RECENT STATE CASES OF INTEREST TO CITIES

Presented to:
TEXAS CITY ATTORNEYS ASSOCIATION
SUMMER CONFERENCE
South Padre Island
June 19, 2014

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Laura, originally from Yukon, Oklahoma, graduated summa cum laude from the University of Oklahoma in 2001 with a liberal arts degree. She attended the University of Texas School of Law, where she was active in student recruiting, advocacy programs, and the Texas Journal on Civil Liberties and Civil Rights. While in law school, Laura worked as a law clerk for TML and as an intern for the Travis County Juvenile Public Defender's Office. After graduating with honors in 2004, Laura clerked for the Supreme Court of Texas. She joined the TML legal staff as legal counsel in November 2006. Laura became Assistant General Counsel in November 2010. Laura was given the TML Employee of the Year Award for 2013. Laura specializes in employment law, sign regulation, and writes amicus briefs for member cities.

TML LEGAL DEPARTMENT
Austin, Texas

The TML Legal Department is a ragtag group of attorneys brought together for one purpose, to give city officials general legal information without knowing anything about the controlling facts, city ordinances, or city charter. This advice often conflicts with that given by a city's own attorney (who does have the pertinent information), but the legal department is free so we must be right. From its ivory tower in northeast Austin, the legal department also moonlights as a therapist for city officials and city attorneys. The TML Legal Department also likes to take great papers written by city attorneys and place them on their Web site. Every two years the legal department emerges from its northeastern home to travel to the state legislature to repeat the information given to them by TML lobbyists, like the puppets they are.

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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 our job just a little bit easier. If you have not had a chance to sign up to be placed on his free email list for case summaries, you should check it out at www.rshlawfirm.com

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ANIMALS

Dangerous Dog: ***Romano v. State,*** **No. 09-13-00250-CV, 2013 WL 6145782 (Tex. App.—Beaumont Nov. 21, 2013) (mem. op.).** This is a dangerous dog case where the court held that even though the Texas Health and Safety Code does not provide for an appeal, a person wishing to appeal a dangerous dog determination by a trial court can appeal a justice court judgment to a county court at law.

The underlying facts are simple. Gus the dog, who was being fostered by a third party for Jennifer Romano of Maggie's House Rescue, attacked the foster caregiver. The Montgomery County animal control officer issued an affidavit for seizure. The justice court issued a warrant for Gus's seizure and subsequently determined that Gus caused serious bodily injury and should be destroyed. Romano appealed to County Court at Law No. 2 (CCL No. 2), but the state argued Texas Health and Safety Code Chapter 822 does not authorize an appeal from the justice court's judgment so CCL No. 2 lacked jurisdiction. The CCL No. 2 granted the motion to dismiss and Romano appealed.

The Beaumont Court of Appeals held that Subchapter A of Chapter 822 of the Texas Health and Safety Code does not contain any appellate provisions. Nevertheless, a county court at law has original and appellate jurisdiction over all causes and proceedings prescribed by law for county courts. TEX. GOV'T CODE § 25.0003(a). Chapter 822 does grant jurisdiction to hear dangerous dog cases to county courts (albeit as the trial court). Additionally, even when an appeal is not expressly provided by other laws, Section 51.001(a) of the Texas Civil Practice & Remedies Code states that a party may appeal a justice court's ruling when the judgment or amount in controversy exceeds $250. Accordingly, even without express authorization from Subchapter A, the county court at law had jurisdiction so long as the amount in controversy was met. Since the record is silent as to the amount in controversy, the case was remanded.

ECONOMIC DEVELOPMENT

Economic Development*: City of Leon Valley Econ. Dev. Corp. v. Little***, 422 S.W.3d 37 (Tex. App.—San Antonio Dec. 31, 2013).** This opinion withdrew a prior opinion of June 19, 2013, and substituted this opinion. In the original opinion, the Fourth Court of Appeals determined that the Leon Valley Economic Development Corporation (EDC) was not a political subdivision unit and was, therefore, not entitled to take an interlocutory appeal from the denial of a plea to the jurisdiction. In this new opinion, the original panel reversed itself and held an economic development corporation's powers, privileges, and functions are specified by statute. Therefore, an economic development corporation falls within the broad definition of governmental unit for purposes of an interlocutory appeal. In this case, a property owner sued the EDC for breach of contract from a failed development project. The EDC filed a plea asserting governmental immunity, which was denied, and the EDC appealed. This substituted opinion holds the EDC is not inherently protected by the common-law doctrine of governmental immunity. However,

Texas Local Government Code Section 505.106(b) statutorily invoked the common-law doctrine of governmental immunity to protect an economic development corporation for limited purposes (i.e. claims brought under Texas Tort Claims Act). Non-tort claims are also precluded under Subsection (a), but only the immunity from liability (which is not jurisdictional). The court held that subsection (a) makes the EDC immune from liability, but since the issue was brought before them on a plea to the jurisdiction, the plea was properly denied as it is not a jurisdictional defense.

GOVERNMENT IMMUNITY

Tort Claims Act: *City of Houston v. Cogburn*, No. 01-11000318-CV, 2014 WL 1778279 (Tex. App.—Houston [1st Dist.] May 1, 2014) (mem. op. on reh'g). In this case, a man tripped over some tree roots on his way to put money in a parking meter and was severely injured. He sued the city under the Tort Claims Act under a theory of special defect. In March 2013, the court of appeals held that the city was open to liability for a special defect and sent the case back to the trial court for a trial on the merits. The city requested rehearing, and the plaintiff failed to submit a response. On rehearing, the court held that the city had proven that the "defect" in question, tree roots, was a naturally occurring phenomenon that was open and obvious, and thus, the city could not be held liable for injuries caused by the tree roots. The court rendered judgment for the city.

Tort Claims Act: *City of Houston v. Davis*, No. 01-13-1678907, 2014 WL 1678907 (Tex. App.—Houston [1st Dist.] Apr. 24, 2014) (mem. op.). A police dog, Berro, bit Mr. Davis after he encountered the police dog during a traffic stop of another vehicle that had been trying to run Davis's car off the road. Davis's wife had told the officer that a car had been trying to run their car off the road. The officer pulled the car over and the Davises also pulled over. Mr. Davis got out of his car and was attacked by the police dog after the police dog had exited the car through an open door without prompting from the officer. The Davises sued the city under the Tort Claims Act (Act), claiming that the officer was negligent in leaving the car door open and that the dog would not have bitten him if the car had been properly equipped to keep the dog in the car. The city argued that it retained immunity under the "emergency exception" to the Tort Claims Act. TEX. CIV. PRAC. & REM. CODE § 101.055(2). The court held that the traffic stop constituted an emergency protected by the Act based on the facts given by both parties, which was that the Davises requested the officer's immediate assistance and he was providing that assistance when the attack occurred. The court also held that the officer did not show reckless disregard or conscious indifference for the possibility of injury when he left the car door open.

Governmental Immunity: *Parker v. Hunegnaw*, No. 14-13-00031-CV, 2014 WL 800998 (Tex. App.—Houston [14th Dist.] Feb. 27, 2014) (mem. op.). City of Houston Mayor Annise Parker appeals the denial of her second amended plea to the jurisdiction in this trespass-to-try-title suit. The appellate court affirmed the denial.

Hunegnaw owned several lots and executed a durable power of attorney (POA) to an agent to handle the property, including selling or conveying the property. Hunegnaw asserts the instrument applied only to lots 36F and G while Mayor Parker contends it applied to all property in the track. In 2004, five lots were transferred to Treasa Antony via deed bearing Hunegnaw's

signature which was a stamp given to his agent under the POA. Antony sold three lots to the City of Houston via general warranty deed. Hunegnaw asserts the deeds were invalid because Antony's deeds were forged and not authorized. Hunegnaw sued the agent, Antony, the notary, and the city's sitting mayor at the time. He asserts the city is wrongfully withholding possession of the property. Mayor Parker asserts the claims against the city are barred by governmental immunity and the mayor, as a public official, is immune unless she acted in an *ultra vires* manner. The trial court denied the plea, Parker appealed. This court previously affirmed the denial in a former opinion. The court notes that in the former opinion, no claims against Parker were viable against her individually, but only in her official capacity. Parker filed a second plea/motion for summary judgment (MSJ) with supporting evidence. The trial court denied the second plea/MSJ and Mayor Parker appealed.

The court first held that the fact that a grantee is an innocent purchaser is immaterial because one cannot obtain bona fide purchaser status when there is a forged deed. The court analyzed several challenges to Hunegnaw's affidavit but determined Parker waived several by not objecting. They were complaints as to defects in form as most (but admittedly not all) of the statements were supported by evidence and therefore not conclusory. The court's standard of review does not permit the inferences argued by Parker, and Hunegnaw properly raised genuine issues of material fact precluding both the plea and MSJ. The court next concluded that it is unclear whether Hunegnaw learned of the alleged fraud prior to the city's purchase and should have acted. Finally, even though Parker was not the mayor at the time of the transfer, she is the one currently "wrongfully possessing" the property. While Parker asserts the head of the Parks and Recreation Department is the proper official, she presented no evidence identifying the official, negating she lacks control over the decisions regarding the property, or that the department head is the proper party. As a result, the court held that the trial court properly denied her second plea/MSJ.

Governmental Immunity: *Munoz v. City of Balcones Heights*, No. 04-13-00439-CV, 2013 WL 6115994 (Tex. App.—San Antonio Nov. 20, 2013, pet. denied) (mem. op.). Munoz sued Star Shuttle and three governmental entities for declaratory relief (the court never really says what type of declaratory relief). All three governmental entities filed pleas to the jurisdiction, which were granted. No dispositive motion for Star Shuttle was evident in the record. After some detailed rendition of the court's requests from the plaintiff to clarify whether any dispositive order exists as to Star Shuttle, the court determined that Star Shuttle had not been dismissed. The governmental defendants were never severed. The orders granting the pleas were therefore interlocutory. While the plaintiff can appeal the granting of the plea at this point, the interlocutory deadlines are what govern. Motions for new trial do not extend to interlocutory deadlines. Plaintiff missed the accelerated deadlines, depriving the appellate court of jurisdiction. The court analyzed a provision for extension of time if the party files a "reasonable explanation" as to why certain extensions are necessary (mainly for briefing purposes). The explanation can be of help to litigators. However, the court determined that the explanation of "I did not intend to file an interlocutory appeal" and the insults to the courts listed by the plaintiff are not a "reasonable explanation." The notice of appeal is untimely and therefore the court lacks jurisdiction.

Tort Claims Act: ***Dallas Metrocare Servs. v. Juarez,*** **420 S.W.3d 39 (Tex. Nov. 22, 2013) (per curiam).** The issue in this case is whether a whiteboard falling on an individual is considered "use" of governmental property under the Tort Claims Act (Act). A patient, Juarez, at a Metrocare clinic was hit in the head by a falling whiteboard and was injured. No one was using the whiteboard when this occurred. Juarez sued Metrocare (a governmental entity) under the Act. The trial court and court of appeals both held that Metrocare's immunity was waived under the Act. The Supreme Court of Texas disagreed as to whether immunity had been waived and sent the case back to the court of appeals, requiring them to consider all of Metrocare's arguments regarding whether Metrocare's immunity is waived under the Act. The Court also held that Metrocare's immunity was not waived under the "use" doctrine because the entity did not use the whiteboard, it merely allowed the patient to access it.

Premises Liability/Negligence: ***City of El Paso v. Collins,*** **No. 08-12-00243-CV, 2013 WL 6665090 (Tex. App.—El Paso Dec. 18, 2013).** This interlocutory appeal arises from the denial of a plea to the jurisdiction in a premises liability/negligence case involving injuries to a minor at a city swimming pool. The El Paso Court of Appeals affirmed in part, reversed and remanded in part, and reversed and rendered in part. A six-year-old girl was at the city swimming pool. She did not know how to swim, but went unsupervised and went under water for a long period of time. She suffered substantial injuries. The parents sued the daycare (which took her to the pool and failed to supervise) and the city. The daycare designated the city as a responsible third-party. The court first held that to the extent the plaintiff's pleadings seek to impose liability solely on the designation, no waiver of immunity exists. The city also argued that the pleadings did not satisfy Texas Rules of Civil Procedure Section 33.004 (designation of responsible third-party), but the court held that such a challenge could not be brought in an interlocutory appeal. As to the premise defect claims (alleging faulty filtration system causing cloudy water and defective drain which could trap a child), the Recreational Use Statute limits a landowner's liability when the plaintiff engages in recreation on the premises. Plaintiffs failed to properly allege the city was aware of any extreme risk a child could be trapped in the defective drain or that cloudy water prevented others from seeing that a child had been trapped. As a result, the city's immunity from suit is not waived for the premises liability claim. Further, the pleadings do not factually support proximate cause. But both defects are ones the plaintiffs should be allowed to try and amend. The court then noted that a cause of action for premises liability is different from one for negligent activity; however, the plaintiffs pleadings do not sufficiently allege such a claim. They did properly allege the negligent use of personal property.

Tort Claims Act: ***City of Smithville v. Watts,*** **No. 03-13-00173-CV, 2013 WL 6665085 (Tex. App.—Austin Dec. 13, 2013) (mem. op.).** This is an appeal arising from the denial of a plea to the jurisdiction in a car accident case under the Texas Tort Claims Act (TTCA). The Austin Court of Appeals reversed the denial and dismissed Watts' claims. Members of the Smithville Volunteer Fire Department (VFD) were returning from a call when the driver lost control of the fire truck and collided with Watts' vehicle. Watts sued the city only asserting claims for a failure to properly maintain and repair the truck and tires and breach of express and implied warranties of merchantability. The city responded with a plea and evidence asserting: (1) the VFD is a separate entity from the city; and (2) there is no waiver of immunity under the TTCA. The city did concede that the city maintained the truck at the request of the VFD; however, the city received no repair request for the truck's tires. Watts countered with evidence of nominal

payments, arguing the volunteers were paid employees. The trial court denied the plea and the city appealed. Going through a phrase-by-phrase analysis of Texas Civil Practice and Remedies Code Section 101.021(1)(A) (i.e. the operation or use of motor vehicle section), the court held that failure to properly inspect, maintain, or repair a truck does not satisfy the nexus requirement for the limited waiver under Section 101.021 of the TTCA. Since the VFD is a separate entity and the operation of the vehicle was not done by a paid city employee (nominal payments do not count), there is no connection between the tire blowout that caused the collision and the negligence of a city employee. Watts also alleged misuse of tangible personal property in his briefing. However, the court noted the pleadings only asserted negligent maintenance, and it was the VFD, not the city, who "used" the property. The Austin Court of Appeals reversed the denial of the plea to the jurisdiction and dismissed all claims.

