



TEXAS CITY ATTORNEYS ASSOCIATION

APRIL 2023 NEWSLETTER

Recent Texas Cases of Interest to Cities

Note: Included cases are from March 11, 2023 through April 10, 2023.

Citizen Initiative: *In re Morris*, No. 23-0111, 2023 WL 2543047 (Tex. Mar. 17, 2023). This is a petition for writ of mandamus related to a citizen-led initiative to amend the city's charter in which the Supreme Court denied the petition.

Advocacy organizations in San Antonio collected sufficient signatures to place a proposed charter amendment before the voters on the city's May 2023 election ballot. If adopted, the proposed charter amendment would prohibit local enforcement of certain state laws related to marijuana possession, theft offenses, and abortion, ban no-knock warrants and chokeholds, replace warrants for certain nonviolent offenses with citations, and create the position of a "Justice Director" to implement and enforce its prohibitions. The city ordered the proposed amendments be placed on the ballot as part of the May general election.

A prospective voter and advocacy organization filed a writ of mandamus arguing that the proposed amendment violates a state law requiring that citizen-initiated charter amendments be confined to a single subject. Specifically, they sought pre-election relief directly from the court to: (1) move the vote on the proposition from the May to the November election; (2) compel the city clerk and city council to separate the proposed amendment into single-subject parts; and (3) order alterations to the ballot language.

The Supreme Court denied the petition, holding that: (1) city council's failure to call an election on the proposed amendment within 78 days of the May election was not a reason to grant pre-election mandamus relief enjoining the vote on the amendment from being held in May; (2) the inability of city's voters to amend the charter for another two years if the allegedly void election on the proposed amendment were held was not a reason to grant pre-election mandamus relief enjoining the vote on the amendment from being held in May; (3) pre-election mandamus relief was not available to have city clerk or council ordered to separate the proposed amendment into "single issue" amendments; and (4) pre-election mandamus relief to order modification of the allegedly misleading ballot language was not available.

Immunity: *Frale v. Tex. A&M Univ. Sys.*, No. 21-0784, 2023 WL 2618532 (Tex. Mar. 24, 2023). This case stems from a premise-defect action brought by a motorist against a public university following injuries sustained at an accident.

The motorist proceeded straight through a T-shaped intersection, leaving the roadway and landing in a shallow ditch on the other side. He sued the university charged with maintaining the road, claiming that a lack of lighting, barricades, and warning signs around the intersection caused his injuries. He further alleged that the Texas Tort Claims Act (TTCA) waived the university's immunity from suit.

The Supreme Court affirmed the court of appeals decision, finding that: (1) the ditch was not a "special defect" and thus did not support application of the TTCA exception to governmental immunity for discretionary decisions about design and signage; (2) the university's decision to redesign a four-way intersection to a three-way T-shaped intersection and place a yield sign, rather than a stop sign or some other signal, was discretionary and thus subject to governmental immunity under Tort Claims Act; and (3) the court of appeals properly ordered the suit dismissed rather than remanded for re-pleading.

Collective Bargaining: *City of Houston v. Houston Prof'l Fire Fighters' Ass'n, Local 341*, No. 21-0518, 2023 WL 2719477 (Tex. Mar. 31, 2023). When the city firefighters' union (Firefighter Union) and the City of Houston reached a collective-bargaining impasse, the Firefighter Union filed suit against the city claiming that the city violated the Fire and Police Employee Relations Act, codified in Chapter 174 of the Local Government Code (Chapter 174) by failing to provide firefighters with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment. The Firefighter Union also requested a declaration of compensation and conditions of employment for one year pursuant to Chapter 174. The city responded by challenging Chapter 174's judicial-enforcement provisions, claiming that such enforcement violates the Texas Constitution's separation of powers clause. The city also claimed it was immune from suit.

While the suit was pending, city voters approved an amendment to the city charter (the pay-parity amendment) that would require the city to set firefighter compensation commensurate with police officer compensation at similar ranks. Upon the amendment's passage, the Houston Police Officer's Union (Police Union) sued the Firefighter Union, seeking a declaration that Chapter 174's state-law compensation standards and collective-bargaining process preempt the pay-parity amendment, rendering it unenforceable. The city joined the Police Union's claim against the Firefighter Union in the second suit.

