Texas Constitution.” TEX. CONST. ART. VIII, § 1. Essentially, according to the city, the appraisal district’s application of Tax Code Sections 41.43(b)(3) and 42.26(a)(3) to resolve taxpayer protests has resulted in a reduction of property value making an unconstitutional and unequal tax. Several commercial and residential property owners intervened. The intervenors then moved to dismiss the city’s claims, which the trial court granted. The city appealed.

“[E]xcept for certain specifically circumscribed rights,” the Tax Code’s comprehensive legislative scheme generally excludes taxing units (like the city) from the appraisal process. Chapter 41, Subchapter A, of the Tax Code provides taxing units, like the city, with a mechanism for challenging certain actions by their local appraisal districts. Chapter 41 also provides property owners a mechanism for appealing appraisals. The Austin Court of Appeals analyzed the city’s standing to bring such a claim and ultimately determined that the city failed to establish an injury sufficient to confer standing. Further, the Tax Code is a pervasive regulatory scheme, vesting appraisal review boards with exclusive jurisdiction to decide protests and challenges as permitted under chapters 41 and 42. The record reflects that even though the city attended the review board hearing, the city did not present a case on the merits of its challenge at the hearing and, in truth, requested the challenge be denied so it could pursue other avenues of attack. The city’s position that it sufficiently exhausted its administrative remedies because it was present at the administrative hearing and requested the denial of its own challenge, if accepted, would thwart the intent of the administrative process and of the exhaustion requirement. The court held that by affirmatively requesting that the review board deny its challenge petition, the city failed to “appear” as required under the law. The trial court did not err in dismissing the city’s case.

***Cypress Creek Fayridge, L.P. v. Harris Cty. Appraisal Dist.*, No. 01-16-00003-CV, 2016 WL 7164032 (Tex. App.—Houston [1st Dist.] Dec. 8, 2016) (mem. op.).** Cypress Creek Fayridge, L.P. (Cypress Creek) sued Harris County Appraisal District (HCAD) over the appraisal of Cypress Creek’s low income apartment. Cypress Creek argued that the HCAD appraised the property at an excessive market value. The trial court sided with HCAD concerning the appraised value of the property stating in its finding of facts and conclusion of law that Cypress Creek did not meet its burden of proof establishing a value different from that of HCAD’s appraisal because it did not present sufficient information to justify a reduction to the appraised value of the property. Cypress Creek moved for a new trial, was denied, and filed an appeal.

Cypress Creek raised two issues on appeal: (1) that HCAD had the burden of proof for the market valuation of the complex; and (2) that the proof is legally and factually insufficient to support the trial court's finding concerning the market value of the apartment complex because HCAD's expert assumed that the complex's operating expenses were comparable to those of other low-income apartment complexes in the same region, rather than taking into account the complex's actual expenses for the previous years that indicated a negative net income. The court concluded that the assignment of the burden of proof affects the standard of review for legal sufficiency. The party who challenges the legal sufficiency of a finding on which it did not bear the burden of proof must show that no evidence supports the finding. However, a party who challenges the legal sufficiency of a finding on which it bore the burden of proof must show not only that no evidence supports the trial court's finding but also that the evidence conclusively proves the contrary.

Cypress Creek argued that who has the burden of proof is unsettled, but the court responded that it had, on many occasions, concluded that the burden of proof was assigned to the taxpayer in a tax appraisal suit. In this case, the burden of proof was not outcome determinative since if the court had assigned the burden of proof to HCAD, Cypress Creek had not shown that there was no evidence to support the trial court's market-value finding. Yet HCAD had shown competent evidence that is legally and factually sufficient to support the trial court's finding. As for the sufficiency of the evidence, the court looks to Chapter 23 of the Tax Code, covering the appraisal methods and procedures that must be followed for the appraisal of property. Cypress Creek contends that the appraisal was not based on the actual expenses of the apartment complex but was based on "the individual characteristics" affecting the property and the "available evidence that is specific" to its value. TEX. TAX CODE § 23.01(b). Also, Cypress Creek contends that the calculation of the market value was speculative because the HCAD's expert assumed that the complex's expenses were similar to those of other low-income apartment complexes in the same region. The court doesn't agree with Cypress Creek's argument that the statute does allow for the appraiser to "analyze comparable operating expense data available" in order "to estimate the operating expenses of the property." TEX. TAX CODE § 23.012(a)(2). This analysis is especially true because the previous market value of the apartments occurred when it did not have a single unit ready to lease, whereas on January 1 of the disputed tax year, all the units were lease-ready and more than half of the units were leased. After reviewing the totality of the evidence and deference due to the trial court, the court affirms the trial court's judgment.

ELECTIONS

***City of Galena Park v. Ponder*, No. 14-15-00708-CV, 2016 WL 6238390 (Tex. App.—Houston [14th Dist.] Oct. 25, 2016).** In this suit to compel a charter amendment election, the Fourteenth Court of Appeals reversed the granting of a summary judgment which favored the election.

Barry Ponder delivered a set of papers to the City of Galena Park City Secretary, Mayra Gonzales, purporting to be a petition in support of city charter amendments proposed by a local group. The amendments concerned, respectively, are: (1) the creation of four new commissioner positions to act as liaisons between the city commission and certain city departments; (2) the appointment and duties of fire chief, fire marshal, and police chief; (3) the procedures for voter initiative, referendum, and recall petitions; and (4) changes to the general powers of the mayor and the

commission. According to the city secretary, there were no proposed charter amendments attached to the signature pages. She reviewed the signature pages to determine the validity of the signatures. The number of valid signatures exceeded the charter requirements. However, the city attorney asserted the petition did not constitute a proper petition primarily because: (1) the signature pages did not include the text or a description of any proposed amendment to the charter, so there was no way to tell what amendments were being presented; (2) there were no amendments attached to the signature pages as referenced; and (3) the proposed amendments covered multiple subjects, which he asserted is not permitted under the law. The city refused to call the election and Ponder filed suit. Both sides filed motions for summary judgment, and the trial court ruled for Ponder. The city appealed.

The court first analyzed Ponder's summary judgment and determined that enough qualified voters signed the petition. However, that does not mean the petition itself is proper. The gap in Ponder's logic is that the papers do not *conclusively* establish that the four amendments presented are the actual amendments that the signatories were demanding be placed on the ballot. Further, the city secretary's letter only stated that the number of signatures exceeded the required number for an amendment petition but was not an acceptance of the rest of the petition. The trial court had erred in granting Ponder's motion.

The court then considered the city's motion. The court narrowed the issues by listing several city issues as abandoned or not preserved. The court then determined that, while Ponder did not conclusively establish entitlement to summary judgment, the city's arguments on the form of the petition did not establish the charter section (Local Government Code Section 9.004) was not met. Further, nothing in the text of Local Government Code Section 9.004 expressly prohibits an election petition from proposing more than one amendment. Further, proposed changes to a city charter may seek broader schematic changes to city government that may make sense only as an all-or-nothing proposition. In other words, broad categories for amendments are fine. Thus, the city did not establish entitlement to summary judgment. The case was remanded back to the trial court.

***City of Houston v. Bryant*, No. 01-16-00273-CV, 2017 WL 17328 (Tex. App.—Houston [1st Dist.] Jan. 12, 2017.)** This is an election contest case where the First Court of Appeals out of Houston held Texas Election Code Section 233.008 (requiring process be served within 20 days) is not jurisdictional. Petitioners challenged a ballot measure concerning term limits for City of Houston elected offices. The city filed a plea to the jurisdiction asserting that while the petition was timely filed and the city received service to the correct person, it did not receive service within the 20 days mandated by Section 233.008. Therefore, the trial court was without jurisdiction. The trial court denied the plea, and the city appealed.

The court of appeals held the 30-day deadline by which the *petition must be filed* under Section 233.006(b) is jurisdictional and non-waivable. It is undisputed that the election contest was filed within that deadline. Thus, according to the court, the trial court obtained subject matter jurisdiction at that time. Section 233.008 is clearly mandatory in that it provides that a citation issued in an election contest “must direct” the officer to return the citation unserved if it is not served within 20 days after it was issued. However, “just because a statutory requirement is mandatory does not mean that compliance with it is jurisdictional.” Section 233.008 does not

require a time to effectuate service and is not expressly jurisdictional. It does not prohibit the reissuance of a citation or preclude a party from making a second attempt. It also does not list a specific consequence for noncompliance. As a result, it is not jurisdictional. And while “other consequences” may be the result of failing to follow a non-jurisdictional deadline, such is not for evaluation under a plea to the jurisdiction.

***City of Houston v. Dacus*, No. 14-16-00123-CV, 2017 WL 536647 (Tex. App—Houston [14th Dist.] Feb. 9, 2017) (mem. op.)**. This is an election case involving posting of an alleged misleading charter amendment where the law of the case doctrine required the trial court to rule against the city. The Supreme Court of Texas has already issued one opinion in this matter and held the drainage charges to be imposed on benefitting real property was among the ballot measure’s chief features, and that Proposition 1 was misleading because it failed to mention the charges. *Dacus v. City of Houston*, 466 S.W.3d 820 (Tex. 2015). The court remanded the case for trial because only the city moved for summary judgment, not the contestants. On remand, the contestants sought summary judgment on the grounds that: (a) the Supreme Court of Texas had decided the issue in *Dacus II*, which became the law of the case; or (b) even if *Dacus II* did not constitute the law of the case, the trial court should reach the same result for the same reasons. The trial court granted the motion, and the city appealed.

The First District Court of Appeals rejected the city’s argument that the case is a challenge to “the post-election implementation of the charter amendment” instead of an election case. The trial court is not deprived of jurisdiction over this election contest merely because additional steps were taken after the election to implement the measure, and the city cited “. . . no authority that voters can bring an election contest challenging the sufficiency of a ballot description only in the rare case in which the measure itself is self-executing.” Second, the case is governed by the questions of law decided in *Dacus II*, but only if the questions of law were answered by the Supreme Court of Texas. The Supreme Court of Texas explained that even voters already familiar with the measure to be voted on can be misled by ballot language that fails to sufficiently describe the measure. The court then compared the ballot’s language (which is undisputed) to the proposed charter amendment’s language (which also is undisputed). From that comparison, the court determined that “[t]he ballot did not identify a central aspect of the amendment” Such holdings are not dictum but are explicit findings by the court. “The question of whether the ballot language misled voters by omitting one of the measure’s chief features calls for a yes-or-no answer, and the state’s highest civil court has answered that question in the affirmative.” As a result, the law of the case required the trial court to rule against the city.

***City of El Paso v. Tom Brown Ministries*, No. 08-16-00075-CV, 2016 WL 7155066 (Tex. App.—El Paso Dec. 7, 2016)**. This is an interlocutory appeal from an order denying the City of El Paso’s plea to the jurisdiction. This case began when then-Mayor John F. Cook, in his individual capacity, sued Tom Brown Ministries (Brown), seeking to enjoin them from circulating recall petitions against Cook by claiming that their conduct violated the Texas Election Code. Brown counterclaimed, suing the city and Cook (in his official capacity), arguing that by seeking to “enforce” the Election Code against them in an unconstitutional manner, the city violated their constitutional right to engage in core political speech in violation of 42 U.S.C. § 1983. Brown sought damages, injunctive relief prohibiting the city from interfering with the right to circulate recall petitions, and a declaratory judgment that certain provisions of the Election Code were

unconstitutional. In its plea to the jurisdiction, the city alleged the trial court lacked subject matter jurisdiction in part because Brown lacked standing.

The relief that Cook sought to address by bringing his suit was strictly private in nature; he did not (and could not) bring such a lawsuit on behalf of the city. Thus, Cook was not acting under color of law or as a city policy-making official in suing Brown but solely in his individual capacity to enforce a private right of action. Any comments made by Cook in his petition suggesting that he was acting for the city did not transform the nature of the suit. The city did not ratify Cook's actions by failing to object to comments made by Cook that he was bringing the suit pursuant to his duties and oath as mayor. And decertifying the recall petition and voting to cancel the recall election (in compliance with an earlier ruling by the El Paso Court of Appeals) did not constitute an official action or policy that would subject the city to liability.

As to Brown's counterclaims, the court concluded they have no standing to bring a counterclaim for injunctive relief against the city. The city did not engage in unconstitutional conduct toward Brown and there is no basis to fear the city will unlawfully enforce the Election Code against Brown in the future. Likewise, Brown lacks standing to assert a claim for declaratory judgment against the city concerning the constitutionality of the Election Code provisions. There is no real controversy, and any opinion on this matter would constitute an advisory opinion. In sum, the appellate court concluded that Brown lacked standing and reversed the trial court's order denying the plea to the jurisdiction, dismissing Brown's claims against the city and Cook.

EMPLOYMENT DISCRIMINATION

Lackey v. Lone Star Coll. Sys. No. 09-15-00399-CV, 2016 WL 6110700 (Tex. App—Beaumont Oct. 20, 2016) (mem. op.). This is an employment discrimination case where the Beaumont Court of Appeals affirmed the granting of the Lone Star College System's plea to the jurisdiction.

Lackey is a 43-year-old Caucasian female who was employed by the Lone Star College System (LSCS) as a human resource manager. Lackey pleaded that a shooting and then a stabbing occurred at LSCS's campuses, and afterwards LSCS opened its employee assistance program (EAP) to all employees. The EAP had previously only been available for full-time employees. When an adjunct professor asserted he was suffering from post-traumatic stress disorder and wanted to use the EAP, Lackey allowed it. She asserted she double-checked the policy change before offering the EAP. LSCS leadership asserted she did not follow the policy correctly and terminated her. Lackey asserts a non-Caucasian Hispanic employee also violated the same policy but was not terminated. Lackey asserted causes of action for disparate treatment and replacement under the Texas Commission on Human Rights Act (TCHRA). LSCS filed a plea to the jurisdiction, which the trial court granted. Lackey appealed.

A plaintiff must make a *prima facie* case showing that a waiver of immunity exists. The waiver of governmental immunity contained in the TCHRA only applies if the plaintiff alleges a violation within the scope of the statute. For Lackey to establish a *prima facie* case as to both of the causes of action (discrimination and discriminatory replacement), she must first establish that she was qualified for her position. LSCS attached a great deal of evidence indicating Lackey was incompetent to perform her position and, in one instance, caused LSCS to become \$4 million

behind in employee retirement payments. After analyzing the evidence and instances of incompetence and reviewing Lackey's responses, the court concluded "LSCS's evidence demonstrated that Lackey was not performing her job at a level that met LSCS's legitimate expectations, and Lackey was therefore not qualified for her job." Because Lackey did not establish that she was qualified, she failed to demonstrate a *prima facie* case under the TCHRA; therefore, LSCS's governmental immunity is not waived. The plea was properly granted.

***Texas Workforce Comm'n v. Wichita Cty.*, No. 02-15-00215-CV, 2016 WL 7157247 (Tex. App.—Fort Worth Dec. 8, 2016).** Julia White, an employee of Wichita County, was on Family and Medical Leave (FMLA) for severe depression and anxiety. White used up all of her paid leave and was on unpaid leave, but the county continued to pay her medical insurance and retained a position for her while she was on FMLA. White inquired to the Texas Workforce Commission (TWC) about unemployment benefits. TWC said that she could apply, and when White did, TWC's initial decision was that she was entitled to unemployment benefits. TWC found that unpaid leave was considered unemployed.

The county appealed TWC's initial decision and requested an administrative hearing, at which the tribunal agreed with the initial TWC decision and ordered the county to be billed for White's unemployment benefits. The tribunal concluded that White was entitled to unemployment benefits because TWC considered that she was separated from her last employment when she went on medical leave and the county could not make any accommodations based on White's restrictions. The county appealed to the TWC's commissioners, and the commissioners agreed with the tribunal. The county sought judicial review of the final decision. The county pleaded that TWC's decision was not supported by law because White was not separated from her employment and was therefore disqualified from benefits. TWC filed a general denial, and the county and TWC both moved for summary judgment. The trial court granted the county's motion for summary judgment and reversed TWC's decision. TWC appealed.

The appellate court indicated that the question of whether FMLA leave precludes simultaneous compensation under a state unemployment law is an issue of first impression. Through the court's *de novo* review of the summary judgment, it determined that an employee on FMLA cannot also receive unemployment benefits because these two laws apply to distinct groups of people. FMLA applies to employees with serious medical conditions who cannot perform their jobs on a temporary basis, desire to return to those jobs, and need protection for the jobs until the reason for leave is resolved. However, unemployment benefits are for people who desire new jobs, are ready and willing to perform them, and need temporary income benefits in the meantime. These two laws are mutually exclusive, and the court does not think that either federal or state legislators intended for a person to be able to receive both benefits at the same time. The court concludes that TWC's argument, which relies on Labor Code Section 201.091, that White was "totally unemployed" because she wasn't performing services or receiving wages during her FMLA leave was an unreasonable interpretation "when construing section 201.091(a)'s definition of 'unemployed' together with section 207.021's benefit eligibility requirement and with provisions of federal law." Therefore, the court affirmed the trial court's decision and found that the county is not liable for the unemployment benefits because White was not qualified to receive unemployment benefits.

***Cooper v. City of Dallas*, No. 05-15-00874-CV, 2016 WL 7163831 (Tex. App.—Dallas Dec. 7, 2016) (mem. op.)**. The City of Dallas hired Teresa Cooper as a police officer. Fourteen years later, she requested a leave of absence and applied for short-term disability benefits for generalized anxiety disorder. Her short-term disability was approved, but when she did not return to work as scheduled, the city terminated her. Cooper appealed the termination to an administrative law judge (ALJ) who determined that her termination was improper because there had been no internal affairs investigation. The ALJ reinstated Cooper to her previous status of being on leave without pay. Cooper was unhappy with being reinstated without pay, and she appealed the ALJ decision to the district court, which affirmed the decision.

Months later, Cooper’s psychologist wrote a letter to the deputy police chief releasing Cooper to return to duty, contingent upon the results of a fitness-for-duty evaluation. Cooper failed to show up to the appointment made by the police department. A second appointment was made, which she again failed to attend. Cooper finally appeared for the third appointment, but when the doctor presented her with a consent form to sign, Cooper included the phrase “under duress without giving consent” next to her signature. Since she’d failed to consent to treatment, the doctor terminated the appointment.

Cooper was ordered to attend another appointment with a different doctor. Instead of attending the appointment, though, she applied to the federal district court to enjoin the city from ordering her to report to a doctor of the city’s choosing. The court denied her application. Cooper failed to attend two additional appointments set by the city. The deputy chief informed Cooper that her status was changed from approved leave without pay to unapproved leave without pay. The Internal Affairs Division (IAD) then issued Cooper three separate written, direct orders to report to IAD to respond to the allegations. Cooper failed to do so. The IAD found Cooper had committed six instances of insubordination, and the chief of police terminated Cooper’s employment. Cooper appealed her termination to the city manager, who upheld the decision. The ALJ upheld the termination, and Cooper appealed. The city removed the lawsuit to federal court. The court dismissed all claims except the substantial-evidence review of the ALJ’s decision, which the court remanded to state district court. Before the state district judge heard arguments, Cooper’s husband filed a plea in intervention. The city moved to strike the plea, which the district court granted. The district court also found the ALJ’s decision was supported by substantial evidence. The Coopers appealed.

The Dallas Court of Appeals concluded that Mr. Cooper’s pleadings fail to allege facts to support a cause of action in his own name. Furthermore, Mr. Cooper failed to show how his interest was separate from his wife’s. Thus, the court overruled Mr. Cooper’s sole issue on appeal. In addressing Cooper’s issues on appeal, the court found that the record contained more than a scintilla of evidence to support the ALJ’s decision and overruled Cooper’s first twelve issues on appeal. The court also found there was more than a scintilla of evidence that Cooper was an employee of the City of Dallas at all relevant times. The court then entertained other “reasons” Cooper brought forth in her pro se brief in support of her issues on appeal. The court analyzed and disposed of each of the arguments before affirming the trial court’s decision.

***Colorado Cty. v. Staff*, No. 15-0912, 2017 WL 461363 (Tex. Feb. 3, 2017)**. This is a Chapter 614 law enforcement termination case where the Supreme Court of Texas changed some of the

standards for investigating, disciplining, and terminating police officers. The court reversed the judgment of the court of appeals and rendered judgment in favor of the employer county. This is a significant case.

