

# Recent State Cases of Interest to Cities

By Laura Mueller, Associate



# ATTORNEY-CLIENT PRIVILEGE

## *In re City of Dickinson, SCOTEX*

- Attorney-client privilege protects expert testimony when the client is also the expert
- **The Court did not create any new privilege doctrines, but focused on Tex. R. Civ. P. 192.3**
- Rule 192.3 allows for discovery of expert information, but is limited by attorney-client privilege



Main takeaway: expert disclosure does NOT overrule attorney-client privilege! Important for code enforcement and any time city staff is the expert.

# CONTRACTUAL IMMUNITY

## *Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc. – SCOTEX*

- A Type B economic development corporation (EDC) executed a contract with a non-profit; when the actual costs far exceeded the contract, they sued each other
- **Is a Type B EDC immune from suit as a political subdivision?**
- Spoiler alert: No, “the Legislature did not authorize municipalities to create [EDC’s] as distinct governmental entities entitled to assert immunity [from suit] in their own right.”



# DANGEROUS DOGS

## *State of Texas v. Dallas Pets Alive (memo opinion)*– Dallas COA

- Dog held by Dallas Pets Alive bit a two-year old at an adoption event; the City seized dog and initiated municipal court proceedings
- Muni court held that dog caused serious bodily injury and ordered euthanasia
- DPA appealed and filed for TRO to protect animal; City claimed government immunity
- Appellate court held that City waived immunity by initiating the underlying proceedings in court & granted TRO



Thank you, City Council  
Members Omar Narvaez &  
Adam Medrano for continuing  
to fight for Rusty.

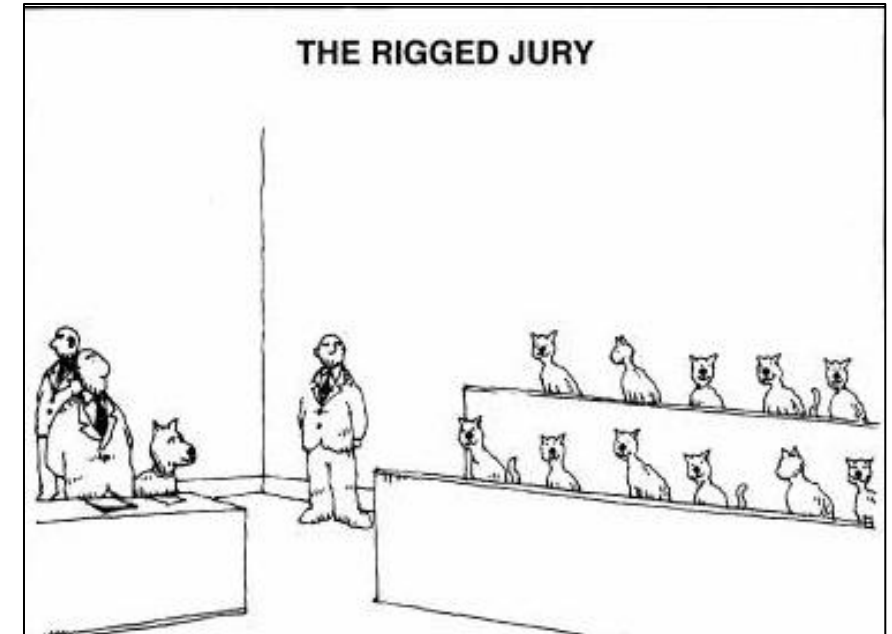


# DANGEROUS DOGS

## *In re Pool* – Austin Court of Appeals

- A dog that allegedly attacked a jogger was determined a “dangerous dog” under Tex. Health & Safety Code § 822.041(2) without a jury trial
- Owner filed mandamus to compel a jury trial de novo; county court denied request
- Judgments can have trials de novo, but convictions cannot be by trial de novo

***Court of appeals harmonized § 30.00014(b) of the Gov. Code (no de novo review of muni courts) with the above provision—dog gets jury trial***