In the first suit, the trial court rejected the city's constitutional and immunity challenges, and the court of appeals affirmed. In the second suit, the trial court ruled that Chapter 174 preempts the pay-parity amendment, and the court of appeals reversed, concluding that state law does not preempt the local amendment.

The Supreme Court held that: (1) Chapter 174 establishes reasonable standards for judicial enforcement such that it does not violate the constitutional separation of powers; (2) the Firefighter Union met all prerequisites for seeking Chapter 174 enforcement and thus, Chapter 174 waives the city's immunity from suit for Chapter 174 compensation; and (3) Chapter 174 preempts the pay-parity amendment, finding that local law may not supplant Chapter 174's rule of decision by requiring an inconsistent compensation measurement. Accordingly, the court remanded to the trial for further proceedings to establish whether the city has complied with Chapter 174's compensation standards, and if not, to set appropriate firefighter compensation.

Immunity: *City of Houston v. Houston Metro Sec.*, No. 01-22-00532-CV, 2023 WL 2602520 (Tex. App.—Houston [1st Dist.] Mar. 23, 2023) (mem. op.). Houston Metro Services (HMS), a private security company providing security services in high-crime areas, sued the City of Houston for tortious interference with contract, negligence per se, negligent training and supervision, conspiracy, and ultra vires after HMS lost its contract to provide security at an apartment complex. HMS alleged that the police department wrongfully failed to arrest certain individuals apprehended by HMS and transmitted expunged criminal records of the owner of HMS. The city filed a motion to dismiss, claiming governmental immunity. The trial court denied the motion and the city appealed.

The appellate court reversed, holding that: (1) HMS's various negligence claims did not implicate the TTCA's waiver of immunity; (2) the TTCA does not waive immunity for intentional torts; and (3) an ultra vires claim could be brought only against a government actor in his official capacity, not against the city.

Tort Claims Act: *City of Houston v. Nicolai*, No. 01-20-00327-CV, 2023 WL 2799067 (Tex. App.—Houston [1st Dist.] Apr. 6, 2023) (en banc 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 trial court denied the city's motion for summary judgment, 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, and the Nicolais moved for en banc reconsideration.

On en banc reconsideration, the appellate court affirmed the judgment of the trial court and reversed the judgment of the appellate court, holding that although choosing to take Caroline to the sobering center was a discretionary act, the act of driving may have been a ministerial act, so the city had not established the officer's official immunity as a matter of law.

Texas Tort Claims Act: *City of Groves v. Lovelace*, No. 09-21-00281-CV, 2023 WL 2533188 (Tex. App.—Beaumont Mar. 16, 2023) (mem. op.). The Lovelaces sued the City of Groves when a tree fell on Scott Lovelace, injuring him and causing his son, a bystander, shock and anguish. The tree was in the city’s right-of-way on property owned by the Lovelaces’ neighbor. The city filed a plea to the jurisdiction claiming governmental immunity. The trial court denied the plea, and the city appealed.

The appellate court reversed, holding that: (1) the claims were properly characterized as a premises defect claim rather than a special defect claim; and (2) the Lovelaces had not established a genuine issue of material fact as to whether the city had actual knowledge of the tree’s dangerous condition as required for a waiver of immunity on a premises defect claim.

