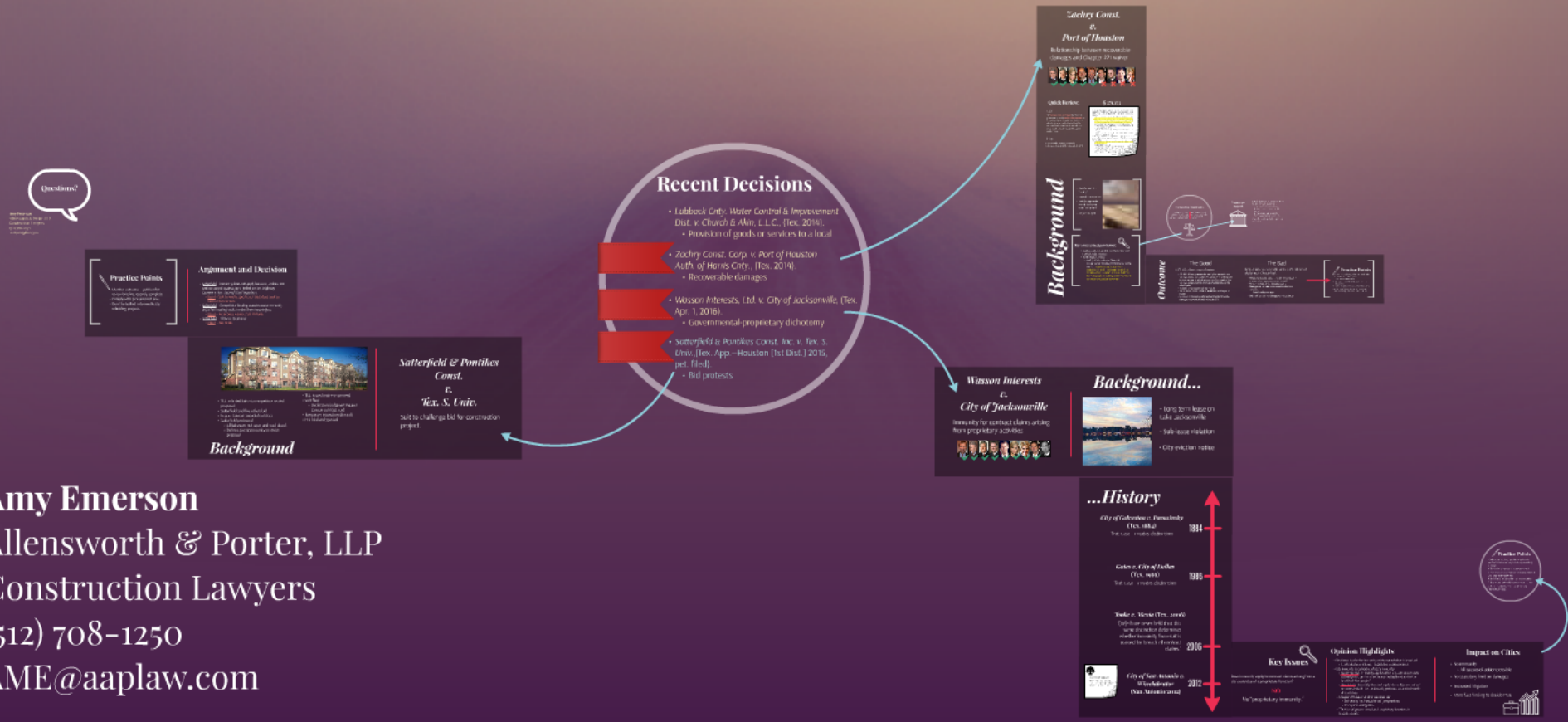
Contractual Immunity Update –
The Latest and Not so Greatest