Tort Claims Act: *City of College Station v. Kahlden*, No. 10-12-00262-CV, 2014 WL 1269026 (Tex. App.—Waco Mar. 27, 2014) (mem. op.). In this case, a police officer stopped to remove boots from a roadway. A driver stopped behind the police officer and was killed when she was struck from the rear by another vehicle. The trial court denied the city's motion for summary judgment alleging governmental immunity and the city appealed.

The city asserted that Section 101.055 of the Tort Claims Act (Act) was an exception to Section 101.021's waiver of governmental immunity. Section 101.021 of the Act waives immunity for certain injuries or death that arise from the use of a motor driven vehicle. Section 101.055 provides that the Act "does not apply to a claim arising . . . from the action of an employee while responding to an emergency call or reacting to an emergency situation" if certain requirements are met. The city also asserted that Section 546.001 of the Transportation Code, which allows emergency vehicles to park of stand when an operator is directing or diverting traffic for public safety purposes, authorized Elkins to stop on the roadway to remove the debris. After discussing the meaning of the term "emergency" in Section 101.055 and the phrase "public safety purpose" in Section 546.001, the appellate court concluded that the city had proved that Section 101.055 applied and that the trial court erred in denying the city's motion for summary judgment.

Tort Claims Act: *City of Deer Park v. Hawkins*, No. 14-13-00695-CV, 2014 WL 953427 (Tex. App.—Houston [14th Dist.] Mar. 11, 2014) (mem. op.). This is an interlocutory appeal from the denial of a plea to the jurisdiction in a premise defect case, which the appellate court reversed, dismissing Hawkins' claims.

Hawkins drove to the city's trash transfer station to dispose of trash and debris. While in an unloading slot, Hawkins lost his balance while standing on his trailer and fell into the open trash bin. Hawkins sued under the Texas Tort Claims Act (TTCA) alleging a premise defect. The city filed a plea to the jurisdiction noting it was unaware the bin posed a dangerous condition, and Hawkins cannot sue for negligent implementation of a rule to keep citizens away from the debris hole. The trial court denied the plea, and the city appealed.

Citing to Hawkins' testimony that as he threw debris into the bin he could see it went at least 15 feet down and that if he fell, he would become injured (open and obvious danger) the appellate court determined Hawkins knew of the dangerous condition the unloading location posed. As a result, he could not establish a waiver under the TTCA. The court then held Hawkins did not

properly allege the negligent implementation of a policy in his pleadings and did not amend. However, even if he had, allegedly negligent implementation of policy does not by itself waive immunity. Waiver of immunity must be demonstrated under some provision of the TTCA before a claim of negligent implementation of policy can be pursued. Since Hawkins knew of the dangerous condition, no theory of liability can attach. The denial of the plea was reversed and Hawkins' claims dismissed.

Official Immunity: *City of Dallas v. Loncar*, No. 05-12-00705-CV, 2014 WL 198408 (Tex. App.—Dallas Jan. 16, 2014) (mem. op.). This is an interlocutory appeal from the denial of a plea to the jurisdiction involving a vehicle collision at an intersection between Loncar and a City of Dallas emergency response vehicle (fire engine). The trial court denied the plea and the Dallas Court of Appeals reversed. The city's fire engine was responding to an emergency call. Evidence submitted notes the fire engine was proceeding properly through the streets, approached an intersection, evaluated the traffic situation as it approached, believed the traffic was clear to enter, but collided with a vehicle trying to beat the yellow light. Loncar, the driver of the vehicle sued the driver of the fire truck, Ferguson. The trial court denied Ferguson's claim of official immunity and he appealed. The Dallas Court of Appeals first went through the details of Ferguson's affidavit. It explained away Loncar's assertions of contradictory statements and Loncar's attempt to create a fact issue, and determined the evidence and testimony as stated posed no fact question. It noted that the legislature "has placed a higher burden upon civilian drivers than upon emergency vehicle drivers; this burden is justified because emergency vehicle operators face more exigent circumstances than civilian drivers and because civilian drivers have the advantage of being able to prevent collisions with emergency vehicles due to the emergency vehicles' use of sirens and lights and due to the conspicuous coloring of emergency vehicles. . . . Emergency responders are entitled to presume other drivers will respect emergency priorities." The court determined the uncontroverted evidence established as a matter of law that Ferguson acted in good faith and was entitled to official immunity.

Texas Tort Claims Act: *University of Tex. Health Science Ctr. v. Dickerson*, No. 14-13-00232-CV, 2014 WL 708521 (Tex. App.—Houston [14th Dist.] Feb. 20, 2014) (mem. op.). This is an interlocutory appeal from the denial of a plea to the jurisdiction arising under the Texas Tort Claims Act. The appellate court reversed the denial and dismissed the claims in which the plaintiff alleged physicians and staff improperly utilized tangible personal property resulting in the death of an infant.

Dickerson brought suit against the University Health Science Center (university) alleging a variety of negligent uses of personal property and motor driven equipment resulting in the death of his daughter from a streptococcus infection. However, all of the allegations essentially stem from the belief that university staff misused and misread test results and failed to inform him of the results before discharge. The university filed a plea to the jurisdiction which the trial court denied and the university appealed.

The appellate court first held that the "use" of property requires more than reading and interpreting data. The use of information is not actionable. Dickerson cited old case law for the proposition that a waiver exists for misreading test data. The court went through several cases examining and detailing the differences in the use of information versus the misuse of

equipment. The court ultimately determined that Dickerson's claims are for the misuse of information for which the university retains immunity. Although focused on medical equipment, the case analysis can be helpful to an attorney dealing with a misuse of information type case. Since no waiver exists in this case, the claims were dismissed.

Recreational Use: *City of Corpus Christi v. Ferguson*, No. 13-12-00679-CV, 2014 WL 495146 (Tex. App.—Corpus Christi Feb. 6, 2014) (mem. op.). This is an interlocutory appeal from the denial of a plea to the jurisdiction in a premise liability case under the Texas Recreational Use Statute. TEX. CIV. PRAC. & REM. CODE § 75.002. Ferguson traveled from her home in San Antonio to Corpus Christi, where she planned to participate with her family in the Harbor Lights Festival boat parade at the city's marina. The morning of the event, but before it started, Ferguson went to the shower facilities but slipped on ice along the way. The city produced evidence that the water lines which allegedly leaked and caused the ice had been drained and turned off the night before, that it posted warning signs noting the lines were drained to prevent ice, and that Ferguson's entry card did not show she was in the area at the time of the alleged fall. After a hearing the trial court denied the plea and the city appealed.

While Ferguson asserts she was not engaged in a recreational use, but was merely returning from a shower in the morning, the Corpus Christi Court of Appeals determined the activity at the marina fell within the Recreational Use Statute since she camped overnight on a sailboat dock at the marina. In other words, "camping overnight on the boat was merely one stage of the broader boating activity . . . ." However, the court then noted that Ferguson was able to present sufficient facts to create a dispute regarding the city's actual knowledge of the ice. Essentially a separate witness informed the city early in the morning that he noticed ice and that Ferguson and her father testified no warning sign was present. A reader of the opinion should take the time to read the footnotes, which surgically cut out various distinguishing factors to make this holding more limited than it initially sounds. The court held that the plea was properly denied.

Official Immunity: *Oxford v. City of Ballinger*, No. 03-13-00108-CV, 2014 WL 858857 (Tex. App.—Austin Feb. 25, 2014, pet. filed) (mem. op.). This is an appeal from the granting of a plea to the jurisdiction where the plaintiff alleged the City of Ballinger destroyed his mobile home and stole other property, which was relevant to another civil lawsuit. The Austin Court of Appeals affirmed the dismissals.

Oxford's mobile home was condemned and demolished by employees of the City of Ballinger. The city filed a motion to dismiss the individual defendants under Section 101.106(e) of the Texas Tort Claims Act under the Texas Civil Practices and Remedies Code because they were employees of the city. The city filed a plea to the jurisdiction asserting the only claims pled were intentional torts (i.e. intentional infliction of emotional distress). The trial court granted the city's motions and Oxford appealed. The court of appeals first held that since Oxford did not dispute he was bringing only tort claims and the individual defendants were employees, the court affirmed the dismissal of the employees. The court next analyzed the wording in Oxford's pro se petition and held that he did not actually say anyone was negligent, but instead claims the city intentionally acted in the demolition of his property. As a result, the city retains immunity for such intentional torts and the claims were properly dismissed.

Tort Claims Act: *Eldridge v. Brazoria Cnty.*, No. 01-13-00314-CV, 2014 WL 1267055 (Tex. App.—Houston [1st Dist.] Mar. 27, 2014) (mem. op.). Eldridge sued the county after being severely injured in a wreck on a county bridge that had been torn out to be rebuilt by the county. Eldridge argued that the county was negligent because it did not have adequate warning signs that the bridge was out, but only "thin barricades" which created a premises defect and special defect under the Tort Claims Act. The county filed a plea to the jurisdiction, trying to shift the blame to the Texas Department of Transportation, with which it had a contract to fix the bridge. It also argued that under Texas Civil Practices and Remedies Code Section 101.021 (Texas Tort Claims Act), a governmental entity is only liable for injuries occurring because of a premises or special defect if the injury is caused by the actions of an employee of the governmental entity. The court of appeals held that a county can be liable for an injury caused by a special or premises defect caused by a condition of real property without participation of a governmental employee based on a Supreme Court of Texas opinion, *DeWitt v. Harris Cnty.*, 904 S.W.2d 650, 653 (Tex. 1995). In *DeWitt*, the court held that when the injury is caused by real property, liability is not determined by the action of a governmental employee, but upon the property itself being unsafe. *Id.* The court of appeals held that there were sufficient facts for the case to go forward without any argument that a county employee caused the injury.

Tort Claims Act: *Molina v. Alvarado*, No. 08-13-00157-CV, 2014 WL 1632991 (Tex. App.—El Paso Apr. 23, 2014). This is an interlocutory appeal of the trial court's denial of a motion for summary judgment. Alvarado alleges that Molina struck and injured him while driving a City of McCamey vehicle under the influence of alcohol. Alvarado sued the city and later amended his petition to include Molina.

Molina argues that the trial court incorrectly denied his motion for summary judgment. He argues that under the Texas Tort Claims Act election-of-remedies provision (Texas Civil Practice and Remedies Code Section 101.106(a)), he is a governmental employee immune from suit. In other words, Molina argues that for purposes of Section 101.106(a), he is completely outside the trial court's jurisdiction because Alvarado filed suit against the city involving the same subject matter.

The appellate court affirmed the trial court's denial of summary judgment, reasoning that Section 101.106(a) bars a suit against an employee only where that employee is sued in his official capacity, i.e., only where the employee is actually acting within the scope of his employment. The court comments that it "seriously doubt[s] that the Texas Legislature intended to extend immunity to city employees driving vehicles under the influence of alcohol." *Id*. at *7. Whether Molina was acting within the scope of employment was a question of fact for the trial court.

Tort Claims Act: *City of Madisonville v. Murders*, No. 10-13-00234-CV, 2014 WL 1518244 (Tex. App.—Waco Apr. 17, 2014) (mem. op.). This is a Texas Tort Claims Act (Act) case where the plaintiffs brought suit against the city and contractor alleging damages after the city replaced a sewer line in front of their business. The appellate court reversed the denial of the city's plea to the jurisdiction and dismissed the case. The court did not go into great detail regarding the underlying facts. It simply noted that even giving the most liberal construction of the pleadings, there are no facts alleged which establish a waiver of immunity under the Act. At most, they allege the city failed to simply maintain the system generally and was negligent in its

efforts to help the contractors locate the sewer line which needed to be replaced. Further, the plaintiffs claims for mental anguish and nuisance do not fall under any waiver. As a result, the trial court erred in denying the plea.

Tort Claims Act: *Ortiz-Guevara v. City of Houston*, No. 14-13-00384-CV, 2014 WL 1618371 (Tex. App.—Houston [14th Dist.] Apr. 22, 2014) (mem. op.). This is a Texas Tort Claims Act case arising from a vehicular accident, but the case turns on whether or not the city had "actual notice" of its fault since the plaintiff failed to provide formal written notice under the Act. The trial court granted the city's plea to the jurisdiction but the court of appeals reversed.

Officer Monroe rear-ended Ortiz-Guevara's stopped car. The investigating officer noted the sole cause was "failure to control speed" by Monroe. Ortiz-Guevara testified in her deposition that, at the accident scene, she told both officers that she was injured even though she did not go to the hospital. The accident report showed no injury. It is undisputed Ortiz-Guevara did not provide written notice of her claim. However, formal notice is not required if the city had actual notice of (1) the city's fault; (2) Ortiz-Guevara's injury; and (3) the identity of the parties.

The court analyzed the general law regarding notice and actual notice to a governmental entity. Actual notice of the alleged fault requires the governmental unit's "subjective awareness of its fault, as ultimately alleged by the claimant, in producing or contributing to the claimed injury." The city contends no jurisdiction exists because a "police report is no more than a routine safety investigation and is insufficient to provide actual notice of a claim." However the report at issue did more than imply fault, it specifically assigned fault noting it was his failure to control speed as the sole cause. Further, "fault" is construed as contributing to the injury, not the complete and exclusive liability for the injury. Additionally, the city was aware Ortiz-Guevara was claiming an injury, or at the very least a fact question exists as to the city's understanding of her claim of injury at the scene. As a result, the trial court erred in granting the plea. The case was reversed and remanded.

Governmental Immunity: *National Pub. Fin. Guarantee Corp. v. Harris Cnty.-Houston Sports Auth.*, No. 01-13-00401-CV, 2014 WL 1464654 (Tex. App.—Houston [14th Dist.] Apr. 15, 2014). National Public Finance Guarantee Corporation (NPFGC) and MBIA Insurance Corporation sued to force the Harris County-Houston Sports Authority (Sports Authority) and the Harris County Sports and Convention Corporation (Convention Corporation) to raise taxes in order to cover minimum bond repayment obligations and the court held it contractually waived its own immunity.