Development Agreements: *City of Jarrell v. BE Theon E. P’ship No. 3, Ltd.*, No. 03-21-00651-CV, 2023 WL 2588567 (Tex. App.—Austin Mar. 22, 2023) (mem. op.). In 2008, BE Theon entered into a development agreement with the city of Jarrell. In the agreement, BE Theon agreed to voluntarily annex its undeveloped property near the intersection of Ronald Reagan Boulevard, and the city agreed to provide sufficient water and wastewater capacity “within three years after the completion of Ronald Reagan Boulevard at its intersection with IH-35.” The agreement also included a provision in which the city agreed to waive its governmental immunity with regard to the development agreement. Later in 2019, after the alleged completion of Ronald Reagan Boulevard, BE Theon provided the city with the “capacities it deemed sufficient for the planned uses of its property” pursuant to the agreement. After receiving no response from the city, BE Theon sued the city seeking specific performance and declaratory relief under Chapter 245 of the Local Government Code to establish the city’s obligations under the development agreement. The city then filed a plea to the jurisdiction, which the trial court denied. The city subsequently appealed arguing that: (1) BE Theon’s pleadings affirmatively negated the waiver of immunity in Chapter 245; (2) the trial court lacked jurisdiction over the breach of contract and promissory estoppel claims; (3) the separation of powers doctrine does not allow the judiciary to enforce the water and wastewater provision of the development agreement through specific performance; and (4) BE Theon’s claims were not ripe.

With regard to the city’s first issue, the court of appeals agreed that while BE Theon’s claims allege the city breached the development agreement by not complying with the provision regarding water and wastewater, BE Theon did not assert that the city had *changed* a regulation then tried to apply that change to BE Theon’s development of the property as required under Chapter 245. Although the court sustained this issue, it remanded the claim so that BE Theon could have an opportunity to replead. Affirming trial court on the city’s remaining issues, the court of appeals held that: (1) the development agreement was a contract that fell within the meaning of Section 212.172 therefore granting the court jurisdiction over the breach of contract claim; (2) BE Theon raised sufficient fact issues with regard to whether the city should be estopped from asserting governmental immunity; (3) the city did not raise a constitutional challenge to Section

212.172 at the trial court level and was barred from raising the issue in this interlocutory appeal; and (4) because facts issue remained with regard to whether Ronald Reagan Boulevard was complete for purposes of the development agreement, the trial court did not err in determining the plea was ripe.

Substandard Building: *Benser v. Dallas Cnty.*, No. 05-21-00725-CV, 2023 WL 2661255 (Tex. App.—Dallas Mar. 28, 2023) (mem. op.). Apex Financial Corporation (Apex) owned a piece of property with a vacant structure in the city of Dallas. When the structure fell into disrepair and the property was unkept, the city assessed maintenance liens and sought a court order requiring Apex to address the substandard building. After a public hearing, the court ordered Apex to demolish the structure within 30 days. When Apex failed to do so, the city obtained an order permitting the city to demolish the structure, which it later did. During this time, Apex’s property taxes became delinquent, and Dallas County and the city (the taxing authorities) sued to collect the accrued taxes and to foreclose on maintenance liens for the cost of upkeeping the property and demolition of the vacant structure. In 2016, the court entered a default judgment against Apex, but the taxing authorities later discovered an error with the last known address for Apex. As a result, they obtained an order for nonsuit, and the delinquent taxes continued to accrue. Then, in 2018, the taxing authorities initiated a new lawsuit including the delinquent taxes and additional maintenance liens that accrued after 2016. Apex filed a counterclaim seeking damages for the city’s wrongful demolition of its structure and removal of any accrued interest assessed after 2016 because Apex did not properly receive notice of the 2016 proceeding. The trial court ruled in favor of the taxing authorities and denied Apex’s counterclaim. Apex subsequently appealed.

In affirming the trial court’s rulings, the court of appeals held that Apex was not entitled to equitable relief in the form of vacatur of the penalties and interest that accrued after the 2016 judgment. The court stated that “[w]hen a party seeks equitable relief, it must offer and prove its willingness to do equity.” Although Apex claimed that had they been notified properly of the 2016 proceeding, it would have made arrangements to pay the judgement therefore avoiding the additional penalties and interest, the court found no evidence in the record showing Apex had attempted to pay any of its delinquent property taxes. The court of appeals further concluded that Apex was not entitled to damages because: (1) the city complied with the notice requirements under Section 214.001 of the Local Government Code; (2) Apex had actual knowledge of the demolition according to the record; and (3) Apex failed to timely appeal the demolition lien. As to Apex’s claim that some of the maintenance liens fell outside the statute of limitations, the court agreed with the taxing authorities that political subdivisions of the state, including cities, are exempted from statute of limitations defenses with regard to the foreclosure of maintenance liens under Texas Civil Practice & Remedies Code Section 16.061(a).

