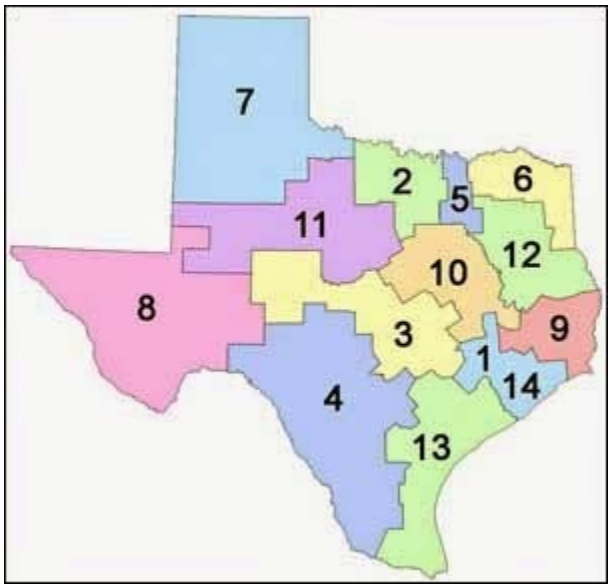

RECENT STATE CASES OF INTEREST TO CITIES

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TML LEGAL DEPARTMENT
Austin, Texas

The Texas Municipal League (TML) Legal Services Department provides legal assistance to TML member cities. The attorneys answer general questions, participate in educational seminars, prepare handbooks, magazine articles, and written materials, including legal opinions and amicus briefs, and provide support services for the Legislative Department. The Staff also assists with trainings and the TCAA newsletter which contains articles and the case summaries presented in this paper.

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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 https://rshlawfirm.com/.

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ELECTIONS

In re Anthony, No. 22-0193, 2022 WL 817826 (Tex. Mar. 18, 2022). Linda Anthony, a retiree, left the occupation box blank in her candidate application for the office of Mayor of West Lake Hills. The city secretary rejected Anthony's application, concluding that, although she is retired, her failure to list an occupation violates the Election Code. Accordingly, the city secretary excluded Anthony from a place on the ballot as a candidate for mayor. Anthony petitioned the Supreme Court for writ of mandamus seeking to direct the city secretary to accept her application and place her on the ballot as a candidate for mayor.

The Supreme Court held that Anthony's application is not defective in failing to list an occupation when she currently has no paid employment and the city secretary had no discretion in rejecting Anthony's application. Therefore, the court granted mandamus directing the city secretary to accept Anthony's application and place her on the ballot as a candidate for mayor.

Hotze v. Turner, No. 14-19-00959-CV, 2021 WL 4738876 (Tex. App.—Houston [14th Dist.] Oct. 12, 2021). This dispute stems from two amendments to the Houston City Charter which prescribed certain limitations on the city's revenue collection, both of which were approved at an election in 2004. In 2014, Hotze sued the city to enforce one of those amendments and declare the other unconstitutional. The trial court granted summary judgment in favor of the city and Hotze appealed. Hotze was challenging a "primacy clause" in one of the propositions which stated, "[i]f another proposition for a Charter amendment relating to limitations on increases in City revenues is approved at the same election at which this proposition is also approved, and if this proposition receives the higher number of favorable votes, then this proposition shall prevail and the other shall not become effective," asserting that this clause violated state law and the Texas Constitution. After analyzing the propositions' language and the city's process of adopting the propositions, the court overruled Hotze's statutory and constitutional challenges and affirmed the trial court's summary judgment order.

EMERGENCY MANAGEMENT

Abbott v. Jenkins, No. 05-21-00733-CV, 2021 WL 5445813 (Tex. App.—Dallas Nov. 22, 2021) (mem. op.). The Dallas County Judge issued a mask mandate in contradiction of Governor Abbott's executive order banning mask mandates (GA-38). A county commissioner sued the county judge for the issuing order and the county judge filed a counterclaim against Abbott in his official capacity over GA-38. The trial court denied Abbott's plea to the jurisdiction and granted an injunction in favor of the county judge. Abbott appealed. The appellate court found that: (1) the county judge alleged sufficient facts that Abbott's ban constraining the county judge's power to enforce a face-covering requirement within the county, enacted through GA-38, was an ultra vires action; (2) the county judge has standing to sue Abbott; (3) the provision of section 22.002 of the Government Code regarding original jurisdiction in the Texas Supreme Court did not apply to the suit against Abbott; and (4) the trial court did not err when it granted the county judge's temporary injunction.

Abbott v. City of San Antonio et al., No. 04-21-00342-CV, 2021 WL 5217636 (Tex. App. —San Antonio Nov. 10, 2021) (mem. op.). This is an interlocutory appeal in which the court of appeals upheld the trial court's order granting a temporary injunction.

In August 2021, the City of San Antonio and Bexar County filed a declaratory judgment suit against Governor Abbott, in his official capacity, alleging that by adopting certain portions of Executive Order GA-38, he acted ultra vires and outside the scope of the Texas Disaster Act (Chapter 418 of the Government Code), and alternatively, the Act violates the Texas Constitution. The suit also included an application for a temporary injunction. The trial court, after an evidentiary hearing, granted the temporary injunction, enjoining enforcement of portions of GA-38 that prohibit local governmental entities from requiring individuals to wear face coverings and setting the case for trial on its merits on December 13, 2021. The Governor filed an interlocutory appeal challenging the temporary injunction.

The court of appeals held that: (1) Section 418.016(a) does not provide the Governor with the authority to suspend statutes that concern local control over public health matters or to prohibit local restrictions on face coverings; and (2) the city and county have alleged sufficient facts that, if taken as true, would confer standing for their claim that the Governor acted *ultra vires*.

In re Paris Indep. Sch. Dist. et al., No. 06-21-00103-CV, 2021 WL 5140152 (Tex. App.—Texarkana Nov. 5, 2021) (mem. op.). Governor Abbott issued Executive Order GA-38, which stated, "[n]o governmental entity, including a county, city, school district, and public health authority, and no governmental official may require any person to wear a face covering . . . ." After the Executive Order was issued, the Paris Independent School District (PISD) issued a mask mandate and the state of Texas sued the school district. The trial court granted the state's temporary restraining order and temporary injunction. PISD filed a writ of mandamus. The appellate court denied the writ of mandamus because PISD could appeal the temporary injunction, which means it had an adequate remedy by appeal and had not established it was entitled to the extraordinary relief of mandamus.

Brown v. Daniels, No. 05-20-00579-CV, 2021 WL 1997060 (Tex. App.—Dallas May 19, 2021) (mem. op.). Persons detained in the Dallas County jail sued the Dallas County sheriff in her official capacity for her handling of the COVID-19 pandemic within the jail. The sheriff filed a plea to the jurisdiction on the grounds that she was immune from suit: (1) for her actions in managing the COVID-19 crisis at the jail; (2) from plaintiffs' claims that she denied their rights under the Texas Constitution; and (3) from plaintiff's claims under the Texas Tort Claims Act (TTCA). The trial court denied her plea to the jurisdiction and the sheriff appealed. The appellate court reversed the trial court's denial and rendered judgment in favor of the sheriff because the plaintiffs' pleadings affirmatively negated jurisdiction, finding: (1) the plaintiffs' claims under the Texas Constitution were facially invalid and failed as a matter of law; (2) the plaintiffs had not provided a statute to support their claims that the sheriff acted ultra vires; and (3) the TTCA does not provide for injunctive relief.

EMPLOYMENT

City of Dallas v. Ahrens, et. al., No. 10-19-00137-CV, 2022 WL 554350 (Tex. App.—Waco Feb. 23, 2022) (mem. op.). At the time this case was filed, Katrina Ahrens was a detective with the Dallas Police Department. Her husband had also been a Dallas police officer before he and four other officers were tragically killed on July 7, 2016 by a sniper while on duty. After this incident, members of the public donated money to a non-profit entity operated by the Dallas Police Association for the benefit of the families of the officers who were killed. After not receiving any benefits from the donations, Katarina reported violations of law related to the handling of the donations by her employer to an appropriate law-enforcement authority. Katrina contends that as a result of her reports of misconduct she suffered adverse personnel actions that would not have occurred otherwise. She sued the City of Dallas for retaliation under the Texas Whistleblower Act, and the city responded by filing a motion to dismiss this claim under the Texas Citizens Participation Act ("TCPA"). After a hearing, the trial court denied the city's TCPA motion to dismiss, and the city appealed. The TCPA protects persons who associate, petition, and speak on matters of public concern from legal actions that seek to intimidate or silence them. It establishes a multi-step process for the expedited dismissal of legal actions that are based on or related to a party's exercise of the rights of free speech, petition, or association. The Whistleblower Act prohibits a government employer from taking an adverse personnel action against a public employee who in good faith reports a violation of law to an appropriate law-enforcement authority. However, the Whistleblower Act does not afford unlimited protection from adverse personnel actions based on legitimate reasons. After reviewing the record, the appellate court concluded that Katrina made a prima-facie showing that the alleged retaliation caused her various employment-related injuries. Additionally, the appellate court determined that it could not say that the city conclusively proved that Katrina's report did not play a role in the decision to take adverse personnel actions against her at the time that it took that action. Accordingly, the appellate court concluded that the trial court did not err when it denied the city's TCPA motion to dismiss and overruled the city's remaining issues.

Edinburg Consol. Indep. Sch. Dist. v. Ayala, No. 13-20-00570-CV, 2021 WL 5828945 (Tex. App.—Corpus Christi-Edinburgh Dec. 9, 2021) (mem. op.). Beginning in 2007, Ayala drove a bus for the Edinburg Consolidated Independent School District (ECISD) until he was injured in a collision. After recovering, he returned to work as a dispatcher and was ultimately terminated in September 2015. Three years later, he applied for employment again with the ECISD. When the District failed to respond to his application, he filed suit alleging a claim for failure to hire based on age, disability, national origin and retaliation. The ECISD filed a plea to the jurisdiction arguing that Ayala's filings did not allege facts sufficient to waive ECISD's governmental immunity. The trial court denied the plea, and ECISD appealed.

The Texas Commission on Human Rights Act waives immunity from suit for governmental units for unlawful employment practices. To overcome the government's immunity, (1) the plaintiff must first allege facts sufficient to create a presumption of illegal discrimination; (2) the defendant may then rebut that presumption by producing evidence of legitimate, non-discriminatory reasons for the employment actions; and (3) the plaintiff must then overcome the rebuttal evidence by producing evidence that the defendant's stated reason is a mere pretext. In this case, Ayala's pleadings were sufficient to establish a prima facie case of discrimination,

which ECISD's rebuttals could not overcome; therefore, the appellate court affirmed the trial court's order.

O'Neill v. City of Fort Worth, No. 02-21-00214-CV, 2022 WL 325386 (Tex. App.—Fort Worth Feb. 3, 2022) (mem. op.). This is a civil service case where the court of appeals affirmed the trial court's ability to order a substituted hearing examiner in an appeal from an indefinite suspension.

O'Neill was a firefighter for the city and was indefinitely suspended after being involved in a physical altercation with a citizen at a TCU football scrimmage. He appealed to a hearing examiner who found for O'Neill. An appeal resulted to the court of appeals, which remanded the issue to decide if the hearing examiner improperly considered outside evidence. On remand, the court held the hearing examiner violated the Civil Service Act (Act) by considering evidence that was not presented in the final hearing. The trial court vacated the examiner's decision and ordered a rehearing. When the city recognized that the same hearing examiner was set to preside over the rehearing, the city objected and filed a plea to the jurisdiction, which the hearing examiner denied. The city then filed suit (that resulted in the present appeal) under the Uniform Declaratory Judgments Act (UDJA) to hold that the same hearing examiner could not preside over the rehearing. The trial court held a trial on the merits under the UDJA claims and found the hearing examiner had exhibited bias, was no longer independent and ruled for the city. O'Neill appealed.

O'Neill argued the city's declaratory-judgment lawsuit was barred by res judicata or collateral estoppel. The main issue presented to the trial court was whether the same hearing examiner could preside over the rehearing regarding O'Neill's appeal of his indefinite suspension. The court noted that the Texas Supreme Court has looked to the Texas Arbitration Act (TAA) in prior opinions to fill in the gaps when the Act is silent. Turning to the TAA concerning the issue here, it has a specific section dedicated to rehearings after an arbitration award is vacated. The Act states in multiple locations that a hearing examiner must be independent and therefore neutral. When a hearing examiner is found to have developed bias against one party, they are not independent. To allow a biased hearing examiner to preside over the rehearing merely because the Act is completely silent regarding rehearings is against the purpose of the Act. The trial court, following the Texas Supreme Court's example for crafting remedies when the Act provides none, is permitted to look to the TAA for guidance. As a result, the trial court's order was affirmed.

Gomez v. City of Austin, No. 08-19-00250-CV, 2021 WL 2134335 (Tex. App.—El Paso May 26, 2021). Gomez sued the City of Austin for employment discrimination following his termination. During jury selection, the city used a peremptory strike on a prospective juror who was Hispanic. Gomez made a Batson challenge, arguing that the city had struck the juror on racial grounds. The trial court denied the challenge, and Gomez appealed.

Employing the Batson framework, the court concluded that Gomez had raised an inference of discrimination and that the city had provided a race-neutral explanation for its use of the strike. The court thus examined whether the totality of the circumstances suggested that the city had purposefully discriminated. It considered five factors: (1) statistical data about the city's use of peremptory strikes; (2) comparative juror analysis; (3) use of the jury shuffle; (4) quantity and quality of questions posed to minority panel members; and (5) the city's history of striking

minority jurors. All but one of these considerations weighed in favor of the city. The court upheld the trial court's overruling of the Batson challenge.

Texas Tech Univ. Health Sciences Ctr. v. Niehay, No. 08-19-00201-CV, 2022 WL 289505 (Tex. App.—El Paso Jan. 31, 2022). This is an interlocutory appeal challenging the trial court's denial of a combined plea to the jurisdiction and motion for summary judgment, seeking dismissal of a lawsuit by Dr. Niehay in which she alleged that she was wrongfully terminated from an emergency medicine residency program because of a perceived impairment, which she identified as morbid obesity.

The appellate court affirmed the trial court's ruling, finding that in a "regarded as" claim, morbid obesity can be considered an impairment under the Texas Commission on Human Rights Act (TCHRA) without evidence of an underlying physiological cause. However, the court limited its holding to morbidly obese workers who can perform their normal job duties without accommodation but are wrongly perceived as being impaired. Dr. Niehay was therefore only required to establish that Texas Tech viewed her as being impaired from her morbid obesity—regardless of the cause—and that Texas Tech terminated her as a result. The court found direct evidence of Texas Tech's discriminatory intent, and concluded that Dr. Niehay met her burden of raising a question of fact on the issue of whether Texas Tech violated the TCHRA in its termination decision.

City of Beaumont v. Mathews, No. 09-20-00053-CV, 2022 WL 318586 (Tex. App.—Beaumont Feb. 3, 2022) (mem. op.). This is a civil service/collective bargaining/arbitrator appeal where the Beaumont Court of Appeals reversed the trial court's order and reinstated the arbitrator's award.

Firefighter Mathews was discharged from the City of Beaumont Fire Department after a formal investigation into a rear-end collision involving Mathews. Driver Freeman apparently rear-ended the vehicle driven by Mathews, causing Mathews to exit his vehicle and strike Freeman one or more times. The incident occurred while Mathews was off-duty, but the department's rules and regulations apply certain standards of conduct regardless of duty status. The arbitrator admitted a statement from Freeman asserting such, which was corroborated by other evidence. Mathews appealed the termination to an arbitrator, who ultimately ruled in favor of the city, confirming Mathews's termination. Mathews appealed to the district court, which reversed the arbitrator's award, holding the arbitrator lacked jurisdiction and exceeded his jurisdiction. The city appealed.

