RECENT STATE CASES OF INTEREST TO CITIES

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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. Besides serving TML member cities, Laura also enjoys spending time with her husband Chris, her two sons, Johnathon and Joshua, and her daughter, Emma.

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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RECENT STATE CASES
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GOVERNMENT IMMUNITY

Tort Claims Act: *San Antonio Water Sys. v. Smith*, No. 04-13-00898-CV, 2014 WL 4723123 (Tex. App.—San Antonio Sept. 24, 2014). This is an interlocutory appeal in a premise liability case under the Texas Tort Claims Act. The Fourth Court of Appeals affirmed the denial of the plea to the jurisdiction filed by the San Antonio Water System (SAWS) alleging a lack of notice of the claim within the statutory time period. Beatriz Smith sued SAWS for injuries she sustained when she fell into a manhole on a sidewalk in front of a church. The City of San Antonio Fire Department responded, along with other entity responders and the incident reports noted Smith had fallen due to an uncovered manhole and possibly broken her arm. SAWS personnel were called to repair the missing cover. Smith's attorney sent a notice of claim letter to the city and to CPS Energy (CPS) pursuant to the Texas Tort Claims Act but did not provide one to SAWS. When Smith sued, she sued the city, CPS, SAWS and the church. SAWS filed a plea to the jurisdiction asserting it did not receive the statutory notice provision, which the trial court denied. The court first analyzed whether SAWS is a separate "governmental unit" entitled to its own statutory notice separate and apart from the city. The City of San Antonio purchased its waterworks system from a private entity in 1925. Pursuant to city ordinance, control and management of SAWS was placed in the hands of a newly created board of trustees. However, the court cited other lawsuits in which SAWS asserted it was part of the city and therefore entitled to tax exempt treatment and was a "special agency" of the city. Citing the most recent ordinance controlling SAWS operations (which also consolidated the city's sanitary sewer and water reuse system) it defined SAWS as an "agency of the City." While the ordinance placed management of SAWS into the hands of the board of trustees, it did not transfer ownership or assets to the board. Importantly, the court determined that SAWS creation is derived from city ordinance only and not the Texas Constitution. It is therefore not a "governmental unit" separate from the city and is not entitled to independent notice under the Texas Tort Claims Act. A fact question exists as to whether the city had actual notice of the claim (on its own and by-and-through notice to CPS, another agency of the city) and therefore the trial court properly denied the plea.

Governmental Immunity—Procedural: *City of Houston v. Downstream Envtl., L.L.C.*, No. 01-13-01015-CV, 2014 WL 5500486 (Tex. App.—Houston [1st Dist.] Oct. 30, 2014, pet. filed) (mem. op.). This is a continuation of the governmental immunity case that first appeared in the April 2014 issue of the TCAA newsletter. Downstream argues that the city damaged its facility and overcharged it for wastewater services, and the city argues that Downstream owes it over $200,000 for wastewater services. An agreed temporary order was entered in December of 2013 that required: (1) the city to keep providing wastewater services despite Downstream's past due bill for services; and (2) Downstream to pay the city $7,500 for services. Between the agreed order and this appellate hearing, the city argues that Downstream has incurred an additional $80,000 in charges and now owes the city more than $300,000, but has paid nothing more towards the bill. The city argues that the agreed order should be dissolved as it is not required to provide free wastewater service to Downstream. The court of appeals reviewed the procedural

history of the order and held that it was no longer valid because it did not state the reasons why it was issued and did not fix an amount of security.

Tort Claims Act: *Henry v. City of Angleton*, No. 01-13-00976-CV, 2014 WL 5465704 (Tex. App.—Houston [1st Dist.] Oct. 28, 2014) (mem. op.). A parent sued the city after her child died from complications of a near-drowning accident at the city pool. The plaintiff argued that the city was liable for her daughter's death because: (1) the city pool was a proprietary function of the city because: (a) it had additional features other than the pool; and (b) the city charged for use of the pool; or (2) immunity was waived under the Tort Claims Act due to: (a) the city's misuse of tangible personal property; or (b) premises defect. The city filed a plea to the jurisdiction under the Tort Claims Act. The court first held that operating a city pool is always a governmental function under the Act even with additional features or a charge for use of the pool. *See* TEX. CIV. PRAC. & REM. CODE § 101.0215. The plaintiff then argued that the placement and use of the lifeguard's chairs was a misuse of personal property that caused the incident. *Id*. § 101.021. The court held that neither the location nor use of the chairs contributed to or was an instrumentality of the child's drowning. For the premises defect allegation, the court looked to the Recreational Use Statute for guidance. TEX. CIV. PRAC. & REM. CODE § 75.003. Under the Recreational Use Statute, a landowner, including a city, only owes a duty as if an individual is a trespasser when the land is being used for recreational purposes as defined in Chapter 75 of the Texas Civil Practices and Remedies Code. *Id*. § 75.002. This means that the plaintiff must show that the city landowner engaged in gross negligence, malicious intent, or bad faith related to the property in order for the landowner to be liable for injuries occurring on its property. The court of appeals held that the plaintiff's allegation that the city failed to install different or elevated lifeguard chairs did not rise to the level of gross negligence under the trespasser duty. The court also noted that the plaintiff failed to allege that the city knew of an extreme risk of harm related to its lifeguard chair design, another element of a gross negligence claim. The court of appeals granted the city's plea to the jurisdiction.

Tort Claims Act: *City of Dallas v. Sanchez,* No. 05-13-01651-CV, 2014 WL 5426102 (Tex. App.—Dallas Oct. 27, 2014, pet. filed). Diane and Arnold Sanchez sued the City of Dallas for negligence in the death of their son. The city filed a motion to dismiss under Rule 91a of the Texas Rules of Civil Procedure, which the trial court granted in part and denied in part. The parties then filed this interlocutory appeal. The Sanchezes contend that the city's liable under the Tort Claims Act for negligent use and misuse of their 911 computer and phone system. The court acknowledged that operation of an emergency ambulance service is a governmental function under the Tort Claims Act. However, the court concluded that the gravamen of the Sanchezes' negligent use and misuse allegations were of non-use of property: the failure to use the telephone and computer systems to determine that two calls made to 911 were not redundant. The court of appeals stated the trial court correctly concluded that there was no waiver of immunity for these claims. The court went on to conclude that the trial court correctly denied the city's motion to dismiss the Sanchezes' claims asserting that equipment failed or malfunctioned. The failure or malfunction of the equipment that allegedly cut off the caller before the call was completed contributed to the city's failure to provide emergency medical attention to Matthew Sanchez. Therefore, these allegations were sufficient to allege that a condition of tangible personal property caused the injury. The Dallas Court of Appeals overruled all issues raised in the appeal and cross-appeal and affirmed the trial court's order.

Tort Claims Act: *Benavidez v. University of Tex.–Pan Am.*, No. 13-13-00006-CV, 2014 WL 5500469 (Tex. App.—Corpus Christi Oct. 30, 2014) (mem. op.). This is an appeal from the trial court granting a plea to the jurisdiction for the University of Texas–Pan American (UTPA) in a Texas Tort Claims Act case which the Thirteenth Court of Appeals affirmed. Benavidez fell from a climbing wall on the campus of UTPA. A UTPA employee testified that the figure-eight knot tied to his harness was either not tied properly or not tied at all. Before he climbed the wall, Benavidez signed a waiver/release from liability but on the back side of the form it listed several safety rules participants must follow. Benavidez argued the safety rules applied to the UTPA belayer. UTPA filed a plea to the jurisdiction which the trial court granted.

The court analyzed whether it could consider the affirmative defense of a release as part of a plea, but ultimately held that because Benavidez did not object to the release's use in that way, the court would consider it without deciding if it was proper. The court held it would be improper to hold UTPA breached the release language because the safety rules on the back are not tied to the release language on the front. The separate sides of the paper constitute separate agreements. Further, the safety policies are for the attendees to follow, not UTPA staff. Violation of these safety rules is enforced by attendee's loss of climbing privileges, which is not applicable to an employee. Since Benavidez released UTPA, the court did not address any of the other arguments on the appeal as they would not change the release. The grant of the plea is affirmed.

Governmental Immunity: *City of Diboll v. Lawson*, No. 12-13-00344-CV, 2014 WL 6792679 (Tex. App.—Tyler Dec. 3, 2014, pet. filed) (mem. op.). In March 2010, Carolyn Burns tripped on a four inch hollow pipe protruding from the ground at a park owned by the City of Diboll after attending her granddaughter's softball game. Burns suffered serious injuries from the fall, and brought a premises defect claim against the city (Louie Lawson was later substituted as plaintiff after Burns' death in an unrelated automobile accident). The trial court denied the city's plea to the jurisdiction and the city appealed.

On appeal, the city argued that Burns was engaged in recreation while she walked to her car after spectating at the softball game, and as a result the city did not owe a greater degree of care to Burns than is owed to a trespasser on the premises in accordance with the recreational use statute. *See* TEX. CIV. PRAC. & REM. CODE § 75.002(f). Noting that there is a conflict among the courts of appeals regarding whether spectating at a sporting event constitutes recreation, the court held that spectating does, in fact, constitute recreation and that an injury occurring on the premises while walking to and from the activity is part of the larger recreational event. Because the court determined that Burns was engaged in recreation, the city owed no greater degree of care than is owed to a trespasser, which under Texas law is a duty not to injure the person through gross negligence. Lawson conceded in his brief that he had not alleged or attempted to prove that the city acted with gross negligence. Therefore, the court held that Lawson's petition affirmatively negated the trial court's subject matter jurisdiction. The court reversed the trial court's order denying the city's plea to the jurisdiction, and dismissed the suit for lack of subject matter jurisdiction.

Governmental Immunity: *Tex. Dep't of Pub. Safety v. Guzman*, No.13-13-00590-CV, 2014 WL 6085684 (Tex. App.—Corpus Christi Nov. 13, 2014) (mem. op.). This is an interlocutory appeal in a premise defect case where the trial court denied the Texas Department of Public

Safety (DPS) plea to the jurisdiction and the Corpus Christi Court of Appeals affirmed. Guzman entered the DPS office to deal with a driver's license matter, slipped and fell on the floor due to water. A DPS custodian was mopping nearby. DPS filed a plea to the jurisdiction alleging a lack of actual knowledge of a dangerous condition and attached the custodian's affidavit asserting he had not mopped that area at the time Guzman fell. The trial court denied the plea and DPS appealed.

The court held that Guzman's affidavit asserted she fell due to water on the floor. Given her expressed observations of the area just prior to her fall, she could reasonably infer the water was due to the custodian's mopping. Since every reasonable inference must be viewed in the light most favorable to the non-movant, the court concluded a fact issue existed as to whether or not the custodian had actual knowledge of the dangerous condition. The fact she did not actually see him mop the area is not determinative. Additionally, the court upheld the trial court's denial of DPS's objections to strike the affidavit, noting her statements were reasonably supported in the affidavit with observed facts.

Tort Claims Act: *Tex. Dep't of Aging & Disability Servs. v. Cannon*, No. 12-0830, 2015 WL 127829 (Tex. Jan. 9, 2015). This is a Texas Tort Claims Act (TTCA) case where the Supreme Court of Texas holds that while individual employees are entitled to dismissal for tort claims, they are not entitled to dismissal for claims outside of the TTCA, such as claims under 42 U.S.C. Section 1983.

Patrick Dyess was a resident of a state supported living center run by the Texas Department of Aging and Disability Services (DADS). Watson, Hubbard, and Turner were employees at the center. Dyess died during an incident where the employees physically restrained him after he became disruptive. Dyess' mother, Cannon, initially sued DADS and the employees under the TTCA. DADS filed a motion to dismiss the employees under Texas Civil Practices and Remedies Code Section 101.106(a) and (e). While the motion was pending, Cannon amended her complaint alleging Section 1983 claims (federal claims) against the individuals and agreed to dismiss the tort claims. DADS asserted the employees were entitled to dismissal under the perfected immunity of Section 101.106(e), regardless of the type of claims. The trial court denied the motion entirely. The court of appeals reversed as to DADS, noting it retained immunity for the claims asserted, but affirmed the denial of the employees. The employees appealed.

The sole issue for the court was whether the employees are entitled to dismissal pursuant to Section 101.106(e) which provides as follows: "If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit." The Supreme Court previously held that all common law claims are brought "under" this chapter, regardless of whether immunity has been waived for them. However, independent waivers in other statutes are not brought under the TTCA. DADS argued an amended pleading brought while a Section 101.106(e) motion is pending should not be considered because the statute requires "immediate" dismissal. However, no dismissal occurs until a court signs an order finding the requirements of subsection (e) are met. Claims brought under 42 U.S.C. Section 1983 are not subject to the TTCA, so the dismissal of an employee under the TTCA does not affect the plaintiff's ability to bring a Section 1983 claim. Although not directly at issue, the court discussed Section 101.106(f) as a comparator for

explanation purposes noting it expressly contemplates amended pleadings and noting their interpretation of subsection (e) does not make subsection (a) inconsistent.

Tort Claims Act: *Texas Dep't of State Health Servs. v. Gonzalez*, No. 13-14-00259-CV, 2014 WL 7205332 (Tex. App.—Corpus Christi Dec. 18, 2014) (mem. op.). This is a Texas Tort Claims Act (TTCA) motor vehicle accident case where the Thirteenth Court of Appeals reversed the denial of a plea to the jurisdiction and rendered judgment for Texas Department of State Health Services (DSHS). Gonzalez was in a four car pile-up. A car driven by Pena hit a concrete barrier in front of Gonzalez who hit her brakes to stop. Three cars behind her, a car driven by Olivarez collided with the car driven by a DSHS employee, Ramos, who was pushed into a car driven by Morales, who then collided with Gonzalez. Gonzalez sued everyone involved. DSHS filed a plea to the jurisdiction asserting Gonzalez failed to provide notice of DSHS' fault and the accident was not proximately caused by the use of a motor vehicle by DSHS employee Ramos. The accident report by police indicated no fault on the part of Ramos and no actual notice was provided that Ramos was at fault. The trial court denied the plea and DSHS appealed.

The court first noted that Gonzalez missed the six month notice deadline under Texas Civil Practice & Remedies Code Section 101.101 by two days and that the "mailbox rule" does not apply to save her. The statute expressly states the entity must "receive" notice within six months, not that it be sent within that time. Further the "mailbox rule" only applies to court filings and service of process. Since the notice is not filed with the court, the rule does not apply. Section 101.101 does state that written notice within six months is not necessary if the entity had actual notice of its fault. However, merely investigating an accident does not provide actual notice of a subjective awareness of fault. Neither the police report nor any information submitted to DSHS after the accident indicated Ramos was at fault in any respect. Gonzalez presented no evidence to create a fact issue that DSHS had a subjective awareness of its possible fault for her injuries. Even the fact that Ramos took photos of the accident shows only a "cursory investigation" of the accident, not an awareness of fault. As a result, the plea should have been granted.

Tort Claims Act: *Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, No. 13-0968, 2015 WL 496303 (Tex. Feb. 6, 2015) (per curiam). The issue in this case is the interpretation of the phrase "arises from the operation or use" of a motor vehicle under the Tort Claims Act, Section 101.0121 of the Texas Civil Practices and Remedies Code. In this case, a county law enforcement officer was repositioning his car on the side of the road during a traffic stop of Molina, with his headlights and high beams pointed into oncoming traffic, when an accident occurred. A Ryder truck hit Molina's truck which was still parked on the side of the road. The accident killed the Ryder truck driver and caused damages to Molina. Molina sued Ryder. Ryder sued the county, alleging that the accident was caused by the county's negligent use of a motor vehicle. The county filed a plea to the jurisdiction arguing that it was immune because the county officer's operation of the vehicle did not cause the accident, but simply furnished a condition. The court of appeals held that the county retained immunity, and Ryder appealed. The Supreme Court held that Ryder had alleged sufficient facts that the county officer was operating the county vehicle because he was relocating the vehicle when the accident occurred and that his operation of the county vehicle did more than furnish a condition for the accident. The Supreme Court remanded the case to the trial court to be heard on the merits.

