

(Short Video)

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TCAA 2017

## CONTRACT IMMUNITY UPDATE

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# SCOTex Game Changers:

- ***Zachry Constr. Corp. v. Port of Houston Auth. of Harris Cnty.*, (Tex. 2014).**
  - Recoverable damages
- ***Wasson Interests, Ltd. v. City of Jacksonville*, (Tex. Apr. 1, 2016).**
  - Governmental-proprietary dichotomy

Zachry Construction Corp.

v.

Port of Houston Authority of  
Harris County (Tex. 2014)

Relationship between recoverable  
damages and Chapter 271 waiver



# Key Issue

What is the  
"balance due  
and owed under  
the contract?"

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# 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).

Corp.

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(2014)

verable  
waiver

# 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.**

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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?

# Immunity holdings:

- Must allege recoverable damages under statute for waiver to apply
- “[B]alance due and owed . . . under the contract”
  - a. Direct damages payable and unpaid
  - b. No need to be stated in or ascertainable from the contract

**Result: Immunity waived for claim for delay damages even though contract contained NDD clause.**

# Can "under the contract" really mean you don't consider the contract?

*The appellate courts seem unconvinced.*

**County of Galveston v. Triple B Servs., LLP, 498 S.W.3d 176 (Tex. App.—Houston [1st Dist.] 2016, pet. filed)**

- Suit for disruption damages
- Recognized Zachry interpretation, but examined recoverability of damages under contract at issue
- Waiver



**City of San Antonio v. Casey Industrial, Inc., 2016 WL 320504 (Tex. App.—San Antonio 2016, pet. denied)**

- Contractor suit for damages under unique force majeure clause
- Recognized Zachry interpretation, but then analyzed numerous contract provisions
- Waiver



**Romulus Group, Inc. v. City of Dallas, 2017 WL 1684651 (Tex. App.—Dallas May 2, 2017, no pet. h.)**

- Payment dispute over temporary employees supplied by Romulus
- Contract included unit price for 25 categories of employees
- Dispute over employees termed "Clerical Positions Not Listed" - Unit price vs. markup
- Did unlisted employees fall within contract?
- Court looked solely to contract, no Zachry interpretation



**City of Colleyville v. Newman, 2016 WL 1314470 (Tex. App.—Fort Worth 2016, pet. denied)**

- Independent contractor reclassified as employee seeks benefits (e.g. health insurance)
- P claimed benefits were direct damages "due and owed" under employment K
- Looked to contractual provision barring P from additional benefits and comp to decide not amounts due and owed
- Distinguished Zachry on basis that NDD was unenforceable
- No waiver



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***Romulus Group, Inc. v. City of Dallas, 2017  
WL 1684631 (Tex. App.-Dallas May 2, 2017,  
no pet. h.)***

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# The Court has been known to ~~walk back~~ *clarify* its immunity decisions

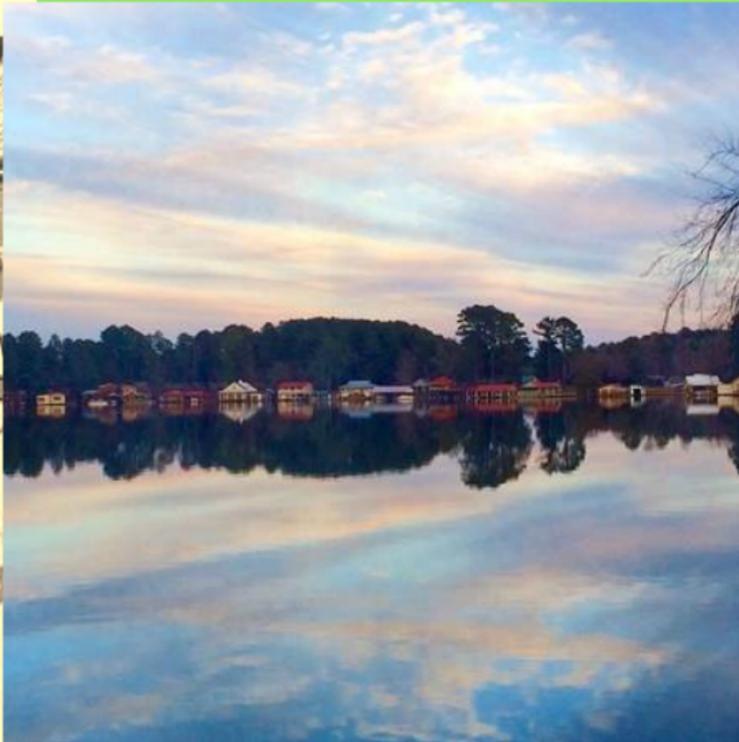
- *Mo. Pac. RR Co. v. Brownsville Nav. Dist.* (1970) – sue or be sued
- *Federal Sign v. Texas Southern University* (1997) – waiver by conduct
- *Ben Bolt-Palito Blanco Consol. ISD v. Pol. Subdivisions Prop./Cas. Joint Self-Ins. Fund* (2006) – services to a governmental entity



# 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

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# Key Issue

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

**NO**

No "proprietary immunity."