Mathews argued the notice of dismissal Chief Huff gave him failed to advise him he had the right under the Civil Service Act (Act) to appeal before either the civil service commission (Commission) or a neutral arbitrator. The question then is whether the lack of that information is jurisdictional when the record shows the firefighter was aware of the options that were available to him under the Act. While Chief Huff's notice does not contain clear and unambiguous language regarding the options it did notify Mathews that he should look to the collective bargaining agreement to decide how to proceed.

The record conclusively proves that Mathews decided after seeking advice from his union that it was in his best interest to demand his appeal be heard by a neutral arbitrator rather than going before a Commission. As a result, the arbitrator's jurisdiction was properly triggered. Next,

Mathews argued the arbitrator improperly considered evidence submitted through the pretrial motion procedure instead of exclusively at the evidentiary hearing. The district court held the arbitrator could not consider pretrial evidence or motions. However, the Act allows the parties to file pretrial motions and expressly states it is not a violation of the Act as long as copies of the filings are served on the opposing party. Thus, the city did nothing wrong by filing a pretrial motion since the certificate of service states the city served the motion on Mathews's legal representative and Mathews never raised a lack of service. In turn, the arbitrator did not violate the Act by conducting a hearing on the city's motion. Next, the court held that the record does not demonstrate the arbitrator considered evidence that was not admitted during the evidentiary hearing. As factfinders, neutral arbitrators are the sole judges of the admissibility of the evidence and the weight and credibility to be given the evidence admitted during a final hearing.

Comparing the arbitrator's findings of fact and conclusions with the evidence presented during the hearing, the court determined the arbitrator relied upon the evidence admitted at the final hearing. The district court conducted a factual and legal sufficiency review of the evidence, but that is not authorized by the Act. District court's appellate review of arbitrator decisions are restricted to jurisdictional grounds and claims the award was procured by fraud, collusion, or through the use of other unlawful means. As a matter of law, the record presented does not allow the district court to reverse the arbitrator's decision. The district court's order and final judgment deprived the city of the statutory benefit of an efficient and speedy resolution through the Act. As a result, the district court's order was reversed and the arbitrator's decision was reinstated.

San Benito Consol. ISD v. Leal, No. 13-20-00569-CV, 2022 WL 243725 (Tex. App.—Corpus Christi Jan. 27, 2022) (mem. op.). Ms. Leal was working as a middle school assistant principal in San Benito Consolidated ISD (the "District") until she was transferred to an instructional facility position at an elementary school. On May 9, 2017, Leal filed a formal charge of discrimination with both the Texas Workforce Commission (TWC) and United States Equal Employment Opportunity Commission (EEOC) and ultimately filed suit against the District on January 30, 2018, alleging, among other things, various forms of discrimination and retaliation under the labor code and violations under the Texas Constitution. The District filed a plea to the jurisdiction, which was denied by the trial court, and the District appealed contending that Leal failed to exhaust her administrative remedies under the Texas Commission on Human Rights Act (TCHRA) and that she failed to make viable constitutional claims.

The TCHRA prohibits employers from discriminating or retaliating against protected employees who engage in protected activities. An employee engages in a protected activity by, among other things, opposing a discriminatory practice, making a charge of discrimination with the EEOC or TWC, or participating in an investigation by the EEOC or TWC. To exhaust administrative remedies, a person must, among other requirements, file a charge of discrimination with the TWC not later than the 180th day after the date the alleged unlawful employment practice occurred. Each discrete discriminatory act starts a new 180-day clock for filing charges. There is an exception to the 180-day deadline, known as the "continuing violation doctrine," which generally applies to unlawful employment practices that cannot be said to occur on any particular day. Leal failed to establish a continuing violation, so most of her discrimination claims were dismissed as untimely.

With regard to her constitutional claims, when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. To make a facially valid claim that her right to free speech was violated, Ms. Leal needed to plead and allege facts which show that: (1) she spoke out publicly on a matter of public concern; (2) her interest in speaking on such matters outweighed the District's interest as an employer; (3) she suffered an adverse employment decision; (4) her speech motivated the adverse employment decision. Because she never spoke out publicly, the court concluded that she failed to state a facially valid claim of free speech retaliation. Finally, Ms. Leal alleged the District violated her constitutional rights to due process when they failed to promote her, but because she had no vested property interest in a work promotion—only a mere expectation—the District had not deprived her of property without due process of law. Ultimately the court affirmed the trial court's decision in part, reversed it in part and remanded the case for further proceedings.

City of Houston v. Cortez, No. 14-20-00565-CV, 2022 WL 364041 (Tex. App.—Houston [14th Dist.] Feb. 8, 2022). The City of Houston's Fire Chief terminated firefighter Pete Cortez after Cortez failed a drug test. Cortez appealed to the Firefighters' and Police Officers' Civil Service Commission for the City of Houston ("the Commission"), and the Commission upheld the termination. Cortez then appealed the Commission's ruling to district court, which: (1) granted a motion for summary judgment filed by Cortez; (2) denied the city's and the Commission's motions for summary judgment; (3) reversed the Commission's decision; and (4) reinstated Mr. Cortez. The city and the Commission appealed.

The dispositive issue before the appellate court was whether the Commission upheld an arbitrary act by the city which "tainted" the Commission's decision "by illegality." An arbitrary act is one that is taken capriciously or at pleasure, and not according to reason or principle. Under the city's civil service executive order, Cortez had a right to retest his hair sample with an independent lab after the positive drug test was returned, and the city had the obligation to inform Cortez of this retest right. The city's effective choice to observe some applicable civil service rules but not others falls squarely within the common understanding of the term "arbitrary," and the court held that the city's failure to fully perform all conditions precedent to removal was either clear abuse by the city or constituted an arbitrary or capricious act. Ultimately, the city's and Commission's decision to terminate Cortez were "tainted by illegality," and the appellate court affirmed the trial court's reversal of the termination.

City of Amarillo v. Nurek, No. 07-20-00315-CV, 2021 WL 5395986 (Tex. App.—Amarillo Nov. 18, 2021). The plaintiff sued the city, city manager, mayor, city council, and members of the city civil service commission seeking: (1) a declaration that the employment positions within the fire marshal's office (FMO) should be classified as civil service positions; and (2) injunctive relief classifying the FMO positions as civil service and affording the plaintiffs the rank they would have been entitled to had the positions been classified as civil service positions. After a bench trial, the trial court: (1) found the plaintiff's position in the FMO was a civil service position; (2) denied the plaintiff relief because it found that the city's firefighters association was the real party in interest;

and (3) found the city classified the plaintiff as a non-civil service employee in good faith. Both the city and plaintiff appealed.

The appellate court: (1) overruled the city's challenges to the trial court's findings; (2) found that the trial court erred when it imputed the actions of the city's firefighters association to the plaintiff based on its conclusion that the association is a real party in interest in this case; and (3) found that the trial court did not have sufficient evidence to support its finding that the city acted in good faith in reclassifying the plaintiff's position to non-civil service. The appellate court remanded the case to the trial court to consider the injunctive relief and attorney's fees claims in light of its order.

Emps.' Ret. Fund of City of Dallas v. City of Dallas, No. 05-20-00494-CV, 2021 WL 5027759 (Tex. App.—Dallas Oct. 29, 2021). The city adopted an ordinance imposing term limits on the retirement fund's (Fund) board members and the board members filed a lawsuit. Both parties filed cross-motions for summary judgment and the trial court granted the city's motion. The Texas Trust Code governs the Fund and the Fund's trust document requires any amendment, including to the board of directors, to be approved in an ordinance approved by the board, adopted by the city council, and approved by a majority of the voters at a general or special election. Because the city failed to comply with the trust document and imposed new requirements on the Fund board members, the appellate court reversed the trial court's judgment in favor of the city, rendered judgment in favor of the Fund, declared the ordinance establishing term limits void and unenforceable, and remanded the case to the trial court to consider the issue of attorney's fees.

City of San Antonio v. San Antonio Park Police Officers Assoc., No. 04-20-00213-CV, 2021 WL 2942531 (Tex. App.—San Antonio July 14, 2021) (mem. op.). This is a civil service/collective bargaining suit where the San Antonio Park Police Officers Association (SAPPOA) sought declaratory relief for three distinct issues related to the legal classification of the city's park and airport police officers: (1) that San Antonio's park and airport police officers are "police officers" entitled to collectively bargain with the city and can receive both current and future benefits of the collective bargaining agreements entered into between the city and the San Antonio Police Officers Association (SAPOA) under chapter 174 of the Texas Local Government Code (Chapter 174); (2) that park and airport police officers are "police officers" entitled to collectively bargain with the city and can receive both current and future benefits of the collective bargaining agreements entered into between the city and SAPOA under chapter 143 of the Texas Local Government Code (Chapter 143); and (3) that the city manager is acting ultra vires by denying park and airport police officers the opportunity to collectively bargain. The city and the city manager filed a plea to the jurisdiction. The trial court denied the plea, and the city and city manager filed an interlocutory appeal, asserting that SAPPOA had not established a waiver of immunity through the Uniform Declaratory Judgments Act (UDJA) or Chapters 143 or 174.

The court determined that section 174.023 provides a limited waiver of immunity. Because SAPPOA clearly alleged a violation of their right to collective bargaining under Chapter 174, these factual allegations were sufficient to establish the subject matter jurisdiction of the court. However, SAPPOA did not allege or argue that Chapter 143 provides for a waiver of immunity for their declaratory judgment claim. As a result, the court determined that SAPPOA did not request a declaration concerning the validity of Chapter 143, but instead sought a declaration as to

the park and airport police officers' rights under this chapter. Thus, the court held that the UDJA does not waive the city's immunity with respect to their declaratory claim pursuant to Chapter 143. Finally, the court held that SAPPOA alleged sufficient facts that, if taken as true, would confer standing for their ultra vires claims. Accordingly, the appellate court affirmed in part and reversed in part the city's plea to the jurisdiction.

City of Fort Worth v. Birchett, No. 05-20-00265-CV, 2021 WL 3234349 (Tex. App.—Dallas July 29, 2021) (mem. op.). The plaintiff brought a whistleblower action against the city, claiming that he was terminated less than 90 days after he made good faith reports of the city's violation of law to the appropriate law enforcement authorities. The city argued that the plaintiff: (1) did not make good-faith reports of a violation of law to an appropriate law enforcement authority; (2) was terminated for performance shortcomings, not reporting violations of law; and (3) after his termination, failed to properly initiate the city's whistleblower grievance procedure. The trial court denied the city's plea to the jurisdiction.

In affirming the denial of the plea to the jurisdiction, the appellate court found: (1) there was a question of fact as to whether the plaintiff made a good faith report of the city's violation of law to law enforcement, including that the police chief's memo said the city's violations could result in "serious administrative and criminal sanctions;" (2) the city's argument that the decision maker didn't know about the plaintiff's reports was unpersuasive because the city presented no evidence to support that assertion; and (3) the plaintiff had satisfied the grievance procedure by sending a letter through his counsel.

Limas v. City of Dallas, No. 05-19-01223-CV, 2021 WL 3197334 (Tex. App.—Dallas July 28, 2021) (mem. op.). After the city terminated her for having several conflicts with coworkers in a new department in violation of city personnel rules, the plaintiff sued the city claiming race discrimination, retaliation, hostile work environment, and harassment. The trial court granted the city's plea, dismissing all of the plaintiff's claims. The appellate court affirmed the trial court's judgment and found that: (1) the plaintiff failed to demonstrate a material fact issue regarding disparate treatment because the comparator she put forth was distinguishable; (2) the plaintiff's complaints regarding her conflicts with coworkers were not protected activity under the Texas Commission on Human Rights Act; and (3) the plaintiff failed to demonstrate that she was subject to harassment based on her race.

Houston Prof'l Fire Fighters Ass'n v. Houston Police Officers Union, No. 14-19-00427-CV, 2021 WL 3206056 (Tex. App.—Houston [14th Dist.] July 29, 2021). In 2003, the City of Houston adopted collective bargaining under the Fire and Police Employee Relations Act (FPERA) to govern fire fighter and police officer compensation and other conditions of employment. Fifteen years later, the city charter was amended to provide pay parity between Houston police officers and fire fighters (Pay Parity Amendment). The Houston Police Officers Union (HPOU) filed suit for declaratory judgment on whether the Pay Parity Amendment was preempted by FPERA. Entry of the state into a field of legislation does not automatically preempt city regulation, and for a statute to preempt a home rule charter or ordinance, the preemption must be stated with "unmistakable clarity." Competing state and local regulations will be given as much effect as possible while avoiding inconsistency. After a long and detailed discussion of preemption

jurisprudence in Texas, the appellate court held that the Pay Parity Amendment was not preempted by FPERA.

Van Deelen v. Texas Workforce Comm'n, No. 14-18-00489-CV, 2021 WL 245483 (Tex. App.—Houston (14th Dist.) Jan. 26, 2021) (mem. op.): Van Deelen was denied unemployment benefits by the Texas Workforce Commission (TWC) upon a finding that he was fired from his employer, Spring Independent School District (Spring ISD) for misconduct. He appealed the decision to the district court. TWC and Spring ISD filed a joint motion for summary judgement, which the trial court granted, finding that there was substantial evidence to support TWC's decision. Van Deelen appealed. The Court of Appeals concluded that substantial evidence supports TWC's determination that Van Deelen was terminated for misconduct. The decision of the trial court is affirmed.

Metropolitan Transit Auth. of Harris Cty. v. Carter, No. 14-19-00422-CV, 2021 WL 126687 (Tex. App.—Houston [14th Dist.] Jan. 14, 2021) (mem. op.): Carter was working as a bus operator when he was administratively terminated for alleged "medical restrictions prohibiting him from performing the essential duties of a bus operator." In its termination letter, Metro did not identify any specific restrictions or essential job functions that Carter could not perform, instead, informing him, that he must be qualified to perform the prospective job requirements and be physically capable of performing the essential functions for an extended period of time. Carter filed suit, alleging disability and age discrimination and retaliation. Metro filed a plea to the jurisdiction, and an amended plea to the jurisdiction arguing that the trial court lacked jurisdiction because Carter had failed to demonstrate Metro's governmental immunity had been waived. At the oral hearing on Metro's plea, Carter non-suited his age discrimination claim. The trial court denied Metro's plea, and Metro filed an interlocutory appeal. The Court of Appeals affirmed the trial court's order and remanded the case for further proceedings, finding that Carter's claims were not time barred, that there was a fact issue as to whether Carter was qualified for the position of bus operator, and that there was at least a fact issue on Carter's retaliation cause.

Goodlett v. NE. Indep. Sch. Dist., No. 04-20-00203-CV, 2021 WL 2117927 (Tex. App.—San Antonio May 26, 2021) (mem. op.). Goodlett was a custodian at Northeast Independent School District (Northeast). He was autistic and had a limited ability to navigate social situations as a result of his disability, but performed capably in his job. After completing a task, one of his coworkers challenged him and several other employees to a race. While running, Goodlett pushed one of his coworkers from behind, injuring her. During an investigation of the incident, it was discovered that Goodlett had previously made two threatening remarks. He was terminated from his employment and sued Northeast under Chapter 21 of the Texas Labor Code, alleging employment discrimination based on his disability. Northeast filed a plea to the jurisdiction, arguing that Goodlett had failed to present a prima facie case of discrimination. The trial court granted the plea to the jurisdiction.

The court affirmed. In order to establish a prima facie case of discrimination, Goodlett had to show that he was treated less favorably than other similarly situated employees who were not members of the protected class under nearly identical circumstances. This required that Goodlett identify a comparator employee who was not terminated under nearly identical circumstances.