Employment Discrimination: *Tex. Health & Human Services v. Sepulveda*, No. 08-22-00043-CV, 2023 WL 2529747 (Tex. App.—El Paso Mar. 15, 2023). David Sepulveda sued the El Paso State Supported Living Center and Texas Health and Human Services

(collectively, “THHS”), alleging age and gender discrimination and retaliation after being denied a promotion multiple times. The trial court granted a partial plea to the jurisdiction in favor of the defendants, dismissing ten claims and leaving one age discrimination claim and two retaliation claims. THHS appealed the partial denial, arguing that Sepulveda failed to provide sufficient jurisdictional facts to support the three remaining claims under the Texas Commission on Human Rights Act (TCHRA).

Governmental units, such as cities and state agencies, have immunity from lawsuits, except when the Legislature waives this immunity. The Texas Labor Code provides a limited waiver of immunity for claims against governmental units alleging violations of the TCHRA. The waiver applies only to suits where the pleadings state a prima facie claim for a TCHRA violation; otherwise, the governmental unit retains immunity. The TCHRA prohibits employment discrimination based on specific characteristics and protects employees from retaliation for reporting discrimination. Texas courts recognize two methods of proof for TCHRA claims: direct evidence and the *McDonnell-Douglas* burden-shifting framework.

In this case, THHS argued that Sepulveda failed to provide sufficient jurisdictional facts for his retaliation claims and that the trial court made an error in denying their plea. The court applied the *McDonnell-Douglas* burden-shifting framework to assess Sepulveda’s retaliation claims under the TCHRA. For a valid retaliation claim, an employee must show engagement in a protected activity, experiencing a material adverse employment action, and a causal link between the two. In the first retaliation claim, while Sepulveda was not selected for a certain position, the court concluded that he could not establish a causal link between a Texas Workforce Commission complaint he had filed and the failure to be selected for the position. In the second retaliation claim, Sepulveda again argued that he was not selected for a position due to his previous complaints, and again the court concluded that he failed to provide sufficient evidence to support the claim. The court did find, however, that Sepulveda did state a prima facie case for age discrimination. Ultimately, the trial court’s order denying THHS’ plea to the jurisdiction for Sepulveda’s age-discrimination claim was affirmed, while the orders denying the pleas for the retaliation claims were reversed, and those claims were dismissed.

Res Judicata: *Wolf v. City of Port Arthur*, No. 09-21-00371-CV, 2023 WL 2802254 (Tex. App.—Beaumont Apr. 6, 2023) (mem. op.). The Wolfs sued the City of Port Arthur in a justice of the peace court after the city demolished a building on their land that had been found to be substandard. At the time the case was filed, a district court had granted the city’s plea to the jurisdiction and motion for summary judgment over the same subject matter. The Wolfs claimed that the current case was a different cause of action. The trial court granted the city’s plea to the jurisdiction and motion for summary judgment, and the Wolfs appealed.

The appellate court held that because the district court had made a final determination on the merits of the claim, the suit was between the same two parties as the district court

case, and the present suit was based on the same claims as those that were or could have been raised in the first action, the Wolfs' suit was barred by res judicata.

Public Information Act: *AIM Media Tex., LLC v. City of Odessa*, No. 11-22-00052-CV, 2023 WL 2530283 (Tex. App.—Eastland Mar. 16, 2023). AIM Media (AIM), a newspaper company, sued the City of Odessa for mandamus relief under the TPIA, asserting that the city failed to timely produce basic information it requested about arrests and crimes that had occurred in the city. The city filed a plea to the jurisdiction alleging that AIM had not adequately pleaded a cause of action for mandamus relief under the TPIA, which was denied by trial court. The court of appeals, in holding that AIM Media had pled the minimum jurisdictional requirements, affirmed the trial court's denial of the city's plea. The city subsequently filed a second plea to the jurisdiction claiming that AIM's cause of action was moot because the city had already produced the responsive documents relevant to AIM's request related to this lawsuit. As a result, the trial court granted the city's second plea to the jurisdiction and denied AIM's motion for summary judgment.