Governmental Immunity—Tort: *University of Tex. at Arlington v. Williams*, No. 13-0338, 2015 WL 1285317 (Tex. Mar. 20, 2015) (plurality opinion). The recreational use statute does not limit governmental immunity related to competitive sports or their spectators. Williams was injured while attending her daughter's high school soccer game on a state facility. She sued the state for a premises defect based on her injury under the Tort Claims Act. The state filed a plea to the jurisdiction, arguing that it was protected by the recreational use statute which narrows the effect of the Tort Claims Act in regard to recreational use because it decreases the government's duty of care. The Supreme Court of Texas took this as an opportunity to review whether the recreational use statute, Section 75.001 of the Civil Practices and Remedies Code, Subsection (L) specifically, lowers a governmental entity's duty of care in cases of injuries inflicted during the spectating of competitive sports. The Court held that it did not. It looked at Subsection (L) which protects a governmental entity's immunity for "any other activity associated with enjoying nature or the outdoors." The Court held that this Subsection should be viewed narrowly to only include those activities that are similar to the other listed activities in Section 75.001, examples of which include fishing, hiking, and camping, among others. The Court held that spectating a competitive sport was not similar to the other activities and therefore did not invoke the protections of the recreational use statute. The Supreme Court affirmed the court of appeals' judgment and the trial court's order denying the state's plea to the jurisdiction. This plurality opinion was only joined by three other justices. Justice Guzman filed a concurring opinion, which Justice Willett joined, that stated that the specific activity, waiting for her daughter, was not "recreational" activity, but did not address the issue of spectating. Justice Boyd issued a concurring opinion, referring to the recreational use statute as the Gordian Knot, and stated that spectating does not fit the description in Subsection (L) with the further analysis that statutes that relieve a person of a common law right of action must be construed narrowly.

Tort Claims Act: ***Williams v. City of Baytown*, No. 01-14-00569-CV, 2015 WL 2090488 (Tex. App.—Houston [1st Dist.] May 5, 2015).** In this Tort Claims Act case, the plaintiff sued the city after his child was killed during a car chase. The plaintiff's child was at a red light when a shoplifting suspect being actively pursed by the police, ran over a police-deployed spike strip, and then rear-ended the deceased. The plaintiff sued the city arguing that the city's use of the tangible personal property of a spike strip was sufficient to allege a Tort Claims Act case. The plaintiff also argued that it was a question of fact whether the police were reckless in their high speed pursuit of the shoplifting suspects. The trial court granted the city's plea to the jurisdiction on the issue of whether the plaintiff had alleged a personal injury related to the use of tangible personal property or motor-driven equipment. First, the court of appeals held that the use of the police cars, motor-driven equipment, did not proximately cause the accident as a police car was not directly involved in the collision. The court then held that the use of the spike strip did not cause or contribute to the accident. The plaintiffs did not produce adequate evidence that either the city's personal property or motor-driven equipment caused the injuries in question, and so the court of appeals upheld the trial court's order granting the city's plea to the jurisdiction.

Tort Claims Act: *Green v. City of Houston,* No. 01-14-00808-CV, 2015 WL 1967582 (Tex. App.—Houston [1st Dist.] April 30, 2015). This is a Tort Claims Act, trip-and-fall case. Green tripped and injured herself at the George Bush Intercontinental Airport in Houston, Texas. She told the Transportation Security Administration (TSA) that she was injured at the airport when she was at the airport and later via e-mail. Later she sued the city for premises defect. The City of Houston has a charter provision that requires that it be notified within 90 days of any personal injury claims. Notice is a jurisdictional requirement. TEX. GOV'T CODE § 311.034. The Tort Claims Act requires that notice to a governmental entity of a Tort Claims Act claim must be "actual notice" which means the governmental entity knew about the injury and knew that the governmental entity was alleged to be at fault. TEX. CIV. PRAC. & REM. CODE § 101.101(c); *Univ. of Tex. Health Sci. Ctr. At San Antonio v. Stevens,* 330 S.W.3d 544, 548-49 (Tex. 2010). In this case, the plaintiff notified TSA, but never contacted or notified the city directly. The court of appeals held that notice to the TSA was not imputed to the city for purposes of actual notice for Tort Claims Act claims and affirmed the dismissal of Green's claims.

Tort Claims Act: *City of League City v. LeBlanc,* No. 01-14-00720-CV, 2015 WL 2147964 (Tex. App.—Houston [1st Dist.] May 7, 2015). LeBlanc sued the city when she stepped into a storm drain and broke her ankle while attending a parade. The storm drain was originally constructed by the Texas Department of Transportation (TxDOT) and covered by a grate instead of a cover by TxDOT. LeBlanc argued that the storm drain was a special defect in an area controlled and/or owned by the city. LeBlanc also sued TxDOT, but that suit was dismissed for procedural problems. The city filed a plea to the jurisdiction that the control and design of the storm drain belonged to TxDOT and that the storm drain was not a special defect as a matter of law. The trial court denied the city's plea to the jurisdiction and the city appealed. The court of appeals held that the design of the storm drain, which was the main complaint of the plaintiff, was discretionary and therefore was protected by immunity. The storm drain was not a special defect because it was being maintained as it was originally designed, with a grate rather than a cover, and therefore was a longstanding and permanent condition. The court of appeals overruled the trial court and granted the city's plea to the jurisdiction.

Tort Claims Act: *Molina v. Alvarado,* No. 14-0536, 2015 WL 2148055 (Tex. May 8, 2015) (per curiam). This case involves the election-of-remedies provisions of the Tort Claims Act. Molina is an employee of the City of McCamey who was sued by Alvarado after a vehicle Molina was driving struck Alvarado's vehicle. Alvarado claimed that Molina was intoxicated when he struck Alvarado's vehicle with a city vehicle. Alvarado sued the city. Then Alvarado amended his pleading to sue the city if Molina was in the course and scope of his employment or Molina as an individual if Molina was not in the course and scope of his employment. Molina objected under Section 101.106 of the Texas Civil Practices & Remedies Code which mandates that a plaintiff must choose the defendant: either the city or the individual. It "force[s] a plaintiff to decide at the outset whether an employee acted independently . . . or acted within the general scope of his or her employment." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653,

657 (Tex. 2008). The Supreme Court held that Alvarado made an irrevocable election when he sued the city, and lost his chance to sue Molina in his individual capacity. He should have sued Molina in his individual capacity first and see how that played out.

Tort Claims Act: *Bexar County v. Leticia Votion*, 04-14-00629-CV, 2015 WL 2405364 (Tex. App.–San Antonio, May 20, 2015). This is a slip-and-fall/actual notice case in which the 4th Court of Appeals affirmed the denial of a plea to the jurisdiction. Votion was working for a third-party contractor as a housekeeper in the Juvenile Justice Center—a Bexar County facility. Votion asserts that while vacuuming, she tripped over torn carpet and fell. She sued the County, which filed a plea to the jurisdiction asserting Votion failed to provide statutory notice of the claim. The trial court denied the plea and the County appealed.

In response to the County's plea to the jurisdiction, Votion averred she gave Scott Foley, an office assistant in the Bexar County Juvenile Probation Department, a completed copy of OSHA Form 301, Injury and Illness Incident Report within three months after her fall. In Foley's deposition, he admitted giving Votion the form for her to complete but denied that Votion gave him the completed form back. A fact question therefore exists as to whether notice was handed in. The question then became whether the form, if handed in timely, gave the County subjective awareness of its probable fault. The documents on record demonstrate that 18 months prior to her fall, the County had reports of various spots on the carpet which were coming apart and could be hazardous. No evidence pointed specifically to the exact spot Votion fell, but it was part of the carpet on which a hazard report was made. The court held a fact question exists as to whether the County had actual subjective awareness of the danger. The plea was therefore properly denied.

Governmental Immunity: *City of Leon Valley, et al v. Wm. Rancher Estates et al.*, 04-14-00542-CV, 2015 WL 2405475 (Tex. App.–San Antonio, May 20, 2015). This is an interlocutory appeal from the denial of a plea to the jurisdiction arising from the denial of a zoning change. The Appellees own varying interest in land within the City and filed an application to change the zoning to better sell the property. A City councilwoman ("Baldridge") who is a real estate broker allegedly contacted Appellees stating she had a client who wanted to purchase the property and threatened to use her power on the City Council to block any zoning changes if they did not accept her client's offer. Appellees did not accept and the City denied the zoning change request. Appellees also asserted the City Defendants trespassed on the property to dig a trench that altered the natural flow of water resulting in flooding. They sued the City and named and unnamed City employees. The City Defendants filed a plea to the jurisdiction which the trial court denied. The City appealed.

The court first held that the individual defendants were sued in their individual capacity. "A person sued only in her individual capacity does not have sovereign or governmental immunity from suit." Texas Civil Practice and Remedies Code §51.014 (the statute authorizing interlocutory appeals) states the court of appeals have jurisdiction for an interlocutory appeal for an official if the official is appealing a motion for summary judgment. The court holds individual immunities are affirmative defenses, not jurisdictional defenses. Since the officials are appealing the denial of a plea to the jurisdiction, that is not authorized under §51.014(a)(5), so their appeal is dismissed. The court then determined there was no waiving of immunity as to the City for the asserted claims under the Water Code, Health & Safety Code, Natural Resources

Code, Penal Code, and Property Code, as asserted by the Appellees. Therefore the trial court should have granted the plea as to those claims. The City asserted the Appellees' claims under the Texas Open Meetings Act ("TOMA") are not proper because they seek monetary damages for such claims. The City also asserts the pleadings do not indicate TOMA claims against the collective body, only against individuals. The court determined that the assertion of immunity from monetary damages is a claim of immunity from liability, not immunity from suit. Therefore it is improper to raise in a plea to the jurisdiction. The Texas Open Meetings Act waives immunity for claims brought to compel compliance or to void actions taken in violation of the Act. The closed meeting allegations involving individuals is still attributable to the City. The court then noted that some evidence existed (when taken the light most favorable to the non-movant) that the City failed to properly take minutes of the meetings and did not accurately reflect what occurred. As a result, the trial court has jurisdiction to hear the TOMA claims raised. The court held the arguments regarding a lack of evidence to establish a conflict of interest were not raised sufficiently to give the other side a fair opportunity to respond, therefore they are remanded. The City contends the minutes and agenda for meeting show the city council's vote on appellees' zoning request was unanimous. However, the minutes do not conclusively establish the other city council members would have voted the same way had Baldridge abstained, so the plea was properly denied. The court did hold the City is immune from trespass claims. The court next chided the City holding "[w]ithout reference to any of appellees' specific requests for declaratory relief, the City argues the trial court erred by denying its plea to the jurisdiction because there is no waiver of immunity 'for monetary damage relief or relief for interpretation of statutory rights' under the Declaratory Judgment Act." Since the court already determined declaratory rights were proper to seek under TOMA, the plea was properly denied as to the declaratory judgment.

GOVERNMENT IMMUNITY - CONTRACT

Governmental Immunity—Contracts: *Damuth v. Trinity Valley Cmty. Coll.*, No. 13-0815, 2014 WL 6612535 (Tex. Nov. 21, 2014) (per curiam). The issue in this case is whether Chapter 271 of the Local Government Code, which waives governmental immunity for certain contracts, includes waiver in cases of employment contracts. Damuth sued his government employer, the community college, when he was fired in the middle of his employment contract. The college argued that claims of breach of employment contract do not waive a governmental employer's governmental immunity because: (1) Chapter 271 does not mention employment agreements; and (2) Chapter 271 is within a title of the Local Government Code dealing with acquisition, sale, or lease of property. The court found these arguments unpersuasive and held that employment contracts are covered under Chapter 271, and that the college's governmental immunity is waived for these types of claims. *See City of Houston v. Williams*, 353 S.W.3d 128, 131, 139 (Tex. 2011).

Contractual Immunity: *Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, No. 04-14-00451-CV, 2014 WL 6687247 (Tex. App.—San Antonio Nov. 26, 2014) (mem. op.). This case is part of a continuing battle between the City Public Service Board of San Antonio (CPS or CPS Energy) and Wheelabrator. In this case, the trial court granted CPS's plea to the jurisdiction as to a claim for attorney's fees and Wheelabrator appealed. Wheelabrator entered into a design and construction contract with CPS Energy in 2004 and later asserted CPS

breached the contract. In 2012, the Fourth Court of Appeals issued an opinion noting CPS retained immunity for claims and damages brought outside of Chapter 271 of the Texas Local Government Code since the proprietary/governmental dichotomy does not exist in a contract context. Wheelabrator brought claims under Chapter 271 and asserted damages including those for attorney's fees. CPS asserted the contract was entered into prior to 2005 (the date immunity waiver added to Chapter 271) so it retained immunity for the attorney's fees claim. The trial court granted the plea and Wheelabrator appealed.

The court of appeals noted the waiver of immunity in Chapter 271 is not retroactive. In 2005, the waiver did not contain a provision for the recovery of attorney's fees but that was amended in 2009. However, that amendment is not retroactive and applies only to contracts executed after June 19, 2009. The court further recognized the Supreme Court of Texas opinion in *Zachry Constr. Corp. v. Port of Houston Auth. of Harris Cnty.*, 449 S.W.3d 98 (Tex. 2014), which disapproved of the Fourth Court's opinion in *Roma Indep. Sch. Dist. v. Ewing Constr. Co.*, No. 04-12-00035-CV, 2012 WL 3025927, at *4-5 (Tex. App.—San Antonio July 25, 2012, pet. denied) holding the damages categories applied to immunity from liability only. As a result, CPS retains immunity from suit for attorney's fee claims under this contract and a plea to the jurisdiction was the proper vehicle to make such a challenge. Next, the court addressed Wheelabrator's claims that CPS waived immunity by seeking affirmative relief but held CPS only asserted that if found liable, any damages should be offset by amounts owed to another contractor on the same project. That is not the same as "joining the litigation process by asserting claims for affirmative monetary relief" but is merely a defensive stance so no waiver exists. Finally, Wheelabrator had ample time to formulate its pleadings, and the pleadings affirmatively show no fact question exists to prevent the plea at this stage since it is clear the contract was entered into in 2004. Therefore, the grant of the plea was affirmed.

Contractual Immunity: *City of San Antonio v. Casey Indus., Inc.*, No. 04-14-00429-CV, 2014 WL 7437638 (Tex. App.—San Antonio Dec. 31, 2014) (mem. op.). This is one of several cases involving contracts between CPS Energy (CPS), Casey Industrial Inc. (Casey) and Wheelabrator Air Pollution Control Inc., (Wheelabrator) regarding a set of breach of contract claims. In this case, the San Antonio Court of Appeals affirmed the denial of CPS' plea to the jurisdiction, holding Casey met its burden to hold immunity was waived. In August 2004, CPS contracted with Casey and Wheelabrator to add pollution control systems to a CPS coal-fired power station. After a contract dispute, Casey sued CPS for breach and quantum meruit, which already went through one appeal. That case resulted in a declaration that the contract was not void and no quantum meruit claim could go forward. CPS moved to dismiss Casey's breach of contract claim asserting it was an "extra-contractual" claim for which CPS maintained immunity. The trial court denied the motion and CPS appealed.

It was essentially accepted that the contract falls within the waiver of immunity found in Texas Local Government Code Sections 271.152 and 271.153, but only as to the contract's terms and payments. CPS argued Casey did extra work not envisioned by the contract and CPS did not issue a change order to authorize it. Casey argued paragraph 14.1.2 allowed it to change the scope of work if Wheelabrator fell into default and request additional compensation for the adjustments. Casey presented evidence via a CPS letter declaring Wheelabrator in default. The court agreed immunity was waived. As far as damages, Casey's original scope of work did not

include the additional work, but such work was defined in the contract which Casey was attempting to compensate for due to Wheelabrator's default. Casey further argued Wheelabrator, as the CPS general contractor, ordered it to do that additional work. Without much in the way of explanation, the court simply stated Casey established a waiver of immunity under the contract for this type of damages and CPS failed to conclusively establish otherwise. As a result, the trial court properly denied the plea.

