Federal Fifth Circuit and Texas Cases of Interest to Cities – February 2026

Note: Included cases are from February 1, 2026, through February 28, 2026. *These case summaries have been prepared with the assistance of AI.*

Civil Rights

Fourth Amendment Searches: *Lewis v. Walley*, No. 24-60379, 2026 WL 548095 (5th Cir. Feb. 27, 2026). Stephen Lewis filed a § 1983 action against Detective Whitney Walley, alleging a Fourth Amendment violation due to Walley's warrantless review of images extracted from Lewis's cellphone by another officer. The district court denied Walley's motion for judgment on the pleadings, rejecting her qualified immunity defense. Walley appealed the decision, arguing that her conduct did not violate clearly established law and was not unreasonable. The Fifth Circuit reviewed the denial of the motion de novo, focusing on whether Walley's actions constituted a Fourth Amendment search and if such actions violated clearly established law, and found that it was not clearly established that Walley's review of the images constituted a search under the Fourth Amendment. Additionally, the Fifth Circuit determined that Walley's reliance on the investigator's statement about a completed search warrant was not objectively unreasonable. The court concluded that Lewis failed to demonstrate that Walley's conduct violated clearly established law, thus not overcoming the qualified immunity defense. Consequently, the Fifth Circuit reversed the district court's decision and rendered a judgment of dismissal in favor of Walley.

Fourth Amendment Seizure: *Kennedy v. City of Arlington, Tex.*, 165 F.4th 937 (5th Cir. 2026). Brittney Kennedy filed a § 1983 action against the City of Arlington and individual police officers, alleging Fourth and Fourteenth Amendment violations following the death of her husband, Marquis Kennedy, during a mandatory self-defense training exercise at the Arlington Police Academy. Marquis suffered a cardiac arrest after participating in the Gracie Survival Tactics course, which involved intense physical scenarios. Despite showing signs of distress, such as lightheadedness and fatigue, Marquis continued the exercise to avoid failing the program. He eventually dropped an "officer in distress" card, signaling that he was in trouble and could not continue, but the instructors allegedly ignored it. Emergency medical services were called after Marquis stopped breathing, but he never regained consciousness and died two days later. The district court dismissed the complaint, finding no plausible allegations of constitutional violations, and the Fifth Circuit ultimately affirmed this decision. The appellate court held that the instructors did not seize Marquis for Fourth Amendment purposes, as there was no intent to restrain or harm him. Additionally, the court found no substantive due process violation, as the instructors did not intend to harm Marquis, and the allegations amounted to negligence rather than a constitutional breach. The court also

dismissed claims of bystander and municipal liability due to the absence of a predicate constitutional injury.

Elections

Election Contest: *Lunceford v. Craft*, 2026 WL 280362 (Tex. App.—Houston [1st Dist.] Feb. 3, 2026). Erin Elizabeth Lunceford contested the results of the 2022 general election for the position of District Judge of the 189th Judicial District in Harris County, where Tamika Craft was declared the winner by a margin of 2,743 votes. Lunceford filed a suit under Section 221.003 of the Texas Election Code, alleging that the election outcome was not the true outcome due to illegal votes being cast and counted, legal votes not being counted, and election officials engaging in fraud, illegal conduct, or mistakes. The trial court, after a bench trial, found that while 2,779 votes were affected, this number was not large enough to put the true outcome of the election in doubt, and thus declared Craft's victory as the true outcome. Lunceford appealed the trial court's judgment, arguing that the trial court erred in its findings regarding the number of affected votes and the application of the undervote percentage.

The appellate affirmed the trial court's judgment, holding that Lunceford did not meet the burden of proving by clear and convincing evidence that the voting irregularities materially affected the outcome of the election. The appellate court found that the trial court did not abuse its discretion in its findings regarding the number of affected votes and the application of the undervote percentage. The court also denied Craft's motion to dismiss the appeal on the basis of untimeliness, concluding that Lunceford's appeal was subject to the notice of appeal rules for regular appeals, not accelerated appeals.

Employment

First Amendment Retaliation: *Castille v. Port Arthur ISD*, No. 24-40644, 2026 WL 507783 (5th Cir. Feb. 24, 2026). Dr. Johnathan Castille, a special education administrator, was terminated from his position at Memorial High School in Port Arthur ISD and subsequently sued the school district and several employees, alleging retaliation for reporting child abuse and participating in a CPS investigation, among other claims. The district court dismissed his case for failure to state a claim, and Castille appealed. On appeal, Castille argued that his First Amendment rights were violated because his reports of child abuse and participation in the CPS investigation were protected speech. Although speech addressing matters of public concern may receive constitutional protection, speech made pursuant to an employee's official duties is not protected—even when the subject of the speech is of significant public importance. The Fifth Circuit determined that Castille's reports and participation were made as an employee, not as a citizen, and thus were not protected by the First Amendment. Castille also claimed that his termination violated his Fourteenth Amendment due process

rights, but the court found he failed to demonstrate a violation of procedural or substantive due process. The Fifth Circuit noted that Castille received notice and a hearing before his termination, satisfying procedural due process requirements. Additionally, Castille's allegations did not meet the high standard required to prove a substantive due process violation, as they did not "shock the conscience." The Fifth Circuit also upheld the district court's decision to grant qualified immunity to the individual defendants, as Castille did not sufficiently plead a violation of his constitutional rights. Furthermore, the court affirmed the dismissal of Castille's conspiracy claim under § 1983, as he did not adequately allege a deprivation of civil rights. Ultimately, the appellate court affirmed the district court's judgment in favor of the defendants.

Disability Accommodations: *Oliver v. Jack Henry & Associates, Inc.*, No. 25-20153, 2026 WL 383608 (5th Cir. Feb. 11, 2026). Maranda Oliver sued her former employer, Jack Henry & Associates, Inc. (JHA), under the Americans with Disabilities Act (ADA) for failure to accommodate and disability discrimination. Oliver, diagnosed with dyslexia, worked as a technical support representative and began experiencing work difficulties in 2020, which she attributed to staff downsizing and remote work requirements. After several incidents of unprofessional behavior, JHA's HR department initially decided to terminate her employment but instead issued a final warning and granted her time off. Oliver requested accommodations for her dyslexia, including fewer tasks and more time to work, but JHA deemed these requests unreasonable as they would burden other employees. JHA also considered transferring Oliver to another department but ultimately denied this due to her not meeting the two-year employment requirement and her documented performance issues. Oliver's employment was terminated on June 2, 2021, for performance and conduct issues. The district court granted summary judgment in favor of JHA, concluding that Oliver's accommodation requests were not reasonable and that JHA had legitimate, nondiscriminatory reasons for her termination. Oliver's appeal was unsuccessful, with the Fifth Circuit affirming the district court's judgment.

Discrimination: *Abajian-Salon V. San Antonio*, No. 25-50010, 2026 WL 311957 (5th Cir. Feb. 5, 2026). Lucy Abajian-Salon, a former probationary police officer with the San Antonio Police Department (SAPD), who had been born in Lebanon, was terminated following an off-duty incident involving construction workers, which led to an internal investigation by SAPD. The investigation concluded that her actions violated SAPD rules, leading to her termination. Abajian-Salon filed a lawsuit against the City of San Antonio, alleging discrimination under Title VII of the Civil Rights Act, 28 U.S.C. § 1981, and the Texas Labor Code. The district court granted summary judgment in favor of the city, dismissing all claims with prejudice. On appeal, Abajian-Salon abandoned claims under the Texas Labor Code, § 1981, and age and race discrimination claims under Title VII, leaving only national origin and sex discrimination

claims. The appellate court applied the *McDonnell Douglas* burden-shifting framework, finding that while Abajian-Salon made a prima facie case, the city provided a legitimate, non-discriminatory reason for her termination. Additionally, Abajian-Salon failed to demonstrate that the city's reason was pretextual. Ultimately, the Fifth Circuit affirmed the district court's summary judgment, concluding that the city's explanation for her termination was legitimate and non-discriminatory.

Gender Discrimination: *City of Pharr v. Guerra*, No. 13-24-00112-CV, 2026 WL 395812 (Tex. App.—Corpus Christi-Edinburg Feb. 12, 2026) (mem. op.). Lt. Krystle Guerra, a lieutenant in the City of Pharr Fire Department, sought district court review of two suspensions—five and ten days—upheld by the City of Pharr Fire & Police Civil Service Commission. Guerra also alleged gender discrimination and retaliation under Chapter 21 of the Texas Labor Code. The city filed a plea to the jurisdiction, arguing that Guerra's Chapter 21 claims were not viable and that the relief she requested exceeded the district court's authority. The city also filed a motion for summary judgment, asserting that the Commission's decisions were supported by substantial evidence. The district court denied both the plea to the jurisdiction and the motion for summary judgment. The city appealed these interlocutory orders.

The appellate court reversed the district court's denial of the city's plea to the jurisdiction regarding Guerra's Chapter 21 claims, concluding that the district court lacked subject matter jurisdiction over these claims. The appellate court found that Guerra failed to establish a prima facie case for her claims of gender discrimination and retaliation, as she did not provide evidence of being treated less favorably than a similarly situated male employee or a causal link between her protected activities and her suspensions. Consequently, the court rendered a judgment of dismissal on Guerra's Chapter 21 claims. The court dismissed the remainder of the appeal, as it did not have interlocutory jurisdiction over the denial of the city's motion for summary judgment.

Ethics

Attorney Ethics; AI Hallucination: *Fletcher v. Experian Info. Sols., Inc.*, No. 25-20086, 2026 WL 456842 (5th Cir. Feb. 18, 2026). The case involves an appeal by Robert Fletcher against Experian Information Solutions, Inc. and Bridgecrest Credit Company, L.L.C. Fletcher's attorney, Heather Hersh, used generative artificial intelligence (AI) to draft a substantial portion of a reply brief without verifying its accuracy. The court issued a show-cause order to Hersh, identifying 16 fabricated quotations and five serious misrepresentations. Hersh's response was found to be evasive and misleading, as she initially failed to admit the use of AI and did not adequately verify the brief's content. The court of appeals determined that Hersh's conduct was "unbecoming a member of the bar" and imposed a $2,500 sanction. The case highlights the ethical obligations of attorneys to ensure the accuracy of AI-generated

legal documents. The court emphasized that existing rules are sufficient to address misconduct related to AI use, and the court's decision reflects ongoing concerns about AI "hallucinations" in legal filings and the need for attorneys to verify AI-generated content.

Note: Although the following case is a federal district court case, it is being included as an additional resource regarding the intersection of AI and attorney ethics.

Attorney Ethics; Artificial Intelligence: *Holmes v. Univ. of Tex. at Austin*, No. 1:24-CV-1135-RP, 2026 WL 297630 (W.D. Tex. Feb. 4, 2026). While this is a trial court order related to a motion for reconsideration, in addition to ruling on the motion, the district court ordered counsel for Ericka Holmes (the plaintiff in this case) to appear at a show-cause hearing concerning the apparent misuse of generative AI in their pleadings. The court identified several indicators of AI-generated legal content that had not been verified by counsel. These included citation to a nonexistent case—"*Harris v. City of Houston* (5th Cir. 2022)"—and reliance on a legal phrase the Fifth Circuit has never used; mischaracterization of real cases; repeated quotations that appeared without supporting analysis; incorrect statements about the basis of the court's prior rulings, including the dismissal of § 1983 claims; egregiously incorrect citation formatting; and disorganized sections of the motion, such as discussion of age discrimination under headings for race discrimination. The court explained that such errors often signal unverified use of generative AI tools and emphasized that attorneys have an obligation to ensure the accuracy of legal authorities and arguments presented to the court. At the time of publication of the order, the show cause hearing had not occurred.