Goodlett attempted to do so by alleging that the other employees who participated in the horseplay leading up to the pushing incident had not been disciplined, but the court held that these employees were not similarly situated because they had not pushed a coworker or made threats. As such, Goodlett failed to establish a prima facie case. The court also found that Goodlett had not established a prima facie case for a failure-to-accommodate claim because he had never requested any accommodation.

GOVERNMENTAL IMMUNITY-CONTRACTS

City of Crawford v. DCDH Dev., LLC, No. 13-20-00281-CV, 2022 WL 868056 (Tex. App.—Corpus Christi Mar. 24, 2022) (mem. op.). In 2018, DCDH Development, LLC ("Developer") and the City of Crawford purportedly entered into a "City of Crawford Developer Agreement" ("Agreement") which addressed numerous aspects of the development of the Developer's property, including annexation, subdivision, and the provision of water services. By late 2019, it became clear that the city did not have sufficient water to serve the development, which essentially ended the project. Developer sued the city for breach of the Agreement, promissory estoppel, and several torts. The city filed a plea to the jurisdiction arguing that it was immune from suit, which the trial court denied. The city appealed. The appellate court analyzed the Agreement, focusing on the nature of the agreement rather than the nature of the alleged breaches, and found it to be an agreement for waterworks and the provision of water services, which are governmental functions under the Texas Tort Claims Act. Governmental immunity protects cities from suit or liability when they are acting in their governmental capacity, unless there is an express waiver of immunity. Developer argued that the Agreement was an agreement for goods or services; therefore, immunity was waived pursuant to Section 217,152 of the Texas Local Government Code. The appellate court disagreed with Developer's waiver argument and reversed the trial court's dismissal of the city's plea.

Hunnicutt v. City of Webster, No. 14-20-00222-CV, 2022 WL 481795 (Tex. App.—Houston [14th Dist.] Feb. 17, 2022). Mary Hunnicutt and Clifford Jackson were siblings who co-owned a 23.5-acre tract of land that fronted Interstate Highway 45 in the City of Webster. After Hunnicutt conveyed 4.41 acres of the property to the city for development, Hunnicutt and Jackson filed suit against the city and its Director of Economic Development, Betsy Giusto, seeking declaratory relief voiding Hunnicutt's conveyance of the 4.41 acres, bringing an action for rescission, and asserting an ultra-vires claim against Giusto. The pleadings alleged that Giusto came to Hunnicutt's home and made false promises and representations to Hunnicutt to induce Hunnicutt to convey her interest in the property. The city filed a plea to the jurisdiction on all of appellants' claims, which was granted by the trial court. Hunnicutt and Jackson appealed. With regard to Jackson's claims, because he never conveyed his interest in the property, he suffered no damage and therefore had no standing to bring or maintain the claims. Consequently, the appellate court affirmed their dismissal. Because Hunnicutt could articulate alleged damage, she had standing to bring her claims but the court ultimately dismissed them on other grounds. Cities are immune from suit except where the legislature has specifically waived the immunity. Hunnicutt could not articulate a waiver for her claims for declaratory relief to determine title of the 4.41 acres previously conveyed to the city, so the claims were barred by governmental immunity. In

addition to claims against the city, Hunnicutt was making claims against Guisto, arguing that she acted without legal authority. On the contrary, Guisto had the legal authority to meet with Hunnicutt regarding development plans for the area and the conveyance of the property, thus negating the ultra vires arguments. The court affirmed the trial court's order dismissing Hunnicutt's and Jackson's claims.

City of San Antonio By and Through the San Antonio Water Sys. v. Campbellton Rd., Ltd., No. 04-20-00569-CV, 2022 WL 219005 (Tex. App.—San Antonio Jan. 26, 2022). This is an interlocutory appeal from the trial court's order denying the plea to the jurisdiction and motion to dismiss for lack of jurisdiction filed by the City of San Antonio by and through the San Antonio Water System (SAWS) in a breach of contract case.

In the contract at issue, Campbellton, a private land developer, sought sewer service from SAWS to accommodate its plan to develop two residential subdivisions. The ten-year contract contained provisions regarding Campbellton's installation and conveyance of certain on-site and off-site facilities to SAWS for the purpose of increasing the capacity of the available sewer service so that Campbellton's two developments could obtain sewer services. The contract was subject to Campbellton satisfying conditions enumerated in the contract. Campbellton alleged that SAWS had attempted to avoid liability under the contract "by passing a 'rule'" that stated any wastewater commitments for which SAWS had previously issued but did not specify an "end date" or "termination date" would automatically terminate fifteen years "from the date made." Campbellton sought specific performance, requesting the trial court order SAWS to "specifically perform its obligations and promises under the contract and supply it with the wastewater capacity which it contracted to provide." Campbellton further sought monetary damages pursuant to section 271.153 of the Texas Local Government Code. In addition to its breach of contract claim, Campbellton sought a declaratory judgment that "the purported 'rule' passed by SAWS which attempts to terminate the contractual obligations of SAWS to Campbellton does not apply to the agreement between Campbellton and SAWS." Campbellton further sought costs and attorney's fees.

The appellate court reversed the trial court's order, finding that SAWS's immunity under Chapter 271 of the Local Government Code had not been waived as the contract was not an agreement to provide services to SAWS. Additionally, the court found no waiver of immunity under Chapter 245 of the Local Government Code as it was unclear whether Campbellton had paid all the impact fees required under the contract within ten years from the date of the contract so as to acquire vested rights. The court further remanded to the trial court to determine attorney's fees and costs.

City of Dallas v. Oxley Leasing N. Loop, LLC, No. 05-21-00241-CV, 2021 WL 5275828 (Tex. App.—Dallas Nov. 12, 2021) (mem. op.). The city leased a property near the airport to the plaintiff to carry on a banking business. The lease had several renewal options conditioned on the lessee timely providing the city with written notice of its intent to exercise the option. Whether plaintiff properly exercised the renewal option to extend the lease term beyond the initial term is in dispute; however, after the expiration of the initial term, the plaintiff continued to occupy the property and pay rent. Later, the city sent the plaintiff an eviction letter and the plaintiff sued for breach of contract. The city filed a plea to the jurisdiction and the trial court denied it on the grounds that the city was engaged in a proprietary function when leasing the property. The city appealed. Using the

Wasson II factors, the appellate court determined that the city was engaged in a proprietary function when leasing the property and affirmed the trial court's decision.

Town Park Ctr., LLC v. City of Sealy et al., No.01-19-00768-CV, 2021 WL 4994785 (Tex. App.—Houston [1st Dist.] Oct. 28, 2021). In this contract dispute, Town Park Center and the city executed a Chapter 380 Economic Development Agreement ("EDA") to develop a commercial shopping center on Town Park Center's property. Under the terms of the EDA, Town Park Center agreed to develop and construct the shopping center according to a development plan that the city had approved. The city in turn agreed to pay annual economic development grant payments (based on sales tax collections) as an incentive and sell storm water detention capacity to Town Park Center.

Town Park Center nonsuited two suits prior to this third suit seeking mandamus, declaratory relief, injunctive relief, takings, ultra vires claims and claims under the "vested rights provision" of Local Government Code, Chapter 245. The city filed a plea to the jurisdiction and argued immunity as well as arguments similar to res judicata. The trial court granted the plea and Town Park Center appealed.

The court noted that res judicata is an affirmative defense and could not be raised in a plea to the jurisdiction. The court held the EDA constituted a contract for goods or services which can trigger a waiver of immunity. The EDA included a provision for Town Park Central to build and dedicate a road to the City as part of the development, which constituted a service. Therefore, the trial court erred in granting the plea as to the breach of contract claim. However, as to the Chapter 245 vested rights claim, Town Park Center did not identify any city order, regulation, ordinance, rule, or other requirement in effect when its rights in the project vested that mandates the sale of the detention capacity at issue. With no change in order or rule, Chapter 245 was inapplicable. As to Town Park's takings claim, the court found it failed to establish the city's refusal to allow the purchase of detention capacity deprived them of the beneficial use of the property. As to the ultra vires claims, merely failing to comply with a contract does not give rise to an ultra vires claim. While Town Park Central points to a city resolution allowing for detention capacity purchases, it does not mandate the sale of detention capacity. It instead only provides that the city may sell detention capacity, which is discretionary. As a result, the appellate court held that the ultra vires claims were properly dismissed. In short, the appellate court reversed the dismissal of the breach of contract claim, ultimately affirmed the dismissal of all other claims, and remanded for trial.

City of Del Rio v. Arredondo, No. 04-20-00409-CV, 2021 WL 3376948 (Tex. App.—San Antonio Aug. 4, 2021) (mem. op.). This is a breach of contract suit where the appellate court held that because the city's plea only challenged non-jurisdictional facts, so the plea was properly denied.

The city hired Arredondo as its city manager. The parties entered into an employment agreement (Agreement), which provided that Arredondo served "at the pleasure of the City Council." The city council later voted to terminate the Agreement, and Arredondo then sued the city, alleging that the city council did not obtain a majority vote to terminate his employment, which constituted a breach of contract claim. He also pled an alternative breach of employment contract claim. The city filed a plea to the jurisdiction, which was denied.

Section 271.152 of the Texas Local Government Code waives governmental immunity for the adjudication of certain breach of contract claims. The city asserts that the contract did not alter the employment-at-will doctrine and that the city complied with the contract. The crux of this appeal is whether the facts asserted by the city are "jurisdictional facts." Not all facts relating to the merits are necessarily jurisdictional facts. The court determined that the at-will nature and the city's compliance with the contract, in this situation, were not jurisdictional facts, so the plea was properly denied.

GOVERNMENTAL IMMUNITY-TORT

Von Dohlen, et. al., v City of San Antonio, 20-0725 (Tex. April 1, 2022). This is a declaratory judgment – statutory cause of action case brought against the City of San Antonio ("City") for violating Chapter 2400 of the Texas Government Code. The Texas Supreme Court held the Plaintiffs failed to allege a proper waiver under the statute but remanded for an ability to cure the defect.

The city council for the City of San Antonio declined to allow Chick-fil-A to operate a concession area within the City's airport. The Plaintiffs alleged the action was taken due to councilmember comments opposing the religious views of the company. Specifically, the company has a legacy of anti-LGBTQ behavior. Later, the Legislature passed TEX. GOV'T CODE § 2400.002, which prohibits a city from taking "any adverse action against any person based wholly or partly on the person's membership in, affiliation with, or contribution, donation, or other support provided to a religious organization." Four years later, the Plaintiffs sued the City and asserted it was in violation of this statutory provision. The City challenged jurisdiction asserting the law is not retroactive, and lack of standing due to no distinct injury from the general public. The trial court denied the plea, but the court of appeals reversed and dismissed the claims. Plaintiffs appealed.

When a statute waives immunity, a plaintiff must still plead an actual violation and mere references to the statute are insufficient. Chapter 2400 explicitly waives sovereign and governmental immunity when a person "alleges" a violation of Section 2400.002. However, the petition's alleged facts all occurred prior to the enactment of Chapter 2400 and nothing afterward. While the Plaintiffs allege the City's violation is continuing in nature, they do not allege any facts to support this. Here, Plaintiffs do not plead sufficient facts to "actually allege a violation" of Chapter 2400 because they fail to point to any specific "action" the City took on or after Chapter 2400 was effective. However, this does not mean the City has negated the ability to plead such a claim. Texas law does not favor striking defective pleadings without providing plaintiffs an opportunity to replead. As a result, the case is remanded to allow the ability to replead.

City of San Antonio v. Riojas, No. 20-0293, 2022 WL 495473 (Tex. Feb. 18, 2022). This is a Texas Tort Claims Act case in which the court was asked to determine whether the need-risk balancing analysis applies in use of law enforcement vehicles in routine traffic management.

Officer Tristan was driving his city patrol car when he turned on his emergency lights to warn approaching motorists of a sudden traffic slowdown that he had observed ahead. Riojas who was riding a motorcycle behind Officer Tristan's vehicle swerved to avoid a collision but lost control and fell to the ground and sustained alleged injuries. Riojas sued the city. The San Antonio court of appeals held that the city was not immune, finding that the city failed to satisfy the good-faith prong of the official-immunity test as it was required to show that before activating his emergency lights, Officer Tristan "balanced the need he perceived [to do so] with the potential risk posed by his chosen course of action."

The Supreme Court of Texas reversed the decision of the appellate court holding that that the need-risk balancing analysis applies only in the context of a high-speed chase or other emergency law enforcement response that carries an inherent risk of harm to the public. In a case involving routine traffic management, the court determined that the city need show only that its officer acted in good faith – that is, "a reasonably prudent officer under the same or similar circumstances, could have believed his conduct was justified based on the information he possessed when the conduct occurred."

City of San Antonio v. Maspero, No. 19-1144, 2022 WL 495190 (Tex. Feb. 18, 2022). This Texas Tort Claims Act (TTCA) case required the Supreme Court of Texas to determine the applicable standard when innocent bystanders suffer harm during a police chase.

The Masperos sustained incapacitating injuries and their two young children died when Rodriguez, a suspect who was being pursued in a high-speech chase by Officer Kory, collided with the Masperos' vehicle. The trial court granted the city's plea to the jurisdiction and dismissed the case, finding that: (1) immunity is not waived under Section 101.021 of the TTCA because no nexus exists "between Officer Kory's police car and the tragic incident;" and (2) Section 101.055 of TTCA applies because "there is no fact issue on 'emergency situation' or conscious indifference/reckless disregard."

The court of appeals reversed holding that: (1) because the evidence demonstrates that Officer Kory continued to pursue Rodriguez up until his collision with the Masperos' vehicle, the Masperos had adequately shown that their injuries "arose from" Officer Kory's use of her patrol car under Section 101.021(1)(A); (2) TTCA's emergency exception is inapplicable because the evidence demonstrates that Officer Kory engaged in an unauthorized chase even when she suspected she could not catch Rodriguez; and (3) Officer Kory's violation of San Antonio Police Department procedure established an independent waiver of immunity from the Masperos' claim for negligent implementation of policy.

The Supreme Court reversed, finding that: (1) the emergency exception to waiver of immunity under the TTCA applied to officer's high-speed chase, and (2) no independent ground for waiver of immunity from suit exists beyond the specific waivers set forth in the TTCA.

Leach v. City of Tyler, No. 12-21-00004-CV, 2021 WL 2371417 (Tex. App.—Tyler June 9, 2021) (mem. op.). In trial court, Leondra Leach alleged that an improperly secured board flew from a city truck and struck Leach and the truck Leach was driving. Leach's employer, who owned the vehicle Leach was driving, gave timely notice to the city of the $207.19 claim for

minor damage to the vehicle, but the notice did not include claims related to personal injuries suffered by Leach individually. The city moved for summary judgment based on Leach's failure to comply with the pre-suit notice requirements found in the Texas Tort Claims Act (TTCA), and the trial court granted the motion. Leach appealed. The appellate court determined that the notice given by Leach's employer was inadequate to convey to the city its "perceived peril" due to Leach's potential claim and was therefore inadequate notice under the TTCA. The appellate court affirmed the trial court's ruling.