Colorado County Deputy Sheriff Marc Staff was terminated from the Colorado County Sheriff's Department. While an at-will employee, his termination notice listed incidents where Staff's behavior with members of the public was improper. The focus of the notice detailed a complaint where the county attorney advised the sheriff of Staff's behavior during a traffic stop. The video of the behavior was investigated, and the investigating lieutenant recommended termination. Staff was listed as argumentative and abusive. Further, he unnecessarily arrested an otherwise cooperative motorist. Staff was provided the recommendation by the lieutenant and told he had 30 days to appeal the termination recommendation to the sheriff for a final order. Sheriff Wied advised Staff to "articulate all of his responses to his termination and the reasons for his appeal." Each incident had been identified in the recommendation with factual details. Staff appealed, but rather than contesting the substantive grounds for termination or attempting to contextualize his behavior, Staff's appeal complained of procedural irregularities in the process leading to his discharge. Sheriff Wied upheld the termination, and Staff sued the county and sheriff for declaratory relief, injunctive relief, and monetary damages. He asserted the county and sheriff violated Chapter 614 of the Texas Government Code with the procedure used for termination. The central theme of Staff's argument was that an internal report based on an external complaint alleging misconduct is insufficient to satisfy the statutory requirements. Sheriff Wied asserted Staff was terminated as an employee-at-will, but in the alternative, the process utilized satisfied Chapter 614. The trial court granted the county and sheriff's motions for summary judgment. The court of appeals reversed and asserted the sheriff violated Chapter 614. The Supreme Court of Texas granted Sheriff Wied's petition for review.

Texas Government Code Section 614.023 states "(a) A copy of a signed complaint against a law enforcement officer . . . shall be given to the officer or employee within a reasonable time after the complaint is filed. (b) Disciplinary action may not be taken against the officer or employee unless a copy of the signed complaint is given to the officer or employee" The court first held that "[a]lthough Sheriff Wied could have discharged Staff for any reason or no reason, Chapter 614, Subchapter B nevertheless applies when an at-will employer terminates for cause that derives from allegations in a complaint of misconduct instead of terminating at will for no cause." In other words, if no complaint was filed against Staff, the sheriff could simply fire him for no reason. However, since a complaint was filed, Chapter 614 applies and the procedures must be followed. This process "helps ensure that cause-based removals of a specified nature bear a modicum of proof and that the affected employee has notice of the basis for removal."

The court then considered "as a matter of first impression, the kind of 'complaint' and 'person making the complaint' that is necessary to both activate and satisfy the statute's procedural safeguards." After applying various statutory construction principles, the court held the person making the complaint does not need to be the "victim" of the alleged conduct; it may be an investigator or supervisor. The court noted in a separate section that some intermediate appellate courts improperly connected the definition of "complaint" in Chapter 614 with a "complaint" under the civil service laws in Texas Local Government Code Chapter 143. However, they are not the same. Under the court's definition of "complaint" for Chapter 614 it, determined Sheriff Wied

followed the requirements. [Comment: For attorneys practicing in this area, the court’s definition and explanation of what qualifies as a proper and sufficient complaint can be extremely helpful]. In this case, Staff received the signed deficiency notice within two days of the initiation of an internal investigation.

He suffered no disciplinary action until the complaint was in hand. However, the Court noted “[n]othing in the statute requires the complaint to be served before discipline is imposed or precludes disciplinary action while an investigation is ongoing. Nor does the statute require an opportunity to be heard before disciplinary action may be taken.” Staff had ample opportunity to marshal any evidence and provide his explanation to the sheriff. As a result, the sheriff complied with Chapter 614. The court reversed and rendered in favor of the sheriff.

***Kaplan v. City of Sugar Land*, No. 14-15-00381-CV, 2017 WL 1287994 (Tex. App.—Houston [14th Dist.] Apr. 6, 2017).** In this case, Leon Kaplan sued the City of Sugar Land for age discrimination under the Texas Commission on Human Rights Act, Texas Labor Code Section 21.051, after Kaplan’s employment with the city was terminated in 2011. The city filed a motion for summary judgment on Kaplan’s age-discrimination claim, and the trial court granted the city’s motion and dismissed Kaplan’s suit with prejudice. Kaplan appealed.

On appeal, the court found that the trial court properly granted summary judgment in favor of the city. According to the court, Kaplan established a prima facie case of age discrimination by showing that he was a member of the class protected by the Texas Commission on Human Rights Act, that he was qualified for his position, and that he was terminated from his position and replaced by someone younger than him. However, the court found that the city conclusively proved legitimate, nondiscriminatory reasons for firing Kaplan, as the city provided several instances of Kaplan’s poor work performance. Further, Kaplan offered no evidence that the city’s reasons for firing him were a pretext for unlawful discrimination. The court overruled Kaplan’s sole issue on appeal and affirmed the trial court’s final judgment.

***Smith v. City of Garland*, No. 05-16-00474-CV, 2017 WL 1439699 (Tex. App.—Dallas Apr. 20, 2017).** This dispute involved promotions in the City of Garland fire department. Originally, the city sued Randy Smith and many other city firefighters after allegations of cheating on civil service examinations that qualified employees for a promotion. The city voluntarily dismissed Smith from the suit because he had not taken the exam in question. However, he intervened and sued the city. The city moved to strike Smith’s intervention and for entry of final judgment. The trial court granted the motion, and Smith appealed.

Smith asserted three issues in his appeal: (1) he had standing to file a motion for new trial, so his notice of appeal was timely; (2) the trial court had abused its discretion in striking his intervention; and (3) the trial court’s judgment is void for lack of subject matter jurisdiction. The Dallas Court of Appeals concluded that Smith’s motion for a new trial did extend the appellate timetable, his notice of appeal was timely, and the court had jurisdiction over the appeal. As for Smith’s second issue, the court noted that there was no administrative remedy for the city to exhaust before seeking declaratory judgment because no party sought to challenge grades and the method of grading of the civil service exam or any commission decision. Instead, the dispute was over how to fill

resulting vacancies in accordance with civil service law. Thus, the court concluded that the trial court properly exercised its jurisdiction over the suit.

In deciding Smith's last issue, the court concluded that Smith had failed to demonstrate a justiciable interest in the controversy since he did not take the test in question. Nor did he show that he would have or should have been promoted. The court also concluded that Smith's intervention would complicate the case, and that he had failed to establish that the intervention was essential to protect his interest. Thus, the court overruled each of Smith's issues and affirmed the trial court's decision.

Jackson v. Port Arthur Indep. Sch. Dist., No. 09-15-00227-CV, 2017 WL 1425589 (Tex. App.—Beaumont Apr. 20, 2017) (mem. op.). In this employment dispute asserting constitutional claims, the Beaumont Court of Appeals affirmed the granting of the school district's plea to the jurisdiction.

Jackson had an employment contract with the Port Arthur Independent School District. She was a principal at a local elementary school and was reassigned as an assistant principal at a high school. Jackson asserted the move violated her rights to free speech and interfered with her property rights. Jackson alleged that Superintendent Brown demoted her based off of criticisms that she had made about matters at the elementary school involving issues of staffing, scheduling, learning plans, and services. Brown and the district filed pleas to the jurisdiction, which the trial court granted. Jackson appealed.

Jackson's contract showed that she was subject to both being reassigned to other schools and to being reclassified into other positions. As a result, she did not have a property interest in her principal position via contract. Jackson's pleadings contained very few facts to support her claim that she was otherwise deprived of any constitutionally protected rights. To survive a plea to the jurisdiction, a plaintiff is required to plead a facially valid constitutional claim. Jackson did not provide the trial court with any evidence to rebut the fact that her contract allowed her to be reassigned and to be reclassified. Further, before any substantive or procedural due process rights attach, a plaintiff must show that they have either a liberty interest or a property interest that is entitled to constitutional protection. Here, Jackson failed to establish either. Further, Jackson failed to plead sufficient facts to show that her speech was protected under either the state or federal constitutions. Her complaints were employee based, not citizen based and not on matters of public concern. As a result, the trial court properly granted the pleas.

GOVERNMENTAL IMMUNITY

City of West Columbia v. Garcia, No. 01-16-00139-CV, 2016 WL 5940481 (Tex. App.—Houston [1st Dist.] Oct. 13, 2016) (mem. op.). The City of West Columbia appealed a denial by the trial court of a plea to the jurisdiction based on governmental immunity.

Marcelino Garcia was a construction worker for Matula & Matula Construction (M&M), which contracted with the city to provide construction work on a municipal water and sewer project. Garcia was at work when he felt a sharp pain in his arm. The M&M's safety director drove Garcia to an occupational health care facility. However, Garcia's condition worsened, and he was

eventually transported to the hospital where he remains paralyzed and in critical care. Garcia sued M&M and the city for intentional infliction of emotional distress, negligence, and premises liability, alleging that exposure to toxic substances at the jobsite caused his illness.

The city, in trial court, filed a plea to jurisdiction claiming governmental immunity from suit and liability. After the hearing, the trial court denied the plea. The city appealed, claiming that the trial court erred because Garcia has not alleged a claim that falls within the limited waiver of immunity provided under the Texas Tort Claims Act (Act). The First Court of Appeals undertook a *de novo* review of the trial court's ruling. The court explained that, in determining a plea to the jurisdiction, a court "may consider evidence and must do so when necessary to resolve the jurisdictional issues raised." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). However, the determination of subject matter jurisdiction might need to be made after a "fuller development of the merits of the case must be left largely to the trial court's sound exercise of discretion." *Blue*, 34 S.W.3d at 554.

The court looks at governmental immunity in four different situations: (1) intentional torts; (2) vicarious liability for negligence; (3) negligent use of motorized equipment; and (4) premises liability. As for intentional torts, the court stated that Garcia's claim of intentional emotional distress was focused on M&M's conduct and only alleged the city's liability on the element of foreseeability. The court found that the city was barred as a matter of law on the intention tort claim and that the trial court erred in denying the city's plea to the jurisdiction on this claim.

As for vicarious liability for negligence, Garcia claimed that the contractual relationship between the city and M&M imputed liability to the city for M&M's failure to provide its employees with safety equipment through respondeat superior and agency theories. The court stated that in order for the city's immunity to be waived, a party would need to prove that the city had the right to control M&M's employees based on the contract. Garcia alleged that the city had a duty to M&M's employees to provide safety equipment for the job and control a water pump. The city did not negate these allegations, and the burden to meet the standard of a trial court's lack of jurisdiction is on the party seeking the dismissal. See *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012). Thus, the court determined that the trial court did not err in exercising discretion to wait for more evidence before determining whether to grant the city's plea to the jurisdiction in this situation.

The city claims that Garcia only alleged the non-use of the motor driven water pump and not the misuse of the pump as required for waiver of immunity under the Act. Construing Garcia's allegations liberally in favor of jurisdiction and seeing evidence that water near the pump was moving, the court concluded that Garcia proved the "use" requirement and that the trial court did not err in denying the city's plea to the jurisdiction on this claim.

Last, the court examined Garcia's premise liability claim, alleging the city controlled the job site and that a dangerous condition existed on the premises. The pleadings did not allege a special defect, only a general premises defect, which means the city only owed the duty of a private person to Garcia—a duty not to "injure a licensee by willful, wanton, or grossly negligent conduct, and [to] use ordinary care either to warn a licensee or to make reasonably safe dangerous condition of which the owner is aware and the licensee is not." *Texas Dep't of Transp. v. Perches*, 388 S.W.3d

652, 656 (Tex. 2012). The court concluded that Garcia’s petition does not make the allegation that the city engaged in any willful, wanton, or grossly negligent conduct, and therefore, the trial court erred in denying the city’s plea to the jurisdiction on this claim.

***Delgado v. River Oaks Police Dep’t*, No. 02-15-00205-CV, 2016 WL 6900900 (Tex. App.—Fort Worth Nov. 23, 2016) (mem. op.)**. Delgado sued the City of River Oaks and its police department for claims arising from his arrest for driving while intoxicated and an involuntary blood draw. The city and police department filed pleas to the jurisdiction and special exceptions asserting governmental immunity and arguing that the police department couldn’t be sued because it is not a separate entity subject to suit. The trial court granted the pleas, and Delgado appealed.

Delgado argued the trial court should have given him the opportunity to amend his pleadings to add additional claims before dismissing his negligence per se claims. The appellate court explained that Delgado “does not contend that, nor does he articulate how, any amendment would have cured the jurisdictional defects. . . .” Further, Delgado did not request an opportunity to amend from the trial court. He waived the issue of an ability to file an amendment, and the trial court therefore properly granted the plea.

***Engelman Irrigation Dist. v. Shields Bros., Inc.*, No. 15-0188, 2017 WL 1042933 (Tex. Mar. 17, 2017)**. The Supreme Court of Texas issued this opinion holding a governmental entity’s sovereign immunity does not protect it from a monetary judgment which has become final, even if the judgment allowed claims for which the entity is immune.

In 1992, Shields Brothers, Inc. (Shields) sued the Engelman Irrigation District (Engelman), a governmental entity, alleging Engelman had breached a contract to deliver water to Shields. Engelman contended the trial court lacked subject-matter jurisdiction because Engelman had sovereign immunity and the “sue and be sued” language in its incorporation authorization did not waive immunity. The “sue and be sued” language dispute was not ultimately decided in the courts at that time. After going up and down the court of appeals, Engelman lost at trial, and the jury awarded damages. This became the *Engelman I* judgment. Engelman did not pay the judgment but sought permission to declare bankruptcy under the Texas Water Code. The Texas Commission on Environmental Quality denied the request, and the district court judgment resulting from that denial is the *Engelman II* judgment. While *Engelman II* was on appeal, the Supreme Court of Texas issued its opinion in *Tooke v. City of Mexia* holding the “sue and be sued” language in many statutes and incorporation documents is insufficient to waive sovereign immunity.

In 2010, Engelman brought the pending suit (*Engelman III*) seeking relief. Since it was always immune and the trial court always lacked subject matter jurisdiction, Engelman should not have to pay the *Engelman I* judgment, arguing it was void. The trial court and court of appeals disagreed, holding the final judgment could not be collaterally attacked, and Engelman appealed to the Supreme Court of Texas.

The Supreme Court of Texas started out by analyzing long-held judicial principals, including that a judicial decision, like *Tooke*, generally applies retroactively. But retroactive application of a judicial decision does not generally extend to allow reopening a final judgment where all direct appeals have been exhausted. The principles of *res judicata* precluded collateral attacks on final

judgments. “The reason for not allowing collateral attack on a final judgment is that such an attack would run squarely against principles of *res judicata* that are essential to a rational and functioning judicial system.” “For any rational and workable judicial system, at some point litigation must come to an end, so that parties can go on with their lives and the system can move on to other disputes.” However, the court also analyzed the fact that *res judicata* does not normally apply when the original tribunal lacked subject-matter jurisdiction. In order to resolve these competing issues, the court held sovereign immunity only “implicates” subject-matter jurisdiction, not that it involved subject-matter jurisdiction for all purposes. Immunity may implicate, yet does not necessarily equate, to an absence of subject-matter jurisdiction because “sovereign immunity includes concerns about both subject-matter and personal jurisdiction but is identical to neither.”

Adopting provisions of the Second Restatement of Judgments, the court held “[w]hen a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court’s subject matter jurisdiction in subsequent litigation.” It is one thing to recognize immunity as equating to jurisdiction when dealing with a defense of an existing claim and preventing the waiver of that defense, and quite another to jettison the principles behind the finality of a judgment as a whole. Next, the court addressed Engelman’s separation of powers argument and held its decision does not preclude the legislature from waiving immunity but merely cements the judicial process of ending litigation through a final judgment not subject to attack. In fact, the court held the reverse of Engelman’s argument is true in that if the legislature had passed a statute adopting *Tooke* and making it retroactive in a way which allowed collateral attack on final judgments, such a statute would cross the separation of powers line into the judicial process.

Finally, the court addressed Engelman’s equity arguments and held “recognizing the continuing validity of the *Engelman I* judgment is hardly so inequitable or contrary to the public interest as to compel abandoning principles of *res judicata* and allowing Engelman to avoid that judgment.” As a result, Engelman cannot collaterally attack a final judgment on the basis of immunity.

***Hidalgo Cty. v. Herrera*, No. 13-15-00167-CV (Tex. App—Corpus Christi Mar. 30, 2017) (mem. op.)**. This is a wrongful death claim brought under the Texas Tort Claims Act where the Thirteenth Court of Appeals reversed the denial of the county’s plea to the jurisdiction and dismissed the case. This is a companion case, of sorts, to a case the Thirteenth Court of Appeals issued on March 14. The family of Reynaldo Herrera sued various entities, resulting from a vehicle accident. A City of Pharr police officer attempted to make a traffic stop for violations of the Transportation Code, only to have the suspect vehicle flee. Various entities joined the pursuit as the fleeing vehicle went through different jurisdictions. The city’s officer eventually disengaged his pursuit, but the other agencies continued. While being pursued by law enforcement, including sheriff’s deputies of Hidalgo County, the suspect vehicle struck Herrera’s vehicle, killing him. The companion case was against the City of Pharr and resulted in the city defendant’s plea being granted since the city’s officer disengaged the pursuit prior to the collision with Herrera. This case encompasses the sheriff’s deputy who followed the suspect vehicle until it struck Herrera’s vehicle. The county filed a plea to the jurisdiction, which the trial court denied. The county appealed.

The court first held that for purposes of analysis, it assumed (without deciding) that Herrera’s death “arises from” the deputy’s operation of a motor vehicle and that the need to apprehend the suspect

presented an “emergency situation” under Texas Local Government Code Section 101.055(2). The county’s immunity remains intact unless Deputy Ortega acted with reckless disregard for the safety of others. The court noted that any pursuit by police invariably creates some degree of risk to the public of a collision. Therefore, the mere fact a pursuit exists is not *ipso facto* evidence of reckless disregard. Next, Deputy Ortega’s affidavit established undisputed evidence of key facts including the grounds on which the pursuing officers believed it was a possible narcotics transport, the high speed at which the suspect vehicle was being driven, the fact Ortega did not know the city police officer had disengaged pursuit, the distance the suspect was from Ortega and the road configurations preventing Ortega from quickly overtaking the suspect vehicle, the traffic conditions Ortega observed, and Ortega’s actions while he searched for the suspect on dirt roads. While searching for the suspect vehicle, Ortega came upon the accident scene after the collision had occurred. Witness affidavits established the collision had occurred at least two minutes before Deputy Ortega arrived at the scene. To counter this evidence, the plaintiffs only submitted the report of a police expert stating Deputy Ortega should not have joined the pursuit if he’d known it was only based on a minor traffic offense. However, the court determined the expert report offered only conclusory opinions regarding Ortega’s deliberate indifference. Based on this uncontroverted evidence, the court held Ortega was not deliberately indifferent, but operated his vehicle with due regard for the safety of the public. As a result, the county retains its immunity and the plea should have been granted.

***Rogge v. City of Richmond*, No. 01-14-00866-CV, 2016 WL 5481484 (Tex. App.—Houston [1st Dist.] Sept. 29, 2016).** The Rogges sued the City of Richmond (Richmond) under federal civil rights law and the Texas Tort Claims Act (Act) after their son committed suicide in Richmond’s jail. The Rogges’ son was arrested for driving while intoxicated. He was taken to Richmond’s jail and was placed in a holding cell while the officer did paperwork to transfer him to the Fort Bend County jail. The son tied his shirt to a metal grate air vent in the ceiling and committed suicide.

The civil rights case was removed to federal court. As to the other claims, the Rogges’ alleged negligence, wrongful death, and survival claims because they contended that their son’s death was caused by the use or condition of property—the metal grate—which was affixed into the ceiling and positioned directly above the toilet in the holding cell. It was alleged that the metal grate presented an unreasonable risk of harm because it was easily accessible to a person who wants to harm himself or, in the alternative, constituted a premises defect because of the position of the vent above the toilet. Richmond filed a plea to the jurisdiction and a motion for summary judgment, arguing the Rogges’ claims were barred by governmental immunity. Richmond argued that the suicide was not caused by a condition or use of tangible personal property, and that the claims were barred by the discretionary-function exception to the limited waiver of immunity found in the Act. The trial court granted the summary judgment in favor of Richmond, and the Rogges appealed.

The Rogges’ argued four issues before the appellate court: (1) their son’s death was caused by Richmond’s use of tangible personal property; (2) his death was caused by a condition of tangible property; (3) the discretionary-function exception to the waiver of immunity did not apply; and (4) the cause of action for a premises defect was not addressed by the motion for summary judgment. The court first determined how to classify the Rogges’ claim. The court stated that “[t]he Tort Claims Act imposes different standards of care upon a governmental entity for

negligence claims based on ‘a condition or use of tangible personal property’ and claims based on a ‘premises defect’ relating to the condition or use of real property.” See *Sampson v. Univ. of Tex. at Austin*, No. 14-0745, 2016 WL 3212996, at *2 (Tex. June 10, 2016). After analyzing the Rogges’ use argument (i.e., that Richmond used the metal grate by installing it in the holding cell for the purpose of preventing a prisoner’s escape through the ventilation, relying on *Retzlaff v. Texas Dep’t of Criminal Justice*, 135 S.W.3d 731 (Tex.App.—Houston [1st Dist.] 2003, no pet.)), the court found no factual evidence supporting this argument and concluded that the Rogges’ claim should be classified as a premises-defect claim because this claim is not a case in which liability is predicated upon any “affirmative, contemporaneous conduct” by Richmond’s employees but instead depends upon the duty or care owed by Richmond to people held in the police station’s holding cell. The court overruled the Rogges’ first and fourth issue.