# DANGEROUS DOGS

## *Washer v. City of Borger*– Amarillo Court of Appeals

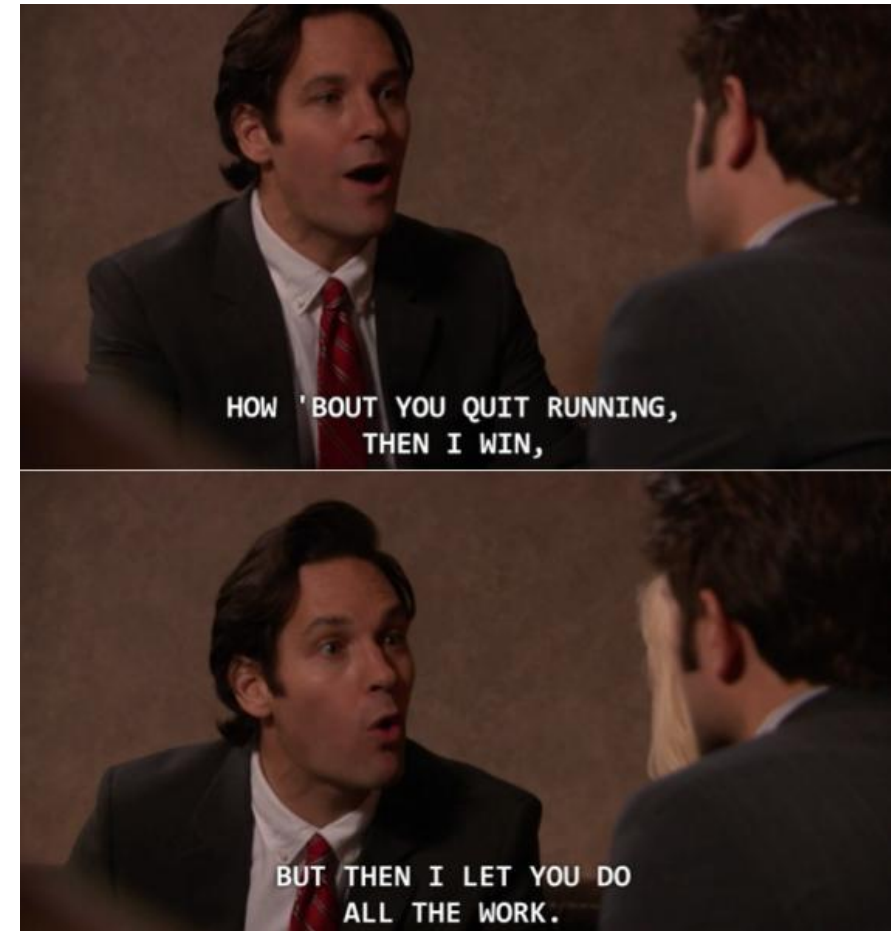
- Court upheld animal control & dangerous dog determination ordinances
- Adopted pursuant to Tex. Health & Safety Code § 822.0421 and allows investigation of dangerous animals (not just dogs) and impoundment if necessary with process for appeal
- Owner challenged ordinances as unconstitutional and preempted
- Since the ordinances were within the scope allowed by the Code, they were lawful



# ELECTION CONTEST

## *Pressley v. Casar* – SCOTEX

- The losing party of a Council election filed an election contest and the winning party moved for Chapter 10 sanctions for improper purpose or lack of legal/factual support.
- Trial Court and Appellate Court granted sanctions; SCOTEX reversed
- **Moot on issues because term over**
- **Some evidentiary support was sufficient to avoid sanctions.**



# EMPLOYMENT

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## *DeFrancesco v. Memorial Vills. Police Dep't* – Houston Court of Appeals [1st Dist.]

- MVPD terminated Officer DeFrancesco, who then alleged retaliation for reports age & race retaliation

First, Court questions whether Appellant is even “Hispanic”

- However, he only recently identified as Hispanic after a settlement for race discrimination by his previous employer
- He also was allegedly racially derogative towards Hispanic people on social media





# EMPLOYMENT

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*DeFrancesco v. Memorial Vills. Police Dep't* – Houston Court of Appeals [1st Dist.]

- Retaliation requires:
  - Engaged in protected activity
  - Adverse Employment Action

Not Protected Activity:

- Reporting one incident involving another employee who chose not to file a complaint was not protected activity
- Letter from Attorney:

“We have not provided facts to support this claim as a courtesy to you”—Not actual claim
- Trying to get out of trouble by alleging discrimination

***No Protected Activities = No Claims***



# GOVERNMENTAL IMMUNITY

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## *Hillman v. Nueces Cty.* – SCOTEX

- ADA asked to furnish exculpatory evidence to a defendant (as required by law)
- Employer told him not to
- ADA called Ethics Line who told him to  
Furnish exculpatory evidence
- ADA furnished evidence
- ADA Fired
- A former DA sued county for wrongful termination, claiming that he was fired for failing to perform an illegal act—Employment Claim



## ***Is Governmental Immunity Waived?***

# GOVERNMENTAL IMMUNITY

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Nope.

- No waiver under Michael Morton Act.
- No waiver for breach of duty not to fire someone for refusing to engage in illegal activity.