Roades v. Henderson, No. 13-20-00315-CV, 2022 WL 802983 (Tex. App.—Corpus Christi Mar. 24, 2022). Steven Henderson, Robert Popp, and John Roades were volunteer fire fighters in Wharton County. Returning from a fire in separate vehicles on October 2019, Roades' vehicle struck the vehicle carrying Henderson and Popp, killing Henderson and severely injuring Popp. Popp's and Henderson's estate sued Roades for damages, and Roades filed a motion to dismiss pursuant to the Texas Tort Claims Act ("TTCA"), claiming that: (1) he was an employee of a governmental unit; (2) he was acting in the general scope of employment at the time of the accident; and (3) the claim could have been brought against the fire department. Appellees responded that (1) the fire department was not a governmental unit; (2) Roades was not acting in the scope of employment, because he was on his way home; (3) Roades was a volunteer, not an employee; and (4) the claims could not have been brought against the fire department under the TTCA. After a hearing, the trial court denied Roades' motion to dismiss, and he appealed. The appellate court analyzed whether Roades was a government employee for purposes of the TTCA. Volunteer firefighters, generally, are not employees under the TTCA, because they are not in the paid service of a governmental entity. However, volunteer firefighters are considered an employee under the TTCA while involved in or providing a response involving fire protection or prevention, rescue, or emergency medical or hazardous material response services. Because Roades was driving home at the time of the collision and not providing emergency response, he could not establish that he was an employee of a governmental unit to invoke dismissal of the case.

City of Houston v. Cavazos, No. 14-20-00284-CV, 2022 WL 777327 (Tex. App.—Houston [14th Dist.] Mar. 15, 2022). This case arose from a collision between a vehicle driven by Erika Cavazos ("Cavazos") and a garbage truck driven by City of Houston employee Esteban Espinoza ("Espinoza"). Cavazos sued the city for personal injuries, and the city filed a plea to the jurisdiction, which was denied by the trial court. Unless waived, governmental immunity can protect a city from suit or liability by defeating a trial court's subject matter jurisdiction. The Texas Tort Claims Act ("TTCA") contains a waiver of governmental immunity for personal injury or damages caused by the wrongful act, omission, or negligence of a governmental employee acting within the scope of their employment, if the damage arises from the operation or use of a motor-driven vehicle. At the trial court, the city failed to conclusively prove that Espinoza's operation or use of the garbage truck did not cause Cavazos's alleged injuries, so because there remained a question of fact, the appellate court affirmed the trial court's denial of the city's plea to the jurisdiction.

City of Houston v. Nicolai, No. 01-20-00327-CV, 2022 WL 960650 (Tex. App. Mar. 31, 2022) (mem. op.). The Nicolais sued the City of Houston after their daughter was killed in a crash while

being transported in a police car to a sobering center with her hands handcuffed and no seatbelt on.

The city filed a motion for summary judgment, asserting that it was entitled to governmental immunity because the officer driving the vehicle was entitled to official immunity, and therefore would not be personally liable to the Nicolais, so governmental immunity was not waived by the TTCA. The trial court denied the motion and the city appealed.

The appellate court held that the officer was entitled to official immunity because in driving Caroline Nicolai to the sobering center she was acting within the scope of her authority, performing a discretionary duty, and acting in good faith. Because the officer would have been entitled to official immunity, the TTCA does not waive the city's governmental immunity and the trial court lacked subject matter jurisdiction over the claims. The appellate court reversed and rendered judgment for the city.

Hung v. Davis, No. 01-20-00746-CV, 2022 WL 1008805 (Tex. App. Apr. 5, 2022) (mem. op.). Fabiola Davis sued Hung, a city public safety officer, and the City of Houston when she and her two minor children were injured when Hung's city-owned vehicle struck the vehicle Davis was driving.

The city filed a motion to dismiss Hung under the election-of-remedies provision of the Texas Tort Claims Act, relying on Section 101.106(e), which requires mandatory dismissal of an employee if a suit is filed against a governmental unit and any of its employees. Davis nonsuited the city and amended her pleading against only Hung. Hung filed a motion to dismiss, arguing that the court lacked subject matter jurisdiction over the claim because Section 101.106(e) conferred immunity on an employee who is sued with the governmental unit.

The appellate court reasoned that Hung had a statutory right to dismissal under Section 101.106(e) that accrued upon the filing of the city's motion to dismiss, and that Hung's right to dismissal was an irrevocable consequence of Davis's election to sue both the city and Hung. The appellate court reversed and rendered, dismissing Davis's claims against Hung.

Manley v. Wise, No. 03-21-00120-CV, 2022 WL 548266 (Tex. App.—Austin Feb. 24, 2022) (mem. op.). Wise sued Chief of Police Brian Manley and six other Austin Police Department officers, alleging that they were responsible for injuries he suffered when he got overheated and dehydrated during cadet training. The officers filed a motion to dismiss, arguing that by suing Chief Manley in his official capacity, Wise had effectively sued both the city and its employees so that the officers were entitled to dismissal under the election-of-remedies provision of the Texas Tort Claims Act. The trial court denied the motion with respect to the individually named officers and the officers appealed.

On de novo review, the appellate court reversed and rendered judgment dismissing Wise's claims against the officers. The court did not reach the question of whether dismissal under the election-of-remedies provision was required. Instead, determining that Section 101.106(f) of the Texas Tort Claims Act applied to the case, the court held that the officers were entitled under Section 101.106(f) to a dismissal of the claims against them because: (1) conducting cadet training was

within the scope of the police officers' employment; and (2) Wise's suit could have been brought against the City of Austin.

Okere v. Dallas Area Rapid Transit, No. 05-20-00489-CV, 2022 WL 500026 (Tex. App.—Dallas Feb. 18, 2022) (mem. op.). The plaintiff sued the Dallas Area Rapid Transit (DART) with numerous allegations that DART bus drivers were harassing him with communications by using their vehicles and train bells to communicate. Plaintiff's claims included causes of actions for intentional infliction of emotion distress and public disclosure of private facts. The trial court dismissed the case on DART's motion to dismiss and the plaintiff appealed. The appellate court affirmed, finding that the plaintiff's claims had no basis in law and that the trial court properly granted DART's motion to dismiss.

Rodriguez v. Duvall, No. 14-20-00402-CV, 2022 WL 619710 (Tex. App.—Houston [14th Dist.] Mar. 3, 2022) (mem. op.). Carlos Rodriguez appealed the trial court's dismissal of his claims for assault, false arrest, and invasion of privacy against City of Houston police officer S.A. Duvall under the Texas Torts Claims Act ("TTCA"). Rodriguez was at a New Year's Eve celebration at a hotel in Houston when he was injured by Duvall, who was providing security for the hotel, when Duvall detained and arrested Rodriguez for suspected narcotics violations. Duvall moved to dismiss Rodriguez's claims against him on the grounds that even though Duvall was working as a security guard, he was discharging his duties as a police officer when he arrested Rodriguez. The TTCA includes an election of remedies provision requiring trial courts to grant a motion to dismiss a lawsuit against a governmental employee sued in an official capacity. Under section 101.106(f) of the TTCA, the governmental unit—not the government employee—must be sued for a governmental employee's work-related tortious conduct and essentially prevents an employee from being personally sued for work-related torts. Even though Duvall was working for a private employer (the hotel) at the time of the incident, he immediately became an on-duty police officer when he saw Rodriguez attempting to conceal or destroy marijuana. Because Duvall was sued in his official capacity, he was entitled to be dismissed from the lawsuit against him personally. The appellate court affirmed the trial court's dismissal of the lawsuit.

Harris Cty. Flood Control District v. Halstead, No. 14-20-00457-CV, 2022 WL 678277 (Tex. App.—Houston [14th Dist.] Mar. 8, 2022). Lance Halstead, a chainsaw operator subcontracted to cut trees for the Harris County Flood Control District ("HCFCD"), was injured when a tree he was cutting in HCFCD's right of way fell and struck him. He sued HCFCD for negligence, and HCFCD filed a plea to the jurisdiction, contending that Halstead had not established a waiver of immunity under the Texas Tort Claims Act ("TTCA"). The trial court denied the jurisdictional plea, and HCFCD appealed the order. The TTCA waives governmental units' immunity from suit in three areas when the statutory requirements are met: (1) use of motor-driven vehicles or motor-driven equipment; (2) injuries arising out of a condition or use of tangible personal property; and (3) premises defects. Halstead alleged a premises defect in that the tree created an unsafe property condition. The court dismissed this argument because Halstead's injuries were not created by a defect in property but rather occurred as the result of activities on the property. Additionally, the TTCA creates a waiver of governmental immunity for torts committed by the use of motor-driven equipment, but the person operating the equipment must be a government employee. Being a sub-

contractor, Halstead was not a government employee; therefore, his operation of the chainsaw would not act as a waiver of governmental immunity under the TTCA. The appellate court reversed the trial court's order denying HCFCD's plea to the jurisdiction and rendered judgment dismissing Halstead's claims for lack of subject-matter jurisdiction.

City of Bellaire v. Hennig, No. 01-21-00077-CV, 2022 WL 210138 (Tex. App.—Houston [1st Dist.] Jan. 25, 2022) (mem. op.). Hennig sued the City of Bellaire, alleging that the city's negligent use of motor-driven equipment caused sewage to back up into her house and damage her property. In the lawsuit, she alleged that the city was negligent in its utilization of a rooter that was too short to reach a blockage, in selecting an inadequate access point to clear the blockage, in failing to adequately clear the line, and in failing to sufficiently inspect the line to determine that it was cleared. She also alleged that the city was negligent in failing to train its personnel on these issues.

Hennig filed a plea to the jurisdiction alleging that its immunity from suit was not waived by the Texas Torts Claims Act (Act), and therefore, the trial court lacked subject matter jurisdiction over her suit. Specifically, the city contended that any allegations concerning the use of motor-driven equipment did not invoke the statutory waiver. It further argued that there was no evidence that the city's operation or use of motor-driven equipment caused Hennig's property damage.

The trial court denied the plea to the jurisdiction. The city appealed and argued that the trial court lacked subject matter jurisdiction over Hennig's suit because governmental immunity was not waived under the Act. The appellate court agreed reversing and rendering judgment dismissing Hennig's suit.

Osman v. City of Fort Worth, No. 02-21-00117-CV, 2022 WL 187984 (Tex. App.—Fort Worth Jan. 20, 2022) (mem. op.). This is an interlocutory appeal from trial court orders granting two pleas to the jurisdiction in favor of the City of Fort Worth and the Dallas/Fort Worth International Airport Board (collectively the "Airport Board"). The underlying lawsuit stems from a lady who was struck by a train in a right-of-way owned by the Airport Board after allegedly crossing adjacent property owned by the Airport Board. Osman alleged that the Texas Tort Claims Act (Act) waived the Airport Board's sovereign immunity. However, the Airport Board argued that they were not given the presuit notice required by the Act, thereby depriving the trial court of subject matter jurisdiction. The Airport Board filed pleas to the jurisdiction on this basis, but Osman moved for continuance to allow additional time for discovery. The trial court denied the continuance and granted the Airport Board's pleas.

Osman argued that the trial court's refusal to allow additional discovery was an abuse of discretion and that the trial court erred by granting the Airport Board's pleas because she raised a genuine issue of material fact regarding the Airport Board's actual, presuit notice. The appellate court found that the Osman failed to explain the nature and materiality of the yet-to-be-discovered information she sought. Furthermore, she had failed to produce evidence that raised a fact issue on each of the three required elements of presuit notice. Instead, Osman disputed the legal standard for such presuit notice. The appellate court affirmed, holding that the trial court

did not abuse its discretion by denying the Osman's continuance and did not err by granting the Airport Board's pleas.

City of Fort Worth v. Alvarez, No. 02-20-00408-CV, 2022 WL 405897 (Tex. App.—Fort Worth Feb. 10, 2022) (mem. op.). This is a Texas Tort Claims Act ("TTCA") vehicle accident case where the Fort Worth Court of Appeals agreed jurisdiction was not pled nor presented but remanded for an opportunity to cure the pleading.

Romero was traveling in a vehicle with her daughter when floodwaters due to rain swept the vehicle into an alleged rain-filled excavation on property owned by Whiz-Q that was purported to have improper drainage due to a defective excavation. Both occupants drowned. The family sued Whiz-Q, the city, and TxDOT. The city filed a plea to the jurisdiction claiming that its immunity was not waived because it did not own, occupy, or control "the property where this incident occurred" or the access road Romero was on. The plea was denied, and the city appealed.

Plaintiffs argued their pleadings incorporated by implication that the flood waters on the access road constituted a defective condition, but the city asserts the pleadings only mention defective excavation. The court held the pleadings must be read as written, which does not include the flood waters as a defective condition. The city next argued that it did not have a duty to make the premises safe because it did not create the dangerous condition nor agree to make safe a known, dangerous condition. However, a premises-liability defendant may be held liable for a dangerous condition on real property if it created the condition or it "assum[ed] control over and responsibility for the premises," even if it did not own or physically occupy the property. "The relevant inquiry is whether the defendant assumed sufficient control over the part of the premises that presented the alleged danger so that the defendant had the responsibility to remedy it." While the city has exclusive control over its roadways, it entered into an agreement with TxDOT to maintain the access road. The city's jurisdictional evidence shows that, at the time of the accident, the city did not possess—that is it did not own, occupy, or control—the property or the defective excavation on the property. Whiz-Q owns and operates its business on the property. The court concluded that at the time of the accident, either Whiz-Q or TxDOT owned or maintained the property, not the city. The pleadings are therefore defective. However, the court noted a premise defect (as opposed to a special defect) could still be potentially raised in the pleadings under the agreement with TxDOT. As a result, the suit was remanded to allow the Plaintiffs to replead under a premise defect theory only.

City of Killeen v. Terry, No. 03-20-00071-CV, 2022 WL 221240 (Tex. App.—Austin Jan. 26, 2022) (mem. op.). Terry, individually and as next friend to his minor child, sued the City of Killeen for injuries and damages resulting from a Killeen Police Department officer's vehicle colliding with Terry's vehicle. The officer was responding to a 9-1-1 call reporting a stabbing and running "Code III," which allows the officer to run with lights and sirens when responding to a major crime like a felony or when a person's life or safety may be an issue. The officer testified that he understood that emergency vehicles under a Code III may disregard traffic-control devices but must do so in a safe and prudent manner with due care, taking into consideration other vehicles, pedestrians, weather, traffic, and obstacles.

The officer had a red traffic light, but having activated his lights and siren approximately 850 feet before the intersection, sounded his air horn three times, and slowed from 72 miles per hour (mph) and entered the intersection in the left-most westbound lane at approximately 61 mph. The dashcam video showed that no cars were stopped in front of the officer before the intersection. Terry, who the officer said was in the outside lane and blocked from his view by the stopped cars, had a green light and proceeded into the intersection. The officer's vehicle slowed to 54 mph as it struck Terry's vehicle.

Terry sued, alleging negligence and negligence per se toward him and his child and seeking to impose liability on the city through respondeat superior. Terry asserted that the city was liable under the Texas Tort Claims Act (Act) because Appellant's employee, acting in the course and scope of his employment, injured Appellee and his child through the operation of a motor vehicle; Terry alleged that the officer would have been responsible and the city would be liable if it were a private person. Terry added allegations that the officer acted with conscious indifference or reckless disregard for the safety of others and a claim for gross negligence after the city filed a plea to the jurisdiction. The city in its plea to the jurisdiction asserted that its governmental immunity was preserved because the officer was responding to an emergency and was operating an emergency vehicle in response to a 9-1-1 call, was not reckless, and complied with all applicable statutes and ordinances. The trial court denied the plea, and the appellate court affirmed the trial court's order.

City of Austin v. Quinlan, No. 03-21-00067-CV, 2022 WL 261569 (Tex. App.—Austin Jan. 28, 2022) (mem. op.). This is an interlocutory appeal filed by the City of Austin, arguing that Quinlan's claims against it were barred by governmental immunity. The district court denied the city's plea without specifying the basis for the denial.

Quinlan filed suit when she injured herself after falling "more than a foot" from the patio on the outer edge of the premises while she was exiting the restaurant. The restaurant, Guero's, "was in possession and control of the premises and held a permit to occupy the City's Right of Way in order to operate a 'sidewalk café'" on a patio area outside the restaurant. To obtain this permit, Guero's agreed to pay the city an application fee of $100 and an annual fee of $200. Additionally, Guero's was required to maintain the premises in accordance with the terms of a Maintenance Agreement (Agreement) with the city.