Immunity

Qualified Immunity; Unlawful Arrest: *Harvey v. Monteil; Garcia; City of Pharr Police Dep't*, No. 25-40127, 2026 WL 483286 (5th Cir. Feb. 20, 2026). In September 2023, Andrew Harvey, a former City of Pharr Police Chief, was arrested by Pharr Police Department officers at his home following text messages allegedly sent from his phone to 911 dispatch. Harvey claimed the officers used excessive force, entered his home without a warrant or consent, and that the City of Pharr failed to properly train its employees regarding 911 communications and constitutional protections. The district court dismissed all of Harvey's claims with prejudice for failure to state a claim. Harvey appealed, and the Fifth Circuit reversed the district court's dismissal of his Fourth Amendment unlawful arrest claim against the officers but affirmed the dismissal of his other claims. The court found that Harvey plausibly alleged an unlawful arrest due to the lack of exigent circumstances justifying the officers' warrantless entry into his home. However, the Fifth Circuit agreed with the district court that Harvey failed to allege the absence of probable cause for his arrest. The appellate court also affirmed the dismissal of Harvey's *Monell* claims against the city for failure to train and supervise, as well as his Fourteenth Amendment selective enforcement claim. Additionally, the court affirmed the district court's denial of Harvey's motion to reconsider and his request for leave to amend his

complaint. The case was remanded for further proceedings regarding the unlawful arrest claim and the officers' entitlement to qualified immunity.

Qualified Immunity: *Elizondo v. Hinote*, No. 25-40007, 2026 WL 311958 (5th Cir. Feb. 5, 2026). Ronald and Maria Elizondo filed a lawsuit under 42 U.S.C. § 1983 against Texas State Trooper Donald Hinote, alleging excessive force in the fatal shooting of their son, Ronald Elizondo, Jr. The incident occurred when Elizondo, Jr. broke into Hinote's vehicle and a neighbor's vehicle, prompting Hinote to confront him with a handgun after being awakened by a security alarm. Hinote shot Elizondo, Jr. when he ran towards him holding an object that appeared to be a weapon. The district court granted summary judgment in favor of Hinote, ruling that his use of force was not unreasonable and did not violate clearly established law. The Elizondos appealed, challenging the grant of qualified immunity to Hinote. The appellate court reviewed the district court's decision de novo, focusing on whether Hinote violated a clearly established statutory or constitutional right. The Elizondos failed to provide a case with analogous facts that would have put Hinote on notice that his conduct was unlawful, finding that the cases cited by the Elizondos were factually distinguishable. Consequently, the Fifth Circuit affirmed the district court's judgment, granting Hinote qualified immunity .

Land Use

Short-term Rentals: *City of Dickinson v. Crystal Cruise Investments*, No. 01-24-00684-CV, 2026 WL 530391 (Tex. App.—Houston [1st Dist.] Feb. 26, 2026). Crystal Cruise Investments, LLC, doing business as Nautical Navy, owned and rented out short-term rental properties, including one on Casa Grande Street in Dickinson without obtaining the required specific use permit as per the city's vacation rental ordinance. After being notified by the city that this operation violated the ordinance, Crystal Cruise filed a lawsuit challenging the ordinance's constitutionality, claiming it violated their rights to due course of law and equal protection under the Texas Constitution. The trial court ruled in favor of Crystal Cruise, declaring the ordinance unconstitutional and enjoining its enforcement. The City of Dickinson appealed, arguing that the trial court erred in invalidating the ordinance and in not awarding statutory damages against Crystal Cruise.

The appellate court reversed the trial court's judgment, holding that the vacation rental ordinance did not violate Crystal Cruise's rights to due course of law or equal protection. The appellate court found that the ordinance was a valid exercise of the city's police power, rationally related to legitimate government interests such as preserving the residential character of neighborhoods and safeguarding public welfare. The court also determined that Crystal Cruise failed to demonstrate it was treated differently from similarly situated parties, thus failing to establish an equal protection violation. Consequently, the appellate court rendered judgment for the city on Crystal Cruise's claims and remanded the city's counterclaim for further proceedings.

Official Capacity

City Attorney: *Mergel v. Bigby*, No. 14-24-00592-CV, 2026 WL 507649 (Tex. App.—Houston [14th Dist.] Feb. 24, 2026) (mem. op.). Debra Mergel, a former city attorney for the City of Arcola, was sued in her official capacity, along with other city officials, by Arcola city councilmembers Rosemary Bigby, Evelyn Jones, and Ebony Sanco for alleged ultra vires acts that included preventing Councilmember Sanco from exercising her office and failing to include requested agenda items on the city council meeting agenda. The trial court issued a temporary injunction against the defendants and, after a bench trial, ruled in favor of the councilmembers, declaring that Mergel and others committed ultra vires acts. Mergel, no longer a city attorney at the time of the final judgment, filed a notice of appeal in her individual capacity after the trial court denied a motion to substitute parties following changes in city officials.

The court of appeals dismissed Mergel's appeal for lack of jurisdiction, as she lacked standing to appeal in her individual capacity. The court noted that the suit was against Mergel in her official capacity, which is distinct from her individual capacity, and thus she was not a party to the judgment in her individual capacity. The court concluded that Mergel could not appeal the judgment rendered against her official capacity and had not taken steps to intervene in her individual capacity to gain standing. Consequently, the appeal was dismissed.

Public Safety

Dangerous Dogs: *Shane Lilly v. The State of Texas*, No. 03-25-00529-CV, 2026 WL 375672 (Tex. App.—Austin Feb. 11, 2026) (mem. op.). Shane Lilly, representing himself, appealed a decision from the trial court regarding his dog, Major, who was ordered to be humanely euthanized after being found to have caused serious bodily injury to Julissa Alvarez. Following the incident, the Austin Municipal Court issued a seizure warrant for Major, and after a hearing, ordered the dog to be euthanized. Lilly appealed this decision to the county court at law, which also found that Major caused serious bodily injury and upheld the euthanasia order. Lilly then appealed to the court of appeals, arguing several issues, including that the trial court's order was not compliant with procedural rules, that Alvarez provoked the attack, and that there were less punitive alternatives to euthanasia.

The court of appeals affirmed the trial court's order, and overruled Lilly's arguments. The court concluded that the procedural rule Lilly cited was inapplicable, and that the statute under which Major was ordered to be euthanized did not require a finding of criminal negligence or an unprovoked attack. The court also determined that Lilly's disability defense was not applicable, as it pertained to a different section of the law not relevant to this case. Additionally, the court found no due process violation in the trial court's reliance on affidavits and testimony rather than live testimony from Alvarez. Finally, the court concluded that the

trial court did not abuse its discretion in ordering euthanasia over rehabilitative training, given Major's aggressive behavior and the risk to public safety.

Tort Claims Act

Special Defects: *Texas Dep't of Transp. v. Simpson*, 2026 WL 472541 (Tex. App.—Corpus Christi-Edinburg Feb. 19, 2026)(mem. op.). This case involves a wrongful death lawsuit filed by Tanya Simpson against the Texas Department of Transportation (TxDOT) following a fatal accident on State Highway 361 (SH 361) in Nueces County. On May 3, 2015, Kyle Matthew Jones, while driving fatigued, crossed into the opposite lane, forcing Laura Ochoa to swerve into a ditch. Floyd Simpson, traveling behind Ochoa on a motorcycle, laid his motorcycle down to avoid a collision and suffered fatal injuries. Simpson alleged that the road's condition, specifically "flushing," constituted a special defect under the Texas Tort Claims Act (TTCA), and that TxDOT failed to place proper warning devices. TxDOT filed a plea to the jurisdiction, asserting governmental immunity, which the trial court denied, leading to this interlocutory appeal.

The appellate court reversed the trial court's decision, holding that Simpson failed to establish the trial court's subject-matter jurisdiction. The court determined that the road condition did not qualify as a special defect under the TTCA, as it did not physically impair travel like an excavation or obstruction. Additionally, there was no evidence that TxDOT had actual knowledge of the alleged dangerous condition. The court also found that TxDOT's decisions regarding the placement of safety features were discretionary functions, preserving TxDOT's sovereign immunity. Consequently, the court rendered judgment granting TxDOT's plea to the jurisdiction and dismissed Simpson's claims for lack of subject matter jurisdiction.

Pleading Sufficiency: *City of Houston v. Ezzeddine*, No. 14-24-00907-CV, 2026 WL 468004 (Tex. App.—Houston [14th Dist.] Feb. 19, 2026). Hasan Ezzeddine, individually and as a representative of the estate of M.D., deceased, along with passengers Aubry Davis and B.T., by and through her next friend Hassan Ezzeddine ("Ezzeddine"), filed a personal injury suit against the City of Houston following a vehicular collision at an intersection with inoperative traffic signals. Ezzeddine alleged that the city was aware of the outage and had placed temporary signage, but another driver, misled by inadequate signage, collided with their vehicle, resulting in M.D.'s death and injuries to the other occupants. The city moved to dismiss the claims under Texas Rule of Civil Procedure 91a, arguing that Ezzeddine failed to plead sufficient facts to demonstrate a waiver of governmental immunity. The trial court denied the city's motion, leading to this interlocutory appeal.

The court of appeals reversed the trial court's decision, agreeing with the city that Ezzeddine did not plead facts sufficient to bring their claims within a statutory waiver of immunity under the Texas Tort Claims Act. The appellate court found that Ezzeddine's allegations were

conclusory and lacked specific facts about the temporary signage's inadequacy or misleading nature. As a result, the court rendered judgment dismissing Ezzeddine's claims with prejudice, as they failed to allege a cause of action for which the legislature has waived the city's governmental immunity.

Governmental Functions: *City of Fort Worth v. JDB Towing, LLC,* No. 02-25-00431-CV, 2026 WL 406038 (Tex. App.—Fort Worth Feb. 12, 2026)(mem. op.). The Fort Worth Police Department removed JDB from its list of approved tow providers, leading to the termination of JDB's software-licensing agreement with AutoReturn, the city's towing liaison. JDB alleged that this removal constituted tortious interference, causing it to suffer damages from lost business. The city argued that the claim arose from its performance of a governmental function, specifically police-purpose vehicle towing, which is protected by governmental immunity. The City of Fort Worth filed an interlocutory appeal after the trial court denied its motion to dismiss JDB's tortious-interference-with-contract claim for lack of jurisdiction.

The court of appeals agreed with the city, holding that police-purpose towing is a governmental function as it is an essential part of the city's police power, thus granting the city governmental immunity. The court noted that the Texas Tort Claims Act does not waive immunity for intentional torts, such as tortious interference with a contract. Consequently, the appellate court reversed the trial court's decision and rendered judgment dismissing JDB's claim for lack of subject matter jurisdiction.