Contractual Immunity: *City of Alamo v. Osuna,* No. 13-13-00317-CV, 2014 WL 6602387 (Tex. App.—Corpus Christi Nov. 20, 2014) (mem. op.). This is an interlocutory appeal from the denial of a plea to the jurisdiction in a breach of contract case for leased property. The Thirteenth Court of Appeals reversed the denial and rendered. Osuna entered into a lease-purchase agreement with the City of Alamo Economic Development Corporation (EDC). Osuna asserts the city and EDC took possession of and locked him out of the property even though he did not miss any payments. While still denying the allegations, the city and EDC filed a plea to the jurisdiction claiming immunity from suit in a contract. The trial court denied the plea and the city and EDC appealed.

The court first analyzed Osuna's argument that the lease required him to make improvements (which he did), transforming the agreement into a services contract for which a waiver exists under Chapter 271 of the Texas Local Government Code. The court analyzed the language of the lease and held its primary purpose was for the lease of property (not services to the city), stating there is "nothing in this lease-purchase agreement that could even arguably support a conclusion that Osuna agreed to provide any services to appellants." The city was not to provide any payment for services or any compensation for activities on the property. The city and EDC had no way to enforce any alleged services under the contract. As a result, the city defendants maintained immunity from suit. The court then noted Osuna abandoned his quantum merit claims since he omitted them from his amended petition. The court also held it was unable to find any case or statute holding immunity is unambiguously waived for civil conspiracy or unlawful lockout. As a result, the plea should have been granted and the court reversed and rendered. However, in a footnote, the court noted the individual defendants did not file an appeal so the civil conspiracy claim will continue in the trial court.

Contractual Immunity: *South E. Tex. Reg'l Planning Comm'n v. Byrdson Servs., L.L.C,* No. 09-14-00198-CV, 2015 WL 269053 (Tex. App.—Beaumont Jan. 22, 2015, pet. filed). This is an interlocutory appeal from the denial of a plea to the jurisdiction in which the Beaumont Court of Appeals reversed the denial and dismissed the South East Texas Regional Planning Commission (Commission). As a result of Hurricane Ike, the Commission used federal funds for home repairs. Byrdson sued the Commission alleging it failed to pay for some work completed and refused to allow other work to proceed. The Commission filed a plea to the jurisdiction which the trial court denied. The Commissioned appealed.

The appellate court first analyzed the changes to Chapter 271 of the Texas Local Government Code which waives immunity for breach of contracts in certain circumstances. The Commission notes the contracts expressly state it is a "contract administrator" but not a party to the contract. However, the nature of the contract benefits the Commission, Byrdson, and the various home owners. The contract also gave the Commission the power to terminate. The Commission was,

therefore, a party to the contract. However, under the contracts, private homes damaged were to be repaired using public money from a limited public fund. The various contracts subjected the contractors to oversight by the governmental entity that was tasked with disbursing the funds for the repairs. The Commission was not obligated to complete the repairs if Byrdson defaulted and it was the homeowner who was solely responsible for ensuring performance. As a result, the goods and services were provided to the homeowner, not the Commission. The fact that the Commission received a warranty and indemnity provision was irrelevant as that was not the basis of the suit and was merely common language to protect the fund administrator (i.e. the conduit of federal funds) from liability attributable to Byrdson. Importantly, the court held "Chapter 271 does not include express language waiving immunity for the contingent claims, such as future warranty and indemnity claims that might be made, when such claims do not form the basis of the claims on which Byrdson sued." As a result, the Commission maintains its immunity from suit.

Governmental Immunity—Contract: *City of Eagle Pass v. Salazar,* No. 04-14-00309-CV, 2015 WL 179283 (Tex. App.—San Antonio Jan. 14, 2015) (mem. op.). The City of Eagle Pass appealed the trial court's grant of summary judgment to Irma Leticia Salazar based on the city's breach of a mediated settlement agreement (MSA) between the parties. Salazar sued the City of Eagle Pass for injuries that she sustained in an automobile accident, and the city entered into a MSA. The MSA required the city to pay Salazar a certain sum of money if she underwent surgery within one year. Two weeks after the MSA was signed, the city presented Salazar with a "Settlement Agreement and Release" that added a stipulation to the payment of the sum of money. Salazar refused to sign the new agreement. Salazar underwent a back surgery, and the city refused to pay the money owed under the MSA. Salazar sued the City of Eagle Pass for breach of contract. The San Antonio Court of Appeals concluded that the MSA was unambiguous on its face and affirmed the trial court's grant of summary judgment for Salazar.

Sale of Real Property: *City of McAllen v. Brand,* No. 13–14–00167–CV, 2015 WL 1544733 (Tex. App.—Corpus Christi Apr. 2, 2015) (mem. op.). Othal Brand, general manager of the Hidalgo County Water Improvement District #3, sued the City of McAllen and its city manager in connection with a 2012 real property exchange between the city and Mark Freeland. The city and Freeland exchanged small parcels of land so that Freeland owned land within a water district and was eligible to run for a director position on the district's board. After Freeland was elected to the board, Brand filed his lawsuit claiming, among other things, that the city failed to comply with Chapters 253 and 272 of the Local Government Code when exchanging property with Freeland. The city filed a plea to the jurisdiction, which was denied by the trial court, and the city appealed.

On appeal, the city argued that Brand lacked standing to complain about the land deal. The court held that Brand had no greater interest in the land deal between Freeland and the city than the general public. Because Brand alleged no particularized injury distinct from the general public, he had no standing to challenge the city's actions. While Brand stated that he "would have considered placing a bid" on the city property in question if the city made public its interest in transferring the property, the court held that this speculative interest was not sufficient to confer standing. Further, because Brand sued as a private citizen, his employment with the water district did not create any particularized interest in the land deal that he would not otherwise have as a

private citizen. The court reversed the order of the trial court denying the city's plea to the jurisdiction, and rendered judgment granting the city's plea and dismissing Brand's claims with prejudice.

Contractual Immunity: *City of Galveston v. CDM Smith, Inc.*, No. 14-14-00294-CV, 2015 WL 1544938 (Tex. App.—Houston [14th Dist.] Apr. 2, 2015). The City of Galveston entered into a contract with CDM Smith, Inc. to administer federal funds received to assist with the recovery from damages caused by Hurricane Ike. CDM sued the city, the city attorney, and the housing director after the city stopped submitting CDM invoices to the responsible state agency for payment, asserting (among other things) breach of contract and a writ of mandamus for violation of the Public Information Act (PIA) regarding open records requests relevant to CDM's claims. The city filed a plea to the jurisdiction on the grounds of contractual immunity from suit, which was denied by the trial court, and the city appealed.

On appeal, the city argued that the waiver of contractual immunity provision in Local Government Code Chapter 271 did not apply because the contract did not state the "essential terms" regarding payment or provision of services to the city since the city's payment obligation was contingent on the receipt of funds from the state. The court held that the contract identifies the maximum compensation to be paid to CDM, the scope of work to be compensated, and the procedure for payment, and therefore sets the essential terms of the agreement. The city further argued that the contract was not for services to the city, but to identify and direct funds to citizens whose homes were in need of repair after Hurricane Ike. The court held that the city did enjoy benefits under the contract through CDM's providing management and operational services, assisting the city's Grants and Housing Department with the program, and developing a master plan and housing study that the city would own. Because the city's agreement with CDM included the essential term regarding payment and required CDM to provide services, the court concluded that the city's immunity from CDM's breach of contract claim was waived under Local Government Code Chapter 271, and affirmed the trial court's denial of the city's plea to the jurisdiction on that claim.

In addition to the contractual immunity issue, the city also asserted on appeal that its immunity had not been waived as to CDM's claims under the PIA. CDM claimed that the city failed to produce documents requested under the PIA, and sought a writ of mandamus to compel them to promptly produce the requested documents. However, the city submitted evidence establishing that it complied with CDM's requests, but that CDM did not follow through on the requests after receiving the city's cost estimate. As a result, CDM could not establish that the city was "unwilling" to supply public information, as is required in a suit for mandamus. The court held that the trial court lacked jurisdiction over all of CDM's claims under the PIA, and reversed the trial court's denial of the city's plea to the jurisdiction.

LAND USE

ETJ: *Town of Annetta South v. Seadrift Dev., L.P.*, No. 02–12–00171–CV, 2014 WL 5013292 (Tex. App.—Fort Worth Sept. 25, 2014, pet. filed). Can a city regulate lot size in its extraterritorial jurisdiction (ETJ)? Texas Local Government Code Section 212.003(a)(4) states that a city shall not regulate in its ETJ "the number of residential units that can be built per acre

of land." The Town of Annetta South adopted an ordinance requiring that all "lots" in the ETJ be at least two acres. A developer sued the city over the ordinance when it created a subdivision with lots less than two acres in the town's ETJ. The town argued that its ordinance just required that "lots" be at least two acres but it did not require a certain number of residential units per lot. The developer, and the court agreed, that the effect of the ordinance was to require one residence per each two acre lot. The trial court granted partial summary judgment to the developer that the ordinance violated Section 22.003(a)(4) and the court of appeals affirmed. One justice dissented, arguing that the statute does not invalidate "density" regulations in the ETJ because it does not use the term "density."

Mandamus: *In re City of Dallas*, No. 05-14-00922-CV, 2014 WL 4900455 (Tex. App.—Dallas Oct. 1, 2014). The City of Dallas filed a petition for writ of mandamus requesting that the Dallas Court of Appeals order the trial court to vacate its order denying the city leave to file its fourth amended answer in a case. The case involves a dispute over whether the vested rights provisions of Chapter 245 of the Texas Local Government Code apply to land owners in Dallas. The land owners own three lots near downtown Dallas where they operate a petrochemical business that stores flammable liquids in above-ground tanks. After setting a trial date and agreeing to a scheduling order, discovery began. The deadline for amending pleadings was agreed upon. However, the land owners amended their petition for partial summary judgment by adding an attorney's fee affidavit in support of their request for attorney's fees. The city responded to the amended motion but failed to challenge the amended motion as untimely since it was made after the deadline in the scheduling order. Then, the city attempted to file its fourth amended answer and counterclaim. The land owners moved to strike the amended answer and counterclaim as untimely, and the trial court granted the land owners' motion to strike the city's amended answer and counterclaim.

The City of Dallas then filed a motion for leave to file its fourth amended answer and counterclaim. The trial court heard argument then orally denied the city's motion as untimely. The city then filed this writ of mandamus. The Dallas Court of Appeals noted that mandamus is an extraordinary remedy that is available only in limited circumstances and is appropriate "only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law." The court concluded that the city did not show that the trial court has clearly abused its discretion and that the city has no adequate appellate remedy. Therefore, the court denied the city's petition.

Alcoholic Beverage Permit: *Pak-a-Sak, Inc. v. City of Perryton*, No. 07-14-00047-CV, 2014 WL 5796034 (Tex. App.—Amarillo Nov. 6, 2014). This is an appeal from a trial court upholding the denial of license to sell alcohol which the Seventh Court of Appeals affirmed. Pak-a-Sak applied for and was denied a wine and beer retailer's off-premises permit from the city. The application was denied pursuant to the city's ordinance providing that "It shall be unlawful for any person to sell, dispense or deliver, or cause to be sold, dispensed or delivered, any beer, liquor, or any other intoxicating beverage within a residential area in the city." The ordinance was enacted under Section 109.32 of the Texas Alcoholic Beverage Code which provides, in part, that an incorporated city may prohibit the sale of beer in a residential area (the city has no zoning). Neither the statute nor the ordinance defined the phrase "residential area."

Pak-a-Sak argued that the city exceeded its legislative authorization (acted ultra vires) by failing to define "residential area." The appellate court rejected this argument because the ordinance simply reiterates the l imitation specified by the statute. Next, Pak-a-Sak argued the ordinance is void for vagueness. The appellate court explained that the verbiage in an ordinance need only provide a reasonable degree of certainty as to what is proscribed, and reference to the common usage and understanding of a term can supply the requisite certainty. Analyzing the common meaning of the terms "residential" and "area" in light of the facts of this case, the court overruled this issue. Finally, Pak-a-Sak argued the city's denial of the permit wasn't supported by substantial evidence. The appellate court overruled this issue because the record contained more than a scintilla of evidence that Pak-a-Sak was located in a residential area.

Zoning: *Board of Adjustment of the City of Univ. Park v. Legacy Hillcrest Inv., L.P.*, No. 05-13-01128-CV, 2014 WL 6871403 (Tex. App.—Dallas Dec. 8, 2014, pet. filed) (mem. op.). In this Board of Adjustment appeal, the Dallas Court of Appeals reversed the trial court's judgment granting relief to Legacy Hillcrest Investments (Legacy) in a zoning dispute. Legacy owns property within the city which is surrounded by single-family, multi-family, parking, and office zones. Legacy sought zoning changes over a span of ten years to allow a planned development. In the last proposal in 2011, Legacy filed a permit application for above-ground parking next to a single-family zone. The board of adjustment (BOA) denied the permit and Legacy brought a writ of certiorari appeal in district court. After a three day hearing, the trial court ruled in favor of Legacy, issued a permanent injunction against violating the Texas Open Meetings Act (TOMA), and awarded attorney's fees. The BOA appealed.

Under the city's code, an above-ground parking structure may not be "adjacent" to a single-family zone. Legacy asserts "adjacent" can have only one meaning, that of being "contiguous," and it is undisputed the parking structure's location does not touch the boundary line although it is within 100 feet. The court held the plain and ordinary meaning of "adjacent" means "to lie near, border or, not distant or far from, nearby but not touching." Additionally, the districts, by definition, go to the center of the streets, which caused a touching of lines by district. As a result, the BOA properly interpreted its own code and denied the permit. The evidence did show the BOA did not take any minutes of work sessions to comply with TOMA but has since started doing so. As a result, a permanent injunction serves no purpose and Legacy was not able to demonstrate imminent harm or irreparable injury. The court held TOMA does not specify the term "convene" so it is not necessarily a violation when the board meets in closed session for work sessions without first opening the meeting publically by some formalized process. Additionally, the evidence established the subject of the closed meetings was to properly seek advice from their attorney regarding pending matters and is an authorized subject for executive session. Finally the court reversed the attorney's fees award and rendered judgment for the BOA.

Extraterritorial Jurisdiction: *Bizios v. Town of Lakewood Village*, No. 02-14-00143-CV, 2014 WL 7447699 (Tex. App.—Fort Worth Dec. 31, 2014, pet. filed). The issue in this case is whether a general law city may enforce its building code in its extraterritorial jurisdiction (ETJ). The home in this case was located in the ETJ of the Town of Lakewood Village. The homeowner received all of the required permits, but did not obtain the town's building permit. The trial court granted the town's request for a temporary injunction that required the

homeowner to stop construction on his home due to his failure to obtain the building permit. The court of appeals reviewed the trial court's grant of a temporary injunction.

The court of appeals held that a general law city does not have authority to require building permits in the ETJ because the legislature has not specifically given general law cities that authority. The court of appeals interpreted Local Government Code Section 212.003 as limiting a city's authority in the ETJ to only plats and subdivision regulations, and as specifically denying a city's ability to regulate buildings in its ETJ. The court also noted that it is a larger city, Little Elm, not the Town of Lakewood Village, that was responsible for the subdivision regulations in this case under Section 212.007 of the Local Government Code. Section 212.049 also states that Subchapter B (Regulation of Property Development) does not give a city the authority to require building permits in the ETJ. The court of appeals also reviewed Chapter 214 (building codes), which only applies within city limits for general law cities. TEX. LOC. GOV'T CODE §§ 214.212(b); 214.904. The court of appeals concluded that Section 214.904's reference to permits in the ETJ refers to those authorized by other law, such as a home rule city's authority in the ETJ and to other permits allowed in the ETJ, such as those for billboards.

Governmental Immunity—Contract: *Western Oilfields Supply Co. v. City of Anahuac,* No. 01-14-00468-CV, 2015 WL 1061130 (Tex. App.—Houston [1st Dist.] Mar. 10, 2015) (mem. op.). This breach of contract case involves the question of when an agreement becomes a "written contract" for purposes of Chapter 271 of the Local Government Code. The company offered the city an agreement regarding the rental and maintenance of water equipment. The city council approved the portion of the agreement laying out the terms, but not the pricing, at a city council meeting. Later, the city administrator signed the contract containing the pricing terms. The city later defaulted on its payments to the company. The company sued and the trial court granted a plea to the jurisdiction on the issue of governmental immunity. The lack of city council approval of the price quote during its meeting was an undisputed fact according to the court. Because a properly executed and authorized contract is essential to trigger the waiver of immunity, the court of appeals held that the trial court properly granted the plea. The court of appeals also noted that the city administrator did not have the authority to enter into this particular contract for the city and thus, his actions could not subject the city to a breach of contract claim. Finally, the court rejected the argument that acceptance of equipment and partial payment created the contract, as such a holding would equate to waiver-by-conduct which is not permitted in Chapter 271 cases.