Quinlan alleges that the city was liable for her injuries to the extent that the patio and/or surrounding area is owned and/or under the control of the city. She further argued that according to the terms of the Agreement, the city assumed contractual responsibility to both monitor and enforce violations by Guero's with regards to safety of the patio. She also claimed that the city further became obligated to ensure that the patio and the street was level so as not to pose a dangerous condition to her and other patrons. Moreover, Quinlan alleged that the city and Guero's were jointly in control of the subject premises and that both Guero's and the city had a duty to exercise the degree of care that a reasonably careful person would use to avoid harm to others under circumstances similar to those described in the petition. Quinlan further alleged that the city, by virtue of the Agreement with Guero's, was obligated to elevate the street and/or provide appropriate modifications to the patio and surrounding area to make such premises safe

for patrons. As an additional basis for liability, Quinlan alleged that the Agreement between the city and Guero's constituted a joint enterprise, thereby making the city vicariously liable for Guero's conduct.

The city filed a plea to the jurisdiction, arguing that Quinlan's claims against it were barred by governmental immunity. The district court denied the city's plea without specifying the basis for the denial. The appellate court affirmed in part and reversed in part the district court's order and rendered judgment dismissing some but not all of Quinlan's claims.

City of Houston v. Green, No. 14-20-00190-CV, 2022 WL 97334 (Tex. App.—Houston [14th Dist.] Jan. 11, 2022)(mem. op.). Officer Samuel Omesa is a police officer for the City of Houston, and on March 18, 2017, while responding to a call for service, Omesa's vehicle collided with Crystal Green's vehicle. Green filed suit for negligence. The city filed a motion for summary judgment, which was denied by the trial court, and the city appealed arguing that (1) the city retained immunity under the emergency exception of the Texas Torts Claims Act ("TTCA") and (2) Omesa was shielded by official immunity.

Generally, a city is immune from tort liability. The TTCA provides a limited waiver of immunity for tort suits against cities for torts committed by their employees who (1) are acting within their scope of employment arising from the operation or use of motor-driven vehicles (2) if the employee would be personally liable to the claimant according to Texas law. If the employee is protected from liability by official immunity, then the employee is not personally liable to the claimant, and the governmental unit retains its sovereign immunity. Additionally, under the "emergency exception," to the TTCA, a city remains immune from tort liability for a claim arising from the action of an employee who is responding to an emergency call or reacting to an emergency situation if the action is (1) in compliance with the laws and ordinances applicable to emergency action or (2) in the absence of such a law or ordinance, the action is not taken with conscious indifference or reckless disregard for the safety of others.

In this case, the court concluded that Green raised a fact issue as to whether Omesa's conduct was reckless because the evidence supported an inference that Omesa entered the intersection without stopping and without his sirens on, despite knowing that he had a red light, it was dark, that his view of the traffic was partially obstructed, and that a collision with another vehicle that could cause serious injury was possible. Therefore, the court overruled the city's first issue. Additionally, the city cannot be vicariously liable for Omesa's acts if he has immunity from liability. Under the official-immunity defense, a government employee may be immune from a lawsuit that arises from the performance of the employee's discretionary duties performed in good faith, provided the employee was acting within the scope of the employee's authority. Good faith depends on how a reasonably prudent officer could have assessed both the need to which an officer responds and the risks of the officer's course of action, based on the officer's perception of the facts at the time of the event. Because the evidence did not reflect that Omesa considered alternative actions and because the city's evidence of good faith assumes the truth of disputed facts, the court conclude that the city did not conclusively establish that Omesa acted in good faith. Thus, the trial court did not err by denying the city's motion for summary judgment, and the appellate court affirmed the lower court's order.

Guzman v. City of Bellville, No. 14-19-00808-CV, 2022 WL 248132 (Tex. App.—Houston [14th Dist.] Jan. 27, 2022). Rodolfo Guzman was riding his bicycle with members of his cycling club when a storm sewer grate dislodged Guzman from his bicycle, causing him to hit the ground and sustain personal injuries. In October 2018, Guzman filed suit against only the Texas Department of Transportation ("TxDOT"), and on November 14, 2018, Guzman amended his petition to add defendants Austin County and the City of Bellville (the "city") as defendants as well as the city's Public Works Director, Mr. Munsch. The city and Munsch filed a plea to the jurisdiction and moved for (1) dismissal of all claims against Munsch based on his immunity from suit and (2) summary judgment dismissing all claims against Munsch. The trial court granted the plea and the motion for summary judgment, and Mr. Guzman appealed.

The Texas Tort Claims Act provides that the filing of a suit against a city constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the city regarding the same subject matter, and if a suit is filed under this chapter against both a city and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the city. Since Guzman added the claims against Munsch after filing suit against the city, the court affirmed the trial court's dismissal of all personal claims against Munsch. The court went on to discuss the failures of Guzman's appellate brief, stating that it failed to adequately brief arguments in support of his other points of appeal, and the court ultimately affirmed the trial court's judgment dismissing the case.

Hulick v. City of Houston, No. 14-20-00424-CV, 2022 WL 288096 (Tex. App.—Houston [14th Dist.] Feb. 1, 2022) (mem. op.). Nicholas Hulick sued the City for negligence, alleging that Officer De La Guardia, a Houston police officer, struck his motorcycle when the officer attempted to make a left-hand turn, causing Hulick serious injuries. The city filed a plea to the jurisdiction, arguing that the officer retained his official immunity, which the trial court granted. Mr. Hulick appealed.

A city cannot be vicariously liable for an employee's acts unless its governmental immunity has been waived. The Texas Tort Claims Act ("TTCA") provides a waiver of governmental immunity for property damage and personal injury proximately caused by the wrongful act or omission or the negligence of a city employee acting within their scope of employment if (1) the damages arise from the operation or use of a motor-driven vehicle and (2) the employee would be personally liable to the claimant according to Texas law. The dispute in this case was whether the officer "would be personally liable to the claimant under Texas law."

The City argued that Officer De La Guardia would not be liable because he is protected by official immunity. A city employee is entitled to official immunity: (1) for the performance of discretionary duties; (2) within the scope of the employee's authority; and (3) provided the employee acts in good faith. An action is discretionary if it involves personal deliberation, decision, and judgment; on the other hand, an action that requires obedience to orders or the performance of a duty as to which the employee has no choice is "ministerial." In determining whether an act is discretionary, the inquiry focuses on whether an employee was performing a discretionary function. A police officer's operation of a motor vehicle while responding to an emergency is a discretionary function; whereas, operating the vehicle on official, non-emergency

business is ministerial. In this case, there was no evidence of an emergency or any urgent circumstance, and the court determined that Officer De La Guardia was performing a ministerial function to which immunity does not attach. Consequently, the court reversed the trial court's order dismissing this case and remanded it back to the trial court for further proceedings.

City of Houston v. Kim, No. 01-20-00333-CV, 2021 WL 5774173 (Tex. App.—Houston [1st Dist.] Dec. 7, 2021) (mem. op.). The plaintiff sued a city employee and the City of Houston for a car accident when the city employee, wearing his City of Houston Police Department uniform, collided with plaintiff as he was leaving a high school parking lot and entering the roadway. The city moved to dismiss the employee under the election-of-remedies provision under the Texas Tort Claims Act ("Act"). The city then filed a motion for summary judgment alleging the employee was not acting in the scope of his employment at the time of the accident. The trial court denied the summary judgment and the city appealed. The appellate court held that, by moving to dismiss the plaintiff's claims against the employee under the Act, the city judicially admitted that the employee was acting within the scope of his employment and could not later dispute that admission.

City of Irving v. Muniz, No. 05-21-00099-CV, 2021 WL 5410410 (Tex. App.—Dallas Nov. 19, 2021, no pet. h.) (mem. op.). Muniz sued the city for injuries from a car accident that happened when he followed detour signs for construction on a city road and his car slid into a large excavation site. The city filed a plea to the jurisdiction on the grounds that the excavation was not a special defect nor a premise defect and the detour/warning signs were a discretionary act. The trial court denied the plea and the city appealed. The appellate court affirmed, finding: (1) the excavation was a special defect as a matter of law; (2) there was a fact question about what warnings were present and whether the warnings were adequate to warn of a special defect; and (3) the city's design of the detour and warning signs were not discretionary.

Galveston Cty. v. Leach, et al., No. 14-20-00181-CV, 2021 WL 5831123 (Tex. App. – Houston [14th Dist.] Dec. 9, 2021). The plaintiffs in this case were injured after being hit by a motor vehicle driven by an unlicensed driver. They sued Galveston County, because the driver of the vehicle was operating the vehicle at the direction and in the presence of a Galveston County Sheriff's Deputy. The county filed this appeal after its plea to the jurisdiction claiming governmental immunity was denied by the trial court.

The Texas Tort Claims Act ("TTCA") waives governmental immunity where a personal injury is proximately caused by the wrongful act or omission or the negligence of a governmental employee acting within the scope of employment if the personal injury "arises from the operation or use of a motor-driven vehicle" and "the employee would be personally liable to the claimant according to Texas law." In this case, the governmental employee was not operating the motor-driven vehicle which caused the injuries; nevertheless, because the driver was in the act of complying with the directions of a governmental employee who was present when the accident occurred, the TTCA waives governmental immunity. The appellate court affirmed the trial court's order.

Gibbs v. City of Houston, No. 01-20-00570-CV, 2021 WL 4733790 (Tex. App.—Houston [1st Dist.] Oct. 12, 2021) (mem. op.). This is a Texas Tort Claims Act ("TTCA") case involving a collision between a pickup truck and a city police department vehicle. Brannon was driving a pickup truck when she collided with a city police department SUV, driven by a city employee. Another plaintiff, Gibbs, was one of six passengers riding in the pickup truck. Brannon sued the city, which the other passengers joined, but Gibbs was not named in the amended petition. After the statute of limitations passed, Gibbs was joined in a later petition. The city filed a motion for summary judgment against Gibbs asserting the statute of limitations. The trial court granted the motion and Gibbs appealed.

The party suing a governmental entity has the burden to establish jurisdiction by pleading—and ultimately proving—not only a valid immunity waiver but also a claim that falls within the waiver. The city argued that neither it nor its employee could be liable to Gibbs under Texas law because Gibbs's claims are barred by limitations. Thus, the city argued, Gibbs's claims do not fall within any TTCA waiver. Gibbs asserted the "inadvertent omission" exception which is based on excusable inadvertence or mistake. However, the exception was created when existing parties were inadvertently dropped from suit, then added back later. In this case, Gibbs joined as a party in the suit for the first time after limitations expired. Ordinarily, an amended pleading adding a new party does not relate back to the original pleading. Since Gibbs was not added until after the limitations expired, it was proper for the court to grant the city's summary judgment.

City of Arlington v. Ukpong, No. 02-21-00078-CV, 2021 WL 4783169 (Tex. App.—Fort Worth Oct. 14, 2021) (mem. op.). This is a Texas Tort Claims Act ("TTCA") premise defect case in which the plaintiff sued the city for injuries she incurred when a dead hackberry tree next to a park's trail she frequented fell on her. The city filed a plea to the jurisdiction and asserted a lack of waiver of immunity. The trial court denied the plea and the city appealed.

The TTCA provides that "if a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property…" Moreover, when property is open to the public for "recreation," the Recreational Use Statute ("RUS") further limits a governmental unit's duty by classifying recreational users as akin to trespassers. Under the RUS, a landowner has no duty to warn or protect trespassers from obvious defects or conditions. A property owner "may assume that the recreational user needs no warning to appreciate the dangers of natural conditions, such as a sheer cliff, a rushing river, or even a concealed rattlesnake." The city did not owe plaintiff a duty to protect her from obvious defects or conditions and generally did not owe a duty to warn or protect her from the dangers of natural conditions in the park, whether obvious or not. Plaintiff's own pleadings asserted the dead tree was an obvious condition. However, even if the dead tree was not an obvious condition, it was a natural condition, and no duty to warn existed regardless. The appellate court reversed the denial of the city's plea to the jurisdiction and dismissed the plaintiff's claims.

City of Houston v. Crook, No. 06-21-00036-CV, 2021 WL 4804453 (Tex. App.—Texarkana Oct. 15, 2021) (mem. op.). Plaintiff sued the city alleging a premises defect and special defect. She alleged she suffered injuries when she was driving on a city street and a tire of her car got stuck in a partially uncovered manhole causing her car to spin out of control and hit a light pole.

The city filed a motion for partial summary judgment, which the trial court denied and the city appealed. The appellate court found there was no support for plaintiff's claims that a partially uncovered manhole or improperly sealed manhole constitutes a special defect. Therefore, the appellate court reversed the trial court's order and remanded for further proceedings.

City of Houston v. Gantt, No. 14-20-00229-CV, 2021 WL 4783070 (Tex. App.—Houston [14th Dist.] Oct. 14, 2021) (mem. op.). Gantt sued the city alleging injuries after being struck by a patrol car driven by a Houston police officer. The city filed a plea to the jurisdiction claiming it was immune from suit due to Gantt's failure to properly notify the city of the claim, but the trial court denied the plea. The city appealed.

The city can be subject to tort liability under the Texas Tort Claims Act ("TTCA"), but the TTCA contains notice requirements which must be followed. Alternatively, the TTCA's notice requirements would have been satisfied if the city had actual notice that: (1) an injury had occurred; (2) to a particular individual; and (3) that was at least partially the city's fault. Additionally, cities may by ordinance or charter put additional notice requirements in place, which the city had done. In this case, police reports and fire department transport records related to the crash were not sufficient to put the city on actual notice of a claim, and Gantt was unable to show that he had otherwise complied with the city's or TTCA's notice requirements. The appellate court reversed the trial court and dismissed the case for want of jurisdiction.

Freeman v. City of Waxahachie, No. 10-19-00379-CV, 2021 WL 4898801 (Tex. App.—Waco Oct. 20, 2021). Sheree Freeman was injured when her foot slid into a curb opening and stormwater drainage inlet which were part of a roadway maintained by the city. She sued for damages alleging that the defective design and construction conditions posed an unreasonable danger and risk of serious injury and harm to roadway users and that the city was on notice of the dangerous conditions.

The city filed a plea to the jurisdiction asserting governmental immunity and lack of pre-suit notice, which the trial court granted. The Freemans appealed. While governmental entities are generally immune from suits seeking to impose tort liability, this immunity can be waived by the Texas Tort Claims Act (TTCA) when injuries are caused by a condition or use of tangible personal or real property such that the governmental entity, were it a private entity, would be liable. To perfect the waiver of immunity, a claimant must meet written notice requirements found in the TTCA along with any city-level notice requirements found in the city charter or ordinances. The City of Houston requires written notice of claims to be made within 60 days of the injury, and in this case, the Freemans failed to timely provide this notice. The Freemans argued that the 60-day notice requirement violates the Open Courts Clause of the Texas Constitution and is unconstitutional, and that Mrs. Freeman was so severely incapacitated by her injuries, compliance was impossible. The appellate court was unconvinced, and the appellants' sole issue was overruled.

Anderson v. Waller Cty., No. 01-20-00097-CV, 2021 WL 3042677 (Tex. App.—Houston [1st Dist.] July 20, 2021) (mem. op.). This is an alleged sexual assault case brought under the Texas

Tort Claims Act (TTCA) where the appellate court affirmed the granting of the county's plea to the jurisdiction.