Emergency Response Exception: *City of Houston v. White*, No. 14-24-00966-CV, 2026 WL 366452 (Tex. App.—Houston [14th Dist.] Feb. 10, 2026)(mem. op.). Daniel White and Wendell White (the Whites) filed a lawsuit against the City of Houston, alleging personal injuries and property damage from a collision with a Houston Fire Department vehicle driven by Ashley Mabe, an employee of the city. The Whites claimed negligence and other related causes of action, but the city filed a motion to dismiss under Texas Rule of Civil Procedure 91a, arguing that the Whites failed to plead facts negating governmental immunity under the Texas Tort Claims Act (TTCA) exceptions, including the emergency response and 9-1-1 emergency service exceptions. The trial court denied the city's motion, leading to this interlocutory appeal.

The court of appeals reversed the trial court's decision, holding that the Whites did not plead sufficient facts to overcome the TTCA's emergency response and 9-1-1 emergency service exceptions, thus failing to establish a waiver of governmental immunity. The appellate court concluded that the trial court erred in denying the city's Rule 91a motion to dismiss and rendered judgment dismissing the Whites' suit for lack of subject matter jurisdiction.

Recent Texas Attorney General Opinions of Interest to Cities

Note: Included opinions are from February 1, 2026, through February 28, 2026.

KP-0511 (Open Meetings Act): The Texas Open Meetings Act applies to a "meeting" of a municipality's governing body. A home-rule municipality's charter may define a quorum for purposes of a "meeting" under the Act. While a gathering of members of a governmental body in less than a quorum does not ordinarily trigger the Act, a governmental body does not always insulate itself by avoiding a quorum. Thus, we cannot conclude as a matter of law that every conceivable gathering involving less than a quorum of a municipality's governing body would not trigger or violate the Act.

KP-0514 (Performance Bonds): Subsection 2253.021(a) of the Government Code obligates a county to require a prime contractor to execute a performance and payment bond.

KP-0515 (Property Tax Elections): Hood County Hospital District's authority to impose a property tax under Special District Local Laws Code Chapter 1042 does not conflict with the voters' ability to limit a tax-rate increase under Tax Code section 26.07. A county's obligation to provide health care services and assistance pursuant to Health and Safety Code section 61.022 does not apply to a person who resides in the service area of a hospital district.

KP-0517 (Sandra Bland Act): The phrase "death of a prisoner in a county jail" in Government Code subsection 511.021(a) requires appointment of an independent law enforcement agency to investigate a prisoner death that occurred in the county jail itself. However, this does not mean the Commission lacks statutory authority to promulgate a rule requiring independent investigation of prisoner deaths while in custody.

Federal and State Cases of Interest to Cities- January 2026

Note: Included cases are from January 1, 2026, through January 31, 2026. *These case summaries have been prepared with the assistance of AI.*

Procurement

Competitive Bidding: *4 Families of Hobby, LLC v. City of Houston*, No. 24-0796, 2026 WL 70833 (Tex. January 9, 2026). In this case, 4 Families of Hobby, LLC, 4 Families of Houston, LLC, and Pappas Restaurants, Inc. (collectively "Pappas") sued the City of Houston, alleging that the city violated Section 252.021(a) of the Local Government Code by entering into a

contract with Areas HOU JV, LLC for food and beverage concessions at Houston's Hobby Airport without following the required procurement procedures for contracts involving expenditures over $50,000. Pappas sought a declaration that the contract was void and requested temporary and permanent injunctions. The trial court denied the city's plea to the jurisdiction without allowing jurisdictional discovery, and the City appealed.

The court of appeals reversed the trial court's decision in part, dismissing Pappas's claims under Chapter 252. The appellate court concluded that the contract was a revenue-generating agreement and did not require the city to make expenditures of $50,000 or more, citing a "no city expenditure" clause in the contract. The court found that the evidence provided by Pappas was insufficient to establish that the contract required such expenditures, and it dismissed the claims without allowing jurisdictional discovery.

The Texas Supreme Court reversed the appellate court's decision, granting Pappas the right to jurisdictional discovery. The Court determined that certain provisions of the contract could reasonably be interpreted to require city expenditures exceeding $50,000, thus warranting further investigation. The Court emphasized that the distinction between revenue and expenditure contracts was irrelevant under Chapter 252 and that the "no city expenditure" clause did not conclusively resolve the issue. The case was remanded to the trial court for jurisdictional discovery to allow Pappas to establish whether the contract required expenditures over the statutory threshold.

Attorney's Fees

Attorney's Fees following Vacatur: *Pool v. City of Houston*, 163 F.4th 284 (5th Cir. 2026). This opinion comes after significant litigation at both the trial and appellate court levels based on the same facts. This case involves a constitutional challenge by professional petition circulators against the City of Houston's charter provisions requiring circulators to be residents and registered voters of the city. Initially, the district court dismissed the action, but the Fifth Circuit reversed and remanded, allowing the case to proceed. On remand, the district court declared the charter provisions unconstitutional and awarded attorney's fees to the circulators, and the city appealed. In a subsequent appeal, the Fifth Circuit found no Article III controversy, as all parties agreed the provisions were unconstitutional, and remanded the case back to the district court for dismissal without prejudice. Following this, the district court vacated the attorney's fee award, prompting the circulators to appeal again. The Fifth Circuit affirmed the vacatur, noting that the lack of a case or controversy from the outset nullified the basis for the fee award. The Fifth Circuit also held that the circulators' failure to seek rehearing of the decision in the second appeal precluded them from restoring their prevailing party status. The decision to vacate the fee award was not deemed unduly prejudicial, as the circulators were aware that the merits judgment was still on appeal. Ultimately, the Fifth Circuit concluded that the district court properly followed its mandate in vacating the fee award.

Land Use

Zoning: *City of Arlington v. Cerkezi Enterprises, L.L.C.*, No. 02-25-00406-CV, 2026 WL 71144 (Tex. App.—Fort Worth Jan. 8, 2026) (mem. op). This case involves a dispute between the City of Arlington and Cerkezi Enterprises, L.L.C., doing business as Euro Car Tech, regarding zoning regulations affecting Euro Car Tech's business operations. Euro Car Tech, operated by Elio Cerkezi, had been conducting major auto repair and selling used cars on a property in Arlington since 2018, despite these activities not being permitted under the property's zoning designation. An erroneous certificate of occupancy issued in 2015 and reissued in 2018 incorrectly authorized major auto repair. In 2022, the State of Texas refused to renew Cerkezi's dealership license due to zoning violations, prompting Cerkezi to seek rezoning. The city discovered the error and issued a corrected certificate of occupancy, leading to multiple citations against Cerkezi for continued violations. Cerkezi sued the city, alleging inverse condemnation, estoppel, and violations of the Local Government Code. The trial court denied the city's motion for summary judgment and plea to the jurisdiction, leading to this appeal.

The court of appeals reversed the trial court's decision, ruling in favor of the city. The appellate court found that Euro Car Tech failed to state a claim that waived the city's governmental immunity. The court held that Euro Car Tech consented to the fence requirement as a condition for rezoning, negating its inverse condemnation claim. Additionally, the court determined that Euro Car Tech could not establish an estoppel claim because it had no protected property interest in the erroneously issued certificate of occupancy. Lastly, the court concluded that Euro Car Tech's business was not a nonconforming use under the Local Government Code, as the zoning ordinance predated Euro Car Tech's operations. Consequently, the appellate court rendered judgment dismissing Euro Car Tech's claims against the city.

Short-Term Rentals: *Rancho De Los Arboles LLC v. Town of Cross Roads*, No. 02-25-00208-CV, 2026 WL 253459 (Tex. App.—Fort Worth January 30, 2026) (mem. op.). In this case, Rancho De Los Arboles LLC and Ellen Eakin (collectively, "Rancho") appealed the trial court's order dismissing with prejudice their claims against the Town of Cross Roads regarding a zoning ordinance that restricts short-term rentals (STRs) in single-family residential districts. Rancho had been using their property for STRs since acquiring it in 2010 and had paid hotel occupancy taxes to the State of Texas and Denton County. Cross Roads had regulated residential property use through a zoning ordinance since 2002, which was amended in 2024 to include specific restrictions on STRs. Rancho filed suit in October 2024, seeking declaratory relief and an injunction against the enforcement of the ordinance, claiming it violated their property rights under the Texas Constitution. The trial court granted Cross Roads's plea to the jurisdiction, dismissing all claims with prejudice, and Rancho timely appealed.

The court of appeals held that the trial court erred in dismissing Rancho's claims for deprivation of constitutional property rights without due process and unconstitutional retroactivity with prejudice, as Rancho was not afforded the opportunity to replead these claims. The appellate court reversed the trial court's dismissal of these two claims and remanded them for further

proceedings. However, the court affirmed the dismissal of Rancho's other claims, including those related to ultra vires acts, disparate treatment, and the interpretation of the zoning ordinance, for lack of jurisdiction.

Nuisance Abatement

Nuisance Abatement: *Richard Montellano v. Gina Ortiz Jones*, et al., No. 04-25-00331-CV, 2026 WL 157128 (Tex. App.—San Antonio Jan. 21, 2026, no pet.) (mem. op.). Richard Montellano appealed the trial court's decision to grant a plea to the jurisdiction filed by officials of the City of San Antonio. Montellano alleged that the officials acted ultra vires by not implementing a relocation assistance program as required by section 21.046 of the Texas Property Code, following the demolition of his home deemed a public nuisance. The court held that the statute's language limits its applicability to situations involving eminent domain, where the government gains possession or the right to use the property. Since the city did not acquire Montellano's property under these terms, the court affirmed the trial court's judgment, concluding that the officials did not have a statutory duty to implement the program. Montellano's claim that his due course of law rights were violated was also dismissed, as he did not have a vested interest protected by the Texas Constitution.

Tort Claims Act

Election of Remedies: *Boyd Dwayne Quincy v. Crystal Dominick Branch*, No. 01-25-00469-CV, 2026 WL 88659 (Tex. App.—Houston [1st Dist.] Jan. 13, 2026) (mem. op.). This case arises from a motor vehicle collision where Crystal Dominick Branch, driving with her minor children, was struck by a dump truck operated by Boyd Dwayne Quincy, an employee of the City of Houston. Branch filed a negligence lawsuit against both Quincy and the city, asserting that Quincy was acting within the scope of his employment at the time of the accident. Quincy and the city filed motions to dismiss, citing the Texas Tort Claims Act's election-of-remedies provision, which they argued barred the suit against Quincy individually. The trial court denied these motions, and Quincy appealed the decision.

The appellate court reversed the trial court's decision, agreeing with Quincy that the election-of-remedies provision required dismissal of the claim against him. The court found that Branch's lawsuit against both Quincy and the city constituted an irrevocable election to sue the city, thereby barring any suit against Quincy individually. The court concluded that Branch's pleadings affirmatively negated subject matter jurisdiction over her claim against Quincy, and thus, remand was unnecessary. The court rendered judgment dismissing Branch's claim against Quincy.

Scope of Employment: *City of Houston v. Tennon*, No. 01-25-00391-CV, 2026 WL 168814 (Tex. App.—Houston [1st Dist.] Jan. 22, 2026) (mem. op.). This case involves a motor vehicle collision between a City of Houston vehicle driven by Reynohld Omar Gamboa and a car driven by Tanisha Tennon. Tennon filed a negligence lawsuit against the city and Gamboa, claiming that Gamboa was acting within the scope of his employment with the city when the accident occurred.