Then, the court looked at the second issue where the Rogges’ claimed that the trial court erred by dismissing their case because immunity was waived due to the condition of the metal grate, which they contend caused their son’s death. A condition of property may be a basis for waiver of governmental immunity when it makes the property inherently dangerous and “poses a hazard when the property is put to its intended and ordinary use.” *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 99 (Tex. 2012). After analyzing the Rogges’ argument that the metal grate’s ventilation holes were “too large” and that an “integral safety component” was lacking, the court determined that there was no evidence in the appellate record that the metal grating was inherently dangerous or hazardous in its intended use as a cover for the air vent and that there were no jurisdictional facts showing that the condition of the grate actually caused the injury. Therefore, the court overruled the Rogges’ second issue since it ruled that Richmond’s immunity was not waived by a defective condition of real property and affirmed the judgment of the trial court.

***Bay City v. McFarland*, No. 13-15-00122-CV, 2016 WL 5941891 (Tex. App—Corpus Christi Oct. 13, 2016) (mem. op.)**. This is a Texas Tort Claims Act case involving an automobile accident where the Corpus Christi Court of Appeals affirmed the denial of the city’s plea to the jurisdiction.

Officer Kunz was dispatched to the scene of a residence where two siblings had been reported fighting with deadly weapons. While in route, Officer Kunz collided with a motorcycle driven by McFarland. The evidence is undisputed that Officer Kunz proceeded through the intersection without stopping at a stop sign. McFarland sued the city, alleging it was vicariously liable for Officer Kunz’s negligence and for negligently hiring him. The city filed a plea to the jurisdiction asserting (1) the emergency responder defense; and (2) that Officer Kunz had official immunity. In response, McFarland’s expert testified the dash cam contradicted Kunz’s affidavit testimony regarding her slowing before entering the intersection. The expert concluded that the operation of her vehicle was reckless and that no reasonably prudent officer could believe that her conduct was necessary. The trial court denied the plea, and the city appealed.

While the evidence is undisputed that Officer Kunz was responding to an emergency call and had her lights and siren on, the evidence before the trial court contained a material fact issue as to whether she slowed before entering the intersection, so the plea was properly denied as to the emergency responder defense. Additionally, the issue regarding whether Officer Kunz slowed down is material to the third “need-factor” under the official immunity defense concerning whether

a safer alternative course of action was available. As a result, the plea was properly denied as to the official immunity defense.

***Laverie v. Wetherbe*, No. 15-0217, 2016 WL 7177730 (Tex. Dec. 9, 2016).** This is a Texas Tort Claims Act case where the Supreme Court of Texas reversed and rendered an order denying a motion for summary judgment and held no “subjective intent” element exists requiring an employee to establish they acted only in their employment capacity.

A University of Texas Tech professor and associate dean, Wetherbe, sued a colleague, Laverie, for defamation. Understanding the university was immune from defamation claims, Wetherbe sued the senior associate dean in charge of the committee charged with searching for a new dean for the Rawls College of Business Administration. During the search, Laverie allegedly told Texas Tech’s provost, Bob Smith, Wetherbe was using “some kind of listening device or other to eavesdrop on people’s conversations in the Rawls College.” Smith said he considered it “only a hearsay report” and denied it played any role in his decision not to appoint Wetherbe. Wetherbe was also passed over for a Horn professorship. Wetherbe sued Laverie for defamation. Laverie filed a Texas Civil Practice and Remedies Code Section 101.106(f) motion for summary judgment to dismiss her and substitute the university since she was acting within the course and scope of her employment. Wetherbe counted the defamatory statements were not uttered in the course and scope of employment but were for personally motivated reasons. The trial court denied the motion. The court of appeals affirmed, noting the record “contains no direct evidence of Laverie’s intentions when she spoke with Smith about Wetherbe . . . and does not conclusively establish the nature of her motivation. . . .” Laverie appealed.

The Supreme Court of Texas analyzed the language and purpose behind Section 101.106(f). The only issue is whether Laverie acted within the scope of her employment when she made the allegedly defamatory statements. Wetherbe seemed to concede Laverie possibly acted within the scope of her employment—he simply argues we cannot know with certainty unless we know why she said what she said. However, nothing in the election-of-remedies provision or the statutory definition of “scope of employment” suggests subjective intent is a necessary component of the scope-of-employment analysis. Rather, the Tort Claims Act focuses on “performance . . . of the duties of an employee’s office or employment,” which calls for an objective assessment. An employee whose conduct is unrelated to his job, and therefore objectively outside the scope of his employment, would not be entitled to such a defense. This is not tantamount to a threshold requirement that government-employee defendants conclusively prove their subjective intent to establish they acted within the scope of their employment. Further, requiring proof of an employee’s subjective intent would burden government employees with proving a negative to attain dismissal.

Moreover, requiring such would require at least a partial analysis of the merits, where the function of the election-of-remedies provision is not to adjudicate the underlying claim but to quickly dismiss government employees when the suit should be brought against their employer. Finally, Laverie’s personal motivations, if she had any, ultimately do not change her job responsibilities and whether the statement was in performance of them. Laverie was the senior associate dean of the business school and a member of the dean search committee. Laverie did not volunteer the information but responded as a direct result of Smith’s specific inquiry on the search. Even if

Laverie defamed Wetherbe, she did so while fulfilling her job duties. As a result, Laverie is entitled to dismissal.

***Castillo v. City of Edinburg*, No. 13-15-00542-CV, 2016 WL 7011580 (Tex. App.—Corpus Christi Dec. 1, 2016) (mem. op.)**. Castillo filed suit against the University of Texas Pan-American and the City of Edinburg for injuries he sustained after he was struck by a vehicle while riding his bike in a crosswalk located in the city. Castillo alleged that the yield signs were in a defective condition because they were placed too close to the crosswalk and the pavement markings were too faded to be clearly visible to drivers. The city filed a plea to the jurisdiction, arguing that it did not waive its governmental immunity for several reasons, including because there was nothing wrong with the condition of the crosswalk. The trial court granted the city’s plea to the jurisdiction, and Castillo appealed.

On appeal, Castillo argued that a fact issue existed regarding whether the condition of the pavement markings and location of the yield sign proximately caused his injuries. Meanwhile, the city argued that Castillo failed to show any evidence that any acts or omissions by the city proximately caused his injuries, and that his injuries were caused solely by the driver’s inattention. The court of appeals cited testimony from the driver of the vehicle that struck Castillo in which the driver clearly states that he was familiar with the crosswalk and that he’d stopped there many times to let people walk across the street. Because of the driver’s undisputed testimony establishing that the condition of the pavement markings and location of yield signs were not substantial factors in bringing about appellant’s injuries, the court determined that Castillo failed to establish that any acts or omissions by the city caused his injuries. The court of appeals affirmed the trial court’s judgment.

***Tarrant Reg’l Water Dist. v. Johnson*, No. 02-16-00043-CV, 2016 WL 7601840 (Tex. App.—Fort Worth Dec. 30, 2016)**. This is an interlocutory appeal in a Texas Tort Claims Act (TTCA) case where the Fort Worth Court of Appeals affirmed-in-part and reversed-in-part the denial of the Tarrant Regional Water District’s (TRWD) plea to the jurisdiction. This is a 32-page opinion, plus the dissent.

Brandy Johnson drowned in the Trinity River after attempting to walk across Trinity Park Dam No. 2 (dam), which had been redesigned and reconstructed in 2002. Plaintiffs alleged the kayak chutes cut into the middle of the dam allowed water to flow unregulated and up to 2,700 cubic feet per second, which constitutes a Class II+ whitewater rapid. The chute was designed to be slippery to allow for kayak travel. Additionally, the materials partially filling a scour hole had been washed away, making the hole dangerous to anyone who fell in. According to the Johnsons, Brandy drowned when she fell from the kayak chute into the scour hole, which was not visible to Brandy and had become deeper than designed. The Johnsons further detailed three previous drownings and two near-drownings at the same site, all involving people falling off the dam. The chute was not designed as a walkway, but these events made TRWD aware people were using it as such. The only warning sign present stated “Safety First Please Watch Your Children.” No additional warning signs were added to the dam after the prior incidents. The plaintiffs alleged the dangerous condition was created by “altering the natural flow of the Clear Fork of the Trinity River by diverting the river through a series of artificial man-made dams and kayak chutes” creating “a smooth looking yet powerful and deceptively dangerous current through the kayak chute.” The plaintiffs further allege the TRWD negligently implemented policy by not filling in the scour

hole. The family sued TRWD under the TTCA asserting a special and/or premise defect on the dam. It also asserted a tangible personal property claim. TRWD filed a plea to the jurisdiction which the trial court denied. TRWD appealed.

After a detailed factual analysis, the court first held the death was a result of the chute's intentional design and not a malfunction of the chute or TRWD's failure to maintain it. The entire design of the dam indicates an intentional design to bring people down to the river to fish and not to parade them across the dam. No waiver of immunity exists for discretionary acts such as design elements. Further, the complaint about the warning signs is a complaint about the decision of whether or not to install safety features, which is likewise barred. The court held the plaintiffs did not allege a special defect, only a premise defect. Further, they did not allege the negligent use of personal property; this was a premise defect claim only. However, with regards to the scour hole, the evidence showed the hole was deeper than it was ever designed to be and TRWD was aware of the depth. The primary maintenance for the dam is "debris removal after storms [and] flow events." Thus, the complaints about the deepening scour hole and possible related boil effect are not complaints about the original design, but rather the failure to maintain the original design. The complaint alleged it was a dangerous condition of which TRWD had actual knowledge, so the plea was properly denied as to that claim.

The dissent disagreed with the majority's holding on the premise defect claim regarding the kayak cut, specifically that there still exists a duty to warn and the "Safety First Please Watch Your Children" sign comes nowhere close. As a result, the dissent would not have reversed any portion of the trial court's order denying the plea.

Montgomery Cty. v. Lanoue, No. 09-16-00195-CV, 2016 WL 7473896 (Tex. App—Beaumont Dec. 29, 2016) (mem. op.). This is a Texas Tort Claims Act slip-and-fall case where the Beaumont Court of Appeals reversed the denial of the county's plea to the jurisdiction and dismissed the case.

When Lanoue entered the Montgomery County Courthouse, the floor had recently been mopped and waxed. The county had placed a sign in the area noting the floor was wet. Lanoue asserted the sign was confusing since the floor looked dry and the sign did not say he should watch out for wax, only that the floor was wet. The undisputed evidence included a still photograph of Lanoue in mid-fall, right next to the warning sign. When he entered onto the floor, he slipped, fell, and was injured. The county filed a plea to the jurisdiction asserting it met its duty to warn of the dangerous condition. The plea was denied and the county appealed.

Premises owners have a duty to either "warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not." Lanoue asserted the "wet floor" warning sign was inadequate because the floor was actually dry but was covered with a slippery wax. However, "[a] warning of the specific material causing a condition is not required, so long as the existence of the condition itself is conveyed." The warning need not identify the specific substance that made the floor wet. Therefore, the court held that the "'wet floor' sign inches from the location where Lanoue fell was adequate as a matter of law to warn Lanoue that the floor was slippery." The plea should have been granted.

***City of Houston v. Collins*, No. 14-16-00449-CV, 2017 WL 421988 (Tex. App—Houston [14th Dist.] Jan. 31, 2017).** This is a Texas Tort Claims Act vehicle accident case involving official immunity where the Fourteenth Court of Appeals reversed and rendered the denial of the city’s plea to the jurisdiction.

Houston Police Department Officer James Brown responded to a dispatch for assistance where another officer was pursuing a motorcycle whose driver was standing up, driving recklessly, and traveling at a high rate of speed. Collins’s vehicle exited a parking lot and turned right onto the road in front of Officer Brown. She then changed lanes into the left lane, then back to the right lane in front of Brown. Brown struck Collins’s vehicle while attempting to go around. Collins sued, claiming Brown recklessly operated his vehicle. The city filed its first plea to the jurisdiction, which the trial court granted, but the Fourteenth Court of Appeals reversed, noting the record did not contain sufficient evidence to establish Brown’s good faith immunity. On remand, the city filed a second plea with new evidence, which the trial court denied.

In the first appeal, the Fourteenth Court of Appeals held that the city established Brown was acting in the course and scope of his employment and was performing discretionary actions. It remanded based on a lack of record evidence that no reasonable officer would have acted the way Brown did under similar circumstances. For this appeal, the court held the officer must assess “both the need to which an officer responds and the risks of the officer’s course of action, based on the officer’s perception of the facts at the time of the event.” The city’s second plea produced various affidavits from officers and dispatchers. The supervising sergeant on duty who overheard the radio exchange regarding the pursuit noted the pursuing officer had stress and urgency in his voice, made it clear the suspect was not stopping and was endangering lives, and that a reasonable officer would conclude an emergency existed. Various officers provided affidavits that such situations require immediate responses from law enforcement for the safety of motorists and the public. The circumstances reasonably qualify as evading arrest, which is a state jail felony under Section 38.04 of the Texas Penal Code.

The court of appeals went into specific detail regarding the testimony supporting each of these statements. The court felt it was important to note the affidavits proffered by the city in support of the first plea stated that the suspect evaded arrest; they did not explain how a reasonable officer could have determined from the radio broadcast that the suspect was fleeing. The evidence for the second plea provided a great deal more detail and specific evaluations that go through an officer’s mind. The court analyzed the “need” and “risk” assessment under the detailed statements and what alternative actions Brown could have used. In response to Collin’s assertions that the new affidavits are conclusory because they analyze things differently than the first set of affidavits, the court held “[t]he new affidavits do not change the underlying factual assertions, but instead provide additional context to explain Officer Brown’s response considering what he reasonably understood to be the situation. The new affidavits were substantiated with facts showing that Officer Brown assessed the need for his response against the risks to the public” and “provide[d] the missing link explaining that reasonable officers’” mindset. After going through the analysis, the court held that the city established Officer Brown was entitled to official immunity. Therefore, the city’s plea should have been granted. Reversed and rendered.

***City of San Antonio v. Cervantes*, No. 04-16-00569-CV, 2017 WL 685718 (Tex. App.—San Antonio Feb. 22, 2017).** This is a Texas Tort Claims Act (Act) case in which the San Antonio Court of Appeals reversed the trial court’s order denying the city’s plea to the jurisdiction because the city lacked proper notice of the claim.

In 2015, Charles Cervantes filed suit against the city seeking damages for personal injuries alleged to be caused by a 2013 automobile accident with a City of San Antonio police officer. Cervantes’ petition asserted the city had both formal and actual notice of the claim, as required by Section 101.101 of the Texas Tort Claims Act. The city filed a plea to the jurisdiction, arguing that governmental immunity was not waived because Cervantes failed to give notice within the required six months from the date of the incident. The trial court denied the plea, and the city filed an interlocutory appeal. As a preliminary matter, the court determined that without further evidence of actual consent between the parties, the city did not waive its right to appeal by signing the trial court’s order.

As a condition of the waiver of immunity from suit, the Texas Tort Claims Act requires that a governmental unit obtain notice of a claim within six months of the incident giving rise to it. That requirement is satisfied if the governmental unit receives formal notice that reasonably describes the damage or injury, the time and place of the incident, and the incident itself. Citing an affidavit from a risk management officer in the city’s finance department, the court concluded that the city did not receive formal notice of the claim. The Texas Tort Claims Act can also be satisfied if the governmental unit has *actual* notice of the injury, but it is not enough that the governmental unit should have known about the injury or should have investigated further. Here, the police reports after the accident showed that there were no injuries reported at the time. In conversations both at the scene and afterwards, Cervantes indicated that he was “shaken up” and “kind of numb,” but that he believed he was “all right.” The court held that there was no evidence to support a finding that the city had actual notice of an injury. Because Cervantes was claiming personal injury and not property damage, the court also rejected his argument that the city’s notice of the property damage from the accident met the Act’s notice requirement. Finally, Cervantes argued that the statute gives rise to an absurd result for claimants whose injuries manifest long after the incident. The court declined to address the argument because there was no evidence that Cervantes was such a claimant. The court reversed the trial court’s order denying the plea.

***Brown v. Corpus Christi Reg’l Transp. Auth.*, No. 13-15-00188-CV, 2017 WL 929484 (Tex. App.—Corpus Christi March 9, 2017) (mem. op.).** This is an appeal from the granting of a plea to the jurisdiction in a Texas Tort Claims Act case. The Thirteenth Court of Appeals affirmed the granting of the plea. A Corpus Christi Regional Transportation Authority (RTA) bus stopped at a bus stop to load and unload passengers. Brown did not initially board, as he had fallen asleep while waiting. As the RTA bus began to move again, one passenger asked the driver to stop so he could get off. The bus driver stopped and the passenger departed. As the bus began to move again, Brown woke up and attempted to board the bus. He lost his balance, fell to the ground, and the bus’s rear tire ran over Brown’s left arm. The investigating police report attributed fault solely to Brown. RTA’s own investigation did not find any fault on the part of the bus driver. Two years later, Brown sued for negligence. RTA filed a plea to the jurisdiction asserting a lack of statutory and actual notice under the Texas Tort Claims Act (TTCA). The trial court granted the plea, and Brown appealed.

It is undisputed that Brown failed to provide a written notice within six months under Section 101.101 of the TTCA. To succeed, Brown must establish RTA had actual notice of the claim. Texas law has rejected the theory that a governmental entity must have actual knowledge *only* of an injury. To qualify as actual knowledge under the notice provision of the TTCA, an entity must have a subjective awareness of its fault in producing or contributing to the injury or damage. RTA provided an affidavit establishing how RTA conducted the internal investigation, what it was told, what it discovered, and that nothing indicated RTA was at fault. A certified copy of the police report indicated Brown was solely at fault. The Supreme Court of Texas has held that “when a police report does not indicate that the governmental unit was at fault, the governmental unit has little, if any, incentive to investigate its potential liability because it is unaware that liability is even at issue.” As a result, no subjective awareness of fault existed, and the plea was properly granted.

***City of Pharr v. Herrera*, No. 13-15-00133-CV, 2017 WL 929483 (Tex. App.—Corpus Christi March 9, 2017) (mem. op.)**. This is an interlocutory appeal from the denial of a plea to the jurisdiction for a wrongful death claim under the Texas Tort Claims Act. The Thirteenth Court of Appeals reversed and rendered judgment for the city. The city’s police officer, Emilio Gonzalez, attempted to conduct a traffic stop. When the vehicle driven by Rafael Quintero failed to stop on command, Officer Gonzalez pursued the vehicle into the City of Alamo. Other law enforcement agencies joined the pursuit. Sometime afterwards, Gonzalez disengaged his pursuit, but others did not. While two Hidalgo County sheriff’s deputies were continuing pursuit, Quintero struck Reynaldo Herrera’s vehicle. Herrera later died due to the injuries. His family sued the city for initiating the chase. The city filed a plea to the jurisdiction asserting governmental immunity, which the trial court denied. The city appealed.

For a waiver of immunity, the vehicle’s use “must have actually caused the injury.” In addition, “a government employee must have been actively operating the vehicle at the time of the incident.” Herrera’s expert provided testimony that Officer Gonzalez “got the momentum going” by initiating the chase when such a chase was not appropriate based on weak, legally-faulty, or non-existent justification for the pursuit. He believed Gonzalez was at fault. However, the court disagreed: “The actual cause of the collision was Quintero’s decision to flee from police officers.” Officer Gonzales had ended his pursuit and was not present when the accident occurred. The evidence in this case does not support a causal nexus between Officer Gonzalez’s use of his vehicle and the plaintiff’s injuries. As a result the plea should have been granted.

***Port of Beaumont Navigation Dist. v. McCarty*, No. 09-16-00356-CV, 2017 WL 1089604 (Tex. App.—Beaumont Mar. 23, 2017) (mem. op.)**. This is a Texas Tort Claims Act case where the Beaumont Court of Appeals reversed and rendered in part and reversed and remanded in part a trial court’s order on a plea to the jurisdiction. Plaintiff McCarty alleges he was injured when the car he was driving was struck by a train at a crossing leased to the Port of Beaumont Navigation District (port). He asserts an unreasonably dangerous condition existed at the crossing, the port knew or should have known of the condition, and it failed to properly warn him. Essentially he asserts that as the crossing is at a curve in the tracks, the crossing tracks and inadequate lighting did not let him see the oncoming train. The port filed a plea to the jurisdiction asserting it did not possess the premises and that it merely held a roadway easement to the crossing. The port also

asserted McCarty ran the stop signal and collided with the train. The trial court denied the plea, and the port appealed.