Harris County and the City of Houston created the venue district under Texas Local Government Code Section 335.021 which issued a series of bonds pursuant to a written Indenture of Trust. The Convention Corporation is a local government entity created to serve as the landlord of Reliant Stadium which was a subject for bond issuance. The funding agreement notes the bonds are to be paid by hotel occupancy taxes and taxes on admissions and parking; however, the taxes shall not exceed $2 per ticket and $1 per car. NPFGC insured the bonds. The Sports Authority also entered into Reimbursement and Indemnity Agreements which provided NPFGC would guarantee regularly scheduled principal and interest payments on the bonds. In exchange, the

Sports Authority agreed to indemnify NPFGC against any failure by it to perform or comply with the covenants or conditions of the Reimbursement Agreements.

On several occasions the revenues were insufficient for the minimum payments on the bonds and the Sports Authority made claims with NPFGC to cover the shortfalls. NPFGC claimed these impermissibly reduced the reserve fund and because state statute authorized an admission tax up to 10% of ticket price and parking tax up to $3 per vehicle, the Sports Authority was required by the Indenture to raise admission and parking taxes to legislative maximums. The Sports Authority refused to raise these taxes on the grounds they were capped at $2 per ticket and $1 per car, and even if not capped, such a tax increase required voter approval. NPFGC sued the Sports Authority, claiming that it had breached the Indenture by refusing to impose admissions and parking taxes at the legislative maximum. The trial court granted the pleas to the jurisdiction filed by the Sports Authority and Convention Corporation based on governmental immunity and NPFGC appealed.

The appellate court first held that the legislature added Section 1371.059(c) to the Texas Government Code, which provides that "[a]n issuer in the proceedings to authorize obligations or a credit agreement, or in a credit agreement, may agree to waive sovereign immunity from suit or liability for the purpose of adjudicating a claim to enforce the credit agreement or obligation or for damages for breach of the credit agreement or obligation." After analyzing the statutory language and amendments after *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006) held the Sports Authority waived its immunity under the Reimbursement Agreement. As a result, the plea should not have been granted as to the Sports Authority.

NPFGC contended that as it was a third-party beneficiary, the Convention Corporation waived its immunity under its funding and lease agreements with the Sports Authority under Subchapter I of Chapter 271 of the Local Government Code (dealing with waiver of immunity in contracts). However, without analyzing whether the contracts were for goods or services (triggering the waiver under subchapter I), the court noted Subchapter I only allows suit for breach of contract. NPFGC did not assert a breach of contract claim against the Convention Corporation and based on the alleged facts, could not. As a result, the trial court properly granted the plea as to Convention Corporation.

GOVERNMENT IMMUNITY—CONTRACT

Governmental Immunity: *City of Midland v. M.T.D. Envtl., L.L.P.*, No. 11-13-00117-CV, 2014 WL 1584508 (Tex. App.—Eastland Apr. 17, 2014). This is a governmental immunity in a breach of contract case where the Eastland Court of Appeals held that simply because immunity from suit is waived under Chapter 271 of Local Government Code, does not mean immunity from suit is waived under the Prompt Pay Act for claims of attorney's fees and interest. [Note: the Legislature amended Chapter 271 in 2011 to prospectively allow interest, so this case's holding should be viewed as applying to contracts entered into prior to the amendment.]

The city contracted with M.T.D. to grind yard waste (tree limbs and other yard waste) and the city agreed to pay M.T.D. by the ton. The city believed M.T.D. dramatically overcharged it and

refused to pay an invoice, over which M.T.D. sued. The city filed a plea to the jurisdiction noting a lack of subject matter jurisdiction for attorney's fees and interest under the Prompt Pay Act. The trial court denied the plea and the city brought this interlocutory appeal. The parties did not contest jurisdiction for the underlying breach of contract claim.

This case involves the interplay between a waiver of immunity from suit and liability under Chapter 271 of the Texas Local Government Code (waiver for claims involving goods or services provided to an entity) and a waiver of immunity from liability under Section 2251.043 of the Texas Government Code (Prompt Pay Act). The city contends the Prompt Pay Act may waive immunity from liability, but it fails to waive immunity from suit. M.T.D. asserts that once immunity from suit is waived under Chapter 271, the issue is simply whether it is entitled to fees under the Prompt Pay Act and not whether the Act has to waive immunity on its own. The court first held the Prompt Pay Act does not, by itself, waive immunity from suit. When analyzing the history of Chapter 271 the court noted the waiver provision was changed in 2009 to allow attorney's fees and again in 2011 to allow for recovery of interest. These changes are prospective only, thereby indicating an intent to retain immunity for contracts entered into prior to 2009 and 2011. As a result, the city retained immunity from suit and the court reversed the denial as to the Prompt Pay Act claims.

Governmental Immunity-Contract: ***Midtown Edge, L.P. v. City of Houston*, No. 01-12-00730-CV, 2014 WL 586232 (Tex. App.—Houston [1st Dist.] Feb. 13, 2014) (mem. op.).** This case began when Edge was trying to develop condominiums in the City of Houston. The city required that Edge build its own wastewater line, and in a letter outlined Edge's options including: cost sharing, financing the line, or building the line and requesting future connectors to pay a pro rata share for connections to the line. Edge chose to build the line without cost sharing. At some point, a different apartment complex connected to the line that Edge had built and Edge requested that the city reimburse Edge for the new connector's pro rata share of the line. The city denied reimbursement and the new connector disconnected from Edge's line and connected to the city's line. The first question is whether the city's letter outlining Edge's options and the city's ordinances regarding this type of exaction created an enforceable contract under Chapter 271 of the Local Government Code. The court held that a contract was not created because the letter's terms were not definite enough to create a valid offer to which Edge could accept. Then Edge argued that requiring it to pay for the line was a taking under the Texas Constitution. The court denied this claim because Edge appeared to have paid for building the line without objection and had consented to the city's requirements. The court also held that the Edge's promissory estoppel claims and declaratory judgment claims were invalid as the city retained its immunity against both claims.

Contractual Immunity: *Lower Colorado River Auth. v. City of Boerne*, 422 S.W.3d 60 (Tex. App.—San Antonio Jan. 8, 2014, pet. filed). In this declaratory judgment action, the Lower Colorado River Authority (LCRA) filed a lawsuit seeking a declaratory judgment confirming it had not breached a contract with the City of Boerne for the purchase of electricity. In its Wholesale Power Agreement (WPA) with LCRA, the city agreed to purchase 100% of its total annual electric power and energy requirements. The WPA contained a Uniform Rate Clause by which the LCRA agreed to lower the rate available to the city if LCRA supplied electricity to

another similarly-situated customer at a lower rate than was set out in the City of Boerne's rate schedule. Over the years, negotiations between the two parties resulted in a new agreement set to expire in June 2016, with a notice of termination required by either party by June 2011. The City of Boerne timely provided notice that it would allow the WPA to expire in June 2016. Additionally, the city sent a breach of contract notice stating LCRA violated the Uniform Rate Clause by permitting other customers a reduction not provided to the city. The city also stated that if the breach was not cured within 30 days, the city would terminate the WPA.

LCRA sued seeking a declaration that it did not breach the agreement. The city filed a plea to the jurisdiction, asserting governmental immunity in relation to both the declaratory judgment and breach of contract claims. The trial court denied the city's plea to the jurisdiction for the breach of contract claim, but granted the plea on the declaratory judgment claim. LCRA appealed. LCRA argued the trial court incorrectly granted the city's plea because the City of Boerne was engaged in a proprietary function when it entered into the WPA and, therefore, waived immunity from suit under Chapter 271 of the Local Government Code. The San Antonio Court of Appeals noted its recent decision in *City of San Antonio v. Wheelabrator Air Pollution Control, Inc.*, 381 S.W.3d 597 (Tex. App.—San Antonio 2012, pet. denied), where the court held that the legislature did away with the proprietary-governmental distinction in contracts in 2005 when it amended Chapter 271 of the Texas Local Government Code. The court stated that based on the plain language of Section 271.152 of the Local Government Code, the Texas Legislature has not expressly and unambiguously waived immunity from suit for LCRA's declaratory judgment claim. Therefore, the court affirmed the trial court's decision.

Contractual Immunity: *Republic Power Partners, L.P. v. City of Lubbock*, 424 S.W.3d 184 (Tex. App.—Amarillo Feb. 5, 2014). This is an accelerated appeal. Republic Power Partners (RPP) appeals the granting of the city's plea to the jurisdiction. The Amarillo Court of Appeals joins the San Antonio Court of Appeals in a split between the intermediate appellate courts regarding whether the legislature abrogated the proprietary/governmental dichotomy in contracts.

RPP sued the city and West Texas Municipal Power Agency (WTMPA) for breach of contract regarding a power development agreement. WTMPA is a municipal power agency formed by the cities of Brownfield, Floydada, Lubbock and Tulia. WTMPA entered into a development agreement with RPP to help find and purchase power. WTMPA's board of directors created the High Plains Diversified Energy Corporation (High Plains) as the local government corporation designated to own and operate the electric energy generation and transmission facilities to be built. RPP raised millions and expended considerable sums completing feasibility studies and arranging for financing of the project. The City of Lubbock believed it should receive a greater share of any surplus revenue and objected to the issuance of revenue bonds arguing High Plains was not a valid local government and WTMPA did not have the authority to create it. The district court agreed and no bonds were issued. RPP then sued WTMPA and the City of Lubbock under a joint enterprise theory for breach of the development agreement. The trial court granted the city's plea to the jurisdiction, noting the city retained immunity from suit, and RPP appealed.

The city relied on *City of San Antonio v. Wheelabrator Air Pollution Control, Inc.*, 381 S.W.3d 597 (Tex. App.—San Antonio 2012, pet. denied), where the court determined the proprietary/governmental distinction does not exist in contract claims after the adoption of

Subchapter I of Chapter 271 of the Texas Local Government Code (waiver of immunity for contracts for goods and services). The Amarillo Court of Appeals agreed with the San Antonio Court of Appeals and held the city retained its immunity, regardless of whether it was performing proprietary or governmental functions. Further, the court held that Chapter 271 does not apply to the city in this case since it did not sign the development agreement. This distinction is important, since the court affirmed the denial WTMPA's plea in a separate opinion issued the same day, *West Tex. Mun. Power Agency v. Republic Powers Parnters, L.P.*, No. 07-12-00374-CV, 2014 WL 486287 (Tex. App.—Amarillo Feb. 5, 2014), noting that while the proprietary/governmental distinction does not apply to contracts, RPP's services of identifying and evaluating potential energy generation and transmissions lines and managing the development process does under Chapter 271's waiver.

Contractual Immunity: *City of Willow Park v. E.S. & C.M., Inc.*, 424 S.W.3d 702 (Tex. App.—Fort Worth Feb. 6, 2014, pet. filed). An engineering firm sued the City of Willow Park after the city failed to pay the firm under a contract between the two entities. The firm sued the city for breach of contract under Texas Local Government Code Section 271.152, quantum meruit, and attorney's fees. The city replied to the suit by asserting immunity based on a provision in the contract that stated that the city did not waive its immunity by entering into the contract. The firm argued, among other things, that such a provision was against public policy, immunity was still waived under state law, and other provisions in the contract contemplated litigation and thus obviated the city's immunity provision. The contractual provision stated:

> 12.11 ***Sovereign Immunity*** —The parties agree that the City has not waived its sovereign immunity by entering into and performing its obligations under this Agreement.

The court of appeals held that the above provision was sufficiently clear to contract around Section 271.152, but that it could not be enforced based on the legislative history and public policy of Chapter 271 of the Local Government Code–that local government entities be held accountable for their contracts. The court also held that the city retained its immunity from attorney's fees based on a prior version of Chapter 271 that was in place when the contract was executed, and that there was not a valid claim for quantum meruit under Chapter 271.

Governmental Immunity: *City of Houston v. Downstream Envtl., L.L.C.*, No. 01-12-01091-CV, 2014 WL 1327936 (Tex. App.—Houston [1st Dist.] Apr. 3, 2014). Downstream was a customer of the city's sanitary sewer system. Some of Downstream's waste was inappropriate for discharge into the city's system. The waste in question caused damage to the city's sanitary sewer system. In response to the discharge of improper waste, the city terminated Downstream's use of the city's sewer system and then raised the cost for Downstream to use the system when its service was renewed. After these actions by the city, Downstream sued for due process and equal protection violations, as well as for breach of contract and negligence. Downstream asked for money damages and injunctive relief. Downstream argued that it was entitled to the money damages because the city's sanitary sewer service and issuance of an industrial waste permit to Downstream, a commercial entity that used the sewer to dispose of the waste of others, was a proprietary instead of a governmental function. The city argued that operation of a sanitary sewer is a governmental function, and that there was no contract under Chapter 271 of the Local

Government Code. The court of appeals agreed with the city that the sanitary sewer function is a governmental function and that the waiver of immunity associated with proprietary functions would not be applied to a contract that was for a governmental function. The court also held that even though the city had brought a claim against Downstream for an unpaid bill, it did not mean that the city had waived its immunity from all suits related to its provision of sanitary sewer services. The court of appeals upheld Downstream's claims for injunctive relief based on its constitutional claims, but disallowed the money damages as there is no allowance of money damages for due process violations under the Texas Bill of Rights.

Contractual Immunity: *City of Seguin v. Lower Colorado River Auth.*, No. 03-13-00165-CV, 2014 WL 258847 (Tex. App.—Austin Jan. 15, 2014) (mem. op.). This is an interlocutory appeal from the denial of a plea to the jurisdiction involving whether immunity protects the City of Seguin from a breach of contract suit brought by the Lower Colorado River Authority (LCRA). The Third Court of Appeals affirmed the denial, which further expands a split among the circuits regarding whether the legislature abrogated the proprietary/governmental dichotomy in contracts.