Anderson alleged that while incarcerated at the county jail, she was taken to her cell by an unknown female jailor and given a minor amount of food and water. She took mayonnaise and obstructed the security camera. After eating her food, she claims she blacked out and therefore assumed she had been drugged. She asserts she was sexually assaulted then released. Anderson brought claims against the county, the sheriff, and several jailors for sexual assault, assault, intentional infliction of emotional distress, and negligence. She amended her pleadings indicating the misuse or malfunctioning of security cameras lead to the assaults as well as providing unsafe food. The county filed several pleas to the jurisdiction, which were eventually granted. Anderson appealed.

A plaintiff's failure to provide the statutorily-required notice deprives the trial court of jurisdiction and requires the court to dismiss the plaintiff's case. Knowledge that an injury has occurred, standing alone, is not sufficient to put a governmental unit on actual notice for TTCA purposes. Further, mere investigation of an incident or injury does not show that a governmental unit had actual notice for purposes of the TTCA. Anderson's written notice was provided four years after her incarceration and nothing in the record indicates the county was aware, for actual notice purposes, that Anderson had reported her claims to the Texas Rangers. Finally, the court held that when a plea is granted and the pleadings consist of only pleading defects which could be cured, the dismissal may be without prejudice, but if the petition could not possibly allege facts demonstrating a waiver of immunity, or if the plaintiff had been given an adequate opportunity to replead and failed, then the dismissal should be with prejudice. Accordingly, the appellate court held that the trial court properly granted the plea with prejudice.

Univ. of Tex. MD Anderson Cancer Ctr. v. Simpson, No. 01-20-00679-CV, 2021 WL 3083104 (Tex. App.—Houston [1st Dist.] July 22, 2021) (mem. op.). This is an interlocutory appeal in a premise defect/Texas Tort Claims Act (TTCA) case where the appellate court reversed the denial of the MD Anderson's plea and dismissed the plaintiff's claims.

Simpson was a visitor to MD Anderson when she slipped and fell "due to a wet slippery floor." Simpson alleged that she did not know that a clear liquid had caused her to fall until she heard someone near the nurse's station point out the liquid and admit they should have cleaned it up. Simpson did not know the identity of any of the persons who were present at the nurse's station. MD Anderson asserted it did not receive any reports of substances or liquids being spilled or present on the floor where Simpson fell and did not receive any reports of falls at that location before Simpson fell. Simpson asserted that anyone who would have admitted to knowing the water was there must be an employee of MD Anderson. The hospital asserted that an unidentified person commenting on the water does not establish a fact issue that the person was an MD Anderson employee. The trial court denied the plea and MD Anderson appealed.

To prove actual knowledge, the plaintiff must show that the governmental unit actually knew of the dangerous condition at the time of the accident. Actual knowledge of an unreasonably dangerous condition can sometimes be proven through circumstantial evidence. However,

circumstantial evidence establishes actual knowledge only when it "either directly or by reasonable inference" supports that conclusion. MD Anderson produced evidence that non-employees of MD Anderson can be present at a nurse's station and wear scrubs. The appellate court found that MD Anderson had met its burden, and that Simpson did not dispute MD Anderson's facts or prove actual knowledge through circumstantial evidence. As a result, the plea should have been granted.

Garcia v. City of W. Columbia, No. 01-20-00653-CV, 2021 WL 3159676 (Tex. App.—Houston [1st Dist.] July 27, 2021) (mem. op.). Garcia sued the City of West Columbia for injuries allegedly sustained as a result of work on a municipal water and sewer project. This was the second appeal before the appellate court. In the first appeal, the appellate court addressed the city's plea to the jurisdiction, in which it asserted governmental immunity. The trial court had denied the city's jurisdictional plea, and the appellate court affirmed in part and reversed in part. Now, in this second appeal, the city moved for traditional and no-evidence summary judgment on several grounds. The trial court granted the city's summary judgment motion without stating a particular basis. Garcia appealed. The appellate court affirmed the trial court's summary judgment as Garcia had failed to submit any evidence that his exposure at the work site caused his injuries.

Texas A&M Univ. Sys. v. Fraley, No. 07-20-00116-CV, 2021 WL 3282161 (Tex. App.—Amarillo July 30, 2021) (mem. op.). The plaintiff sued Texas A&M University System (A&M) for his injuries from a one-vehicle accident where he drove on a portion of a road that he claimed A&M removed without installing new traffic control devices. The trial court denied A&M's plea to the jurisdiction and A&M appealed.

The appellate court found that: (1) A&M had complied with its obligations to timely appeal; (2) A&M's decisions to eliminate a roadway and not install a new traffic control or safety devices were discretionary roadway design decisions excluded from liability under the Texas Tort Claims Act; (3) the removal of the portion of road was not a special defect because it was not a threat to the ordinary users of a particular roadway; and (4) the plaintiff's claims did not give rise to a misuse of tangible personal property. Therefore, the appellate court reversed the trial court and dismissed the plaintiff's claims for lack of jurisdiction.

Klassen v. Gaines Cty., No. 11-19-00266-CV, 2021 WL 2964423 (Tex. App.—Eastland July 15, 2021) (mem. op.). This is an excessive force/Section 1983 case where the Eastland Court of Appeals affirmed the trial court's granting of the county's dispositive motion.

Deputies responded to a disturbance involving possible aggressive actions by Klassen. Klassen was ordered to the ground and, while one of the deputies was attempting to put Klassen into the prone position, Klassen moved his hands and the deputy used his body weight to move Klassen into position. This caused Klassen to strike his chin on the ground, knocking out several teeth and breaking his jaw. Klassen sued. The deputies filed a motion to dismiss under the Texas Tort Claims Act (TTCA), which the trial court granted. They then filed a motion for summary judgment for the remaining federal and state claims. The trial court granted the motion as to the state claims, leaving the federal claims pending. Klassen then filed an amended petition which

was almost exactly the same as the previous petition except that he attached an expert's opinion that the force used was excessive. In response, appellees filed another motion to dismiss and a motion for summary judgment in the alternative, which the trial court granted. Klassen appealed the granting of the motion.

The court of appeals specifically noted that the trial court stated in its order that it examined the entire record when it dismissed Klassen's claims, indicating that the trial court dismissed the claims under the motion for summary judgment as opposed to the motion to dismiss under the pleadings. When doing so, the standard for determining whether a trial court made an appropriate holding when it considered certain summary judgment evidence is a review for an abuse of discretion. In this case, the court found no such abuse. The court found dismissal of the deputies was proper under the TTCA. Second, the court found there was no excessive force after reviewing the video. Third, the court found that qualified immunity shielded the deputies as Klassen was unable to establish specific actions constituted a violation of clearly established law. The court found Klassen had suffered no "constitutional injury" via the excessive force claim, so the county could not be held liable for any failure to train its deputies.

City of Mission v. Gonzalez, No. 13-20-00138-CV, 2021 WL 3085988 (Tex. App.—Corpus Christi July 22, 2021) (mem. op.). One evening in 2017, Gonzalez injured her knee in a fall while taking out her garbage. Although the fall was on private property, she sued the city, claiming the fall was caused by mud created by water which leaked from a faulty water line repair. The city filed a plea to the jurisdiction claiming immunity from suit, but the trial court denied the plea. The city appealed, arguing that Gonzalez failed to properly notify the city pursuant to the requirements of the Texas Tort Claims Act (TTCA). Alternatively, the city argued that the TTCA's notice requirements would have been satisfied if the city had actual notice that an injury had occurred to a particular individual that was at least partially the city's fault. Gonzalez could not establish that either sufficient notice under the TTCA or actual notice had been given to the city. As a result, the appellate court reversed the trial court and dismissed the case for want of jurisdiction.

Hidalgo Cty. Det. Center v. Huerta, No. 13-20-00113-CV, 2021 WL 3085853 (Tex. App.—Corpus Christi July 22, 2021) (mem. op.). Huerta, who was an inmate in the Hidalgo County Detention Center, sued the county for damages after he was injured when a table he was sitting at failed. The county filed a plea to the jurisdiction claiming immunity from suit because the county did not have knowledge of the dangerous condition, while Huerta had knowledge of the table's dangerous nature. The trial court denied the plea, and the county appealed.

Because the table had failed at least three previous times in the same way and injured at least one other inmate before injuring Huerta, the court held that the county did have notice of the dangerous condition. However, because Huerta was an experienced welder who watched the table being repaired and admitted that he knew the repair was inadequate, the county had no duty to make the condition reasonably safe for him. Accordingly, the court reversed the trial court's judgment and dismissed the case for lack of jurisdiction.

City of Houston v. Gantt, No. 14-20-00229-CV, 2021 WL 3416990 (Tex. App.—Houston [14th Dist.] Aug. 5, 2021) (mem. op.). Gantt sued the city alleging injuries after being struck by a patrol car driven by a Houston police officer. The city filed a plea to the jurisdiction claiming it was immune from suit due to Gantt's failure to properly notify the city of the claim, but the trial court denied the plea. The city appealed.

The city can be subject to tort liability under the Texas Tort Claims Act (TTCA), but the TTCA contains notice requirements which must be followed. Alternatively, if the city had actual notice that an injury had occurred to a particular individual that was at least partially the city's fault, the TTCA's notice requirements would have been satisfied. Additionally, cities may by ordinance or charter put additional notice requirements in place, which the city had done. In this case, police reports and fire department transport records related to the crash were not sufficient to put the city on actual notice of a claim, and Gantt was unable to show that he had otherwise complied with the city or TTCA notice requirements. The appellate court reversed the trial court and dismissed the case for want of jurisdiction.

Foreman v. Lyndon B. Johnson Hosp., No. 14-19-00733-CV, 2021 WL 3161440 (Tex. App.—Houston [14th Dist.] July 27, 2021) (mem. op.). Seventeen years after his conviction for sexual assault of a child, Foreman filed suit against several parties, including the City of Houston Police Department, raising complaints related to DNA tests and medical swabs which led to his conviction. Foreman alleged he was injured through the non-use of medical laboratory equipment such as microscopes and specific clamps. The city filed a plea to the jurisdiction, which was granted by the trial court. While the use of certain types of property can waive sovereign immunity under the Texas Tort Claims Act, non-use of property does not. The appellate court affirmed the dismissal.

Branch v. Fort Bend Cty., No. 14-19-00447-CV, 2021 WL 2978639 (Tex. App.—Houston [14th Dist.] July 15, 2021) (mem. op.). Branch was an inmate in the Fort Bend County Jail in 2016 when he injured his spine and head after falling on a concrete floor that was wet from a burst pipe. He sued the county for damages resulting from his injuries. The county filed a plea to the jurisdiction claiming immunity from suit due to Branch's failure to properly notify the county of the claim under the Texas Tort Claims Act (TTCA), and the trial court dismissed Gantt's suit. He appealed.

A local governmental entity can be subject to tort liability under the TTCA, but the TTCA contains notice requirements which must be followed. Alternatively, if the entity had actual notice that an injury had occurred to a particular individual that was at least partially the city's fault, the TTCA's notice requirements would have been satisfied. In this case, Branch had, in fact, failed to give notice within the six-month time frame required by the TTCA, and the facts that (1) the injury occurred while Branch was under county supervision, (2) in a county facility, and (3) county personnel tended to his injuries were not sufficient to put the county on actual notice of a claim. The appellate court affirmed the trial court's dismissal of the case for want of jurisdiction.

Rogers v. City of Houston, No. 14-19-00196-CV, 2021 WL 2325193 (Tex. App.—Houston [14th Dist.] June 8, 2021). Noris Rogers sued defendants, including the City of Houston, for several torts, among other claims, based on events that occurred when employees of a tree trimming service contracting for the power company, accompanied by a City of Houston police officer, came to Rogers' property to trim an oak under a power line. The city filed a plea to the jurisdiction, which was granted by the trial court. Rogers filed a 15-point appeal, most of which will not be discussed here. In his claims against the city, Rogers argued that the off-duty police officer was acting in a proprietary function rather than a governmental function. The appellate court disagreed, holding that even though the officer was off duty and being paid by the power company, the provision of police services is closely related to the governmental function of "police and fire protection and control" for which the city is immune from suit or liability in tort. The appellate court affirmed the trial court's dismissal of all claims against the city.

MUNICIPAL COURT

Jaramillo v. City of Texas City, No. 01-20-00654-CV, 2022 WL 363271 (Tex. App.—Houston [1st Dist.] Feb. 8, 2022) (mem. op.). Following a physical inspection of the buildings on Jaramillo's property, Texas City notified Jaramillo in writing that the structures were "substandard" as defined in several provisions of Texas City's Code of Ordinances and the International Property Maintenance Code. Texas City then filed a complaint in its municipal court seeking an order requiring Jaramillo to abate the alleged substandard structures on his real property and, if he failed to comply, authorizing Texas City to demolish the structures.

Texas City set the matter for an abatement hearing on July 15, 2020. That same day, Jaramillo and Texas City signed an Agreed Order of Abatement ("Abatement Order"). Jaramillo and the Texas City prosecutor discussed the terms of the Abatement Order on the record. The municipal court judge asked about Jaramillo's agreement to the order and he responded in the affirmative. Two weeks later, Jaramillo filed suit against Texas City alleging an unlawful taking of his property. He alleged that, prior to the abatement hearing, the Texas City prosecutor threatened him with either agreeing to an order authorizing Texas City to demolish the structures on his real property or Texas City would fine him up to $2,000 per day from January 21, 2020 (the date of the initial inspection) to July 15, 2020 (the date of the abatement hearing). According to Jaramillo, he had "no financial choice except to agree to the [Abatement] Order." He alleged that the prosecutor's conduct was illegal and denied him procedural due process in violation of Article 1, Sections 17 and 19 of the Texas Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

Jaramillo requested that the trial court issue a declaratory judgment finding that Texas City's actions were null, void, and of no effect and a writ of certiorari to the municipal court under state law. He also sought a temporary restraining order and a temporary injunction seeking to prevent Texas City from taking certain actions in connection with the structures on his real property. Appellant also requested monetary relief.

The trial court granted Jaramillo's request for a temporary restraining order and set a temporary injunction hearing for September 2, 2020. Following the hearing, the trial court denied

Jaramillo's request for a temporary injunction. The next day, he filed his first amended petition adding claims of fraud and civil conspiracy against Texas City. He alleged "the City's course of action is a series of concerted acts of fraud, collusion and misrepresentation by the named participants and others, designed to induce Plaintiff into the Agreed Order, the end consequence of which is the taking of his Property." He claimed Texas City had misrepresented the code violations and corresponding fines to him and had "coerced and induced" him to sign a document that "fraudulently represented his rights in the 'Property.' " He sought monetary relief, a declaration from the trial court that Texas City's actions were null, void, and of no effect, and a writ of certiorari to the municipal court under state law.

Texas City moved to dismiss Jaramillo's lawsuit for want of jurisdiction arguing: (1) Jaramillo could not appeal the Abatement Order, (2) his appeal was untimely and filed in the wrong court, and (3) Texas City is immune from his intentional tort claims. Jaramillo did not respond to the motion. The trial court granted Texas City's motion to dismiss, which Jaramillo appealed. The appellate court affirmed.

City of Galveston v. Jolly, No. 14-19-00599-CV, 2021 WL 2324943 (Tex. App.—Houston [14th Dist.] June 8, 2021) (mem. op.). After the city received an order from the municipal court ordering the demolition of structures on John Jolly's property, Jolly obtained a TRO from the County Court at Law enjoining the demolition. The city filed a plea to the jurisdiction and motion to vacate the TRO. The County Court at Law declined to vacate the TRO, and the city appealed. The appellate court held that the county court at law has jurisdiction to order the TRO and affirmed the lower court's ruling.