In analyzing whether or not the pleadings indicate a special defect or an ordinary premise defect, the court held that the question turned on the objective expectations of an ordinary user of the roadway. The court held: “In our opinion, an ordinary user on a road that crosses railroad tracks at a crossing equipped with a crossbuck—the familiar black-and-white, X-shaped signs that read ‘RAILROAD CROSSING’—is expected to cross railroad tracks only after looking for trains to determine if any trains are in hazardous proximity to the crossing.” The mere presence of railroad tracks and the transitory nature of a train passing through a crossing is unlike an obstruction or excavation, and nothing indicated the tracks caused the accident. As a result, no special defect exists. Under a theory of a premise defect regarding the tracks or land, McCarty was unable to establish the port breached any duty. The evidence established signs were present near the crossing that provided warnings about the presence of trains at the crossing. As a result, the plea should have been granted as to all claims regarding the tracks. However, under an inadequate lighting premise defect theory, the court was not convinced the record established or negated such a claim. The court went over each way McCarty could establish a waiver and each way the port could negate it and held it could not establish either determination based on the record. As a result, it remanded the inadequate lighting claim to allow McCarty the ability to replead.

Jackson v. City of Texas City, No. 13-16-00179-CV, 2017 WL 1455091 (Tex. App.—Corpus Christi Apr. 20, 2017) (mem. op.). This is a wrongful death action where the Corpus Christi Court of Appeals affirmed the granting of the city’s plea to the jurisdiction under the recreational use statute.

Plaintiffs and their daughter Kaloni attended a family reunion at a city park. During the event, Kaloni wandered into the pond and drowned. It was undisputed that the city had posted at least one warning sign near the ponds which read “No Swimming, Beware of Snakes.” The parties also agreed that there were no barriers or fences along the edges of the pond nearest to the playground. The parents sued the city alleging negligence and gross negligence. The city filed a plea to the jurisdiction and later supplemented. The trial court granted the plea and the plaintiffs appealed.

To defeat immunity in a premises case, it must also be established that the government-defendant had a duty to warn or protect the injured party. A landowner has no duty to warn or protect recreational users from open and obvious defects or conditions. Under the gross negligence theory, there must be legally sufficient evidence that the city had actual, subjective awareness that conditions at the pond involved an extreme degree of risk but nevertheless were consciously indifferent to the rights, safety, or welfare of others. After analyzing the facts, the court held the city carried its initial burden by presenting evidence which negated the subjective-awareness component. A pond is open and obvious as a possible danger. The city was unaware of any risk which went beyond what a reasonable recreational user would be aware of. Further, the posting of warning signs is usually sufficient to avoid a finding of conscious indifference. As a result, the trial court properly granted the plea.

***City of Austin v. Frame*, No. 03-15-00292-CV, 2017 WL 1832485 (Tex. App.—Austin May 5, 2017) (mem. op.)**. The Austin Court of Appeals withdrew the opinion and judgment in this case that was originally decided May 27, 2016, and substituted this opinion.

This recreational use/personal injury case involved Joseph Rosales jumping the curb and driving onto a hike-and-bike trail. In so doing, his vehicle and debris struck and killed Colonel Griffith and injured Diana Pulido. The appellees (Griffith’s estate and Pulido) sued the city for, among other things, failure to construct a guardrail or barrier for a known danger, which was allegedly a failure to carry out a ministerial act. The city filed a plea to the jurisdiction, which was denied. The city appealed.

The sole issue on appeal was whether the appellees’ allegations concerned discretionary roadway design, as the city contended, or a negligent failure to implement a previously formulated policy, as the appellees contended. Texas courts have generally found that actions and decisions implicating social, economic, or political considerations are discretionary while those that do not involve these concerns are operational– or maintenance-level. The court analyzed the facts and policies alleged. It held that even if the city had a policy to fix identified hazards, “. . . it does not necessarily follow that the City’s failure to address this particular hazard was negligent policy implementation for which immunity is waived. The policy that the appellees describe does not mandate the construction of a guardrail or barrier with sufficient precision to make that action nondiscretionary. . . . Rather, it requires the City to balance social and economic concerns and devise a plan to address each specific identified hazard. This demands a level of judgment . . .” which equates to discretionary action. The court further elaborated that even if the city had made a specific decision to modify the area, “immunity does not vanish where a governmental entity has decided to change the design of a public work but has not yet implemented that change.” The court reversed the district court’s order denying the plea and rendered judgment, dismissing the case.

***Reaves v. City of Corpus Christi*, No. 13-15-00057-CV (Tex. App—Corpus Christi Apr. 13, 2017)**. This is a Texas Tort Claims Act police chase case where the Corpus Christi Court of Appeals reversed the granting of a Rule 91a motion to dismiss based on immunity. This is a 35 page opinion which goes through a detailed analysis of Rule 91a.

A city police officer initiated a high-speed chase against a suspect, Balboa, who eventually ran a stop sign and collided with plaintiff’s vehicle. Instead of filing a plea to the jurisdiction, the city filed a Rule 91a motion to dismiss based on immunity, which the trial court granted. Reaves appealed.

The city’s motion was based on the assertion that it was Balboa who had collided with the plaintiff’s vehicle, so there is no nexus with any city employee’s operation of a motor vehicle. The court may not consider evidence in ruling on a 91a motion and must decide the motion based solely on the pleading. Rule 91a declares that the trial court “must” grant or deny the motion within 45 days after it is filed. The court first considered the plaintiff’s argument that the order was signed by the court 159 days after the filing of the motion, well beyond the 45 days. However, even though the words “must” and “shall” are mandatory, failure to comply does not equate to jurisdiction.

Other circuits have held that Rule 91a issues are not jurisdictional; this court agreed, but based on different reasoning. The legislature prescribed no consequence for non-compliance. Unlike other rules which overrule a motion as a matter of law, Rule 91a remains silent. The court felt this was a clear indication that non-compliance was non-jurisdictional to the movant. Additionally, correction by mandamus was an effective way to serve the purpose of Rule 91a. Next, the court held that since the trial court could not consider evidence during their consideration of the motion, the fact that the trial court engaged in evidentiary inquiries relating to the motion was an error. After a detailed analysis and review of other court holdings, the court ruled a Rule 91a motion is not a plea to the jurisdiction. While some similarities in the standards exist, they are separate procedures. After analyzing the plaintiff's petition under the standard the court had adopted (retaining a fair notice standard and rejecting a factual standard), it held that the pleadings, taken as true and liberally construed, were sufficient to allege an appropriate causal connection to trigger jurisdiction.

GOVERNMENTAL IMMUNITY CONTRACT

***City of Rio Grande City v. BFI Waste Services, LP*, No. 04-15-00729-CV, 2016 WL 5112224 (Tex. App.—San Antonio Sept. 21, 2016) (mem. op.)**. This case involves an exclusive solid waste contract between BFI Waste Services of Texas (Allied) and the City of Rio Grande City. Allied sued the city, city employees, and councilmembers, as well as another solid waste company (Grande). The city notified Allied that it had failed to perform certain obligations of the contract and demanded that Allied cure the breaches. In September 2015, the city alleged Allied failed to cure the breaches and terminated the contract. The city then entered into a contract with Grande for solid waste services.

Allied filed suit against the city alleging breach of contract claims and requesting a temporary injunction against the city prohibiting Allied from providing services. After removing the case to federal court, the federal court remanded the case back to state court, at which time Allied filed an amended petition. The trial court granted the temporary injunction and denied the city's plea to the jurisdiction. The city appealed. The city contended that governmental immunity extended to Grande, the solid waste company that the city entered into a contract with after notifying Allied of the termination. However, the court noted that governmental immunity does not extend to a private contractor hired on a governmental contract and exercising independent discretion for the actions allegedly causing the loss. Thus, the court concluded that Grande was not entitled to derivative immunity. The court also concluded that Allied alleged enough evidence to provide the trial court with jurisdiction over the claims for breach of contract, restraint of trade, abuse of office, tortious interference, violations of the contracts clause and due course of law clause of the Texas Constitution, and violations of the contracts clause and Fourteenth Amendment of the United States Constitution.

Next, the court looked at alleged Texas Open Meetings Act (TOMA) violations and provided more insight into the specificity required in an agenda posting. Allied alleged the city violated TOMA by failing to provide proper notice for actions taken during two meetings. During one of the meetings, the council met with their city attorney to discuss the contract. The city argued that Allied's letters to the city constituted a "very real threat of litigation" supporting the need for discussion in a closed session. However, the court indicated that the record before the court did

not contain evidence of “actual threat of litigation, when the threat was made, or its scope.” Furthermore, the court states that since the exception is an affirmative defense, the city had the burden to conclusively show the application of the exception. The court concluded the city did not meet the burden. Additionally, the court noted that the public interest in the solid waste service was elevated, and the city was required to provide full and adequate notice. Comparing the notice given against the action taken, the court stated that they could not conclude the evidence presented did not reasonably support the trial court’s conclusion. Therefore, the court affirmed the trial court’s order in denying the city’s plea in part and reversed and rendered in part.

***Byrdson Svs., L.L.C. v. South E. Tex. Reg’l Planning Comm’n*, No. 15-0158, 2016 WL 7421392 (Tex. Dec. 23, 2016).** After South East Texas Regional Planning Commission (commission) received federal hurricane relief funding, it contracted with Byrdson Services, LLC (Byrdson) to rebuild certain areas within its jurisdiction. Under a contract between the State of Texas and the commission, the state provided \$95 million to the commission for various disaster-relief and housing-restoration services. The contract authorized the commission to subcontract the repair work, which it did to Byrdson. A dispute arose between the commission and Byrdson regarding the quality of Byrdson’s work and payment due under the contracts. Byrdson sued the commission for payments allegedly due. The commission filed a plea to the jurisdiction, which the trial court denied but the court of appeals reversed and granted. Byrdson appealed.

The commission asserted Local Government Code Chapter 271 does not apply because its contracts do not state essential terms “for providing goods or services to the local governmental entity.” Citizens benefitted, not the commission. Byrdson countered the warranty and indemnity provisions provide the requisite services to the commission. These provisions require Byrdson to warrant its work to the homeowner and to hold the commission harmless. The court held it was not going to analyze the case in that fashion since contractual provisions intended to shield the commission from liability would have the effect of waiving immunity. Instead, the court noted the contract with the state obligated the commission to provide services to the property owners. By subcontracting the work, Byrdson was helping the commission fulfill its obligation to the state. “For this reason the Byrdson agreements provided real and direct services to the Planning Commission that brings the agreements within chapter 271.” Finally, the court held “[w]e have never suggested that the agreements covered by chapter 271 are limited to those where the governmental entity obtains a property interest, nor can such a limitation be gleaned from a plain reading of the statute.”

***City of Dallas v. Trinity E. Energy, L.L.C.*, No. 05-16-00349-CV, 2017 WL 491259 (Tex. App.—Dallas Feb. 7, 2017) (mem. op.).** In this accelerated, interlocutory appeal, the Dallas Court of Appeals reversed the trial court’s order granting the City of Dallas’ plea to the jurisdiction.

The city sought additional revenue by leasing minerals on city-owned property to a private party. The city sought bids from private parties and specifically asked Trinity East Energy (Trinity) to submit a bid. Trinity advised the city of specific pieces of property where surface drilling sites would need to be placed and asked for the city’s pre-approval of these sites before closing on the leases. The city refused to do so, stating the process would take too long. The parties negotiated the drill sites to be included in the leases. The city accepted Trinity’s bids. In the lease, the city

agreed that it “would not unreasonably oppose Trinity’s request for a variance of waiver if necessary for its operations.”

The planning commission voted to deny Trinity’s applications for drill sites, which Trinity appealed to the city council. The motion to override did not receive three-fourths’ votes. Thus, the applications were denied. Following this denial, the city adopted a new gas well ordinance with more restrictive setback requirements. The new ordinance negated the possibility of locating a drill site on the leased property. In the meantime, the leases expired, and the minerals reverted to the city. Trinity sued the city, alleging breach of contract. The city filed a plea to the jurisdiction. Trinity argued that the city had acted in its proprietary capacity when it leased the mineral rights to Trinity and governmental immunity does not apply to proprietary acts. The city responded that the “governmental-proprietary dichotomy” should not be extended to breach of contract claims. The trial court granted the city’s plea to the jurisdiction based on governmental immunity.

Shortly after the trial court granted the city’s plea, the Supreme Court of Texas concluded that the governmental-proprietary dichotomy does apply to claims for breach of contract in *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427 (Tex. 2016). The Dallas Court of Appeals cited *City of Corpus Christi v. Gregg*, 289 S.W.2d 756 (Tex. 1956), in concluding that the city was engaging in a proprietary function in leasing mineral rights. Thus, governmental immunity did not apply. The court also concluded that Trinity raised fact issues about whether the city’s actions resulted in the deprivation of all economically viable use of Trinity’s mineral interests. The court reversed the trial court’s decision and remanded the case back to the trial court.

***JAMRO Ltd. v. City of San Antonio*, No. 04-16-00307-CV, 2017 WL 993473 (Tex. App—San Antonio Mar. 15, 2017) (mem. op.)**. This is, in essence, a breach of contract claim against the City of San Antonio where the Fourth Court of Appeals affirmed the granting of the city’s plea to the jurisdiction. The city created a tax increment reinvestment zone (TIRZ) to finance public improvements in the Palo Alto Trails Development (project). The city clerk received an application from JAMRO seeking the use of tax increment financing for the project, and the application proposed public improvements for the project. The ordinance included findings that the improvements in the TIRZ would significantly enhance the value of all the taxable real property in the TIRZ and was in compliance with Texas Tax Code Chapter 311. However, before the city signed any agreements with developers or the TIRZ board, the city terminated the zone. JAMRO sued for breach of contract and a host of other claims asserting the city was performing a proprietary function, that city officials were the ones who had originally approached JAMRO about the zone, and it had relied upon the city’s initial actions in creating the zone to its detriment. JAMRO made changes to its plans and specifications at the city’s request and completed the construction but was never notified the TIRZ had been terminated. The city filed a plea to the jurisdiction which the trial court granted. JAMRO appealed.

Governmental functions are “functions enjoined on a municipality by law . . . to be exercised by the municipality in the interest of the general public.” JAMRO argues the city’s actions were proprietary because it sought out a specific private developer “to spur development in a specific area of town for the benefit of only those inhabitants and the City itself.” Chapter 311 of the Texas Tax Code, also known as the Tax Increment Financing Act, gives the city the authority to create reinvestment zones to promote development or redevelopment of an area that would not occur

solely through private investment. The city's ordinance allowed the use of tax increment financing for proposed public improvements for the project, including streets, drainage, water, sewer, etc., which are statutorily defined as governmental acts. The city's ordinance contained express findings that the TIRZ met the criteria for a reinvestment zone contained within the Tax Code. After analyzing the Tax Code provisions and the definitions of governmental and proprietary functions contained within the Texas Tort Claims Act, the court held the city's actions were directed at financing public improvements and were governmental functions. The city was entitled to immunity, and the plea was properly granted.

***City of Leon Valley Econ. Dev. Corp. v. Little*, No. 04-15-00488-CV, 2017 WL 1066829 (Tex. App.—San Antonio Mar. 22, 2017) (mem. op.)**. This is a breach of contract case where the Fourth Court of Appeals reversed a jury award against an economic development corporation, holding it was immune from liability.

This is the second appellate case involving this dispute. The Leon Valley Economic Development Corporation (EDC), which is a Type B EDC, agreed to purchase certain land from Little as part of a project if the EDC could obtain specific financing terms from a state loan program. When the EDC was unable to obtain the financing under the conditions and time frame it desired, it did not purchase and Little sued claiming a breach of contract. The EDC originally filed a plea to the jurisdiction, but the court of appeals eventually determined that because it is a non-profit creature of statute, it was only entitled to immunity from liability, not immunity from suit. The interlocutory opinion remanded the case for trial. The jury found that Little and the EDC “intend[ed] to be bound by agreements relating to the Larry Little-Leon Valley Town Center project without the execution of a written agreement” and that the EDC “fail[ed] to comply with the agreement.” The jury awarded over \$100,000 for expenditures Little made in performance of the agreements and over \$1,400,000.00 in lost past and future profits. The EDC appealed.

The court reiterated a Type B EDC is not immune from suit for breach of contract. However, Texas Local Government Code Section 505.106(a) states that an EDC is not liable for damages arising from pursuing a project. Actions taken pursuant to the Development Corporation Act of 1979 (Act) to develop projects authorized by the Act are governmental functions. While the EDC approved the state's loan commitment component as part of the project, the Act requires such projects also be approved by the city council by resolution. The city council did not approve the project in time for the loan amount to be authorized by the state program. After analyzing the project and undisputed actions of the EDC, the court held it was performing the governmental functions of a Type B corporation in its dealings with Little and the project and proposed expenditures were authorized by the Act. As a result, it is immune from liability for all damages. While Little argued the acts of the EDC were not for public benefit, but his own private benefit, the court did not find the argument persuasive. The project was intended and expected to revitalize the specific town center area, create jobs, and expand the tax base. Moreover, the Act expressly provides that a corporation may provide direct financial incentives to a private business enterprise, provided there is a performance agreement. As a result, the jury award was reversed and judgment was rendered in favor of the EDC.

***City of Denton v. Rushing*, No. 02-16-00330-CV, 2017 WL 1103530 (Tex. App.—Fort Worth Mar. 23, 2017) (mem. op.)**. In this breach of contract case, the Fort Worth Court of Appeals

affirmed the denial of the city's plea to the jurisdiction and held the city's policy manual waived immunity for the plaintiffs' claims for unpaid on-call time. The implication being when a city manager creates a policy, regardless of whether city council sees it, that creation can waive immunity from suit and bind the city in contract.

The city, by ordinance, delegated to the city manager the ability to create policies. The city manager's office created a policy manual including Policy No. 106.06, which defined and established the city's pay practices and administrative procedures for response time and on-call duty. It sets forth the pay the city will provide employees for on-call services and includes charts setting forth specific examples of how on-call pay is calculated. All three plaintiffs worked week-long on-call shifts in addition to their normal work hours at least one week per month for several years. Plaintiffs alleged a unilateral employment contract was created when the city, as the employer, created the policy and agreed to pay them a specific rate in exchange for working on-call shifts. The city filed a plea to the jurisdiction and alternative summary judgment, arguing it retained immunity because the policy cannot create an authorized contract and its disclaimers preclude a determination of a contract. The trial court denied the plea and the city appealed.

The court analyzed the language of Texas Local Government Code Section 271.152, which waives immunity for written authorized contracts for goods or services in certain situations. It went point-by-point and element-by-element. It held a unilateral contract is created when a promisor promises a benefit if a promisee performs. The policy, according to the court, created such a contract notwithstanding the disclaimer. The reason being, the unilateral contract was not a contract altering the employment-at-will or employment relationship, but was a contract only to pay a certain amount for on-call time if such on-call time was worked. So, it's a limited contract only to on-call payment for performance. The court also determined the contract was "executed" because the city manager had authority to create it, after approval by an executive committee, and put the policy in the policy manual. It was therefore properly approved and adopted by the city. The court then held the constitutional prohibition against paying additional compensation for services already performed does not apply because it promised to pay prior to performance. As a result, it is not immune from a breach of contract claim and the plea was properly denied.

Hughes v. Tom Green Cty., No. 03-16-00132-CV, 2017 WL 1534203 (Tex. App.—Austin Apr. 20, 2017) (mem. op.). This is a breach of contract case where the Austin Court of Appeals affirmed the granting of the county's plea to the jurisdiction.

Hughes's uncle, Duwain E. Hughes, Jr., by his will, gave the county his home and remainder estate in order to establish a branch of the Tom Green County Library and required it be named after him. He also gave Southern Methodist University (SMU) certain mineral interests in order to establish an endowment chair in the SMU English Department. The mineral interests exceeded the amounts needed to maintain the chair. The county intervened in a probate application asserting it was entitled to the excess funds since it was bequest of the residuary estate. Charles Hughes, as heir, intervened alleging the "residuary estate" bequest had lapsed. The parties entered into a mediated settlement agreement (MPA) where Hughes and the county agreed to split equally the excess proceeds. The county used its funds to remodel the current library but did not name it after Duwain Hughes. Charles Hughes sued alleging a breach of the MPA. The county filed a plea to the jurisdiction, which the trial court granted. Hughes appealed.

The court first held that the city did not waive immunity by intervening in the SMU litigation. The voluntary litigation exception to immunity is limited to claims related to and defensive to claims asserted by the governmental entity. In other words, a governmental entity waives its immunity only as to claims asserted by the party it has sued. Here, the county did not make a decision to seek affirmative relief from Hughes and asserted no claims to which Hughes filed related defensive claims. The county filed its plea in intervention against SMU before Hughes was a party. When Hughes did become a party, it was only against SMU, not the county. Therefore the MPA is not related to an underlying claim for which immunity is waived. The county also did not waive immunity by conduct. The trial court properly granted the plea.