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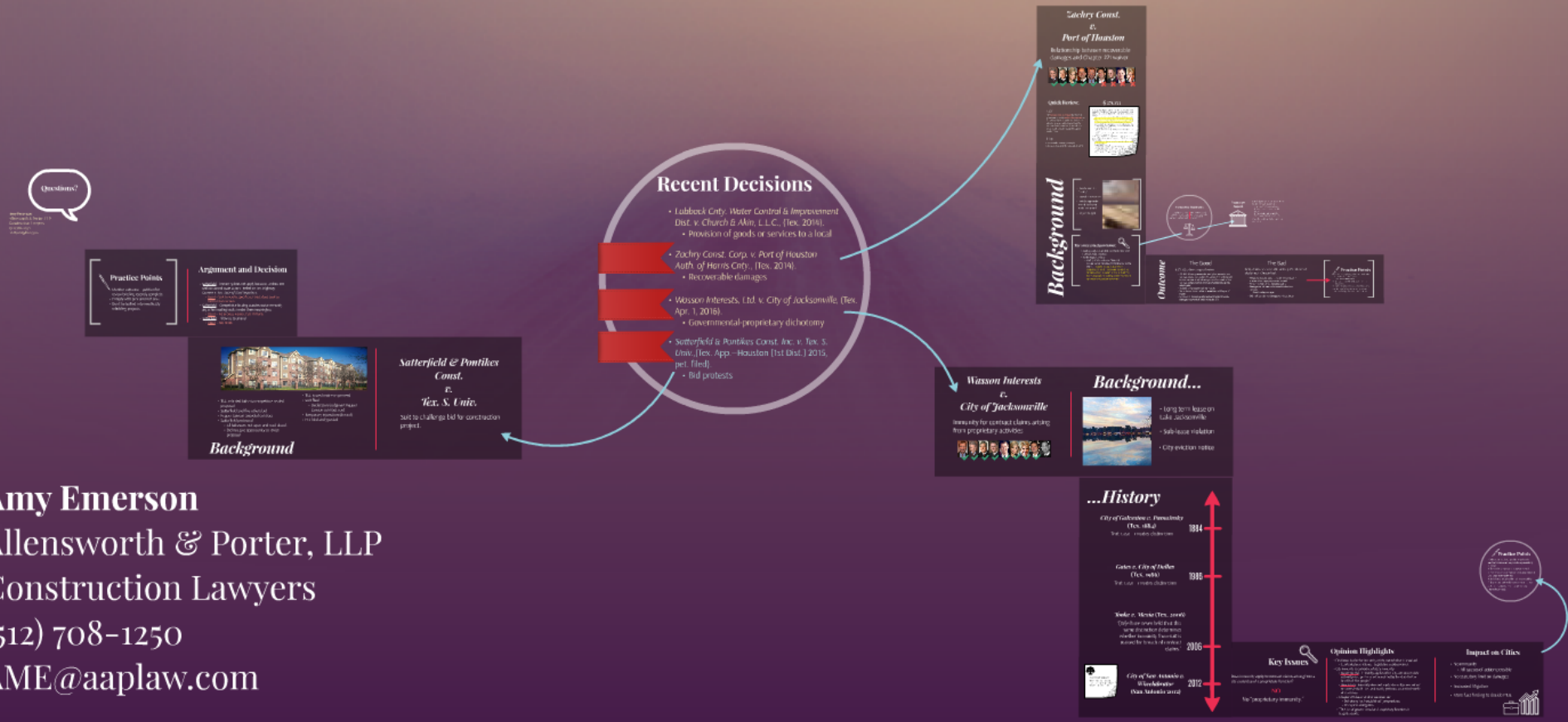

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Recent Decisions

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  - Provision of goods or services to a local
- *Zachry Const. Corp. v. Port of Houston Auth. of Harris Cnty.*, (Tex. 2014).
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Zachry Const.

v.

Port of Houston

Relationship between recoverable damages and Chapter 271 waiver

Quick Review:

§ 271.153

(a)(1)

the **balance due and owed** by the local governmental entity **under the contract** as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration;

(b)(1)

consequential damages, except as expressly allowed under Subsection (a)(1);

(a) Except as provided by Subsection (c), the total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter is limited to the following:

(1) the balance due and owed by the local governmental entity under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration;

(2) the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract;

(3) reasonable and necessary attorney's fees that are equitable and just; and

(4) interest as allowed by law, including interest as calculated under Chapter 2251, Government Code.

(b) Damages awarded in an adjudication brought against a local governmental entity arising under a contract subject to this subchapter may not include:

(1) consequential damages, except as expressly allowed under Subsection (a)(1);

(2) exemplary damages; or

(3) damages for unabsorbed home office overhead.

(c) Actual damages, specific performance, or injunctive relief may be granted in an adjudication brought against a local governmental entity for breach of a contract described by Section 271.151(2)(B).

Background

- Plan to work "in the dry"
- Time of the essence
- Port change order forced Zachry to work "in the wet"
- Project delayed

Key contractual provisions:

- Zachry solely responsible for the manner and method of construction
- No-damages-for delay
  - Zachry shall receive no financial compensation for delay or hindrance to the Work . . . EVEN IF SUCH DELAY OR HINDRANCE RESULTS FROM, ARISES OUT OF OR IS DUE, IN WHOLE OR IN PART TO THE NEGLIGENCE, BREACH OF CONTRACT OR OTHER FAULT OF THE PORT.