Tennon alleged that the Texas Tort Claims Act (TTCA) waived the city's governmental immunity for her claims. The city filed a motion to dismiss under Texas Rule of Civil Procedure 91a, arguing that Tennon failed to establish a waiver of immunity and did not plead facts to overcome the emergency or 9-1-1 exceptions to the TTCA's waiver of immunity. The trial court denied the city's motion, leading to this interlocutory appeal.

The appellate court affirmed the trial court's decision, holding that Tennon sufficiently alleged facts to establish a waiver of governmental immunity under Section 101.021(1) of the TTCA. The court found that Tennon's pleadings adequately alleged that Gamboa was acting within the course and scope of his employment and that his actions were negligent, thus triggering the TTCA's waiver of immunity. Additionally, the court concluded that Tennon sufficiently negated the applicability of the emergency and 9-1-1 exceptions by alleging that Gamboa's actions were not in compliance with applicable statutes and were conducted with conscious indifference or reckless disregard for safety.

Tort Claims Act: *Erica Lee Castillo v. City of San Antonio*, No. 04-25-00122-CV, 2026 WL 221256 (Tex. App.—San Antonio Jan. 28, 2026) (mem. op.). Erica Lee Castillo appealed the trial court's dismissal of her personal injury suit against the City of San Antonio, which was based on her failure to provide timely notice under the Texas Tort Claims Act. Castillo conceded she did not provide formal notice but argued that the city had actual notice through crash reports. The reports indicated minor vehicle damage and no reported injuries, which did not establish the city's subjective awareness of personal injury claims. The court concluded that the city neither received formal written notice nor had actual notice of Castillo's personal injury claims, thus affirming the trial court's dismissal due to lack of subject-matter jurisdiction.

Employment

Age Discrimination & Retaliation: *Awe v. Harris Health Sys.*, 163 F.4th 969 (5th Cir. 2026). Ayodeji Awe, a former chaplain at Harris Health System (HHS), sued his former employer for age discrimination under the Age Discrimination in Employment Act (ADEA) and retaliation under both the ADEA and Title VII of the Civil Rights Act of 1964. After leaving HHS in 2020, Awe reapplied for a job in 2021 but was not rehired, which led to his lawsuit. The district court granted summary judgment in favor of HHS, concluding that Awe failed to establish a *prima facie* case for his ADEA claims and did not provide evidence of pretext for his Title VII claim. Awe's age discrimination claim was dismissed because one of the hired candidates was older than him, and the twelve-year age gap with the youngest hired candidate was not substantial enough to support his claim. His ADEA retaliation claim failed because he did not demonstrate that his complaints were related to age discrimination. However, Awe successfully established a *prima facie* case of retaliation under Title VII by showing he engaged in protected activity and suffered a materially adverse action. Despite this, HHS provided a legitimate, non-retaliatory reason for not rehiring him, citing a preference for internal candidates, which Awe could not prove was pretextual. The Fifth Circuit affirmed the district court's decision, agreeing that Awe's evidence was insufficient to support his claims.

Employment Discrimination: *Harris Cnty. v. Hall*, No. 01-25-00399-CV, 2026 WL 168118 (Tex. App.—Houston [1st Dist.] Jan. 22, 2026) (mem. op.). Michael J. Hall, a former detention officer with the Harris County Sheriff's Office, filed an employment discrimination suit against Harris County, alleging violations of the Texas Commission on Human Rights Act (TCHRA) for disability discrimination and retaliation. Hall's employment was terminated after his third leave of absence request was denied, citing his lack of a current Commission on Law Enforcement (TCOLE) license and poor attendance. Hall filed a complaint with the Texas Workforce Commission on Civil Rights and subsequently sued the county. The county filed a plea to the jurisdiction and a motion for summary judgment, asserting governmental immunity and arguing that Hall failed to establish a prima facie case of discrimination or retaliation and did not exhaust administrative remedies. The trial court denied the county's plea and motion, leading to this interlocutory appeal.

The appellate court reversed the trial court's decision, holding that the county's governmental immunity was not waived because Hall failed to establish a prima facie case for any of his claims, including disability discrimination, failure to accommodate, retaliation, pattern and practice discrimination, and aiding and abetting discrimination. The court found that Hall was not qualified for his position at the time of termination due to an expired TCOLE license and failed to exhaust administrative remedies for his retaliation and aiding and abetting claims. Consequently, the appellate court rendered judgment dismissing Hall's claims against the county.

Employment Discrimination: *South Texas College v. Villagran*, No. 13-24-00224-CV, 2026 WL 62579 (Tex. App.—Corpus Christi-Edinburg Jan. 8, 2026) (mem. op.). Rolando Villagran, a former employee of South Texas College (STC), filed an employment discrimination lawsuit against STC, claiming discrimination based on national origin and sexual orientation, as well as a hostile work environment and retaliation. Villagran, a Hispanic, gay male, alleged that he was subjected to increased scrutiny and unfair treatment compared to similarly situated employees, and that he was wrongfully terminated despite improving his performance under a Conduct and Performance Improvement Plan (CPIP). STC filed a combined traditional and no-evidence motion for summary judgment, arguing that Villagran failed to establish a prima facie case for his claims and that STC had legitimate, nondiscriminatory reasons for his termination. The trial court denied STC's motion, leading to this interlocutory appeal.

The appellate court reversed the trial court's decision, concluding that Villagran failed to establish a prima facie case for his claims. The appellate court found that Villagran did not provide evidence that he was replaced by someone outside his protected class for his national origin discrimination claim, nor did he show that similarly situated employees were treated more favorably. For the sexual orientation discrimination claim, although Villagran established a prima facie case, STC demonstrated a legitimate, nondiscriminatory reason for his termination, and Villagran failed to prove this reason was pretextual. Additionally, Villagran conceded his hostile work environment and retaliation claims, and the court found no evidence supporting these claims. Consequently, the appellate court rendered judgment dismissing all of Villagran's claims for lack of jurisdiction.

Employment Discrimination: *South Texas College v. Fuentes*, No. 13-24-00049-CV, 2026 WL 111223 (Tex. App.—Corpus Christi-Edinburg Jan. 15, 2026) (mem. op.). Daniel Fuentes, a

former lead custodian at South Texas College (STC), filed a lawsuit against STC alleging hostile work environment, retaliation, and age and disability discrimination following his termination. Fuentes claimed that STC subjected him to discriminatory treatment due to his age, disability (diabetes and anxiety), and for engaging in protected activities. STC filed a motion for summary judgment, arguing that Fuentes failed to establish a prima facie case for his claims and that his termination was for legitimate, nondiscriminatory reasons related to poor job performance, specifically inventory control issues. The trial court denied STC's motion, leading to this interlocutory appeal.

The appellate court reversed the trial court's decision and rendered a judgment of dismissal for want of jurisdiction. The appellate court found that Fuentes failed to establish a prima facie case for age discrimination, as he did not provide evidence that he was replaced by someone significantly younger or treated less favorably than similarly situated employees outside his protected class. Additionally, Fuentes did not demonstrate that his termination was pretextual for disability discrimination, as he admitted to inventory mistakes and provided no evidence of disparate treatment. The court also concluded that Fuentes's retaliation claim lacked evidence of a qualifying complaint, and his hostile work environment claim did not show severe or pervasive harassment.

Employment Discrimination and Retaliation: *Univ. of Tex. at San Antonio v. Wilkerson*, No. 13-24-00021-CV, 2026 WL 202566 (Tex. App.—Corpus Christi-Edinburg Jan. 26, 2026) (mem. op.). Damien Wilkerson, a former warehouse worker at the University of Texas at San Antonio (UTSA), filed a lawsuit against UTSA under the Texas Commission on Human Rights Act (TCHRA), alleging disability discrimination, failure to provide reasonable accommodations, and retaliation. Wilkerson, who suffered from panic disorder and post-traumatic stress disorder, requested to work from home as an accommodation, which UTSA denied, leading to his termination. Wilkerson claimed that UTSA failed to engage in a meaningful interactive process to accommodate his disability and retaliated against him for previous complaints. UTSA filed an amended plea to the jurisdiction and motions for summary judgment, asserting sovereign immunity and arguing that Wilkerson was not qualified for his position and that his accommodation requests were unreasonable. The trial court denied UTSA's motions, prompting this interlocutory appeal.

The appellate court reversed the trial court's decision, holding that UTSA's sovereign immunity was not waived under the TCHRA because Wilkerson failed to establish a prima facie case for his claims. The court found that Wilkerson's request to work from home was not a reasonable accommodation, as the essential functions of his warehouse job required in-person attendance and driving, which he could not perform. Additionally, the court concluded that Wilkerson did not demonstrate a causal link between any protected activity and his termination to support his retaliation claim. Consequently, the appellate court rendered judgment in favor of UTSA, dismissing all of Wilkerson's claims for lack of subject matter jurisdiction.

Immunity

Supervisors' Qualified Immunity: *Hankins v. Martin*, No. 25-30114, 2026 WL 27803 (5th Cir. Jan. 5, 2026). Bilal Hankins, then eighteen, was searching for a neighbor's lost dog with a friend and a minor. They were driving slowly through the neighborhood in a BMW when they

encountered Kevin Wheeler, a police officer for the Orleans Levee District Police Department (OLD-PD), working off-duty for a private security detail for the Hurstville Security and Neighborhood Improvement District (Hurstville). Wheeler suspected the group of planning to break into cars and called for backup from officer Ramon Pierre, a police officer for the Housing Authority of New Orleans (HANO), who was also working security for Hurstville. Together, they pulled the group over and questioned them. The stop was brief, and no physical force was used. Hankins sued the officers, Hurstville, their other employers, and supervisors at HANO and OLD-PD, alleging, among other things, unlawful seizure and excessive force following a traffic stop. The district court initially granted summary judgment to all defendants, but the Fifth Circuit reversed, citing material fact disputes regarding reasonable suspicion. On remand, the HANO supervisors filed for summary judgment on the basis of qualified immunity, which was again granted by the trial court as Hankins failed to show their actions were objectively unreasonable. Hankins again appealed. On appeal, the Fifth Circuit found no duty for Pierre's HANO supervisors to supervise Pierre during private details, and Hankins could not demonstrate deliberate indifference. Hankins also failed to prove the supervisors' training of Pierre was objectively unreasonable, as Pierre had completed all required training. Lastly, Hankins could not establish a causal link between the supervisors' alleged failure to discipline Pierre and the alleged constitutional violations. Ultimately, the Fifth Circuit concluded that the HANO supervisors were entitled to qualified immunity, and affirmed the district court's judgment.

Qualified Immunity: *Perdomo v. City of League City, Tex.*, 163 F.4th 921 (5th Cir. 2026). In May 2022, Yoni Perdomo, a subcontractor, was terminated from a residential remodeling project in League City, Texas, and returned to the site to retrieve his tools and unpaid wages. After the general contractor refused payment and demanded Perdomo leave, Perdomo called the police. Officers Trevor Rector and Tanner Surrat arrived, and after a brief exchange, Officer Rector warned Perdomo he would be arrested if he returned to the property. Perdomo then put his hands behind his back and slammed his back into Officer Rector's chest twice, leading Officer Rector to tackle him, resulting in Perdomo hitting his head on the concrete. Perdomo filed a lawsuit against the officers, the League City Police Department, and the City of League City, claiming excessive force, false arrest, and other violations under 42 U.S.C. § 1983 and state law. The district court dismissed the claims, finding the officers acted reasonably and were entitled to qualified immunity, as video evidence contradicted Perdomo's account. The Fifth Circuit affirmed the dismissal, agreeing that the officers' actions were reasonable and supported by probable cause. The court found no deliberate indifference to Perdomo's medical needs, as the officers called an ambulance immediately after the incident. Additionally, the court ruled that the city and police department were not liable under *Monell* because no constitutional violation occurred. The officers were also entitled to official immunity under Texas law, as their actions were objectively reasonable and undertaken in good faith.

