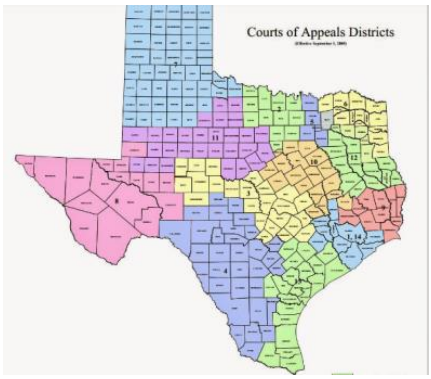

RECENT STATE CASES OF INTEREST TO CITIES

Presented to:
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Bastrop
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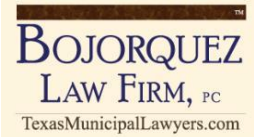

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Laura, originally from Yukon, Oklahoma, graduated summa cum laude from the University of Oklahoma in 2001 with a liberal arts degree. She attended the University of Texas School of Law and worked as a law clerk for TML and as an intern for the Travis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

TML LEGAL DEPARTMENT
Austin, Texas

The Texas Municipal League Legal Services Department provides legal assistance to TML member cities. We answer general questions; participate in educational seminars; provide support services for the legislative department; and prepare handbooks, magazine articles, and written materials including legal opinions and amicus briefs.

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

Table of Authorities

RECENT STATE CASES

ADMINISTRATIVE PROCEDURE ACT

***Fisher v. Public Util. Comm'n*, No. 03-16-00540-CV, 2018 WL 454730 (Tex. App.—Austin Jan. 11, 2018)**. In November 2013, the City of Georgetown and the Chisholm Trail Special Utility District (Chisholm) submitted an application with the Public Utilities Commission (PUC) to transfer Chisholm's certificated water-service area to the City of Georgetown. Some residents of the rural area serviced by Chisholm opposed the move, concerned that their service level would deteriorate once they no longer had control over the utility through their local, elected water board.

The State Office of Administrative Hearings (SOAH) held a contested-case hearing on the matter in July 2015. The administrative law judge provided a proposal for decision to the PUC, which was considered at an open meeting held in December 2015. Some Chisholm customers, including appellants, argued against the transfer at the public hearing, but the PUC approved it anyway. After Fisher and the appellants filed a motion for rehearing, which the PUC ignored, the appellants sued for judicial review of the PUC's decision.

At trial, the court's decision hinged on whether or not Fisher and the other appellants had timely filed their motion for rehearing— a necessary prerequisite for review of a contested-case decision. The APA had been amended in 2015 to extend the filing deadline from 20 to 25 days. Appellants had filed their motion for rehearing 21 days after notice. The trial court held that the old deadline applied and dismissed appellants' suit.

On appeal, appellants argued 1) that the new, 25-day filing deadline applied and therefore they had timely filed, and 2) in the alternative, the PUC lacked jurisdiction to approve the transfer, and therefore appellants did not have to file for rehearing.

The court quickly disposed of appellants' second argument regarding jurisdiction, since it had already reviewed and rejected that argument in another case in which appellants were intervenors. On the second issue, the appellate court affirmed the trial court's holding that the old filing deadline applied. The 2015 amendments specified that the changes to the deadline apply only to an administrative hearing that is set on or after September 1, 2015. The SOAH judge had set the underlying administrative hearing for July 20, 2015. Because the administrative hearing had been set before September 1, 2015, the 20-day deadline for motions for rehearing applied, not the newly enacted 25-day deadline.

ANNEXATION

***In re City of Pearland*, No. 14-17-00921-CV, 2018 WL 344036 (Tex. App.—Houston [14th Dist.] Jan. 9, 2018) (supp. mem. op.).** The Fourteenth Court of Appeals in Houston granted the city's petition for mandamus compelling a trial court to lift its temporary restraining order issued in an annexation lawsuit.

Senate Bill 6, which requires certain cities to obtain consent by a majority of the property owners in an area before it can annex, went into effect December 1, 2017. The City of Pearland attempted to annex an area prior to the bill's effective date. On November 20, plaintiffs filed their First Amended Petition, which alleged (among other things) that the city, in the annexation process, had failed to comply with certain provisions of the Texas Open Meetings Act. Plaintiffs requested and were granted a temporary restraining order preventing the city from considering the annexation ordinance. The trial court granted set an injunction hearing for December 4, 2017. Pressed for time, the city filed a mandamus and request for emergency relief in the court of appeals. The court issued an order for the trial court to remove the restraining order on November 27, later filing a supplemental brief explaining its legal reasons.

The court removed the restraining order because it found that the order went beyond preserving the status quo. Under Government Code Section 551.142(a), the court reasoned, a property owner whose property has been annexed has standing to challenge the validity of and enjoin an annexation ordinance based on violations of the Open Meetings Act. Therefore, if the city did violate the Texas Open Meetings Act, the property owners would have a legal remedy to challenge the annexation (after it occurred) for violations of the Act. The purpose of a restraining order is to preserve the status quo. By restraining the city's actions and setting a hearing after Senate Bill 6 went into effect, the district court essentially had made a final, non-appealable adjudication affecting the city. That is not maintaining the status quo but issuing a ruling on the merits.

***Hall v. City of Bryan*, No. 10-16-00044-CV, 2018 WL 327142 (Tex. App.—Waco Jan. 3, 2018) (mem. op.)**. This is a disannexation lawsuit where the Waco Court of Appeals affirmed the trial court's summary judgment motion dismissing the plaintiff's claims for disannexation.

This is the third lawsuit (fourth appeal) brought by Hall in order to disannex property which was annexed by the city back in 1999. The procedural history entails various trips to the Waco Court of Appeals. In 1999, the city annexed a strip of land leading up to the city's airport, one section belonging to Hall. Hall initially sued for disannexation in 2004 asserting the city failed to follow the annexation service plan. That suit was unsuccessful. She sued again in 2010 and was unsuccessful. She sued again in 2012. Each time Hall attempted different grounds and claims seeking disannexation. In the present case (Hall III), the city filed a plea to the jurisdiction which the trial court granted and Hall appealed. The Waco Court of Appeals affirmed in part and reversed in part, holding that the court had jurisdiction to hear the claims that the city failed to provide proper police patrols under the annexation plan created in 1999. All other claims were dismissed. The case was remanded for the police patrol claim and Hall amended her petition again trying to reinject the dismissed claims. The city filed a motion for summary judgment as to all claims, which the trial court granted. Hall appealed.

The Waco Court of Appeals first examined whether Hall's amended petition after remand raised new claims or if they simply recast the claims already dismissed. The court determined she simply re-labeled claims that the city failed to provide sanitary sewers, fire suppression with hydrants, or a water line capable of supporting fire hydrants. Under the law of the case doctrine, the court would not revisit such claims and they remain dismissed. As to the police patrol claims, the city first asserted the claims were barred by res judicata since Hall raised or could have raised

the same claims in Hall I. Hall's twist on the police patrol claim is that even if the city provided police patrols, it did not provide them "in good faith" under Chapter 43 of the Local Government Code. The court analyzed the evidence submitted in the city's summary judgment and noted Hall expressly agreed that in her 2004 petition, she was complaining that the city was not conducting routine and preventative police patrols. Further, she agreed that, in anticipation of supporting her petition for disannexation in 2004, she had recorded 130 hours of video purportedly showing no routine patrols on a street in the annexed area. This is some of the same video evidence she contends supports her claims in her 2014 petition. Regardless of whether the specific claim of no regular or routine preventative police patrols was actually pursued in the 2004 petition for disannexation, Hall knew the claim was present in 2004 and could have raised it. Under the principle of res judicata, such claims are precluded in the present case. The judgment of the trial court is affirmed.

APPELLATE PROCEDURE

***EMF Swiss Avenue, LLC v. Peak's Addition Home Owner's Assoc.*, No. 05-17-01112-CV, 2017 WL 5150954 (Tex. App.—Dallas Nov. 7, 2017) (mem. op.)**. This case involves the underlying proceeding in which Peak's Addition Homeowner's Association (HOA) appealed the City of Dallas Board of Adjustment's (BOA) determination that a building permit was properly issued for construction on property owned by a developer, EMF. The judgment in the underlying proceeding was declaratory in nature. Specifically, the judgment granted summary judgment for the HOA and reversed the BOA's decision upholding the building official's decision to issue a building permit. The issue in this particular case was whether that judgment constitutes a judgment for something other than money or an interest in real property such that the trial court was required to set security pursuant to Rule 24.2(a)(3) of the Texas Rules of Appellate Procedure.

The court relied on the determination in *Haedge v. Central Texas Cattleman's Association* that a "judgment that affirmed a private association's decision stripping certain shareholders of their shared and accompanying right to graze heads of cattle on certain land could be superseded and the amount of security was to be determined under rule 24.2(a)(3)." No. 07-15-00368-CV, 2016 WL 836084, at *1 (Tex. App.—Amarillo 2016) (per curiam). The Dallas Court of Appeals concluded that the judgment at issue in this case was analogous to the judgment in *Haedge*, because the judgment was entered for something other than money or an interest in real property. Both judgments adversely affected the property rights of appellants. Thus, they should be permitted to be superseded under Rule 24.2(a)(3). The court grants EMF's motion, vacates the trial court's order denying EMF's motion, and remands the case to the trial court to set supersedeas security.

CIVIL SERVICE

***City of Amarillo v. Nurek*, No. 07-17-00120-CV, 2018 WL 1415406 (Tex. App.—Amarillo Mar. 21, 2018)**. This is a civil service lawsuit where the Amarillo Court of Appeals reversed-in-part the denial of the city's plea to the jurisdiction.

In Amarillo, firefighter positions have civil service protection and firefighters are contained within the Fire Suppression Department. However, positions in the City of Amarillo Fire

Marshal's Office (FMO) have traditionally been treated as outside the protection. Nurek and Stennett were the highest scoring individuals on the promotional exams for positions of an Investigator I (equivalent rank of lieutenant) and Investigator II (equivalent rank of captain) within the FMO. When they were not offered the positions, they sued to declare the positions subject to civil service protection (and therefore eligible for placement via promotional exam). They also sought instatement in the positions and back pay. The city filed a plea to the jurisdiction which was denied. The city appealed.

Immunity bars a declaratory judgment action seeking a declaration of the government's liability for money damages. However, governmental immunity does not bar a claim for declaratory relief including adjudicating the status of an individual under state law or city policy. The court of appeals held the trial court does have jurisdiction to examine the city's failure to classify firefighter positions within the FMO as civil service positions.

Under Section 180.006 of the Texas Local Government Code, immunity is waived "for claims to recover monetary benefits that are authorized by a provision of…" the Civil Service Act. However, the claims asserted do not specify the sections which would authorize the payment in the plaintiffs' pleadings. "While appellees may prove to be right regarding appellants' erroneous classification of FMO positions outside of the civil service, it is clear that appellees have not affirmatively pled facts demonstrating that their claims for monetary benefits are authorized by a provision of the Civil Service Act." Further, the pleadings do not differentiate between acts of the city and any alleged ultra vires acts of individual officials. Nothing indicates where the city manager is responsible for service job classification. The failure to allege sufficient jurisdictional facts to demonstrate the trial court's jurisdiction gives rise to a right to amend the pleadings, unless the jurisdictional defect may not be cured by repleading. As a result, part of the plea should have been granted and part was proper to deny, but amended pleadings should be ordered.

***In re City of Beaumont,* No. 09-17-00304-CV, 2017 WL 5179785 (Tex. App.—Beaumont Nov. 9, 2017) (mem. op.)**. In this case, the Beaumont Court of Appeals conditionally grants the city's mandamus petition as to the trial court's role in reviewing the decision made by an independent hearing examiner in an employment dispute between the City of Beaumont and one of its firefighters.

James Matthews was a firefighter for the City of Beaumont until 2008, when he was indefinitely suspended. He had the right to either appeal the decision to the city's civil service commission or to an independent third-party hearing examiner. TEX. LOC. GOV'T CODE §§ 143.053, 143.057. In 2011, the Beaumont Court of Appeals overturned the first hearing examiner's decision. In August 2012, a second hearing examiner dismissed Matthews' challenge. Thereafter, Matthews sued the city in district court, challenging the validity of that decision. In July 2017, nearly five years after Matthews appealed the second hearing examiner's decision to the district court, Matthews asked the trial court to allow him to litigate the matter before the civil service commission instead of a hearing examiner. Relying heavily on *City of DeSoto v. White*, 288 S.W.3d 389 (Tex. 2009), Matthews argues the city's 2008 notice to him about his right to appeal was deficient. The trial court entered an order allowing Matthews to re-litigate the dispute before the city's civil service commission. The city brings this mandamus proceeding arguing that: (1) the trial court abused its discretion by incorrectly applying the law; and (2) a regular appeal

following a final decision before the civil service commission would be insufficient to remedy the trial court's alleged error.
The Beaumont Court of Appeals concludes that there is evidence that Matthews knew his rights under the law in 2008 and certainly by 2011. Thus, this case is distinguishable from *White* and Matthews waived any claim to seek a change in forums. In addition, the court notes that: (1) the Local Government Code does not provide a remedy if a city issues a notice that does not contain the information required in Local Government Code Section 143.057(a); and (2) the law presumes individuals are fully aware of their statutory rights. The trial court abused its discretion by misapplying the law in this case.

The Beaumont Court also concludes that the benefits of issuing the writ outweigh any detriment. The city lacks an adequate remedy by appeal. The city's mandamus petition is conditionally granted and the trial court is directed to vacate its order.

CONCEALED HANDGUNS

***Holcomb v. Waller Cty*., No. 01-16-01005-CV, 2018 WL 1321132 (Tex. App.—Houston [1st Dist.] Mar. 15, 2018)**. This is a concealed handgun/courthouse civil suit where the First District Court of Appeals reversed a declaratory judgment for the county.

The Waller County Courthouse houses civil and criminal courts as well as county offices. Outside, the county has a sign, pursuant to Penal Code Section 30.06, indicating it is a criminal violation for a concealed handgun license holder to enter the courthouse carrying a concealed handgun. Holcomb, a license holder, followed the procedure in Texas Government Code Section 411.209(a), to put the county on notice that he believed the sign was used improperly since it prohibited carrying a handgun in all areas of the courthouse, not just areas accessible to the courts. In response Waller County sued Holcomb seeking a declaratory judgment his interpretation of the statute was incorrect. The trial court denied Holcomb's plea to the jurisdiction and granted the county's requested relief. Holcomb appealed.

Holcomb's letter to the county providing notice of an ostensible violation of Section 411.209(a) is the basis for the county's suit against him. As a matter of law, however, writing a letter to a political subdivision to complain about perceived unlawful action does not create subject-matter jurisdiction. Holcomb had a statutory right to notify the county of his contention. Even in the absence of a statute, he had a constitutional right to complain. Holcomb's letter therefore does not constitute a redressable wrong. Further, no harm has befallen the county due simply to the letter. Since the Texas Attorney General has the exclusive right to seek enforcement, any legal dispute over the lawfulness of the county's signage would be between the county and the attorney general, not Holcomb. Waller County effectively sought and obtained a declaratory judgment in its favor as to its disagreement with the attorney general without making that office a party. Because only the Attorney General has the authority to decide whether a suit for violation of Section 411.209(a) is warranted, the attorney general was a necessary party and the judgment rendered was an impermissible advisory opinion. Finally, since the county utilized the suit to impact Holcomb's statutory and constitutional right to complain about perceived unlawful action, its actions entitled Holcomb to attorney's fees under the Citizens Participation Act

(CPA). The declaratory judgment of the trial court is reversed, and the case is remanded for the sole purpose of awarding Holcomb attorney's fees.

Justice Jennings concurred regarding the lack of subject-matter jurisdiction for the county to sue Holcomb. However, he dissented as to the remand, noting that if no jurisdiction exists, the trial court could not grant the motion to dismiss under the CPA. It would be improper for the trial court to award attorney's fees in such a case.

CONDEMNATION

***State v. Speedway Grapevine I, LLC*, No. 02-16-00144-CV, 2017 WL 4683831 (Tex. App.—Fort Worth Oct. 19, 2017)**. This is a condemnation case where the Fort Worth Court of Appeals affirmed the jury verdict condemnation award, including the admission of valuation evidence by the owner's representative.

Speedway owned real property which included a car wash and an Express Lube on a specific lot. In connection with a road-widening improvement project, the State of Texas condemned a portion of the frontage. Speedway asserted the condemnation affected the ability to operate the two businesses. The state appealed the commissioner's award, but the jury awarded more than the commissioner's award. The state's expert opined Speedway's remainder property had sustained damages in the amount of $0, excluding a total cost to cure of $105,826.00. Adding the value of the part condemned ($159,789.00), it opined Speedway was entitled to total compensation in the amount of $265,615.00. Speedway's experts opined the remainder property suffered a total damage of $2,609,420.00. Adding the value of the part condemned to that figure, Speedway asserted it was entitled to compensation in the total amount of $2,748,822.00. After a jury trial, the jury found the part condemned had a market value of $92,190.00 and that Speedway's remainder property was damaged in the amount of $4,401,028.00. The state appealed.

The state first objected to Speedway's appraisal expert, McRoberts, arguing he speculated on post-condemnation nonconforming treatment; that Texas law did not recognize his income approach; and that he had improperly relied upon noncompensable impairment of access. The trial court excluded McRoberts' income approach, but not his cost approach. It also permitted him to testify regarding internal traffic circulation difficulties, unsafe access, and nonconformance with zoning regulations. Mr. High, Speedway's representative as the owner, testified about his experience in the car wash industry; the reasons why Speedway located the car wash where it did; the market value of the whole property; problems with a cure plan devised for the state; and the viability of the car wash after the condemnation. The state acknowledges that a property owner may testify to the value of his property, as High did here, but it argued the owner's valuation testimony must still meet the same requirements as any other opinion evidence. The court rejected this argument in part. The Property Owner Rule "is an exception to the requirement that a witness must otherwise establish his qualifications to express an opinion on land values." Based on the presumptions that an owner is familiar with his property and will know its value, the rule accepts that a property owner is qualified to testify. However, qualification is not the same as the basis of the opinion. The property owner "must [still] provide the factual basis on which his opinion rests." But, the burden is not difficult or complex. "Evidence of price paid, nearby sales, tax valuations, appraisals, online resources, and any other

relevant factors may be offered to support the claim." High's testimony covered a range of topics that, taken together, provided some probative evidence to factually support his valuation opinion. Such included his great level of experience in, and knowledge about, the car wash industry and the effects of such property reductions. The testimony was properly admitted. McRoberts testified that the condemnation had affected the property's functionality so greatly that the property had experienced a change in its highest and best use to something like a small veterinary clinic or an office. McRoberts did not base his opinions on only his word, or on mere conjecture; he based it on the issues that began affecting Speedway's property only after the condemnation—unsafe access, internal circulation, and zoning nonconformities. McRoberts thus provided a reasoned basis to support his damage opinions, reinforced by well-established case law, logic, and mathematics. The court held "[b]oiled down, the State's argument is nothing more than an evidentiary sufficiency challenge improperly masquerading as an expert opinion admissibility issue. When the highest and best use of property is disputed, the jury is responsible for deciding which use is appropriate when it determines market value." Sufficient evidence exists in the record to support the jury's verdict. As a result, the verdict is affirmed.*****

***Pizza Hut of Am., L.L.C. v. Houston Cmty. Coll. Sys.*, No. 01-17-00101-CV, 2017 WL 6459550 (Tex. App.—Houston [1st Dist.] Dec. 19, 2017) (mem. op.)**. This is a condemnation suit where the central issue is a tenant's standing in a condemnation suit and claim for a pro rata share of the award. The First Court of Appeals held the tenant had no standing.