# Impact on Cities

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

# The Wasson Effect

## Increased Litigation?

- 4 appellate opinions in one year
  - *Jamro Ltd. v. City of San Antonio*, 2017 WL 993473 (Tex. App.—San Antonio Mar. 15, 2017, no pet.)
    - TIRZ = Gov't Function
  - *City of San Antonio v. Hays St. Bridge Restoration Grp.*, 2017 WL 7710112 (Tex. App.—San Antonio Mar. 1, 2017, no pet. h.)
    - Bridge Restoration = Gov't Function (Render)
  - *City of Dallas v. Trinity E. Energy, LLC*, 2017 WL 491259 (Tex. App.—Dallas Feb. 7, 2017, pet. filed)
  - *Wasson Interests, Ltd. v. City of Jacksonville*, 513 S.W.3d 217 (Tex. App.—Tyler 2016, pet. filed)

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*Wasson Interests, Ltd. v. City of Jacksonville* (Tyler)  
Governmental vs. Proprietary

*City of Dallas v. Trinity East Energy*

# Conflicting Results

*Wasson Interests, Ltd v. City of Jacksonville (Tyler)*  
On Remand, Governmental vs. Proprietary

*Wasson-*

- Lease of lake lots for residential development not a listed activity
- Under General Definitions = Proprietary because discretionary
- City's actions listed as governmental
  - Lease purpose to protect water supply = waterworks, dams and reservoirs, water and sewer service
  - Termination of lease = enforcement of land use restrictions

Jacksonville & Court-

**Result-**

- **Lease & lease termination = Gov't activity → immunity applies**

filed)

- *Wasson Interests, Ltd. v. City of Jacksonville*, 513 S.W.3d 217 (Tex. App.—Tyler, 2017), [filed](#)

- City lease with Trinity for floodplains
- Purpose-built floodplains
- Trinity needed for floodplains
- Drill sites for floodplains
- Planning for floodplains
- After den... preventing...

## *City of Dallas v. Trinity East Energy LLC (Dallas)*

- City leased mineral rights on city property to Trinity for oil & gas drilling
- Purpose-additional city revenue from parkland & floodplain properties
- Trinity needed to surface drill - required city permit
- Drill sites in lease but no pre-approved permit
- Planning commission & council denied permits
- After denial, set backs became more restrictive preventing drilling



# Cont.

Trinity  
Sued

- Oil & gas leases not listed; proprietary per *City of Corpus Christi v. Gregg*, 289 S.W.2d 746 (Tex. 1956)

Dallas

- Lease & permits involved listed activities: Regulation of parks, floodplains, environment of land use restrictions

Court

- Followed *Gregg* - Lease & denial of permits proprietary

*Wasson*  
(Tyler)

• Lease for private • Le

Followed *Gregg* - Lease &  
denial of permits  
proprietary

## *Wasson* (Tyler)

- Lease for private use
- Canceled due to zoning
- Lease served arguable govt. purpose
- Governmental

## *Trinity* (Dallas)

- Lease for private use
- Canceled due to zoning
- Lease served arguable govt. purpose
- Proprietary

# Practice Points

## Wasson Lessons

- 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

7.) Assert PTJ for any d  
claims or remedies that  
available under statutes

Zachry



- 4.) Insist on contractual limitations of liability
- 5.) Use merger and written amendment clauses
- 6.) Train city employees to avoid entering into oral contracts



## Zachry Lessons

- 7.) Assert PTJ for any damage claims or remedies that are not available under statutes

- Example: injunctive relief

- 8.) Don't expect that a PTJ will be granted based on contract limits

- 9.) Include contractual limitations of liability anyway and define consequential damages

# One to Watch

## Contract Waivers & Attorney Fees



§ 271.153(a)(3) Tex. Loc. Govt. Code

(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 contract subject to this subchapter is limited to the following:

\* \* \*

(3) reasonable and necessary attorney fees that are equitable and just."

*County of Galveston v. Triple B Services*, 498 S.W. 3d 176  
(Tex. App.—Houston [1st Dist.] 2016, pet. filed)

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(3) reasonable and necessary attorney fees that are equitable and just."

*County of Galveston v. Triple B Services*, 498 S.W. 3d 176  
(Tex. App.—Houston [1st Dist.] 2016, pet. filed)

- Triple B sought recovery of fees under
  - TCPRC § 38.001
  - County Waiver Statute (Tex. Loc. Govt. Code § 262.007(d))
- Court
  - § 38.001 does not apply to govt. entities
  - Waiver not "substantive basics for attorney's fees; it only allows attorney's fees if another statute—or the contract—allows attorney's fees."
    - Relied on text of § 262.001; and
    - *Zachry* interpretation of § 271.151-.153

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## ***Take Away:***

**Attorney fees may  
not be recoverable  
from City unless  
agreed to in  
contract.**

- Court
  - § 38.001
  - Waiver allows a
  - allows a
  - Relie
  - Zach

Questions?