Qualified Immunity: *Lewis v. Delgado*, 163 F.4th 926 (5th Cir. 2026). In November 2020, the Rosenberg, Texas Police Department received a report of armed suspects in a white Dodge Charger, leading Officer Adam Vasquez to stop a similar vehicle occupied by plaintiffs Michael Lewis and Regina Armstead. During the high-risk stop, Lewis, who had a dialysis-related stent

in his forearm, was handcuffed for six minutes, resulting in damage to his stent and subsequent surgery. The district court denied qualified immunity to the officers on Lewis's excessive force claim, citing a genuine dispute of material fact regarding when the officers were informed of Lewis's condition. The officers appealed, arguing that their conduct did not violate clearly established law. The Fifth Circuit reviewed the denial of qualified immunity *de novo* and focused on whether the officers violated a clearly established right. The court found that the officers' actions did not violate clearly established law, as no precedent closely matched the facts of this case, particularly given the high-risk nature of the stop and the brief duration of the handcuffing. The court noted that Lewis's cited cases involved significantly greater force or longer durations of handcuffing. Additionally, the court found no consensus in other circuits' opinions that would clearly establish the officers' conduct as unconstitutional. Consequently, the Fifth Circuit reversed the district court's denial of qualified immunity, concluding that the officers were entitled to its protections.

Qualified Immunity: *Lewis v. Grant*, No. 24-11011, 2026 WL 228766 (5th Cir. Jan. 28, 2026). Sophia Lewis filed an excessive force lawsuit on behalf of her deceased son, Shamond Lewis, against Officer Annette Grant after he died in pretrial detention at the Dallas County Jail. Shamond Lewis, diagnosed with paranoid schizophrenia, was involved in an altercation during the booking process, leading to a call for officer assistance. Officer Grant's actions during the incident are disputed, with conflicting accounts of whether she stood or squatted over Lewis. After being restrained and placed in a chair, Lewis became unresponsive and was later hospitalized, where he died six days later from a likely severe anoxic brain injury. Sophia Lewis sued under 42 U.S.C. § 1983, claiming Grant's actions were objectively unreasonable and violated Lewis's Fourteenth Amendment rights. The district court granted summary judgment for Grant, citing qualified immunity, as it was not clearly established that her conduct constituted excessive force. On appeal, the Fifth Circuit reviewed the case *de novo* and upheld the district court's decision, agreeing that the rights allegedly violated were not clearly established at the time. The court distinguished the case from others cited by the plaintiff, noting differences in the use of force and circumstances. Ultimately, the trial court's decision was affirmed, and Grant was entitled to qualified immunity.

Recent Texas Attorney General Opinions of Interest to Cities

Note: Included opinions are from January 1, 2026, through January 31, 2026.

KP-0507 **(Local Option Homestead Exemption)**: Subsection 11.13(n-1) of the Tax Code prohibits the governing body of a school district, municipality, or county from repealing or reducing the local option homestead exemption from the amount that was adopted for the 2022 tax year through the 2027 tax year. Thus, the Village of Salado's governing body may not reduce the rate of its local option homestead exemption for fiscal year 2025–2026 from that adopted for the 2022 tax year.

KP-0505 **(Diversity, Equity, and Inclusion)**: Our nation was founded on the radical notion that all are created equal. Though we have often failed to live up to that promise, it remains as a constitutional lodestar—both in the U.S. and Texas Constitutions. The race- and sex-based, public sector preferences discussed in this opinion cannot survive strict scrutiny and are therefore unconstitutional. Furthermore, a large body of DEI practices in the private sector triggers liability under Title VII, the Texas Commission on Human Rights Act, and Section 1981 in addition to state and federal securities law.

December 2025

Recent Federal Fifth Circuit Cases of Interest to Cities

Sex Discrimination in Public Employment: *Jackson v. Duff*, 161 F.4th 343 (5th Cir. 2025). Debra Mays Jackson, Vice President of Jackson State University (JSU), filed a § 1983 action against members of the Mississippi Board of Trustees of State Institutions of Higher Learning, alleging sex discrimination in violation of the Equal Protection Clause after she was not hired as JSU's president. The Board appointed Thomas Hudson, a male, as interim president despite Mays Jackson's interest and qualifications, and later appointed him as the permanent president without a national search. Mays Jackson filed an EEOC charge in 2021, claiming discrimination based on sex. In 2023, after Hudson was placed on administrative leave, Mays Jackson applied for the presidency again but was denied an interview, and Marcus Thompson was selected instead, despite not applying and having less experience. Mays Jackson alleged that the Board's actions in both 2020 and 2023 were discriminatory. The district court dismissed all claims except the § 1983 equal protection claim related to the 2023 decision, finding that Mays Jackson had made a prima facie case of sex discrimination, holding that the board members were not entitled to qualified immunity because it was clearly established that sex discrimination in public employment violated the Equal Protection Clause. The board members appealed the denial of their motion to dismiss based on qualified immunity.

The Fifth Circuit affirmed the district court's decision, agreeing that Mays Jackson adequately pleaded a violation of clearly established law and that each accused member individually caused her alleged injury. The Fifth Circuit emphasized that the pleadings were taken as true only for the purpose of evaluating the motion to dismiss and did not express any view on the ultimate merits of the claims.

Chinese Property Ownership: *Wang v. Paxton*, 161 F.4th 357, 358 (5th Cir. 2025). Peng Wang, a Chinese citizen, challenged the constitutionality of Texas's Senate Bill 17, which prohibits individuals domiciled in designated countries, including China, from acquiring property interests in Texas and became effective September 1, 2025. Wang has lived in Texas for sixteen years on an F-1 student visa and intends to remain in Texas after graduation, which means he is not domiciled in China. The district court dismissed Wang's complaint for lack of standing, as he

was not domiciled in China and faced no substantial threat of enforcement of the statute. Wang appealed.

Senate Bill 17 defines domicile as having a true, fixed, and permanent home to which an individual intends to return. Wang's lack of intent to return to China and his established life in Texas meant he did not meet this definition. Additionally, the Texas Attorney General repeatedly disavowed applying the statute to Wang, eliminating any credible threat of enforcement. Wang's arguments regarding his F-1 visa status and other Texas laws were found irrelevant to the domicile definition under SB 17. The court also noted that the presumption of enforcement applies only in First Amendment contexts, which was not relevant to Wang's case. Consequently, the court concluded that Wang lacked standing due to the absence of a credible threat of enforcement and an injury-in-fact.

Religious Practice; Land Use: *Perez v. City of San Antonio*, No. 23-50746, 2025 WL 3559986 (5th Cir. Dec. 12, 2025). Gary Perez and Matilde Torres, members of the Lipan-Apache Native American Church, sued the City of San Antonio, alleging that the city's development plan for Brackenridge Park prevented them from performing essential religious ceremonies. They claimed violations under the First Amendment Free Exercise Clause, the Texas Religious Freedom Restoration Act (TRFRA), and the Texas Constitution, seeking access to the park for worship, preservation of trees, and allowance for cormorants to nest. The district court granted them access for religious ceremonies on specific dates but did not enjoin the city's tree removal and rookery management plans. Perez and Torres argued that these plans substantially burdened their religious practices, but the court found that the city had compelling interests in public health and safety and that the plans were the least restrictive means to achieve these interests. The Fifth Circuit determined that Perez's and Torres' access claims were moot as the city had removed fencing and a hazardous limb, allowing access to the sacred area. The court also concluded that the city's actions did not substantially burden Perez's and Torres' religious exercise under TRFRA, as they still had access to the park and the bird deterrence measures were necessary for public safety. The city's plans were found to be narrowly tailored to achieve compelling governmental interests, such as repairing retaining walls and mitigating health risks from bird guano. The court held that Perez and Torres failed to establish a likelihood of success on their claims under the Free Exercise Clause and the Texas Constitution. The Supreme Court of Texas clarified that the religious-service-protections provision of the Texas Constitution does not apply to the preservation and management of public lands, further weakening their case. Ultimately, the Fifth Circuit affirmed the district court's judgment and denied the Perez's and Torres' emergency motion for an injunction pending appeal.

First Amendment: *LIA Network v. City of Kerrville, Tex.*, No. 24-50788, 2025 WL 3684253 (5th Cir. Dec. 19, 2025). A grassroots citizen advocacy group, Liberty in Action Network (LIA), and two of its members, Terri Hall and Rachel Vickers, challenged a City of Kerrville ordinance regulating "canvassing" and "soliciting" under the First Amendment. The ordinance imposed restrictions on canvassing and soliciting activities, including time-of-day limits, prohibitions at properties with "No Solicitors" signs, and requirements for permits. Plaintiffs argued that these

provisions restricted their free speech rights, and they sought a preliminary injunction. The district court granted the injunction for the permitting provision but denied it for the other provisions. The city appealed.

The Fifth Circuit found that LIA had standing to challenge most provisions, as their intended activities were arguably affected by the ordinance and there was a credible threat of enforcement. The Fifth Circuit determined that the ordinance's definitions of "canvassing" and "soliciting" were content-based, subjecting them to strict scrutiny. The city failed to justify the restrictions under either strict or intermediate scrutiny, as it did not provide evidence of a genuine governmental interest or narrow tailoring. The Fifth Circuit held that the district court's injunction against the permitting provision was overbroad and should be limited to protect only the LIA. The case was remanded for further proceedings consistent with these findings.

***Heck* Application: *Kleinman v. City of Cedar Park*, No. 25-50260, 2025 WL 3687507 (5th Cir. Dec. 19, 2025).** Michael Kleinman, AusPro Enterprises, L.P., and MMK Holdings, L.P. challenged the constitutionality of a City of Cedar Park ordinance banning "head shops" within city limits. Kleinman and AusPro faced criminal fines under the ordinance but appealed their convictions, invoking their right to a trial de novo, which nullified the municipal court's judgment. The district court dismissed their claims under *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), which bars § 1983 claims if success would undermine a conviction, and granted summary judgment for the city.

However, the Fifth Circuit found that *Heck* does not apply because Kleinman and AusPro do not have final convictions, as their prosecutions are ongoing. The court also noted that MMK was never charged, making the application of *Heck* to its claims improper. The district court's dismissal of the standalone equal protection claim regarding utility termination was affirmed, as the appellants disclaimed any intent to raise such a claim. The Fifth Circuit reversed the district court's *Heck* dismissals and remanded for further proceedings, while affirming the dismissal of the water termination claim. The appeal was deemed final and appealable because it sought review of whether *Heck* even applied. The case highlights the procedural nuances of applying *Heck* to ongoing criminal matters and the implications for § 1983 claims.

Excessive Force: *Ramirez v. Granado*, No. 24-10755, 2025 WL 3760687 (5th Cir. Dec. 30, 2025). Juanita Ramirez filed an excessive-force claim against Officer Jonathan Granado after he shot and killed her son, Estevan Ramirez, as he fled from police. The district court granted summary judgment to Officer Granado, concluding his use of deadly force was reasonable and that qualified immunity shielded his actions.