In this second appeal, AIM argued that: (1) because the case fell within two exceptions to the mootness rule, the release of the requested information during the pendency of the lawsuit did not render the controversy moot; (2) it had a right to request prospective mandamus relief compelling the ongoing, timely production of all future requests for basic information under the TPIA; and (3) the court of appeals should remand the case to the trial court for consideration of its request for attorneys' fees. Affirming the trial court's ruling, the court of appeals held that: (1) both the voluntary-cessation doctrine and the review-evasion doctrine did not apply in this case; (2) AIM's request for prospective relief was barred by governmental immunity; and (3) because AIM did not "substantially prevail" in the case even though the city voluntarily released the requested information, the court could not assess reasonable attorneys' fees under the TPIA.

Tort Claims Act: *Garcia v. Guerra*, No. 13-21-00166-CV, 2023 WL 2607729 (Tex. App.—Corpus Christi–Edinburg Mar. 23, 2023) (mem. op.). Garcia sued Guerra, the city manager of Pharr, Texas, for slander and intentional infliction of emotional distress, and sued the City of Pharr for wrongful termination. The trial court severed the claims against the city from the claims against Guerra, dismissed the claim against the city, and dismissed with prejudice the claims against Guerra individually. Garcia appealed the dismissal of his claims against Guerra.

The appellate court affirmed, holding that because Guerra was acting within the scope of his employment when he made the allegedly slanderous statements, the TTCA forecloses suit against him in his individual capacity.

Texas Whistleblower Act: *City of Houston v. Garcia*, No. 14-22-00024-CV, 2023 WL 2603759 (Tex. App.—Houston [14th Dist.] Mar. 23, 2023). Plaintiff Monica Garcia alleged that the City of Houston violated the Texas Whistleblower Act by terminating her employment during her probationary period in retaliation for reporting concerns about the

Houston's oversight of policies during the COVID-19 pandemic. Houston appealed the trial court's denial of the city's plea to the jurisdiction, based on Garcia's failure to initiate a grievance with the city. The Texas Whistleblower Act (TWA) protects public employees who report violations of law by their employers or other public employees to appropriate law enforcement authorities. Governmental entities cannot take adverse personnel action against such employees. If an employer retaliates against an employee for making such a report, the employee may sue the employer; however, the employee must first initiate action under the grievance or appeal procedures of the employing state or local governmental entity. The court concluded that Houston has no formal grievance or appeal procedures for probationary employees like Garcia; however, Garcia was still required to give the city some pre-suit notice that she wanted to administratively challenge her termination, even in the absence of an applicable formal grievance or appeal procedure. The court reversed the trial court's ruling and rendered judgment for Houston.

Tort Claims Act: *City of Houston v. Cardenas*, No. 14-21-00732-CV, 2023 WL 2808044 (Tex. App.—Houston [14th Dist.] Apr. 6, 2023) (mem. op.). Cardenas sued the City of Houston for injuries sustained after falling through an unsecured water meter box opening, alleging negligence and breach of duty of care. The city claimed governmental immunity, arguing they had no prior knowledge of the issue and filed a motion for summary judgment, which the trial court denied. Houston appealed, contending that the trial court wrongly denied its motion for summary judgment, as it did not have any notice of the alleged dangerous condition of the water meter box lid at the time of the incident. Under the Texas Tort Claims Act (TTCA), a governmental unit may be held liable for personal injury or death caused by a condition or use of tangible property if it would be liable as a private person. The parties agree that Houston owed Cardenas the same duty a private person owes to a licensee; therefore, Houston would need to have actual knowledge of the defect to be liable. The city presented evidence that it lacked actual knowledge of any defect or issue with the water meter box or its lid before the incident, which Cardenas argued against. Ultimately the court disagreed with Cardenas, concluding that Cardenas failed to raise a fact question as to whether the City of Houston had actual knowledge of any dangerous condition involving the water meter box at the judgement and rendered judgement dismissing the claims against the city.