***Romulus Group, Inc. v. City of Dallas*, No. 05-16-00088-CV, 2017 WL 1684631 (Tex. App.—Dallas May 2, 2017) (mem. op.)**. This is a breach of contract case where the Dallas Court of Appeals reversed an order granting the city’s plea to the jurisdiction.

Romulus won a bid for a 36-month contract to provide temporary clerical and professional labor. He provided employees within 25 categories of job types. Romulus asserted that the city began re-designating employees into a catch-all category of “clerical not listed” and paying them a lower rate below the contracted rate for the true category. The city eventually terminated the contract under the termination clause. Romulus made a demand for \$1.6 million in underpayment due to the unauthorized re-designations. When the city refused to pay, Romulus sued for breach of contract under Chapter 271 of the Texas Local Government Code. The city filed a plea to the jurisdiction which the trial court granted. Romulus appealed.

The city argued Romulus had provided employees who did not fit into any of the 25 categories willingly, so they could not complain that they were not paid under the contract. Romulus asserted that the employees did fall under the contract and the city’s re-designation gave an appearance of extra-contractual services. The court found the city’s argument did nothing more than create a fact issue on the merits of the underlying claim. Further, Romulus pleaded that when it came time to pay for services provided, the city had paid at a lower rate than allowed by contract. By way of example, a Coordinator II position was bid at \$23/hour, but the evidence submitted shows the city modified the pay to \$21.92/hour, which was calculated by paying \$18 an hour times 21.8% as a mark-up. Such indicates the city underpaid as to what was due and owed in order to establish jurisdiction. The city also asserted Romulus failed to provide timely notice of a claim. However, the court of appeals had previously concluded that the notice provision in Section 271.154 was an affirmative defense to the merits of the suit, not a matter that deprived the trial court of subject matter jurisdiction. The order granting the plea was reversed and the case remanded.

LAND USE

***Barras v. City of Orange*, No. 09-16-00073-CV, 2016 WL 6809226 (Tex. App.—Beaumont Nov. 17, 2016) (mem. op.)**. This is an appeal from the denial of an injunctive request to prevent the City of Orange from relocating its administrative offices. In 1996, within the city’s comprehensive plan, the city determined its administrative offices should be centralized in the City of Orange Old Town Center. In 2016, the city purchased and made plans to move some of its offices outside of the Old

Town Center. Historic Orange Preservation Empowerment, Inc. (HOPE) sued for injunctive relief to prevent the move. The trial court denied the injunctive relief and HOPE appealed.

HOPE argued the city is required to amend the city charter because it requires that “[n]o subdivision, street, park, or any public way, ground or space, public building or structure or public utility, whether publicly or privately owned which is in conflict with the comprehensive plan shall be constructed or authorized by the City.” HOPE asserted that this makes the comprehensive plan mandatory and not simply a guide. However, the plan expressly provides that it is “a guide to the physical development of Orange[,]” and it states that it is “a tool for elected and appointed officials and city staff to guide decision making for growth and development issues.” After analyzing the plan, the court held it is a guiding document only. Additionally, the parts of the plan relating to the location of the city’s administrative offices were never adopted by ordinance. The charter applies only to legislation adopted through ordinance, not resolution. The resolution passed by the city council to move its facilities is therefore not in conflict with the comprehensive plan. As a result, the trial court properly denied the injunctive relief.

***City of Pharr v. Garcia*, No. 13-15-00409-CV, 2016 WL 7011579 (Tex. App.—Corpus Christi Dec. 1, 2016) (mem. op.)**. Following a lawsuit in County Court at Law One in 2009, the City of Pharr and Jose Escamilla entered into a final order that contained a permanent injunction and language that prohibited Escamilla and all other assigns from using a specific property in any way inconsistent with the allowed residential uses under the city’s zoning ordinance. In 2013, Escamilla sold the property to a company, who filed for and secured a rezoning of the lot from single-family residential to office-professional. German Garcia and other property owners filed a petition to intervene in County Court at Law One, seeking compliance with the agreed final order. That case was dismissed after the city filed a motion to vacate the final order due to a change in circumstances.

Garcia also filed suit against the city in the 430th District Court, claiming inverse condemnation and seeking damages for the city’s failure to enforce the agreed final order involving the property at issue, as well as filing ultra vires claims against the city council members and members of the zoning board. Garcia also asked the trial court to issue a temporary injunction and declaratory judgment voiding the rezoning of the lot and enforcing the prior injunction issued by County Court at Law One. The court dismissed with prejudice the claims against the city officials, but denied the city’s plea to the jurisdiction relating to the declaratory judgment and inverse condemnation claims. The city appealed. In its sole issue, the city claimed the trial court erred by denying its plea to the jurisdiction regarding the declaratory judgment and inverse condemnation claims. The city argued that Garcia did not establish sufficient evidence to establish the jurisdiction of the district court to enter a declaratory judgment. The court held that, as an intervening party to the original lawsuit in County Court at Law One, Garcia cannot ask the district court to overrule the county court’s decision and reinstate an order issued by another court. Any attempt to reinstate the county court’s agreed final order should have been filed in that court. As a result, the trial court should have granted the city’s plea to the jurisdiction as to the declaratory judgment action.

On the inverse condemnation argument, the court of appeals held that Garcia raised a fact issue regarding whether or not the rezoning damaged or devalued the market value of his property

without adequate compensation from the city. As a result, the court overruled the city's issue regarding Garcia's inverse condemnation claim.

***City of Plano v. Carruth*, No. 05-16-00573-CV, 2017 WL 711656 (Tex. App.—Dallas Feb. 23, 2017) (mem. op.)**. This is a referendum case where the Dallas Court of Appeals dismissed all but one of the plaintiffs' claims under a plea to the jurisdiction. It held the trial court had jurisdiction to consider the merits of the remaining mandamus/*ultra vires* claim against the city secretary.

The city adopted a comprehensive plan and zoning ordinance. The city charter permits qualified voters to submit a referendum petition seeking reconsideration of and a public vote on any ordinance. Citizens submitted a referendum petition to the city secretary asking to alter the ordinance adopting a change in the comprehensive plan. The city secretary did not act on the referendum petition. The city took the position that zoning and comprehensive plans have been removed from the referendum scope by state law, so no action was required. The citizens filed a writ of mandamus seeking a court order directing the city secretary to present the petition to the city council and directing the city council to reconsider the comprehensive plan and submit it to popular vote if the council did not entirely repeal it. In addition, they sought a declaratory judgment that, pending approval by the voters in a referendum, the comprehensive plan would be suspended. The city filed a plea to the jurisdiction that the trial court denied. The city appealed.

The court of appeals first held the plaintiffs properly pleaded jurisdiction against the city secretary. The court held there is a difference between the merits of whether mandamus should be issued and whether the trial court has jurisdiction to hear those merits. "Whether the trial court should ultimately grant or deny the petition for mandamus is not the issue before [the court]." Based on the language in the pleadings, the trial court has jurisdiction to hear the merits of the mandamus claim. However, no mandamus can be issued against the remaining officials since the city secretary has not submitted the petition to the council. Their duty is not triggered unless and until the petition is submitted; therefore, the claims are not ripe. Finally, the court dismissed the declaratory judgment claims, noting the charter does not provide that an ordinance is suspended immediately upon the filing of a referendum petition. The charter is clear that a suspension applies only upon the subject being submitted to popular vote. Until the council is presented with the petition and acts on it, any declaration about the effect of that action would be advisory. The trial court's order was affirmed in part and reversed in part.

***Ex parte Sedigas*, Nos. 10-16-00157-CR & 10-16-00189-CR, 2016 WL 5944788 (Tex. App.—Waco Oct. 12, 2016) (mem. op.)**. This is a case where the Tenth Court of Appeals affirmed the trial court's finding that the city's "no touch" ordinance is constitutional. Rebekah Sedigas and Erika Hollaway (appellants) were charged with a Class A misdemeanor for violating the City of Waco ordinance which, in part, prohibits employees who appear nude or semi-nude in a sexually oriented business (SOB) from knowingly or intentionally touching customers and the clothing of customers. Appellants filed pre-trial applications for writ of habeas corpus arguing the ordinance is facially unconstitutional in that it: (1) violates the First Amendment because it is overbroad and encompasses lawful conduct; and (2) violates the Eighth Amendment because the punishment is disproportionate to the offense. The trial court denied the applications, finding the ordinance constitutional. Appellants appealed.

Appellants, relying on *Blue Movies, Inc. v. Louisville/Jefferson Cty. Metro Gov't*, 317 S.W.3d 23 (Ky. 2010), argued that the ordinance is overbroad because it applies to a dancer even when not in a state of nudity or performing and that it applies to employees who are fully clothed but regularly appear nude or semi-nude at a SOB. The appellate court concluded that the City of Waco ordinance is different than that in *Blue Movies*. Examining the plain language of the ordinance, the court found that the City of Waco ordinance only applies at the time that the employee is nude or semi-nude on the premises of a SOB and touches a customer. The first issue was overruled.

As to the type of disproportionate punishment argument raised in the second issue, a court considers the following: (1) whether there is a national consensus against imposing the punishment for the offense; (2) the moral culpability of the offender at issue in light of their crimes and characteristics; (3) the severity of the punishment; and (4) whether the punishment serves legitimate penological goals. The court relied on the reasoning in *Rivera v. State*, 363 S.W.3d 660 (Tex. App.—Houston [1st Dist.] 2011, no pet.) to conclude that prosecuting the “no touch” ordinance as a Class A misdemeanor is justified to deter continuing violations of the ordinance that the city council has determined leads to greater criminal activities (such as prostitution). The second issue was overruled.

***MHI P’ship, Ltd. v. City of League City*, No. 14-15-00457-CV, 2017 WL 1450563 (Tex. App.—Houston [14th Dist.] Apr. 18, 2017).** In 1997, the City of League City established the League City Public Improvement District Number One (PID). The city adopted a service and assessment plan by ordinance, which included a specific assessment rate to fund both phase one and phase two of the public improvement projects. Later, the city commissioned an audit to reconcile the actual cost of phase one and phase two, which ultimately showed that the city had collected more than \$1.7 million in excess funds after the developer had been fully reimbursed.

After the city filed a petition in interpleader in the trial court, the trial court ultimately rendered a final judgment ordering that the funds available for each property be distributed to the legal title owners of each property appearing of record as of the date of the trial court’s judgment. MHI Partnership, Ltd., who had purchased various residential lots located within the PID, appealed the trial court’s judgment.

On appeal, the court initially found that there was no trial evidence to support several findings of fact by the trial court. Additionally, the court held that the trial court had erred in concluding that the refund amount for each property should be distributed to the holder of record title to each property as of the date of the trial court’s judgment. The language in the city’s ordinance provided that the excess assessments should be refunded to “parties having an interest in such funds.” Using this language, the court reasoned that the interpleaded funds should be distributed to the property owners who paid the assessments at the initial rates based on a pro rata formula instead of going to the property owner as of the date of the trial court’s judgment, as those owners may not have actually paid any of the assessments. The appellate court reversed the trial court’s judgment and remanded for further proceedings.

PROPERTY TAX

***Anheuser-Busch, L.L.C. v. Harris Cty. Tax Assessor-Collector*, No. 01-15-00422-CV, 2016 WL 5920766 (Tex. App.—Houston [1st Dist.] Oct. 11, 2016).** Harris County Tax Assessor-Collector

(HCTAC) sent property tax notices out to Anheuser-Busch (Busch) in November 2012 concerning seven properties. Five of the bills were mailed to Busch's authorized agents and two were mailed to Busch, but none were mailed to both Busch and the authorized agent. The Tax Code requires the tax-assessor-collector to "prepare and mail a tax bill to each person in whose name the property is listed on the tax roll and to the person's authorized agent." TEX. TAX CODE § 31.01(a). Property taxes must be paid by February 1 in order to avoid penalties and fees for delinquent taxes. *Id.* § 31.02. However, if a tax bill is mailed after January 10, the default delinquency date is postponed for at least 21 days. *Id.* § 31.04(a).

Busch looked on the HCTAC's website and determined the property tax amount due, and on January 23, 2013, mailed a check for the amount of the property tax. The check was received by HCTAC on January 28, but on February 5, 2013, Busch's bank did not honor the check due to internal fraud prevention protocols. HCTAC assessed penalties and interest and sent a delinquent tax bill to Busch. On Feb. 21, 2013, Busch tendered another check for the property tax but without the penalties and fees. Instead, they sent a letter asking HCTAC to waive the penalties and fees. HCTAC refused to waive and Busch paid the penalties but stated that they were paying under protest and duress because they did not want to accrue more penalties. Busch filed suit. Both sides moved for summary judgment. The trial court denied Busch's motion stating that HCTAC did not strictly comply with Section 31.01(a) of the Tax Code, but Busch had actual notice of the bill and tried to pay, and that legislative intent of this Tax Code section was to make sure the taxpayer received notice, not to create a loophole to allow taxpayers to avoid timely payment. Busch appealed.

The First Court of Appeals began by addressing HCTAC's contention that the trial court did not have subject matter jurisdiction because Busch failed to establish a waiver of sovereign immunity. The court reviewed the immunity issue under a *de novo* standard. Previously, the court stated that where a claim of declaratory or injunctive relief is brought seeking a refund of illegally collected tax payments, governmental immunity does not apply if the tax payer alleges that the payments were made as a result of fraud, mutual mistake of fact, or duress, whether express or implied. *Niven v. City of League City*, 245 S.W.3d 470, 474 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). The court determined that no legislative consent to sue was required for Busch's declaratory judgment because Busch pleaded that they paid the penalties under duress because they did not want the penalties to continue to accrue.

Next, the court looked at the merits of the summary judgment. The court reviewed the trial court's decision to grant or deny a summary judgment under a *de novo* standard. Because both parties filed motions of summary judgment on overlapping issues, the court will review the summary judgment evidence supporting both motions and "render the judgment that the trial court should have rendered." *Moers v. Harris Cty. Appraisal Dist.*, 469 S.W.3d 655, 660 (Tex. App. — Houston [1st Dist.] 2015, pet. denied).

The Court analyzed Section 31.01(a) of the Tax Code which stated that the tax bills must be mailed by January 10 to the property owner and its authorized agents. If the tax bill is mailed after January 10, then the delinquency deadline of February 1 would be postponed. TEX. TAX CODE § 31.04. HCTAC argued substantial compliance with the statute was all they needed because they mailed the tax bills before January 10. The court disagreed because the statute did not demand

only substantial compliance. Also, the legislature amended Section 31.01(a) to require the tax bills be mailed to the property owner and its authorized agent. The court stated that it was not empowered to rewrite the statute and allow for Section 31.04 of the Tax Code to be considered substantial compliance when the legislature made it clear what was required.

Next, HCTAC argued that Busch waived any complaints because of its attempt to pay the tax bill by the deadline. Waiver is defined as “the intentional relinquishment of a right actually known, or intentional conduct inconsistent with claiming that right.” *Ulico Cas. Co. v. Allied Pilot Ass’n*, 262 S.W.3d 773, 778 (Tex. 2008). The court concluded that there was no evidence that Busch relinquished its right to avoid penalties and interest in attempting to pay the tax bill before February 1. Actually, the court thought Busch was doing the opposite by attempting to pay the tax bill to preserve its right to avoid penalties and interest. Then, HCTAC argued that the form used to designate authorized agents informs taxpayers that HCTAC does not have to send out duplicate copies and operates as a waiver of Section 31.01(a). The court did not agree with this either and stated the form, which is contrary to Section 31.01(a), did not explain the rights that Section 31.01(a) stated and that signing the form would waive those rights.

Last, HCTAC contended that the voluntary payment rule prevents Busch from complaining of the lack of notice because it issued a check before the deadline. Generally, “a tax voluntarily paid cannot be recovered, though it had not the semblance of legality.” *City of Houston v. Feizer*, 13 S.W. 266, 267 (Tex. 1890). The rule also operated to prevent a party from misleading his opponent into believing the controversy is resolved before later contesting the payment and seeking recovery. *Highland Church of Christ v. Powell*, 640 S.W.2d 235, 236 (Tex. 1982). And if the facts are undisputed, then the determination becomes a question of law. The court rejected HCTAC’s argument stating that Busch does not seek recovery of the taxes it attempted to pay, but of the penalties and interest, which it tendered under protest and duress. Therefore, the court reversed the trial court’s rendition of summary judgment in favor of HCTAC for five of the seven properties since HCTAC did not send the tax bill to both Busch and its authorized agent. As for the remaining two properties, there was still a factual dispute concerning the appointment of authorized agents.

***City of El Paso v. Mountain Vista Builders, Inc.*, No. 08-15-00186-CV, 2017 WL 912154 (Tex. App.—El Paso March 8, 2017).** The City of El Paso filed suit on May 18, 2009, over property taxes allegedly owed on multiple tracts of land that were or had been owned by Mountain Vista Builders, Incorporated (Mountain Vista). Mountain Vista answered with a general denial. Mountain Vista did not contest that it owned the properties at the relevant date for assessing taxes but, instead, presented testimony that it was developing the properties by building homes and then selling the tracts, arguing that any outstanding taxes due on the land should have been addressed before title passed to the buyers. Mountain Vista argued the title company should have been alerted to any notice of a tax deficiency prior to closing. Mountain Vista also argued its procedure of paying the taxes was hampered by the El Paso Central Appraisal District (CAD) which sent tax notices to the wrong business address; it had learned of the claimed delinquent tax bills from its bank in 2011 after all the tracts had been sold and the title company had gone out of business.

The city argued that any claim of lack of notice had to first be presented to the CAD. The court agreed, holding that a taxpayer who claims lack of notice from the taxing entity as a defense must

pursue an available administrative remedy upon learning of the claimed tax liability. The city also complained of the admission of evidence and findings supporting affirmative defenses (such as waiver or estoppel) that were never pleaded. The court again agreed with the city, concluding that a taxpayer can't avoid tax liabilities at trial based on affirmative defenses that were never raised in a defensive pleading.

PUBLIC INFORMATION

***Paxton v. City of Dallas*, No. 15-0073, 2017 WL 469597 (Tex. Feb. 3, 2017).** This is a Texas Public Information Act (PIA) case where the Supreme Court of Texas holds the attorney/client privilege, in and of itself, is a compelling reason to prevent disclosure under the PIA, even if an entity untimely requests a Texas attorney general (AG) opinion. This is a case of first impression. The City of Dallas received two PIA requests for information but failed to timely notify the AG within the ten-business-day deadline of its intent to seek an AG opinion. The city did seek an opinion and asserted the documents are protected by the attorney/client privilege. The AG determined that since the city failed to timely request an opinion, it waived the privilege and all documents must be released. When an entity fails to timely request an opinion, the documents are presumed public *unless there is a compelling reason to withhold the information*. The AG did not consider the attorney/client privilege a compelling reason. The city filed suit under the PIA to obtain judicial rulings but received conflicting results at the trial courts. The city and AG appealed respectively. At the different court of appeals levels, both courts held the privilege was a compelling reason to withhold the information. The AG filed a petition for review for both cases.

The Supreme Court of Texas went into great detail and history (39 pages worth) discussing the balance between the attorney/client privilege (which is for the public's benefit for governmental advice) and the public's right to information (which is also for the public's benefit). It noted the AG has determined through agency precedent that the mere ability to waive the attorney/client privilege automatically and categorically precludes the privilege from constituting a compelling reason, even when the privilege has not actually been waived. The court rejected this argument and held "[b]ecause failing to meet the PIA's deadline to assert a statutory exception to disclosure does not, in and of itself, constitute waiver of the attorney-client privilege, requested information does not automatically lose its confidential status." It further rejected the AG's interpretation for all exceptions under the PIA "that something more is always required to rebut the presumption that arises from a governmental body's failure to timely request an attorney general decision." The court held that certain exceptions (not all but some) can be compelling reasons *in their own right*.

The AG's interpretation alters the plain language of the PIA. "To require public disclosure of confidential attorney-client communications as an automatic—and irremediable—sanction for missing a statutory deadline is not necessary to achieve the PIA's objective of an open government and would be a jurisprudential course fraught with peril." Finally, Justice Guzman puts an accurate but humorous summary on the entire thing by writing "[r]obotic perfection by a governmental body's public information officer is a statutory ideal, not an absolute requirement. To err is human, but to conduct a City's legal affairs without the occasional error would require divinity." The dissent writes for 37 pages but essentially states the attorney-client privilege, by itself, is not enough to overcome the presumption of openness which attaches when the PIA deadlines are not met. The dissent would require an additional showing of a compelling reason for the non-release.