On appeal, the Fifth Circuit reversed and remanded the case, finding genuine disputes of material fact that precluded summary judgment on qualified immunity. The incident occurred after a high-speed chase, where Ramirez, a passenger, fled the vehicle holding a handgun. Officer Granado claimed Ramirez swung the gun in the officers' direction, justifying the use of deadly force. However, Officer Watson, who was closest to Ramirez, stated that Ramirez never pointed

the gun at the officers. The autopsy report showed that Ramirez was shot in the back of the head and shoulders, suggesting he was fleeing when shot. The Fifth Circuit emphasized that the reasonableness of force must be assessed based on the totality of circumstances and that deadly force is unreasonable against a fleeing suspect who poses no immediate threat. The Fifth Circuit found that the evidence, including body-camera footage and witness statements, created genuine disputes about whether Ramirez posed a threat and concluded that these factual disputes should be resolved by a jury, not at summary judgment. The court also noted that it was clearly established law that deadly force is unreasonable against a fleeing felon who does not pose a sufficient threat. As a result, the case was remanded for further proceedings consistent with the opinion.

Qualified Immunity & Discovery: *Majors v. City of Canton, Mississippi*, No. 25-60148, 2025 WL 3755537 (5th Cir. Dec. 29, 2025). Allyson Majors filed a lawsuit against the City of Canton, Mississippi, its Board of Aldermen, and the City Attorney (collectively "City Defendants"), alleging retaliatory termination for reporting election fraud and forgery. She raised claims under 42 U.S.C. §§ 1983 and 1985, as well as under Mississippi law. The City Defendants removed the case to federal court and asserted defenses including qualified immunity and state immunity, seeking dismissal or summary judgment. The district court initially denied the City Defendants' motion and ordered full discovery, but later clarified it had not ruled on immunity and ordered limited discovery instead.

The City Defendants appealed, and the Fifth Circuit reviewed the discovery order under the collateral order doctrine. The Fifth Circuit found that the district court's order contravened the precedent set in *Carswell v. Camp*, 54 F.4th 307 (5th Cir. 2022), which prohibits discovery against defendants asserting immunity before ruling on their defense. The Fifth Circuit noted that Majors's constitutional claims must survive an immunity-based motion to dismiss without discovery. The district court erred by ordering limited discovery without ruling on whether Majors's allegations overcame qualified immunity. Additionally, the Fifth Circuit ordered discovery without a request from the City Defendants, which is contrary to the procedure outlined in *Carswell*. Consequently, the Fifth Circuit vacated the district court's discovery order and remanded the case for further proceedings.

Election Law: *La Union del Pueblo Entero v. Nelson*, No. 22-50775, 2025 WL 3771384 (5th Cir. Dec. 31, 2025). This case involves multiple plaintiffs (collectively "La Union") challenging the Texas Election Protection and Integrity Act of 2021, known as S.B.1, which was enacted to ensure uniform and consistent application of the Texas Election Code, reduce election fraud, protect ballot secrecy, promote voter access, and ensure all legally cast ballots are counted. La Union argue that various provisions of S.B.1 violate the U.S. Constitution and federal statutes, including the Americans with Disabilities Act (ADA) and the Voting Rights Act (VRA). The defendants, including Texas Secretary of State Jane Nelson and Attorney General Ken Paxton, appealed the district court's denial of their motions to dismiss based on sovereign immunity and standing.

The Fifth Circuit considered whether the Secretary of State and the Attorney General had sufficient connection to the enforcement of the challenged provisions to strip them of their sovereign immunity under the *Ex parte Young* doctrine. The Fifth Circuit analyzed the Secretary's connection to the enforcement of the provisions and concluded that the Secretary had sufficient connection to some provisions, such as those related to voter registration list maintenance and mail-in ballot applications, to overcome sovereign immunity; however, the Fifth Circuit found that the Secretary did not enforce other provisions, such as those related to early voting sites and ballot requirements, and thus was entitled to sovereign immunity for those provisions. Regarding the Attorney General, the Fifth Circuit concluded that he was not a proper *Ex parte Young* defendant for most of the challenged provisions, except for Section 2.06, which allows the Attorney General to sue to recover civil penalties from counties that fail to comply with voter registration list maintenance requirements. The Fifth Circuit found that the Attorney General had demonstrated a willingness to enforce this provision through public statements and the formation of an Election Integrity Unit.

The Fifth Circuit also addressed standing to bring their claims and concluded that La Union had standing to challenge the provisions enforced by the Secretary and the Attorney General, as their injuries were traceable to the actions of these officials. Fifth Circuit court affirmed the district court's denial of the Secretary's motion to dismiss the plaintiffs' claims challenging certain provisions and reversed the denial of the Secretary's and Attorney General's motions to dismiss other claims.

Negligence and Discrimination: *Quiroz v. Hernandez*, No. 25-40032, 2025 WL 3768726 (5th Cir. Dec. 31, 2025). This case involves an appeal by Madelyn Marina Quiroz and her mother, Marina Naomi Hernandez Quiroz, following the dismissal of their claims against twenty-three defendants related to a serious car collision. The collision occurred on January 23, 2020, when Madelyn, a backseat passenger, was injured due to reckless driving by Morgan White, who was racing Eduardo Hernandez. The district court dismissed the claims against all defendants with prejudice, except for Eduardo Hernandez, whose claims were dismissed without prejudice, and the Quirozes appealed. The Quirozes alleged negligence by first responders and private parties, as well as discrimination under 42 U.S.C. § 1983 against city officials for their handling of the post-accident investigation.

The Fifth Circuit found the Quirozes' complaint to be vague and filled with conclusory allegations, failing to establish state action or discriminatory intent for § 1983 claims. The claims against Allegiance Mobile Health and its paramedic, Steve Smith, were dismissed as they were not considered state actors, and the claims were time-barred. The Fifth Circuit also dismissed claims against the City of Dayton and its officials, finding them duplicative and time-barred. Claims against the City of Liberty and its paramedic, Katelyn Grimes, were dismissed due to lack of specific allegations and potential statute of limitations issues. The Liberty County Defendants were granted Eleventh Amendment and prosecutorial immunity, and the court noted the Quirozes lacked standing to sue them. Ultimately, the Fifth Circuit affirmed the dismissal of

all claims with prejudice, except for those against the Liberty County Defendants, which were modified to be without prejudice.

Recent Texas Cases of Interest to Cities

Note: Included cases are from December 1, 2025, through December 31, 2025. *These case summaries have been prepared with the assistance of AI.*

Tort Claims Act: *City of Houston v. Ortiz*, 2025 WL 3521320 (Tex. App.—Houston [1st Dist.] December 9, 2025) (mem. op.). David Mejia and Lilia Lopez, individually and as next friends of Z.O., a minor, filed a lawsuit against the City of Houston, alleging that a city employee abandoned a patrol vehicle on the highway, causing a collision that resulted in serious injuries to the Ortizes. The city filed a motion to dismiss under Rule 91a of the Texas Rules of Civil Procedure, arguing that governmental immunity applied and that the appellees failed to plead facts to overcome this immunity or the exceptions under the Texas Tort Claims Act (TTCA). The trial court denied the motion to dismiss, and the city appealed.

The appellate court affirmed the trial court's decision, concluding that the Ortizes' pleadings sufficiently alleged facts within the TTCA's waiver of immunity, as the claims arose from the operation or use of a motor-driven vehicle. The court also found that the Ortizes' pleadings did not need to negate the official immunity defense, as they included allegations of reckless driving, which negated good faith. Additionally, the court determined that the Ortizes' pleadings did not implicate the emergency or 9-1-1 exceptions to the TTCA, and thus, they were not required to allege additional facts negating these exceptions.

Tort Claims Act: *City of Houston v. Humphries*, No. 01-25-00276-CV, 2025 WL 3521323 (Tex. App.—Houston [1st Dist.] Dec. 9, 2025) (mem. op.). Shadrick Humphries was injured when he slipped on a puddle in a restroom at William P. Hobby Airport and subsequently sued the City of Houston for negligence and premises liability. The city moved for traditional summary judgment, arguing governmental immunity and that it owed Humphries only the duty owed to a licensee, not an invitee, on private property, and claimed it did not have knowledge of the premises defect before Humphries's fall. The trial court denied the summary-judgment motion, concluding that while the city owed only the duty owed to a licensee, there was a question of fact about whether the city had actual knowledge of the premises defect.

On appeal, the city challenged the trial court's denial of its motion for summary judgment. The appellate court reversed the trial court's interlocutory order, concluding that the city conclusively negated the statutory waiver of governmental immunity and that Humphries did not raise a genuine issue of material fact. The court rendered judgment dismissing Humphries's claims against the city.

Tort Claims Act: *City of Houston v. Michaca*, No. 01-24-00224-CV, 2025 WL 3545572 (Tex. App.—Houston [1st Dist.] Dec. 11, 2025) (mem. op.). This case involves a motor-vehicle collision between Houston Police Department Officer Horace James Scott and Martha Gladis Moran Michaca at an intersection, where Scott was pursuing a fleeing aggravated robbery suspect. The City of Houston moved for summary judgment, claiming governmental immunity under the Texas Tort Claims Act (TTCA), citing the emergency exception and official immunity. The trial court denied the motion, and the city appealed, arguing that the trial court erred in denying summary judgment.

The appellate court affirmed the trial court's decision, holding that genuine issues of material fact existed, preventing summary judgment. The court found that fact issues were raised regarding whether Officer Scott complied with the laws applicable to emergency vehicles, as required by the TTCA's emergency exception, and whether he acted in good faith for official immunity to apply. The court concluded that the city did not meet its burden to show no genuine issue of material fact existed concerning the applicability of the emergency exception or official immunity.

Plat Approvals: *City of Pasadena v. Carousel Village Condo's, Inc.*, 2025 WL 3635891 (Tex. App.—Houston [1st Dist.] Dec. 16, 2025) (mem. op.). Carousel Village Condo's, Inc. ("Carousel Village") applied to the City of Pasadena for a final plat and permit to build a travel trailer park, which was rejected by the city. Carousel Village sought a writ of mandamus to compel approval and sought declaratory and injunctive relief against the application of Pasadena Municipal Code Chapter 21. The city responded with a plea to the jurisdiction and summary judgment, which the trial court denied. Carousel Village's claims included challenges to the city's governmental immunity and the applicability of the ultra vires doctrine. The city argued that Carousel Village's claims were not ripe and were barred by governmental immunity.

The appellate court concluded that the city's governmental immunity barred Carousel Village's claims and reversed the trial court's denial of the city's plea to the jurisdiction, dismissing the case for lack of jurisdiction. The court found that the Texas Uniform Declaratory Judgments Act did not waive the city's governmental immunity, and the provisions of the Local Government Code invoked by Carousel Village did not apply. Additionally, the court determined that the ultra vires exception to governmental immunity did not apply, and Carousel Village did not preserve its constitutional challenge.

Statute of Limitations: *City of Houston v. De La Cruz*, No. 01-24-00797-CV, 2025 WL 3672311 (Tex. App.—Houston [1st Dist.] Dec. 18, 2025) (mem. op.). This case involves a motor-vehicle accident that occurred on February 2, 2022, between Carwin Alexander Flores, an employee of the City of Houston, and Myrna De La Cruz. De La Cruz filed a negligence suit against Flores and alleged that the city was vicariously liable for Flores's conduct. The original petition was filed on February 5, 2024, one business day after the two-year statute of limitations expired. The city and Flores filed a joint motion to dismiss under Rule of Civil Procedure 91a,

arguing that the suit was barred by limitations and that De La Cruz did not exercise due diligence in serving process. The trial court denied the motion, and the city and Flores appealed.