LCRA entered into wholesale power agreements (WPAs) to sell electrical power to the cities of Seguin and Georgetown. These WPAs were set to expire in 2016. However, in 2012, the City of Seguin along with numerous other entities declared LCRA in breach of their WPA and terminated the agreement. LCRA sued seeking a declaration that it did not breach the agreement. The cities filed separate but near identical pleas to the jurisdiction, asserting governmental immunity to both the declaratory judgment and breach of contract claims. The trial court denied these pleas. After a severance of the defendants, the City of Seguin appealed. Late last year, a Third Court of Appeals panel affirmed the denial in *City of Georgetown v. Lower Colo. River Auth.*, No. 03–12–00648–CV, 2013 WL 4516110 (Tex. App.—Austin Aug. 23, 2013, pet. filed). The court held that the act of purchasing electricity is a proprietary function for which the city did not retain immunity. The panel affirmed the denial of the City of Seguin's appeal by simply stating that the reasoning is the same as in the *Georgetown* case and there was no reason to reiterate it again.

LAND USE

Substandard Structure: *City of Bryan/Bldg. & Standards Comm'n v. Cavitt*, No. 12-000858-CV-361 (Tex. App.—Waco May 8, 2014). This is an interlocutory appeal from the denial of a plea to the jurisdiction in a structural standards case. The Waco Court of Appeals affirmed the denial.

The city determined the Cavitt property was dilapidated, hazardous, and a public nuisance. In numerous public meetings Cavitt requested the ability to bring the property up to code. The city's building and standards commission (BSC) issued a repair schedule and ordered Cavitt to attend each BSC meeting to demonstrate compliance with the schedule. When Cavitt failed to comply with the schedule without adequate explanation, the BSC ordered demolition of the property. Cavitt appealed the order to district court. In his appeal, he also brought a takings claim. The city filed a plea to the jurisdiction arguing no taking could occur since the property was declared a public nuisance. The trial court denied the plea and the city appealed.

The appellate court held that this type of lawsuit is fundamentally a constitutional one, and pursuant to *City of Dallas v. Stewart, 361 S.W.3d 562 (Tex. 2012),* the determination of a nuisance ultimately must be made by a court, not a commission. Before a nuisance determination will act as a bar to a takings claim, the determination must be reviewed *de novo* by a court. As a result, the trial court retained jurisdiction. Both the appeal from the demolition order and the takings claim can be heard.

Substandard Structure: *Stewart v. City of San Antonio*, No. 04-13-00720-CV, 2014 WL 1713532 (Tex. App.—San Antonio Apr. 30, 2014) (mem. op.). The underlying suit arises out of a structural standards commission determination that a building was substandard and subsequent order of demolition. Stewart was a lienholder and possible property owner who appealed the determination but lost at the trial court. The court determined the appeal was frivolous since Stewart had no grounds, so she appealed to the San Antonio Court of Appeals. While she asserted her appeal was not frivolous, her focus centered on the trial courts failure to address her ownership interest. However, she did not contest the nuisance finding. As a result, Stewart's arguments lacked an arguable basis in both law and in fact. The court affirmed the determination that the appeal was frivolous.

Historic Preservation: *City of San Antonio Bd. of Adjustment v. Reilly*, No. 04-13-00221-CV, 2014 WL 1033493 (Tex. App.—San Antonio Mar. 19, 2014). This is an appeal from a trial court order reversing the decision of the City of San Antonio Board of Adjustment (BOA) regarding the demolition of a building. Reilly owned property that he planned to demolish and replace with a six-unit apartment complex. He filed an application to demolish the structure as required by the City of San Antonio's Unified Development Code. However, the historic preservation officer denied the request. Reilly appealed the officer's decision to the BOA. After a public hearing on the appeal, the BOA upheld the denial of the permit. Reilly then filed suit.

The trial court granted Reilly's summary judgment motion alleging that the BOA abused its discretion in denying the demolition request because Reilly presented evidence that the property had lost its historic, cultural, architectural, or archeological significance. The BOA then appealed. Under the city's ordinances, to obtain a demolition permit in a historic district, an individual must show either unreasonable economic harm or that the property suffered a loss of significance. The appellate court points out that Reilly had the burden to establish the property had undergone significant and irreversible changes that caused it to lose significance. While Reilly did present some evidence indicating the property had undergone a loss of architectural significance, he failed to address a loss of historical or cultural significance. Meanwhile the city showed that the property retained some architectural, historical, and cultural significance. Based on the trial court evidence presented, the appellate court concluded that the BOA acted within its discretion in upholding the decision to deny Reilly's demolition request. Therefore, the court reversed the trial court's judgment and rendered judgment affirming the BOA's decision.

Zoning: *Sewell v. City of Llano*, No. 03-13-00580-CV, 2014 WL 411654 (Tex. App.—Austin Jan. 29, 2014) (mem. op.). Marc Sewell filed a "verified petition" under Chapter 211 of the Local Government Code stating that a decision of the Llano Board of Adjustment was illegal. The trial court issued a one sentence order denying the petition, without conducting a hearing on the merits. Sewell attempted to appeal that order in this case. The Austin Court of Appeals

stated that the trial court's one-sentence order did not constitute a ruling on the merits, and thus, no final, appealable judgment was rendered. Therefore, the court dismissed the case for want of jurisdiction.

Zoning: *Abbott* v. *City of Paris,* No. 06-13-00092-CV, 2014 WL 895195 (Tex. App.—Texarkana Mar. 7, 2014). This case has a fairly complex history involving a previous lawsuit and appeal. Both suits involve a piece of property Ranger Abbott purchased, half of which was being used as a mobile home park. This property was being used as a mobile home park prior to the City of Paris' annexation of the property. The remainder of the property was unused; however, Abbott intended to expand the mobile home park to encompass the entire property. The property was zoned "commercial" when Abbott acquired it, but the city manager at the time informed Abbott by letter that a mobile home park was an "approved, non-conforming use" of the property. Abbott submitted a plan to the city's planning and zoning department detailing his proposal for roadways, driveways, and new trailer pads. The department informed him that placing additional mobile homes on the property would require a change in zoning. Abbott believed this rezoning requirement was a breach of the letter he received from the city manager, and he sued the city.

In the first suit, the city filed a plea to the jurisdiction, which the trial court granted with respect to the claims Abbott filed under the Texas Tort Claims Act. However, the trial court denied the city's plea to the jurisdiction relating to Abbott's claims for inverse condemnation, due process, equal protection, and breach of contract. The city appealed, and the appeals court reversed and rendered judgment dismissing the lawsuit.

Abbott filed a second lawsuit against the city in October 2012. The city filed a plea to the jurisdiction alleging that Abbott failed to present any evidence that there was a waiver of governmental immunity. The trial court granted this plea. Abbott appealed. After analyzing and dismissing each of Abbott's claims, the Texarkana Court of Appeals affirmed the judgment of the trial court.

Road Dedication: *Chaney v. Camacho*, No. 04-12-00358-CV, 2013 WL 6533123 (Tex. App.—San Antonio Dec. 11, 2013) (mem. op.) This is a private versus public road dedication case. A jury determined the road at issue was private. The San Antonio Court of Appeals affirmed. Chaney owned property on one side of the road, and the Camacho's owned the property on the other side of the road. However, a survey revealed that the disputed road was within the Camacho's property. In the underlying lawsuit, Chaney sued Simon, Felipe, and Medina County asking for a declaratory judgment adjudicating the public status of the disputed road. The Camachos claim the road as their private driveway, and counter-sued Chaney and Medina County for a declaratory judgment adjudicating the private status of the disputed road. The Camachos asserted the property documents established the roadway was merely an easement across their land. The jury ruled for the Camachos. The county and Chaney appealed. The court began with an explanation of what a "public dedication" is and how it comes about. The court analyzed whether the evidence demonstrated an express dedication. The language in the dedication of plat noted the public had an easement for use of the roadway (with a reversionary clause for profit). It also noted that the trustees reserved the right to close off from the public or to abandon the roadway to the public. The language had contradictory provisions, and it was the

jury's duty to determine the dedicating party's intent. The jury determined, and the evidence supported a finding that, the dedication was for an easement only, not for the full dedication of the roadway. The court then analyzed an implied dedication standard and ruled the evidence supported the jury finding that no donative intent was present or acceptance by the county. The jury determinations, including the award of attorney's fees, were affirmed.

OPEN GOVERNMENT

Public Information Act: *City of San Antonio v. Abbott,* No. 03-11-00668-CV, 2014 WL 1415184 (Tex. App.—Austin Apr. 10, 2014). In this Public Information Act case, the City of San Antonio withheld information contained within its call-for-service and dispatch logs as privileged. The Office of the Texas Attorney General (AG) opined the records had to be released, and the city appealed. The appellate court agreed with the city and held the records could be withheld. The city asserted that its call-for-service logs relating to motor vehicle accident reports were excepted from disclosure under Texas Transportation Code Section 550.065 (relating to releasing accident information only under certain circumstances and after required redactions). Section 550.065 provides that information that "relates to a motor vehicle accident reported under . . . [C]hapter [550]" is privileged and for the confidential use by the city. Chapter 550 reports are required when an accident results in injury to or the death of a person or damage to the property of any one person to the apparent extent of $1,000 or more. The city may release the report if a requestor can provide two of three sets of information which only a party to the accident should know. It is undisputed that the requestor, the Texas Weekly Advocate, did not provide two of the three required pieces of information instead seeking information about all accidents or all calls on a given day. The requested call-for-service and dispatch logs contain two of the pieces of information required.

The AG concluded that the exception to disclosure applies only to the accident report itself and not information that may simply relate to it, such as dispatch logs. The city appealed the opinion to district court, which agreed with the AG's conclusion. The city appealed. The Austin Court of Appeals held the legislature's use of the phrase "information that . . . relates to a motor vehicle accident" reported under Chapter 550 has the effect of broadening the scope of Section 550.065 to render more than the actual accident reports confidential. In this case, the city provided evidence at trial that when an accident is required to be reported under Chapter 550, the report is linked within the city's computer system with all other data gathered, including the initial call for service. As a result, all of the linked information "relates to" the accident and is confidential. Thus, the trial court erred in ordering its release. The court of appeals reversed and rendered judgment for the City of San Antonio.

PERSONNEL

Employment: *Lacey v. City of DeSoto*, No. 03-12-00122-CV, 2014 WL 1018074 (Tex. App.—Austin Mar. 14, 2014) (mem. op.). This is an appeal from a trial court order granting the City of DeSoto and the Texas Commission on Law Enforcement Officer Standards and Education's (Commission), now called Texas Commission on Law Enforcement, plea and motion to dismiss in a license revocation challenge. Lacey was a former law-enforcement officer who lost his license from the Commission after being convicted of driving while intoxicated. His employment

with the city was then terminated. Lacey went through the administrative hearing process to challenge the suspension of his license. Afterwards, he filed his first suit. The Commission filed a plea to the jurisdiction asserting he did not exhaust his administrative remedies becausehe did not file a motion for rehearing. The trial court granted the plea. Lacey then filed this second lawsuit against the city as well as the Commission. However, the only requested relief was the same relief Lacey sought in the first suit, which is the reversal of his suspension. The trial court granted the city's motion to dismiss and the Commission's plea to the jurisdiction. Lacey then filed this appeal. The court first went through the law regarding the administrative appeal process and noted that a motion for rehearing is one of the administrative remedies that a party must exhaust before seeking judicial review. It is a jurisdictional prerequisite. Lacey argued Section 2001.144(a)(4) of the Government Code means that the administrative order may not be signed later than the 20th day after it was rendered in order to be final. That was incorrect, though. The signature page on the administrative order states January 13, 2011, as does the text. This date is the date of finality, which starts the clock to file a motion for rehearing. As a result, Lacey's claims against the Commission are barred by not only res judicata but also jurisdictional prerequisites. Since the only relief sought by Lacy was the reversal of his suspension, which does not involve anything the city has the authority to do, the trial court properly granted the city's motion to dismiss.

Whistleblower: *City of Fritch v. Coker*, No. 07-13-00287-CV, 2014 WL 812915 (Tex. App.—Amarillo Feb. 27, 2014) (mem. op.). This is an interlocutory appeal from the denial of a plea to the jurisdiction in a Whistleblower Act case in which the appellate court reversed the lower court, dismissing all claims.

Coker was the Chief of Police for the City of Fritch. The city received complaints about the status of property within the city owned by Alana Gariepy. After obtaining an administrative search warrant, the city began abatement procedures. However, when Coker arrived with personnel to begin abating the nuisance, he spoke with Gariepy, believed the city had not followed the proper procedures and withdrew personnel from the property. Coker then contacted the Texas Rangers, the local district attorney, the attorney general's office and the Texas Department of Public Safety informing them that he believed the city trespassed on Gariepy's property violating her civil rights because it did not follow the proper abatement procedures. The city terminated Coker and he filed suit. The city filed a plea to the jurisdiction. The trial court granted the plea as to Coker's *Sabine Pilot* claims but denied it as to the Whistleblower claims. The city appealed.

The appellate court first analyzed Coker's affidavit in response to the city's plea and held that certain statements were conclusory. Coker claims he was informed that the correct procedures had not been followed regarding the appeal of the Gariepy abatement. Yet, nowhere in the record is there provided either information about the nature of the defect, the proper procedures, or even why Gariepy makes such a claim. Further, there is no support for his claim that the police were on the property illegally. Next, the court analyzed the administrative search warrant issued by the municipal court judge and the official minutes of the city council meeting declaring a nuisance and ordering abatement. Both supported lawful presence on the property. As a result, Coker could not have believed he was reporting a violation of law in good faith. The city therefore negated an essential jurisdictional element and the plea should have been granted.

Collective Bargaining: ***Orange Assoc. of Fire Fighters v. City of Orange*****, No. 14-13-00061-CV, 2014 WL 891591 (Tex. App.—Houston [14th Dist.] Mar. 6, 2014) (mem. op.).** This is a collective bargaining case where the trial court held a grievance was not subject to the collective bargaining agreement's (CBA) arbitration provision. The Fourteenth Court of Appeals reversed and remanded (but really rendered).

Orange Association of Firefighters (association) filed suit against the City of Orange and its city manager (the city), seeking declaratory and injunctive relief to compel arbitration of a grievance pursuant to the parties' CBA. The basis of the grievance was that the fire chief assigned an employee involuntarily to the position of fire marshal when, in the past, the position had been filled by voluntary assignment. The association alleged that the change from its past practices was a violation of the CBA. The city refused to submit to arbitration noting the CBA expressly provided an exclusion for assignments of work. The association brought suit. The trial court granted the city's traditional motion for summary judgment, denied the association's motion and the association appealed.