***McLane Co., Inc. v. Texas Alcoholic Beverage Comm’n*, No. 03-16-00415-CV, 2017 WL 474067 (Tex. App.—Austin Feb. 1, 2017).** In this Public Information Act (PIA) request lawsuit, the Austin Court of Appeals affirmed the granting of several pleas to the jurisdiction by a state official and the Texas Alcoholic Beverage Commission (TABC). In 2015, McLane Company, Inc. (McLane) submitted a PIA request to the TABC. The TABC sought an opinion from the Texas Attorney General (AG) under the PIA procedures. The AG determined most of the information must be released, but allowed two exceptions. The TABC filed suit against the AG, and McLane intervened. McLane sought a writ of mandamus ordering TABC to produce the requested information. McLane also sought declarations under the Texas Uniform Declaratory Judgments Act (UDJA). It further sued Sherry Cook, TABC’s Chief Administrative Officer and Officer for Public Information, asserting her failure to release the information as an *ultra vires* activity. TABC filed a plea to the jurisdiction contending sovereign immunity deprived the trial court of jurisdiction over McLane’s UDJA and *ultra vires* claims. Cook also filed a plea to the jurisdiction asserting that sovereign immunity barred McLane’s suit against her. The trial court granted the pleas, and McLane appealed.

The Supreme Court of Texas has explained that “the UDJA does not enlarge the trial court’s jurisdiction but is ‘merely a procedural device for deciding cases already within a court’s jurisdiction.’” *Texas Dep’t of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 (Tex. 2011) (*per curiam*). To the extent McLane’s petition seeks the trial court to order that “the PIA requires the TABC and Cook to promptly search for and produce” responsive documents and the method in which they are to search, such a suit falls outside of the confines of the declaratory judgment action authorized by the PIA. Instead, such relief seeks a declaration of McLane’s rights under the statute. As articulated in the *Sefzik* case, immunity is not waived under the UDJA except where the invalidity of an ordinance or statute is at play.

The UDJA does not waive sovereign immunity for “bare statutory construction” claims. As a result, the UDJA claims raised in the plea were properly dismissed. Further, while sovereign immunity does not bar a true *ultra vires* claim against a public official, McLane’s claims stem from the belief Cook was not performing a reasonably comprehensive search. The PIA does not authorize a declaration as to the search performed. Further, even if a proper *ultra vires* claim was factually pleaded, the redundant remedies doctrine precludes McLane pursuing it. The legislature created an explicit waiver of sovereign immunity in the PIA, and neither TABC nor Cook has challenged McLane’s right to intervene in the underlying PIA suit. McLane has a right of potential recovery under the PIA and therefore cannot sue for the same thing under an *ultra vires* theory. As a result, the trial court properly granted the plea.

***University of Tex. Sys. v. Paxton*, No. 03-14-00801-CV, 2017 WL 1315374 (Tex. App.—Austin Apr. 7, 2017).** This is a Texas Public Information Act (PIA) case where the Austin Court of Appeals reversed a summary judgment granted to the Texas Attorney General (AG) and remanded the case back to the trial court. The university received a PIA request seeking several categories of information related to three separate social-science research studies being conducted by a tenured faculty member regarding terrorism. The university released some information but requested an AG opinion for the remainder of the responsive information. Specific to this lawsuit, the university asserted the identities of the human research subjects who participated in the study

are protected from disclosure by Government Code Section 552.101 (matters confidential as a matter of law—constitutional and common-law privacy).

The AG disagreed and determined the identities must be released, noting no highly embarrassing facts exist within the information to keep private. The university filed suit against the AG under the PIA. The parties filed cross-motions for summary judgment. The trial court granted the AG's motion. The university appealed the granting of the AG's motion but did not appeal the denial of its motion. Instead, it sought a remand for trial.

The court noted the AG's arguments were not that of a traditional summary judgment, but that once the AG determined no embarrassing facts exist, the university must completely negate the lack of embarrassing facts, not simply raise a fact question on the subject. The court rejected this argument outright.

The Supreme Court of Texas has not limited the type of information that is highly intimate or embarrassing, and such a status may be fact driven. The studies were designed to explain and predict individual actions related to terrorism and counterterrorism by using laboratory experiments with human subjects. The experiments captured feelings and behaviors of individuals that they may not otherwise share with the public, and their participation could lead to negative inferences about why they were selected, chose to participate, or what their responses may have been. In a footnote, the court also noted in the context of common-law privacy, a party's expectation of privacy (encapsulated in a confidentiality agreement) before choosing to participate in a study is relevant to whether a reasonable person of ordinary sensibilities would find disclosure to be an embarrassing fact. Fact-specific questions related to the research study exist, including whether details in the results could be tied to the subjects' identities, whether a reasonable person would view participation in the study as embarrassing, and the potential consequences. While the university bears the burden at trial to establish the exception, its burden of proof to counter a summary judgment is merely to raise a fact question. The order granting the AG's motion was reversed and the case is remanded.

TAKINGS

***City of Floresville v. Starnes Investment Group, LLC*, No. 04-16-00038-CV, 2016 WL 5398298 (Tex. App.—San Antonio Sept. 28, 2016).** This accelerated appeal involves confusion over whether a parcel of land was located inside or outside of city limits. Starnes Investment Group (Starnes) purchased property to develop a recreational vehicle park. When Starnes filed its zoning application with the City of Floresville, Starnes was informed that the property was entirely outside of the city limits. Thus, the city's zoning requirements were inapplicable, and only approval by Wilson County was required. One year later, the city finished updating and digitizing its city limits map, resulting in a finding that Starnes's property was partially inside and partially outside the city's limits. The city informed Starnes that zoning approval was required and approved a zoning application in September 2013. In June 2015, Starnes sued the city alleging several causes of action. The trial court granted special exceptions in favor of the city and allowed Starnes to replead. In their amended petition, Starnes alleged: (1) a takings/inverse condemnation claim, (2) due process and equal protection violations, and (3) a violation of the Vested Property Rights Act. The trial court denied the city's plea concerning jurisdiction, and the city then appealed, arguing

Starnes's amended petition failed to allege a claim for which appellants' governmental immunity had been waived.

The court analyzed Starnes's takings and inverse condemnation claims and concluded that the petition alleged no facts and that the incorrect information provided by the city was nothing more than a mistake. There were no facts alleging that the city knew to a substantial certainty that harm would occur as a result of the delay. Thus, the trial court had erred in denying the city's plea to the jurisdiction on Starnes's takings/inverse condemnation claim. Likewise, the court concluded that Starnes failed to allege any facts that the city deprived Starnes of its interests and business expectations in the property or that the city treated Starnes differently from others similarly situated. The trial court had erred in denying the plea concerning jurisdiction on the equal protection claim.

Lastly, the court concluded that Starnes did not assert any factual allegations to support the contention that Section 245.002 of the Local Government Code was violated. The delay in approval was caused by incorrect information and not by a change in the city's existing code. The court concluded that the trial court also erred in denying the city's plea on this issue. After discussing whether to remand or render judgment, the court noted that Starnes had a fair opportunity to allege facts demonstrating the trial court had jurisdiction to hear the case. Therefore, the court concluded that if the case were remanded, Starnes would not be able to show jurisdiction. The court rendered judgment dismissing Starnes's claims against the city.

***Bonham v. City of Corsicana*, No. 06-16-00026-CV (Tex. App.—Texarkana Nov. 29, 2016).** This is an eminent domain proceeding where the Sixth Court of Appeals affirmed the dismissal of an appeal from a special commissioner's assessment. The city initiated eminent domain proceedings and a special commissioner's panel assessed damages. The city deposited the amount into the registry of the court, and the property owner corporation timely objected and filed suit. However, it did not serve the city with proper citation. More than seven years later, the trial court dismissed the corporation's objections for want of prosecution. The corporation appealed.

The corporation argued that its failure to proceed to trial was excused because the city was responsible for prosecuting the case. "[W]hen a condemnee properly contests a condemnor's right to condemn, the condemnor bears the burden to go forward to trial on that issue." Thus, when an objection is filed, the "proceeding converts into a normal pending cause in the court with the condemnor as plaintiff and the condemnee as defendant." However the statute expressly states "[t]he objecting party must secure service of citation on the adverse party and try the case in the manner of other civil causes." "While the condemnor becomes the plaintiff for the purpose of proving his right to condemn, the condemnee still must secure the service of citation on the condemnor." Texas Civil Practice & Remedies Code Section 17.024(b) and its interpreting case law provide that service is proper against a city only by serving the mayor, clerk, secretary, or treasurer. No such service occurred in this case. And while a condemning entity has the burden to show the right and power to condemn at trial, it was under no legal obligation to do so unless and until it had been served with citation. The trial court was within its power to dismiss the case. Further, the corporation failed to preserve its estoppel arguments.

***Meuth v. City of Seguin*, No. 04-16-00183-CV, 2017 WL 603646 (Tex. App.—San Antonio Feb. 15, 2017) (mem. op.)**. This is a takings case in which the San Antonio Court of Appeals affirmed the trial court’s order granting a plea to the jurisdiction by the City of Seguin.

Prior to the City of Seguin annexing the property in question, a storm water drainage culvert pipe was constructed underneath it. After the city annexed the property in 1965, the owner constructed a house on the land over the drainage pipe. The current property owner, Tracy Meuth, brought several claims including: the city’s annexation of the property and use of the pipe without a drainage easement, the city’s permitting of a home to be built over the property, and the city’s failure to take action to repair the corroding pipe and associated soil instability underneath the house.

Meuth first alleged that the city’s actions and inactions amounted to a taking of her property. A takings claim requires (1) an intentional governmental act; (2) that results in property being taken; (3) for public use. First, the court determined that neither the annexation nor permitting of the house’s construction resulted in her property being taken for public use. The court noted similarities with *AN Collision Ctr. of Addison, Inc. v. Town of Addison*, 310 S.W.3d 191 (Tex. App.—Dallas 2010, no pet.), where the City of Addison purchased a previously constructed airport that drained rainwater onto AN Collision’s property. There, the Dallas court noted that the drainage was caused by the prior construction of the airport, and not by any act of the city. They concluded that a failure to take corrective measures does not rise to the level of a taking. The court also compared Meuth’s case to *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 799 (Tex. 2016), where the Supreme Court of Texas held that governments “cannot be expected to insure against every misfortune occurring within their geographical boundaries, on the theory that they could have done more. No government could afford such obligations.” *Id.* at 804. Here, Meuth’s taking claim focused on city’s failure to take corrective measures to send the water elsewhere and repair the corroding pipe. Because Meuth’s claims were based on the city’s failure to take action, the court held that the city’s actions were not intentional and that the trial court properly granted the city’s plea to the jurisdiction.

Meuth next alleged that the trial court erred in granting the city’s plea to the jurisdiction on her declaratory judgment claim. The Supreme Court of Texas has explained that “private parties cannot circumvent the State’s sovereign immunity from suit by characterizing a suit for money damages as a declaratory-judgment claim.” *City of Houston v. Williams*, 216 S.W.3d 827, 828-29 (Tex. 2007) (quoting *Texas Nat. Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 856 (Tex. 2002)). Here, the San Antonio court concluded that because Meuth’s declaratory judgment sought to hold the city “liable” for costs of repair, it was also barred by the city’s sovereign immunity.

For Meuth’s remaining claims, including intentional and negligent misrepresentation, gross negligence, and fraud, Meuth contended that the trial court erred in granting the city’s plea to the jurisdiction because the city was engaged in a proprietary function for which immunity was waived. The court, quoting the Dallas Court of Appeals, concluded that refusal to repair the pipe is a governmental function and that Meuth “cannot avoid the effect of governmental immunity by creative pleading.” *Bell v. City of Dallas*, 146 S.W.3d 819, 821 (Tex. App.—Dallas 2004 no pet.).

Finally, Meuth argued in the alternative that the city should be stopped from asserting immunity based on promises it had allegedly made to Meuth before she purchased the property. “The general rule has been in this state that when a unit of government is exercising its governmental powers, it is not subject to estoppel.” *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835 (Tex. 1970). There is a narrow and rarely-applied exception, however, for cases where justice requires the doctrine’s application and where there is no interference with governmental functions. *Id.* at 836. The court held that the facts of the case did not present an exceptional case for estopping the city because: (1) the property owners, not the city, chose to build the house; (2) The Supreme Court of Texas has held that a city is not estopped from asserting immunity even if a plaintiff acts in reliance of the city’s representations; (3) the city received no benefit for its promises; and (4) unlike the only two occasions when the Supreme Court of Texas has applied estoppel, the City of Seguin’s misrepresentations did not extinguish Meuth’s right to pursue her claim. The San Antonio court affirmed the trial court’s order.

Guadalupe Cty. v. Woodlake Partners, Inc., No. 04-16-00253-CV, 2017 WL 1337650 (Tex. App.—San Antonio Apr. 12, 2017) (mem. op.). This is a takings case where the San Antonio Court of Appeals reversed the denial of the county’s plea to the jurisdiction, holding that the county is not liable for property values affected by Federal Emergency Management Agency (FEMA) flood plain adjustments.

In 2007, FEMA revised its 100-year Flood Insurance Rate Maps for Guadalupe County. After the revisions, several lots owned by defendants (Woodlake Partners) became encompassed in a floodway and floodplain. Woodlake Partners would later submit a development permit application. However, the county asserted that the applicants were now required to submit a no-rise document from an engineer and that federal regulations required the construction to have the lowest floor elevated to or above the base flood level. Woodlake Partners filed suit asserting a taking and that the new regulations would require new homes to be built 8-12 feet above ground, which was against their restrictive covenants. They also asserted it would negatively affect home values. The county filed summary judgment motions, asserting immunity. Both were denied by the trial court, and the county appealed.

The court first held the county’s no-evidence motion for summary judgment was improper, as such motions should not be utilized to establish a lack of jurisdiction given the change in burden shifting. However, in the traditional summary judgment motion, the county challenged the existence of jurisdictional facts, including causation. Woodlake Partners based their takings claim on the portions of the county’s order requiring them to obtain a no-rise certificate and construct the houses 8-12 feet above ground level. However, these same requirements appear in the federal regulations setting forth flood plain management criteria for flood-prone areas, specifically 44 C.F.R. § 60.3. Additionally, uncontested evidence established that if the county had not adopted the FEMA maps, neither flood insurance nor financing would be available for homes built on the lots. Woodlake Partners was required to follow the same federal standards regardless, so the county’s adoption of the FEMA maps did not cause any damage. And since the inverse condemnation claim was the only pleaded waiver of sovereign immunity, the trial court should have dismissed the claims.

***City of Beaumont v. Ermis*, No. 09-15-00451-CV, 2017 WL 1178348 (Tex. App—Beaumont Mar. 30, 2017) (mem. op.)**. This is a demolition/takings case where the Beaumont Court of Appeals reversed the denial of the city’s plea to the jurisdiction and dismissed the case.

Ermis acquired her property interest in 2002 Park Street in 2008. However, in 2007 the city had found the structure to be a dangerous structure and scheduled it for demolition. The notice that the structure was dangerous came from multiple levels, including an initial order by a field supervisor, an ordinance signed by the acting mayor declaring the property dangerous and a public nuisance, a formal, mailed notice to the owners of the property in 2007 (the Seymours) that the building must be demolished within 10 days, and a signed certified mail return receipt from the Seymours noting it was received within one week of being mailed. In 2008, the Seymours conveyed the property to Brian Muldrow by special warranty deed. The city submitted evidence that Muldrow and Ermis were married at the time of the conveyance. In 2010, Ermis filed suit, challenging the ordinance and declaration for demolition. The city filed a plea to the jurisdiction, which the trial court denied. Afterward, Ermis sued several city officials including the assistant city attorney who had done work on the matter. They appeared, joined the city’s plea, which had already been denied, and requested the court rehear the plea. The court denied their requests and the city defendants appealed.

The court first declared the city’s actions were governmental not proprietary, although they asserted Ermis did not argue that they were proprietary, so it’s unclear why they brought it up. Ermis did not own the structure at 2002 Park Street when the city declared it dangerous and ordered that it be repaired or demolished. Her pleadings must establish that she had standing to pursue her claims against the city for issuing Ordinance Number 07-105 and for the decisions she alleged the city had made afterwards. Ermis’ pleadings state she knew the city had declared the property a dangerous structure and ordered it demolished before she and her husband acquired the property. Under Texas law, the injury occurred when the city declared the structure on the property dangerous and ordered it demolished. At that time, Ermis did not own it, and nothing indicates she acquired such a claim from the Seymours as part of the purchase. Her standing cannot rest on rights owned by the Seymours in the absence of an express assignment. Subsequent purchasers of a property cannot recover for injuries to the property that were committed prior to their purchase. Further, given the facts alleged by Ermis, the standing deficiencies cannot be cured by repleading. But even if they could, she was already given ample opportunities to replead and did not. As a result, the plea should have been granted. The remainder of the opinion deals with whether the court had jurisdiction over the individual city defendants’ appeals. The court holds it did not, so it dismissed the appeals to await an appealable order.

Justice Johnson concurred but wrote separately, as she felt the proper analysis was to examine the language of Chapter 214 of the Texas Local Government Code, the mechanism used by Ermis to sue originally. Section 214.0012(a) states that “[a]ny owner, lien holder, or mortgagee of record of property” may sue to declare an order illegal. Ermis does not qualify under the statute since she did not own the property at the time of the injury and therefore has no standing. Additionally, the owner has 30 days to seek judicial review, which did not happen. Further, Section 214.001(e) expressly provides that notice of a demolition order is binding on subsequent grantees and lienholders if filed in the public records office, which had occurred.

***City of Socorro v. Campos*, No. 08-14-00295-CV, 2016 WL 4801600 (Tex. App.—El Paso Sept. 14, 2016).** This is a takings case where the Eighth Court of Appeals affirmed the trial court’s order denying the City of Socorro’s plea to the jurisdiction. The Valley Ridge Subdivision was built between 2000 and 2004 in the flow of the Sparks Arroyo. In 2006, the city experienced a historic rain event, and there was significant damage to Valley Ridge. The city built a ditch (in 2009) and two embankments (in 2013) to divert water away from Valley Ridge. Subsequently, residents of the Patti Jo Neighborhood experienced flooding. Residents of the Patti Jo Neighborhood brought a takings claim against the city arguing that the city had redirected the flow of water toward their neighborhood while being substantially certain that it would cause flooding and damage to their properties. Additionally, they argued the city created an intentional nuisance actionable under the takings clause. The city filed a plea to the jurisdiction which was denied by the trial court. The city appealed.

The appellate court stated that a takings claim consists of three elements: (1) an intentional act by the government under its lawful authority; (2) resulting in a taking, damaging, or destruction of plaintiff’s property; (3) for public use. The court concluded that, at least on the face of the petition, the residents had sufficiently pleaded the intent element. Rejecting the city’s argument that the allegation of a single flooding event was insufficient to support a takings claim, the court explained that recurrence goes only to the merits of a claim and is not a pleading requirement to invoke the trial court’s jurisdiction. The court also concluded that, taking all of the alleged facts together, the Patti Jo residents allege an invasion and unreasonable interference with their property as of 2013. The court noted that an important difference between this case and *Harris Cnty. Flood Control Dist. v. Kerr*, No. 13-0303, 2016 WL 3418246 (Tex. June 17, 2016), is that *Kerr* arose after a trial court ruling on a combined motion for summary judgment and plea to the jurisdiction, so the Supreme Court of Texas was able to consider the evidence of motive and not merely the pleaded allegations. All the parties agreed that the resolution of the nuisance claim turns on the resolution of the taking claims, and because the court held the Patti Jo residents had adequately pleaded their takings claim, the court affirmed the trial court’s refusal to dismiss the nuisance claim.

In its conclusion, the court again reiterated that its decision means no more than that the Patti Jo residents have sufficiently pleaded claims which allow them now to try and prove those allegations, stating that “[s]kepticism over whether they will be able to meet the substantial burden that they face is simply not a justification for denying them an opportunity to meet their evidentiary burden.”

***Wells v. Texas Dep’t of Transp.*, No. 13-15-00175-CV (Tex. App.—Corpus Christi Feb. 2, 2017) (mem. op).** This is a takings case involving allegations that the Town of South Padre Island took sand from the plaintiff’s property without due process or just compensation. However, this opinion focuses on a subsequent settlement and its enforceability. Wells purportedly owns various properties along Park Road 100 on South Padre Island. The Texas Department of Transportation (TxDOT) maintains Park Road 100, including keeping the roadway clear of sand. Wells filed suit against the Town of South Padre Island (town) and TxDOT, alleging TxDOT removed sand from his property adjacent to the road and transported it to town beaches. The town filed a summary judgment asserting, among other things, that it only provided trucks via a subcontractor and did not actually remove or take anything. After granting the town’s motion (which was interlocutory),

the trial court ordered the parties to mediation. At mediation the parties settled and signed the mediated settlement agreement (MSA). However, one month later Wells withdrew his consent, asserting it was not a knowing and willful consent. The town counterclaimed to enforce the MSA and filed an additional summary judgment motion. The trial court denied the town's enforcement motion but severed the case so the original MSJ could become final. The parties appealed and cross-appealed.