Pizza Hut was a tenant of the Woodridge Plaza Shopping Center when the Houston Community College System (HCCS) condemned the property. As part of the condemnation proceedings, a condemnation award of $427,100 was designated to be paid to all of Woodridge Plaza's tenants, and Pizza Hut sought $7,100 as its pro rata share. The trial court concluded, based on language in Pizza Hut's lease, it had no standing and was not entitled to any of the award. Pizza Hut appealed.

The Pizza Hut lease with the prior owners had a condemnation clause noting "[t]he Condemnation Award shall belong to the Landlord, however, Tenant shall be entitled to the Unamortized Cost of Tenant Improvements, plus Tenant's relocation expenses as determined by the condemning entity or court of law." After condemnation, Pizza Hut continued operating its business at the Woodridge Plaza location—using its established equipment and improvements—at a profit and without interruption of physical impairment by the condemnation. In April 2016, while the condemnation proceedings were still pending, Pizza Hut sold all ninety of its Houston locations, including the Woodridge Plaza location. The sale price included improvements to the Woodridge Plaza location but not the leasehold interest. A lessee generally has standing in condemnation proceedings and is entitled to share in a condemnation award when part of its leasehold interest is lost by condemnation. However, a tenant may waive this right in the lease or elsewhere. By the definition in the lease, Pizza Hutt suffered no impairment. The court rejected Pizza Hutt's argument that the uncertainty created by the condemnation constituted an impairment. It operated with no change in profit and did not establish the "uncertainty" had any impact on its operation. As a result, it lacked standing to sustain a claim against HCCS.

CONSTITUTIONALITY OF ORDINANCE

***Noble v. State*, No. 07-16-00105-CR, 2017 WL 4785327 (Tex. App.—Amarillo Oct. 18, 2017) (mem. op.)**. In this case, the Amarillo Court of Appeals affirms Noble's criminal conviction.
The City of Amarillo has an ordinance that prohibits "sudden vehicle speed or acceleration" which produces noise, smoking tires, or causes one or more tires to lose contact with the surface of the street. Noble was stopped for violating the ordinance. The stop resulted in a search of the vehicle leading to the discovery of methamphetamine. Noble was arrested without a warrant.

On appeal, Noble argued, among other things, that the city ordinance was unconstitutionally vague because it: (1) failed to provide sufficient notice to give a person of ordinary intelligence notice that his conduct was prohibited; and (2) failed to provide sufficient notice to law enforcement personnel to prevent arbitrary and erratic enforcement. Noble relied on *Meisner v. State*, 907 S.W.2d 664 (Tex. App.—Waco 1995, no pet.) to attack the noise element of the ordinance. The court distinguished this case from *Meisner*, concluding that it is not the noise that is prohibited by the city ordinance (as was the case in *Meisner*) but the *conduct* of sudden acceleration that produces noise. The police officer testified that Noble was stopped because the officer observed the car accelerate with a "sudden burst of speed" that caused the tires to burn and spin and the end of the vehicle to slide. Noble was not arbitrarily stopped because his vehicle made noise. The court concluded the ordinance is not unconstitutionally vague; both issues are overruled.

***Spaeth v. State*, No. 07-15-00395-CR, 2017 WL 4785326 (Tex. App.—Amarillo Oct. 18, 2017) (mem. op.)**. The Amarillo Court of Appeals affirms Spaeth's criminal conviction.

The City of Amarillo has adopted ordinances that prohibit U-turns in certain areas of the city. Spaeth was stopped for making a U-turn in a "business district." The stop resulted in a search of the vehicle leading to the discovery of marihuana. Spaeth was arrested.

Spaeth argues the term "business district" in the city ordinances is unconstitutionally vague because it could mean two different things. First, he argues the term is synonymous with "central business district". Second, he argues the term could refer to various undefined areas of the city. Applying the rule of statutory construction that a court does not interpret a statue to render any part meaningless or superfluous, the court concluded that the term business district and central business district are not synonymous. The court then noted that an undefined term does not make a statute vague but requires use of the term's plain and ordinary meaning. The intersection where Spaeth made the U-turn fits within the plain and ordinary meaning of the term "business district" (the intersection is zoned "light commercial" and has businesses on two of the four corners and the other two corners are commercial lots). Spaeth was lawfully stopped and his issue is overruled.

CONTRACTUAL IMMUNITY

***Texas Mun. League Intergovernmental Risk Pool v. City of Abilene*, No. 11-17-00253-CV, 2018 WL 2142753 (Tex. App.—Eastland May 10, 2018).**

The City of Abilene purchased real and personal property insurance from the Texas Municipal League Intergovernmental Risk Pool (TML IRP) to cover over 400 structures located in Abilene. Following a June 2014 wind and hail storm, TML IRP evaluated the claim and ultimately paid the city a total of $6,948,132.78 for damages caused by the storm. In June 2016, the city submitted an additional Proof of Loss for damages amounting to $19,960,422.33. When the property wasn't appraised, the city filed a breach of contract suit against TML IRP, arguing that

TML IRP failed to properly investigate and evaluate the damage caused by the storm. The city filed an amended petition seeking damages under Texas Local Government Code Section 271.153 and sought to compel TML IRP to participate in the appraisal process to determine the amount of the city's damages. TML IRP claimed that Local Government Code Section 271.152 did not waive immunity for a claim of specific performance related to the appraisal. The trial court denied TML IRP's plea to the jurisdiction and granted the city's motion to compel appraisal and abate the case. TML IRP appealed.

On appeal, the dispute focused on whether the Texas Local Government Contract Claims Act (Local Government Code Sections 271.151-.160) waives TML IRP's governmental immunity for the city's request for the trial court's enforcement of the appraisal provision in the property coverage document. TML IRP asserted that the city's request is a remedy that is not permitted, as specific performance is not authorized by Local Government Code Section 271.153. The city contended that the appraisal provision is a contractual adjudication procedure that is enforceable under Section 271.154 of the Local Government Code.

The court held that the city's request for enforcement of the appraisal provision in the property coverage document is not a claim for specific performance. In the context of an insurance contract, appraisal is not sought in equity as a substitute for inadequate monetary damages, but rather is a procedural vehicle provided by the contract to determine the amount of loss. The court concluded that the appraisal provision constituted an alternative dispute resolution procedure because it settles a dispute regarding the amount of damages by means other than litigation. The appraisal provision was therefore an adjudication procedure under Local Government Code Section 271.154, and the request to compel appraisal was not considered a claim for specific performance, as argued by TML IRP. The court affirmed the trial court's order denying TML IRP's plea to the jurisdiction.

***City of San Saba v. Higginbotham*, No. 03-17-00408-CV, 2018 WL 2016463 (Tex. App.—Austin May 1, 2018) (mem. op.).** This is an immunity case where the Austin Court of Appeals reverses the trial court's order in part and renders judgment dismissing a breach of contract claim against the city.

The Higginbothams brought tort claims against the city and San Saba Pecan, LP, (company) after sewage backed up into their house. They alleged that the incident occurred because the company dumped pecan shells and residue into the public sewer system, and the city was aware of and allowed this to occur. All three parties eventually entered into a settlement agreement to equally split the cost of repairing the Higginbotham's property in return for the Higginbotham's promise to release the defendants from all liability if they were satisfied with the repairs. The city then filed a plea to the jurisdiction requesting the suit be dismissed. The Higginbothams amended their claims, arguing the city committed anticipatory breach of the settlement agreement by filing the plea. The trial court granted the city's plea as to the tort claim but denied the plea as to the breach of contract claim, concluding that the city was acting in a proprietary function.

The city appealed the trial court's denial of its plea on the contract claim, arguing the relevant action to consider is the operation of the sewer system. The Higginbotham's argue the relevant action to consider is entering the agreement.

The Texas Supreme Court has held that a governmental entity does have immunity from suit for a breach of a settlement agreement when it is immune from the underlying lawsuit. In light of that case law, the Austin Court of Appeals court concludes the operation of the sewer system is a governmental function and the city is immune from suit (absent some waiver). Entering into the agreement did not negate the city's immunity. The trial court's order denying the city's plea to the jurisdiction is reversed.

***Diaz v. City of Elsa*, No. 13-16-00577-CV, 2018 WL 1192623 (Tex. App.—Corpus Christi March 8, 2018) (mem. op.)**. In 2010, Jesse Diaz, a warrant officer with the City of Elsa, was offered and subsequently accepted the position of interim police chief. The city manager sent a letter on official city letterhead confirming Diaz's appointment as interim police chief and providing that if Diaz was not ultimately selected as the permanent chief, he would assume his former position as warrants officer. In 2011, a new city manager submitted a memorandum removing Diaz as interim police chief and terminating his employment with the city. Diaz sued, arguing that he and the city entered into an employment agreement in the form of the initial city manager's letter, and that the city breached the agreement resulting in damages. The trial court granted the city's plea to the jurisdiction on the grounds that the city was immune from suit and no valid waiver of immunity existed.

On appeal, Diaz argued that the trial court erred by granting the city's plea to the jurisdiction, as Local Government Code Section 271.152 waives immunity for purposes of adjudicating a claim for breach of contract. The primary issue on appeal was whether Diaz could establish that the initial city manager's letter was a contract subject to Section 271.152's waiver of immunity. Ultimately, the court determined that the city manager's letter meets each of the five elements required by Section 271.151(2) and was a unilateral employment contract that falls within the scope of the statute's waiver of immunity. The court reversed the trial court and remanded for further proceedings.

***Castle v. City of Victoria*, No. 13-17-00013-CV, 2018 WL 1755816 (Tex. App.—Corpus Christi Apr. 12, 2018) (mem. op.)**. In 2008, Kenneth Castle and the City of Victoria entered into a contract for the transfer of Castle's water rights associated with property he owned along the Guadalupe River to the city. The city executed a leaseback provision in the contact and a separate lease agreement whereby Castle could divert 108 acre feet of water for irrigation use for 15 years in exchange for annual payments by Castle. In 2015, the Texas Commission on Environmental Quality (TCEQ) notified Castle that he never had the right to legally pump water under the lease provisions because TCEQ had not been notified and because the city had amended the certificate of adjudication from the state and used all the water allotment given under the certificate. Castle sued the city for breach of contract and fraud. The city claimed governmental immunity under a plea to the jurisdiction, which was granted by the trial court.

On appeal, Castle alleged that because the city was acting in a proprietary, not governmental, role, governmental immunity does not apply. In reviewing the governmental-proprietary distinction in the Texas Tort Claims Act, the court determined that the provisions of the water rights contract would fall into the "waterworks" category of the Texas Tort Claims Act in Texas

Civil Practice and Remedies Code Section 101.0215(a)(11). Therefore, Castle's claims involved the city's governmental functions.

Castle argued that even if his claims involved governmental functions, the water being leased back to him by the city is a good, not a real estate right, and immunity is therefore waived under Local Government Code Section 271.152. The court found that even if the water leased back to Castle could be considered a good or service, Castle requested damages for "loss of use, lost profits, lost earnings, lost earning capacity, injury to real or personal property, and damages to crops and livestock." The requested relief is not recoverable under Local Government Code Section 271.153 for a balance due and owing, for additional work, or for any other amount that would fall within the statutory scheme. The court concluded that the city did not waive its governmental immunity for the claims raised by Castle because the contract between Castle and the city did not fall under the provisions of Chapter 271 of the Local Government Code, and affirmed the trial court's ruling on the city's plea to the jurisdiction.

***City of Beaumont v. Interflow Factors Corp.*, No. 09-17-00284-CV, 2017 WL 6521345 (Tex. App.—Beaumont Dec. 21, 2017) (mem. op.).** This is an interlocutory appeal from the denial of a plea to the jurisdiction in a contract dispute claim. The Beaumont Court of Appeals affirmed the denial.

Interflow Factors Corporation (Interflow) sued the city and a contractor named Barnett alleging the city waived immunity by contracting with Barnett to perform landscaping services. Barnett hired Interflow to deal with her invoices and assigned the right to the collected payments on the present and future accounts. The city was provided notice of the assignment. The city allegedly began submitting payments to Interflow for the work performed by Barnett. However, Interflow alleged that, at Barnett's request, the city directly paid Barnett for four invoices that totaled $11,847.00. According to Interflow, because the city had received notice of the assignment, the city's payments to Barnett did not discharge the city's liability to Interflow pursuant to the invoices. The city filed a plea to the jurisdiction, which the trial court denied. The city appealed.

The first issue addressed by the court was that the city did not have a contract with Interflow, only Barnett. Therefore, the waiver of immunity under Texas Local Government Code Section 271.152 came into question as it relates to assignments. The court performed a mild analysis of the language, and citing to *First-Citizens Bank & Trust Co.*, 318 S.W.3d 560 (Tex. App.—Austin 2010, no pet.), held the statute does not limit who can collect under the contract. An assignee steps into the shoes of the assignor. Therefore, as long as the contractor would have a right to seek payment, so does the assignee. The court held immunity was therefore waived. [Comment: the court analyzed the issue of Barnett no longer having the right to seek payment since she was already paid, as that was, apparently, considered a merits-based argument which was not necessary to analyze for jurisdictional purposes.]*

CRIMINAL TRESPASS

***Hudson v. State*, No. 09-17-00092-CR, 2017 WL 6559183 (Tex. App.—Beaumont Dec. 20, 2017) (mem. op.) (not designated for publication)**. This is a case where the Beaumont Court of Appeals affirms the trial court's conviction of criminal trespass.

On September 7, 2016, after consulting with and receiving permission from the city manager, the city librarian requested a trespass warning against Hudson for making a disturbance at the library. Hudson was issued a verbal trespass warning by Detective Steele. On September 13, 2016, the librarian reported that Hudson had returned to the library in violation of the trespass warning. Officer Medina arrested Hudson for criminal trespass.

Hudson complains that: (1) he was deprived of due process because the city library's trespass policy was unconstitutionally vague and violates due process; (2) the criminal trespass statute is unconstitutional on its face and as applied because it violated his First and Fourteenth Amendment rights; and (3) the evidence is insufficient to sustain his conviction.

In regard to the due process claim, Hudson had the burden to establish that there was no procedure in place to challenge the decision to ban him from the library. In the absence of Hudson producing any evidence regarding the city's process to challenge a decision by the city manager shown, issue one was overruled. As to his second issue, the court determines the forum analysis applicable to the library, concluding that it is "public property which is not by tradition or designation a forum for public communication." In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes so long as the regulation on speech is reasonable and not an effort to suppress expression merely because of the speaker's views. In reaching its conclusion about the forum analysis applicable to the library, the court notes that just because Hudson used the internet in the library this did not create a designated public forum. Hudson concedes that he wasn't visiting the library for expressive purposes, but argues his First Amendments rights were violated because he was banned. The jury heard testimony that Hudson was banned because he created a disturbance not because of his speech. The court overruled the second issue, stating that the constitution does not forbid a state to control the use of its property for its own lawful nondiscriminatory purpose. Moreover, one element of criminal trespass is proving that the entity in possession of the property warned the defendant that he could not return to the property so the defendant doesn't have to speculate about what aspect of his conduct the statute proscribes. The record does not support the argument that the criminal trespass statute is unconstitutional as applied. As to the third issue, the court concludes that, based on the evidence presented, a rational juror could have found the essential elements of the offense of criminal trespass beyond a reasonable doubt.

ELECTIONS

***Betrand v. Holland*, No. 01-16-00946-CV, 2018 WL 1720742 (Tex. App.—Houston [1st Dist.] Apr. 10, 2018) (mem. op.)**. The City of Friendswood held a special election on May 7, 2016, to authorize a Type B economic development sales and use tax to fund local economic development. The measure passed. Appellants/contestants filed suit challenging the validity of the election arguing that: (1) the ballot language was misleading in that it "did not expressly notify voters that approving the ballot item would approve the formation of a[n] [economic development] corporation which would have separate administrative costs and could have separate staff than the City and the collected taxes would pay for such corporation and overhead versus taxes being directly used for improvements"; and (2) a specific precinct was omitted from the ordinance calling the election. Both parties filed a motion for summary judgment. The trial

court granted summary judgement for the city and dismissed the election contest. The contestants appealed.

First, the contestants argued that the ballot was not sufficient because Section 505.251 of the Local Government Code requires voters to approve a sales and use tax "to be used for the benefit of a corporation." Contestants contend that the city's failure to specify on the ballot that the tax would be used for the benefit of a corporation did not capture the "measure's essence" because it omitted the crucial details about how their votes would provide the necessary statutory authorization to levy a sales and use tax to benefit an economic development corporation. The issue that has to be addressed to determine the sufficiency of a ballot is whether the ballot "sufficiently submits the question . . . with such definiteness and certainty that the voters are not misled." *Dacus v. Parker*, 466 S.W.3d 820, 826 (Tex. 2015). Not every detail needs to be on the ballot, and short, general descriptions are often acceptable, but the ballot must identify the measure by its chief features, showing its character and purpose. *Id*. The test to determine inadequacy is whether the ballot language: (1) affirmatively misrepresents the measure's character and purpose or its chief features; or (2) misleads the voters by omitting certain chief features that reflect its character and purpose. *Id*. at 826.

The First Court of Appeals concluded that the ballot wording was sufficient under *Dacus* because it stated that it would adopt a Type B sales and use tax; the tax would be under Chapter 505 of the Local Government Code that specifically deals with Type B economic development corporations; and that it would "promote new or expanded business enterprises in the downtown area … including but not limited to … maintenance and operations expenses". The ballot identified the general purpose of the measure, and it substantially submitted the measure to the voters with sufficient definiteness and certainty, without misrepresenting or omitting "chief features that reflect its character and purpose."