Land Use: *Board of Adjustment for the City of San Antonio v. East Cent. Indep. Sch. Dist.,* No. 04-14-00341-CV, 2015 WL 1244665 (Tex. App.—San Antonio Mar. 18, 2015) (mem. op.). Sarosh Management (Sarosh) contracted to purchase property and intended to operate a convenience store that sold alcohol on that property. In Sarosh's application to the Texas Alcoholic Beverage Commission (TABC), Sarosh disclosed that the property was located within 300 feet of a school. Sarosh sent a letter to the principal of the East Central Independent School District school located near the property informing the school of its intentions. Sarosh obtained the proper permits from TABC and began construction on the store. During construction, Sarosh applied for a certificate of occupancy with the City of San Antonio listing the business as a convenience store with alcoholic beverages, and the City of San Antonio issued the certificate. The city's chief building inspector reinspected the property a few months later and revoked the

certificate of occupancy. The inspector stated that the certificate was issued in error because the store was located within 300 feet of a school, which is prohibited by city ordinance.

Sarosh appealed the inspector's decision to the city's board of adjustment (board), which voted to overturn the inspector's decision. The East Central Independent School District challenged the board's decision by filing a petition for writ of certiorari. The trial court entered a judgment setting aside the board's action, and Sarosh and the city appealed.

The board contends it did not abuse its discretion by overturning the inspector's decision because the inspection failed to follow the procedures for revoking permits provided for in the city's ordinance. The San Antonio Court of Appeals disagreed concluding that the inspector complied with the proper revocation procedure. The court also stated that because the certificate of occupancy was issued in violation of the ordinance, the certificate was void. Thus, Sarosh did not acquire any rights under the certificate and had no due process claim. The Court of Appeals affirmed the trial court's decision.

Billboards: *State of Texas v. Clear Channel Outdoor, Inc.*, No. 13-0053, 2015 WL 1870306 (Tex. Apr. 24, 3015). This case involves whether a billboard is personal or real property and how to value a billboard properly. The court of appeals held that the billboards affected by the Texas Department of Transportation's road project were real property and allowed testimony about the billboards' business income, increasing the valuation of the billboards to over $250,000. The Texas Supreme Court held that the value of the real property as rental property and the value of the billboard as a structure should have been considered, not the advertising revenue of the billboard as separate property. As a result, the court concluded that evidence of advertising operations was not admissible, and remanded the case back to the trial court.

Zoning: *City of Dallas v. TCI West End, Inc.*, No. 13-0795, 2015 WL 2147986 (Tex. May 8, 2015) (per curiam). The issues in this case are: (1) whether Sections 54.012 and 54.017 of the Local Government Code allow a city to sue a property owner over zoning violations; and (2) whether actual notice under Section 54.017 must be given before violation of the applicable ordinance. Section 54.012 states that a city may pursue a civil action against a property owner for various ordinance violations including a violation of a zoning ordinance. TEX. LOC. GOV'T Code § 54.012. Section 54.017 requires that the property owner have actual notice of the requirements in the ordinance and then violate the ordinance. *Id*. § 54.017. The trial court held for the city but the court of appeals reversed, holding that Chapter 54 of the Local Government Code could only be used for ordinances related to health and safety. The ordinance in this case was for the preservation of historical property. The Supreme Court of Texas held, through a plain language analysis, that the court of appeals erred when it inserted a health and safety requirement into Section 54.012. The court also noted that Chapter 54 and Chapter 211 are two different statutory schemes that give cities two options in enforcing their ordinances, either civil actions under Chapter 54 or civil penalties under Chapter 211. TEX. LOC. GOV'T CODE chs. 54 & 211. The court also held that there was sufficient evidence of notice under Chapter 54 to move forward and remanded the case back to the court of appeals for review.

Open Meetings: *Tarrant Reg'l Water Dist. v. Bennett*, No. 02-13-00354-CV, 2014 WL 6686482 (Tex. App.—Fort Worth Nov. 26, 2014, pet. filed). This case involves a question regarding the interpretation of Water Code Section 49.064. Section 49.064 states that water districts are covered by the Texas Open Meetings Act (TOMA), but meetings of committees appointed by a district are not constrained by TOMA so long as there is not a quorum of water district board members at a committee meeting. The court of appeals held that Section 49.064, in conjunction with the TOMA definition of a meeting as a gathering where there is a quorum of the governing body in attendance, means that the committees in this case were not required to have open meetings. The court also noted that the fact that the board may be "rubber-stamping" the committees' decisions did not make the committees subject to TOMA's requirements. In this opinion, the court also discounted the persuasiveness of the various Texas Attorney General Opinions that state that a committee of a government body might be covered by TOMA if the committee has the power to control public business or policy. The court's discussion of the non-applicability of the attorney general opinions is two-fold: (1) none of the opinions specifically address Section 49.064 of the Water Code; and (2) construing TOMA to cover meetings of less than a quorum renders the term "meeting" within the TOMA meaningless.

Public Information Act: *Abbott v. City of Dallas*, No. 03-13-00686-CV, 2014 WL 7466736 (Tex. App.—Dallas Dec. 23, 2014, pet. filed). In this case, Attorney General Greg Abbott (AG) appealed the trial court's determination that documents the City of Dallas sought to withhold from public disclosure under the Public Information Act (PIA) as confidential attorney-client communication are excepted and may be withheld. The City of Dallas received a PIA request for information pertaining to the operation of a landfill. The city sought to exclude certain documents from the request and requested an opinion from the AG's office as to whether they were subject to disclosure. In a letter ruling, the AG concluded that because the city had failed to comply with the deadline under the PIA for requesting an attorney general's opinion within ten business days of receiving the request, the city was required to demonstrate a compelling reason for withholding the information. This compelling reason must be independent of the privileged nature of the information. The letter ruling went on to conclude that the city failed to demonstrate a compelling reason to withhold the information and ordered the city to release it. This led the city to file suit against the AG seeking a determination that the information consisted of privileged attorney-client communications, not subject to disclosure. The trial court agreed with the city and granted the city's motion for summary judgment.

The AG appealed the trial court's decision. In its appeal, the AG argued that "[b]ecause a client may waive the attorney-client privilege, it is discretionary, and because Rule of Evidence 503 and Disciplinary Rule of Professional Conduct 1.05(b) do not make information confidential for purposes of section 552.101, the City may not assert the privilege under than exception." Instead, the AG argued that the city must assert privilege under Section 552.107(1) of the Texas Government Code. Since Section 552.107(1) protects a city council's interests, it is discretionary and waived by the city's failure to comply with procedural requirements of the PIA. The court of appeals stated that the fact that the attorney-client privilege may be waived is not determinative of whether attorney-client information falls within the purview of Government Code Section 552.101. The court of appeals concluded that Section 552.101 exempts from

disclosure information that is protected by the attorney-client privilege and that the City of Dallas established that the information is protected by the attorney-client privilege. The court affirmed the trial court's judgment.

Public Information Act: *Tyler v. Paxton*, No. 03-12-00747-CV, 2015 WL 410281 (Tex. App.—Austin Jan. 28, 2015) (mem op.). This is a Public Information Act (PIA) case where the Victoria County District Attorney (DA or Tyler) attempted to exempt documents from disclosure. The Austin Court of Appeals remanded the case for consideration of the compelling nature of the attorney/client privilege in relation to the documents. Tyler's office received a request under the PIA for information relating to services rendered to the DA's office by specific attorneys. Tyler's office asserts it mailed a request to the Office of the Texas Attorney General (AG) for an opinion regarding whether certain information is protected by the attorney/client privilege and work product but for "reasons unknown" the postmark was after the ten-day deadline to mail in a request.

The AG's opinion letter agreed the attorney/client privilege applied but since Tyler's office did not mail the letter timely, it waived the privilege. The AG did not consider the waiver a compelling reason to except the documents from disclosure. Tyler sued the AG under the PIA. Both sides submitted opposing summary judgments. The trial court denied Tyler's motion and granted the AG's motion. Tyler appealed. The court first analyzed Tyler's request for an implied "good faith" defense for the failure to comply with the deadline requirements and that such is not a knowing waiver of the privilege. The court held the plain language of the PIA does not include a good faith defense for failing to timely mail and they declined to imply one. As to the nature of the attorney/client privilege and whether it and the work product privilege are compelling reasons to withhold information despite the missed deadline, Tyler did not raise those issues in his summary judgment motion. However, the court went on to say that "[t]he DA's failure to affirmatively demonstrate a compelling reason . . . does not necessarily establish that the trial court was correct in granting the AG's motion for summary judgment." The AG failed to establish in its motion that the reason was not compelling or could not be compelling. Citing to the court's recent holding in *Abbott v. City of Dallas*, No. 03-13-00686-CV, 2014 WL 7466736 (Tex. App.—Austin Dec. 23, 2014, no pet. h.), the court held the attorney/client privilege could qualify as a compelling reason to withhold the information even if the deadline is missed. As a result, the court held neither party is entitled to summary judgment and remanded the case to consider the issue of the compelling nature of the information.

Public Information Act: *City of Dallas v. Paxton*, No. 13-13-00397-CV, 2015 WL 601974 (Tex. App.—Corpus Christi Feb. 12, 2015, pet. filed) (mem. op.). This is a Public Information Act (PIA) case involving the attorney-client privilege and the city's alleged failure to timely file a request with the attorney general (AG) under the PIA. As part of a docketing control order from the Texas Supreme Court, the case was transferred to the Corpus Christi Court of Appeals. The City of Dallas received a PIA request which sought, among other things, all communications regarding a local hotel. Some of the information contained attorney-client privileged communications which the city sought to exempt from release under Texas Government Code Sections 552.101 and 552.107. However, the request for an AG opinion was not timely sent within 10 business days so the AG determined the privileged communications must be released. The AG opinion did not address the city's claim that the information constituted information

which was confidential as a matter of law. The city filed suit under the PIA. The trial court granted, in part, the city's motion for summary judgment (MSJ) holding the information was attorney-client privileged information, but did not address whether it was a compelling reason to withhold the information. It denied the rest of the city's MSJ and granted most of the AG's MSJ. The city appealed.

The court of appeals first noted the striking resemblance of the case to *Abbott v. City of Dallas*, No. 03-13-00686-CV, 2014 WL 7466736 (Tex. App.—Austin Dec. 23, 2014, no pet. h.) where the Austin Court of Appeals recently held the attorney-client privilege could be raised under Section 552.101 as information made confidential as a matter of law, instead of the overly-restrictive interpretation by the AG that the privilege is discretionary and can only be raised in Section 552.107. The panel found the *Abbott* case compelling and adopted its reasoning. Since Section 552.101 is a mandatory section for non-disclosure, the city demonstrated a compelling reason to justify non-release, despite the failure to follow the procedural elements of the PIA. The court of appeals then reversed the award of attorney's fees to the AG. The case was reversed and rendered in favor of the city.

Public Information Act: *Paxton v. City of Liberty*, No. 13-13-00614-CV, 2015 WL 832087 (Tex. App.—Corpus Christi Feb. 26, 2015) (mem. op.). This is a Public Information Act (PIA) case regarding phone records belonging to a city police officer. The City of Liberty received a PIA request for all calls made or received from a specific phone number belonging to a city police officer for six months. The city submitted a request to the attorney general (AG) for a ruling, arguing the information was excepted under the informer's privilege and ongoing criminal cases exceptions. The AG determined the city did not properly comply with requesting an opinion and thereby waived all exceptions. The city filed suit under the PIA asserting a compelling reason to still withhold the information. The trial court determined the officer's name and the numbers used must be released, except for the phone numbers of victims, witnesses, and informers which could be redacted. The AG filed a notice of appeal.

The court held there is no evidence to support the city's contention that either exception protects third party interests which would justify withholding despite non-compliance. "The City had the burden to show both an exception to disclosure and a compelling reason to withhold the information, but it has made no effort to establish a compelling reason to withhold the requested information apart from the fact that the information falls within the exceptions it asserted." The court further held the city did not raise the issue of constitutional privacy or common-law physical safety exception in its summary judgment so it could not raise those issues on appeal. As a result, the trial court erred in allowing the redaction.

Open Meetings Act: *In re City of Galveston*, No. 14-14-01005-CV, 2015 WL 971314 (Tex. App.—Houston [14th Dist.] March 3, 2015) (mem. op.). This is a Texas Open Meetings Act (TOMA) case involving the authorization to conduct executive sessions for the purpose of obtaining privileged legal advice. The City of Galveston was sued by a property owners' association (POA) on the grounds that the city council's approval for a property owner to operate a dog kennel on her property was void for being in violation of the TOMA. More specifically, it is alleged that the city council's executive session was illegal because it involved discussion of factual issues that were outside of the exception for attorney-client communications authorized

by Section 551.071 of the Government Code. The trial court concluded that the executive session "exceeded the scope" of Section 551.071 and ordered the city to disclose the recording of the executive session to the POA. The city sought mandamus relief from the trial court's order to disclose the recording of the executive session, asserting that the trial court's order conflicts with TOMA's authorization to conduct closed executive sessions for the purpose of obtaining privileged legal advice.

In reaching its decision on the city's request for mandamus relief, the court of appeals took an in-depth look at the parameters of Government Code Section 551.071. Notably, the court concluded that the means by which a city council solicits and receives legal advice from its attorney does not necessarily follow a formulaic construct, and the conveyance of factual information or the expression of opinion or intent by a city councilmember may be appropriate in a closed meeting pursuant to Section 551.071 if the purpose of any such statement is to facilitate the rendition of legal advice by the city attorney.

With regard to the city's request for mandamus relief, the court held that because the trial court ordered the disclosure of parts of the meeting that were properly closed under TOMA, in addition to the portion of the discussion that exceeded the scope of Section 551.071, it abused its discretion. The court conditionally granted the city's petition for writ of mandamus to the extent the trial court ordered the disclosure of portions of the executive session audio recording that were properly closed to the public under Section 551.071. The appellate court directed the trial court to vacate its order to disclose the audio recording of the entire discussion relating to the zoning decision, and instead exclude from the order those parts of the discussion that were for the purpose of facilitating the rendition of legal advice. The court of appeals stated that it will issue the writ of mandamus only if the trial court fails to act in accordance with its opinion.

Public Information Act: *Kallinen v. City of Houston*, No. 14-0015, 2015 WL 1275385 (Tex. Mar. 20, 2015) (per curiam). This per curiam opinion answers the question of whether a court has to wait to rule on a suit by a public information requestor until the Office of Attorney General (OAG) issues a ruling on a city's public information opinion request. According to the Supreme Court of Texas, a court does not have to wait. The City of Houston received an open records request from Kallinen and chose to pursue an opinion from the OAG's Open Records Division regarding some of the information. Before the OAG could issue a response, Kallinen filed suit against the city pursuant to Texas Government Code Section 552.321(a). The city argued successfully in the court of appeals that the trial court was deprived of jurisdiction in a Public Information Act suit until the OAG ruled on the opinion request. Kallinen, the requestor, appealed the ruling. The city argued that the OAG's ruling had to come first as a jurisdictional requirement under exhaustion of remedies principles. The Supreme Court disagreed, holding that "[t]he requirement that a governmental body seek a ruling from the Attorney General when withholding requested information is a check on the governmental body, not a remedy for the requestor to exhaust." The Court also held that a trial court has the discretion to stay proceedings while waiting for an OAG ruling or not. The case was sent back to the court of appeals for further review.