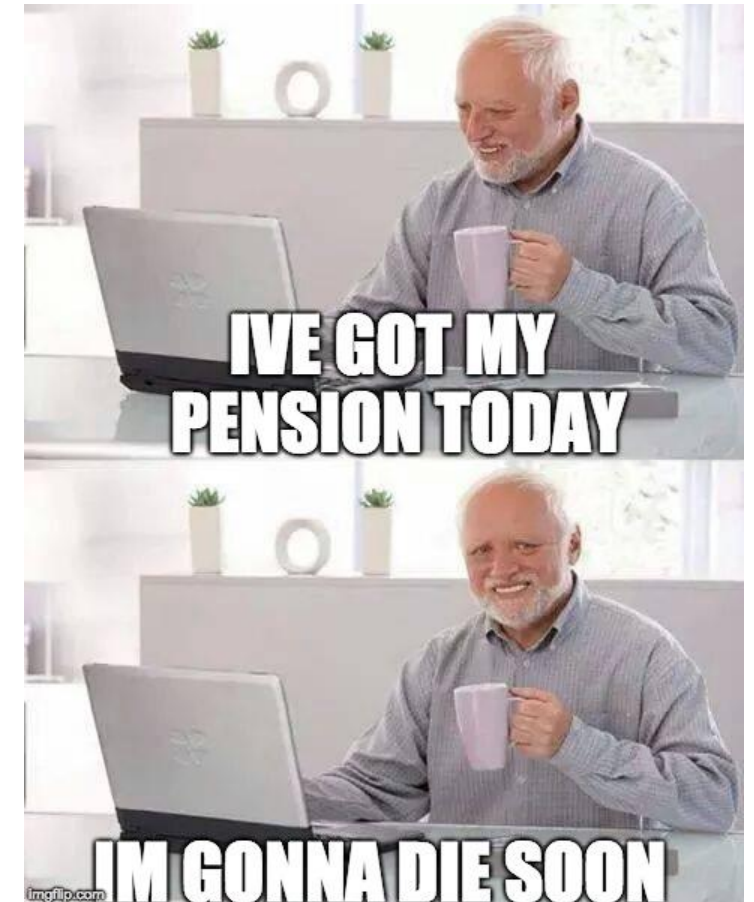
**SCOTEX declined to waive immunity, claiming that this was within the legislative (not the judiciary) power**



# PENSIONS

## *Eddington v. Dallas Police & Fire Pension Sys.*– SCOTEX

- The Texas Constitution prohibits the reduction of benefits in certain local public retirement plans; Dallas Police and Fire Pension System amended its pension plan to reduce the interest rate paid on Deferred Retirement Option Plan accounts.
- **Does the reduction in future interest constitute a reduction of benefits?**
- No, the Constitution protects against “accrued” benefits—those earned by service, not by future service





# PENSIONS

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## *City of Houston v. Houston Mun. Emps. Pension Sys.– SCOTEX*

- The City created the Pension System (City-controlled NPO) and transferred some of its employees therein. The Pension System Board designated its employees as “city employees” for purposes of pension benefits and sought to compel the City to provide information regarding employees in a similar situation (transferred from City to City-controlled NPO) and to allocate funds for these employees’ pensions.
- **Does the state Pension statute authorize the Pension System’s actions and did the City act outside the law by refusing to comply with the the Pension System’s requests?**

# PENSIONS

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## *City of Houston v. Houston Mun. Emps. Pension Sys.– SCOTEX*

- Yes, the Pension statute expressly authorized pension board to construe statute, and pension board had authority to interpret “employee,” as term was used in statute, to include employees of corporations.
- Yes, the statute stated that City “shall provide full and timely information” to pension system and that city “shall make contributions” to pension system, leaving no room for city to exercise judgment regarding making of payments

# **POLICIES & PROCEDURES MANUAL**

## ***City of Denton v. Rushing – SCOTEX***

- On-call Utilities Department employees pay scales were questioned
- Alleged that Personnel Manual was Contract

“The contents of this manual do not in any way constitute the terms of a contract of employment.

**The city’s policies and procedures manual did not create an enforceable contract.**



# PREEMPTION

## *City of Laredo v. Laredo Merchants Assoc.* – SCOTEX

- **To reduce litter**, the City of Laredo passed an ordinance banning stores from providing/selling single-use plastic or paper bags at checkout
- Merchants Association brought suit claiming ordinance is preempted by the Solid Waste Disposal Act (SDWA)
- Court held that language of SDWA specifically prohibits ordinances that attempt to prohibit or restrict “the sale or use” of containers “for solid waste management purposes” = **preemption**.