Vorwerk v. City of Bartlett, No. 03-21-00001-CV, 2021 WL 3437889 (Tex. App.—Austin Aug. 6, 2021) (mem. op.). The Bartlett Municipal Court declared a 1986 Toyota mobile home to be a junk vehicle. The municipal court found that defendant Hisle was the owner or person in lawful possession of the mobile home. Hisle was properly notified and appeared in person before the court, and was afforded ample time to remove the mobile home from his property under the city's ordinance. The mobile home was also declared to be a public nuisance. The court ordered that, if the mobile home was not immediately removed from the property, the city would remove it. Vorwerk then filed suit in justice court asserting she owned the vehicle and the city committed a taking by removing the vehicle. The city filed a plea to the jurisdiction which was granted. Vorwerk appealed to the county court at law, and the city filed a plea, which was granted. Vorkwerk appealed.

The appellate court found that the city and the mayor presented undisputed evidence that Vorwerk was not the registered owner of the mobile home. Because Vorwerk did not present any evidence that she was the owner of the mobile home at the time of the municipal court proceeding, the court concluded that she did not raise a fact issue concerning her ownership of the mobile home at the time of the municipal court hearing. Accordingly, the trial court properly dismissed the case for lack of jurisdiction.

TAKINGS

City of Baytown v. Schrock, No. 20-0309, 2022 WL 1510310 (Tex. May 13, 2022). Schrock brought regulatory-taking and declaratory-judgment claims against the City of Baytown ("Baytown"). Pursuant to a city ordinance, Baytown disconnected and refused to reinstall water services to Schrock's rental property after the property's utility bills went unpaid. The Baytown ordinance in this case did not regulate land use. The ordinance permitted the City to refuse to connect utility service to the property until outstanding utility bills associated with the property were satisfied. The City's provision of utilities to the property was a service; its regulation of that service was not a regulation of the property itself. Because the City's enforcement actions against the property were conditional and did not result in permanent ouster, they were not a regulatory taking. The city's refusal to reconnect property owner's utility service, due to outstanding utility bills, which prohibited owner from renting out the property did not constitute a regulatory taking.

Webb v. City of Fort Worth, No. 02-21-00133-CV, 2022 WL 123219 (Tex. App.—Fort Worth Jan. 13, 2022) (mem. op.). This is a constitutional-taking-and-nuisance suit involving governmental immunity as it relates to a city's responsibility for the escape of raw sewage into a home. Webb, a Fort Worth homeowner, sued the City of Fort Worth after his home flooded with raw sewage. He sought damages for a taking under the Texas Constitution, for common law nuisance and statutory nuisance per se, and for negligence, as well as a declaratory judgment. The city filed a plea to the jurisdiction, as well as traditional and no-evidence motions for summary judgment, all of which the trial court granted before dismissing his claims against the city with prejudice.

Webb appealed and argued that the trial court: (1) abused its discretion by refusing to file findings of fact and conclusions of law; (2) abused its discretion by failing to hold an evidentiary hearing on the city's plea to the jurisdiction; (3) erred by granting the city's plea to the jurisdiction and summary-judgment motions, as well as by dismissing his suit with prejudice. Because Webb was not entitled to findings and conclusions or an evidentiary hearing on the plea to the jurisdiction and because the trial court did not err by granting the city's plea to the jurisdiction, the appellate court affirmed the trial court's decision without reaching Webb's two summary-judgment issues.

City of San Antonio v. Davila, No. 04-20-00478-CV, 2021 WL 3376949 (Tex. App.—San Antonio Aug. 4, 2021) (mem. op.). This is a trespass to try title case where the appellate court reversed the denial of the city's plea to the jurisdiction but remanded to allow plaintiffs the ability to replead.

The Davilas sued the city in a trespass to try title action, alleging that, as part of closing and abandoning a street and conveying parcels to adjoining landowners in 1987, the city deeded the subject property to the Davilas' parents. Alternatively, they allege they adversely possessed the property. The city filed a plea to the jurisdiction asserting that the city issued a quit claim deed authorizing the sale of the property to their parents. The quit claim deed contains a metes-and-bounds description of the subject property, reserves a utility easement, and recites that the city passed an ordinance authorizing the sale of the property to their parents. The trial court denied the plea and the city appealed.

The Davilas argue Section 16.005 of the Texas Civil Practice and Remedies Code waives the city's governmental immunity, which relates to road closure ordinances. They did not request relief from the city's ordinance under Chapter 16, which authorized the sale or abandonment of property, but from the quitclaim deed itself. The court determined that the quit claim deed did not waive immunity. Additionally, when a city is sued in a trespass to try title action based on adverse possession, governmental immunity is not waived, and the trial court lacks subject matter jurisdiction. As a result, the appellate court determined that the claims, as alleged, do not waive immunity. However, because the plea attacks the pleadings only and the city did not argue or explain why the pleading defect—suing the city instead of government officials for ultra vires acts—is incurable, the Davilas must be given the opportunity to amend their pleadings.

Mims v. City of Seguin, No. 04-20-00355-CV, 2021 WL 3057506 (Tex. App.—San Antonio July 21, 2021) (mem. op.). A group of homeowners whose property was damaged by flooding from a city sewage project sued the city, asserting inverse condemnation and nuisance claims. The trial court granted the city's plea to the jurisdiction.

The appellate court concluded that the city's plea challenged only the sufficiency of the homeowners' pleadings and did not present evidence to negate the existence of the jurisdictional facts alleged by the homeowners. Because the trial court did not allow the homeowners to cure any deficiencies and granted the plea outright, the appellate court held that under these circumstances, the standard of review permits the court to affirm only if the homeowners' pleadings affirmatively and incurably negate the trial court's subject matter jurisdiction. The court determined that the homeowners' pleadings did not affirmatively and incurably negate the trial court's subject matter jurisdiction. As a result, the facts alleged by the homeowners establish the trial court's jurisdiction. The court; therefore, reversed the trial court's judgment and remanded for further proceedings.

City of Dallas v. Reggie, No. 05-20-00646-CV, 2021 WL 3196963 (Tex. App.—Dallas July 28, 2021) (mem. op.). The city towed two of plaintiff's vehicles for being parked for more than 24 hours in the same spot in violation of a city ordinance. The city sold the vehicles at an auction almost a month after impounding them and after sending two certified letters. The plaintiff filed a lawsuit seeking an injunction before the auction but served the city after the auction. The city appealed the denial of its plea to the jurisdiction. The court reversed the denial and found: (1) there is no waiver of immunity for plaintiff's unlawful seizure claim; (2) plaintiff failed to establish a clam for inverse condemnation because he did not contest the validity or constitutionality of the city ordinances or Texas Transportation Code provisions permitting the impoundment and sale of abandoned or unattended vehicles; (3) plaintiff's due process claims were insufficient to state a claim because he didn't allege any policy or custom existed that deprived him of his due process rights; and (4) plaintiff's injunction claims were moot.

San Jacinto River Auth. v. Lewis, No. 14-19-00696-CV, 2021 WL 2931280 (Tex. App.—Houston [14th Dist.] July 13, 2021). Lewis sued the San Jacinto River Authority (SJRA) for a taking related to property damage caused by the SJRA's release of water from Lake Conroe during Hurricane Harvey, alleging constitutional inverse condemnation claims in Harris County district court. SJRA filed a plea to the jurisdiction: (1) challenging the subject matter jurisdiction

of the district court over constitutional inverse condemnation claims; and (2) alleging that appellees failed to plead sufficient facts demonstrating a waiver of governmental immunity. The trial court denied SJRA's plea to the jurisdiction, which SJRA appealed.

Section 25.1032 of the Texas Government Code squarely places jurisdiction over eminent domain proceedings brought in Harris County with the county civil court at law rather than the district court. Additionally, in his original petition, Lewis neither made reference to statutory takings causes of action from Chapter 2007 of the Government Code, nor alleged waiver of SJRA's immunity under that chapter. The appellate court held that Lewis failed to make a statutory takings claim, reversed the trial court's order denying SJRA's plea to the jurisdiction, and rendered judgment dismissing appellee's claims for lack of subject matter jurisdiction.

Martinez v. City of Laredo, No. 04-19-00694-CV, 2021 WL 1894905 (Tex. App.—San Antonio May 12, 2021) (mem. op.). Martinez possessed two taxi permits issued by the City of Laredo. She was arrested for identity fraud and theft, and while these charges were pending, the city temporarily revoked her taxi permits. Martinez sued the city, alleging that this was an unconstitutional taking. The city filed a motion to dismiss for lack of jurisdiction. The city argued that Martinez did not have a vested property right in the permits; thus, the city could not have unconstitutionally taken a property right from Martinez, and that there was no claim for which the city waived governmental immunity. The trial court granted the motion.

On appeal, the court analyzed whether Martinez had a takings claim that would vest the court with jurisdiction. First, Martinez sought a damage remedy, which is unavailable under Texas law for unconstitutional conduct. Second, she had no state constitutional takings claims because she did not allege that the taking was for public use. Third, under Texas law, no person can acquire a vested right to use public streets and highways for commercial business, and therefore Martinez did not have a property right in the taxi permits.

San Jacinto River Auth. v. Ray, No. 14-19-00095-CV, 2021 WL 2154081 (Tex. App.—Houston [14th Dist.] May 27, 2021) (mem. op.). This case arises from flooding produced by the rainfall from Hurricane Harvey in 2017. Appellees (more than 300 property and business owners) asserted that the San Jacinto River Authority (SJRA) released water from Lake Conroe knowing that this action would flood thousands of downstream homes and businesses and alleged constitutional inverse condemnation claims under Article I, Section 17 of the Texas Constitution in Harris County district court. SJRA filed a plea to the jurisdiction: (1) challenging the subject matter jurisdiction of the district court over constitutional inverse condemnation claims; and (2) alleging that appellees failed to plead sufficient facts demonstrating a waiver of governmental immunity. Appellees countered that: (1) fair notice pleading should save their constitutional takings claim; and (2) they also pleaded statutory takings under Government Code Chapter 2007. SJRA replied that if Appellees filed statutory takings claim, only one of the appellees filed their case in time and the others should be time-barred. The trial court denied SJRA's plea to the jurisdiction, which SJRA appealed.

Texas Government Code Section 25.1032 squarely places jurisdiction over eminent domain proceedings brought in Harris County with the county civil court at law rather than the district

court. Additionally, in their original petition, appellees made no reference to Chapter 2007 of the Government Code, nor did they allege waiver of SJRA's immunity under that chapter. The appellate court held that appellees failed to make a statutory takings claim, reversed the trial court's order denying SJRA's plea to the jurisdiction, and rendered judgment dismissing appellees' claims for lack of subject matter jurisdiction.

ZONING

Powell v. City of Houston, No. 19-0689, 2021 WL 2273976 (Tex. June 4, 2021). Two homeowners challenged the City of Houston's historic preservation ordinance on the grounds that it was zoning enacted in violation of the city's charter, which only allows zoning to be adopted after public notice and a voter referendum, and it did not comply with certain provisions of Chapter 211 of the Local Government Code. The historic preservation ordinance allows for the creation of historic districts in which properties cannot be modified or demolished without the approval of a historical commission. The court of appeals held that the ordinance is not a zoning regulation because the purposes for which it was created, its function, and its way of regulating property use and development all differ from those of zoning laws.

The Supreme Court affirmed. The court concludes that the ordinary meaning of zoning is the district-based regulation of the uses to which land can be put and of the height, bulk, and placement of buildings on land, with the regulations being uniform within each district and implementing a comprehensive plan. Zoning regulations also tend to be comprehensive geographically by dividing an entire city into districts, though this need not always be the case. In contrast, the court finds that the historical preservation ordinance does not regulate the purposes for which land can be used, lacks geographic comprehensiveness, impacts each site differently in order to preserve and ensure the historic character of building exteriors, and does not adopt the enforcement and penalty provisions characteristic of a zoning ordinance. Accordingly, the ordinance is not zoning and was not enacted in violation of the city charter.

City of Austin v. Acuna, No. 14-20-00356-CV, 2022 WL 805953 (Tex. App.—Houston [14th Dist.] Mar. 17, 2022). The City of Austin undertook a comprehensive revision of its zoning ordinances and failed to give individual written notice to landowners as required by state statute. A number of landowners sued the city seeking a declaratory judgment and injunctive relief, which was granted by the trial court, and the city appealed. The city argued that the trial court erred in finding that the city violated Texas Local Government Code §§ 211.006 and 211.007 by failing to provide written notice to all affected property owners of the Planning Commission's public hearing and by failing to recognize property owners' protest rights. Because the city was undertaking a comprehensive revision of its zoning ordinances rather a change affecting only a few properties, the city believed that individual notice was not required. The court disagreed, stating that the zoning statute's notice requirement "must be rigidly performed" and that actions taken without proper notice are invalid. The city further argued that requiring the city to send upwards of 250,000 notices would be an absurd reading of the statutes. The court disagreed with this argument as well and affirmed the trial court's decision.

City of Fort Worth v. Rylie, No. 02-17-00185-CV, 2022 WL 803842 (Tex. App. Mar. 17, 2022). This case was on remand from the Supreme Court to make a determination on the city's argument that the Texas Penal Code's fuzzy animal exception does not apply to eight liners because eight liners violate the Texas Constitution. The appellate court determined that eight-liner machines award prizes by chance and for consideration; therefore, eight liners are lotteries. Because the Texas Constitution prohibits lotteries, eight liners are unconstitutional regardless of the fuzzy animal exception.

City of Dallas v. Homan, No. 05-20-01111-CV, 2022 WL 969631 (Tex. App.—Dallas Mar. 31, 2022) (mem. op.). The city received protests from more than 20 percent of the eligible property owners within two hundred feet of a property (Property) seeking a proposed zoning amendment prior to the public hearing. At the hearing, the attorney representing the Property said that one of the protests should be thrown out on a technical issue. Council voted to throw out the protest affidavit, thus reducing the percentage of protestors to below 20 percent so council could pass the zoning amendment by a simple majority instead of three-fourths majority. One of the protestors sued, seeking declaratory relief that the zoning amendment was invalid. The city filed a plea to the jurisdiction and motion for summary judgment, which the trial court denied. The city appealed. The appellate court affirmed the trial court's denial of the plea and motion for summary judgment, finding: (1) the plaintiff had standing to sue for declaratory relief as a property owner within 200 feet of the Property; and (2) the city's argument that it could allow the untimely withdrawal of a protest affidavit and then characterize it as something else to avoid triggering the statutorily imposed requirements for notice and a new hearing was without merit.

Farahnak v. City of Southlake Bd. of Adjustment, et al., No. 02-21-00202-CV, 2022 WL 405899 (Tex. App.—Fort Worth Feb. 10, 2022) (mem. op.). Farahnak appealed the trial court's determination that the board of adjustment (Board) did not abuse its discretion in allowing a special exception and variance for a property in close proximity to Farahnak. Farahnak also argued that the Board failed to expressly make any of these findings and that even if the findings had been made in Farahnak's favor, the compatible-use finding and the setback criterion would have been supported by no evidence based on Farahnak's assertions at the public hearing.

The evidence showed that the ordinance at issue, while mentioning governing "criteria" and necessary "find[ings]" for a special exception, did not require that the Board make express findings tracking the criteria and findings lists and did not require that any findings be included in the meeting minutes. Therefore, the appellate court found that the Board's failure to do so did not render its ultimate decision illegal. Moreover, the only question that state law allows a reviewing court is the determination of the legality of the Board's decision, which inquires whether the Board clearly abused its discretion. The appellate court affirmed the trial court's order and found that there was no illegality in the Board's determination and that it was appropriately reviewed.

MVP Raider Park Garage, LLC v. Zoning Bd. of Adjustment of City of Lubbock, No. 07-20-00261-CV, 2022 WL 119131 (Tex. App.—Amarillo Jan. 12, 2022) (mem. op.). The plaintiff sued the city's board of adjustment for denying a conditionally approved signage variance in 2019 when the variance was up for review. The board had granted the variance in 2012 with the

condition that it would be up for review after seven years. The trial court granted the board's motion for summary judgment and the plaintiff appealed.