Public Information Act: *Ken Paxton, Attorney General of the State of Texas v. City of Dallas*, 03-13-00546-CV (Tex. App.–Austin, May 22, 2015). This is a Public Information Act

("PIA") case where the trial court held the birth dates of certain members of the general public are confidential as a matter of law and exempt from disclosure. The Third Court of Appeals affirmed. The City received several unrelated PIA requests, but all contained dates-of-birth of members of the general public the City sought to redact under common law privacy. The Texas Attorney General ("AG") opined the information was public and must be released. The City appealed the opinions and combined the various requests into a single matter. Both the City and AG moved for summary judgment. The trial court ruled in favor of the City and the AG appealed.

Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. Citing to *Texas Comptroller of Public Accounts v. Attorney General of Texas,* 354 S.W.3d 336 (Tex. 2010), the court held the general public has a "nontrivial privacy interest" in their birth dates, arising from concerns about the potential for and growing problem of identity theft and fraud. Citing to the AG's own publications on the web, the court noted "[t]he Attorney General has observed that preventing identity theft 'begins by reducing the number of places where your personal information can be found.'" Citing *Preventing Identity Theft, FIGHTING IDENTITY THEFT,* http://www.texasfightsidtheft.gov/preventing.shtml). The court held dates-of-birth of citizens are confidential as a matter of law by judicial decision and the public has no legitimate interest in its release.

PERSONNEL

Employment Discrimination: *Smith v. City of Austin*, No. 03-12-00295-CV, 2014 WL 4966292 (Tex. App.—Austin Sept. 30, 2014). This is an employment dispute case under the Americans with Disabilities Act (ADA) and Texas Commission on Human Rights Act (TCHRA) in which the Austin Court of Appeals affirmed the trial court's grant of summary judgment for the City of Austin. Smith was an assistant payroll manager who was terminated after she failed three times within almost a year to timely submit the city's federal income-tax liability to the Internal Revenue Service (IRS), resulting in the city incurring a large tax penalty (which was later abated). She claims she suffered from a disability, major depression and anxiety disorder which instantaneously limits her concentration and, as a result of the city failing to make a reasonable accommodation, the errors occurred. The city filed a motion for summary judgment, which the trial court granted arguing no evidence existed to establish the city had any knowledge she was disabled or regarded as disabled. Smith timely and properly completed the IRS forms, except these three times over a year period. The court began by holding "[I]t is important to distinguish between an employer's knowledge of an employee's disability versus an employer's knowledge of any limitations experienced by the employee as a result of that disability." The court explained that "the ADA requires employers to reasonably accommodate limitations, not disabilities." Smith made several vague references that her mental illness might affect her job performance, but nothing establishing her illness limited her ability to concentrate or what the limitations might be so that the city knew what to accommodate. Furthermore, there is no evidence that any doctor placed any limitations on Smith's work or identified any major life activities that are substantially limited by her mental illness. Even though after her termination the city explained to the IRS the failure was due to her mental illness, such an explanation is no

indication the city knew about it beforehand. The trial court properly granted summary judgment for the city.

Civil Service: *Zambrana v. City of Amarillo*, No. 07-13-00058-CV, 2014 WL 5037808 (Tex. App.—Amarillo Oct. 8, 2014) (mem. op.). This is a civil service case regarding a firefighter where the Amarillo Court of Appeals reversed the granting of a plea to the jurisdiction and sent the case back to the trial court. Zambrana was a City of Amarillo firefighter charged with a Class A misdemeanor for domestic violence. Zambrana entered into an agreed suspension with conditions tied to the outcome of the criminal charges. Zambrana was convicted and, pursuant to the agreement, the conviction acted as an automatic resignation. However, contrary to the agreement (which waived rights to appeal), Zambrana attempted to appeal. The city's civil service commission refused to process the appeal based on the agreement. Zambrana argued the conviction was not final, and the agreement contemplated a final conviction, not simply a conviction at the trial court level. Zambrana filed a mandamus action to force the city to commence the appeal process and declare his rights under the contract. The city filed a plea to the jurisdiction asserting immunity as this was a contract dispute. The trial court granted the plea and Zambrana appealed. The court first noted the city's plea was really not a challenge to the court's jurisdiction but an assertion Zambrana's claims lacked merit. Courts have mandamus power to compel actions by public officials and that is what Zambrana asserted. The court makes a dicta statement that the court has jurisdiction to hear the declaratory judgment claim, but does not analyze why. Essentially, the court decided the plea did not challenge the court's jurisdiction so all parts were improperly granted.

Whistleblower: *Bell Cnty. v. Kozeny*, No. 10-14-00021-CV, 2014 WL 4792656 (Tex. App.—Waco Sept. 25, 2014) (mem. op.). This is a Whistleblower Act case where the Waco Court of Appeals reversed the denial of the county's plea to the jurisdiction but remanded to allow plaintiff to replead. Kozeny was an employee of Bell County Juvenile Center and had been tasked with investigating the falsification of training records. He reported to the first assistant district attorney and discussed at length the falsification of such records. He alleges he was terminated within 90 days of making that report. The county filed a plea to the jurisdiction which the trial court denied. The crux of the county's appeal is that Kozeny's pleading did not specify the criminal law allegedly violated. The court agreed the conclusory statement in the pleadings that only asserted he reported "the falsification of training records . . . which is a crime" was insufficient to invoke jurisdiction. However, the pleadings do not negate jurisdiction either, so the plaintiff should be given the opportunity to replead and allege more than vague conclusory statements sufficient to invoke the trial court's jurisdiction.

Retirement: Layton v. City of Fort Worth, No. 02-14-00084-CV, 2014 WL 6997350 (Tex. App.—Fort Worth Dec. 11, 2014) (mem. op.). Layton, a former employee receiving disability benefits from the City of Fort Worth, sued the city and its retirement fund after his disability benefits were discontinued. The court of appeals reviewed whether it had subject matter jurisdiction of the claim. Layton's three arguments were that the city violated its own procedures, the city violated a vested right in discontinuing the disability benefits, and that the city violated his due process rights. The court of appeals first held that no law allowed judicial review of the fund's administrative order discontinuing Layton's benefits. Next, the court held that Layton had no vested right in the disability benefits because the numerous conditions and

requirements in the disability administrative rules made the benefits a "mere expectancy" not a "guarantee." Finally, the court reviewed the case as an ultra vires claim as in *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). The court held that the long list of conditions and requirements, and the fund's control over the disability determination, precluded an argument that a ministerial duty was violated as in Heinrich. The court of appeals held it had no jurisdiction to hear this case.

Employment Discrimination: *Barnes v. Texas A & M Univ. Sys.*, No. 14-13-00646-CV, 2014 WL 4915499 (Tex. App.—Houston [14th Dist.] Sept. 30, 2014) (mem. op.). This is an employment discrimination, hostile work environment, retaliation case where the Houston Court of Appeals reversed in part and affirmed in part the granting of the defendants' summary judgment motion. Barnes, an African American female, was an employee who complained of treatment by her supervisor, Lupe Linderos. Barnes was ultimately authorized to work from home; however, four months after authorization, her employment was terminated. Barnes filed suit but the trial court granted the summary judgments filed by the university. Barnes appealed.

The court first held there was no evidence that Barnes received disparate treatment compared to similarly situated employees outside her protected class. Barnes' references to other employees were too dissimilar to be proper comparators and the trial court properly granted summary judgment for her discrimination claims. Barnes did establish she engaged in protected activities by complaining about racist comments of colleagues. However, she offered only a temporal relationship between when she complained and her termination as evidence of causation which is insufficient. As a result, her retaliation claim was properly dismissed. Her hostile work environment claim survived due to the fact the university did not raise the argument in its no-evidence motion (the one the court granted). The court did not rule on the traditional summary judgment evidence motion. Therefore it was improper to grant the no-evidence motion as to that claim.

Employment Discrimination: *Killingsworth v. Housing Auth. of City of Dallas*, No. 05-12-00524-CV, 447 S.W.3d 480 (Tex. App.—Dallas Oct. 14, 2014). This is a breach of contract, Section 1981 (race) and Section 1983 (due process) case in an employment dispute in which the Dallas Court of Appeals affirmed the granting of summary judgment for the Housing Authority of the City of Dallas (DHA). Killingsworth asserted he had a written employment contract to be the DHA president and chief executive officer; however, the DHA board retained the existing president rather than hiring him. Killingsworth asserted that even though no public vote occurred by the board to approve the contract (a term within the contract) the board chair signed the letter agreement. He also asserted that he spoke to each commissioner individually prior to any meetings who supported his retention and he was told that the board members all voted in executive session to approve the contract.

Killingsworth sued, but the trial court granted the DHA's summary judgment motion. The trial court also did not allow any discovery of disclosure of executive session information. He appealed. The Fifth Court of Appeals held the letter agreement had two primary conditions: (1) being signed by the chair; and (2) being approved by the board. These conditions were required to occur after the contract was presented to Killingsworth to bind DHA. The summary judgment evidence conclusively established the board did not vote to approve the contract. As a result, no

breach could occur. The court rejected Killingsworth's "law of the case" argument from an interlocutory appeal in this case. The interlocutory opinion merely held the trial court has jurisdiction to hear this type of case and whether the board properly executed the contract; it was not a determination that the contract was, in fact, properly executed. With regards to Killingsworth's Section 1983 due process claims, the court held his claims hinged on the validity of the contract, and the court determined the contract was not valid. As to his Section 1981 claim, the retained director was African American, but that alone cannot support a claim. Killingsworth presented no evidence to create a fact issue that race-based motives were part of the decision making. All of the DHA evidence established race was not a factor. Finally, the trial court properly ruled on the summary judgment before the completion of discovery. The preclusion of discovery into executive session matters (to the extent limited specifically by the trial judge) was not error. As a result, summary judgment was properly granted.

Whistleblower Act: *Carter v. Texas Dep't of Motor Vehicles*, No. 13-13-00596-CV, 2014 WL 5314522 (Tex. App.—Corpus Christi Oct. 16, 2014) (mem. op.). This is a Whistleblower Act case where the Thirteenth Court of Appeals affirmed the granting of a plea to the jurisdiction for the Texas Department of Motor Vehicles (DMV). Carter was a Historically Underutilized Business Coordinator for the DMV and was on a six month probationary period. During that time, she filed several complaints against co-workers including complaints that the hearing-impaired co-worker's proximity to her bothers her, her co-workers were unskilled, she was underpaid, and disagreed with the policy prohibiting the acceptance of free meals. Carter was terminated during the probationary period and she sued alleging Whistleblower Act violations. DMV filed a plea to the jurisdiction which the trial court granted and she appealed.

The court held Carter's petition of fourteen different complaints did not identify any violation of law and only made vague references to "irregularities" and "abnormalities" she believed were illegal. She also did not report to an appropriate law enforcement authority before her termination. Reporting irregular purchase authorizations to the Texas Comptroller the day after her termination is insufficient. As a result, the trial court properly granted the plea.

Age Discrimination: *City of Sugar Land v. Kaplan*, No. 14-14-00292-CV, 2014 WL 5285662 (Tex. App.—Houston [14th] Oct. 16, 2014). This is an age/disability discrimination case where the court of appeals held the plaintiff was required to assert his claim in an administrative complaint filed within 180 days from the date of his termination and failed to do so. Kaplan, a 69 year old employee with high blood pressure and diabetes, was an administrative manager of the city's parks and recreations department who was terminated. Kaplan filed an administrative complaint within 180 days, but only asserted age discrimination. The right-to-sue letter from the Equal Employment Opportunity Commission (EEOC) only listed age discrimination. The city filed a plea to the jurisdiction asserting a failure to exhaust administrative remedies as to disability, but Kaplan asserted it related back to his age claim and filed a new EEOC complaint as to disability. The trial court denied the plea and the city appealed.

The mandatory filing of an administrative complaint is a jurisdictional/statutory prerequisite to suit. Kaplan failed to timely file such a complaint as to disability. The charge must contain an adequate factual basis to put the employer on notice of the existence and nature of the claims against it. The relation-back doctrine allows a plaintiff to amend facts which relate back to the

original complaint, it does not permit the filing of a separate charge. The plea should have been granted so the court reversed and rendered.

Whistleblower: *Texas Comm'n on Envtl. Quality v. Resendez*, No 13-0094, 450 S.W.3d 520 (Tex. Nov. 21, 2014) (per curiam). This case is a follow up to *Texas Dep't of Human Servs. v. Okoli*, 440 S.W.3dd 611, 616 (Tex. 2014), in which the Supreme Court of Texas held that an internal report of wrongdoing is not sufficient to trigger the employee protections available in the Whistleblower Act, Chapter 554 of the Texas Government Code. The Whistleblower Act protects government employees from adverse employment actions that result from reporting legal violations to "appropriate law enforcement authorities." In this case, the employee was terminated from the Texas Commission on Environmental Quality after reporting violations of law to her supervisors and a state senator's office. The court affirmed its holding from *Okoli*, and held that the report of wrongdoing to internal supervisors and a state senator's office was insufficient because these individuals have no "outward-looking" law enforcement authority.

Civil Service: *Hamilton v. Washington*, No. 03-11-00594-CV, 2014 WL 7458988 (Tex. App.—Austin Dec. 23, 2014) (mem. op.). In this appeal, the Austin Court of Appeals affirmed in part and reversed in part the trial court's grant of a plea to the jurisdiction in a civil service indefinite suspension case. Hamilton was given notice he was indefinitely suspended for violating both the City of Austin Civil Service Commission (commission) and the City of Austin Police Department rules. The opinion never says what he did or which rules apply. (I googled it and this is what I found. Don't Drink and Drive, folks. http://www.austinchronicle.com/news/2011-05-27/cops-dont-let-cops-drive-drunk/). Hamilton's lawyer advised he wanted an appeal to a hearing examiner. The city attorney advised Hamilton his appeal was deficient because it simply stated he wanted an appeal and not the required language under Section 143.010(b). Section 143.010(b) requires a statement denying the charge, challenging the legal sufficiency of the charge, alleging the action taken does not fit the offense, or some combination of these statements. Hamilton sued for declaratory relief to compel the commission to consider his appeal proper and sufficient to trigger its jurisdiction. He sought reinstatement and back pay. The city filed a plea to the jurisdiction which the trial court granted and Hamilton appealed.

After going through the difference between appealing to the commission versus appealing to a hearing examiner, the court noted that because the commission did not hold a hearing (because it felt it had no jurisdiction), Hamilton could not be appealing a decision of the commission. The suit is therefore an independent action to determine an issue never before addressed by a Texas court, i.e. whether the language of Section 143.010 must not only be included in an appeal to the commission but also in an appeal to a hearing examiner. As a result, this is a standard declaratory judgment action to interpret a statute and immunity from suit must be waived separately from Chapter 143 of the Texas Local Government Code. The trial court lacked jurisdiction over all retrospective relief including back pay, reinstatement, etc. because the commission has exclusive jurisdiction over that dispute. Since the hearing examiner's powers are equal to that of the commission, the commission level is what has exclusive jurisdiction over retrospective relief. Since the commission rejected his appeal, he has not exhausted his administrative remedies and no retrospective relief can be granted at this point by the court. In short, since no order of the commission or hearing examiner is before the court, the trial court has no jurisdiction to issue

retrospective relief. Immunity under the Uniform Declaratory Judgment Act (UDJA) to sue a city is only waived to challenge an ordinance.

Hamilton challenged the constitutionality of Section 143.010(b) as being vague and ambiguous as applied by the city. While this is not a city ordinance, the court interpreted the "as applied" challenge as a challenge to the city's pronouncement of the statute and immunity is therefore waived. As a result, the trial court erred regarding the "as applied" constitutional challenge. Further, a party can sue an official in their official capacity for prospective relief of a ministerial job duty. Hamilton sued officials for ultra-vires actions and no immunity exists for such a suit for prospective relief except under *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009). Finally, since Hamilton is not a police officer "authorized to act" on behalf of the Austin Police Association (he was only suing for himself), he does not qualify as a party to the collective bargaining agreement for purposes of a breach of contract suit. And while he is a third-party beneficiary, he has not yet exhausted his administrative remedies which are required before he can bring suit. So, the trial court has jurisdiction to hear the "as applied" constitutional challenge and the ultra-vires claims for prospective relief, but nothing else. The court seems to indicate that Hamilton should have sought the prospective relief first, then if successful in getting a hearing, he could have sued after the exhaustion of that process.