The appellate court affirmed the trial court's decision, holding that Rule 91a was not the appropriate vehicle for dismissing the case based on limitations because the file stamp date on the petition was not part of the allegations and could be rebutted by evidence. The court found that the dispute over the filing date raised a fact issue that required evidence to resolve, making Rule 91a an improper procedural vehicle for resolving the dispute. Additionally, the court concluded that the city did not establish that De La Cruz's action had no basis in law or fact, as the city's contentions were based on factual disputes requiring evidence. Therefore, the trial court did not err in denying the motion to dismiss.

Tort Claims Act: *City of Houston v. Williams*, No. 01-23-00974-CV, 2025 WL 3712204 (Tex. App.—Houston [1st Dist.] Dec. 23, 2025) (mem. op.). In this interlocutory appeal, the City of Houston challenged the trial court's denial of its motions to dismiss Monique Williams's negligence claims. Williams alleged that on November 27, 2021, she was involved in a car collision in Harris County, Texas, caused by Jo Ann Walton, an employee of the city, resulting in serious bodily injuries. Williams claimed negligence against Walton and vicarious liability against the city, asserting Walton was acting within the scope of her employment. The city filed motions to dismiss under Texas Rule of Civil Procedure 91a, arguing governmental immunity and that Williams's claims did not fall under the Texas Tort Claims Act's waiver of immunity. The trial court denied the city's motions due to insufficient notice under Rule 91a.3(b), as the motions were not filed at least twenty-one days before the hearing.

The appellate affirmed the trial court's orders denying the city's motions to dismiss, holding that the trial court did not err in denying the motions based on the city's failure to comply with the twenty-one-day notice requirement of Texas Rule of Civil Procedure 91a.3(b). The court found that Williams had sufficiently objected to the untimeliness of the city's first motion, and the trial court had the authority to deny the second motion sua sponte. The appellate court concluded that the city did not meet its burden to establish that the trial court erred in its decision.

Tort Claims Act: *Valerie Hall v. City of Jersey Village*, 2025 WL 3768170 (Tex. App.—Houston [1st Dist.] Dec. 31, 2025) (mem. op.). Valerie Hall, while working as a manager at The Backyard Grill located on the Jersey Meadows Golf Course, was injured by a golf ball hit by Terry R. Thomas. Hall and her husband sued the restaurant, Thomas, and the City of Jersey Village, which owns the golf course, alleging negligence and seeking damages under the Texas Tort Claims Act. The trial court initially granted the city's plea to the jurisdiction, but this decision was reversed on interlocutory appeal to allow for amended pleadings and jurisdictional discovery. After the Halls amended their petition and conducted discovery, the city filed a combined plea to the jurisdiction and no-evidence motion for summary judgment, which the trial court granted, dismissing all claims against the city.

The appellate court affirmed the trial court's decision, concluding that the Halls failed to produce evidence to support their claims against the city. The court found that the Halls did not demonstrate that Thomas was acting within the scope of his employment at the time of the incident, which was necessary to waive the city's governmental immunity under the Texas Tort Claims Act. Additionally, the court held that the Halls did not plead facts sufficient to establish a premises liability claim or a waiver of immunity for loss of consortium claims, as these were derivative of Hall's barred claims. Consequently, the appellate court upheld the dismissal of all claims against the City of Jersey Village.

Tort Claims Act: *City of Houston v. Torres*, No. 01-23-00905-CV, 2025 WL 3768328 (Tex. App.—Houston [1st Dist.] Dec. 31, 2025) (mem. op.). Jose Torres, a painter employed by Arredondo's Real Drywall, Inc., was injured while working at Houston Fire Department Station #34 when a motorized bay door, operated by firefighter Adam Ricci, knocked over the scissor lift Torres was using. Ricci, unaware of Torres's presence, opened the bay door with a remote control from his emergency vehicle, causing the accident. The trial court found the City of Houston negligent and awarded damages to Torres, concluding that the city's actions proximately caused Torres's injuries. The city appealed, challenging the trial court's subject-matter jurisdiction and the sufficiency of evidence regarding negligence under the Texas Tort Claims Act (TTCA).

The appellate court reversed the trial court's judgment, holding that the city's governmental immunity was not waived under the TTCA. The appellate court found that Ricci owed no legal duty to Torres because the risk of harm was not foreseeable, as Ricci was unaware of Torres's presence behind the bay door. Consequently, the city retained its governmental immunity, and the trial court lacked subject-matter jurisdiction to hear the case.

Texas Tort Claims Act: *City of Forest Hill and Richard Winters v. Lina Mino*, No. 02-25-00132-CV, 2025 WL 3492583 (Tex. App.—Fort Worth Dec. 4, 2025) (mem. op.). This case involves an appeal by the City of Forest Hill and Sergeant Richard Winters (the "city") against Lina Mino, a police officer from a different department who was injured during a police training course hosted by the city and private entities. The city argued that the Texas Tort Claims Act (TTCA) applied because the city's actions were governmental functions. The court agreed that the training was sufficiently connected to police protection and control to constitute a governmental function under the TTCA, and the city offering the training to officers outside of its police department and partnering with private entities did not make the function a proprietary one. The court also dismissed the state-law tort claims against Winters, but affirmed the denial of dismissal for the § 1983 claims. The court did not address the appellants' third issue regarding jurisdiction over claims seeking damages beyond those authorized by the TTCA, as it was rendered unnecessary by the court's other holdings.

Public Information Act: *City of Olmos Park v. Grable*, No. 08-24-00388-CV, 2025 WL 3619332, (Tex. App. – El Paso, Dec. 12, 2025) (mem. op.). In September 2023, the City of Olmos Park terminated its chief of police following an operational assessment of its police

department. Grable requested the assessment, but the city withheld it on the grounds of attorney-client privilege, pursuant to an Attorney General ruling. Grable filed suit against Olmos Park seeking a writ of mandamus to compel disclosure. Olmos Park filed a plea to the jurisdiction (PTJ) and a motion for summary judgment (MSJ). The trial court denied Olmos Park's PTJ and MSJ. Olmos Park appealed the trial court's rulings, arguing that governmental immunity was not waived and that the requested information was privileged.

The appellate court affirmed the trial court's PTJ denial, holding that immunity was waived under the Texas Public Information Act because Olmos Park refused to supply public information. It found that the trial court had jurisdiction to determine if the requested information was subject to disclosure, regardless of the Attorney General's ruling. The appellate court also dismissed Olmos Park's MSJ appeal, explaining that it was not an appealable order because it was neither a final order nor one involving jurisdictional issues.

Employment Discrimination: *City of Brownsville v. Garcia*, No. 13-24-00159-CV, 2025 WL 3676269 (Tex. App.—Corpus Christi–Edinburg Dec. 18, 2025) (mem. op.). Valerie Garcia, a former full-time municipal court judge for the City of Brownsville, Texas, from 2014 to 2018, filed a lawsuit against the city on January 27, 2023, alleging violations of the Texas Commission on Human Rights Act (TCHRA) and discrimination under § 21.051 of the Texas Labor Code. Garcia claimed that the city did not post or publish the job opening for the presiding municipal court judge position, thereby denying her the opportunity to apply, and alleged that the city discriminated against her based on her sex by hiring Rene De Coss, a male, for the position. The city filed a plea to the jurisdiction, arguing that Garcia did not apply for the position and that municipal court judges are not employees but public officials, thus challenging the existence of an employment relationship. The trial court denied the city's plea, leading to the city's appeal.

The appellate reversed the trial court's decision, finding that Garcia failed to establish a prima facie case of gender discrimination under the TCHRA. The appellate court determined that Garcia and De Coss were not similarly situated, as De Coss had significantly more experience and different responsibilities, which did not meet the requirement of being "nearly identical" for comparison purposes. Consequently, the appellate court rendered judgment dismissing Garcia's claims against the city.

Retaliation: *Hirsch v. City of Houston*, No. 14-24-00536-CV, 2025 WL 3636680, (Tex. App.-Houston [14th Dist.] Dec. 16, 2025). Hirsch, a police cadet at the Houston Police Academy, filed suit against the City of Houston under the Texas Workers' Compensation Act (TWCA), the Labor Code, and the Texas Commission on Human Rights Act (TCHRA), alleging that she was harassed and retaliated against after filing a workers' compensation claim for an injury suffered during her training. The trial court granted Houston's plea to the jurisdiction and dismissed Hirsch's claims with prejudice. Hirsch appealed the trial court's ruling.

The appellate court reversed the trial court's ruling on two grounds. First, the appellate court found that Hirsh raised a fact question regarding her status as a first responder, which could waive governmental immunity under the TWCA. Second, the appellate court determined that Hirsch's TCHRA retaliation claim was timely and that the Act's anti-retaliation provision applies to active and prospective employees. The appellate court remanded the case for further proceedings.

Employment Discrimination: *Texas Department of Public Safety v. Turner*, No. 14-24-00709-CV, 2025 WL 3636681 (Tex. App.—Houston [14th Dist.] Dec. 16, 2025). Turner, a Black female with a 26-year career at the Texas Department of Public Safety (DPS), filed suit against the Department of Public Safety (DPS) alleging discrimination and retaliation after being passed over for a promotion to Major in the Investigative Support Section in favor of a white male applicant. Turner claimed that DPS based its decision on her race and sex, and in retaliation for previous complaints against a superior. The trial court denied DPS's plea to the jurisdiction and motion for summary judgment. DPS appealed the trial court's rulings.

The appellate court reversed the trial court's rulings, concluding that Turner failed to raise a genuine issue of material fact regarding her claims. Specifically, the appellate court found that DPS had articulated a legitimate, non-discriminatory reason for promoting Hicks, based on his relevant experience and vision for the department, which Turner could not prove was a pretext for discrimination. The appellate court also found that Turner did not establish a prima facie case of retaliation, as there was no causal link between her prior complaints and the promotion decision. As a result, the appellate court reversed the trial court's rulings and rendered judgment dismissing Turner's claims.

TCEQ Wastewater Permitting; Regionalization: *Texas Commission on Environmental Quality v. City of Georgetown,* No. 15-24-00132-CV, 2025 WL 3759799 (Tex. App. [15th Dist.] Dec. 30, 2025)(mem. op.). The Texas Commission on Environmental Quality issued a wastewater discharge permit to AIRW 2017-7, L.P. for a new treatment plant in Williamson County, Texas. The City of Georgetown challenged this decision, arguing it was not supported by substantial evidence and was arbitrary and capricious. The trial court reversed the Commission's decision, citing non-compliance with Texas's regionalization policy. TCEQ appealed. The Commission and other appellants argued that substantial evidence supported the permit's compliance with the regionalization policy, particularly due to cost considerations. The Commission's findings included that the cost of connecting to the city's wastewater services would allegedly reduce property value by $20 million, justifying an exception to the regionalization policy.