The central issue in this appeal is the town's right to enforcement of the MSA. The town produced conclusive evidence to establish a valid contract. The terms of the MSA state that in consideration of \$10,000 paid by the town to Wells, within twenty-one days Wells agreed to execute a full and final release and would dismiss the town with prejudice. The MSA states it is enforceable as a Rule 11 agreement. Wells did not establish the lack of an essential term (i.e. the ownership disposition of the sand) as his own affidavit states the ownership interest was transferred to TxDOT, not the town. So the town could not agree on the ownership of property it does not own. Second, despite Wells' complaints about his own counsel, he signed the MSA, and the town conclusively established it complied with the terms by tendering payment by the deadline. As a result, the trial court should have granted the summary judgment motion on the town's counterclaim.

House of Praise Ministries, Inc. v. City of Red Oak, No. 10-15-00148-CV, 2017 WL 1750066 (Tex. App.—Waco May 3, 2017) (mem. op). In this case, House of Praise Ministries, Inc. (HOP) appealed a district court order granting the city's plea to the jurisdiction.

HOP bought property in the city to build a new church. A brick structure and mobile home park were on the property when HOP bought it. Instead of building a church, HOP funded payments on the property loan with the rental fees from the mobile home park. In 2013, the city's municipal court held a hearing, found the property substandard, and ordered HOP to make specified repairs or demolish and remove the brick structure and mobile home park. HOP first filed a motion for a new trial, which was overruled by operation of law, and then filed a petition for review in district court. The city filed a plea to the jurisdiction. The district court granted the city's plea. HOP appealed, raising complaints about the trial court's evidentiary rulings and attacking the order on the merits of the plea to the jurisdiction.

HOP's complaints about the trial court's evidentiary rulings were overruled. As for the plea to the jurisdiction, the city alleged that HOP had failed to timely perfect its appeal of the municipal court's order as required by Local Government Code 214.0012(a) (requiring a petition be filed within 30 calendar days). The time for filing a verified petition is triggered when a copy of the final order is delivered in one of three methods: personal delivery, delivery by mail, or mailing by first class mail. Personal delivery means hand-delivered, in person, to the owner, lienholder, or mortgagee of record aggrieved by the order. Even though HOP had a copy of the order, the city did not provide proof of delivery of the signed final order by any of the three alternative methods provided in statute. Thus, HOP's amended verified petition was filed within 30 days, and the court's jurisdiction was invoked. (In addition to being timely filed, Section 214.0012(a) requires a verified petition to set forth why the final order is illegal and specify the grounds of the illegality. The Waco Court of Appeals held that this is not a jurisdictional prerequisite.)

HOP also attacked the trial court's order on the plea to the jurisdiction claiming it had sufficiently pleaded regulatory taking and due process violations. HOP asserted the city's *enforcement* of code violations (not the code provisions themselves) constitutes a regulatory taking. As a result, the court held HOP did not assert a claim for a regulatory taking over which the court would have jurisdiction. HOP's procedural due process claim was essentially that a more detailed description of the violations should have been given by the city. This is not a valid procedural due process claim and the court didn't err in granting the plea to the jurisdiction on the claim.

While neither the regulatory taking nor due process claims could be cured through amended pleadings, the court of appeals held that HOP must be given the chance to amend its substantive due process pleadings to allege a sufficient claim. If HOP is unable to assert facts that make a *prima facie* case for a violation of substantive due process, the court may then properly dismiss HOP's claim on a plea to the jurisdiction. The lower court's judgment was affirmed in part and reversed and remanded in part.

UTILITY RATES

Oncor Elec. Delivery Co., L.L.C., v. Public Util. Comm'n of Texas, No. 15-0005, 2017 WL 68858 (Tex. Jan. 6, 2017). This is a Supreme Court of Texas case which held several things, but the main issue of interest to local governments is factors used in determining rates as well as the validity of certain franchise fee agreements. Oncor Electric Delivery Company, LLC (Oncor) is the largest transmission and distribution utility in Texas and the sixth largest in the United States. Oncor is regulated by the Public Utility Commission (PUC), even after deregulation of certain parts of electric utility operations. In June 2008, Oncor initiated a ratemaking proceeding at the PUC, its first request for a comprehensive rate increase since deregulation. Several parties intervened during the administrative matter. After extensive hearings, the administrative law judges recommended only an increase of 1/7th of the requested rate. Oncor and other parties to the administrative proceeding sued for judicial review and then appealed to the court of appeals. Various parties appealed to the Supreme Court of Texas, which granted all petitions and consolidated the cases.

The court first held that while the Public Utilities Regulatory Act (PURA) requires an end-user electrical utility to discount rates to a state-funded university, Oncor cannot sell to end-users. It can only charge for transmission and distribution. As a result, it does not have to provide any such discount. Next, the court held that when Oncor's parent corporation sold 19% of the ownership to other investors, it could not file an "affiliated group" consolidated tax return with the parent corporation. Filing under a consolidated tax return can affect the tax liability in a calculation for long-term expenses. Long-term expenses is one element the PUC reviews in determining rate changes. Oncor filed its return individually, not consolidated, and the court held it was proper. Next, the court held that cities are entitled to franchise fees for a utility's use of streets, alleys, and other public areas. The court then held that the PUC's determination Oncor could not pay a negotiated franchise fee to the cities was improper. Section 33.008(f) of PURA does not restrict renegotiated franchise charges to only those agreed to on the expiration of franchise agreements existing on September 1, 1999. The provision simply precludes the inference that Section 33.008(b) is exclusive.

***Gatesco Q.M. Ltd. v. City of Houston*, No. 14-14-01017-CV, 2016 WL 6134455 (Tex. App—Houston [14th Dist.] Oct. 20, 2016).** In this case, the Fourteenth Court of Appeals affirmed-in-part and reversed-in-part the granting of the city’s summary judgment motion in regard to a constitutional challenge to the city utility charging late fees and shutting off a customer’s water service. The case is good analysis of constitutional ordinance challenges and the new *Patel* due-course-of-law test.

Gatesco owns an apartment complex known as the Quail Meadows Apartments. The only available supplier of water for the apartments comes from the city. Gatesco, a longtime water customer, paid its water bill to the city one day late. The city assessed a ten-percent late fee of \$1,020.03 pursuant to an adopted ordinance. Gatesco did not want to pay the late fee and challenged it in an administrative proceeding. Though unsuccessful in this proceeding, Gatesco still did not pay the late fee. To avoid having its water shut off, Gatesco obtained a temporary restraining order, but the trial court denied Gatesco’s request for temporary injunction. Within two hours, Gatesco paid the late fee, although the city claimed Gatesco paid the fee at the wrong location. The city shut off the water to the entire complex 17 minutes after Gatesco paid the fee, but turned the water on later that afternoon. But, because the water had been turned off, the city required a cash security deposit of \$35,200.00, an estimate of three months of water bills to turn it back on. After the case went up and back to the court of appeals on a plea to the jurisdiction, the trial court granted the city’s summary judgment motions. Gatesco appealed.

Gatesco first sought a declaratory judgment that the late fee is an excessive fine under the Texas Constitution. Whether the constitutional prohibition has been violated is a question for the court to decide under the facts of each particular case. Generally, prescribing fines is a matter within the city’s discretion. A fine is not unconstitutionally excessive “except in extraordinary cases, where it becomes so manifestly violative of the constitutional inhibition as to shock the sense of mankind.” This ordinance applies a bright-line, ten-percent late charge to all people paying late, subject to a few exceptions. The charge is proportional to the unpaid amount owed and is thus proportional to the amount of water and sewer services consumed. The city has discretion to prescribe fees to be assessed for late payment for the city’s water and sewer services with the object of incentivizing timely payment for these services. There are no “extraordinary circumstances” here to justify an excessive fee under the Texas Constitution, so the summary judgment is affirmed in that regard. Gatesco also asserts the city’s ordinance is an unconstitutional tax.

In order to determine whether the late fee is a regulatory charge or a tax, the court applied the “primary purpose” test. Under this test, the court does not examine the specific regulatory costs incurred by the city as to this one delinquent payment by Gatesco; instead, it looks at whether the aggregate late fees collected exceed the amount reasonably needed for regulation. The court examined the regulation as a whole to determine whether the late fees imposed are intended to raise revenue or compensate the reasonable costs for regulation. In analyzing the facts and admissions, the court held that whether the city incurred any collection costs before charging Gatesco the late fee is not material. The record does not show the fees were unreasonable in relation to overall costs of the system. As a result, the trial court did not err in granting summary judgment on this question. As to Gatesco’s equal protection claims, Gatesco bears the burden of showing that it has been treated differently from others similarly situated and that the treatment is not

rationally related to a legitimate governmental interest. The summary-judgment evidence does not address how the city treated similarly situated customers, so the trial court did not err in granting summary judgment. Next, the city violated federal substantive due process if it exercised its power in an arbitrary and unreasonable way. Since no suspect class or fundamental right is involved, the analysis is under the rational basis test. The summary judgment evidence does not raise a genuine fact issue as to whether it is not at least fairly debatable that each component of the challenged conduct was rationally related to a legitimate governmental interest. The trial court did not err in granting summary judgment on this issue.

The court, however, utilized a different standard for the substantive-due-course-of-law violation under the Texas Constitution. The court analyzed the Supreme Court's holding in *Patel v. Texas Dep't of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015). In *Patel*, the court held that the proponent of an as-applied challenge to an economic regulation statute under Article I, Section 19's substantive-due-course-of-law protections must demonstrate that either: (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest. However, since the *Patel* opinion is so new, the city's no-evidence summary judgment evidence did not address or incorporate the "oppressive" arguments or elements, which are essential to a no-evidence determination. Accordingly, the court reversed the trial court's judgment as to these claims and remanded. Since the substantive-due-course-of-law claims are remanded, so too must the claim for injunctive relief and attorney's fees.

***G-M Water Supply Corp. v. City of Hemphill*, No. 12-16-00129-CV, 2016 WL 6876499 (Tex. App—Tyler Nov. 22, 2016) (mem. op.)**. This is an injunction case where the Tyler Court of Appeals reversed an injunction requiring a purchaser of city water to make payments at a specific rate until otherwise ordered by the court. G-M is a nonprofit water supply company which had a contract to purchase a minimum level of city water each month. The less they purchased, the more per gallon they paid. G-M later built a treatment plant and started purchasing less water. The city adjusted the rate and demanded payment. G-M refused. In 2014-15, the city charged G-M \$2.8333 per 1,000 gallons of water, but raised the rate in 2015-16 to \$5.2137 per 1,000 gallons of water. The city filed an application for temporary injunction requesting that G-M pay the accrued arrearages into the trial court's registry, along with the full amount of future monthly invoices all calculated at the higher rate. The trial court granted the injunction, and G-M appealed.

To establish an irreparable injury, the applicant must make "a clear and compelling presentation that without the injunction, it would suffer an actual irreparable injury resulting in extreme hardship, or that the injunction is extremely necessary to prevent an actual irreparable injury." The record shows G-M had sufficient funds in its accounts, so the city did not establish it would not be able to satisfy a monetary judgment if obtained. Additionally, the last, actual, peaceable, non-contested status between the parties that preceded the controversy was when the parties operated under the contract rate for 2014-2015. However, the trial courts order used the 2015-2016 rates, which altered the status quo. And while this dispute has no doubt affected the city's short term ability to make all the budgeted capital purchases at the preferred time, the evidence shows that the city maintains capital reserves of over \$1,000,000.00, so it can negate the effects of its postponed capital expenses and still provide all services until this matter can be resolved at

trial. Finally, the city did not establish it would be required to sue for each month of non-payment, and the court believes any breach of contract suit could encompass everything in a single action. Therefore, it was an error to issue the injunctive relief.

***R.E. Janes Gravel Co. v. Texas Comm’n on Env. Quality*, No. 14-15-00031-CV, 2016 WL 7323307 (Tex. App.—Houston [14th] Dec. 15, 2016).** The City of Lubbock applied to the Texas Commission on Environmental Quality (TCEQ) for an amendment to an existing permit, which would authorize the city to use a portion of the Brazos River to convey treated wastewater effluent from a discharge point to a point downstream, where the effluent would be diverted for beneficial purposes. The R.E. Janes Gravel Company (company) owned property downstream from the proposed diversion point and contested the application under the belief that the city’s diversion of water upstream would threaten the company’s viability. TCEQ granted the amended permit and the company filed suit in district court against TCEQ. The city intervened in the suit. The trial court ultimately signed a final judgment in favor of the city and TCEQ, and the company appealed.

The company’s two issues on appeal were: (1) that TCEQ failed to comply with Texas law when authorizing the amended permit; and (2) even if TCEQ were authorized to grant the permit, TCEQ failed to properly measure carriage losses (the amount of flow lost during conveyance between the discharge and diversion points).

On the first issue, the company argued that because the city had been discharging the effluent derived from surface water into the Brazos River before obtaining a permit, existing discharges had become surplus water and the city’s requested diversion would constitute a new appropriation of water that subordinated diversion to senior water right holders downstream. The city contended that its requested amendment complies with Water Code Section 11.042(c) in that it sought to divert no more than the amount discharged so that the effluent is actually not a new appropriation of state water subject to appropriation by senior water rights holders. Thus, the company was seeking to improperly lay claim to the city’s own effluent, which it has a right to transport for reuse. The court of appeals agreed with the city, reasoning that the TCEQ’s authority to grant a party the right to use a stream to convey surface water from a discharge point to a point downstream where it will be diverted for reuse under Water Code Section 11.042(c) would be meaningless if, under Water Code Section 11.046(c), the water became surplus water available for appropriation by senior rights holders upon being discharged into the stream. The court overruled the company’s first issue.

In its second issue on appeal, the company argued that its substantial rights have been prejudiced because there is no evidence to support TCEQ’s finding, conclusions, and decision with regard to the calculation of carriage losses. TCEQ requires that an application for a permit under Section 11.042(c) includes an estimate of carriage losses. The city submitted with its application a memo prepared by its water-planning manager calculating carriage losses. The company did not believe that TCEQ’s determination of carriage losses based on the city’s estimate was reasonably supported by substantial evidence. The court of appeals disagreed, concluding that substantial evidence supported the reasonableness and reliability of the city’s calculation of carriage losses, as the city’s calculation was supported by more than a scintilla of evidence. The court overruled the company’s second issue and affirmed the trial court’s judgment.

***Saldivar v. City of San Benito*, No. 13-15-00387-CV (Tex. App.—Corpus Christi Sept. 29, 2016) (mem. op.)**. This is a Texas Whistleblower Act (Act) case where the Thirteenth Court of Appeals affirmed the granting of the city’s summary judgment motion. Saldivar was a communications specialist for the City of San Benito Police Department. Saldivar asserts various supervisors requested Saldivar to run criminal history checks on various city employees. She refused to do so and told her supervisors that criminal histories could only be conducted on police applicants and civilian staff that worked in the police department. Saldivar was demoted and asserts her replacement conducted what she viewed as unauthorized criminal background checks. She notified the Texas Department of Public Safety. Saldivar was then subject to an internal investigation three months later, but the opinion did not address the grounds. As a result of the investigation, the city terminated Saldivar. Saldivar inquired as to the procedures to appeal her termination internally and was provided the grievance procedures. Two years later, Saldivar sued under the Act. The city filed a summary judgment motion asserting Saldivar failed to file suit within 90 days of the termination. The trial court granted the city’s motion, and Saldivar appealed.

A public employee who seeks relief under the Act must sue not later than the 90th day after the date on which the alleged violation: (1) occurred; or (2) was discovered by the employee through reasonable diligence. TEX. GOV’T CODE § 554.005. The 90-day window to file suit will normally “start to run when the cause of action accrues—in retaliation actions, when the retaliatory action occurs.” This timeframe can be tolled if the employee is pursuing relief under the appropriate grievance system. Saldivar responded that the tolling provision is triggered as soon as she gives “reasonable notice” of her intent to follow the grievance procedure, but she need not do anything else. The court disagreed. She waited more than two years after her termination to bring suit. When Saldivar asked for the grievance procedures, the city provided them but also informed her that she could not grieve or appeal a termination by the city manager. Saldivar’s only recourse at that point was to file suit. A grievance system that does not apply to an employee’s adverse employment action cannot be used to toll. As a result, the trial court properly granted summary judgment based on the statute of limitations.

***Torres v. City of San Antonio*, No. 04-15-00664-CV, 2016 WL 7119056 (Tex. App.—San Antonio Dec. 7, 2016) (mem. op.)**. Stephen Torres worked in various positions at the San Antonio Fire Department. While assigned to the arson division, Torres observed what he believed was improper use of credentials by two peace officers and relayed his concerns to his supervising captain. Torres also submitted a written memo to the deputy chief detailing what he’d witnessed. After an investigation, the Office of Municipal Integrity (OMI) labeled Torres’s allegations as unfounded. A few years later, Torres applied for a lateral transfer that included an increase in pay. Torres and one other less experienced candidate were interviewed. The committee recommended the other individual for the position. After learning that he was not selected, Torres filed a complaint alleging that he was discriminated against due to his race/national origin. The city’s investigation did not find discrimination against Torres. Torres then filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). Later, Torres filed this suit claiming the city retaliated against him for the OMI complaint in violation of the Texas Whistleblower Act. The trial court granted the city’s summary judgment motion, which Torres appealed.

The court of appeals concluded that there was a disputed fact issue on the element of “good faith” as to whether Torres’s decision to report to OMI was reasonable. The court then looked at the next necessary element of a whistleblower claim: causation. The city alleged that Torres provided no evidence showing any retaliatory action in the two years subsequent to the complaint and prior to the non-selection. Torres provided testimony from the members of the committee that Torres’s OMI report was brought up during the selection process. Thus, the court concluded there was some evidence that the fact that Torres reported the misuse of credentials was considered in whether to select him for the position. The city did not negate causation and the case was remanded to the trial court.

Jones v. City of Port Arthur, No. 09-14-00442-CV, 2016 WL 6809207 (Tex. App—Beaumont Nov. 17, 2016) (mem. op.). Jones was employed as an operator of a residential garbage truck with the City of Port Arthur. After he was terminated, he sued under the Texas Whistleblower Act. Essentially, Jones reported his truck was leaking potentially flammable hydraulic fluid to the city’s public works department and solid waste management division superintendent. However, he was told the leak was not a problem, that a minor repair fixed it, and that he needed to drive the truck. He refused, asserting the truck was unsafe to operate on the roadway. He was suspended until his ultimate termination. Jones asserted that during his suspension he reported the violation to the Occupational Safety and Health Administration (OSHA) and the Texas Commission on Environmental Quality (TCEQ). The trial court granted the city’s plea to the jurisdiction and motions for summary judgment. Jones appealed.

To be a “good faith” report, an employee must not just believe the entity was an appropriate law enforcement authority under the Texas Whistleblower Act, but his belief must be “reasonable in light of the employee’s training and experience.” He must show that a reasonably prudent public employee in similar circumstances would have believed he had made the report to an appropriate authority and that the report was regarding a violation of law. Jones testified he had obtained two associates degrees, one in management development and the other in process technology. He served in the United States Marine Corps and was assigned to a supply unit. He does not have training as a mechanic. The court held that Jones failed to present evidence that it was reasonable, in light of his training and experience and the circumstances presented, for him to believe the conduct he reported was a violation of the law.

The court held his report to the city manager did not qualify and neither did any of the internal reports made to different departments. Even if a report is made in good faith, there must be a causal link. The plaintiff must show that the person who took the adverse employment action knew of the employee’s report of illegal conduct. Both reports to outside agencies were made after his supervisor sent Jones home indefinitely and initiated termination proceedings. The start of the adverse action was the indefinite suspension, not the final date the termination letter was signed. Further, no evidence exists the decision maker was aware of the complaints to OSHA or TCEQ prior to the termination letter. As a result, no causal connection exists.

Connally v. Dallas Indep. Sch. Dist., No. 08-15-00310-CV, 2016 WL 7384188 (Tex. App—El Paso Dec. 21, 2016). This is a Texas Whistleblower Act case where the El Paso Court of Appeals affirmed in part and reversed in part the granting of the school district’s plea to the jurisdiction.

The Dallas Independent School District (DISD) hired Connally in 2009 as its director of compliance, with part of her duties being to make recommendations for University Interscholastic League (UIL) rules. In order to prevent illegal recruiting of student athletes, the UIL requires the filing of a prior athletic participation form (PAPF) to ensure that a student athlete transferring into a new high school actually lives within the new school's attendance zone. This triggers a host of other forms to be signed and submitted.

Connally pointed to several instances of what she categorized as inaccurate or fraudulent forms. She was not in charge of reviewing the forms so had no power to enforce compliance. Connally reported her suspicions of wrongdoing at various times to three departments within DISD: (1) the Office of Professional Responsibility (OPR); (2) the Internal Audit Department (IA); and (3) the Professional Standards Office (PSO); (4) the chief and assistant chief of the DISD police department; and (5) the PSO's manager, Jeremy Liebke, who was a commissioned police officer and a former detective with the DISD police department. Connally participated as an expert on UIL rules during the investigations. PSO issued a detailed report in which it confirmed virtually all of Connally's reports of wrongdoing, including falsification of government forms. Sometime later, Connally was terminated for reported performance issues. She sued under the Texas Whistleblower's Act. DISD filed a plea to the jurisdiction, which was granted.