Competing

Zachry: No-damages provision unenforceable because delays caused by Port's intentional misconduct.

Outcome

§ 271.153 de

- 271.152: A
  contract su
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  contract, ***su***
  subchapte
- "Subject to"
- Terms & co
  waiver.
- Conclusion
  damages r

- Plan to work “in the dry”
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“Freeze Wall” Plan

Working in the Dry

Key contractual provisions:

- Zachry solely responsible for the manner and method of construction
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Competing Arguments

Zachry: No-damages provision unenforceable because delays caused by Port's intentional misconduct.

Port: Immune from suit because no amounts "due and owing under the contract."

Issues on Appeal

1. Did Chapter 271 waive immunity for Zachry's delay damage claim?
    a. Does § 271.153's limit on damages define and restrict the scope of the waiver?
    b. If so, are delay claims sought by Zachry recoverable under § 271.153?

2. Was the no-damage-for-delay provision enforceable?

Outcome

The Good

§ 271.153 defines scope of waiver

- 271.152: A local governmental entity that enters into a contract subject to Chapter 271, waives "immunity to suit for the purpose of adjudicating a claim for breach of the contract, ***subject to the terms and conditions of this subchapter***."
- "Subject to" language modifies "waives"
- Terms & conditions = other nine sections of Chapter 271 waiver.
- Conclusion: **Immunity only waived if plaintiff seeks damages recoverable under Chapter 271**.

The Bad

Delay claims are recoverable under § 271.153 even if disclaimed in the contract.

- "[B]alance due and owed . . . under the contract" = amount of damages payable and unpaid.
- All common-law, direct damages qualify
- Damages do not need to be ascertainable from contract
  - Proof = delay damages
- DID NOT consider no-damages-for-delay clause

Practice Points

- Assert PTJ for any damage claims or remedies that are not available under statutes
  - Example: injunctive relief
- Don't expect that a PTJ will be granted based on contract limits
- Include contractual limitations of liability anyway
- Watch: *City of Colleyville v. Newman*, 2016 WL 1314470 (Tex. App.—Fort Worth Mar. 31, 2016).

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Wasson Interests v. City of Jacksonville

Immunity for contract claims arising from proprietary activities

Background...

- Long term lease on Lake Jacksonville
- Sub-lease violation
- City eviction notice

...History

City of Galveston v. Posnainsky

(Tex. 1884)

Tort case – creates distinction

1884

Gates v. City of Dallas

(Tex. 1986)

Tort case – creates distinction

1986

Tooke v. Mexia (Tex. 2006)

"[W]e have never held that this same distinction determines whether immunity from suit is waived for breach of contract claims."

2006

City of San Antonio v. Wheelabrator (San Antonio 2012)

2012

Doe
city

Courts of Appeals

- Pre-Wheelabrator – Immunity waived for proprietary contracts
- Post-Wheelabrator – Split

Key Issues

Does immunity apply to contract claims arising from a city's exercise of a proprietary function?

NO

No "proprietary immunity."

Opinion Highlights

- First issue is whether immunity exists, not whether it is waived
  - Courts decide existence. Legislature decides waiver.
- City immunity is derivative of state immunity
  - Governmental: Immunity applies when city acts under state authority—i.e., performs act mandated by the state for the benefit of "the people."
  - Proprietary: Immunity does not apply when city does not act on state's behalf – i.e., voluntarily performs an act for benefit of its citizens.
  - Chapter 271 does not alter common law
    - Dichotomy "well-established" jurisprudence
    - No express abrogation
  - TTCA list of governmental and proprietary functions is to guide courts.

Impact on Cities

- No immunity
  - All causes of action possible
- No statutory limit on damages
- Increased litigation
- More fact finding to decide PTJs

Practice Points

1. When contracting, consider whether the contract involves or may involve a proprietary function
2. Try to define contracts as governmental
3. Consider separate contracts for governmental and proprietary activities
4. Insist on contractual limitations of liability
5. Use merger and written amendment clauses
6. Train city employees to avoid entering into oral contracts

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Tex. S. Univ.

Suit to challenge bid for construction project.

- TSU solicited bids via competitive sealed proposal
- Satterfield and five others bid
- Pepper Lawson awarded contract
- Satterfield protested
  - All bids were not open and read aloud.
  - Did not give opportunity to revise proposal

- TSU is
- Suit fi
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- Tempo
- PTJ fil

Background

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nd read aloud.