The appellate court held despite the express clause reserving the right to management to assign work, the city violated the CBA's "maintenance of standards" provision by altering its past practices of filling the position of fire marshal by voluntary assignment. The court focused on the lack of an exclusion for "maintenance and standards" from the arbitration provision even though there was an express exclusion clause for assignments of work. The court further held the grievance involves the "interpretation, enforcement, or application" of the CBA and, thus, would be subject to the specified grievance procedure including arbitration. The trial court's order was reversed and a judgment compelling arbitration rendered. The court then reversed the award of attorney's fees against the association.

Age Discrimination: ***City of Austin v. Chandler*****, No. 03-12-00057-CV, 2014 WL 1568689 (Tex. App.—Austin Apr. 18, 2014).** This is a substituted opinion for one the court issued on February 7, 2014. Essentially, several public safety officers over 40 years of age sued the City of Austin when they lost rank and years of service due to a merger of the Public Safety Emergency Management Department (PSEM) and the Austin Police Department. The trial court ruled for the officers. The city appealed arguing the officer's disparate impact claims were not in their Equal Employment Opportunity Commission (EEOC) charge. The court held that while the EEOC charges do not use the terms "disparate impact" or "facially neutral policy" the substance of the complaints identify a facially neutral policy having the specific negative impact on older officers. The court noted that given 33 of the officers identified the policy, the EEOC would reasonably be expected to investigate the case under both a disparate-treatment and disparate-impact theory. The court then went through a lengthy analysis of the testimony and evidence and determined the evidence was legally and factually sufficient to support the jury's verdict. For an attorney dealing with impacts due to benefits as well as pay, this analysis can be helpful in understanding what to avoid.

Employment Law: ***Rodriguez*** **v.** ***City of Poteet,*** **No. 04-13-00274-CV, 2014 WL 769286 (Tex. App.—San Antonio Feb. 26, 2014) (mem. op.).** This is an age discrimination and retaliation case where the trial court granted the city's traditional motion for summary judgment and the

appellate court affirmed. Rodriguez, the Director of Public Works, received a salary reduction then initiated an age discrimination suit in 2008, but settled in 2009. In 2010, two subordinates filed complaints against Rodriguez, and after an independent investigation, Rodriguez was terminated for violating the city's sexual harassment policy. He sued alleging age discrimination and retaliation for filing the 2008 suit. The city filed a traditional motion for summary judgment, which the trial court granted. Rodriguez appealed, claiming the trial court judge erred in excluding affidavits he filed countering the city's evidence. The appellate court noted Rodriguez's first attempt to file the affidavits was by fax, which is not permitted by the local rules. The second attempt was by Federal Express. Although the package was delivered by the deadline, Rodriguez was unable to show the affidavits were "put under the custody or control" of the clerk, which is required by the Texas Rules of Civil Procedure. Further, the city specifically objected that an affidavit produced by Rodriguez in the discovery period was unsworn. The trial court sustained the objection and did not consider the affidavit. The court of appeals concluded that the trial court properly excluded the affidavits in question.

The court briefly examined Rodriguez's claim that two officials had retaliatory biases against him. However, the court found that Rodriguez offered no evidence suggesting the two officials were the ones making the termination decision. The court then held the city properly met its burden of production establishing a legitimate non-discriminatory basis for the termination, which negated Rodriguez's retaliation and age discrimination claims. As a result, the trial court judgment is affirmed.

Law Enforcement: *Harris Cnty. Sheriff's Civil Serv. Comm'n v. Guthrie,* 423 S.W.3d 523 (Tex. App.—Houston [14th Dist.] Feb. 13, 2014). This is an appeal from a district court order reversing the Harris County Sheriff's Civil Service Commission's (commission) order affirming the termination of a deputy after he engaged in and interfered with an investigation into the theft of $17 out of his wife's car at a local car wash. The appellate court reversed the district court order and remanded.

Guthrie's wife reported $17 stolen from her car while at a local car wash. The theft was reported to and investigated by Humble Police Department (PD). Guthrie, a sheriff's deputy, arrived at the scene and attempted to take over. Ultimately, he caused at least four sheriff's deputies to respond to the scene even though PD officers were already present. After receiving verbal complaints about the matter, Guthrie's supervisor, Major Hitchcock, signed a letter addressed to Internal Affairs who conducted an investigation and obtained witness statements. Guthrie received a proposed termination letter and was given the opportunity to respond before the letter became official. Guthrie appealed to the commission, which affirmed the termination. Guthrie appealed to district court which held that the department failed to follow Section 614.023 of the Texas Government Code requiring a signed complaint to be provided to the officer before disciplinary action is taken. The commission appealed.

The appellate court first held that a "signed complaint" under Section 614.023 could only be a complaint written and signed by a person claiming to be the victim of misconduct. However, the evidence established the car wash owner's "complaint" was for the temporary shutting down of the business, which was not the basis of termination. The termination letter listed several violations of civil service regulations including untruthfulness regarding the incident and a gross

overreaction. As a result, Guthrie received a proposed termination letter listing the grounds alleged and was given the opportunity to respond. Further, Guthrie was provided the detailed signed statements of car wash employees, including the general manager, which spelled out the factual basis demonstrating the overreaction and untruthful behavior. As a result, the court held the signed statement qualified as a complaint under Section 614.023. The district court's order was reversed

Whistleblower: *City of Houston v. Smith*, No. 01-13-00241-CV, 2014 WL 768330 (Tex. App.—Houston [1st Dist.] Feb. 25, 2014) (mem. op.). This case is a fact based inquiry into whether a grievance was timely initiated. Under the Whistleblower Act, a claimant must, before filing suit, initiate a grievance within 90 days of when the alleged adverse action "occurred" or "was discovered by the employee through reasonable diligence." TEX. GOV'T CODE § 554.006. In this case, a peace officer sued the city under the Whistlebower Act for a demotion. The facts are that the officer was promoted temporarily to an administrator position. While in this position, the officer reported errors and violations of law of a third party to his superiors at the police department. The officer was then demoted to a different position, but was told that the demotion was temporary and for a special project for which he had special skills. This was in October 2010. At the end of May 2011, the demotion was made permanent. The officer then initiated a grievance. The grievance was timely filed if dated back from the May 2011 date, but not the October 2010 date. The issue in this case is whether his grievance was timely initiated. The court held that there was a fact issue as to whether the grievance was timely initiated because there was evidence that the "discovery" of the adverse employment action under Chapter 554 of the Texas Government Code occurred in May 2011 when the demotion was made permanent.

Harassment: *Texas Dep't of Aging & Disability Servs. v. Iredia*, No. 01-13-00469-CV, 2014 WL 890921 (Tex. App.—Houston [1st Dist.] Mar. 6, 2014) (mem. op.). This is a case about what constitutes harassment. In this case, a supervisor at a state supported living center continually made comments to a subordinate about how "skinny" she was, his sexual preferences, and how his preferences related to her body type. The subordinate stated that these comments occurred every day her supervisor was in the office for the three years she worked at the center. She also stated that he kicked her door in every time he came to see her and treated her coworkers more favorably. When she was terminated, she filed suit for harassment. The issue was whether these types of comments could be viewed as "sexual harassment" under Chapter 21 of the Labor Code. The court held that the comments and other allegations created a hostile work environment based on sexual harassment. The court held that the supervisor's actions were not severe, but that there was sufficient evidence that the cumulative effect of his comments and actions were pervasive enough to create an abusive work environment, even if some of the conduct was not "sexual" in nature.

Collective Bargaining: *City of Brownsville v. Longoria*, No. 13-12-00224-CV, 2014 WL 1370115 (Tex. App.—Corpus Christi Apr. 3, 2014) (mem. op.). This is a collective bargaining case where the fire fighters' association attempted to invoke a provision allowing it to the same wage increases provided to the police department association (PD) after the PD settled a separate lawsuit. Following a bench trial, a judgment was rendered for the Brownsville Fire Fighters' Association (BFFA) and the city appealed.

In what the court terms the "me too" provision of the contract, if the city "voluntarily negotiates" an across-the-board wage increase for non-exempt employees (under the Fair Labor Standards Act), the bargaining unit shall be granted the same improvement. Both the PD and BFFA have similar "me too" clauses. In 2007, the PD sued the city asserting the "me too" provision entitled them to the same rate increase provided to the fire fighters. The suit went to trial and the city lost. Afterwards, the city negotiated a settlement for less than the judgment. The settlement provided for a certain increase for police officers.

In response, the BFFA sued the city asserting the settlement of the PD lawsuit entitled the fire fighters to a raise. The city argued the settlement was not a "voluntary negotiation" since it would never have entered into one had it not lost at trial. The appellate court disagreed noting both parties to the settlement made concessions so sufficient evidence existed it was voluntary. The city next asserted the settlement was not for an "across-the-board" adjustment. However, the court noted the term means across every group or classification, not that every adjustment must be at a uniform rate or a strict rank-to-rank comparator. Finally, the city argued that the PD settlement was its own "me too" lawsuit attempting to bring the PD in line with BFFA. To say that BFFA now gets a raise due to the settlement to bring PD into line with BFFA is an absurd result. The court dismissed this argument simply noting the plain language of the "me too" clauses ties the increases to fiscal years, not the origin or circumstances surrounding the increase. As a result, the trial court judgment is affirmed.

Whistleblower Act: *City of South Houston v. Rodriguez,* 425 S.W.3d 629 (Tex. App.—Houston [14th] Mar. 20, 2014). This is an interlocutory appeal from the denial of a plea to the jurisdiction in a Whistleblower Act case which the appellate court reversed.

Rodriguez worked as a municipal clerk for the city and supervised two employees. She discovered what she believed to be "ticket fixing" by one of the clerks. She reported her suspicion to a council member because the mayor was allegedly involved in "fixing" several of the tickets. She also reported it to the city prosecutor and judge, who agreed that discrepancies existed between the paper tickets and files entered electronically, but believed it was merely a matter of processing and did not take any action. The opinion is unclear at what point she was discharged, but a discharge occurred sometime later.

The appellate court analyzed the reports for the "good faith" element under the Whistleblower Act. Rodriguez' belief that the mayor was involved was not reasonable given the limited hearsay she based it upon. Further Rodriguez offered no evidence regarding why "a reasonable chief clerk with her training and experience would have believed ticket fixing was occurring based on fourteen tickets having been improperly processed in an office with the problems faced by the South Houston municipal court office." The court almost offhandedly noted Rodriguez also could not point specifically to what statutory law makes illegal the specific activity she alleges. As a result, the city's plea should have been granted.

Employment: *City of San Antonio v. Salvaggio,* 419 S.W.3d 605 (Tex. App.—San Antonio Nov. 20, 2013, pet. denied). This is a hearing examiner case where the City of San Antonio appeals the trial court's summary judgment in favor of Police Lieutenant Salvaggio affirming the hearing examiner's award overturning his indefinite suspension and reinstatement. The San

Antonio Court of Appeals affirmed the reinstatement. Salvaggio took a promotional exam for captain. This was the first time post-it notes were used to designate assigned setting. Despite the fact no exam procedures were given out, no definition of "exam materials" was provided (but a rule prevented testing materials from being taken out of the exam room), and no prohibition against scribbling on the post it-notes was expressed. Salvaggio used the post-it note as scratch paper, writing down notes about topics he wanted to review during the mid-day break. The note was confiscated and was reported to his supervisors. Several months later, some incidents involving several candidates taking test booklets out of a detective promotional examination were reported to the media. During an investigation of these incidents by the city, the post-it note incident with Salvaggio was mentioned and a separate investigation was opened. Salvaggio was eventually suspended indefinitely and appealed to a hearing examiner who reinstated him. The city appealed to the district court which affirmed the hearing examiner's determination.

The city asserts the hearing examiner exceeded his authority because the definition of "testing materials" is a policy decision over which the examiner has no jurisdiction. The San Antonio Court of Appeals noted that if the hearing examiner had created a new rule by defining "testing materials" it would be improper. However, that is not what the examiner did in this case. Reading the hearing examiner's written decision as a whole, the hearing examiner did not define "test materials" to exclude, or include, the post-it note. The examiner based his decision on the fact that the term "test materials" *had never been defined* by the city's civil service commission, which was the sole entity authorized to define the term. The chief had no authority to define the term to include the post-it note. Since the city failed to establish the note was testing material, it failed to properly assert a violation. The reinstatement was affirmed.

Employment: *Talley v. City of Killeen*, 418 S.W.3d 205 (Tex. App.—Austin Nov. 20, 2013, pet. denied). The Austin Court of Appeals was asked to determine if the City of Killeen Civil Service Rule .053(B)(1), providing that a disciplinary appeal such as Talley's must be submitted within 240 consecutive hours of receipt of notice, is consistent with Section 143.010 of the Texas Local Government Code, which provides that the appeal must be filed "within 10 days." In this case, the city provided written notice to Talley that her employment as a city police officer was suspended indefinitely. On the tenth day after receiving notice, Talley filed her appeal, but the city rejected the appeal noting that it was filed beyond the 240-hour mark (she missed by a few hours). Talley sued for declaratory relief asserting the city's local rule was preempted. The parties filed competing summary judgment motions and the trial court ruled for the city. Talley appealed.

Two hundred forty hours is ten days worth of hours, however, the court analyzed the statutory meaning of the word "day" and compared the Civil Service Act's different references to "day" versus "hours" deadlines. As a result, the court held that the legislative intent was to allow ten days for an appeal, which deadline ends on the last full day, irrespective of the consecutive hours in between. The court also analyzed the phrase "after the date the action occurred" in holding the beginning of the clock runs after the day notice is received, not the hour upon which it is received. The court reversed the trial court's summary judgment for the city and remanded.

Employment: *Bracey v. City of Killeen*, 417 S.W.3d 94 (Tex. App.—Austin Nov. 6, 2013). This case involves the civil service relationship between police officer and city. The court was

asked to decide whether an independent hearing examiner "exceeded her jurisdiction" within the meaning of the Civil Service Act's judicial-review provisions in upholding a police officer's indefinite suspension (i.e., dismissing him) when the disciplinary action fully complied with the requirements specified within the Civil Service Act, yet originated with "complaints" that were not reduced to writing, signed, and provided to the officer.