The appellate court affirmed the trial court and found: (1) the board did not abuse its discretion when it issued the variance in 2012 subject to the condition that it be reviewed every seven years and doing so didn't make the variance a temporary variance; (2) the plaintiff's issue with the review provisions in the variance should have been brought in 2012 after the variance was granted with the conditions; and (3) the testimony at the 2019 hearing was sufficient for the board to revoke the variance.

Board of Adjustments for City of San Antonio v. Lopez, No. 13-20-00199-CV, 2022 WL 242749 (Tex. App.—Corpus Christi Jan. 27, 2022) (mem. op.). The Lopezes own four parcels of real property where they began operating a cement manufacturing facility in 1995. In 1996, the city annexed the property and adopted a new zoning ordinance, and the Lopezes were granted non-conforming use rights allowing them to continue to operate their cement business, which the new zoning rules which would otherwise have prohibited.

Between January and March 2018, the city issued the Lopezes over two hundred citations for various violations of the city's code, and on June 19, 2018, the city revoked the Lopezes' non-conforming use permit and certificate of occupancy. As a result, the city ordered the Lopezes to cease all business operations on the property. The Lopezes reapplied for the same permits, but the city denied their application. Ultimately, the Lopezes appealed the city's administrative decision to revoke their non-conforming use privileges to the city's Board of Adjustments ("BOA") which ruled in favor of the city's decision to terminate the Lopezes' rights, and the Lopezes appealed the BOA's decision to trial court, including additional takings claims and a request for an injunction against the city.

The city responded with a plea to the jurisdiction, which the trial court denied. The city appealed the trial court's judgment, arguing on one hand that the trial court did not have jurisdiction, because the Lopezes failed to exhaust their administrative remedies by not pursuing a rezone of their property. Challenging an action of a BOA requires petitioning a trial court for a writ of certiorari in a specified amount of time and contains no rezoning requirements; therefore, the appellate court dismissed the city's first point of appeal.

The city also argued that the civil trial court had no authority to enjoin enforcement of criminal statutes by the city's municipal court. A civil court has jurisdiction to declare a criminal statute constitutionally invalid and enjoin its enforcement only when: (1) there is evidence that the statute at issue is unconstitutionally applied by a rule, policy, or other noncriminal means subject to a civil court's equity powers and irreparable injury to property or personal rights is threatened; or (2) the enforcement of an unconstitutional statute threatens irreparable injury to property rights. Because evidence showed that the city was actively preventing the Lopezes from remedying the alleged violations they were simultaneously being cited for, the court concluded that the Lopezes' petition adequately challenged the constitutionality of the city's application of its ordinances and thereby met the first requirement. The Lopezes also presented evidence supporting the allegations that the city's enforcement threatened an irreparable injury to their

vested property rights thereby meeting the second requirement as well. The appellate court held the Lopezes had properly invoked the trial court's jurisdiction and affirmed the trial court's judgment dismissing the city's plea to the jurisdiction and enjoining enforcement of the citations against the Lopezes.

TitleMax of Tex., Inc. v. City of Austin, No. 01-20-00071-CV, 2021 WL 5364773 (Tex. App.—Houston [1st Dist.] Nov. 18, 2021.). TitleMax sought declaratory and injunctive relief against the City of Austin relating to a city ordinance intended to regulate payday lending practices. The city filed a plea to the jurisdiction, asserting that, because the specific ordinance at issue was penal in nature, the civil district court lacked jurisdiction to declare it unconstitutional or to enjoin a prosecution filed thereunder. The trial court granted the city's plea to the jurisdiction and dismissed TitleMax's case. TitleMax appealed.

The appellate court found that TitleMax showed a threatened irreparable injury to its vested property rights and the "essence" of its claims was not a "criminal law matter" outside a Texas civil court's subject-matter jurisdiction. Therefore, the appellate court reversed the trial court because the trial court erred in granting the city's plea to the jurisdiction dismissing TitleMax's claims.

Polecat Hill, LLC, et al., v. City of Longview, et al., No. 06-20-00062-CV, 2021 WL 5702184 (Tex. App.—Texarkana Dec. 2, 2021). The city notified Polecat that its property was in violation of the city's health and safety standards ordinances. Polecat sued the city and the city countersued seeking an injunction to prohibit violations of its ordinances. The trial court ruled in favor of the city and issued a permanent injunction. Polecat appealed. The appellate court rejected Polecat's arguments and found: (1) Polecat failed to preserve its complaints about the affidavits to the motion for summary judgment for appeal; (2) Chapter 54 does not require proof of continuing violations; (3) the city carried its burden on its motion for summary judgment; and (4) Polecat could not defeat the city's no-evidence motion for summary judgment on the inverse condemnation and Equal Protection claims.

City of Grapevine v. Muns, No. 02-19-00257-CV, 2021 WL 3419675 (Tex. App.—Fort Worth Aug. 5, 2021). This appeal arises from a challenge to the City of Grapevine's municipal ordinance banning short-term rentals (STRs). Plaintiffs own residential properties in Grapevine that they lease to others on a short-term basis. The city passed an ordinance expressly prohibiting STRs in the city. As a result, the plaintiffs sued the city, requesting declarations that the STR Ordinance violates their substantive due-course-of-law rights, is preempted, and is unconstitutionally retroactive. Plaintiffs also asserted a regulatory-takings claim and sought injunctive relief.

The city moved for summary judgment and filed a plea to the jurisdiction arguing that the trial court lacked subject-matter jurisdiction over this case because: (1) the plaintiffs failed to exhaust their administrative remedies; (2) the plaintiffs were seeking an advisory opinion on the STR Ordinance because they have not challenged the city's existing zoning ordinance under which STRs are not a permitted use in the first place; (3) the plaintiffs' regulatory takings claim is invalid; and (4) governmental immunity bars the plaintiffs' claims for declaratory and injunctive

relief. The trial court disagreed and denied the city's motion and plea. The city then filed an interlocutory appeal, contending in five issues that the trial court lacked jurisdiction and thus erred by denying the city's jurisdictional plea. The appellate court reversed and rendered in part and affirmed in part.

Given the nature of real property rights, the appellate court concluded that the plaintiffs had a vested right to lease their properties and that this right was sufficient to support a viable due course of law claim. Because the plaintiffs had pleaded valid claims challenging the constitutionality of the STR Ordinance, the city was not immune from the plaintiffs' requests for injunctive relief. However, the appellate court did find that the plaintiffs failed to plead a facially valid preemption claim. Therefore, the court reversed the part of the trial court's order denying the city's amended plea to the jurisdiction as to that claim and rendered judgment dismissing it. The appellate court affirmed the remainder of the trial court's order.

Draper v. City of Arlington, No. 02-19-00410-CV, 2021 WL 2966139 (Tex. App.—Fort Worth July 15, 2021). This is an appeal arising from a challenge to two City of Arlington municipal ordinances regulating short-term rentals (STRs). Plaintiffs own residential properties in the City of Arlington that they have leased to others on a short-term basis. The city adopted two complementary ordinances: (1) an ordinance amending the city's Unified Development Code to specifically allow STRs as permitted uses only in certain areas of the city; and (2) an ordinance regulating the operation of STRs. As a result, plaintiffs sued the city and its mayor, seeking declarations that both ordinances violate their due-course-of-law and equal protection rights under the Texas Constitution and that the STR ordinance's prohibition against STR tenants congregating outdoors on the premises during certain hours violates the tenants' assembly and freedom of movement rights under the Texas Constitution.

The plaintiffs applied for a temporary injunction to enjoin the city and the mayor from enforcing the ordinances. The trial court denied the application, and the plaintiffs appealed. The appellate court affirmed the trial court's order holding that the regulations adopted by the city were rationally related to legitimate governmental interests and within the city's police powers. Moreover, the appellate court concluded that the plaintiffs lacked standing to raise a violation of the tenants' assembly and freedom of movement rights.

London v. Rick Van Park, LLC, No. 05-20-00813-CV, 2021 WL 1884650 (Tex. App.—Dallas May 11, 2021) (mem. op.). The plaintiff sued the city secretary and former chair of the planning and zoning committee for declaratory and injunctive relief, claiming the city officials acted ultra vires for failing to issue a certificate of no action on a preliminary development plan in the city when the submitted plan was deemed deficient, not properly filed, and substantially incomplete per the Town of St. Paul's ordinances. The trial court denied the city officials' plea to the jurisdiction and the city officials appealed. The appellate court found that the officials the plaintiff sued were not the "municipal authority" responsible for the no action certificate. As such, the court granted the plea, and gave the plaintiff the opportunity to replead.

TitleMax of Tex., Inc. v. City of Austin, No. 07-20-00305-CV, 2021 WL 1899357 (Tex. App.—Amarillo May 11, 2021) (mem. op.). TitleMax sued the city, seeking declaratory and injunctive

relief relating to a city ordinance designed to regulate companies' credit-service activities. The trial court granted the city's plea to the jurisdiction on the grounds that the ordinance was a penal law that could not be challenged in civil court. The appellate court reversed, relying on the Texas Supreme Court case *Texas Propane Gas Association v. City of Houston*, which held that a law that contains both civil and criminal aspects can be challenged in civil court if the "essence" of the law is civil.

MISCELLANEOUS

Builder Recovery Services, LLC v. Town of Westlake, No. 21-0173, 2022 WL 1591976 (Tex. May 20, 2022). The town of Westlake ("Town") passed an ordinance that required waste removal businesses to obtain a license to conduct its business and charged the businesses 15% of their gross revenue. Build Recovery Services ("BRS") brought declaratory-judgment action seeking declaration that the ordinance was unlawful. BRS is paid by private customers to provide dumpsters during construction projects and then haul the loaded dumpsters to landfills. General-law cities, like Town, have "only such implied powers as are reasonably necessary to make effective the powers expressly granted." The Supreme Court has previously held that a general-law city's implied powers are limited to those that are "indispensable" to carrying out expressly granted powers. Additionally, section 363.111 of the Texas Health & Safety Code authorizes general-law municipalities to "adopt rules for regulating solid waste collection, handling, transportation, storage, processing, and disposal. Supreme Court held that general-law municipality's express power to regulate construction trash hauling did not include implied power to charge licensing fees based on a percentage of revenue. Town may charge a fee to pay for the regulation of trash hauling but the fee must be a fixed amount. An example would be basing the fee off of the number of license applications or per construction site or a fixed amount calculated to offset staffing or paperwork expenses incurred by the Town because of the regulation. But a floating, percentage-of-revenue fee will fluctuate based on economic forces having nothing to do with the Town's internal costs.

Handgun Notice: ***Paxton v. City of Austin***, No. 03-19-00501-CV, 2021 WL 3085845 (Tex. App.—Austin July 22, 2021) (mem. op.). The attorney general (AG) filed suit against the city under former section 411.209 of the Texas Government Code, alleging two types of violations: (1) the display of a permanent etched glass "no guns" sign that "depicts a handgun inside of a circle with a line through it;" and (2) oral warnings prohibiting the carrying of handguns on the premises of city hall. The AG requested civil penalties in the amount of $1,500 per day of violation and attorney's fees. During the trial, a citizen testified that he sent the city notices to remove a pictorial sign prohibiting the carrying of guns and was orally told he could not enter the premises. The trial court dismissed the claims related to the city's prohibition picture of a gun with a circle and line through it, but held the AG met its burden of proof as to other warnings (including oral warnings) on six separate days. The trial court ordered penalties of $9,000 against the city. The city did not appeal, but the AG did, asserting that the court should not have dismissed the pictorial violation and the city should have been penalized over $5 million due to continuing violations.

The appellate court affirmed the civil penalties imposed by the trial court against the city but denied the AG's request for stronger penalties as a matter of law. Because the AG had not raised any complaint until his appeal regarding the trial court's award of a $1,500 per diem amount rather than the mandatory $10,000 minimum authorized by the statute for subsequent violations, the court could not review that issue as it was not preserved.

Public Improvement District: ***Artuso v. Town of Trophy Club***, No. 02-20-00377-CV, 2021 WL 1919634, (Tex. App.—Fort Worth May 13, 2021) (mem. op.). Plaintiff Artuso sued the Town of Trophy Club for negligence and gross negligence with regard to his home's placement in the town's Public Improvement District No. 1 (PID) and the special assessments imposed in the district. Artuso asserted he timely paid all assessments and even overpaid, claimed that the manner in which the town apportioned the PID costs was arbitrary and capricious, amounting to a violation of his due process rights, and complained that the town had not responded to his assessment-reduction petition. The town filed two pleas to the jurisdiction, which were granted. Artuso appealed arguing that the trial court's oral statements about the grounds for granting the plea were improper as the trial court's signed order listed no grounds.

The appellate court asserted it could not look to the oral statements in the record, only to the wording of the actual written order. By applying this policy, the courts and parties are relieved of the obligation to "parse statements made in letters to the parties, at hearings on motions for summary judgment, on docket notations, and/or in other places in the record." Because Artuso had failed to challenge all of the grounds upon which the town's motion could have been granted, and failed to brief all grounds, the court of appeals affirmed the granting of the dispositive motions.

Public Information: ***City of Odessa v. AIM Media Texas, LLC***, No. 11-20-00229-CV, 2021 WL 1918968 (Tex. App.—Eastland May 13, 2021) (mem. op.). This is a Public Information Act (PIA) case where the Eastland Court of Appeals held the plaintiff is properly under the jurisdiction of the PIA.

AIM Media, a newspaper company, sued the City of Odessa for mandamus under the PIA, asserting that the city failed to timely provide the information requested and improperly redacted information. The city asserted that it provided all requested information and that AIM Media plead conclusory allegations only, with no facts. The city filed special exceptions to the bare pleadings and then filed a plea to the jurisdiction, which was denied. The city appealed.

The court noted that the city challenged the pleadings only, so the pleadings were taken as true for purposes of the plea. The PIA allows a requestor to sue for mandamus. While the court appeared to acknowledge that a lack of factual allegations can be grounds for a plea, the court held that the city failed to obtain a ruling on its special exceptions. As a result, whether the special exceptions properly put AIM Media on notice of any jurisdictional defects was not before the court. Taking the pleadings as true, the court held that AIM Media pled the minimum jurisdictional requirements. The plea was therefore properly denied.

Public Information Act: ***City of Georgetown v. Putnam***, No. 08-20-00171-CV, 2022 WL 883856 (Tex. App.—El Paso Mar. 25, 2022). Terrell Putnam filed a lawsuit against the City of

Georgetown, its mayor, and city manager (collectively, "the city"), to compel the city to provide a specific document to him pursuant to the Texas Public Information Act (PIA). The city had declined to provide the document after receiving an opinion letter from the Texas Attorney General that it was confidential and exempted under the PIA. During the litigation, however, the city voluntarily released the document to Putnam. The city thereafter filed a plea to the jurisdiction, arguing that the trial court lacked subject matter jurisdiction to hear any of Putnam's claims because the release of the document rendered Putnam's lawsuit moot, and because Putnam never had a valid claim for relief against the city that waived its immunity. Putnam opposed the city's plea to the jurisdiction, arguing that he was entitled to a judgment as a matter of law on his claims for declaratory relief under both the PIA and Uniform Declaratory Judgement Act (UDJA), as well as an award of attorney's fees and costs. The trial court agreed with Putnam.

The appellate court reversed the trial court's order, finding that: (1) release of the records mooted Putnam's claims under both the PIA and UDJA; (2) Putnam is not entitled to attorney's fees under the PIA because he did not substantially prevail in his PIA claim as the city released the records prior to the trial court's order granting his motion for summary judgement; and (3) Putnam is not entitled to attorney's fees under the UDJA as the city's immunity was not waived under the UDJA.