- TSU issued notice to proceed
- Suit filed
  - Declaratory judgment Pepper Lawson contract void
- Temporary injunction (denied)
- PTJ filed and granted

Argument and Decision

- Satterfield – immunity does not apply because DJ does not seek to control state action. Relied on *Tex. Highway Comm'n v. Tex. Ass'n of Steel Importers*.
  - Court – Suit to void a specific contract does seek to control state action
- Satterfield – Competitive bidding statutes waive immunity – any other reading would render them meaningless
  - Court – No express waiver, TSU immune.
- Satterfield – Allow us to amend
  - Court - No, moot.

Practice Points

- Monitor outcome – petition for review briefing recently complete.
- Comply with procurement laws
- Don’t be bullied into needlessly rebidding projects

Questions?

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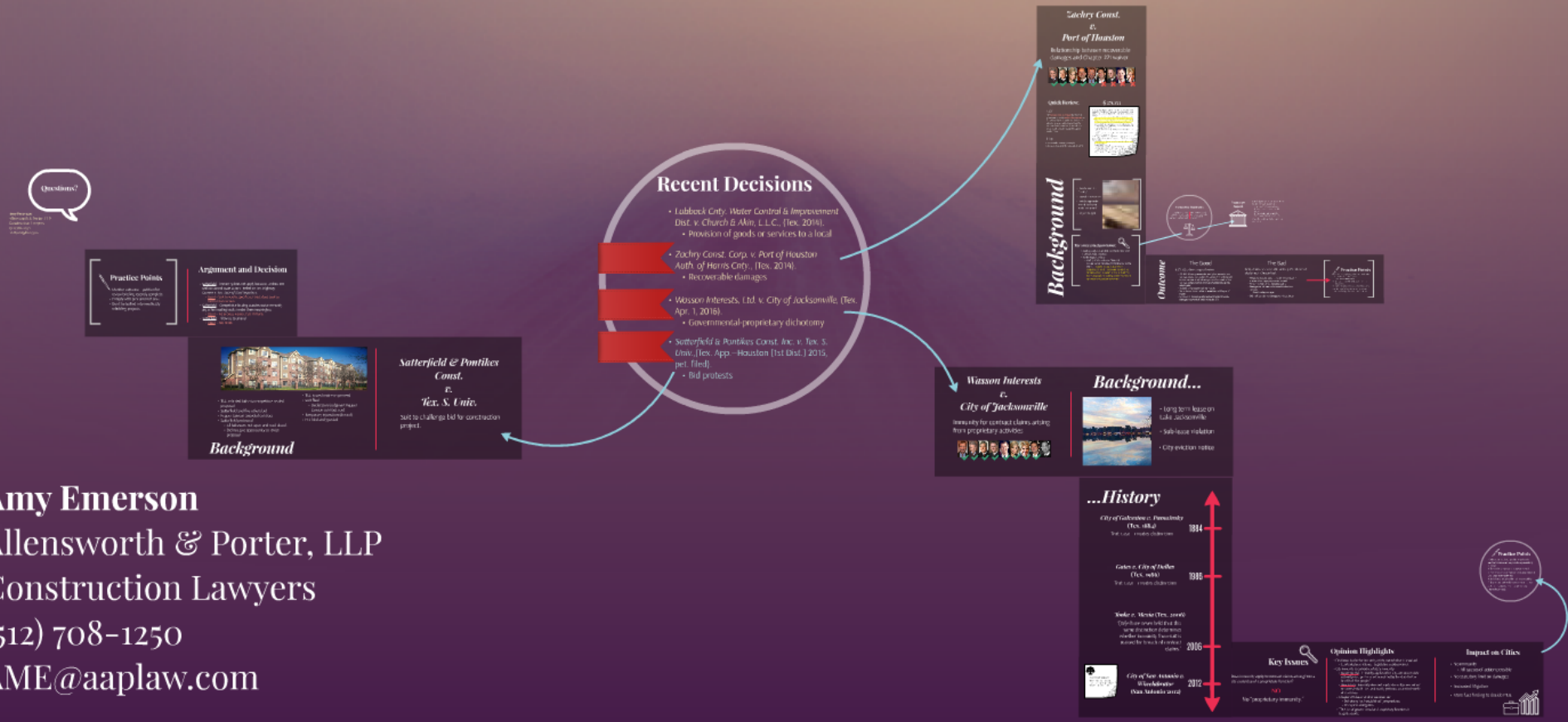

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