The Austin Court of Appeals analyzed the notice and specificity requirements for informing an officer of an alleged rule violation under the Civil Service Act. The court analyzed Subchapter B of Government Code Chapter 614 which regulations—including a type of notice requirement—apply when certain law enforcement agencies are presented with a "complaint" against one of their officers. The court noted that Chapter 614 includes civil service complaints, and only meet and confer and collective bargaining complaints are excluded from its application. In December of 2010, following an internal investigation, the police chief indefinitely suspended Bracey based on his alleged violation of several city civil service rules. The chief prepared, filed, and delivered to Bracey a letter of disciplinary action detailing the civil service rules that Bracey had allegedly violated (mainly dealing with providing false information to the department). Bracey timely perfected an appeal before an independent hearing examiner who confirmed the suspension and Bracey appealed to district court. The trial court dismissed Bracey's case which he again appealed. The court went through a lengthy analysis of the power of the hearing examiner and what can and cannot be done within his/her jurisdiction. It examined whether compliance with Subchapter B of Chapter 614 was jurisdictional or merely mandatory, a distinction which grants or denies the power to reinstate for non-compliance. The court ultimately held Bracey was protected by Subchapter B and was entitled to a written complaint prior to disciplinary action; however, failure to provide the written complaint does not equate to automatic reinstatement. Bracey's sole complaint is that the hearing examiner "exceeded her jurisdiction" by failing to reinstate him based on Subchapter B. The court concluded that the hearing examiner had no jurisdiction to award him that remedy based solely on any failure by appellees to provide him one or more written "complaints" required by Subchapter B. Bracey did not preserve any complaint that the hearing examiner failed to enforce Subchapter B through a remedy that would be within her jurisdiction to award. Accordingly, the hearing examiner did not "exceed her jurisdiction" as a matter of law.

Workers Compensation: *City of Houston v. Rhule*, 417 S.W.3d 440 (Tex. Nov. 22, 2013) (per curiam). The city and Rhule entered into a settlement agreement regarding Rhule's on-the-job injury, in which the city agreed to pay future medical expenses related to his injury. The settlement agreement was reached in 1988, but the city quit paying his medical bills in 2004. Rhule sued in district court in 2008 without going to the Division of Workers Compensation (Division). The district court granted Rhule damages and the court of appeals affirmed. The Supreme Court, in a per curiam opinion, held that the district court did not have jurisdiction over Rhule's case because the Division had exclusive jurisdiction of Rhule's claim, and he failed to exhaust his administrative remedies before going to district court.

Employment Discrimination: *Moreno v. Texas Dep't of Transp.*, No. 08-12-00078-CV, 2013 WL 6668714 (Tex. App.—El Paso Dec. 18, 2013, pet. filed). In this wrongful-termination action, Moreno appeals the trial court's directed take-nothing judgment in favor of the Texas Department of Transportation (TxDOT). The Eighth Court of Appeals affirmed. Moreno worked

for TxDOT for 15 years. When his longtime supervisor retired, his successor was critical of Moreno. Additionally, employees on a new project accused Moreno of being abusive, which an internal audit confirmed. Moreno was terminated and he brought suit alleging age discrimination (he was 49 years old, and was replaced by a 32 year old), national origin discrimination, and due process. The court first address the exclusion of some evidence of different national origins who were not disciplined for more egregious conduct, but the court held the submission was not made within the rules of evidence or preserved. The directed verdict was proper since Moreno did not offer any evidence showing TxDOT management was motivated because of his age. Further he did not present evidence to support his argument that his replacement, while Hispanic, was not of Mexican ancestry. Finally, Moreno did not have a property right in his at-will employment at TxDOT so no due process claim is present. As a result, the directed verdict in favor of TxDOT was affirmed.

Age Discrimination: *Wilsher v. City of Abilene*, No. 11-11-00355-CV, 2013 WL 6924004 (Tex. App.—Eastland Dec. 31, 2013) (mem. op.). This is an age discrimination case brought by former city employees. The trial court dismissed all claims, but the Eastland Court of Appeals reversed and remanded for trial.

Plaintiffs allege that the city forced them to retire on the basis of their age under what the city identified as a voluntary retirement incentive program. The city first filed a plea to the jurisdiction asserting several of the plaintiffs did not exhaust their administrative remedies because they did not file a complaint with the Texas Workforce Commission. The city filed a no-evidence summary judgment as to all other plaintiffs asserting no evidence of discharge, replacement by younger employee, or pretext. The trial court granted the plea and motion for summary judgment, dismissing all claims. Plaintiffs appealed.

The court first noted that the trial court entered findings of fact and conclusions of law ("FFCL"), which have no place in a summary judgment proceeding. If a trial court makes factual findings, this indicates that a question of fact was present and that summary judgment was improper. It noted that normally a court should not consider the FFCL but here they conflict with the general nature of the orders granting summary judgment. Therefore, the court reversed the summary judgment orders. As to the plea, the single-filing rule allows a plaintiff who has not filed a charge with the Equal Employment Opportunity Commission (EEOC) to piggyback on an EEOC complaint that has been filed by another person who is similarly situated. The non-filing plaintiffs were similarly situated so they can rely on the filings of the other plaintiffs and the plea should have been denied. The orders are all reversed and the matter remanded for trial.

This holding should be considered a cautionary note when a city files a plea and motion for summary judgment, especially when the plea may require an evidentiary hearing. FFCL are appropriate after an evidentiary hearing on the plea but apparently can have adverse consequences to a summary judgment motion. A city litigator should make sure any orders signed in such situations clearly delineate what is being ruled upon, what was considered for each, what was not considered, and that there is no inconsistency in the orders.

Employment Discrimination: *Pena v. County of Starr*, No. 04-12-00462-CV, 2013 WL 6672476 (Tex. App.—San Antonio Dec. 18, 2013, pet. denied) (mem. op.). This is an appeal

from a grant of a summary judgment in an employment case involving disability, discrimination, retaliation, Family Medical Leave Act (FMLA), and worker's compensation claims. The San Antonio Court of Appeals affirmed in part and reversed in part. Pena was hired as an animal control officer by Starr County, and he was injured on the job. While undergoing treatment, doctors discovered he had a life-threatening condition and would need to miss additional work to undergo surgery. Complications arose, and while Pena was hospitalized, the county terminated his position. At the time of termination, Pena was 58 years old. Pena filed a lawsuit against the county alleging retaliation and discrimination based on age and disability and amended his petition to add claims for violations of the FMLA and Americans with Disability Act (ADA). The county moved for summary judgment, which the trial court granted. Pena appealed. Starr County argued Pena did not file a request for FMLA leave before his surgery. However, the San Antonio Court of Appeals pointed out that filing a request is required for "foreseeable" leave. Pena's on-the-job injury should only have kept him away from work for a week. Unforeseeable complications during the surgery kept him away from work much longer. Pena, through his daughter, informed the county as soon as he felt practical under the circumstances.

Because Pena amended his petition to add an FMLA claim, the county raised the statute of limitations defense under the FMLA. The court concluded that Pena's original claims were filed within the limitations period, and because the FMLA claim asserted in his amended petition related to the same occurrence as other allegations in the petition, the county failed to establish that Pena's FMLA claim was barred by limitations. Thus, the trial court erred in granting summary judgment on Pena's claim for violations of the FMLA. As to the age discrimination claim, the court concluded that Pena did not point to any evidence he was replaced by a younger employee or that there was any kind of connection to his age. Instead, testimony established he believed he was terminated because of his injury and condition. The court's grant of summary judgment was proper for the age discrimination claims. The court noted, in relation to Pena's disability claim, that the county may have established the back injury was not a disability; however, the life-threatening cardio disease doctors found could have been. The county did not address this issue, so summary judgment on the disability claim was improper. Finally, the court agreed with the county that the trial court lacked subject matter jurisdiction for the worker's compensation retaliation claim since governmental immunity has not been waived for such claims.

Whistleblower Act: *Ysleta Indep. Sch. Dist. v. Franco*, 417 S.W.3d 443 (Tex. Dec. 13, 2013) (per curiam). This case discusses the ongoing jurisprudence about who is an "appropriate law enforcement authority" under the Whistleblower Act and holds that a school district is not an appropriate law enforcement authority for purposes of the federal Asbestos Hazard Emergency Response Act because the school district is only responsible for internal compliance.

Retaliation: *Zuniga v. City of San Antonio*, No. 04-13-00142-CV, 2014 WL 60929 (Tex. App.—San Antonio Jan. 8, 2014, pet. filed) (mem. op.). In this retaliation case, the San Antonio Court of Appeals affirmed summary judgment for the city. Zuniga began working for the City of San Antonio's utility (CPS Energy or city) as a custodian and worked his way up to the position of Journeyman Carpenter. In 2009, Zuniga made a complaint against the director regarding ethnic and racial discrimination. However, an investigation revealed no policy violations. In one incident in 2010, Zuniga threw a roll of duct tape at a foreman and was placed

on a corrective action plan. Several months later, a safety inspector photographed Zuniga violating safety policies by erecting a ladder in the bed of a CPS Energy truck in order to see onto a leaky roof. His corrective action plan was amended. Within days, Zuniga filed a complaint with the Equal Employment Opportunity Commission and the Texas Workforce Commission asserting retaliation by CPS Energy. That same month Zuniga was injured when a table saw cut off the tip of his thumb, which rendered him impaired and disabled. An investigation revealed the injury was preventable. Since he was on decision-making leave for safety violations already, he was terminated at this point.

Zuniga filed suit against the city under Section 451.001 of the Texas Labor Code alleging that he was discriminated against because he sustained and reported his on-the-job injury. The city filed summary judgment motions, which the trial court granted. Zuniga appealed the trial court's decision. The San Antonio Court of Appeals noted, without addressing whether Zuniga made out a prima facie case, that CPS Energy established a legitimate non-discriminatory reason for its actions. Because they had articulated a legitimate, non-retaliatory reason for the adverse employment action, the burden shifted back to Zuniga to show that the articulated reasons were pretextual. The court stated that Zuniga did not meet the burden to raise a fact issue from which a jury could infer that CPS Energy terminated him because he filed an internal complaint. As a result, the court concluded that the trial court correctly granted summary judgment in favor of the city.

Whistleblower: *Forth Worth Indep. Sch. Dist. v. Palazzolo*, No. 02-13-00006-CV, 2014 WL 69889 (Tex. App.—Fort Worth Jan. 9, 2014) (mem. op.). An employee of a high school made allegations of illegal activity occurring at the school to school district officials and employees as well as to other organizations. After these allegations were made, the employee received a poor evaluation and was transferred to a new school to a position with lower pay. The employee pursued grievances at different levels against the school and had his transfer changed to a better school, his pay reinstated, and his poor performance evaluation changed to a positive evaluation. At the last grievance hearing, the employee stated that he was fine with the transfer and the evaluation. After this occurred, he sued the school district for a whistleblower claim under Government Code Chapter 554 because: (1) he was transferred; (2) he received the negative evaluation; and (3) the school lifted a trespass warning against a parent of another student who had been allegedly threatening the employee's daughter. The school argued that the employee failed to comply with Section 554.006 of the Texas Whistleblower Act that requires initiation of grievance procedures before filing a whistleblower claim and that the lift of the trespass warning was not an adverse employment action. The court held that an employee does not satisfy the initiation requirement of Section 554.006 if he or she purposely tries to circumvent the employer's efforts to redress the grievance through its procedures. The court held that the employee in this case had purposely circumvented the school's grievance process by stating to the grievance board that he was satisfied with the action taken by the school in reaction to his grievance as to the transfer and the evaluation issues, and thereby denied the school the possibility of further addressing his grievance. The court of appeals also held that the timing of the lifting of the trespass warning excluded it from being an "adverse employment action" under the Whistleblower Act.

PROCEDURAL

Religious Freedom: *Kountze Indep. Sch. Dist. v. Matthews*, No. 09-13-00251-CV, 2014 WL 1857797 (Tex. App.—Beaumont May 8, 2014) (mem. op.). This is a religious freedom case brought to the court of appeals as an interlocutory appeal from the denial of a plea to the jurisdiction. The parents of several cheerleaders (parents) brought suit after the school prohibited the cheerleaders from including religious-theme messages on the run-through banners. The trial court denied Kountze Independent School District's (KISD) plea to the jurisdiction and granted, in part, the parent's motion for summary judgment. The KISD appealed.

The cheerleaders would normally create run-through banners which the team would run through and destroy as it entered the field. In 2012, the cheerleaders decided to include biblical messages to provide a positive message of encouragement for the team and fans. Afterwards, the superintendent received a complaint from the Freedom from Religion Foundation complaining about the practice, which promptly resulted in the ban. The parents asserted the "ban on banners" violated Chapter 106 (discrimination in governmental programs) and Chapter 110 (Texas Religious Freedom Restoration Act) of the Texas Civil Practice and Remedies Code. While going through the factual background the court, in a foot note, held that due to the procedural history of the case and evidence presented, the parents could not maintain a claim for any damages, including nominal. Only prospective relief is permissible. KISD asserts the parents' claims are moot because after the lawsuit was filed, the KISD board initiated legislative proceedings to examine the issue and obtain community information resulting in the passage of a resolution holding the ban on religious banners is not required under the law so long as the messages are displaying fleeting expressions of community sentiment, even if the source is of a religious nature. Under Texas Supreme Court precedent, a challenge to a policy or official action can become moot if the statute, policy, or action is repealed or fundamentally altered. After a lengthy examination of this precedent, the court held the new resolution addressed the parents' concerns and rendered the challenge moot. The court determined the alleged wrongful acts are not likely to be repetitious and no collateral consequences are apparent. As a result, the trial court erred in denying the plea. However, under the Uniform Declaratory Judgment Act, the parents may still be entitled to attorney's fees since their actions resulted in the new resolution. The claim of attorney's fees was therefore remanded.

Vested Rights: *City of San Antonio v. Rogers Shavano Ranch, Ltd.*, No. 04-13-00623-CV, 2014 WL 631484 (Tex. App.—San Antonio Feb. 19, 2014) (mem. op.). This opinion addresses whether a plaintiff can recover attorney's fees under the Uniform Declaratory Judgment Act (UDJA) for claims brought under the vested rights provision of Chapter 245 of the Texas Local Government Code. The appellate court held they could.