Whistleblower: *Lubbock-Crosby Cnty. Community Supervision & Corrs. Dep't v. Lance,* No. 07-14-00222-CV, 2014 WL 7369938 (Tex. App.—Amarillo Dec. 22, 2014) (mem. op.). This is a Texas Whistleblower lawsuit where the Seventh District Court of Appeals reversed the denial of the entities plea to the jurisdiction. Lance was jointly employed by the counties' corrections department and juvenile board. (Such a situation is not uncommon when dealing with juveniles in the correction systems.) Prior to his joint employment he worked in the Child Protective Services Division of the Texas Department of Family and Protective Services (CPS). Lance was approached by co-workers at the county corrections department and juvenile board about the care being given to a specific child by the mother. Lance contacted a former assistant at CPS regarding the matter; however, nothing in his call or email indicated any immediate danger to the child. Several months later the child went missing and was found dead. Lance allegedly reported to various law enforcement entities, including the sheriff and Texas Rangers, that CPS had decided a nonemergency removal was needed but was never executed. Lance contacted CPS legal counsel and informed her that CPS employees were going to go to jail due to the mishandling of the case. He also released confidential autopsy reports. Lance was later terminated for threatening CPS employees and releasing confidential information. Lance sued both employers. The trial court denied the pleas and the entities appealed.

The court first noted the determination of whether a violation of law is reported is a question of law, not fact. The reporting of a violation invokes the waiver of sovereign immunity only if the conduct reported by the plaintiff constitutes a violation of law. And while Lance listed eleven statutes allegedly implicated by his report, none of the conduct, if true, would constitute a violation. Lance's report did not indicate any deficiencies in the investigation only that CPS did not follow through on the nonemergency removal after the investigation was complete. Further, included in Lance's eleven statutes are such things as the Texas Penal Code section defining "culpable mental state," which does not criminalize anything but only define matters criminalized by other statutory sections. In the end, Lance's report was the failure to effectuate

the nonemergency removal of the child, which CPS could not have done anyway. CPS must seek and obtain a court order for such removal. Failing to file the appropriate paperwork is not a violation. Since no violation of law was specified, no Whistleblower protection attaches, and no waiver of immunity exists. The plea should have been granted.

Civil Service: *Stubbs v. City of Weslaco*, No. 13-14-00054-CV, 2015 WL 124310 (Tex. App.—Corpus Christi Jan. 8, 2015) (mem. op.). This is an appeal from the dismissal of a mandamus action where the Thirteenth Court of Appeals reversed the dismissal and ordered the trial court to consider whether the firefighter's appeal from indefinite suspension should be submitted to a hearing examiner. Stubbs was a firefighter for the City of Weslaco when he was injured in an accident unrelated to his employment and was temporarily disabled. After a year of not receiving any updates on his condition, the fire chief put Stubbs on indefinite suspension. Stubbs filed an appeal with the civil service commission, however, the director of the civil service commission denied the submission noting he did not follow the proper procedure. Texas Local Government Code Section 143.057(b) requires a request for an independent hearing examiner be submitted to the director and not to the commission. Stubbs sued for writ of mandamus to compel the director to submit the appeal to a hearing examiner, for injunctive and declaratory relief, and for monetary relief. The trial court dismissed the claims and Stubbs appealed.

The court first held the city could not be sued for mandamus, only its officials. The claims for monetary damages and declaratory relief also do not survive against the city as it retains immunity. The commission is the exclusive authority over reinstatement, not the trial court so the trial court did not err in dismissing those claims. The only claims that survive are the mandamus, injunctive relief, and declaratory judgment claims against the civil service director. The court expressed no opinion on the merits of the remaining claims, only that the trial court has jurisdiction to hear them and remanded those claims. The court affirmed in part and reversed in part.

Employment Discrimination: *Anderson v. Houston Cmty. Coll.*, No. 01-14-00062-CV, 2015 WL 174233 (Tex. App.—Houston [1st Dist.] Jan. 13, 2015). Ms. Anderson sued the Houston Community College and her supervisor, Dr. Bradford, for discrimination, hostile work environment, and retaliation under the Texas Commission on Human Rights Act (TCHRA), Chapter 21 of the Labor Code. The trial court dismissed Ms. Anderson's claims and awarded Dr. Bradford's attorney's fees to be paid by Ms. Anderson. Anderson appealed arguing that she alleged enough facts to allow her claims to go forward and that she should not be required to pay Dr. Bradford's attorney's fees because Bradford should not be held to be a prevailing party. The court of appeals affirmed the trial court's order because the plaintiff: (1) failed to raise fact issues on her race and gender discrimination claims; (2) failed to raise fact issues that harassment was pervasive and severe enough to cause a hostile work environment; and (3) because she presented no evidence of an adverse employment action caused by protected activity, which is an essential part of a retaliation claim. The court further held that Ms. Anderson's supervisor, Dr. Bradford, could not be held individually liable under the TCHRA because she does not fit the definition of employer. The court affirmed the trial court's order for the plaintiff to pay Dr. Bradford's attorney's fees because the TCHRA and prior cases allow attorney's fees to be awarded to a defendant if the suit is "frivolous, meritless, and unreasonable." The court of appeals noted that

the fact that an individual cannot be liable under the TCHRA is well established; therefore, the plaintiff's suit against Dr. Bradford was "frivolous, meritless, and unreasonable."

Employment Law: *Draper v. Guernsey*, No. 03-14-00265-CV, 2015 WL 868991 (Tex. App.—Austin Feb. 25, 2015) (mem. op.). This is a land use dispute, but the opinion focuses on the dismissal of a city employee under Texas Civil Practice and Remedies Code Section 101.106 versus ultra-vires claims. Draper, pro se, sued the City of Austin and the Director of Planning, Guernsey, regarding property he owns, the development of which is under certain restrictions pursuant to city ordinance. The city filed a motion to dismiss Guernsey under Section 101.106(a) (suit against entity precludes suit against employee) and 101.106(e)(suit against entity and employee means employee entitled to dismissal), which the trial court granted.

The court first noted that the pleadings are not very clear, but it appears some claims by Draper are ultra-vires claims to force the defendants to recognize some form of vested right under Chapter 245 of the Texas Local Government Code. The proper defendant to an ultra-vires claim seeking to restrain allegedly unlawful actions by the city would be Guernsey, not the city. However, Draper also sought monetary damages exceeding $10 million asserting various improper acts by Guernsey and other city officials. The court analyzed the interplay between subsection (a) and (e) and ultimately held: (1) all claims against Guernsey, individually, were properly dismissed; (2) suit against Guernsey in his official capacity only is a suit against the city, but must be brought against Guernsey in his capacity as an official for ultra-vires purposes; and (3) the trial court's wording that dismissed Guernsey in all respects was error. So, Guernsey individually is let out but the ultra-vires claims remain.

Civil Service: *City of New Braunfels v. Tovar*, No. 03-14-00693-CV, 2015 WL 2183479 (Tex. App.—Austin May 7, 2015). This is a Civil Service Act interlocutory appeal where the trial court affirmed the denial of the city's plea to the jurisdiction arising out of a promotional exam dispute. Tovar took a Sergeant's exam, administered to create a promotion list. None of the test-takers passed the exam with a score of 70% or above so no list was ultimately created. He subsequently ascertained that this grade represented only the percentage of his correct answers on the exam, without adjustment. Contending that he was entitled to additional points for seniority that would give him a passing grade (and eligibility for placement on the promotion-eligibility list as the sole candidate), Tovar filed an appeal with the Fire Fighters' and Police Officers' Civil Service Commission (Commission). He asserted Texas Local Government Code Section 143.033 provides his seniority can count for up to 10 points, but the city concluded that seniority is only added to candidates who have already passed.

The Commission denied relief. Tovar sued the city. The city filed a plea to the jurisdiction, which the trial court denied. The Austin Court of Appeals first determined that Tovar was not suing to be promoted to sergeant, but to be placed on the eligibility list. Therefore, he has standing even though no open sergeant position was currently available. The court then determined that Tovar's claims fall within the waiver of immunity under Section 143.015. The court determined that suing the individual commissioners in their official capacity is the same as suing the Commission, so the requirements of Section 143.015 are met as to proper parties. Suing the individual commissioners for ultra-vires claims also properly triggers Section 143.015. Finally, the court states that it agrees with the merit argument that Section 143.033 gives the

Commission no discretion in adding seniority points to determine whether someone passes the exam and used the different language used for fire fighters and police officers. The court noted that fire fighters' seniority only applies to passing scores while the language for police officers is not the same, so it therefore must apply regardless of passage.

Civil Service: *City of San Antonio v. Cortes*, No. 04-14-00301-CV, 2015 WL 1938695 (Tex. App.—San Antonio Apr. 29, 2015). This is a civil service/collective bargaining case involving the city's motion to compel arbitration, which the court of appeals agreed should be granted. The Collective Bargaining Agreement (CBA) for the firefighters sets forth health benefits for employees. Gerard Cortes, a San Antonio firefighter, received a letter advising him that his dependents needed to go through the verification process for eligibility. Cortes alleges the directive for verification implied disciplinary action if he did not comply, but that such directive was contrary Texas law.

Cortes filed suit alleging the city unilaterally altered his health benefits. The city filed a motion to abate and compel arbitration, which the trial court denied. The city appealed this decision. The city asserted Cortes' claims are identical to those already brought by the firefighter union and are related to the same CBA. In the union's suit, the Fourth Court of Appeals previously held the claims must be submitted to arbitration. The city asserts Cortes is in privity with the union under the CBA and therefore, res judicata and collateral estoppel prevents Cortes from re-litigating the issue of compelled arbitration.

The Fourth Court held that even though Cortes added a slightly different claim, the fact he is challenging the same CBA provision and the factual context of his claims still place his suit within the issue preclusion framework. Even though the union's suit has not resulted in a final judgment yet, the issue of compelled arbitration was procedurally defined and ruled upon in the interlocutory opinion in that case. As a result, it is a final determination on that issue for collateral estoppel purposes. Since union members are in privity with their union, Cortes is collaterally estopped from challenging the issue of compelled arbitration. The denial of the motion to abate and to compel arbitration was reversed.

Civil Service: *Saifi v. City of Texas City*, No. 14-13-00815, 2015 WL 1843540 (Tex. App.—Houston [14th Dist.] Apr. 23, 2015) (mem. op.). The City of Texas City hired Saifi as a firefighter in 2007, when he signed a Conditions of Employment ("COE") Agreement. The city is governed by the Civil Service Act and the Employee Relations Act. In 2011, the city terminated Saifi's employment when he was unable to complete a national registry test to enable him to obtain his paramedic certification as required by the COE Agreement. Saifi argued that he was not required to pass the national registry test as a condition of employment because he had not passed the prerequisite tests before he was hired, as required by the agreement. He sued the city alleging breach of contract and violation of the Civil Service Act, and requesting declaratory relief. Saifi also alleged that sovereign immunity was waived by the city. The city filed a motion to dismiss for lack of subject matter jurisdiction, which was granted by the trial court. Saifi appealed.

The central issue on appeal is whether the city's governmental immunity bars Saifi's claims. Saifi argued that the city's immunity was waived under Local Government Code Section

271.152, as the COE Agreement and the Collective Bargaining Agreement, read together, constitute a contract for purposes of the statutory waiver. The court of appeals concluded that Saifi's pleadings do not contain sufficient facts to demonstrate jurisdiction under Local Government Code Section 271.152, but also contained no incurable defects. Therefore, Saifi could amend his pleadings and develop the record with respect to his contention that his COE Agreement, read in conjunction with the CBA and incorporated Civil Service Act provisions, satisfies the requirements for waiver of the city's immunity. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-227 (Tex. 2004). The court ruled similarly on Saifi's claim that the city's immunity was waived under Section 180.006 of the Local Government Code because he is a firefighter covered by Local Government Code Chapter 143 who has alleged a claim for back pay. The court reversed the trial court's judgment granting the city's plea to the jurisdiction and remanded the case for further proceedings.

Civil Service: *City of Del Rio v. Jalomos*, No. 04-14-00381-CV, 2015 WL 1875940 (Tex. App.—San Antonio Apr. 22, 2015). In this civil service case, the Fourth Court of Appeals affirmed the dismissal of a suit filed by the City of Del Rio seeking judicial review of a hearing examiner's decision. Daniel Jalomos was a police officer for the city. After a complaint was filed against Jalomos, the police chief suspended him indefinitely. Jalomos appealed and elected to have his appeal heard by a hearing examiner. After an evidentiary hearing, the hearing examiner ruled for Jalomos and reinstated him. The city filed suit to overturn the hearing examiner's decision. However, the trial court granted Jalomos' plea to the jurisdiction. Section 143.052 of the Texas Local Government Cod e states that upon suspending an officer, the department head shall, within 120 hours (5 days) file with the commission a written statement giving the reasons for the suspension and deliver a copy to the person suspended. The city waited 360 hours to file a statement and failed to provide Jalomos with notice. The "crux of the City's argument is that the Act did not authorize the hearing examiner to reinstate Jalomos based solely on the procedural failures." The court determined that Section 143.052 requires the department head to describe the acts which were in violation of the policy and provide a copy to the suspended employee, not simply the commission. Because the statement given to Jalomos failed to comply with Section 143.052(e), the hearing examiner was required to reinstate Jalomos under Section 143.052(f). The hearing examiner heard evidence for two days, then issued a sixteen-page decision in which he provided a thorough analysis of the law and the evidence. The hearing examiner's actions were expressly authorized and therefore he did not exceed his authority by holding for Jalomos.

Sexual Harassment Retaliation: *San Antonio Water Sys. v. Nicholas*, No. 13-0966, 2015 WL 1873217 (Tex. Apr. 24, 2015). This case concerns a sexual harassment retaliation claim by Nicholas, a former San Antonio Water System (SAWS) employee. Nicholas sued SAWS after she was terminated during a reorganization. She argued that her termination was retaliation for a counseling session she had with an executive regarding possible sexual harassment claims of two other employees three years earlier regarding unwanted lunch invitations. The trial court granted a verdict of over one million dollars in Nicholas' favor, including over $700,000 in future compensatory damages. The court of appeals affirmed. SAWS appealed to the Supreme Court of Texas. SAWS's main argument at the Supreme Court is that there was legally insufficient evidence of Nicholas' belief that she was dealing with sexual harassment claims when she counseled the executive. The Supreme Court held that the elements in a retaliation claim against a governmental entity are jurisdictional, and thus, an appellate court can appropriately review the

elements at any level in the proceedings. The court held that the lunch invitations of the counseled executive were not enough to constitute the pleading of an unlawful employment practice sufficient to result in a valid retaliation claim.

Whistleblower: *Vicki Ward v. Lamar University, Texas State University System and James Simmons,* 14-14-00097-CV, 2015 WL 2250900 (Tex. App.–Houston [14th] May 12, 2015). This is a Texas Whistler Blower Act case where the 14th Court of Appeals affirmed in part, reversed in part and remanded the case after the trial court granted the Defendants' Plea to the Jurisdiction. Ward worked as an Associate Vice President for Finance at Lamar University ("Lamar") which is part of Texas State University System ("System"). While reviewing payment requests, Ward noticed suspicious financial transactions within certain departments and reported it to the police department. Ward issued a report to the President of Lamar outlining an investigation, however, the report was leaked to the media. Ward asserted the President indicated he wanted to "hurt her" as the author of the leaked report. Shortly afterwards, Ward lost the ability to approve and review procurement documents. When she appealed the reduction in duties to the Chancellor system, she was told she should take a severance and was no longer a "good fit" for the System. However, Ward was not terminated after the Chancellor conversation and remains employed. The System's plea to the jurisdiction addressed the Whistleblower claims but not Ward's constitutional claims. The trial court granted the plea as to the Whistleblower claims and *sua sponte* dismissed the free speech claims under the Texas Constitution. Ward appealed.