# PREEMPTION

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## *City of Laredo v. Laredo Merchants Assoc.* – SCOTEX

- “Container” or “Package” includes a plastic bag according to the dictionary
- Concurrence = a patchwork of plastic bag laws



# TEXAS CITIZENS PARTICIPATION ACT

## *State ex rel. Best v. Harper – SCOTEX*

- Harper was elected to County Hospital District Boards and ran on lowering taxes; once in office, he moved to set the tax rate at zero & allegedly posted blog that accused other officials of violating the law
- Resident brought suit to remove him for incompetency, but also alleged Open Meetings Act violations
- Under removal statute, county attorney represents State; lower courts dismissed State's removal action under TCPA b/c no *prima facie* grounds for removal



# **TEXAS CITIZENS PARTICIPATION ACT**

## ***State ex rel. Best v. Harper – SCOTEX***

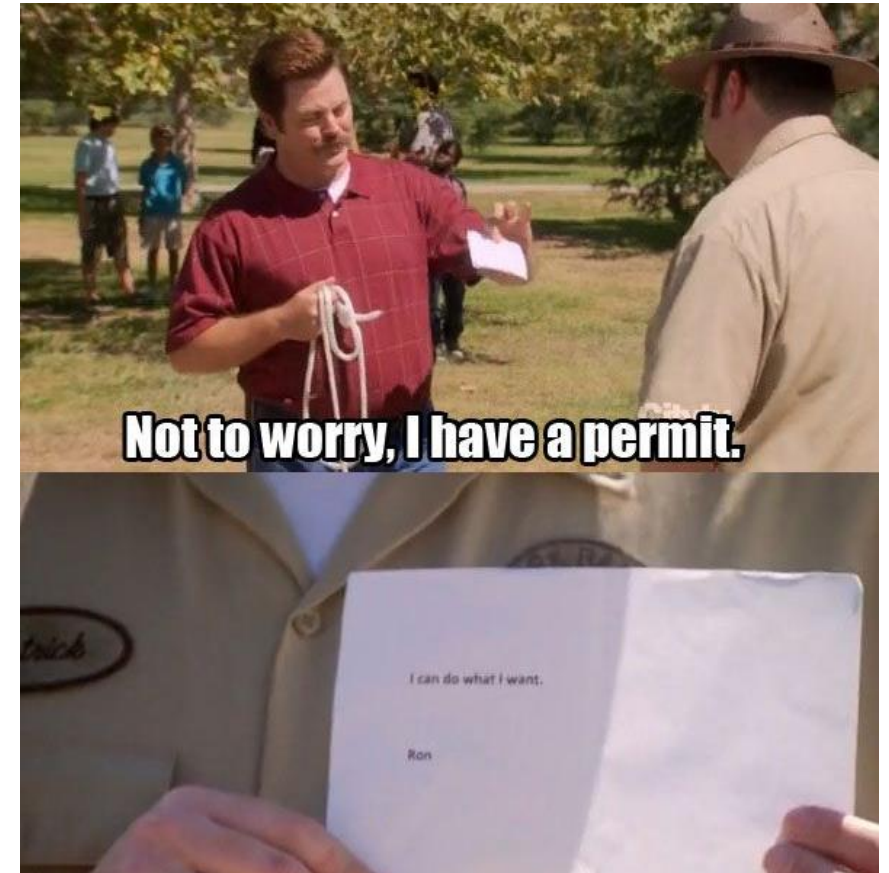
- SCOTEX held that removal suit was a “legal action” under the TCPA, not an “enforcement action”
- Enforcement actions are based on unlawful conduct; incompetency is not against the law
- State’s suit under the TCPA is dismissed because being incompetent or having strange political beliefs is not unlawful
- But: State may still have claim to remove him for Open Meetings Acts violations

# UNCONSTITUTIONAL LOCAL LAW

*City of Tyler v. Liberty Util. Corp.* – Houston Court of Appeals [1st Dist.]

- City of Tyler wanted to provide sewer service within Liberty's service area
- State law prohibits dual service in the area, so the City went to the Legislature, which passed Water Code Section 13.2475
- This provided the City an exception from the general law so they could provide service

***The Court struck this down as an unconstitutional local law.***





# Open Meetings Act v. Court of Criminal Appeals

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*State of Texas v. Doyal* (Tex. Crim. App.)

-County Commissioner (County Judge)

-Indicted for violating TOMA:

“knowingly conspires to circumvent [the Act] by meeting in numbers less than a quorum for the purpose of secret deliberations”

*Unconstitutionally Vague*

Texas Legislature addressed in S.B. 1640.



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# MORE CASES OF INTEREST TO LAURA MUELLER



# Conclusion

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