The developers sought declarations that either a water contract or a development sewer report constituted an "original application for the permit" under Chapter 245 thereby vesting their rights and preventing application of future ordinances and regulations. In addition, the developers sought attorney's fees under the UDJA. The city filed a plea to the jurisdiction asserting it retains governmental immunity for the attorney's fee claims which the trial court denied. The city appealed. Citing to the Texas Supreme Court's holding in *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618 (Tex. 2011), the San Antonio Court of Appeals noted that governmental immunity is

waived under the UDJA only for claims challenging an ordinance, not for claims challenging or seeking the construction of another statute, law, or written instrument. The court pointed out some inconsistency under *Sefzik* with the language of the UDJA, but held that *Sefzik* "is the more recent pronouncement, and we are bound by its holding." The court went further stating that under *Sefzik* and the *Heinrich* line of cases, even if another statute authorized declaratory relief against a city it is not a clear and unambiguous waiver for attorney's fees under the UDJA. This is a recently developing area of law where the UDJA application is being limited only to claims challenging the validity of an ordinance and the local governmental entity retains immunity for all other UDJA claims. Further, if another statute authorizes a UDJA action against an entity, that does not waive immunity from attorney's fees, since only acts challenging ordinances can do so. The Fourth Court of Appeals, in this case, held that the award of attorney's fees is also redundant since the attorney's fee claims are "incidental to [the] central theory of relief." Citing to *Jackson v. State Office of Admin. Hearings*, 351 S.W.3d 290, 301 (Tex. 2011), the court held that such incidental claims do not waive immunity for the awarding of fees. This essentially means that if the statute authorizing the initial claim, in this case Chapter 245, does not authorize attorney's fees, then the UDJA cannot be used to create such an award. If the initial statute does authorize such fees, then they are recoverable under the UDJA. As a result, the trial court erred in denying the city's plea.

Procedure: *In re City of Houston*, 418 S.W.3d 388 (Tex. App.—Houston [1st Dist.] 2013). This is a mandamus case involving a motion for new trial that was granted by a trial court in a governmental immunity case. In the underlying case, an individual sued the city under the Tort Claims Act due to injuries caused by a vehicular accident involving a police car. The plaintiff lost at trial, but the trial court then granted a motion for new trial based on the city's alleged repeated misconduct in concealing and destroying evidence and due to newly-discovered evidence that was in the city's possession but not released. The court of appeals held that the merits of the trial court's reasons for the new trial were not sufficient and granted the city's request for mandamus overturning the grant of a new trial because: (1) the newly discovered evidence was not used by the city and could have been discovered by the plaintiff by the use of due diligence; and (2) the argument of misconduct was not sufficient because the jury received proper instructions related to any alleged misconduct by the city. The court of appeals ordered the trial court to enter judgment on the trial court's judgment in favor of the city.

TAKINGS

Takings: *City of Keller v. Hall*, No. 02-12-00061-CV, 2014 WL 1712163 (Tex. App.—Fort Worth May 1, 2014). This case includes a detailed discussion of flooding laws and studies and how these issues can affect takings claims against cities where the property in question is in a flood plain. The Halls had flooding issues on their property that they partially blamed on city road work and other development. They filed suit against the city for inverse condemnation based on the repeated flooding of their property. The city filed a plea to the jurisdiction and argued that: (1) the city did not cause the damage; (2) the city did not know its actions would cause the damage; and (3) the Halls did not give the city notice about a potential takings claim in a timely manner. The court of appeals held that these were fact based questions that required looking at the merits and that the city did not have to intentionally cause damage for it to be a takings claim. The court held that a city only needs to know that "specific damage is

substantially certain to result from its conduct." 2014 WL 1712163, *3 (quoting *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004)). Despite presenting evidence of the fact that Halls' property was in a flood plain and that it was the "rain" that caused the damage, the court held that there was sufficient evidence that the city's actions worsened or exacerbated the flooding to allow the takings claim to go forward. Evidence also showed that the Halls had informed the city of their concerns with the city's actions and worsening flooding of their property. The court was unimpressed with the "humor" in the city's brief as well. The court allowed the Halls' takings claims to go forward.

Takings: *City of New Braunfels v. Carowest Land, Ltd.*, No. 03-11-00699-CV, 2014 WL 1774535 (Tex. App.—Austin Apr. 30, 2014). This is an interlocutory appeal from the denial of a plea to the jurisdiction arising out of a dispute between the City of New Braunfels and a local property owner, Carowest Land Ltd. (Carowest). The city's public works department took on a project to help control flooding by diverting flow from tributaries to the Guadalupe River. To provide a portion of the drainage channel's route, Carowest conveyed a strip of land to the city that crossed property Carowest owned in the area. A series of disputes between the city and Carowest lead to an extensive history between the two.

The parties entered into a letter settlement to try and resolve the dispute. However, both sides later asserted material breaches of the settlement by the other party. One breach claim was that, under the agreement, Carowest would be liable to the contractor for any delay damages caused by Carowest. Carowest sued the city, and the city filed counterclaims. The city filed two pleas to the jurisdiction (one voluntarily dismissed and the second the subject of this appeal), while Carowest filed for a temporary restraining order (TRO). The trial court denied both the city's plea to the jurisdiction and Carowest's TRO. The city then filed this appeal.

The court first analyzed Carowest's inverse condemnation claims for the dirt and fill from the drainage channel that Carowest claims the city promised him. The court noted that Carowest did not own the tract of land (since he dedicated it) that the fill was taken out of, which would normally preclude a takings claim. However, the court noted the documents on file indicate Carowest may have, via deed and contract, a reversionary interest in the fill through an option clause. The court then noted that there is a difference between when the city acts as a sovereign and when it acts as a contract party. Carowest pled, at most, an ordinary breach of contract claim which does not rise to a taking. The court concluded that the district court erred in denying the city's plea to the jurisdiction, as to this claim.

The court next addressed Carowest's equal protection and substantive due process claims. Just as the takings claim failed, these claims also failed since they were predicated on the same facts and "subsumed" into the takings claims.

Next, the court looked at Carowest's common-law monetary claims for contract and tort. Since the city's actions were governmental not proprietary, the city maintained immunity. The court noted that the Texas Supreme Court has rejected a general waiver by conduct theory and such a theory would only apply as to whether immunity existed in the first place. Carowest's only colorable argument was that the city filed counter-claims and thereby waived its immunity from suit. The fact immunity is waived only as to the offset of the city's counterclaims is a merit

argument, not a restriction on the initial jurisdiction of the court. The city must establish it complied with its obligations under the contract in order to bring a breach claim for failing to indemnify for delay damages; Carowest's breach claims are germane and connected with the counter-claim waiver as are the associated attorney's fees. The tort claims are also germane to the counter-claims. The court noted that even if the city did not waive immunity from suit by filing counter-claims, Carowest's contracts are subject to the waiver contained in subchapter I of Chapter 271 of the Texas Local Government Code.

The court next analyzed the three declaratory judgment claims: Open Meetings Act violations, the validity of the city's contract with contractor to build the trench, and the validity of contractor's delay claims against the city (which implicate city's indemnification counter-claim). Carowest alleged the city council improperly convened in executive session. The city argued that the trial court did not have jurisdiction to decide this claim. The court of appeal concluded that the city's arguments implicated only the merits of Carowest's claims, not the trial court's jurisdiction.

The validity of the trench contract was challenged under Chapter 252 of the Local Government Code. The city argued that Carowest lacked standing to assert this claim because it is not a "property tax paying resident" of the city, as required by Chapter 252. However, the court concluded that the district court could have concluded that Carowest pays taxes and is a resident of the city. Therefore, the district court did not err in denying the city's plea as to this issue.

The third and final declaratory claim at issue concerned the validity of the delay claim. The court concluded that because this issue is tied to the waiver under Subchapter I of Chapter 271, the district court had jurisdiction. Thus, the court affirmed the district court's order denying the city's plea to the jurisdiction as to Carowest's declaratory claims.

Inverse Condemnation: *City of Corpus Christi v. Scorpio Dev., L.L.C.*, No. 13-13-00445-CV, 2014 WL 1007880 (Tex. App.—Corpus Christi Mar. 13, 2014) (mem. op.). This is an interlocutory appeal from the denial of a plea to the jurisdiction in an inverse condemnation case which the appellate court affirmed.

The city approved a subdivision plat which contained two lots which were later sold to Scorpio Development (Scorpio). Scorpio alleged that the city took 35 feet of its property without compensation when it widened the adjacent roadway. The city asserted Scorpio dedicated that section of right-of-way and therefore no taking could occur as a matter of law. Scorpio asserted the dedication was not authorized. The trial court denied the city's plea to the jurisdiction and the city appealed.

While the City cited to deposition testimony that the 35 foot expansion area lies within the 50 foot dedicated right-of-way, Scorpio submitted evidence that it lost 35 feet of property. While the testimony does not appear to be a direct contradiction, the Corpus Christi Court of Appeals held it believes a fact question exists as to whether or not the expansion project exceeded the 50 foot dedication. The court did note that this fact issue will ultimately determine whether Scorpio will succeed on the merits, but that the court could not be the one to make that call with the current record. As a result, the plea was properly denied and the trial court order was affirmed.

Takings: *City of Dallas v. Millwee-Jackson Joint Venture,* No. 05-13-00278-CV, 2014 WL 1413559 (Tex. App.—Dallas Apr. 4, 2014) (mem. op.). This is an interlocutory appeal from the denial of a plea to the jurisdiction in an inverse condemnation suit. The appellate court affirmed the denial noting jurisdictional fact questions existed precluding dismissal. Millwee-Jackson Joint Venture (MJJV) intended to build a hotel and sought a permit to build a bridge over a creek to connect to a key artery in 1982. Due to a variety of reasons, the property did not develop. MJJV alleges that in 1998, the City deleted the main artery, Alamo Street, from its master thoroughfare plan. The city closed Alamo Street in 2002, and MJJV filed suit in 2004 for inverse condemnation, injunction and nuisance. The case went up and down from the trial court to the court of appeals until the city amended its plea to the jurisdiction. The trial court denied the plea, and the city appealed.

After analyzing the standards for different types of regulatory takings, the court explained that MJJV alleges Texas Department of Transportation intends to acquire city parkland for widening of an interstate, and, under federal and state law, the city must mitigate the loss by acquiring new parkland. MJJV's property is the nearest property realistically capable of being condemned for that purpose, so the city allegedly was intentionally thwarting its development to lower condemnation costs. Despite no direct evidence that the city intended to condemn the property for parkland, MJJV presented evidence forming the basis of this speculation. While the city produced plans and evidence of future development showing the MJJV property not being acquired for any purpose, the court determined a fact question existed. The court next examined MJJV's investment-backed expectation entitlement. The city asserted that since MJJV offered to donate the property to the city prior to closing Alamo Street, MJJV had no expectation of development. MJJV countered that the offer to donate was part of an attempted settlement in a sign code dispute, which the city did not accept. It purchased the property in a commercial zone and produced evidence of the attempted development activity towards the property. As a result, factual questions existed, precluding dismissal.

Next, the city asserted that no taking can occur for the closing of Alamo Street since it was not connected with the property originally and thus, no denial of access could result. However, the evidence established MJJV's property could not be developed without the bridge connecting it to Alamo Street and permits were applied for and conditionally granted prior to closure. Sufficient jurisdictional assertions were raised to give jurisdiction to the trial court. The court then analyzed MJJV's injunctive relief to force the city to reopen Alamo Street. Even though MJJV's property does not abut Alamo Street as typically required under Texas Civil Practice and Remedies Code Section 65.015 (statutory requirements for closure in relation to abutting property owner's rights), an owner can acquire rights by easement or prescription so the property does not have to abut the roadway. MJJV presented evidence establishing jurisdiction to determine whether its actions qualify as a prescriptive easement to Alamo Street, which could entitle MJJV to force the city to reopen the roadway. Finally, in relation to the nuisance claim, the court simply said the regulatory taking claim remains unresolved so fact questions exist as to nuisance. The court of appeals ruled that the plea was properly denied by the trial court.

Inverse Condemnation: *City of El Paso v. Ramirez,* No. 08-12-00309-CV, 2014 WL 996368 (Tex. App.—El Paso Mar. 14, 2014). In this case, property owners filed suit against the city alleging claims of inverse condemnation, nuisance, and trespass when the city's landfill's

retention ponds overflowed during heavy rainfall, damaging owner's buildings and crops. The trial court denied the city's plea to the jurisdiction and the city appealed. (This is the second time this case has been before the appellate court on the city's plea to the jurisdiction. *See City of El Paso v. Ramirez*, 349 S.W.3d 181 (Tex. App.—El Paso 2011, no pet.).

The city argued that property owners did not plead a valid takings claim and thus those claims are barred by governmental immunity. The city argues the nuisance and trespass claims are also barred by the city's governmental immunity. The appellate court held that the owners' pleadings alleged facts to show that the discharge of water was the result of an intentional act, and that the property had been taken for a public use, both required for an inverse condemnation claim. The court also held that fact issues existed as to whether the city knew the construction, operation, and maintenance of the landfill was substantially certain to damage the property by continuing to flood it during heavy rainfall so the trial court did not err when it denied the city's plea to the jurisdiction.

Takings: *San Antonio Water System v. Overby*, No. 04-13-00364-CV, 2014 WL 1033921 (Tex. App.—San Antonio Mar. 19, 2014). This is an interlocutory appeal from the denial of a plea to the jurisdiction in a flooding case. The Overbys allege their yard and home were flooded by rainwater and sewage over several years due to the deteriorated condition of an alleyway behind their home. They sued several entities including the San Antonio Water System (SAWS). Specific to SAWS, the Overbys claimed SAWS failed to properly maintain the sewer system and brought takings, negligence, declaratory judgment and nuisance claims. SAWS filed a plea, which the trial court granted in part and denied in part, dismissing the declaratory judgment action and negligence claims. After further discovery, SAWS filed a second plea, which the trial court denied. SAWS appealed that denial. The appellate court first determined SAWS was a governmental entity subject to takings claims. Examining the evidence in the light most favorable to the Overbys, the court assumed SAWS knew it should have changed the grade in the alleyway. However, the evidence presented failed to show the necessary intent to form a takings claim.