While analyzing the Whistleblower claims, the court noted an "adverse personnel action" is one allowing claims based on retaliatory actions "likely to deter" reporting of governmental violations of law while weeding out "petty slights" and "minor annoyances." The standard bars trivial claims resulting from a plaintiff's unusual subjective feelings, while allowing claims arising from the particular circumstances of the challenged action. They also analyzed the definition of a "grievance" procedure. The court determined a fact issue exists as to whether an appeal to the Chancellor of the System is an ap peal to the employer (which is actually Lamar). The court also noted a fact issue exists as to whether the employment action taken against Ward by Lamar was an "adverse action." However, the court noted her actions against the System are different because the only actions alleged were implied threats and an offer of severance. As a result, the plea was properly granted as to the System, but improperly granted to Lamar. The court then chided the trial court for its *sua sponte* dismissal of the free speech claims noting the parties should be permitted to develop their own arguments and respond to attempts to dismiss without the court deciding matters *sua sponte* without notice to the dismissed party. The court then held the trial court improperly the plea as to Lamar and the System.

The dissent asserts the majority erred in addressing Ward's Constitutional claims because Ward did not challenge the dismissal on appeal and they reversed an unassigned error. The court should not engage in such conduct and "[t]his is especially true when the unraised points are state constitutional issues of first impression for which the court has not one iota of merits briefing from either side."

PROCEDURAL

Pension Audit: ***Board of Trustees of Houston Firefighters' Relief & Retirement Fund v. City of Houston,*** **No. 01-12-01167-CV, 2015 WL 464232 (Tex. App.—Houston [1st Dist.] Jan. 27, 2015).** The issue in this case was when and how a city may request information related to an audit of its public pension. The City of Houston sued the retirement fund to force it to give the city all information related to an extensive, "replication-level" audit. Section 802.1012 of the Government Code requires that every five years the city audit its pension funds separately from the fund's own audits. Chapter 802 also requires that the city enter into an agreement with the auditor regarding the confidentiality of the fund's information. The city did an audit in 2008, but asked again to do the audit in 2011, requesting all actuarial and other information from the fund. The question is what duty the fund's auditors have to release information to the city. The court of appeals held that the fund had some discretion to decide what information to release to the city and was not required to release information sufficient to do the "replication-level audit" that the city wished to conduct. The court of appeals rendered judgment in favor of the fund.

Billboards: ***Garrett Operators, Inc. v. City of Houston,*** **No. 01-13-00767-CV, 2015 WL 293305 (Tex. App.—Houston [1st Dist.] Jan. 22, 2015).** This is a procedural vested rights case. The city argued that the billboard company, Garrett Operators, filed their suit outside the statute of limitations and that no tolling applied to their case. The court of appeals held that the suit was timely filed under the tolling statutes because their prior case had been dismissed for lack of jurisdiction and there were no other impediments to using the tolling provisions. The primary issue was whether the city 's sign code required a person converting a regular billboard to an LED billboard needed a permit based on a provision that required a permit to "erect, reconstruct, alter, relocate or use a sign" but not if the change was just for "electrical wiring or devices." The court of appeals held that changing a billboard to an LED board was more than just changing the wiring and was more of a reconstruction requiring a permit. The court of appeals also noted that an interpretation of the sign code that would allow such a change to be made without a permit would swallow the entire sign code and its requirements for permits. Because the sign owner did not apply for a permit (as required when reconstructing a sign), he had not vested his rights under Section 245.002 and his construction of an LED sign could be barred by a later sign code amendment adopted before he filed for his permit.

Vested Rights: ***CPM Trust v. City of Plano,*** **No. 05-14-00104-CV, 2015 WL 1568746 (Tex. App.—Dallas Apr. 7, 2015).** This case involves a billboard installed in 1961. At the time of purchase, the property was not in the jurisdiction of the City of Plano. However, the property was later annexed by the city. Based on the city's sign ordinance, the city ordered that the property owner, CPM Trust (The Trust) to remove the remainder of the billboard that was damaged following a storm. The Trust filed an application to the city's board of adjustment (board) to appeal the decision of the administrative official requiring removal of the billboard. The building official's decision was upheld by the board. The Trust filed a petition in the trial court. The trial court affirmed the board's decision.

The Trust appealed the trial court's judgment. The Dallas Court of Appeals concluded that the board abused its discretion by not allowing appellants the option to make repairs as provided in the city ordinance, and the trial court erred by affirming the board's decision. The Trust also

asserted a takings claim stating that they were entitled to recover temporary damages including rentals or lost profits for the period of time the damaged billboard was unusable. The Dallas Court of Appeals concluded that The Trust did not allege a taking, and the trial court properly granted the city's plea to the jurisdiction on the takings claim. The court rendered judgment reversing the board's decision and remanded the case to the trial court.

Recall Election: ***In re Johnson,*** **No. 10-14-00341-CV, 2015 WL 505220 (Tex. App.—Waco Feb. 2, 2015) (mem. op.).** In this case, relators (a former mayor and three sitting councilmembers) sought a writ of mandamus directing the City of Hearne City Council to order a recall election of Councilmember Vaughn. The county elections administrator certified that the city had received a petition with a sufficient number of qualified signatures to trigger a recall election under the city charter. Respondents (the current mayor, a sitting councilmember, Vaughn, and the city secretary) argued the city council had no ministerial duty to schedule the recall election before the next uniform election date (May 2015) because there was a pending declaratory-judgment counterclaim in district court challenging the allegations against Vaughn. The Waco Court of Appeals held that the counterclaim had no bearing on the city council's ministerial duty under the city charter to order the recall election. Moreover, the court held that because the recall election should have been held on November 4, 2014 (but didn't because a majority of the council failed to vote in favor of ordering the election) the election shall be held within thirty-five days of the date of the opinion.

Procedure: ***HS Tejas, Ltd. v. City of Houston,*** **No. 01-13-00864-CV, 2015 WL 1020625 (Tex. App.—Houston [1st Dist.] March 5, 2015).** This is the continuation of a case regarding a takings claim based on floodway regulation. The two prior cases, *City of Houston v. HS Tejas, Ltd*., 305 S.W.3d 178 (Tex. App.—Houston [1st Dist.] 2009, no pet.) and *City of Houston v. HS Tejas, Ltd*., No. 01–11–00431–CV, 2012 WL 682298 (Tex. App.—Houston [1st Dist.] 2012, no pet.)(mem. op.), dealt with whether HS Tejas had a ripe claim. After holding in 2011 that HS Tejas had shown a ripe claim, the case was remanded to the trial court. The city filed a no evidence summary judgment motion and a plea to the jurisdiction alleging that HS Tejas had not offered evidence of a takings claim. Specifically, the city argued that HS Tejas had not produced evidence that: (1) the city acted intentionally; (2) its action resulted in a taking; or (3) it took the property for a public use. After an evidentiary hearing, the trial court granted the city's plea to the jurisdiction. The court of appeals held that the trial court improperly granted the plea to the jurisdiction because a defendant may not challenge subject-matter jurisdiction on the premise that the plaintiff provided no evidence to support the pleadings for a plea to the jurisdiction without producing its own evidence negating the plaintiff's evidence. The city did not produce evidence that the court lacked jurisdiction and so the plea to the jurisdiction should not have been granted. The court of appeals remanded the case back to the trial court.

Declaratory Judgment Act: ***Guadalupe-Blanco River Auth. v. Texas Attorney General,*** **No. 03-14-00393-CV, 2015 WL 868871 (Tex. App.—Austin Feb. 26, 2015) (mem. op.).** The Guadalupe-Blanco River Authority (Authority) filed a suit against numerous entities asserting the San Antonio Water System (SAWS) improperly filed an application with the Texas Commission on Environmental Quality (TCEQ) that would significantly diminish the amount of water available for a major project by allowing SAWS to reuse effluent that it had previously used and discharged. The Authority alleged that SAWS' application "creates a cloud over" the

revenue pledge made by the Authority to secure bonds to pay for its project because there will be less water available to sell to its customers. All of the defendants filed pleas to the jurisdiction asserting the claims were not ripe and the claims do not fall within the enabling act because TCEQ has exclusive or primary jurisdiction over the controversy, and because the claims are barred by sovereign immunity. The trial court granted all pleas to the jurisdiction and the Authority appealed.

The Expedited Declaratory Judgment Act (Act) contained within Texas Government Code Sections 1205.001-.152 was designed to provide a method of adjudicating the validity of public securities in an efficient and quick manner. The Authority argued the Act is the proper vehicle to challenge the permit because allowing the permit would mean the $100 million bond expenditure cannot result in the required total of needed water. However, the court held the Act's expedited purpose, which relates to only a limited set of topics, is to prevent "one disgruntled taxpayer" from stopping "the entire bond issue by simply filing suit." The relief sought by the Authority was not concerned with whether the securities were properly authorized or whether the procedures for issuing the securities were followed. Instead, the relief centers on trying to force SAWS to return water to the Guadalupe River for the benefit of the Authority. The relief cannot fairly be construed as bearing on the "legality and validity" of the bonds at issue. As a result the trial court was without jurisdiction to hear the case and properly granted the pleas.

TAKINGS

Substandard Building: ***City of El Paso v. Fox,*** **No. 08-12-00264-CV, 2014 WL 5023089 (Tex. App.—El Paso Oct. 8, 2014).** This is an interlocutory appeal from the denial of a plea to the jurisdiction in which the El Paso Court of Appeals reversed the denial and dismissed Fox's claims. The city issued an order removing the electric meters on an apartment complex which Fox owned jointly with Perkins. Perkins sued for due process violations and inverse condemnation and Fox intervened asserting he was the primary owner. The city filed a plea to the jurisdiction (among other things) but the trial court denied the plea. The court first noted that Fox filed an amended petition seeking declaratory judgment and injunctive relief which sought only equitable damages, therefore he was not recasting a damages claim as a declaratory judgment action. Next, the court noted that Texas Local Government Code Section 214.0012 grants a party the right to file a verified suit to challenge an order like the one issued by the city, but only as a writ of certiorari to declare part or all of the order illegal. Interestingly enough, the court held it could take judicial notice on appeal of the official minutes of the city council meetings posted on the website, even though the city's counsel did not provide them to the court in its brief. It then noted the minutes reflect Fox's appearance, the city's proceedings, the city's order giving Fox time to fix the problems and that the problems were not fixed. This essentially destroys Fox's due process claims. However, the court does not hold that. Instead, it simply states that regardless of all of those facts, Fox did not file a verified pleading pursuant to Section 214.0012 and therefore did not invoke the court's jurisdiction. Fox had filed a previous appeal on a collateral issue and the court took notice of the fact it had determined Fox failed to file a verified plea at that time. His claims were dismissed.

Regulatory Taking: ***City of Houston v. Carlson*****, 451 S.W.3d 828 (Tex. Dec. 19, 2014).** Condominium owners sued the City of Houston after they were ordered to vacate their

condominiums for safety reasons. The trial court held that the condominium owners had not suffered a taking and dismissed the case. The court of appeals reversed. Previous to this case, courts had held that the action in question did violate the condominium owners' due process rights, and overturned the city's actions. This regulatory takings case was brought after the due process case. The owners argue that the procedure the city followed in the order to vacate led to a regulatory taking of their property. The Supreme Court held that the owners had not alleged a taking because they argued about procedural issues and not whether the building regulations themselves caused a taking. The Court held that a civil enforcement procedure cannot, by itself, be the basis of a regulatory taking.

Substandard Buildings: ***Whallon v. City of Houston*****, No. 01-11-00333-CV, 2015 WL 505429 (Tex. App.—Houston [1st Dist.] Feb. 5, 2015).** The City of Houston demolished a condominium complex that had many issues and then sued multiple owners for the cost of demolition and attorney's fees. Three of these defendant property owners were Whallon, Garcia, and Grayshaw. The trial court entered judgment against Whallon, but not Garcia and Grayshaw because they were on the list of property owners who were settling with the city. However, one month after the trial court's judgment, the city asked the court to modify the judgment to add Garcia and Grayshaw. The court modified the judgment to include Garcia and Grayshaw's pro rata share of the demolition costs. The issues are whether the trial court: (1) had jurisdiction over Garcia and Grayshaw at the time of the corrected final judgment; and (2) made multiple mistakes related to the judgment against Whallon. The court of appeals first looked at the issue of res judicata in relation to the suits of all three defendants. The argument is that the city should have sought demolition fees in front of the building and standards commission, but did not do so, and thus its case was barred by res judicata. The court of appeals held that the cases were not barred by res judicata because any suit before the commission or the district court was not mutually exclusive. Next, the court of appeals reviewed whether the trial court had jurisdiction over Garcia and Grayshaw at the time of the corrected final judgment. The court of appeals reversed the judgments against Garcia and Grayshaw because there was sufficient evidence that there were settlement agreements with these defendants under Rule 11. The court of appeals reviewed Whallon's case to determine whether the demolition costs and attorneys' fees were appropriate. The court of appeals first held that Chapter 214 of the Local Government Code authorizes an award of attorneys' fees for the city. The court of appeals also reviewed the amount of the attorneys' fees. It held that the evidence supported the trial court's awards of attorneys' fees to the city for Whallon's case.

Condemnation: ***Whittington v. City of Austin*****, 456 S.W.3d 692 (Tex. App.—Austin Jan. 29, 2015, pet. filed).** The City of Austin could not agree on a price for property owned by the Whittingtons that the city desired to use for the construction of a downtown convention center and cooling plant, so the city filed a condemnation suit. Extensive litigation and multiple appeals resulted from this condemnation. However, the Austin Court of Appeals looked at a single issue: the interest awards ordered by the district court. The Whittingtons argued that they were entitled to the interest earned on funds the city deposited during the 10-plus years that the money remained in the court registry during the time the Whittingtons and the City of Austin were litigating the condemnation. The city, though, contends that the final judgment in 2013 should be the starting point for determining interest rates and that the Whittingtons were not entitled to an interest award between the 2007 and 2013 judgments in the case.

The Austin Court of Appeals concluded that the decision to challenge the propriety of a taking does not waive a property owner's constitutional entitlement to compensation if the taking is deemed proper. Similarly, the court stated that challenging a condemnor's authority to take property does not waive a property owner's right to recover otherwise permissible interest awards. The court noted that the city's punitive interpretation would reverse the equities involved in this case. By electing to condemn and assume possession of the property before the condemnation proceeding became final, the city ran the risk that the Whittingtons might challenge its ability to condemn the property, and thus, the city would owe interest on any compensation awarded that exceeded the amount of the initial deposit. The Austin Court of Appeals reversed the portion of the district court's judgment awarding the accrued investment interest to the city and remanded the case for further proceedings.

Regulatory Taking: *City of Galveston v. Murphy*, No. 14-14-00222-CV, 2015 WL 167178 (Tex. App.—Houston [14th Dist.] Jan. 13, 2015). Following Hurricane Ike, the City of Galveston informed Joe Murphy and Yoram Ben-Amram (property owners) that, because their multi-family dwellings had been unoccupied for over six months, their properties had lost grandfathered non-conforming status and would require a specific use permit (SUP) to be occupied as multi-family dwellings. Property owners submitted a SUP application to the city, and city staff recommended approval, subject to meeting specified conditions, including meeting all compliance requirements necessary to lift the condemnation, and providing more parking spaces or requesting a variance. The city council ultimately denied the SUP request. The property owners sued the city, arguing that the city unconstitutionally took their property without just compensation through inverse condemnation. The city filed a motion to dismiss for lack of subject matter jurisdiction on the grounds that the claims were not ripe because there was no final or definitive decision regarding use of the property as multi-family dwellings. The trial court denied the city's motion to dismiss, and the city appealed.

On appeal, the city argued that the property owners' claims were not ripe because they never obtained a final decision regarding their use of the property as an apartment complex, because the denial of the SUP application was based on code safety and structural concerns with the property. In other words, the decision was not final because the city encouraged the property owners to bring the property within compliance and reapply. The court of appeals relied on the decision in *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) to conclude that the property owners' regulatory takings claims with regard to the city's denial of the SUP application were not ripe, as the property owners did not obtain a final decision since the city was open to reapplication. However, the court of appeals also concluded that the city did not meet its burden to establish that its decision to revoke the property's grandfathered nonconforming status was not final and authoritative. All of the evidence in the record as to ripeness was focused on the lack of an SUP reapplication and not a failure to obtain a final decision on the city's removal of the property's grandfathered nonconforming status.

The court of appeals affirmed in part the trial court's denial of the city's plea to the jurisdiction regarding the takings claims based on the revocation of the property's grandfathered nonconforming status, and reversed in part the trial court's denial of the city's plea to the jurisdiction regarding the takings claims based on the denial of the SUP application.