The court first held none of the departments (OPR, IA, and PSO) were appropriate law enforcement authorities as they only had the power for internal review against employees. None of these departments had any external authority to investigate criminal law violations against third parties. Likewise, the PSO manager, Liebke, was not acting in the role of a police officer while he acted as a manager and had no external authority regarding PSO roles. No law authorizes an individual police officer who is commissioned through a police agency the unfettered authority to conduct an investigation of any nature he chooses without the permission or authority from the agency. Even though Liebke briefly held his commission with the DISD police department after his transfer, there is nothing in the record to suggest that the DISD police department had authorized him to continue to investigate criminal law violations. The Supreme Court of Texas made it clear that it is the governmental arm or entity to which the report is made that is the key focus, and that any report must be made to an individual within that governmental arm or entity. However, DISD police department has the authority to investigate virtually all violations of criminal laws occurring within its jurisdictional boundaries. While the UIL rules are not criminal in nature, the falsification of a governmental record is a violation of Section 37.10 of the Texas Penal Code. This falls under the DISD police department's authority, which is outward reaching. Therefore, the granting of the plea was sustained as to all reports except the falsification reports to the police chief and assistant Chief. The claims associated with those reports have been reversed and remanded for trial.

Barnett v. City of Southside Place, No. 01-16-00026-CV, 2017 WL 976067 (Tex. App.—Houston [1st Dist.] Mar. 14, 2017). This is a Texas Whistleblower Act case where the Fourteenth Court of Appeals affirmed the granting of the city's plea to the jurisdiction. Barnett worked as a detective for the City of Southside Place. Barnett informed the chief of police (McCarty) that he had learned that the city had implemented an illegal ticket quota system. McCarty included that information in a written memorandum to the Texas Rangers summarizing a list of his grievances

against City Manager David Moss. He also forwarded the Texas Ranger memo to the mayor. After Barnett and McCarty met with Texas Ranger Jeff Owls, Barnett resigned but with an effective date of two weeks later. One day later, the city suspended McCarty pending an investigation for McCarty's conduct on a variety of matters. Several days later, the city manager informed Barnett of allegations of misconduct against him and provided him the opportunity to respond. The city manager advised that, if true, the allegations would constitute grounds for termination. Barnett refused to respond. One day before Barnett's resignation became effective, the city manager terminated Barnett for insubordination. Barnett's F-5 separation notice to the state reflected a "dishonorable discharge." Barnett sued under the Texas Whistleblower Act (Act). The city filed a plea to the jurisdiction which the trial court granted. Barnett appealed.

To allege a violation of the Act, a plaintiff must allege that an adverse employment action was taken because he, in good faith, reported a violation of law by the employer to an appropriate law enforcement authority. The city argued that Barnett failed to raise a fact question as to whether: (1) he suffered an adverse employment action; and (2) the action taken was because he reported a violation of law. However, "Barnett's assertion that his employment was terminated is belied by his own sworn testimony that he voluntarily resigned before he received the termination letter." Barnett testified that when Moss instructed him to answer written questions and cooperate in the internal investigation, Barnett told him that he had already resigned and that he no longer considered himself an employee of the city. "Although the termination letter might otherwise qualify as an adverse employment action under a different set of facts, it does not here because there is undisputed evidence that Barnett had already resigned his employment" Further, under the definitions in the Act, a "public employee" means someone paid to perform services for the entity. The Act thus prohibits adverse personnel actions that affect the benefits flowing from an ongoing employment relationship. Since he was no longer employed when the F-5 was issued, it is not an adverse personnel action under the Act.

Finally, Barnett asserted he did not have adequate time for discovery. To preserve an issue for appeal, the record must show the complaint was made to the trial court by a timely request, objection, or motion, and that the trial court: (1) ruled on the request, objection, or motion, either expressly or implicitly; or (2) refused to rule, and the complaining party objected to that refusal. The trial court reset schedules and discovery to accommodate various case management aspects and witness availability for depositions. Since Barnett did not object to any of the resets, Barnett did not properly raise the issue before the trial court. The plea was properly granted.

WORKERS' COMPENSATION

***City of Dallas v. Ellis*, No. 05-16-00348-CV, 2017 WL 655927 (Tex. App.—Dallas Feb. 17, 2017) (mem. op.)**. This is a workers' compensation/statute of limitations/subrogation case in which the Dallas Court of Appeals reversed the trial court's order and rendered judgment granting the city's motion, thus reviving the dormant judgment. In 1987, a City of Dallas employee was injured in an automobile accident during the course and scope of his employment. The city paid the workers' compensation benefits while Ellis, an attorney, represented the employee in his suit against the third-party tortfeasors. The suit settled, and the settlement agreement provided for Ellis to resolve the city's workers' compensation lien. The city, however, was not paid, sued Ellis for conversion of the lien, and obtained a judgment awarding the city about \$87,000. A modified final judgment later reduced the total award to about \$75,000.

In 2012, the city filed a motion to revive the judgment by scire facias. However, the motion mistakenly sought to revive the earlier judgment rather than the modified judgment. After a writ of execution issued two and a half years later, the city realized it had revived the wrong judgment. In 2015, the city filed its first amended motion to revive the modified judgment, acknowledging that a judgment becomes dormant after ten years of rendition and ordinarily can be revived by scire facias within two years from the date it became dormant. The city asserted that Section 16.061(a) of the Civil Practices and Remedy Code exempted it from the two-year statute of limitations. Ellis filed a response arguing that laches barred the city's motion, but did not challenge the city's statute of limitations assertion. The trial court revived the modified judgment.

Ellis filed a motion for reconsideration and a motion for a new trial, reasserting his laches defense and arguing that Section 16.061 did not exempt the city from the statute of limitations because the underlying claim was based on a subrogation interest belonging to the city employee, not the city. After a hearing, the trial court granted Ellis' motion, vacated its order reviving the modified judgment, and ordered that the judgment is not revived and is considered dormant and unenforceable for all purposes. The city appealed, asserting that the ruling was in error because: (1) the city had established the necessary statutory requirements to revive the judgment; and (2) Ellis' defenses of limitations and laches do not apply.

The city argued that it met all statutory requirements to revive the judgment and therefore that the trial court lacked discretion to deny its motion. In determining whether to issue a writ of scire facias reviving a judgment, the trial court shall consider the date of the underlying judgment, evidence of any writs of execution, and the date of the motion to revive the judgment scire facias. *Chen v. Nguyen*, No. 05-15-00077-CV, 2016 WL 258786, at *1 (Tex. App.—Dallas Jan. 21, 2016, no pet.). Though the city waited longer than two years to revive the judgment, it argued that it was exempt under Section 16.061, which provides “A right of action of this state or a political subdivision of the state, including ... an incorporated city ... is not barred by any of the following sections [of the Texas Civil Practice and Remedies Code]: ... 31.006”

Here, Ellis argued that the city was asserting a subrogation interest in its employee's claim, not its own “right of action.” The court disagreed, reasoning that the city was seeking to invoke Section 16.061 and avoid the statute of limitations for a judgment for conversion, resulting from the city's suit against the employee's attorney who refused to pay the city what it was owed. The city, therefore, was asserting its own “right of action” and an employee's, and was thus entitled to exemption.

The court also rejected Ellis' laches defense. Laches is an equitable defense that prevents a plaintiff from asserting a claim due to delay—“not mere delay but delay that works a disadvantage to another.” *Culver v. Pickens*, 176 S.W.2d 167, 170-71 (Tex. 1943). Two essential elements must exist for laches to bar a claim: (1) a party's unreasonable delay in asserting a legal or equitable right; and (2) a good-faith change of position by another to his detriment because of the delay. *Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 80 (Tex. 1989).

Ellis claimed he was harmed by the city's delay in reviving the judgment because: (1) post-judgment interest had more than tripled the original judgment; and (2) he is no longer eligible to

serve on city boards or commissions. In support, Ellis asserted in his affidavit that he intended to pay the city but held the impression that the city was willing to negotiate and settle for less than the judgment. He also asserted that, as a result of his conflict with the city, he is no longer eligible to serve on board and commissions and has suffered damage to his personal and professional reputations. The court reviewed the affidavit and concluded that there was no evidence that Ellis had a good faith, detrimental change in his position because of the city's delay, nor evidence that the city offered to settle for less than it was owed. The damage to Ellis' reputation and increase in the amount owed in interest, the court said, was due solely to Ellis' failure to pay a judgment he owed. The court reversed the trial court order granting Ellis' motion for reconsideration and a new trial and granted the city's motion for scire facias.

Misc.

***Gándara v. State*, No. 08-15-00201-CR, 2016 WL 6780081 (Tex. App.—El Paso Nov. 16, 2016).** This case is characterized by the court as “an example of how difficult it is to distinguish politics from bribery.” In December 2012, the City of Socorro notified the townsfolk of San Elizario that it was proposing to annex the business area, which was made up of approximately twenty businesses, including the Licon Dairy (known for its azadero cheese and petting zoo). Gándara solicited the Licons' public support of the city's annexation in exchange for his efforts as a sitting councilmember of the City of Socorro to “mediate” or “spearhead” favorable initiatives for the dairy (e.g., he offered for the city to spend \$40,000 in advertising for the dairy and \$40,000 for a spring break event that would bring visitors to the dairy). Gándara was indicated on one count of bribery under Texas Penal Code Section 36.02.

Gándara raised two issues on appeal. He claimed the trial court should have granted a motion for directed verdict in his favor “because the evidence proved that [he] did not bribe the Licons.” In his second issue, he claimed his conviction “must be reversed because it violated his rights to free speech and to engage in political activity guaranteed by the United States and Texas Constitution.” The appellate court explained that, under Section 36.02, the State must prove that: (1) Gándara intentionally or knowingly solicited or agreed to accept from Licon Dairies; (2) a benefit, that is a pecuniary gain or advantage, to include any benefit to any other person in whose welfare he has a direct and substantial interest; (3) as consideration for his opinion, recommendation, vote, or other exercise of discretion as councilmember. The State argued that the City of Socorro is the “other person.” Thus, the question is whether the evidence is sufficient to show Gándara had a “direct and substantial” interest in the city or, stated another way, whether his interest in the city was “unbroken by any intermediary or agency, and not speculative or illusory, but of a considerable value.”

The court concluded that Gándara promised his vote in return for the Licons' public support of the annexation. The court assumed, without deciding, that the Licons' public support possessed some pecuniary gain or advantage to the City of Socorro. However, the court found that the State presented no evidence that the city would, in fact, actually benefit. Thus, the benefit was speculative and illusory. Moreover, Gándara's interest in the city is not direct or substantial and any benefit he would receive from an increased tax base would be the same benefit received by all similarly situated taxpayers. The court concluded that the evidence is insufficient to support the jury's finding and rendered a judgment of acquittal, noting that any other conclusion would mean

that “every public official that furthered the interest of his constituency of which he was a member” would be guilty of bribery.

***Wilson v. State*, No. 09-15-00412-CR, 2016 WL 6110712 (Tex. App.—Beaumont Oct. 19, 2016).** This is a case where the Beaumont Court of Appeals affirmed the trial court’s conviction of criminal trespass. On July 2, 2015, Wilson was given an oral and written warning by a city police officer that he could not return to the City of Dayton community center. The warning was issued on the request of the city manager. Wilson was arrested when he returned to the community center on July 8. Wilson was convicted by a jury of criminal trespass, a Class B misdemeanor.

Wilson appealed the conviction, arguing that: (1) he had not received procedural due process because the city’s unwritten building-use policy allowed the city manager to exercise discretion in prohibiting individuals from entering the community center; (2) the city’s unwritten policy was vague and unenforceable; (3) the city’s unwritten policy was enforced in an arbitrary and irrational manner; and (4) the evidence before the jury didn’t support his conviction.

The court characterized Wilson’s complaints about the unwritten policy as a civil matter that should be taken up with the city council. Alternatively, Wilson could have sought to enjoin the city from enforcing the city manager’s decision if he could prove that the decision to ban him was irrational or arbitrary. When focused on the elements of the criminal-trespass statute, the court concluded that the statute does not require prior notice of the type of conduct that could result in losing the right to enter the premises. It only requires that a person be warned by someone with authority to do so that they can no longer enter the owner’s property. (To the extent that the Texarkana Court of Appeals’ decision in *Anthony v. State*, 209 S.W.3d 296 (Tex. App.—Texarkana 2006, no pet.) implies that constructive notice of a building-use policy is an element of the criminal-trespass offense, the Beaumont Court of Appeals disagrees.) The court concluded that the evidence showed that the city had authorized the city manager to exclude Wilson from the community center and that Wilson’s use of the facility was inconsistent with its purpose. Issues one, two, and three were overruled.

The fourth issue was also overruled. The court concluded that the evidence showed that: the community center was built and managed by the city, the city manager was in charge of the property, the city manager had the right to prohibit Wilson from being on the property, Wilson was informed that he could not return to the community center, and Wilson did return.

A dissenting justice found the reasoning in *Anthony* persuasive and concluded that the conviction should be reversed and that the city’s unwritten policy is unconstitutionally vague.

***City of Austin v. Utility Assoc., Inc.*, No. 03-16-00586, 2017 WL 1130397 (Tex. App.—Austin Mar. 24, 2017).** In this consolidated case, the court reversed the denial of a plea to the jurisdiction and dissolved an injunction order that prevented the City of Austin from utilizing its contract for body-worn cameras. The city bid and executed a \$12.2 million contract with Taser International, Inc., (Taser) for body-worn cameras. One of the vendors that had submitted a competing proposal, Utility Associates, Inc., (Utility) accused city staff of manipulating or corrupting the selection process to favor Taser. Utility sought an injunction to prohibit the purchase and to invalidate the award. The city defendants filed various pleas to the jurisdiction. The trial court granted the pleas

as to the declaratory judgment claims and attorney’s fees but denied them as to other claims. The trial court granted the temporary injunction in order to preserve the status quo. The city appealed.

The parties’ arguments centered largely on the extent to which plaintiffs’ claims were authorized under a provision of Chapter 252 of the Local Government Code regarding competitive bidding requirements. Section 252.061 states, in part, “[i]f the contract is made without compliance with this chapter, it is void and the performance of the contract, including the payment of any money under the contract, may be enjoined...” The court considered the plaintiffs’ public policy arguments and dispelled them, including the argument that attorney’s fees are proper and essential weapons against public corruption. The legislature is best suited to waive immunity, not the judiciary. Next, the court held the plaintiffs are unable to establish an *ultra vires* claim against city officials under Chapter 252 as the definition of “responsible offeror” has too much discretion built in to be ministerial. While Chapter 252 may require the city defendants weigh specified considerations and factors, it does not limit their discretion in the outcome of these judgment calls. Additionally, *ultra vires* claims are only prospective, not retrospective.

The basis of the plaintiffs’ claims is to retrospectively undo an award, not to prevent awards in the future. As a result, the plaintiffs failed to allege a proper *ultra vires* claim. The injunction issued by the trial court exceeded the power for enjoining under Chapter 252. Additionally, Utility did not establish it was qualified to act as a plaintiff under Chapter 252, which was the only applicable waiver of immunity mentioned in the pleadings. The pleas should have been granted in their entirety.

***Topletz v. City of Dallas*, No. 05-16-00741-CV, 2017 WL 1281393 (Tex. App.—Dallas Apr. 6, 2017) (mem. op.)**. This is an interlocutory appeal of the trial court’s order granting a temporary injunction requested by the City of Dallas. Dennis Topletz owns and/or manages approximately 225 rent houses in the city. The City of Dallas filed suit against Topletz for a variety of code violations and for maintaining nuisance properties. After the city filed its lawsuit, Topletz sent a letter to his tenants directing them to refuse to allow any city inspectors to enter their houses and to tell city inspectors there were no issues with their houses that needed to be addressed.

Two tenants, James Choice and Reneka Towers (tenants), intervened in the city’s lawsuit, alleging violations of the Texas Property Code and Deceptive Trade Practices Act. Shortly after the tenants intervened in the suit, Topletz sent someone to the tenants’ homes asking them to sign documents stating their rent houses complied with city codes and the tenants were satisfied with the condition of the house. After this encounter, the tenants amended their petition to include an application for a temporary restraining order, temporary injunction, and permanent injunction. The city joined in the tenants’ application for a temporary restraining order and a temporary injunction. The trial court granted the relief requested by the tenants. Topletz filed this interlocutory appeal.

Topletz raised six issues contending that the temporary injunction should be vacated or modified. The only issue the court found compelling was that the injunction improperly enjoins Topletz from engaging in lawful activities and exceeds the scope of the pleadings. Because the injunction would prohibit Topletz from raising rent, properly initiating eviction proceedings, or carrying out evictions, the court concluded that the injunction enjoins activities Topletz otherwise has a legal right to perform. Thus, the injunction is too broad. The court modified the temporary injunction

order to delete that paragraph and affirmed all other portions of the trial court's temporary injunction order.

***Vera v. City of Hidalgo*, No. 13-16-00088-CV, 2017 WL 56380 (Tex. App.—Corpus Christi Jan. 5, 2017) (mem. op.)**. This is a dispute between the City of Hidalgo and the BorderFest Association as to who owns the rights and ability to control the BorderFest annual cultural festival. The BorderFest festival has been held in the City of Hidalgo (Hidalgo) for the past thirty-nine years. The BorderFest Association (association) determined that in 2016 the festival would be held in the neighboring City of McAllen (McAllen). Hidalgo sued the association and Joe Vera, the assistant city manager of McAllen, for a declaratory judgment and injunctive relief regarding ownership of the festival. Vera was the former city manager of Hidalgo. Hidalgo was counter-sued for federal trademark infringement and unfair competition. The association claimed sole ownership and rights to the BorderFest brand and sought its own injunctive relief against Hidalgo from using the BorderFest mark, name, and goodwill. After a two-day temporary injunction hearing, the trial court granted Hidalgo's temporary injunction and prohibited the association from using the BorderFest name or utilizing the event in McAllen. The association filed an interlocutory appeal.

The preliminary record shows BorderFest has been held exclusively in Hidalgo for the previous thirty-nine years and has brought the city "fame" over these years. The city has paid the cost of the festival each year, although the association provided some funds to "defray" the full cost to the city. The city also contributed a large number of personnel and man hours to the festival. The record further shows that the 40th anniversary of the festival being held in Hidalgo was threatened by the actions of the association agreeing to hold the BorderFest festival in McAllen. Based on these facts, the court of appeals held the trial court was within its discretion to grant Hidalgo's temporary injunction application because Hidalgo had pleaded and proved it had: (1) a cause of action against Vera and the association; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. The trial court's rulings shows that it sought to preserve the status quo because these orders were issued approximately one month prior to BorderFest's 40th anniversary, while the underlying ownership issues would be resolved later at trial. The court of appeals expressly disclaimed any aspects of the opinion that were meant to address the ultimate resolution of the case and limited its ruling only to a temporary injunction standard of review.

***Housing Auth. of the City of Alice v. Texas Mun. League Joint Self-Insurance Fund*, No. 04-15-00813-CV, 2017 WL 1161195 (Tex. App.—San Antonio Mar. 29, 2017) (mem. op.)**. In this dispute over the amount owed for storm damage to property, the Housing Authority of the City of Alice (authority) sued its insurer, the Texas Municipal League Intergovernmental Risk Pool (IRP). The authority had purchased an insurance policy from IRP to protect against damage to the authority's property. The policy required that the authority provide signed and sworn proof of loss to IRP within 60 days.

In May 2014, a storm damaged 120 of the authority's properties. The authority reported the damage to IRP the next day by telephone. The authority sent a signed, written report of the loss two days later. IRP determined that the authority's reimbursable loss minus their deductible was \$429,143.72 and tendered payment to the authority. The authority disputed the proposed amount

of loss and asserted that its actual losses exceeded \$3 million. To support this claim, the authority attempted to invoke the appraisal process described in their insurance policy. IRP resisted this, and the authority sued for breach of contract. The trial court denied the authority's motion for summary judgment and granted IRP's partial summary judgment motion. The authority filed a notice of appeal. The court of appeals looked at whether the summary judgment order was final, and thus, whether the court had appellate jurisdiction. The authority claimed that the case involved only two parties and one cause of action, so the trial court's order inescapably disposed of its breach of contract claim and the entire case.

The court of appeals concluded that the trial court's order granted only a partial summary judgment and does not dispose of the entire case. Because there was no other circumstance making the order final, the order was interlocutory. Thus, the appellate court did not have jurisdiction and dismissed the appeal for want of jurisdiction.