While SAWS may have known the damage was preventable, that knowledge did not equate to an intent to deprive the Overbys of their property. The appellate court concluded that the takings claim should have been dismissed. As to the nuisance claim, the Overbys claim the Texas Tort Claims Act waived SAWS immunity. However, even if accurate, there was no nexus between the use of motor driven equipment and the alleged injury to the property. The injury of the Overbys did not relate to the use of equipment but to the state of the alleyway behind their home. As a result, the nuisance claim should also have been dismissed. The trial court's order denying the plea was reversed and judgment rendered for SAWS.

Billboards: *State v. Moore Outdoor Props., LP*, 416 S.W.3d 237 (Tex. App.—El Paso Nov. 13, 2013, pet. filed). This is an inverse condemnation case arising out of the state's exercise of eminent domain over a billboard and the property on which the billboard was located. Of particular interest to cities is the discussion by the court of the city's permit that allowed use of the land for a billboard structure. The appellate court concludes that the sign or billboard permit obtained by the property owner from the city is not a compensable property right in the context of a condemnation proceeding, but that the existence of the permit would be taken into

consideration in determining the fair market value of the property. The court also held that the billboard is a fixture not personal property and reiterated that advertising revenue cannot be taken into account when valuing the billboard or property for condemnation purposes but allowed the testimony including this issue to stand because it did not cause harmful error. TML has joined an amicus brief on this case at the Supreme Court of Texas and briefing and has been requested.

Vested Rights: ***City of San Antonio v. Greater San Antonio Builders Assoc.*****, 419 S.W.3d 597 (Tex. App.—San Antonio Nov. 20, 2013, pet. denied).** This is a vested rights case under Chapter 245 of the Texas Local Government Code. The City of San Antonio appealed from a declaratory judgment invalidating its "fair notice ordinance" and the San Antonio Court of Appeals affirmed. In relation to permits for development, the city passed an ordinance requiring the applicant to fill out a specific city form which flags the permit for the city to recognize vested rights. The purpose is "to provide standard procedures for an applicant to accrue rights under Chapter 245 of the Texas Local Government Code." The Plaintiffs are organizations whose members include individuals and entities who are concerned with issues affecting the real estate industry in the greater San Antonio area or who own real property in the city. In a separate interlocutory appeal, the Plaintiff's standing was affirmed and they were permitted to proceed at the trial court level. The Plaintiffs filed traditional summary judgment motions (two of them on different issues) which the trial court granted. The city appealed.

The city asserted the fair notice ordinance ensures the city will have enough information about a project to determine whether the project has changed and, therefore, is subject to current development regulations. Plaintiffs countered that the fair notice ordinance allows the city to prevent owners from obtaining or utilizing vested rights that have already been authorized by the legislature under Chapter 245. The city conceded it would not recognize a vested right without the fair notice form since its absence makes an application incomplete. However, the court held that Chapter 245 expressly defines the documents and information that cause the accrual of a vested right. Tex. Loc. Gov't Code § 245.002(b). The city's form requires additional information beyond what is recognized in the statute and therefore fails to recognize rights which vest under state law. Unfortunately, the court then held that since the city did not present z severance clause argument in response to the summary judgment, they could not do so on appeal. The entire ordinance is therefore invalid. This seems a little extreme since the law is the law and whatever provision may be invalid, the presence of a severance clause separates it as an operation of law. But the Fourth Court of Appeals did not see it that way and invalidated the entire ordinance.*

Takings: ***City of Corpus Christi v. Aguirre Props., Inc.*****, No. 13-13-00314-CV, 2013 WL 6730052 (Tex. App.—Corpus Christi Dec. 19, 2013) (mem. op.).** This is an interlocutory appeal from the denial of a plea to the jurisdiction in a negligence, takings, and nuisance case involving three instances of flooding. The Thirteenth Court of Appeals affirmed in part and reversed in part.

The property owners alleged in the petition that the city uncovered a damaged sewer line and initiated repairs with motor-driven equipment. A few weeks later the city ruptured a parallel line about ten feet away from the property. As a result, the property was flooded through the lines as

well as above ground flooding. The city then "jetted" the line which the plaintiff alleges damaged the line further, exacerbating the flooding.

The court first noted that the city failed to provide any evidence to counter the pleading allegations so the court based its determination on the pleadings alone. The pleadings allege the use of motor driven equipment which ruptured the lines and proximately caused the damages for the second flooding event. As a result, the plaintiffs met the "nexus" requirement between the use of motor driven equipment and the damage. However, for the first and third flooding events, the use of equipment to merely attempt a repair is not a proper nexus. Since a pleading defect such as this could be cured, the plaintiff should be given the ability to replead and properly allege the nexus.

With respect to the takings claims, the court held the accidental occurrences of the three flooding events is not an "intentional" taking. However, to the extent the city blocked access to the property for several months, created dirt banks and damaged the property while repairing the lines by tearing up the blacktop and replacing it with only dirt, such occurrences could be viewed as intentional and for public use so those claims were permitted to go forward. The nuisance claim as it related to the second flooding event was also permitted to go forward and the plaintiff should be permitted to replead with respect to the other two.

Condemnation: *City of San Antonio v. Kopplow Dev., Inc.*, No. 04-09-00403-CV, 2014 WL 462294 (Tex. App.—San Antonio Feb. 5, 2014). This is a case on remand to the San Antonio Court of Appeals from the Supreme Court of Texas. The underlying lawsuit involved a project by the City of San Antonio to reduce downstream flooding. The city built a permanent, concrete inflow wall across an easement owned by Kopplow. Kopplow sued the city for a taking, and the city counterclaimed for condemnation of the easement. At the trial court, the jury awarded damages to Kopplow. Both parties appealed. On the original submission to the San Antonio Court of Appeals, the court affirmed part of the damage award and reversed a portion of the damage claim. The petition for review was granted by the Supreme Court of Texas. The Supreme Court of Texas held that the fact that flooding has not yet occurred does not render Kopplow's inverse condemnation claim premature because the claim is based on the thwarting of approved development, not flooding. The Supreme Court of Texas remanded the case back to the San Antonio Court of Appeals to consider Kopplow's cross-appeal point that its vested right to develop the property meant the trial court erred in excluding evidence of the value of the entire property. The San Antonio Court of Appeals concluded that because the jury did not hear evidence related to the cost to fill the entire property, Kopplow was harmed. Therefore, the court reversed and remanded the case back to the trial court.

MISCELLANEOUS

Ethics: *Tidwell v. State*, No. 08-11-00322-CR, 2013 WL 6405498 (Tex. App.—El Paso Dec. 4, 2013). In this case, Tidwell appeals his convictions of misuse of official information, retaliation, and official oppression. The convictions arose out of Tidwell's investigation and criminal prosecution of two nurses who filed complaints with the Texas Medical Board (TMB) against a doctor. Tidwell was a county attorney at the time.

In regard to the misuse of official information, the El Paso Court of Appeals explains that under Penal Code Section 39.06(b), a public servant commits an offense if with intent to obtain a benefit or harm or defraud another, he discloses or uses information for a nongovernmental purpose that: (1) he has access to by means of his office or employment; and (2) has not been made public. Information has not been made public if it is information to which the public does not generally have access and that is prohibited from disclosure under the Public Information Act (PIA). Noting that the PIA doesn't actually prohibit the disclosure of *any* information, the court concludes that the phrase "prohibited from disclosure" contemplates the exceptions to disclosure found in Subchapter C of the PIA. Tidwell then tries to argue that because the TMB did not request an attorney general decision to withhold the information, the complaint was presumed to be subject to required public disclosure. The court rejects this argument for several reasons including the fact that the information is confidential by law, which constitutes a compelling reason to withhold the information. Tidwell also argues that the complaints were used for a governmental purpose (he argues they were used to investigate and prosecute the nurses for misuse of official information). The court rejects this argument because Tidwell was found to be involved with the sheriff in impermissibly obtaining the complaints from the TMB. Specifically, the sheriff had led the TMB to believe that he was investigating a TMB license holder (the doctor) rather than the nurses.

In regard to the retaliation conviction under Penal Code Section 36.06 and the official oppression conviction under Penal Code Section 39.03(d), the court concludes the evidence was legally sufficient to support Tidwell's conviction. Both of those offenses require an "unlawful act." The court discusses the fact that the jury charge in this case defined the term "unlawful" as meaning conduct that is criminal or tortious or both and includes what would be criminal or tortious but for a defense not amounting to justification or privilege.

International Property Maintenance Code and City Ordinances: *State of Texas v. Cooper*, 420 S.W.3d 829 (Tex. Crim. App. Nov. 20, 2013). This case looked at the City of Plano's property maintenance legislative scheme. The City of Plano adopted the 2003 International Property Maintenance Code (IPMC) as part of its local property maintenance code. The IPMC contains offense and penalty provisions that require an individual receive notice of violation before being prosecuted. However, the city also adopted a separate provision that did not require notice of a violation before prosecution. The court looked at whether the appellee, Jay Cooper, was entitled to notice of violations of the IPMC before his subsequent violations of the code could result in convictions. The court held that Cooper was entitled to notice of violations and added that if the city intended to eliminate the required notice, then the city should have deleted the requirement from the IPMC before adopting it.

Ordinance Construction: *City of Houston v. Little Nell Apartments*, 424 S.W.3d 640 (Tex. App.—Houston [14th Dist.] Jan. 23, 2014). This is an interlocutory appeal from the denial of a plea to the jurisdiction involving a City of Houston employee's actions, which the plaintiff asserts were ultra vires in that they subjected plaintiff to improper drainage fees. The city's director of public works and engineering, Daniel Krueger, was sued in his official capacity. The court of appeals affirmed the denial.

In 2011, the city enacted a specific ordinance referred to as the "drainage fee ordinance." The ordinance created a municipal drainage utility which charged a fee to recover costs of service and used the fee exclusively for defined purposes. Fees are calculated based on square foot of impervious cover of a benefitted property. Plaintiff asserts that some of its properties are not part of the city's drainage system so should not be subject to the ordinance or charged the fee. After exhausting the administrative process under the ordinance (which yielded no change in the fees) the plaintiff sued the city and the director of public works for a declaration the ordinance is invalid and for ultra vires acts of imposing the fee by the director. Defendants filed a plea to the jurisdiction. After an evidentiary hearing, the court granted the plea in part (mainly to the claims for monetary damages), but denied it as to declaratory claims involving ultra vires acts of Krueger. Defendants filed this interlocutory appeal.

The Fourteenth Court of Appeals first determined if it had appellate jurisdiction over Krueger's appeal since the original notice of appeal was only on behalf of the city (although it was amended later). The court concluded the city and Krueger made a bona fide attempt to appeal, and based on Supreme Court precedent, an appellate court has jurisdiction over an appeal even if the notice of appeal has some defects. The city and Krueger insist that the drainage fee ordinance grants Krueger the authority and discretion to assess drainage charges after making the threshold determination as to service area. Plaintiffs assert the question is not his authority to assess fees, but whether their properties fall under the ordinance at all since they are not within the service area. The court went through a lengthy analysis of the text of the drainage fee ordinance, analyzing various definitions and grants of authority. In the end, the court concluded that, under the plain language of the drainage fee ordinance, a property must be a benefitted property to be subjected to drainage charges. The ordinance, while granting the director authority to assess fees, does not give him authority to determine which properties are benefitted properties, so imposing fees on properties which are not benefitted properties is an ultra vires act. After examining the apparently large amount of evidence presented at the hearing (including proof of the property location, service areas, permits, etc.) the court concluded the pleadings and evidence establish the court has jurisdiction to determine if the director exceeded his authority by applying charges to the plaintiff's property. It affirmed the denial.

The court spent a lot of time determining what authority the ordinance does not grant, so be careful of wording within an ordinance. The opinion provides guidance to attorneys as to what types of words they should put into ordinances in order to properly grant full authority to accomplish a particular purpose. Such authority needs to be balanced with avoiding an "unbridled discretion" problem.

Ordinance Construction: *Houston Belt & Terminal Ry. Co. v. City of Houston*, 424 S.W.3d 663 (Tex. App.—Houston [14th Dist.] Jan. 23, 2014). This is a companion case to *City of Houston v. Little Nell Apartments*, No. 14-12-01157-CV, 2014 WL 257977 (Tex. App.—Houston [14th Dist.] Jan. 23, 2014), in that it deals with a similar application of the city's drainage fee ordinance by the city's director of public works and engineering, Daniel Krueger. In this case, Houston Belt and Terminal Railway Company, BNSF Railway Company, and Union Pacific Railroad Company (railroads) sued the city and Krueger for declarations with respect to the validity of the drainage fee ordinance, and if valid, whether Krueger violated the ordinance by: (1) imposing drainage charges on the railroads' non-"benefitted properties"; and (2)

determining the amount of drainage charges imposed on their properties. The city and Krueger filed a plea to the jurisdiction on governmental immunity grounds, and the trial court sustained the plea as to the railroads' ultra vires claims against Krueger. The railroads appealed that decision, arguing that Krueger didn't have the authority to determine whether some properties are subject to the ordinance, and for those that are subject to the ordinance, that he didn't have the authority to determine whether they contained impervious surface.

As with the decision in *Little Nell*, the court rejected the city and Krueger's argument that the ordinance gave Krueger the authority and discretion to impose drainage charges on all of the properties in question. The railroads argued that many of the properties in question do not fit within the definition of "benefitted property" in the ordinance because they do not make use of the city's drainage system, and instead discharge directly to natural water sources not owned or controlled by the city. The court concluded that the pleadings and evidence establish that the trial court had jurisdiction with regard to Krueger's alleged ultra vires actions in imposing fees on properties alleged not to be "benefitted properties." The court reversed the trial court's order on the city and Krueger's plea to the jurisdiction as to the railroads' claims that Kruger acted ultra vires by imposing drainage charges on properties that were not "benefited properties."

The railroads acknowledged that some of their properties are "benefitted properties" as defined by the ordinance, and argued that for these properties Krueger exceeded his legal authority by applying drainage charges for areas that are not "impervious surfaces." After reviewing the language of the ordinance, the court construed the plain language to grant Krueger the discretion to determine whether certain areas contained "impervious surface" for purposes of charging the drainage fee. Because the railroads only alleged facts demonstrating acts within Krueger's legal authority and discretion under the ordinance, their claim that Krueger acted outside his legal authority was an attempt to control state action, and thus was barred by governmental immunity. As a result, the court affirmed the granting of the city and Krueger's plea to the jurisdiction as to the claim that Krueger acted ultra vires when determining the impervious square footage of the railroads properties subject to drainage charges.