The court next addressed contestants' argument that the city "failed to identify one of its precincts in the ordinances calling the election" in violation of Section 42.061(a) of the Texas Election Code. Section 42.061(a) of the Texas Election Code provides "[t]he governing body of a political subdivision other than a county shall establish the election precincts for elections ordered by an authority of the political subdivision." "The precincts may be established before each election or, once established, remain established until changed, at the governing body's discretion." TEX. ELEC. CODE § 42.061(b). The court found the contestants were misinterpreting the Election Code. It does not require any particular ordinance relating to an election to list the precincts eligible to vote, nor does it mandate that the way to "establish precincts" is to list them in all ordinances related to an election. So long as the city has established elections precincts before each election or in the past, Section 42.061 is satisfied. The court overruled this argument and affirmed the trial court's judgment.

EMPLOYMENT

***Tex. Workforce Comm'n v. Wichita County,* No. 17-0130 (Tex. May 25, 2018).** This is an unemployment case that analyzes whether being on unpaid Family Medical Leave Act (FMLA) leave is "unemployment" under the Texas Unemployment Compensation Act (Act).

In this case, Ms. White worked for Wichita County as an assistant emergency management coordinator. She went on FMLA leave for severe anxiety and depression and soon ran out of paid leave. She switched to unpaid leave, but the County continued to pay her health premiums. While on unpaid leave, White applied for unemployment compensation. The Texas Workforce Commission, the entity responsible for determining eligibility for unemployment compensation, determined that White was eligible for the compensation. This opinion was affirmed by the Commission Appeal Tribunal. The District Court reversed the opinions holding that White was unemployed and the court of appeals affirmed. The Texas Workforce Commission appealed to the Supreme Court of Texas.

The Supreme Court looked at the plain language of the Texas Unemployment Act which states that "individual is totally unemployed in a benefit period during which the individual does not perform services for wages in excess of the greater of: (1) $5; or (2) 25 percent of the benefit amount." TEX. LABOR CODE § 201.091(a). The Court held that unemployment under state statute does not require that the person no longer maintaining an employer-employee relationship, only that the individual's wages are low enough. Further, voluntarily leaving a position because of medical reasons does not disqualify someone from benefits. *Id.* § 207.045(a), (d). Finally, the Court noted that even if an individual is on unpaid leave for FMLA reasons is "unemployed" within the Act's meaning, does not mean the employee would qualify for unemployment compensation under the other requirements within the Act.

***City of Granbury v. Willsey*, No. 02-17-00343-CV, 2018 WL 1324774 (Tex. App.—Fort Worth Mar. 15, 2018) (mem. op.)**. This is an age/sex discrimination and retaliation case where the Fort Worth Court of Appeals affirmed-in-part and reversed-in-part the order denying the city's plea to the jurisdiction.

Willsey worked for the city for over seventeen years, including nine years as a police officer and almost nine years as a public works inspector. In 2016, the city eliminated her inspector position but reassigned her to be a permit clerk. Three days after she inquired as to how long before her retirement would vest, the city terminated her. The city asserts the inspector and the permit clerk position were eliminated and absorbed into the existing number of employees. The city filed a combined answer/plea to the jurisdiction. The trial court denied the plea. The city appealed.

The court went through a detailed point-by-point prima facie analysis. To be successful in an age discrimination claim, a plaintiff must plead that she was either: (1) replaced by someone outside the protected class; (2) replaced by someone younger; or (3) otherwise discharged because of her age. Willsey did not plea or establish she was qualified for the inspector position, only that she was eliminated. Simply because she was an inspector for nine years does not equate to her continued qualifications for the position. The same goes for her sex discrimination claims. Under the retaliation claims, Willsey asserts that the city pursued her after her termination by "making up false accusations against her and seeking criminal charges against her" for stealing records, interfering with her future employment. However, the court responded "[e]ven construing Willsey's pleadings liberally in her favor, we are left to guess what the protected activity is that Willsey participated in prior to her termination that the final decision-maker for the city was aware of and the causal link between that protected activity and her termination."

The court then analyzed whether the lack of pleading sufficiency could be cured by allowing her the ability to amend. Because this is a reduction-in-force case rather than a true replacement case, and the city's arguments focus on a replacement case, it has not established an amendment would be futile. As a result, the case was remanded to allow the trial court to allow an amendment after some level of discovery has occurred.

***Alamo Heights Indep. Sch. Dist. v. Clark*, No. 16-0244, 2018 WL 1692367 (Tex. April 6, 2018)**. This is a workplace same-sex discrimination, harassment and retaliation case where the Texas Supreme Court held that while the actions complained of were vulgar, they were not motivated by an illegal purpose.

The Alamo Heights Independent School District (AHISD) employed Catherine Clark as a coach. Clark asserts her fellow female coach, Monterrubio, began sexually harassing her by making continuous comments about her body. Clark filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). The principal placed Clark on an intervention plan. Monterrubio was transferred to another campus. However, Clark was ultimately terminated and filed suit. AHISD filed a plea to the jurisdiction which was denied. At the intermediate court of appeals, the panel held the high frequency of the non-severe comments nevertheless created a hostile environment centered around Clark's gender and affirmed. The Texas Supreme Court granted review.

The facts take up a large section of the opinion. However, the key factual points of note are that Monterrubio would often comment about Clark's breasts and appearance. Monterrubio would also comment about her own sex life to male and female employees, including sexual escapades. She would send vulgar cartoons intended to be humorous. The court noted the multitude of other events were not sexual in nature, but were merely rude or crass. Monterrubio's behavior was the same whether it was addressed to a male, female, parent, teacher, or student. AHISD investigated Clark's complaints each time, either at the campus level or district level. At one point, the district did transfer Monterrubio to a different campus. However, Clark continued to have personality conflicts with other employees and her performance was continuously documented as being low. AHISD eventually terminated Clark.

The court went through a very detailed analysis of same-sex harassment standards under Title VII and the Texas Commission on Human Rights Act (TCHRA). Citing the seminal case of *Oncale v. Sundowner Offshore Services, Inc*., the U.S. Supreme Court held Title VII's protection against workplace discrimination "because of . . . sex" applies to harassment between members of the same gender. The court recognized same-sex discrimination cases are more complicated because of their nature. In addition to sexual desire, the court noted a same-sex case can be established by showing general hostility to a particular gender in the workplace or direct comparative evidence of treatment of both sexes. However, all of the methods require conduct to have more than offensive sexual connotations, but to be discriminatory because of the gender.

The court stressed and restressed that the context of the workplace and the individual acts is critical to an analysis of the sexual desire method. Clark never alleged, and no evidence established, Monterrubio was homosexual and none of the contexts demonstrate any sexual desire towards Clark, so the sexual desire method was disposed of. Next, the court noted there

was no evidence of a general hostility towards women. None of the record "even hints" that Monterrubio's behavior, characterized as mistreatment of men and women alike, evinces hostility towards women in the workplace. Finally, the court noted there was no evidence of a comparative discrimination. The court held comments about gender-specific anatomy, alone, does not create an inference of harassment. Clark made over 100 wide-ranging complaints about Monterrubio and only a handful were about gender-specific anatomy. Focusing "only on gender-specific anatomy and ignoring motivation is legally unsound and is a misreading of *Oncale*." Regardless of how it might apply in opposite-sex cases, a standard that considers only the sex-specific nature of harassing conduct without regard to motivation is clearly wrong in same-sex cases. Motivation, informed by context, is the essential inquiry. Under the retaliation claim, the court held that permitting a retaliation case, predicated on a but-for analysis, to proceed to trial when the prima facie case has been rebutted and no fact issue on causation exists "defies logic." To qualify as a protected activity, complaining of harassment is not enough. The complainer must show some indication gender is the motive. Therefore, none of Clark's internal complaints constitute protected activity. However, the EEOC complaint does qualify as protected. The TCHRA does not protect employees from all forms of retaliation, only those actions which are materially adverse. The only actions taken against Clark which qualified was placing her on an intervention plan and the eventual termination. However, Clark failed to establish causal link between either of these actions and her EEOC complaint. Eight months elapsed between the EEO charge and recommendation for termination. Such is too long in this situation. Further, nothing shows the stated reasons for Clark's termination were false. It is undisputed Clark failed to follow lesson plans, failed to maintain student grades properly, and had low performance reviews. An employer is not forbidden from addressing performance issues involving employees who have engaged in protected activity, including following through on known pre-existing issues. As the jurisdictional analysis for the plea requires a full analysis of the factual issues, and Clark failed to carry her burden, the plea should have been granted.

The majority's opinion spends the last several pages responding to the dissent's analysis, calling the legal theories flawed and the listing of facts a distortion. The court held the purported harassment is "repugnant and unacceptable in a civilized society. But we cannot step beyond the words of the statute . . . . " Plaintiff's claims were therefore dismissed.

***Schovanec v. Assadi-Porter*, No. 07-17-00426-CV, 2018 WL 1404494 (Tex. App.—Amarillo Mar. 20, 2018) (mem. op.)**. This is a due process in employment case where the Amarillo Court of Appeals reversed the denial of Texas Tech University's plea to the jurisdiction and dismissed the case.

Assadi-Porter was on a twelve-month, non-tenure track as an associate professor at Texas Tech University. She received a notice of termination at one point and was told she could grieve the termination. She asserts she relied upon the advice of human resource personnel and met with her supervisors to contest the termination. By the time she formally grieved the termination, the university deemed her grievance untimely. She sued the university and its president asserting due process violations. The university and president filed a plea to the jurisdiction, which was denied. They appealed.

A two-part test applies to due process claims: (1) does the plaintiff have a recognized liberty or property interest; and 2) if so, what process is due. In the employment context, a recognized property interest exists when an employee can only be dismissed for cause. Under Texas law, an employment relationship is presumed to be at-will, and an employer may terminate at-will employees "for good cause, for bad cause, or no cause." An at-will employment relationship creates no property interest in continued employment. A faculty member's employment is subject to her contract and the school's operational policies. The university's policies state that for non-tenure professors, they can either be terminated for cause prior to the expiration of a term or non-renewed at the close of a term. However, the court held the policies must not be read in isolation and the next policy in the manual states the dismissal provision applies only to non-tenured faculty who have served more than six years. Assadi-Porter served for less than two. As a result, since no specific contract or policy adoption applies to Assadi-Porter; she is presumed to be an at-will employee and has no property interest in continued employment.

EXPUNGEMENT

***Burke v. State*, No. 09-16-00091-CV, 2017 WL 5179499 (Tex. App.—Beaumont Nov. 9, 2017) (mem. op.)**. The Beaumont Court of Appeals affirms the trial court's decision that a former peace officer waived his right to file a petition seeking to expunge his records.

In July 2009, Burke (a peace officer at the time) was indicted for official oppression. In 2014, Burke reached an agreement with the state enjoining him from working as a peace officer in the State of Texas until December 2024 in exchange for a dismissal of the case. The Agreed Order provides that Burke "waives all rights to file any motion to modify or dissolve this injunction." In a separate order dismissing the case, the state alleged that it no longer wished to prosecute because of the permanent injunction. About six months after agreeing to the permanent injunction, Burke filed a petition seeking to expunge any and all records arising out of the charges. The City of Beaumont and Jefferson County opposed Burke's request. The city argued Burke had waived his right to expunge because he agreed that he would not seek to modify or dissolve the injunction. The trial court denied Burke's petition for expunction. Burke appealed, arguing that he qualified to have the records expunged and that the Agreed Order was legally unenforceable.

As to his first argument, the Beaumont Court of Appeals holds that the Agreed Order functions like a pre-trial diversion agreement or a negotiated plea agreement, which are similar to contracts. Because Burke's petition to expunge would necessarily result in the destruction of the Agreed Order, the court concludes that the trial court was authorized to deny the petition.

The Beaumont Court of Appeals then concludes Burke's argument that the Agreed Order is unenforceable is without merit. Even if the Agreed Order couldn't function as a final judgment (an issue the appellate court does not decide), the agreement Burke made with the state is enforceable through a new suit alleging Burke's request to expunge the records is a violation of the agreement with the state. The trial court's order is affirmed, it did not abuse its discretion in concluding that Burke waived his right to file a petition seeking to expunge the records.

***Collin Cty. v. City of McKinney*, No. 05-17-00546-CV, 2018 WL 2147926 (Tex. App.—Dallas May 10, 2018).** In this statutory construction case, the Dallas Court of Appeals held City of McKinney lacks authority to enforce its building codes in its extraterritorial jurisdiction (ETJ), but it has authority to require a landowner to plat its property.

The city and Collin County previously entered into an agreement designating the city as the exclusive authority for platting and related permits. Custer Storage Center, LLC (Custer) owns land located in the county and within the city's ETJ and uses the property for a self-storage business. During construction, the city demanded Custer plat the property and obtain city building permits. When Custer refused, the city sought a declaratory judgment and injunction. All parties (city, county and Custer) filed summary judgment motions. The trial court concluded that the city's and county's respective authority to enforce platting and building permit requirements for property in the city's ETJ is determined based on whether a property is subdivided and held the city could only require building permits if the property is subdivided.

The Dallas Court of Appeals analyzed the Texas Supreme Court's opinion in *Town of Lakewood Village v. Bizios*, 493 S.W.3d 527 (Tex. 2016) and held that while a home-rule municipality has authority under the Texas Constitution within its borders, it requires express authority to regulate in the ETJ. The need for express authority applies to every city, regardless of type. Since no express authority allows extending building codes into the ETJ, the city cannot require building permits. However, the Texas Local Government Code does expressly authorize a city and county to designate the city as the exclusive authority for plat and subdivision regulations. That does not allow tagging the building codes onto the plat or subdivision ordinances. However, Custer's construction plans clearly trigger a requirement for platting, which they did not perform. Since the court significantly modified the judgment, it remanded back to the trial court to determine the issue of attorney's fees.

***City of Justin v. Town of Northlake*, No. 06-17-00054-CV, 2018 WL 2027163 (Tex. App.—Texarkana May 7, 2018) (mem. op).** In this extraterritorial jurisdiction (ETJ) case, the Town of Northlake (Northlake) filed suit against the City of Justin (Justin) asking for, among other things: (1) a declaratory judgment: (a) that a 1997 "Joint Resolution and Agreement" (1997 Agreement) between Fort Worth and Northlake relating to both municipalities' ETJ was legal and valid; (b) that the resulting ETJ boundaries were legal and valid; (c) that a certain Justin ordinance that added property to its ETJ was void ab initio and invalid; and (2) a permanent injunction regarding Justin's development of the disputed property. Justin counterclaimed asking for a declaratory judgment: (1) that the 1997 Agreement between Fort Worth and Northlake was void ab initio; and (2) that Northlake's resolution purporting to transfer the disputed property into Northlake's ETJ was void ab initio and invalid. Both parties filed summary judgment motions, and the trial court granted the motion filed by Northlake.

Justin appealed contending that the trial court erred in granting Northlake's motion for summary judgment and denying its motion for summary judgment. Justin also argues that because the trial court erred in granting Northlake's motion for summary judgment, it also erred in awarding attorney fees in favor of Northlake.

The appellate court concludes that while former Local Government Code Section 43.021 gave home rule cities (like Fort Worth) authority to exchange areas with other cities, it did not address the authority of a general law city (like Northlake) to adjust its boundaries or exchange its ETJ. As for Justin's argument that the exchange impermissibly expanded Northlake's ETJ beyond the one-half mile provided in Section 42.021, the court concludes that Northlake provided no evidence that the area Fort Worth exchanged was within the one-half mile area. Because Northlake failed to establish that it was entitled to judgment as a matter of law, the trial court judgment is reversed and the case is remanded.

GOVERNMENTAL IMMUNITY

Fort Worth Transp. Auth. v. Rodriquez, No.16-0542, 2018 WL 1976712 (Tex. April 27, 2018). This is a statutory-construction case on the damages-cap and election-of-remedies under the Texas Tort Claims Act (TTCA).

After Peterson, a pedestrian, was struck and killed by a public bus in Fort Worth, her daughter, Rodriguez, sued the Fort Worth Transportation Authority (FWTA), its two independent contractors (MTA and MTI), and the bus driver (Vaughn) under the TTCA. Rodriguez pled a single count of negligence against all defendants collectively. FWTA is a regional transportation authority, a governmental unit under the Transportation Code, and performs governmental functions. Rodriguez asserted FWTA, MTA, and MTI were engaged in a joint venture and vicariously liable for each other's actions, but Vaughn is only employed by the independent contractor, so cannot take advantage of the election of remedies under Section 101.106 of the TTCA. The trial court denied Rodriguez's motion and granted summary judgment in favor of the defendants, ruling that FWTA, MTI, and MTA should be treated as a single governmental unit under the TTCA, limiting Rodriguez's claim to a maximum recovery of $100,000.

The court of appeals reversed in part, holding that FWTA, MTI, and MTA were separate entities—each subject to a separate $100,000 damages cap, for a total of $300,000—and that Vaughn, an employee of MTI, was not an employee of a governmental unit and therefore was subject to unlimited personal liability. The Texas Supreme Court granted the petition for review.

Texas Transportation Code Section 452.056(d) provides that an independent contractor of a transportation authority, while not a governmental entity, is liable for damages only to the extent that the authority or entity would be liable if the authority or entity itself were performing the function. The court first analyzed the damage cap language and held the TTCA does not allow the imposition of liability above $100,000 for a single person. The fact that FWTA delegated its transportation-related governmental functions to independent contractors, as it is statutorily authorized to do, does not somehow expand the potential liability arising from those governmental functions. Next, the court analyzed Section 452.056. Since an authority is only allowed to perform governmental functions, but is allowed to contract for the performance of those functions under the statute, the contractor, by extension, is performing governmental functions. That does not grant the contractors immunity, but does limit their liability in the performance of those functions. Likewise, if Vaughn had been employed directly by FWTA, she would be entitled to protection under the TTCA's election-of-remedies provision. That MTI provided Vaughn's services to FWTA makes no difference. She is permitted to take advantage of Section 101.106. Finally, the Court held the defendants were not entitled to attorney's fees.

The dissent focused on the fact that Section 452.056 does not list independent contractors as governmental units. As a result, Justice Johnson believes that while the caps apply, they are not cumulative and Rodriguez should be entitled to $100,000 from each defendant.*

***City of San Antonio v. Torres*, No. 04-17-00309-CV, 2017 WL 5472537 (Tex. App.—San Antonio Nov. 15, 2017) (mem. op.).** This case involves a collision between a City of San Antonio police vehicle and a truck containing passengers Patrick Torres and Johnnie Dears (collectively referred to as Torres).

Torres' truck was struck by a city police vehicle being operated without emergency lights or sirens activated. The police officer failed to heed the stop sign at an intersection, resulting in the collision. Torres sued the city for personal injury damages, alleging that the officer negligently caused the collision. The city filed a plea to the jurisdiction asserting its governmental immunity. The city argued that the officer was responding to an emergency situation, his actions were in compliance with the applicable statute and ordinances, and he did not act with conscious indifference or reckless disregard for the safety of others. The trial court denied the city's plea to the jurisdiction, and the city filed this interlocutory appeal.