Condemnation: *City of Highland Haven v. Taylor*, No. 03-12-00732-CV, 2015 WL 655278 (Tex. App.—Austin Feb. 12, 2015) (mem. op.). Eugene Taylor and Charles Fenner brought suit against the City of Highland Haven seeking damages for an alleged inverse condemnation caused by the construction of a bridge near their property. After heavy flooding, a bridge was built in the Wolf Creek Channel, which cut off the city's access to Wolf Creek. Following a heavy rainfall after the bridge's construction, the property owners complained about sediment accumulation. Taylor and Fenner filed suit arguing that the sedimentation constituted inverse condemnation of their waterfront properties. The City of Highland Haven filed a plea to the jurisdiction claiming governmental immunity, which the district court denied. This appeal resulted.

The City of Highland Haven argued that Taylor and Fenner lacked a property interest in the channel near their waterfront property that would support their takings claim. The appeals court agreed concluding that Taylor and Fenner's pleadings affirmatively demonstrated that they have no property interest in the channel sufficient to support a takings claim. Because they failed to do so, the district court lacked jurisdiction over the claims. Thus, the court of appeals reversed the district court's denial of the city's plea and rendered judgment dismissing Taylor and Fennder's claims.

Standing: *City of Arlington v. Texas Oil & Gas Assoc.*, No. 02-13-00138, 2014 WL 4639912 (Tex. App.—Fort Worth Sept. 18, 2014). The issue in this case is the associational standing of a group of natural gas operators regarding a new fee and fire code requirements placed on individual natural gas operators by the City of Arlington. The association sued the city alleging that the new ordinances violated property and constitutional rights of its members. The city argued that the association did not meet the third prong of the associational standing that requires that "neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members." The court of appeals addressed this prong as one of convenience for the parties. The court held that the association did have standing and that the need for discovery from individual members of an association does not negate the third prong of the associational standing test. The court further held that the association's request for a declaratory judgment that the city's ordinances are invalid is appropriate under associational standing because all of its members would benefit from such a decision.

Eminent Domain: *State v. Chana*, No. 01-13-00953-CV, 2015 WL 1544719 (Tex. App.—Houston [1st Dist.] Apr. 2, 2015). In this eminent domain case, the question was how to value the Chanas' property that was condemned by the state. The trial court held that the Chanas' property was worth almost one million dollars, based on evidence of the Chanas' expert witness. The state disputed the testimony of the expert witness and argued that his testimony should be excluded because it was based on a violation of the project-enhancement rule. The project-enhancement rule states that property cannot be given an increased value in an eminent domain proceeding where the increase in the value only exists because of the project itself. The state argued that the parcel that was evaluated by the Chanas' expert witness was only evaluated like it was because of the amount of land the state took. The court of appeals held that there was sufficient evidence that the expert witness correctly based his testimony on the highest and best use of the property, and did so without regard to any value added by the project itself. The court of appeals also held that the trial court was permitted to exclude property tax protest records

from the analysis which would have shown a lower value, because the records included inadmissible evidence in an eminent domain proceeding, namely property listings. The court of appeals affirmed the trial court's judgment.

Inverse Condemnation: *City of Justin v. Rimrock Enters., Inc.*, No. 02-13-00461-CV, 2015 WL 1579579 (Tex. App.—Fort Worth Apr. 2, 2015). This case involved two questions: (1) whether the city took part of Rimrock's property when it paved a preexisting gravel road; and (2) if it took the property, what was the taken property's value. The city argued that it did not take any property from Rimrock because either: (1) the entire piece of property was already impliedly dedicated to the public; or (2) because the city did not intend to take the property because it thought the street had already been impliedly dedicated to the public. The court dismissed both arguments. The court addressed evidence in the record that showed that the history of the "trail" could lead a jury to infer only a portion of the roadway was impliedly dedicated to the public. The court held that the city's argument – that a dedication to the public means (as a matter of law) a dedication of the entire right-of-way – is misplaced since this case is about an implied dedication. The case law supporting a ruling as a matter of law comes from express dedications. In regard to the city's second argument, the court looked at the city's very clear intent to improve the roadway and the fact that the city had even asked Rimrock for a release of any areas which may intrude (which was refused by Rimrock). As a result, evidence existed for a jury to determine the city had the intent to take property specifically for public use. The trial court did not abuse its discretion in its instruction to the jury regarding how to calculate damages based on the value of the severed portion taken as opposed to the decreased value of the entire property. In the end, the court affirmed the jury award of Rimrock's claims for a taking but did not allow reimbursement for attorney's fees.

Vested Rights: *Village of Tiki Island v. Premier Tierra Holdings, Inc.*, No. 14-14-00629-CV, 2015 WL 1393278 (Tex. App.—Houston [14th Dist.] Mar. 24, 2015). The plaintiff sought a declaratory judgment action to determine vested development rights under Chapter 245 of the Texas Local Government Code. This is an interlocutory appeal from the denial of a plea to the jurisdiction where the 14th Court of Appeals determined no justiciable controversy exists and reversed the denial.

Premier Tierra Holdings, Inc., (Premier) owns a tract of property in the Village of Tiki Island (village), located in Galveston County. Premier desires to develop or sell the property for a mixed-use marina development (project). Premier asserted that Chapter 245 of the Local Government Code required the village to consider the approval of an application for a permit solely on the basis of the regulatory scheme existing at the time the first plat application for a project is filed, and therefore certain provisions of the village's zoning ordinance (adopted later) could not be applied to its project. The application was denied. Premier sued seeking a declaration it has a vested right as of its original plat application for the project. The village filed a plea to the jurisdiction asserting the relief sought was for a ruling on a "hypothetical future application of land-use regulations." The trial court denied the village's plea and it appealed.

The court held that while Chapter 245 allows a declaratory judgment action to determine certain vested rights, at the time Premier filed its plat application, the village was governed by Chapter 212 of the Local Government Code, which establishes the standards for approval of a proposed

subdivision plat. The village contended Premier never exercised its statutory right to request that the village provide the reasons for the denial, never appealed the denial, and never advanced the denial was improper. The court held that "Premier's request for declaratory relief fails to present a justiciable controversy because the record does not disclose the reasons why the [village] denied the 2010 plat application; no plat or permit applications have since been denied for any specified reasons; and Premier has not challenged the [village's] denial of its plat application in this or any other proceeding."

The village was not required to approve the application simply because it was filed, but was entitled to approve, disapprove, or conditionally approve based on regulations in effect at the time. Essentially, since Premier did not ascertain the reason for the denial or attempt to cure any defects and the village has the right to deny for some reasons but not others, no controversy yet exists. The court disagreed that the claims failed because of mootness and ripeness and expressly stated that its opinion should not be read or implied to hold "the plat application itself or any statutory rights Premier acquired for the project as a result of filing the plat application are necessarily mooted." Since the court could not do anything at this juncture, no jurisdiction yet exists.

Takings: *Village of Tiki Island v. Ronquille,* No. 01-14-00823-CV, 2015 WL 1120915 (Tex. App.—Houston [1st Dist.] Mar. 12, 2015). This case arose when the Village of Tiki Island (village) enacted an ordinance that prohibited short-term rentals for most homes in the village, but grandfathered other homes. Multiple homeowners sued the village, arguing that the ordinance constituted a taking because their home values were diminished by the enactment and enforcement of the ordinance. The trial court granted the homeowners a temporary injunction against the city's enforcement of its ordinance. The village filed a plea to the jurisdiction, but the plea was never heard or submitted before the trial court. The village brought this interlocutory appeal based on the temporary injunctions, but also continued to argue that the trial court did not have subject matter jurisdiction because the plaintiffs did not allege sufficient facts of a taking. The court of appeals first held that the village's interlocutory appeal was timely as to only one plaintiff. Then the court of appeals allowed the review of subject matter jurisdiction in the one case pursuant to Rusk State Hospital v. Black, 392 S.W.3d 88 (Tex. 2012), even though the issue of jurisdiction was technically raised for the first time on the interlocutory appeal. The court of appeals held that the trial court did have subject matter jurisdiction because the plaintiff had shown sufficient evidence of an economic impact on her property to constitute a viable takings claim. However, the court of appeals dismissed the plaintiff's declaratory judgment claim because the claim merely restated the plaintiff's takings claim. The court of appeals held that the trial court's temporary injunction order was also correct as the plaintiff had identified a vested right related to the rental of her property sufficient for a temporary injunction.

Utility Relocation: *Southwestern Bell Tel., L.P. v. Emmett,* No. 13-0584, 2015 WL 1285326 (Tex. Mar. 20, 2015). Southwestern Bell (d/b/a AT&T) sued the city when it, under contractual obligation to a flood control district, required AT&T to move its facilities from a city bridge that was going to be demolished and rebuilt. AT&T alleged that the county flood control district who directed the city to require relocation, not AT&T, was responsible for the cost of relocating the utility's facilities. The trial court held that the company was responsible for the relocation. The court of appeals affirmed pursuant to the language of Section 49.223 of the Water Code which

requires a district to pay relocation costs if the district makes such location necessary. The appellate court held that the district did not make the relocation necessary because of the city's involvement in the project and because the bridge in question had not been demolished yet. AT&T appealed to the Supreme Court of Texas. The Court held that Section 49.223 required that the district pay for the relocation after reviewing what the words "made necessary" means in context of the statute. The district had contractual authority to require the city to require the relocation, and this was sufficient under Section 49.223 according to the Court. The district made necessary the relocation of the lines.

Takings: *Schrock v. City of Baytown,* No. 01-13-00618-CV, 2015 WL 1882190 (Tex. App.—Houston [1st Dist.] Apr. 23, 2015) (mem. op.). The City of Baytown filed a lien against Schrock's rental property when his renters left without paying their utility bills. The city also refused to turn on water and wastewater until Schrock paid for his renters' delinquent utility bills based on its ordinance requiring a landowner to tell the city his or her property was a rental property or pay all bills. The city argued that Schrock had neglected to follow its ordinance, even though there was evidence that the renters were required to submit their leases to the city when they opened their utility accounts. Schrock sued the city, arguing that it committed a taking of his rental property because he was unable to rent out his property without utility services. The court of appeals noted that the city's ordinance may have violated Section 552.0025 of the Texas Local Government Code which prohibits a city from requiring a person to pay a renter's or other utility customer's bill. The court of appeals held that Schrock's allegation that the city unreasonably refused to turn on the utilities to his rental properties was sufficient to allege a takings claim and avoid summary judgment. The court of appeals remanded the case to the trial court.

Takings: *Marissol Ochoa Sierra and Emilio Chapa Trevino v City Of Pharr*, 13-14-00425-CV, (Tex. App. — Corpus Christi, May 21, 2015). This is an appeal from the granting of a plea to the jurisdiction involving the alleged wrongful sale of an impounded vehicle. The Thirteenth Court of Appeals affirmed the granting of the plea. Pharr police reported that it was informed by an agent with Customs and Border Protection that the agency had Sierra in custody. At the time of her arrest she was driving a Cadillac Escalade which was impounded. While Sierra provided proof of ownership of other property seized, she could not provide proof of ownership of the vehicle, noting it was purchased from a friend but the ownership transfer had not yet occurred. When the Escalade remained unclaimed for more than twenty days, the City put notices in a newspaper then sold it. Later, seeking return of the vehicle, Sierra and Trevino filed suit asserting the seizure was improper and the City had no valid claim to the title. The City filed a plea asserting the recorded title owner (Armando Guadalupe Bazan Garcia) made no claim and that Sierra and Trevino had no standing as they were not the title owners. The court granted the plea.

Although Sierra and Trevino alleged that Trevino owned the vehicle, they provided no evidence to establish title or standing to seek recovery of the Escalade. Instead, the City provided a bill of sale, which it attached to its plea to the jurisdiction that identified Garcia as the registered owner of the vehicle. This conforms with Sierra's statement to police that the sale had not been completed. Sierra and Trevino did not respond to this evidence by disputing it with contrary evidence. As a result, they did not establish standing and the plea was properly granted.

MISCELLANEOUS

Personal Injury Judgment: *City of Beaumont v. Brocato*, No. 09-13-00210-CV, 2014 WL 5490937 (Tex. App.—Beaumont Oct. 30, 2014) (mem. op.). This is an appeal from the trial court by the city regarding a judgment rendered in a personal injury case which the Ninth Court of Appeal affirmed, with one modification. The Brocatos' daughter was involved in a collision with a police officer employed by the city. Following the first trial of the case, a jury found the police officer negligent. After appeal by the city, the case was remanded for a new trial and the remand provided that "All costs of the appeal are assessed against the [Brocatos]." On retrial, the jury found both drivers negligent, with the Brocatos' daughter less than fifty percent responsible. The Brocatos were awarded a judgment. The city appealed from the judgment, raising three issues.

First, the city argued that the jury did not have legally sufficient evidence to support its award of future medical expenses. Specifically, the city argued the Brocatos failed to show their daughter will probably need surgery on her ankle. The court overruled this issue. While not conclusive, the court found there was more than a scintilla of evidence to enable reasonable and fair minded jurors to conclude that she would need surgery. Next, the city argued the jury erred in awarding past medical expenses because the issue was not submitted to the jury. The issue is overruled because the city failed to object that the jury charge omitted this issue, which means the court must deem the element to have been "found by the court in such manner as to support the judgment." Tex. R. Civ. P. 279. Finally, the city argued the trial court erred by taxing the city with all the costs of court because of the language in the remand. The appellate court agreed and explained that the trial court could have (but did not) offset the judgment with the prior award of costs related to the appeal per the mandate. The appellate court modified the trial court's judgment accordingly.

Building and Standards: *Gold Feather, Inc. v. City of Farmers Branch*, No. 05-13-01175-CV, 2014 WL 7399271 (Tex. App.—Dallas Dec. 17, 2014) (mem. op.). This is a structural standards case where the Dallas Court of Appeals affirmed a summary judgment order in favor of the city because Gold Feather failed to comply with an order from the city's structural standards commission. The city sent notices to Gold Feather of ordinance violations including a parking lot in disrepair, structural disrepair, improper signage, weeds, and more. Gold Feather asserted it recently purchased the property and intended to have it developed but was refusing to bring the property into compliance in the meantime. The city's structural standards commission held Gold Feather was in non-compliance and assessed civil penalties if the violations were not repaired within thirty days. After giving substantial time for repairs, the city assessed civil penalties in the amount of $22,000 ($500/day for each day of a continued violation) and brought suit to enforce and collect. Gold Feather asserts it was verbally promised an extension (which was later rescinded) so did not comply as quickly as it could have but should not have been assessed a civil penalty. The city filed a summary judgment which was granted and Gold Feather appealed. The court first held that Gold Feather's assertion of ineffective assistance of counsel does not apply to civil cases and the city's penalties are civil in nature, not criminal. Next, Gold Feather failed to appeal the commission's order so it could not raise a takings or due process claim by asserting the taking was performed by a non-judicial body. Without deciding whether

such a defense/claim is even proper, it must still be raised in an appeal from the commission's order, which did not occur. As a result, the summary judgment order is affirmed.

Substandard Buildings: *Henderson v. City of Houston*, No. 14-13-01025-CV, 2015 WL 971227 (Tex. App.—Houston [14th Dist.] March 3, 2015) (mem. op.). After the City of Houston Buildings and Standards Commission ordered all occupants to vacate a house and ordered the owner or lienholder to repair or demolish a house and garage within a certain timeframe, the occupant of the property, Joe Henderson, filed a petition for judicial review of the commission orders. He alleged that he was deprived of due process, that the buildings did not violate city codes, and that the commission improperly considered evidence regarding the condition of the house and garage because the inspections were illegal. The city filed a plea to the jurisdiction alleging that Henderson lacked standing to seek judicial review. The trial court granted the city's plea to the jurisdiction and Henderson appealed.

On appeal, the court pointed out that both Local Government Code Section 54.039 and Local Government Code Section 214.0012 only confer standing on an "owner, lienholder, or mortgagee of record" to seek judicial review. Because Henderson was the occupant of the property and not an owner, lienholder, or mortgagee of record for the property, he did not have standing to challenge the commission's determination. Therefore the trial court did not err by dismissing Henderson's claims for want of jurisdiction.