In its appeal, the city argues: (1) Torres failed to plead facts demonstrating jurisdiction exists; (2) the city presented sufficient evidence to support its plea that the officer was in compliance with the applicable statute and ordinances and did not act with conscious indifference or reckless disregard for the safety of others; and (3) Torres failed to present evidence raising a fact issue regarding the jurisdictional facts.

The court of appeals analyzed the city's three arguments, concluding that Torres did state a claim against the city arising from the employee's driving with reckless disregard for the safety of others. The court pointed out that the Third Amended Petition alleged that the officer "drove inattentively, failed to keep a proper lookout, failed to control his speed, failed to heed a stop sign, and failed to operate his vehicle with appropriate regard for the safety of others." Because the court must liberally construe the pleadings, the court concluded that Torres did state a claim.

The city provided an affidavit from the officer on the evidence, along with a deposition and the incident crash information. The court pointed out that the city did not present evidence that the officer "looked for oncoming traffic at the intersection or that he took any other action to determine whether slowing down was necessary to protect the safety of others." Without this evidence, the court concluded that the city's evidence was insufficient to establish that the officer complied with the law and ordinances applicable to an emergency situation. The court also concluded that the evidence presented contained no facts demonstrating the officer identified or considered any possible risks to the safety of others. Taken together, the city's evidence failed to establish the applicability of the emergency exception to waiver of immunity in Section 101.055(2) of the Texas Tort Claims Act.

The court held that when viewing the evidence presented in the light most favorable to Torres, there is a material fact question as to whether the officer acted recklessly or with conscious disregard for the safety of others. Thus, the court affirmed the trial court's order denying the city's plea to the jurisdiction.

***Luttrell v. El Paso Cty.*, No. 08-16-00090-CV, 2017 WL 6506402 (Tex. App.—El Paso Dec. 20, 2017).** In the thirty-nine page opinion, the El Paso Court of Appeals addressed a challenge to El Paso

County's use of a special assignment judge who would issue and handle all contempt proceedings when a juror would fail to appear for duty. The court held the county retained immunity based on the pleadings but the plaintiff should be afforded the opportunity to amend. The case was remanded. For government attorneys or those suing governments, this opinion provides a good basis and starting point for various immunity issues and Uniform Declaratory Judgment Act (UDJA) claims.

Appellants filed a lawsuit on behalf of themselves and others, naming Judge Woodard and El Paso County, requesting a declaration that their contempt judgments were void for lack of jurisdiction and that Judge Woodard imposed court costs and fees in an "illegal" manner. Apparently, when a juror failed to respond to a jury summons in a particular court in El Paso County, that court would either "refer" or "transfer" the matter to Judge Woodard for the purpose of allowing him to conduct contempt proceedings against the recalcitrant juror. The collective jurors sought to have their court costs and fees removed and the process stopped. The case has many implications and court performed various analyses of statutes discussing the power of the courts and the counties. By the time the case hit the court of appeals, Judge Woodard had been dismissed under judicial immunity and the only issue was the immunity of the county. The county filed a plea to the jurisdiction, which the trial court granted. The collective jurors appealed.

The court began with a history of governmental immunity and transitioned into immunity in declaratory judgment proceedings. The court cited various cases, noting the UDJA only waives immunity if the validity of a statute (or ordinance) is in play. The appellants failed to identify a statute being challenged. Their pleadings "reveal that the true nature of their claims center on their belief that the actions of Judge Woodard and/or the County violated existing law, i.e., that they were held in contempt in violation of their due process rights, and that they were accessed illegal court costs and fees…." Such claims cannot be brought under the UDJA. Additionally, the UDJA may not typically be used to collaterally attack, modify, or interpret a prior court judgment. The contempt proceedings were declared to be criminal in nature, not civil. Civil courts may only exercise "equity jurisdiction" in cases involving criminal proceedings in a "narrow" set of circumstances, which are not present here. The UDJA is the wrong vehicle for making a challenge to the validity of a criminal contempt judgment. There is a line of cases stating the UDJA can be used to collaterally attack void judgments. The proper method to collaterally attack a criminal contempt judgment as being void is through either a petition for a writ of habeas corpus when the contemnor has been subjected to jail time, or a petition for a writ of mandamus when, as here, the contemnor is subjected only to a fine. Such are exclusive mechanisms.

Appellants also sought the recovery of the fines, fees, and costs, which they believe Judge Woodard wrongfully imposed. However, appellants' request for a "refund" cannot be brought in a UDJA proceeding in the absence of legislative permission. When fees are paid in the context of a judicial proceeding, the aggrieved party may challenge the imposition of those fees (illegal or otherwise) in the context of those proceedings, thus satisfying the requirements of due process. When a party pays an illegal tax or fee "under duress" in an administrative matter they may challenge it, but these were judicial proceedings. In a judicial proceeding, once a defendant pays the fee, it is voluntarily given. To avoid paying the fee, the defendant must challenge it in the proceedings or utilize another system established for the challenge. Appellants had other means of challenging the validity of the costs and fees imposed on them. They could have challenged it in the proceedings, filed a mandamus, or brought claims under article 103.008 of the Texas Code of Criminal Procedure, which provides a separate statutory remedy to correct erroneous or unsupportable court costs. They failed to do so. As to appellants attempted ultra vires claim, they only named the county. Such claims must be brought

against an official. Additionally, claims of judicial court action versus county administrative action, falls outside the scope of any takings claims under the Texas Constitution. As to the appellants Section 1983 claims, a judge has judicial immunity from a lawsuit brought under Section 1983 and, therefore, cannot be named as the "person" who violated the plaintiff's constitutional rights, when the lawsuit is based on the judge's judicial actions. A county may only be held liable in a Section 1983 case if the plaintiffs are able to demonstrate that the county had an "official policy or custom" that caused them to be subjected to a denial of a constitutional right. Appellants have not alleged in their current pleadings that the county had any policy or custom that deprived them of their federal constitutional rights and only allege Judge Woodard acted without authority. There is nothing in the pleadings or the record to suggest that Judge Woodard was executing any county policies and, to the contrary, everything points to him acting in his judicial capacity (for which he is immune from suit). Finally, the court noted that while the panel "expresses no opinion" as to whether the appellants can successfully amend, they recognized they should be given the opportunity. The court ends by stating "[w]e do caution Appellants, however, that any amendment to their pleadings must focus on the liability of the County as the only remaining party in the proceeding, with the recognition that Judge Woodard is no longer a party to the proceedings, and expressly explain what actions the County took that would render them liable to Appellants." The case was then remanded.*****

***Davis v. City of Lubbock*, No. 07-16-00080-CV, 2018 WL 736344 (Tex. App.—Amarillo Feb. 6, 2018) (mem. op.)**. This is an immunity case where the Amarillo Court of Appeals affirms the trial court's order sustaining the city's plea to the jurisdiction and dismissing the case.

The City of Lubbock holds a permit from the Texas Commission on Environmental Quality (TCEQ) to pump effluent from its wastewater system to a site used for crop irrigation. By the terms of the TCEQ permit, the city must conduct grazing and harvesting activities on the irrigated land according to an approved crop management plan. One crop grown and harvested by the city on the site is Tricticale, harvested by bailing into hay. Though not required by the TCEQ permit, the city sells some of the hay to the public. Davis purchased some of the hay and fed it to her horses. Two of her horses subsequently died and a third was disabled.

Davis sued the city arguing the employees had baled the hay in a way that led to the presence of bacteria and failed to exercise ordinary care in harvesting the hay. She also alleged the employees negligently failed to test the hay for bacteria before selling it and that the harvesting was performed by use of motor-driven equipment. The city filed a plea to the jurisdiction, asserting the activity was a governmental function for which its immunity from suit was not waived. The trial court sustained the city's plea to the jurisdiction and Davis appealed.

The Amarillo Court of Appeals concludes that the sale of the baled hay is sufficiently related to the performance of the city's TCEQ-permitted activities as to come within the governmental functions authorized by the permit and the city is immune from suit. The court also finds that the facts do not show Davis sustained any damage arising from the city's use of a vehicle or motor-driven equipment. Thus, the court overrules her second issue regarding whether the city's immunity was waived under the Tort Claims Act. The trial court's order is affirmed.

***City of Hidalgo v. Hodge*, No. 13-16-00695-CV, 2018 WL 460808 (Tex. App.—Corpus Christi Jan. 18, 2018) (mem. op.).** Mary Hodge was injured at a concert event after stepping into a hole. She

sued the City of Hidalgo under a premises liability theory. The city filed a plea to the jurisdiction claiming immunity, which was denied by the trial court.

On appeal, the city argued that it did not have the duty to treat Hodge as an invitee for purposes of the provision of Texas Tort Claims Act waiving city immunity because Hodge could not show that the city had possession or control of the premises, because she did not pay the city to enter the premises, and because the hole was not a special defect. With regard to the city controlling the premises, the city contended that it leased the premises to the Borderfest Association and therefore did not control the premises when Hodge fell. However, the court concluded that not only did no written agreement exist leasing the premises to Borderfest, but Hodge introduced evidence demonstrating the city's involvement in the actual operation of the event. The court concluded that Hodge's evidence sufficiently established as a matter of law that the city had control of the premises at the time Hodge fell.

The city also contended that because Hodge paid an entrance fee to Borderfest, as opposed to the city, that she was not an invitee under Texas Civil Practice and Remedies Code Sec. 101.022(a) and instead was a licensee. The court held that no authority allows Hodge to be treated as a licensee just because Borderfest, and not the city, received the entry fee for use of the premises. According to the court, the relevant question was whether Hodge paid for entry onto the premises and not whether the city received the payment.

On the question of whether the city had actual or constructive knowledge of the defect (using invitee status) the court found that adequate evidence was presented that city employees inspected the ground around the bleachers, that the hole was man-made, and that the city was solely responsible for setting up the bleachers and maintaining the grounds. The court overruled the city's issues on appeal and affirmed the trial court's judgment.

***Brown v. Waco Transit Sys.*, No. 07-16-00258-CV, 2017 WL 4872801 (Tex. App.—Amarillo Oct. 27, 2017) (mem. op.)**. The Amarillo Court of Appeals reversed an order granting a plea to the jurisdiction by the Waco Transit System, Inc. (WTSI).

Brown alleges he suffered personal injuries while riding a bus operated by WTSI. Specifically, during Brown's ride the door fell open, striking him on the head and causing injury. Brown sued WTSI, but his petition was contradictory alleging in some portions that WTSI is a non-profit doing business with Texas, but in other portions alleging it is a governmental entity. WTSI filed a plea to the jurisdiction alleging it is immune from suit under governmental immunity because it is the "agent" of the City of Waco. WTSI alleged it contracted with the City of Waco to perform governmental functions, entitling it to derivative immunity. The trial court granted the plea and Brown appealed.

A private entity generally is not entitled to claim governmental immunity unless "'its actions were actions of the government, 'executed subject to the control of' the governmental entity." Specifically, "[i]f the contractor or agent lacked discretion, its actions were the actions of the governmental unit; if it had discretion, then it may be sued like any other private actor…. " The contract shows merely that the city and WTSI agreed to the appointment of WTSI as the city's agent for the limited purpose of operating the city's bus system. Under the contract, while the city agreed to "provide" the buses, WTSI is the employer of the transit system employees,

including the drivers and mechanics. The parties' agreement thus does not give the city control over the details of the operation or use of the buses, and the record contains no evidence that the work was performed in a manner giving the city such control. WTSI's ability to assert the city's governmental immunity depends on proof its actions were those of the city, and that it exercised no discretion in its activities. Factual evidence may later prove differently, but for plea purposes, WTSI did not show it is entitled to share the city's governmental immunity. The order granting the plea was reversed.

***City of Bedford v. Smith*, No. 02-16-00436-CV, 2017 WL 4542858 (Tex. App.—Fort Worth Oct. 12, 2017) (mem. op.)**. This is a Texas Tort Claims Act (TTCA) case involving a pedestrian falling into a manhole where the Fort Worth Court of Appeals affirmed in part and reversed in part the denial of the city's plea to the jurisdiction.

Smith alleges she was walking across the grass to reach her apartment when she stepped onto a manhole lid which flipped open. Smith fell into the manhole and was injured. Smith sued the city. The city filed a plea to the jurisdiction. The trial court denied the plea and Smith appealed.

Even though the trial court denied the plea, its order specifically held the manhole was not a special defect. The court performed a cursory analysis citing its own recent precedent and agreed it was not a special defect as it was not excavation-like in nature. Additionally, since Smith did not challenge that finding in the appeal, the plea should have been granted as to the special defect claims. As to the premise defect claims, the court simply stated the pleadings do not support a claim for premise defect. Smith also alleged a general negligence claim. However, Smith did not plead sufficient facts to establish a negligence claim for the negligent condition or use of tangible personal property. But, the trial court was within its discretion to provide Smith an opportunity to amend her pleadings since the city's evidence and the pleadings did not affirmatively negate an incurable jurisdictional defect. The trial court also has discretion to postpone its consideration of a jurisdictional plea so that the plaintiff has sufficient opportunity to produce evidence that might raise a fact issue. The city filed its plea and held a hearing two weeks after filing an answer, so no time for discovery had elapsed. And while the court cautioned that a trial court is to make a finding on jurisdiction as soon as practical, it could not say, with the record before it, that the trial court abused its discretion in this case. As a result, the plea was properly denied without prejudice to allow Smith an opportunity to replead and produce evidence.

***City of Edinburg v. Balli*, No. 13-17-00183, 2017 WL 5184495 (Tex. App.—Corpus Christi Nov. 9, 2017) (mem. op.).** Melinda Balli sued the City of Edinburg after she was struck by a vehicle as she used a crosswalk near the Hidalgo County Courthouse. The pedestrian traffic light displayed a "walk" signal for pedestrians at the same time the vehicle traffic light at the intersection displayed a green left-turn arrow. According to her petition, the city was aware of the problem with the traffic signals due to a similar collision on January 17, 2012. She alleged that the city's negligent acts and omissions were a proximate cause of the collision and of her resulting injuries. The city filed a plea to the jurisdiction arguing that the traffic lights were not malfunctioning so as to cause a waiver of immunity under the Texas Tort Claims Act. The traffic signals were working exactly as intended by the Texas Department of Transportation, which designed the traffic lights to simultaneously display "walk" and left-turn signals. The trial court denied the city's plea to the jurisdiction, and the city appealed.

On appeal, the city argued that it retained immunity because the traffic lights were functioning as intended and therefore didn't constitute a wrongful condition of real property and because Balli complains of a discretionary decision concerning design of the roadway. The city claimed that it assumed responsibility for the traffic lights in 2012 and had not changed the lights' programming since that time. As a result, the traffic lights did not qualify as a wrongful condition of real property for which immunity would be waived. The city included with its plea its agreement with the Texas Department of Transportation regarding the lights as well as affidavits and deposition transcripts showing the city had not altered the lights' design and programming. Based on these transcripts, the city carried its initial burden by negating the "condition" component of Balli's proposed waiver of immunity. The burden therefore shifted to Balli to introduce evidence supporting the existence of a fact issue. Balli argues that there was a conflict between the "walk" signal and the protected left-turn signal. But according to the court, this evidence simply attacks the wisdom of the discretionary design choices of the city for which immunity is not waived. The court sustained the city's issue.

***City of Houston v. Gutkowski*, No.14-17-00234-CV, 2017 WL 4679287 (Tex. App.—Houston [14th Dist.] Oct. 17, 2017).** This is an interlocutory appeal from the denial of a plea to the jurisdiction involving a Texas Tort Claims Act (TTCA) claim. The Fourteenth Court of Appeals reversed the denial and dismissed the plaintiff's claims.

Patricia Gutkowski fell out of bed and was unable to move. Her family called 9-1-1 which dispatched City of Houston firefighters to the scene. Upon arrival, the family of Patricia Gutkowski alleged firefighter personnel did not have a portable lifting device, lift board, or lift sling. As a result, they were unable to place Gutkowski in a proper position for lifting resulting in an injury and laceration to her leg. The laceration caused significant blood loss which allegedly caused a heart attack later that day. The Gutkowski family sued the city, which filed a plea to the jurisdiction. The trial court denied the plea and the city appealed.

The court first analyzed the pleadings and evidence and determined the Gutkowski family's claim relating to property lacking an integral safety component was actually a claim for the non-use of personal property in disguise. While the Gutkowski family alleged the emergency service vehicle was tangible personal property lacking an integral safety component of a lifting device, they did not allege the vehicle was improperly used. They only alleged it did not have something firefighter personnel should have used in the bedroom. Further, the integral safety component doctrine is limited to and turns on the governmental entity negligently providing personal property missing an integral safety component, not the non-use of certain medical equipment over others. Further, the allegation that firefighter personnel negligently wrapped the laceration with tangible supplies is insufficient to trigger a waiver of immunity. It is not enough that some property is involved; the use of that property must have actually caused the injury. Here, that is not the case. As a result, the plea should have been granted.

***University of Tex. Health Sci. Ctr. v. Rios*, No. 16-0836, 2017 WL 6396028 (Tex. Dec. 15, 2017)**. This is a Texas Tort Claims Act (TTCA) case involving Section 101.106(e) where the plaintiff sued both the entity and employees. The Texas Supreme Court held the employee's

right to "immediate dismissal" is triggered upon the filing of the motion to dismiss, regardless of subsequent pleading amendments.

Dr. Rios was a first-year resident whose relationship with the faculty physicians became strained. Rios sued the university along with faculty physicians Drs. Fuentes, Patel, Smalling, and four others (the "doctors"). The attorney general answered for the defendants and moved to dismiss the doctors under Section 101.106(e). Before the court ruled, Rios amended his petition and dropped his tort claims against the university, leaving only the doctors. He kept his claims against the University for breach of contract. The trial court dismissed the contract claims but denied the motion as to the doctors. The University (since it filed the motion) appealed on behalf of the doctors. The court of appeals affirmed and the university sought a petition with the Texas Supreme Court.

The Texas Supreme Court first held an entity's immunity is not waived for the acts of an independent contractor under the TTCA. Rios alleged as fact that the University acted "through" the doctors in tortuously interfering with his employment relationships. To establish a waiver, such actions must be done by an "employee" else there is no waiver. Assuming Rios intended to plead a viable claim, his allegation was a judicial admission. Further, the factual allegations in the pleadings are those of employees, not contractors. The subjective intent of the individual acting is not relevant to the determination of whether they are employees; the connection between their job duties and allegedly tortious conduct is what controls and it is an objective analysis. As a result, Rios sued the doctors as "employees" of the university, so Section 101.106(e) is applicable. Section 101.106 requires a plaintiff to decide on a theory of tort liability before suit is even filed. A plaintiff must decide at the outset who to sue. The decision is "an irrevocable election at the time suit is filed." The court recognized that under Texas Civil Rule of Procedure 65, an "amended" pleading replaces the original as if it did not exist. However, it is the filing of the motion to dismiss, not its specific content, which triggers the right to dismissal and Rule 65 does not nullify that. Additionally, when a rule of procedure (i.e. Rule 65) conflicts with a statute (Section 101.106), the statute controls. As a result, the doctors were entitled to be dismissed at the moment the university filed its motion.

***The City of The Colony v. Rygh*, No. 02-17-00080-CV, 2017 WL 6377435 (Tex. App.—Fort Worth Dec. 14, 2017) (mem. op.)**. This is a Texas Tort Claims Act (TTCA), negligent operation of motor-driven equipment case where the Fort Worth Court of Appeals reversed the denial of the city's plea to the jurisdiction and dismissed the plaintiff's claims.

The Rygh's home was flooded when raw sewage backed up into their home. Prior that morning, Rygh's neighbor, Harper, advised the city a pipe outside his home was expelling sewage into this yard. City repair crews arrived and determined a blockage was causing the backup witnessed by Harper. The city used a "vac" truck to clear the line. The truck is powered by the engine of the truck and uses a nozzle to break the blockage. The truck uses pressurized water which is propelled downstream out of the back of the nozzle[,] which propels [the nozzle] upstream toward the blockage. When used, the nozzle broke the blockage causing the sewage to immediately begin flowing downstream away from the residences. The Ryghs later sued the city, alleging that its employees' negligent use of the truck to break through the blockage in the sewer

main had caused the sewage to back up into their residence. The trial court denied the city's plea to the jurisdiction and the city appealed.

The Texas Supreme Court has repeatedly clarified that the phrase "arises from" requires a nexus between the operation or use of the motor-driven vehicle and the plaintiff's personal injuries and property damage. As the uncontroverted evidence established, no water was sent upstream toward the residences. Employees were monitoring the sewage levels upstream and noted no sewage reversed course when the nozzle was deployed. Only a physical object was thrust upward into the line 20 or so feet to break the blockage. The nexus requires more than mere involvement of property; the vehicle's operation or use must have actually caused the injury. Further, the timing in the different affidavits does not conflict as the Ryghs' affidavit asserted their home flooded at approximately 7:45 a.m. and the city's crew did not arrive at the location until after 8:00 a.m. The jurisdictional evidence conclusively establishes that the property damage sustained by the Ryghs did not arise from the city's use of the truck. Finally, no waiver of immunity exists for the claims the city failed to notify the Ryghs of work on the sewer line. The plea should have been granted.*****

***Clegg v. City of Fort Worth*, No. 02-17-00040-CV, 2017 WL 6377433 (Tex. App.—Fort Worth Dec. 14, 2017) (mem. op.)**. This is a Texas Tort Claims Act (TTCA) vehicle accident case where the Fort Worth Court of Appeals affirmed the granting of the city's plea to the jurisdiction.

Madrigal's car collided with Howell's car when Madrigal ran a red light. Clegg was a passenger in Madrigal's car who suffered injuries. Fort Worth Police Officer Olimpo Hernandez witnessed the accident. He wrote a crash report stating he observed multiple containers of beer inside Madrigal's car, Madrigal smelled of alcohol, had a blood-alcohol level of .10, and was arrested. Clegg filed suit against the city and Hernandez asserting they failed to regulate traffic through the use of his patrol vehicle. In a separate suit, Clegg sued Madrigal. Hernandez was dismissed pursuant to Section 101.106(e). The city then filed a plea to the jurisdiction asserting the police department was not a jural entity and Clegg's injuries were not caused by the operation of Hernandez' vehicle. The trial court granted the city's plea and issued findings of fact and conclusions of law. Clegg appealed.

Characterizing Clegg's briefing as a "garbled morass," the court held it was not required to guess at what causes of action he was trying to advance but would attempt to decipher them based on the pleadings. However, under Section 101.055, the TTCA unequivocally does not apply to a claim arising "from the failure to provide or the method of providing police or fire protection." Such is the heart of what Clegg is alleging. Further, no negligent act of Hernandez caused the accident. "[T]he (vehicle)'s use must have actually caused the injury." That is not the case here. Therefore, no waiver of immunity exists. Moreover, the Texas Supreme Court "has never held that non-use of property can support a claim under the [TTCA]." The plea was properly granted.

***Tarrant Cty. v. Carter-Jones*, No. 02-17-00177-CV, 2018 WL 547588 (Tex. App.—Fort Worth Jan. 25, 2018) (mem. op.)**. This is a premise defect/Texas Tort Claims Act (TTCA) case where the Fort Worth Court of Appeals reversed the denial of a plea to the jurisdiction and rendered judgment for the county.

Marks, a courthouse worker, noticed a puddle of water in front of a restroom, which is in an alcove separate from the hallway. The puddle was confined, was approximately two feet in diameter, and was not expanding. She reported it to maintenance. About an hour later, Carter-Jones slipped and fell on water located in the hallway. Carter-Jones sued the county under a premise defect theory. The county filed a plea to the jurisdiction, which was denied. The county appealed.

Merely referring to the TTCA in a petition does not establish a waiver of immunity. Courts must consider the factual allegations and/or evidence. The court first noted Carter-Jones did not plead and, therefore, did not establish personal property was involved for waiver purposes. Carter-Jones and the county disagree about what the known "dangerous condition" in this case actually was under a premise defect theory. Carter-Jones asserts the water on the alcove floor that later spread to the hallway created an unreasonable risk of harm. The county asserts it must have known of the water in the hallway which caused the fall for a waiver to exist. The county's evidence established that it did not have actual knowledge of the water in the hallway. Its evidence asserts the facilities-management department would have responded to a water leak or hazard in the corrections-center hallway more quickly than water in front of a closed bathroom in an alcove with no traffic. "Actual knowledge" requires knowing that "the dangerous condition existed at the time of the accident, as opposed to constructive knowledge which can be established by facts or inferences that a dangerous condition could develop over time." No evidence exists the county had actual knowledge water was in the hallway. While Carter-Jones's conclusory pleadings state the county had actual knowledge, the evidence established otherwise, with no contravention. As a result, the plea should have been granted.

***Delameter v. Beaumont Indep. Sch. Dist.*, No. 09–17–00045–CV, 2018 WL 651268 (Tex. App.—Beaumont Feb. 1, 2018) (mem. op.).** This is a wrongful death/Texas Tort Claims Act case where the Beaumont Court of Appeals affirmed the granting of the school district's plea to the jurisdiction.

A disabled/wheelchair bound child was receiving therapy while attending school in the Beaumont Independent School District (BISD). The bus BISD used to pick up the child had both a driver and an attendant. After his chair was placed on the bus, it was locked in place. The duties of the District's employees required them to lift the chair onto the bus, to lock the chair in place, and to monitor the child's condition on the way to school. During transport the child became unresponsive. The driver and attendant stopped the bus and called BISD headquarters. They did not drive the bus to any emergency room, but awaited the arrival of an ambulance consistent with District policies. Unfortunately, the child died. The family brought suit against BISD asserting the bus was driven in a negligent manner causing the child to become nonresponsive. The District filed a plea to the jurisdiction, which was granted. The family appealed.

According to the Delameters, the bus's movement eventually caused the restraints to tighten around the child causing him to lose consciousness. The Delameters also argued that stopping the school bus and waiting for an ambulance when the driver could have made it to a nearby hospital involved the use or the operation of the bus. However, after analyzing the evidence

submitted, the court held nothing indicated the driver drove the bus at an unsafe speed or that he engaged in any unsafe maneuvers. Even though the Plaintiff's evidence suggests that the child's harness may have required adjustment, this statement amounts to no evidence to show that the harness injured or caused his death. Further, the failure to drive the bus to the hospital is a non-use of property, which does not waive immunity. As a result, the plea was property granted.*****

***City of Killeen v. Worsdale,* No. 03-17-00640-CV, 2018 WL 1077242 (Tex. App.—Austin Feb. 28, 2018) (mem. op.)**. In this interlocutory appeal, the City of Killeen appealed the trial court's denial of its plea to the jurisdiction of Joy Worsdale's wrongful-death claim under the Texas Tort Claims Act (TTCA). The lawsuit stems from a motorcycle accident involving Scott Worsdale. The motorcycle collided with a large dirt mound "obstructing the full width" of the roadway. Worsdale and his passenger were seriously injured and later died from the injuries sustained. The City of Killeen Police Department (KPD) arrived on scene shortly after the accident and began investigating. The report by the KPD indicated that officers had conversations concerning who owned the road and was responsible for the maintenance. The report did not, though, make any conclusions about fault.

Appellees' petition alleged that the dirt mound was a special defect on the city's property that the city knew or should have known about. The petition also argued the city had a duty to make the premises safe by eliminating the risk of harm, and it failed to do so. The city's plea to the jurisdiction asserted that: (1) appellees did not provide the city with the required, written statutory notice of their claims within six months of the accident; and (2) the city did not have "actual notice" of appellees' claims within that same period. The trial court denied the plea, and the city appealed.

Appellees conceded that they did not provide written notice of their claim under the TTCA to the city within six months. Instead, they argued that the city had notice of their claims under Texas Civil Practices and Remedies Code Section 101.101(c): "The notice requirements provided or ratified and approved by Subsections (a) and (b) do not apply if the governmental unit has actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged." The Austin Court of Appeals found the facts in this case similar to those in *City of Dallas v. Carbajal*. In that case, the court held that "although the report described what apparently caused the accident (i.e. missing barricades), it 'did not even imply, let alone expressly state, that the City was at fault' and was no more than a 'routine safety investigation, which is insufficient to provide actual notice.'" The court concluded that the evidence did not demonstrate a *subjective awareness* by the city of its fault, as alleged. The court reversed the trial court and rendered judgment in favor of the City of Killeen.

***Texas Dep't of Criminal Justice v. Cisneros*, No. 09-17-00161-CV, 2018 WL 1095533 (Tex. App.—Beaumont March 1, 2018) (mem. op.)**. This is an interlocutory appeal from the denial of a plea to the jurisdiction in a Texas Tort Claims Act (TTCA) case, where the Beaumont Court of Appeals reversed the denial and ruled in favor of the Texas Department of Criminal Justice (TDCJ).

Cisneros was injured in an accident involving a commercial grade woodworking power saw while incarcerated by the TDCJ. While Cisneros was cleaning the saw with an air hose while it

was turned off, another incarcerated individual turned the power on. Cisneros lost his right hand and fingers. He sued the TDCJ for negligence. The TDCJ filed a plea to the jurisdiction, which was denied. It appealed.

The TDCJ asserted Cisneros failed to file a notice of claim within the statutory time period. Cisneros asserts the TDCJ had actual notice of his claim and therefore, formal statutory written notice is not needed. To have such actual knowledge, the governmental unit must have: (1) knowledge of a death, injury, or property damage; (2) subjective awareness of the governmental unit's alleged fault producing or contributing to the death, injury, or property damage; and (3) knowledge of the identity of the parties involved. Subjective awareness is required because if a governmental entity is not aware of its fault, it does not have the same incentive to gather the information the statute is designed to provide. Fault, as it pertains to actual notice, is not synonymous with liability; rather, it implies responsibility for the injury claimed.

Cisneros asserts that because the guards were called and an incident report was created, TDCJ had actual notice of his claim. However, the report indicated Cisneros acted negligently by failing to follow protocols requiring a supervisor to lock out the machine. The investigation reports do not show TDCJ's fault. The fact that TDCJ investigated Cisneros's accident does not constitute subjective awareness. No other evidence existed within the record indicating TDCJ had knowledge of some fault of its own. As a result, the plea should have been granted.

***City of San Antonio v. Tenorio*, No. 16-0356, 2018 WL 1441791 (Tex. March 23, 2018)**. An officer of the San Antonio Police Department (SAPD) was involved in a high-speed pursuit wherein the fleeing suspect entered a freeway going the wrong way. Once the suspect entered the freeway, SAPD stopped pursuit. The suspect continued driving and struck another vehicle. Tenorio, an occupant of that vehicle, sued the city. The city filed a plea to the jurisdiction asserting it failed to receive notice under the city's charter, which requires written notice of a claim within ninety days after the injuries or damages were sustained. The trial court denied the plea and the Fourth Court of Appeals affirmed. The City of San Antonio filed an interlocutory appeal with the Texas Supreme Court.

The city argued that the Fourth Court of Appeals applied an erroneous standard. The city maintains that the correct standard is whether it was subjectively aware that some fault on its part caused the collision, not whether it was subjectively aware that it simply played a role in producing or contributing to it. The city maintains that the crash report listing "fleeing or evading police" as a contributing factor to the collision does not raise a fact issue as to whether the city was at fault in causing it.

Tenorio responded that the court of appeals used the proper standard. In her view, the appeals court used the phrase "played a role" to point out that fault is not synonymous with liability in the context of determining actual notice but to imply some responsibility for the injuries claimed. She also argued that the city confused fault with complete liability, meaning that the duty improperly views fault in this context as referencing the city being exclusively at fault. Lastly, Tenorio argued that the court of appeals correctly held that because the crash report listed "fleeing or evading police" as a contributing factor to the collision, there was a fact issue as to whether the city had subjective awareness of its fault.

The Texas Tort Claims Act (TTCA) requires written notice not later than six months after the day that the incident giving rise to the claim occurred with additional notice requirements that can be applied by a city ordinance or charter. However, written notice is not required if the city has actual notice. To have actual notice, a governmental unit must have the same knowledge it is entitled to receive under the written notice provisions of the TTCA. Actual notice is a fact question when the evidence is disputed, but it is a question of law when the evidence is undisputed. Also, if a governmental unit investigates an accident, whether the information acquired through its investigation meets the actual notice requirements of the TTCA depends upon the particular facts of the case.

The Texas Supreme Court reviewed the information presented by the city which included the SAPD's investigative report concerning the pursuit and witnesses statements at the time. The court focused on the part of the report and witness statements about the SAPD calling off the pursuit once the suspect drove the wrong way on to the freeway. The court found that though Tenario correctly asserted that the city did not believe that its employees were negligent in this case, this does not make the city subjectively aware of its fault in causing the crash and Tenario's injuries. Therefore, the city did not have actual notice under the TTCA and governmental immunity does apply. The court granted the petition for review, and without hearing oral argument, reversed the judgment of the court of appeals and rendered a judgment dismissing the cause for want of jurisdiction.

***Ramos v. City of Laredo,* No. 04-17-00099-CV, 2018 WL 1511875(Tex. App.—San Antonio Mar. 28, 2018)**. This is a Texas Tort Claims Act (TTCA) case where the San Antonio Court of Appeals reversed a jury verdict and rendered judgment against the city.

While Ramos, a motorcyclist, was making a left-hand turn into the park he was struck by another motorcycle with flashing lights attempting to exit the park in the wrong lane driven by an individual Ramos asserted was named Guerra. Guerra is a police officer with the City of Laredo. Ramos sued the city and Guerra. The city claimed that Guerra was on leave on the date of the accident, was not involved in the accident, and was not acting in the course and scope of his employment at the time of the accident. But the city also asserted Guerra must be dismissed under Section 101.106(e) of the TTCA. In response to the city's plea to the jurisdiction and motion to dismiss, Ramos non-suited Guerra with prejudice. Guerra testified he was at home, asleep, at the time of the accident. At trial, over Ramos' objections, the court submitted a question to the jury on whether Guerra was acting within the course and scope of employment. The jury returned a verdict Guerra was negligent and liable but was not acting within the course and scope of his employment. Ramos appealed the verdict.

Section 101.106(e) of the TTCA is titled "Election of Remedies" and provides that when a claimant files suit "under this chapter" against both a governmental unit and its employee, the employee shall immediately be dismissed from the suit upon the filing of a motion to dismiss by the governmental unit. By filing a Section 101.106(e) motion to dismiss, a governmental unit "effectively confirms the employee was acting within the scope of employment and that the government, not the employee, is the proper party." Thus, when the city requested that Guerra be dismissed pursuant to Section 101.106(e), the city confirmed Ramos's allegation that Guerra was acting in the scope of employment at the time of the accident and agreed to vicariously defend its

employee. Because of the election by the city to be held responsible for its employee in its plea, the court held the city was bound to its judicial admission that Guerra was acting in the scope of employment at the time of the accident.

Justice Barnard wrote separately only to emphasize that the Fourth Court prognosticated this type of argument in 2011 and cautioned entities not to shift arguments mid-stream trying to avoid liability. Either the employee is not in the course and scope and no dismissal under Section 101.106(e) applies, or they are in the course and scope and Section 101.106(e) requires a dismissal.

INTERLOCUTORY JURISDICTION

***City of Magnolia 4A Econ. Dev. Corp. v. Smedley*, No. 16-0718, 2017 WL 4848580 (Tex. Oct. 27, 2017)**. This is a flooding case, however, the issue for the Supreme Court is a litigation procedure issue. The court of appeals held that it did not have interlocutory jurisdiction over claims which were re-raised in a subsequent motion. However, the Texas Supreme Court held the intermediary courts have interlocutory jurisdiction separately for each motion filed.

The underlying claims involved Smedley suing the city, the city's 4A and 4B economic development corporations (EDCs), and contracted entities alleging that the defendants caused Smedley's property to flood and retain standing water, causing damages after they facilitated a Chicken Express going onto the lot next to his. The city was dismissed based on its plea to the jurisdiction. However, the EDCs filed their own pleas/Rule 91a motions which were partially denied. The EDCs later filed summary judgment motions, which were likewise denied. When the EDCs attempted to take an interlocutory appeal of the denial of the motion for summary judgment (MSJ), the court of appeals stated the grounds were identical to those raised in the pleas. Therefore, the court lacked interlocutory appeal jurisdiction under Texas Civil Practice and Remedies Code Section 51.014. The EDCs filed a petition for review which the Texas Supreme Court granted.

The crucial question is whether the twenty-day period to bring an interlocutory appeal ran from the trial court's denial of the plea/91a motion or the date of denial of the MSJ. *See* Tex. R. App. P. 26.1(b) (providing that a timely interlocutory appeal must be filed within twenty days after the challenged order was signed). The court of appeals held the proper trigger date was the denial of the plea. The Texas Supreme Court, citing its own prior precedence, noted that if an amended plea was merely a motion to reconsider, then the twenty-day clock did not reset. *City of Houston v. Estate of Jones*, 388 S.W.3d 663 (Tex. 2012). The court noted it was compelling that the original plea was a pleadings challenge only and the later motion was an evidence-based motion. The EDCs asserted that, in light of the discovered evidence, there was no evidence as to the claims under the Water Code or Takings Clause, and that there was affirmative evidence the EDCs did not own or control the lot, preventing them from being able to provide injunctive relief. The court cautioned that the procedural mechanism, alone, is not dispositive and a court must analyze the substance of the motions. However, after doing so, the court held the EDCs' MSJ cannot be considered a mere motion for reconsideration of the initial plea. As the MSJ was

a distinct motion from the plea, the court of appeals had interlocutory jurisdiction to hear the appeal. It remanded the case back to the court of appeals for analysis.

OPEN MEETINGS ACT

***City of Donna v. Ramirez,* No. 13-16-00619-CV, 2017 WL 5184533 (Tex. App.—Corpus Christi Nov. 9, 2017).** Oscar Ramirez, a former city manager in the City of Donna, brought causes of action against the City of Donna under the Texas Open Meetings Act and the Texas Whistleblower Act after being terminated. He alleged he was terminated after he reported to the police chief and a municipal judge that city officials ordered him to waive or discount certain city fees or charges for city services. He also alleged the city's agenda giving notice of Ramirez's termination violated the Texas Open Meetings Act's notice provision because the word "cancelled" was written on the agenda notice posted near the front door at city hall, and the city conducted the meeting anyway. The trial court denied the city's plea to the jurisdiction and the city appealed.

On appeal, the city argued that Ramirez failed to identify a violation of any provision of the Texas Open Meetings Act, and that Ramirez did not have standing to complain of a violation under the Act because he was present at the meeting and therefore didn't suffer any injury. On the standing issue, the court held that because the Act allows an "interested person" to bring an action to correct a violation of the Act, a plaintiff need to only show that he shares the general public's interest in ensuring that the protections of the Act are enforced.

The substantive issue regarding the Texas Open Meetings Act before the court was whether the presence of the word "cancelled" prominently displayed on the agenda demonstrates a violation of the Act, even if other required notices did not indicate the meeting was cancelled, if the city council continued with the meeting. The court held that viewing the agenda notice in its entirety would lead a member of the general public to conclude that the city council would not be holding a meeting at the time indicated to discuss any matter. The meeting notice did the opposite of informing the general public that a meeting would be held. As a result, the court concluded that Ramirez has presented facts supporting a violation of the Act, specifically Section 551.041's requirement that a governmental body "give written notice of the date, hour, place, and subject of each meeting held by the governmental body."

The city also argued on appeal that Ramirez failed to identify a violation of the Texas Whistleblower Act. The court disagreed, holding that Ramirez presented evidence in good faith that elected city officials had ordered him to waive or discount certain bills and charges for city services. Such actions, if true, could potentially violate Article III, Section 52 of the Texas Constitution and Section 39.02 of the Penal Code. The court affirmed the trial court's order denying the city's plea to the jurisdiction.

***State v. Doyal*, No. 09-17-00123-CR, 2018 WL 761011 (Tex. App.—Beaumont Feb. 7, 2018)**. In this case, the state appeals the trial court's dismissal of an indictment alleging Doyal, as a member of the Montgomery County Commissioner's Court, violated Section 551.143 of the Texas Open Meetings Act (TOMA) by knowingly conspiring to circumvent the TOMA by meeting in a number less than a quorum. Doyal filed a motion to dismiss asserting that Section

551.143 is facially unconstitutional because it violates the First Amendment, and is overbroad, vague, and confusing. The trial court dismissed the indictment and the state appeals.

The state argues the trial court erred by dismissing the indictment on the ground that: (1) the statute is facially unconstitutionally vague and ambiguous; and (2) the statute facially violates the First Amendment and is overbroad.

The Beaumont Court of Appeals concludes that Section 551.143 is directed at conduct, not speech, and thus, rejects that strict scrutiny must be applied in reviewing the section. That means the court presumes the statute is valid and that the legislature did not act arbitrarily or unreasonably in enacting it. The Beaumont Court of Appeals applies the plain meaning to the terms "conspire," "circumvent," and "secret." The court then finds that the attorney's general's reasoning that use of the term "deliberation" in Section 551.143 is not vague but consistent with the definition of the term in Section 551.001 "because meeting in numbers less than a quorum describes a method of forming a quorum, and a quorum formed this way may hold deliberations like any other quorum."

In sum, the court concludes that Section 551.143 describes the criminal offense with sufficient specificity that ordinary people can understand the prohibited conduct, that the statute provides reasonable notice of the prohibited conduct, and that the statute is reasonably related to the state's legitimate interest in assuring transparency in public proceedings. Doyal does not meet his burden to prove the statute is unconstitutionally vague and overbroad. The Beaumont Court of Appeals reverses the trial court order and remands the cause back to the trial court for further proceedings.

For the reasons set out above, the Beaumont Court of Appeals also reverses the orders dismissing the indictments against two related defendants. See *State v. Riley*, No. 09-17-00124-CR, 2018 WL 757037 (Tex. App.—Beaumont Feb. 7, 2018); *State v. Davenport*, No. 09-17-00125-CR, 2018 WL 753357 (Tex. App.—Beaumont Feb. 7, 2018).

PERFORMANCE BOND

***City of Wolfe City v. American Safety Cas. Ins. Co.*, No. 06-17-00075-CV, 2018 WL 792108 (Tex. App.—Texarkana Feb. 9, 2018).** In December 2011, the City of Wolfe City entered into a contract with Mckinney and McMillen, LLC (M&M) to enhance its water distribution and treatment system. American Safety Casualty Insurance Company (American Safety) issued a performance bond in favor of the city for the total value of the contract with M&M. In March 2013, the city engineer signed a certificate of substantial completion. Attached to the certificate was a pre-final inspection punch list of items that needed to be corrected or completed within 30 days. Shortly after the certificate was issued, the city began experiencing significant problems with the installed system. The city worked with M&M in an attempt to resolve the ongoing problems but was unsuccessful. On November 4, 2013, the city contacted American Safety to trigger its performance bond requirements. The city then filed suit in March 2014. American Safety filed both traditional and no-evidence motions for summary judgment. The trial court granted both motions, and the city appealed.

The Texarkana Court of Appeals noted that under the terms of its bond, American Safety bound itself to perform M&M's contract with the city if M&M failed to do so. The bond specifically incorporated the terms of the contract, and American Safety is liable to the city if M&M breached the contract. The court looked at the specific terms of the contract in question and determined that M&M was obligated to repair or replace any defects in the work discovered within one year after substantial completion of the project. When viewed in the light most favorable to the city, as required, the court concluded that the summary judgment evidence produced by the city was more than a scintilla of probative evidence. Thus, the trial court erred in granting American Safety's no-evidence motion for summary judgment.

The court next looked at American Safety's traditional motion for summary judgment. American Safety argued that it was entitled to rely on the certificate of substantial completion. Specifically, the issuance of the certificate discharged American Safety's duty under the performance bond. The court states that "Texas courts have long held that a surety's liability under a performance bond issued to secure performance of a construction contract is determined by examining the underlying contract." The court cites a number of cases and points out that none of the cases held that the issuance of a certificate of substantial completion would discharge the surety of liability on a performance bond. The court concluded that the contract required a fully functioning system, and a certificate of substantial completion did not release M&M from that duty. Thus, American Safety would still be liable under the performance bond, which incorporated the contract provisions. The court reversed the judgment of the trial court and remanded the case back to the trial court.

PUBLIC INFORMATION

***Rines v. City of Carrollton*, No. 05-15-01321-CV, 2018 WL 833367(Tex. App.—Dallas Feb. 13, 2018) (mem. op.)**. Mark Rines made a request under the Texas Public Information Act (PIA) to the City of Carrollton for the civil service files of fourteen current or former police officers. The city provided Rines with a cost estimate for the records, and he paid that amount to the city. While processing the request, the city decided to seek an attorney general's ruling as to whether information was subject to the PIA requirements. While waiting on the ruling, the city provided other requested information and reduced the amounts charged for production, refunding a portion to Rines. The city received rulings from the attorney general and provided Rines with information pursuant to those rulings. Rines then filed a complaint with the attorney general alleging that the city acted in bad faith in providing its initial cost estimates, and thus, Rines was entitled to "three times the amount of the overcharge" pursuant to Texas Government Code Section 552.269(b). Shortly thereafter, Rines filed a complaint with the attorney general that the city did not properly comply with PIA requests. The attorney general conducted an investigation, which resulted in a final determination that the city did fail to deliver to Rines "all the material he requested that was required to be public." Rines then filed suit against the city, alleging violations of the PIA.

The city filed a plea to the jurisdiction and motion to dismiss in which it asserted that Rines' requested relief fell into one of three categories: (1) requested government action; (2) retrospective monetary relief; and (3) city's production of documents. Further, the city argued:

(1) "[appellant] cannot compel the City to perform activities that are not required by statute, regulation, ordinance, or common law";

(2) "monetary relief sought as compensation for conduct occurring before the requested injunction is retrospective in nature" and therefore barred by sovereign immunity; and

(3) "the balance of [Rines'] requested injunctive relief has been made moot" because the city has made "full and complete disclosure of records in its custody that respond to [his PIA] requests" and has "provided evidentiary support that it has disclosed all responsive information it has in its custody."

In response, Rines filed a document that he titled "Objections to Defendant's Answer," in which, he requested in camera review and discovery regarding city files and documents. At the hearing on the city's plea to the jurisdiction and motion to dismiss, several city officials testified describing their responsibilities and how they conducted the search for records. They also testified that the city has no information responsive to Rines' requests that was not given to him. Following the hearing, the trial court granted the city's plea to the jurisdiction. Following a motion for sanctions and accompanying hearing denying the sanctions, Rines appealed listing fifteen issues. In his fifteen claims, Rines argued the trial court violated provisions of the Texas Civil Practices and Remedies Code and that testimony in the trial court was inadequate. Rines also raised several issues that he failed to raise in the trial court. The Dallas Court of Appeals analyzed each issue thoroughly before deciding against Rines on all fifteen issues and affirming the trial court's order.

***Ramirez v. Wells*, No. 01-17-00262-CV, 2018 WL 1474201 (Tex. App.—Houston [1st Dist.] Mar. 27, 2018) (mem. op.)**. This is a Texas Public Information Act (PIA) suit where the First District Court of Appeals in Houston affirmed the trial court judgment in favor of the court administration defendants.

Ramirez was removed from the eligibility list to receive criminal court appointments in the Harris County Criminal Courts at Law, after having been on the list for some time. Ramirez filed a PIA request to see all records related to his removal. Ed Wells, the court manager, informed him the judiciary is exempt from the PIA and the rules of judicial administration protect release of internal deliberations of the court. The question under Rule 12 is whether the documents are court administrative files versus judicial records. Ramirez appealed to the Office of Court Administration (OCA), arguing that the decision to remove him from the list was an administrative decision, and thus, the information he requested did not constitute judicial records. The OCA agreed they were administrative, but determined it only had authority over judicial records so could not grant Ramirez any relief. Ramirez filed a petition for writ of mandamus under the PIA to compel release of the records. After opposing summary judgments, the trial court granted Wells' motion for summary judgment. Ramirez appealed.

Under the PIA, the judiciary is specifically excluded in the PIA's definition of "governmental body." Access to information collected, assembled, or maintained by or for the judiciary is governed by the rules adopted by the Supreme Court of Texas or by other applicable laws and

rules. The record demonstrated that regardless of whether the records were "judicial" or "administrative" they qualify as "information produced, maintained, or assembled by the judiciary." Access is therefore not governed by the PIA. Since Ramirez' petition only seeks mandamus under the PIA, the trial court properly denied his summary judgment.

***Miller v. Gregg Cty.*, No. 06-17-00091-CV, 2018 WL 1386264 (Tex. App.— Texarkana Mar. 20, 2018)**. This is a Public Information Act (PIA) lawsuit in which the Texarkana Court of Appeals flipped back and forth between sections of the Texas Government Code before modifying the trial court's order regarding release of certain records held by Gregg County.

Miller sought a PIA request to allegedly "expose the depth and degree of the intimate relationships" between City of East Mountain Police Department officers and deputies of the Gregg County Sheriff's Office. Miller filed a suit under the PIA seeking a writ of mandamus in County Court at Law #2 to compel Gregg County to disclose certain police phone log information. The county filed a plea to the jurisdiction, which was granted. Miller appealed.

The PIA provides that "A suit filed by a requestor under this section must be filed in a district court for the county in which the main offices of the governmental body are located." Tex. Gov't Code § 552.321(b). "District courts are always the courts of exclusive original jurisdiction for mandamus proceedings unless the constitution or a law confers such jurisdiction on another tribunal." Miller asserts Section 25.0003(a) of the Texas Government Code states "In addition to other jurisdiction provided by law, a statutory county court exercising civil jurisdiction concurrent with the constitutional jurisdiction of the county court has concurrent jurisdiction with the district court in: (1) civil cases in which the matter in controversy exceeds $500 but does not exceed $200,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs, as alleged on the face of the petition . . . ." However, the Texas Legislature expressly amended the PIA in 1999 and added the requirement that a suit be brought in district court. The court of appeals held this created a "condition precedent" to bringing a PIA mandamus action under Government Code Section 311.016(3). The court of appeals stated the question then becomes whether Section 552.321(b) trumps other sections of the Government Code. After a statutory construction analysis, the Texarkana Court of Appeals held Section 552.321(b) does not deprive a county court at law of its jurisdiction under Section 25.0003(a). That being said, the court then analyzed the evidence submitted and the extent to which the county searched for responsive phone records requested. The county presented uncontroverted evidence that no responsive documents exist. As a result, the trial court properly granted the plea, but based on the challenge to jurisdictional facts, not the jurisdiction of a county court at law. The court then modified the judgement, taking out references to dismissal of claims for declaratory and injunctive relief, which were not present in Miller's prayer for relief.

PUBLIC PURPOSE

***Tarrant Appraisal Dist. v. Tarrant Reg'l Water Dist.*, No. 02-17-00042-CV, 2018 WL 547777 (Tex. App.—Fort Worth Jan. 25, 2018)**. The Tarrant Appraisal District (TAD) asserted part of the property owned by the Tarrant Regional Water District (TRWD) was not "used for public purposes" and therefore was not tax exempt. The Fort Worth Court of Appeals affirmed the order dismissing TAD's suit.

TRWD acquired property in connection with a federal control project. Undertaken in concert with the United States Army Corps of Engineers, the program's purpose was to control flooding on the Clear Fork Trinity River. A portion of the property was not used directly for flood control but was used for public trails, common areas, and river access. In an effort to counteract a lack of use outside of certain areas along the trails and "to encourage development of river-facing businesses on TRWD's property and adjoining properties," TRWD determined it would improve and lease to chef Tim Love's River Shack, LLC, property to run a restaurant on the river front. River Shack pays TRWD rent based on a percentage of its annual sales and "[a]ll income received by TRWD from the [lease] is deposited into the general fund of TRWD and used exclusively for [] TRWD's public purposes." TAD asserted the property was not exempt from taxation. TRWD followed the procedures in the Tax Code to challenge the decision, ending in district court. TRWD filed a motion for summary judgment which the trial court granted. TAD appealed.

TRWD is a governmental entity created under statute. TRWD is authorized to make and enforce reasonable rules that are necessary to accomplish TRWD's "authorized purposes," which include (i) regulating "all recreational and business privileges on any . . . body of land . . . owned . . . by the district," (ii) promoting "state or local economic development," and (iii) stimulating "business and commercial activity in the district." TRWD is further permitted to provide for or participate in the acquisition, construction, development, operation, or maintenance of recreational facilities intended to promote economic development. TAD contends the Tax Code should control over the TRWD authorization statutes and applies only when public property is used exclusively for the use and benefit of the public. TRWD asserts its creation is dictated by the Texas Constitution and it serves a public purpose as a matter of law. Interestingly, the court, after going through a detailed analysis of the Texas Constitution, statutory construction principles, and the Tax Code, held the Tax Code controls, but the property is exempt as a matter of law.

The court ends up holding unconstitutional, as a local law, a portion of the uncodified statute authorizing TRWD's creation and authority. The result being the Tax Code controls for purposes of determining the exemption. Under Section 11.11(a) of the Texas Tax Code, a property is exempt from taxation if it is used for a public purpose. The court declined to adopt TAD's interpretation that it must be used "exclusively" for public purposes with no simultaneous use benefiting an individual private business. The court compared other statutes and constitutional provisions where the legislature expressly inserted "exclusive-use" language. TAD's argument "has no basis in the text" of either the Tax Code or its constitutional counterpart for exclusivity. Whether property is used for public purposes is a highly fact-specific question that must be answered on a case-by-case basis. The court held "[c]ontrary to TAD's overly-narrow characterization, the Property is not some run-of-the-mill strip mall that TRWD developed merely for retail purposes. River Shack no doubt operates a business for profit, but that is only one facet of a larger project that, at its core, unquestionably has a public purpose." TRWD entered into the lease with River Shack "to encourage development of river-facing businesses on TRWD's property and adjoining properties." The property "was intended and designed as a trail amenity to provide the public with recreational enhancements ancillary to the public's use of the Trinity Trails system." Thus, the evidence conclusively demonstrates, TRWD leased the property to River Shack in connection with its optimistic plan to develop it for economic and recreational

purposes. With its pavilion, common areas, and location adjacent to the Trinity Trails, and developed and leased for economic and recreational purposes, the property is used for public purposes as a matter of law.

RED LIGHT CAMERAS

***Hunt v. City of Diboll*, No. 12-17-00001-CV, 2017 WL 5167554 (Tex. App.—Tyler Nov. 8, 2017).** Paul Hunt and ADE-WIFCO Steel Products, Inc. (collectively, appellants) both received notices of infractions for red light violations captured by red light cameras in 2015. Appellants sued the City of Diboll pursuant to the Uniform Declaratory Judgment Act challenging the validity of two city ordinances dealing with red light cameras that, at that point, had not been published in the city newspaper. Appellants also sought a declaratory judgment that three city officials acted ultra vires by installing red light camera systems and collecting red light camera penalties. The trial court granted the city's pleas to the jurisdiction and dismissed all claims against the city and city officials.

On appeal, the court first addresses appellants' claim that the city's initial red light camera ordinance is unconstitutional because it deprives them of their presumption of innocence and other constitutional protections. The city argues that appellants were not charged with any criminal offense, only a civil penalty, and must challenge the constitutionality of the ordinance in criminal court. The Tyler Court of Appeals agreed with the city on this point. The alleged harm flowed directly from the city's enforcement of its ordinance, making appellant's claim an impermissible attempt to obtain a naked declaration of the ordinance's unconstitutionality. In other words, appellants made no showing that enforcement of the ordinance caused irreparable injury to personal or property rights.

Next, the court addresses whether appellants failed to exhaust their administrative remedies. While Chapter 707 of the Transportation Code creates a pervasive regulatory scheme to handle claims arising out of the use of red light camera systems, because the city did not publish its red light camera ordinance as required by city charter, the court held that appellants were not obligated to exhaust their administrative remedies. The court analyzed the language in the city's charter and concluded that the city did not publish the ordinance in accordance with its charter. The ordinance was not effective at the time appellants were assessed the red light penalties, so appellants were not required to exhaust their administrative remedies. The city also argued that its later publication of the ordinance in 2016 rendered appellants' claims moot. The court disagreed because the penalties were assessed prior to the city's publication of the ordinance.

On the issue of the ultra vires claims against the city officials, the court stated that the only available remedy in an ultra vires suit is prospective, as measured from the date of an injunction. In this case, the pleadings seek reimbursement of penalties paid in the past, a remedy that would not be available in an ultra vires suit. Therefore, the court held that the trial court did not err in granting the city's plea to the jurisdiction on appellants' ultra vires claims for relief.

***National Media Corp. v. City of Austin*, No. 03-16-00839-CV, 2018 WL 1440454 (Tex. App.—Austin Mar. 23, 2018) (mem. op.)**. The dispute began in 2009 when National Media acquired the sign rights, relocation rights, interests and entitlements in an off-premise advertising display located on real estate owned by a third party, Anchor Equities, Ltd.. Soon after, National Media filed an application with the City of Austin to register the sign as a "non-conforming off-premise sign." Current city ordinances prohibit off-premise signs in all districts, "[u]nless the accountable official determines that the sign is a nonconforming sign."

On November 19, 2009, the city issued "notices of violation" to both National Media and Anchor Equities, and issued a "notice of denial of registration" to National Media. These were issued based on the findings of a city investigation. The investigation found the sign had been dismantled in 2003, with the exception of three support poles. In 2009, National Media built a new sign in its place. Because the sign was dismantled more than five years before reconstruction work began and no permit was obtained, the new sign was in violation of the city's sign code. National Media filed a lawsuit against the city seeking declaratory relief under the Uniform Declaratory Judgments Act (UDJA) and a determination that it was entitled to register the sign. The city filed three pleas to the jurisdiction, each of which was denied by the trial court.

In 2011, after the city's third plea to the jurisdiction had been denied by the trial court, the city issued a formal "use determination" to National Media that determined the construction, installation, or maintenance of an off-premises sign at the site does not qualify as a non-conforming use under the city's zoning code. National Media appealed to the city's board of adjustment, which upheld the city's determination. In response, National Media added to its pleadings a request for judicial review of the board's decision.

Both parties filed cross-motions for summary judgment. The trial court dismissed all of National Media's claims and found that the board's ruling in favor of the city was improper and illegal because it misapplied zoning codes. While that appeal was pending before the court, a third-party contractor employed by National Media razed the sign in connection with the construction of apartments on the site.

National Media requested declarations by the court that it was entitled to relocate the sign, and that by denying its right to do so, the city was acting unlawfully. In addition, they asserted a takings claim. The trial court granted National Media's motions for partial summary judgment, later conducting a bench trial on damages and rendering a final judgment.

Both parties appealed this final judgment. In cross-appeals, the parties dispute the trial court's decision to deny the city's plea to the jurisdiction and the final judgment awarding National Media Corporation declaratory relief and damages for their regulatory-taking claim.

The city's plea challenged the trial court's authority to determine that National Media was entitled to register and relocate the sign and that the restrictions imposed by the city constituted a regulatory taking under state and federal law. National Media alleged neither a physical taking of

its property by the city nor did it challenge the constitutionality of its sign ordinance. Rather, National Media argued that the city illegally applied and enforced its zoning ordinances. This effectuated a total regulatory taking of its property interest in the sign. The court ruled that National Media's claims did not trigger a waiver of immunity, citing the absence of a properly pled takings claim and the plaintiffs' failure to challenge property-use restrictions.

To have a property interest in a governmental benefit such as a permit, a person must have more than a unilateral expectation of that benefit. National Media's expectation of a permit is not a protected property interest, and the receipt of a permit is not a matter of right. National Media does not dispute its violation of registration requirements, one of which was the requirement that National Media register its sign with the city by August 21, 1999, or within 180 days after their purchase. According to the city's ordinance, a "sign owner may not replace or relocate the sign if it is dismantled before an application for a permit authorizing the replacement or relocation is filed." Unless properly registered, such determinations are within the province of the city.

The court reversed the trial court's denial of the city's plea to the jurisdiction, and granted the city's plea to the jurisdiction while dismissing all of National Media's claims.

STREET ABANDONMENT

***The Jesus Christ Open Altar Church, LLC v. City of Hawkins,* No. 12-17-00090-CV, 2017 WL 6523088 (Tex. App.—Tyler Dec. 21, 2017) (mem. op.).** This is a property dispute case in which the Twelfth Court of Appeals affirmed the trial court's declaratory judgment regarding the city's control over it right-of-way.

The city filed a declaratory judgment action against the church regarding whether a plat recorded in 1909 dedicated fee simple ownership or any easements for roads to the city as well as whether the city had abandoned the roadway. Apparently, the city executed an "abandonment" deed in 1994 and questions arose regarding the scope of the abandonment. After a hearing, the trial court defined the scope of the property at issue. It further held the 1909 plat conveyed easements in and to the streets and alleys of the city, and the city holds an easement over the property at issue. Also, the court determined that the city has not conveyed or abandoned its easement. The church, which was claiming ownership of the property, appealed.

Once a road is dedicated to public use, that road remains subject to that use unless it is abandoned. The purpose of a public road, particularly one of local character, is to provide access to property abutting upon it, as well as a thoroughfare between distant points. To show common law abandonment, one must show intent to abandon and acts of relinquishment. The testimony showed that the named street (i.e. Ash Street) was not built on the land where the 1909 plat shows it to be. The city has not used its easement across the disputed tract of land and has no plans to use it. However, there is no evidence of an express intention to abandon the city's easement. There is no evidence that it would be impossible or highly improbable to build a street on the disputed property or that the object of the easement wholly fails. Although it was established more than 100 years ago and no street has been built, mere nonuse of the easement does not amount to abandonment. In early 1994, English Funeral Home, which at the time owned the church property at issue, petitioned the city to abandon certain unused streets and alleys,

referencing the original 1909 plat. The city did expressly abandon certain streets under the request and referenced them by block number. The record includes deeds showing the chain of title of the church property from 1993 until the church's 2015 purchase. Utilizing incorporation by reference, the court determined the church's assertion of the location of the easements and scope contradicts the deeds. The trial court's determination that the church property is south of the abandoned easement, and not included in it, is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Judgment was affirmed in favor of the city.

TAKINGS

***Rodriguez v. City of Fort Worth*, No. 07-16-00037-CV (Tex. App.—Amarillo Dec. 8, 2017) (mem. op.)**. This is a takings/condemnation and Texas Tort Claims Act (TTCA) case where the Fort Worth Court of Appeals affirmed the granting of the city's plea to the jurisdiction.

Prior to Rodriguez's ownership of a residential structure, the City of Fort Worth's Building Standards Commission found it to be substandard and hazardous to public health. A copy of the order was mailed to the then owner and filed in the deed records of Tarrant County on October 19, 2012. Rodriguez purchased the property on December 12, 2012, without personal knowledge of the commission's order but, the court found Rodriguez possessed constructive knowledge due to the filing in the deed records. The property was demolished on June 28, 2013, by a contractor hired by the city. Rodriguez brought suit, alleging the city intentionally destroyed the building (a takings) or negligently destroyed it under the TTCA. The city filed a plea to the jurisdiction which the trial court granted. Rodriguez appealed.

As to Rodriguez' TTCA claim, nothing in the record shows city employees were involved with the demolition by "operating" or "using" motor-driven vehicles or equipment or by exercising any control over the independent contractor or its employees. No city-owned motor-driven vehicles or equipment were used in the demolition. As a result, the city has not waived its immunity under the TTCA.

As to Rodriguez' takings claim, Rodriguez did not allege any facts demonstrating that demolition of his property was for public use. The improvements on the property were found to be substandard and hazardous to public health; however, the owner was given the opportunity to bring those improvements up to code in order to prevent their demolition. When the owner failed to comply, the city removed the public health hazard. As such, Rodriguez' claims do not allege a constitutional taking.

Rodriguez also asserted he requested leave to amend his pleadings and was denied. However, Rodriguez was given and took advantage of two prior amendments to address the city's plea and supplemental plea. Because Rodriguez had a reasonable opportunity to amend he cannot now complain about being deprived of an opportunity to amend. Furthermore, even if Rodriguez were afforded an opportunity to amend, his live pleading indicates incurable defects – specifically, the use of an independent contractor of the tort claims and lack of a public purpose for takings. As a result, the plea was properly granted.

UTILITY RELOCATION COST

***City of Richardson v. Oncor Elec. Delivery Co. LLC,* No. 15-1008, 2018 WL 663159 (Tex. Feb. 2, 2018)**. This case involves a dispute between a city and a utility over who must pay relocation costs to accommodate changes to public rights-of-way.

The City of Richardson negotiated a franchise agreement with Oncor Electric Delivery Company (Oncor) requiring Oncor to bear the costs of relocating its equipment and facilities to accommodate changes to public rights-of-way. Richardson later approved the widening of thirty-two public alleys. Oncor refused to pay for the relocation. While the relocation dispute was pending, Oncor filed an unrelated case with the Public Utility Commission (PUC), seeking to alter its rates. That dispute was resolved by settlement, but the settlement included the city passing a tariff ordinance. The court had to decide whether a pro-forma provision in a tariff, which sets the rates and terms for a utility's relationship with its retail customers trumps a prior franchise agreement, which reflects the common law rule requiring utilities to pay public right-of-way relocation costs.

By nature, a franchise agreement represents the unique conditions a city requires of a utility in exchange for the utility's right to operate within the city. Here, the franchise contract incorporated a conventional right-of-way ordinance (ROW Ordinance) requiring the utility, upon written notice from the city, to remove or relocate "at its own expense" any facilities placed in public rights-of-way. The ROW Ordinance is typical of others throughout Texas. "Tariff" is defined as "the schedule of a utility . . . containing all rates and charges stated separately by type of service, the rules and regulations of the utility, and any contracts that affect rates, charges, terms or conditions of service." 16 Tex. Admin. Code §25.5(131). A tariff filed with the PUC governs a utility's relationship with its customers, and it is given the force and effect of law until suspended or set aside. However, the PUC's rules also contain a "pro-forma tariff," the provisions of which must be incorporated exactly as written into each utility's tariff. The city and Oncor sued each other over payment of the relocation costs, each citing the differences between the ROW Ordinance/Franchise Contract and pro-forma tariff. The trial court granted the city's motion for summary judgment, but the court of appeals reversed and rendered judgment for Oncor.

Under the common law, a utility's right to use a city's public rights-of-way is permissive and is subordinate to the public use of such rights-of-way. The Texas Supreme Court has traced this principle back at least as far as 1913. The Texas Utilities Code mirrors the common law, but specifically apply to "streets." Oncor argues that the legislature's use of "street" and not "alley" is significant and precludes these statutes from applying to alleys. Under statutory construction principles, every word included and excluded by the legislature has significance. Looking to the statutory scheme, the court found particularly relevant the legislature's recognition of the broad authority afforded to home-rule cities. As a home-rule city, the City of Richardson has "exclusive original jurisdiction over the rates, operations, and services of an electric utility in areas in the municipality." Furthermore, the court held that in the context of home-rule cities, the recognition of a specific power does not imply that the other powers are forbidden. The legislature did not intend to strip municipalities of their common law right to require utilities to bear relocation costs. The language in the tariff does not unmistakably address the relocation

costs. The tariff addresses Oncor's relationship with end-users, which, in this case, does not include the city. As a result, the city retains the power to address costs through its ROW Ordinance and its franchise contract. The court reversed the judgment of the court of appeals and reinstated the judgment of the trial court.

WATER UTILITIES

***Mountain Peak Special Util. Dist. v. Public Util. Comm'n of Texas*, No. 03-16-00796-CV, 2017 WL 5078034 (Tex. App.—Austin Nov. 2, 2017) (mem. op.)**. The Public Utility Commission of Texas (PUC) granted the City of Midlothian's petition for expedited release of a portion of property it owned from the certificated service area of Mountain Peak Special Utility District (Mountain Peak). In Mountain Peak's suit for judicial review of the release, Mountain Peak contended that the PUC erred in granting the city's petition for decertification because the statutory requirements of Texas Water Code Section 13.254(a-5) were not met. Specifically, Mountain Peak argued that the property the city sought to have decertified was receiving water service from Mountain Peak and, thus, was not eligible for expedited release under Chapter 13 of the Water Code. In addition, Mountain Peak asserted that the PUC's approval should be set aside because federal law 7 U.S.C. § 1926(b) preempted the decertification. After a hearing, the district court affirmed the PUC's order granting the city's petition for decertification. Mountain Peak appealed.

The court recognized that the determination of whether a tract of land is receiving water service is a fact-based inquiry requiring the PUC to consider whether the utility has facilities committed to providing water to the particular tract in furtherance of its obligation to provide water to the tract pursuant to its certificate of convenience and necessity (CCN). The court of appeals found the city's affidavits regarding water service compelling and concluded that the evidence provided a reasonable basis for the PUC's finding. The mere existence of water lines on or near property was not enough to mean that the property was "receiving water service."

The Austin Court of Appeals relied on its decision in *Creedmoor-Maha Water Supply Corp. v. Texas Comm'n on Envtl. Quality*, 307 S.W.3d 505 (Tex. App.—Austin 2010, no pet.). In that case, the court determined that in the context of a plea to the jurisdiction, uncontroverted record evidence that the utility "lacked both the infrastructure and water to serve" the development negated any allegations in the water supply corporation's petition that it had provided or made service available. *Creedmoor-Maha*, 307 S.W.3d at 523. In this case, the court recognized that there was disputed evidence on that issue. Because the court must presume that the trial court resolved any disputed facts in favor of its judgment, the court affirmed the trial court's conclusion that 7 U.S.C. § 1926(b) did not preempt the PUC's order. Thus, the court affirmed the district court's judgment affirming the PUC's order.

WHISTLEBLOWER

***Metropolitan Transit Auth. v. Williams*, No. 01-17-00724-CV, 2018 WL 541932 (Tex. App.—Houston [1st Dist.] Jan. 25, 2018) (mem. op.)**. This is a Texas Whistleblower Act suit where the First District Court of Appeals in Houston reversed the denial of the employer's plea to the jurisdiction and rendered judgment for the metropolitan transit authority (Metro).

Williams was a track maintainer for Metro. Williams complained to Metro's compliance officer asserting a hostile work environment by his supervisor, Ratcliff. Williams alleged Ratcliff instructed him to "snitch" on anyone or anything going wrong on the track and that when Williams expressed reservations Ratcliff became hostile. Later an incident occurred between Williams and another Metro employee, Fred Burton. Burton reported the incident to the Metro police the next day. Burton asserted Williams began to curse at him, calling him a derogatory name for a black person, and threatening to fight him off Metro property. Three other people were witnesses to the incident, including Ratcliff. Williams wrote a response to the incident but asserts Burton's accusations were retaliation for Williams' complaint against Ratcliff. Police charged Williams with assault by threat and Metro terminated Williams. On an aside, after Williams was terminated, another employee reported Ratcliff and Burton for theft of Metro property and Williams cooperated with the investigation. Williams filed suit under the Texas Whistleblower Act. Metro filed a plea to the jurisdiction which the trial court denied. Metro appealed.

"Snitch" means to report on someone else. Williams' attempt to change the meaning is unsupported in the text of his report. In the context of the entire passage, Ratcliff asking Williams to be his eyes and ears on the track conveys the idea that Williams would watch what other people were doing and report to Ratcliff. Nothing in this passage indicates that Ratcliff was engaged in any criminal activity and seeking Williams's help in the process. Simply because Williams was later charged with a crime by another employee does not mean Williams was retaliated against for his report to the compliance officer. Metro produced evidence that another employee reported the criminal acts of Ratcliff and Burton after Williams was fired. Metro's evidence established that an officer was assigned to investigate the allegations and that the first time the officer spoke to Williams was after he had been terminated. Metro could, therefore, not retaliate against him because of anything he provided the officer.

***City of Hereford v. Frausto*, No. 07-17-00400-CV, 2018 WL 445657 (Tex. App.—Amarillo Jan. 16, 2018) (mem. op.)**. This is a case where the Amarillo Court of Appeals affirms the trial court's order denying the city's plea to the jurisdiction.

Frausto was employed with the City of Hereford. Following an initial investigation by local police, he was tasked with investigating a dog complaint. Frausto ultimately forwarded the matter to the municipal court judge who set the matter for hearing to determine whether the dog was a "dangerous dog" under state law. The city attorney became aware of the hearing, reviewed the reports, and decided to cancel the hearing. Frausto believed this to be illegal and reported it to the local police chief. Several weeks later, Frausto was terminated. He sued the city arguing a violation of the Texas Whistleblower Act (Act). The city filed a plea to the jurisdiction which was denied. The city appealed.

The Act, at Section 554.002 of the Government Code, provides that a local government may not suspend or terminate an employee "who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." The city argues that Frausto didn't satisfy the good faith component of the Act. Reading the allegations in the live pleading in a light most favorable to Frausto, the court concludes that a

question of fact exists regarding whether Frausto's belief about the city attorney violating the law was held in good faith. The trial court's order is affirmed.

WORKERS' COMPENSATION

***State Office of Risk Mgmt. v. Martinez*, No. 16-0337, 2017 WL 6391426 (Tex. Dec. 15, 2017).**

In 2001, Martinez, a caseworker for Texas Department of Family and Protective Services (DFPS), was working from home on a Saturday at her kitchen table in preparation for the next week's hearings when she got up, slipped in her kitchen and fell. She broke her shoulder and hit her head in the fall. Martinez filed for workers' compensation with the State Office of Risk Management (SORM). SORM denied her claim on the grounds that she was not injured in the course and scope of her employment, was not engaged in the furtherance of her employer's business at the time of the injury, and did not establish a causal connection between her injuries and her employment.

Martinez requested a benefit review conference to dispute the coverage denial. The Texas Workers' Compensation Commission (TWCC) conducted the conference. SORM argued that Martinez's injuries were not compensable because she did not obtain permission to work at home, which is a violation DFPS overtime policy. The benefit review officer's report listed two "disputed issue[s]" that remained unresolved when the conference concluded: "Did [Martinez] sustain a compensable injury on June 9, 2001?" and "Did [Martinez] sustain disability as the result of the June 9, 2001, claimed injury, and if so, for what period(s)?" The case proceeded to a contested case hearing. SORM reasserted it original argument, but the hearing officer was not persuaded and ruled Martinez was "furthering the business and affairs" of DFPS when she fell, but concluded that her injury "did not arise out of nor [occur] in the course and scope of her employment" and she did not sustain a compensable injury. Martinez appealed to the TWCC's Appeals Panel which reversed the hearing officer's decision and rendered a decision that Martinez did sustain a compensable injury and supported the finding of the hearing officer that she had authority to work from home in spite of DFPS's overtime policy.

SORM appealed to district court arguing the appeal panel's decision was "contrary to the law and facts." Both parties filed for summary judgment. SORM did not argue the grounds it did in the administrative phases (violations of DFPS overtime policy). Instead, SORM argued that Martinez violated a statute by working from home. The trial court denied Martinez's motions for summary judgment and granted SORM's motion. Also, Martinez appealed the trial court's ruling that she did not suffer a compensable injury to the court of appeals. However, the court of appeals held that the Labor Code barred the trial court from exercising jurisdiction over SORM's motion because the Labor Code limited the trial court's review of the appeal panel's decision to "issues decided by the appeals panel and on which the judicial review is sought" which did not include SORM's violation of statute argument.

Martinez also appealed the trial court's denial of her summary judgment motion stating the SORM waived judicial review of the compensability of her injuries by failing to bring before the appeals panel all of the factual findings that the hearing officer made during the contested case hearing. The court of appeals did not agree stating that using the hearing officer's finding to

argue the hearing officer determined that Martinez sustained a compensable injury is contrary to the hearing officer's finding that her injury did not rise in course and scope of her employment and did not sustain a compensable injury. The court of appeals reversed the grant of SORM's summary judgment, affirmed the denial of Martinez's summary judgment, and remand to trial court. Both parties filed petitions for review with the Texas Supreme Court.

The Texas Supreme Court had to consider what the meaning of "issue" was in Title 5 of the Labor Code in order to review this case. The court did a review of the Labor Code by reviewing the different sections that used the word "issue" and those sections that did not use the word "issue," but where it could be implied. Specifically, the court reviewed Section 410.301(a) which does not use the word "issue" but discusses "a final decision of the appeals panel regarding compensability or eligibility for or the amount of income or death benefits." The court determined that since there is no explicit definition, it had to assume the legislature intended the phrase "a final decision of the appeals panel regarding compensability or eligibility" to "describe" the "issues" on which the trial court may render a judgment.

Going through the administrative process and discussing how the parties defined "issue," the court determined that the parties were disputing the same two issues throughout the administrative process: "Did [Martinez] sustain a compensable injury…?" and "Did [Martinez] sustain a disability…?". The different grounds that SORM argued were arguments, not issues, and SORM was free to raise them at any time. The court remanded the case back to the court of appeals for that court to consider the merits of Martinez's statutory argument and or further proceeding consistent with this opinion.

As for Martinez's cross-petition's first issue concerning the hearing officer's finding, the court agreed with the intermediate court of appeals that Martinez is not free to pick and choose among the hearing officer's finding of facts and have the court draw a conclusion contrary to the report's finding of facts. Then, the court looked at Martinez's cross-petition's second issue concerning SORM not challenging the hearing officer's finding that established compensability and, therefore, SORM cannot seek judicial review on that aspect. The court stated that the Labor Code makes it clear that a hearing officer's incorrect finding of facts are "errors," not issues and that a party does not need to appeal every finding related to an issue in order to preserve the issue for judicial review. Since the trial court does a de novo trial on the issues decided by the appeals panel, the trial court is not required to defer to the hearing officer's factual findings. Thus, a party's failure to challenge a factual finding does not preclude a trial court from reviewing the issue that the findings purportedly supported. In conclusion, the court affirmed the intermediate court of appeals' decision to uphold the trial court's denial of Martinez's motion for summary judgment.

ZONING

***Kenneth H. Tarr v. Timberwood Park Owners Assoc.*, No. 16-1005, 2018 WL 2372594 (Tex. May 25, 2018).**

This case revolves around whether short-term vacation rentals violate certain restrictive covenants that limit tracts to residential purposes and single-family residences. A homeowner began advertising his house on websites such as VRBO (vacation rental by owner), formed an LLC to manage the rental of the home, and consistently rented the home out to vacationers.

The homeowners' association (HOA) fined the homeowner for violating two restrictive covenants on the land, which required the property to be used for residential purposes and designated any house on the property as a single-family-residence. In the HOA's view, short term vacation rentals to parties of various sizes, not all of whom were members of a single family, violated the covenants by making the land "a commercial rental property."

The trial court held for the HOA, and the appellate court affirmed. Upon review, the Supreme Court of Texas acknowledged persistent disagreement among the courts on whether to construe restrictive covenants narrowly or liberally. Traditionally they were construed narrowly because "[t]he right of individuals to use their own property as they wish remains one of the most fundamental rights that individual property owners possess." However, Texas Property Code Section 202.003 states: "A restrictive covenant shall be liberally construed to give effect to its purposes and intent." Texas courts differ on the extent to which this statute alters the common law approach. The court declined to resolve this controversy because in this case, it held that under either method of interpretation, the restrictive covenant did not prohibit short-term vacation rentals.

The court arrived at its conclusion by first holding that the single-family requirement was a structural constraint, not a use constraint: it merely limited the type of building that could be built on the property. The homeowner was therefore not violating that provision. With respect to the residential use covenant, the court distinguished between conduct on the property, which consists of the activities of the renters themselves, and the owners' use of the property, which consists of renting for profit. It took a close reading of the deed as to whether the covenant restricts conduct on the property or the owner's use. Because some language in the deed referred to conduct *on* the property ("no business shall be conducted on any of these tracts which is noxious or harmful"), the court concluded that the relevant inquiry concerned conduct on the land.

The court held that residence purposes refer to "living purposes as distinguished from uses for business or commercial purposes," and contemplates "activities generally associated with a personal dwelling. So long as renters used the home for residential purposes, "no matter how short-lived, neither their on-property use nor Tarr's off property use violates the restrictive covenants."

Importantly, the court held that a similar covenant may preclude short-term rentals if it defines "residential" or "business" uses more specifically.

***Risoli v. Board of Adjustment of the City of Wimberley*, No. 03-17-00385-CV, 2017 WL 4766724 (Tex. App.—Austin Oct. 20, 2017) (mem. op.)**. This is a board of adjustment appeal in which the Austin Court of Appeals remanded the property owner's claims back to the trial court.

Risoli sued the Board of Adjustment of the City of Wimberley (BOA or city) alleging it had improperly revoked the "grandfathered use status" of Risoli's property, barring her from using it as a short-term rental facility. The city filed a plea to the jurisdiction, which included an argument that she missed the filing deadline. The trial court granted the plea, and Risoli appealed.

A person aggrieved by a board of adjustment's decision may seek judicial review by presenting a petition "within 10 days after the date the decision is filed in the board's office." Tex. Loc. Gov't Code § 211.011(b). The filing date is jurisdictional. The controlling question is whether the city administrator's letter was the BOA's "decision" that was "filed in [its] office" and triggered the deadline.

The BOA held a meeting on September 6, 2016, regarding Risoli's appeal of the city administrator's decision to revoke her property's grandfathered use. On September 14, the city administrator wrote a letter to Risoli stating the BOA unanimously voted to uphold the determination and that she must immediately cease all such activities. The letter was emailed to Risoli on September 16, and then again on October 18. Risoli filed her petition November 17 but argued the BOA's minutes had not yet been approved and, therefore, no decision was "filed in the board's office." The city argued the letter was filed at city hall, which is the office where the BOA's records are kept and maintained. However, the BOA did not submit any evidence to the court to back-up or establish these facts. The BOA did not define what constituted its "decision" and had not adopted protocols defining where its office is located or what it means for a decision to be filed. Given the absence of evidence, mere argument in pleadings is insufficient to factually support the motion. The order dismissing Risoli's claims was reversed and the case was remanded back to the trial court.

***Electro Sales & Svs., Inc. v. City of Terrell Hills*, No. 04-17-00077-CV, 2018 WL 1309709 (Tex. App.—San Antonio Mar. 14, 2018) (mem. op.)**. The dispute began when Electro Sales and Services, Inc. (Electro) bought a strip center consisting of three rental spaces in a single building from Billy and Gin Wei Eng. The strip center had been rezoned from commercial to semi-commercial use in the 1960s. The City of Terrell Hills grandfathered nonconforming commercial use of the suites and allowed the use to continue, unless vacant for more than six months. The middle suite had been vacant for more than six months prior to Electro's purchase of the strip center. The Engs claim they had informed Electro that the middle suite had lost its nonconforming use rights prior to the sale of the strip center. Elctro disputes this claim.

Electro sent an application to the city to rezone the strip center from semi-commercial to commercial. The city considered the application but, ultimately, denied it. During this time period, the city council amended its ordinance to allow for the issuance of special use permits. The amended provisions contained an application process and procedures for considering special use permit applications. Such applications were required to be accompanied by a site plan and meet other specific requirements. Electro then sent the city a second rezoning request for a special use permit for a barber shop but failed to submit the required site plan, so the permit was denied.

Another similar business was granted a special use permit by the city. This prompted Electro to file suit against the city and the Engs. They alleged regulatory taking and declaratory judgment claims against the city, and alleged fraud, negligent misrepresentation, and statutory fraud claims against the Engs.

The city moved for summary judgment, asserting traditional and no-evidence grounds. In its summary judgment motion to the trial court, the city challenged the trial court's jurisdiction to consider Electro's regulatory takings claim on three grounds. The city argued that because its immunity was not waived and Electro had not alleged a viable claim, the trial court lacked jurisdiction to consider the regulatory taking claim. Electro argued that the city's denial of their rezoning request denied them all economically viable use of the middle suite or unreasonably interfered with their rights to use and enjoy the property. The trial court granted the city's motion. The claims against the city were severed into a separate cause, making the order final and appealable. Electro appealed.

The court of appeals noted that it was undisputed that Electro continued to receive income from the rental of the two end suites, and Electro produced no evidence that the strip center was rendered valueless by the city's denial of the rezoning request. Thus, the court concluded that the zoning of the strip center could not have interfered with Electro's investment-backed expectations because the zoning was in existence when Electro purchased the property. The court further concluded that the city's denial of Electro's rezoning request could not qualify as a physical taking, given the failure to produce any evidence to substantiate this claim. Finally, the court affirmed the trial court's ruling, recognizing its jurisdiction to render judgment in the matter of the city's no-evidence motion for summary judgment on the regulatory claim.

***City of Krum v. Rice*, No. 17-0081, 2017 WL 6390973 (Tex. Dec. 15, 2017).** In 2014, Rice pled guilty to sexual assault of a fourteen-year-old. Rice agreed to deferred adjudication, the terms of which barred him from going "within 1,000 feet of a premise where children commonly gather, including a . . . playground" until 2024.

Rice also had to register as a sex offender. At the time, the City of Krum had in place a sex offender residency restriction ordinance (SORRO) prohibiting registered sex offenders who had committed violations involving minors under the age of sixteen from residing "within 2,000 feet of any premises where children commonly gather."

Rice challenged the city's ordinance, alleging that general law cities had no statutory authority to enact a SORRO. The city filed a plea to the jurisdiction, arguing that Rice lacked standing to sue. The trial court denied the city's plea, and the city filed an interlocutory appeal.

At the Second Court of Appeals, the city continued to argue Rice's lack of standing, stating that his claimed injury was not traceable to the city or the SORRO because the terms of his community supervision already prevented him from living at his parents' house. The city also argued the trial court lacked jurisdiction to hear Rice's civil challenge to the SORRO, which the city contended was a penal ordinance. The divided court of appeals affirmed the trial court's order denying the city's plea to the jurisdiction and held that Rice had standing because the restriction in the SORRO was broader than that of Rice's community supervision. Also, the court

of appeals, concluded that Rice's alleged general desire to live somewhere in the city that violated the SORRO was enough to establish an injury, and the SORRO is interpreted as a civil or regulatory ordinance in its intent and effect, despite its penal language.

The city filed a petition for review in the Texas Supreme Court reiterating its jurisdictional arguments. However, while the lawsuit was pending, the Texas Legislature passed House Bill 1111 (codified at Local Government Code § 341.906), which expressly authorizes general-law cities to prohibit registered sex offenders from going near "child safety zones"; caps the distance of any SORRO at 1,000 feet; and requires an exemption for persons who established residence within a restricted zone before the effective date of the relevant ordinance. The bill's effective date was September 1, 2017. After the bill's effective date, the city passed an amended SORRO. The amended ordinance prohibits registered sex offenders from living within 1,000 feet of a "child safety zone."

The Texas Supreme Court held that Rice's challenge to the SORRO is moot in light of H.B. 1111 because the bill clearly empowers general law cities to enact ordinances that limit the movements of sex offenders, like the city's amended SORRO. Also, the court stated the alleged basis for Rice's interest no longer existed and is moot since any ruling by the court about the SORRO's validity would have no effect on Rice's right because the community-supervision restriction would still be in place. The court granted the city's petition for review, vacated the judgments of the court of appeals and the trial court, and dismissed the case for lack of jurisdiction.

***Schmitz v. Denton Cty. Cowboy Church*, No. 02-16-00114-CV, 2018 WL 2144141 (Tex. App.—Fort Worth May 10, 2018) (mem. op.).** In 2014, the Denton County Cowboy Church (church) purchased property zoned single family residential under the Town of Ponder's zoning ordinance. The church's property is adjacent to the plaintiffs' property. According to Town of Ponder's comprehensive plan, the plaintiffs' properties are designated for future low-density residential zoning. In 2015, the church began construction of an arena. The town issued a building permit for an open arena. Plaintiffs sued the church and town, seeking injunctions prohibiting the church from continuing construction. They also brought claims under Section 1983 for due process, takings, and equal protection violations. At this time, the town voted to amend the zoning code and issued a special use permit ("SUP") to the church, but did not pass an ordinance. The town and church filed a plea to the jurisdiction, which the trial court granted. The plaintiffs appealed.

The Second Court of Appeals issued an opinion and judgment in this appeal on August 31, 2017. On a motion of rehearing filed by Appellants Peter Schmitz, Sean Pollock, Larry La Duke, and Becky LaDuke and Appellee Denton County Cowboy Church, the court granted both motions for rehearing, withdrew its August 31, 2017 opinion and judgment, and issued a rehearing opinion without rebriefing or further argument.

The court was asked whether the trial court abused its discretion by denying the appellants'' request for a temporary injunction or erred by granting the plea of jurisdiction filed by the church and the town in the context of appellants'' suit for declaratory judgment, injunctive relief, civil-rights violations, and nuisance injuries arising from the town's facilitation of and the church's

activities at its current and future rodeo arenas. The court did a de novo review and reviewed appellant's claims against the town and the church separately.

The court reviewed appellant's four claims against the town: (1) Uniform Declaratory Judgment Act; (2) 42 U.S.C.A. § 1983; (3) private-nuisance injuries; and (4) permanent injunctive relief. The court determined that the trial court did not err by dismissing the majority of the appellants' UDJA request because the appellants challenged the town's actions contrary to its ordinances instead of the validity of the ordinance. In doing this, the town's governmental immunity was not waived under the UDJA. Also, the appellants argued that the town implicitly waived its own immunity under the UDJA by implicitly waiving it by ordinance. The court stated that governmental immunity was not waived because the ordinance did not constitute a clear and unambiguous waiver of the town's immunity. However, the appellants' argument concerning violation of the Open Meetings Act (OMA) did have a limited waiver of immunity and conferred subject-matter jurisdiction on the trial court. Therefore, the trial court did err by granting the town's plea to the jurisdiction regarding declaratory requests based on the violation of the OMA, on the violations of the town's ordinance enacted under the OMA and dismissing the appellants' attorneys-fee claims arising from their OMA-based, UDJA claim. Also, the court's review of the UDJA claims concerning the clear and unambiguous waiver of governmental immunity applied to the appellants' private-nuisance injuries claim. The court found that appellants did not affirmatively demonstrate that the trial court had jurisdiction over this claim and, therefore, the trial court did not err by granting the town's plea directed to the private-nuisance injuries claim.

Under the Section 1983 claim, appellants' claimed the town violated their civil rights by failing to ensure appellants' due-process rights were protected, committed a taking of property without just compensation, and engaged in impermissible spot zoning. Appellants had the burden to present jurisdictional facts to sufficiently establish that their taking claims were viable in order for the town's governmental immunity to be waived. However, a governmental unit's refusal or failure to enforce its own regulations or ordinances is not considered a viable takings claim. The appellants challenged the manner in which the town enforced its ordinance, instead of failure to enforce its ordinance. Therefore, the Appellants failed to allege a viable takings claim that would waive the town's immunity and the trial court did not err by granting the town's plea on this argument and the dismissal of attorney-fee claims.

The court determined that the appellants' also failed to affirmatively demonstrate the trial court's jurisdiction to their permanent injunctive relief claim when it dealt with the town's alleged violations of or failures to enforce its zoning ordinance. The waiver of governmental immunity for this claim is based on allegations of the governmental officials violating the law or exceeding their powers, not failure to enforce their ordinance. However, the appellants' permanent injunctive claims when it came to the alleged violation of the OMA did statutorily waive the town's governmental immunity since the town did not follow its notice provisions in its zoning ordinance.

Also, the town's argument that the Religious Land Use and Institutionalized Persons Act (RLUIPA) mandated that it allow construction and operation of the arena and divested the trial court of jurisdiction over the appellants' remaining claims was not effective because RLUIPA is not equivalent to governmental immunity. The court stated that the RLUIPA was not

appropriately raised in a plea to the jurisdiction. The RLUIPA is a defensive tool, not an immunity from governmental activity regarding religious institutions.

Next, the court reviewed the church's arguments concerning standing for the appellants' claims for declaratory and injunctive relief and nuisance injuries. The court determined that the appellants did not have standing concerning their claims of declaratory and injunctive relief because the church was not the entity with the power to enforce the town's zoning ordinances. Only the town was allowed to enforce its zoning ordinance based on the power given to the town by the legislature in Chapter 211 of the Local Government Code. The trial court did not err by granting the church's plea to the jurisdiction concerning these claims.

As for standing in regard to the private nuisance claims, the appellants had to show that the violation of a zoning ordinance would cause them to suffer damages or injury beyond that would be suffered by the general public and that the damages or injuries are concrete and particularized, and actual or imminent. Of the appellants, the court found that only Mr. Schmitz was able to produce evidence of a particularized, imminent injury, while the other appellants were not. Therefore, the trial court erred in in granting the church's plea directed at Mr. Schmitz's claim, but not at the other appellants' private-nuisance claim.

Finally, the court reviewed the appellants' argument that the trial court erred by denying their request for a temporary injunction against the town and the church. To obtain a temporary injunction, the appellants must plead and prove: (1) a viable cause of action; (2) a probable right to the relief sought; and (3) that a probable, imminent, and irreparable injury will occur prior to the final judgment. For the trial court's denial to be considered an error, the trial court would have to abuse its discretion. After reviewing the court record, the court determined that the trial court did not abuse its discretion in denying the temporary injunction since it could not conclude that the trial court clearly abused its discretion.

In conclusion, the court affirmed in part and reversed in part the trial court's order and remanded limited portions of the case to the trial court for further, consistent proceedings.