The appellate court found substantial evidence supporting the Commission's decision, including the consideration of opportunity costs. The city also argued the permit failed to protect water quality, comply with antidegradation policies, and protect human health, among other issues. However, the Fifth Circuit found substantial evidence supporting the permit's compliance with water quality standards and antidegradation policies. The appellate court also found the permit protective of human health, meeting nuisance odor requirements, and that AIRW's application

was complete. Ultimately the appellate court reversed the trial court's judgment and affirmed the Commission's order granting the permit.

November 2025

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from November 1, through November 30. *These case summaries have been prepared with the assistance of AI.*

Equal Protection: *Banda v. City of McAllen, Tex.*, No. 24-40508, 2025 WL 3094122 (5th Cir. Nov. 4, 2025). Cynthia Banda, representing the estate of Melissa Banda, filed a lawsuit against the City of McAllen, Texas, following an incident where Melissa Banda was murdered by her ex-husband, Richard Ford, Jr. Melissa Banda had previously filed for divorce and a temporary restraining order against Ford and made multiple complaints to the McAllen Police Department about his abusive behavior, including physical assault, stalking, and violation of protective orders. Despite these complaints, Ford was arrested only once and released the next day. On August 6, 2020, Ford kidnapped and murdered Melissa Banda, for which he was later found guilty of capital murder and sentenced to life imprisonment without parole. Cynthia Banda initially filed a wrongful death claim, a survival action, and a claim under the Texas Tort Claims Act in state court. She later amended her petition to include a gender-based equal protection claim under 42 U.S.C. § 1983, alleging city liability based on the city's law enforcement policies regarding domestic violence. The city removed the case to federal court, arguing federal question jurisdiction, and the district court dismissed Banda's complaint for failure to state a claim, denying her leave to amend.

The Fifth Circuit Court of Appeals reviewed the case, focusing on two main issues: whether the case was properly removed to federal court and whether the district court erred in dismissing Banda's equal protection claim. The court affirmed the district court's decision, finding that the city did not waive its right to removal by participating in state court proceedings, as its actions did not constitute a "clear and unequivocal" waiver. The court also held that Banda failed to state a plausible equal protection claim under *Monell* because she did not provide sufficient facts to establish that the McAllen Police Department had a policy of providing less protection to victims of domestic assault compared to other assault victims, nor did she establish discriminatory intent. Additionally, the court found no error in the district court's denial of Banda's request for leave to amend her complaint. Banda had been given an opportunity to amend her complaint after the city's first motion to dismiss, but she failed to cure the deficiencies identified by the court. Consequently, the Fifth Circuit affirmed the district court's judgment in favor of the City of McAllen.

Open Records: *Clark v. City of Pasadena*, 158 F.4th 653 (5th Cir. 2025). Antel C. Clark, proceeding pro se, sued the City of Pasadena, the Pasadena Police Department, and others, including the attorney general of Texas and Rent Recovery, alleging violations of the U.S.

Constitution, the Fair Debt Collection Practices Act, and Texas state law. The lawsuit arose after Clark and his son were evicted from their apartment following the son's arrest for aggravated armed robbery. Clark's request for information about his son's arrest was denied by the city and police department under the Texas Public Information Act's law-enforcement exception. Clark's motions for default judgment against the other parties were denied by the district court, which also granted the other parties' motions to dismiss, and Clark appealed.

On appeal, Clark forfeited his arguments related to the motions to dismiss by failing to brief them. The Court of Appeals reviewed the denial of default judgment for abuse of discretion. The court found that the city had entered a defense, thus the denial of default judgment was not an abuse of discretion. Clark's motion for default judgment against the Attorney General was denied because he did not properly serve process. The court also found no abuse of discretion in denying default judgment against Rent Recovery, as they had filed an answer before Clark's motion. Clark's claim of judicial bias was dismissed, as adverse rulings alone do not warrant disqualification. Ultimately, the Court of Appeals affirmed the district court's judgment.

Photo Lineup; Due Process; Qualified Immunity: *Williams v. City of Baton Rouge*, No. 24-30723, 2025 WL 3084762 (5th Cir. Nov. 4, 2025). Archie Williams filed a lawsuit under 42 U.S.C. § 1983 against the City of Baton Rouge and several former detectives and forensic scientists, alleging violations of his Fourteenth Amendment right to due process. Williams claimed that the detectives used an impermissibly suggestive photographic lineup procedure and suppressed exculpatory evidence, while the forensic scientists suppressed and fabricated crime scene evidence. He also brought state law claims for malicious prosecution, spoliation of evidence, intentional infliction of emotional distress, and negligence. The district court granted summary judgment in favor of the city, detectives, and scientists, finding that they were entitled to qualified immunity and that there was no underlying constitutional violation to support Williams's claims. Williams appealed the decision.

The case arose from a 1982 incident where Anne Eaton was raped and stabbed in her home, and Williams was later identified as the assailant through a series of photographic lineups. Despite Eaton's initial uncertainty, she eventually identified Williams, who was convicted and spent thirty-six years in prison before being exonerated by fingerprint evidence implicating another person. On appeal, Williams argued that the district court erred in granting qualified immunity to the police and forensic defendants and in dismissing his state law and *Monell* claims. The court of appeals affirmed the district court's judgment, agreeing that the police defendants' identification procedure was not impermissibly suggestive or unreliable enough to violate due process and that there was no genuine issue of material fact. The court also found that the forensic defendants were entitled to qualified immunity, as Williams failed to establish a *Brady* violation or that the forensic scientists' conduct violated clearly established law. Additionally, the court held that the city was not liable under *Monell* because Williams did not prove a constitutional violation or deliberate indifference in the city's training protocols. Consequently, the court affirmed the district court's decision to grant summary judgment in favor of the government parties.

Drag Performance: *Woodlands Pride, Inc. v. Paxton*, 157 F.4th 775 (5th Cir. 2025). The case involves a legal challenge brought by non-profit organizations, businesses, and a performer involved in drag performances (collectively "Woodlands Pride") against the Texas Attorney General, counties, county district attorneys, and the City of Abilene (collectively "Paxton"). Woodlands Pride filed a § 1983 action, alleging that a Texas law banning "sexually oriented performances" on public property or in the presence of minors violated the First Amendment. The United States District Court for the Southern District of Texas ruled in favor of Woodlands Pride, finding the law facially unconstitutional and enjoining its enforcement. Paxton appealed the decision.

The United States Court of Appeals for the Fifth Circuit reviewed the case, focusing on whether Woodlands Pride had standing to bring the action. The court found that the host of an annual pride festival and an organization hosting community events failed to establish standing, as their conduct did not arguably violate the law. However, a drag production company demonstrated an injury-in-fact, satisfying the requirements for standing, as its performances arguably included proscribed conduct under the law. The court also determined that the drag performer lacked standing because the performer did not perform sexual shows at all-ages events. The court vacated the district court's injunction and remanded the case, instructing the district court to determine whether a substantial number of the law's applications were unconstitutional in relation to its legitimate sweep.

The decision included a concurrence and partial dissent, which argued that the majority misapprehended standing principles and ignored the legislative intent behind the law, which was perceived as a statewide "drag ban." The dissent emphasized that Woodland Pride's performances arguably fell within the statute's scope and that there was a credible threat of prosecution, thus supporting standing. The case highlights the complexities of pre-enforcement challenges and the interpretation of laws affecting free speech and expression.

Death in Custody: *Niter on behalf of C.W. v. Brown*, No. 24-10961, 2025 WL 3188375 (5th Cir. Nov. 14, 2025). Christopher Darnell Williams died by suicide while detained in Dallas County Jail, prompting his family (collectively "Niter") to sue under 42 U.S.C. § 1983, alleging that a number of parties failed to monitor Williams and improperly removed him from a mental health unit. The district court dismissed the claims, and the appellate court affirmed this decision. Niter appealed the decision as to certain defendants.

Regarding the claims against Dallas County and Sheriff Marian Brown in her official capacity, the court found that Niter failed to adequately plead a *Monell* claim, as they did not provide specific facts to support the existence of a policy or custom that led to Williams' death. The court emphasized that mere conclusory allegations are insufficient to meet federal pleading standards. Additionally, the claim against Sheriff Brown in her individual capacity was dismissed based on qualified immunity, as Niter did not allege that Brown had actual knowledge of a substantial risk of suicide or that she was personally involved in decisions regarding Williams' confinement.

Niter did not challenge the dismissal of claims against the Texas Department of Public Safety, which was based on sovereign immunity, nor the claims against unknown jail employees, which were dismissed due to limitations and failure to serve. These unchallenged rulings were affirmed. Consequently, the appellate court affirmed the district court's dismissal of all claims.

Contaminated Drinking Water: *Sterling v. City of Jackson, Mississippi*, No. 24-60370, 2025 WL 3205505 (5th Cir. Nov. 17, 2025). In this case, a number of plaintiffs (collectively "Sterling") alleged that the City of Jackson, Mississippi knowingly contaminated their drinking water with lead and misled residents about its safety, resulting in severe health effects. The city's water system, consisting of aging pipes, was prone to lead contamination due to untreated acidic water, which the city failed to address despite being aware of the risks since 2013. The city switched a section of its water source from high-pH well water to low-pH surface water, exacerbating the lead contamination problem. Despite knowing the severity of the issue, the city delayed informing the public and falsely assured residents that the water was safe to drink. Sterling and others, including children, suffered from lead poisoning and related health issues, requiring special services. The district court dismissed the case, granting judgment on the pleadings and qualified immunity to city officials, and Sterling appealed.

On appeal, the Fifth Circuit Court of Appeals reversed the dismissal of the due process claims against the city, while affirming the dismissal of claims against city officials due to qualified immunity. The court recognized the right to bodily integrity and state-created danger as viable theories under substantive due process, allowing the lawsuit to proceed against the city. The court found that the city's conduct, if proven, could constitute deliberate indifference and a violation of residents' constitutional rights. However, the court held that the city officials were entitled to qualified immunity because the right was not clearly established in this context. The case was remanded for further proceedings consistent with the appellate court's findings.

Land Use Regulation: *T&W Holding Co., L.L.C. v. City of Kemah, Tex.*, No. 24-40679, 2025 WL 3248185 (5th Cir. Nov. 21, 2025). This case involves a dispute between T&W Holding Co., L.L.C., Palapas, Inc., and It's Five O'Clock Here, L.L.C. (collectively "T&W") and the City of Kemah, Texas regarding the use of T&W's property. T&W own a four-story building in Kemah, Texas, where Palapas operates a bar and Five O'Clock operates a food truck. The city issued a zero-occupancy notice for the building in July 2021, citing safety hazards, and towed the food truck in October 2021. T&W filed a § 1983 action alleging takings, due process, and equal protection violations under federal and state constitutions, and sought declaratory judgment. The district court dismissed the claims, finding the zero-occupancy notice claims unripe and the food truck claims not justiciable. T&W appealed.

On appeal, the Fifth Circuit held that the zero-occupancy notice claims were ripe because the city's issuance of the notice constituted a final decision, and no exhaustion of state remedies was required for § 1983 claims. The court reversed the district court's dismissal of the zero-occupancy notice claims and remanded for further proceedings. However, the court found that Plaintiffs waived their food truck claims by failing to adequately brief them on appeal;

consequently, those claims were dismissed. The court also reinstated the declaratory judgment claim related to the zero-occupancy notice claims. The case was affirmed in part, reversed in part, and remanded for further proceedings.

Tort Claims Act: *Benavides v. Harris Cty., Tex.,* No. 24-20457, 2025 WL 3270630 (5th Cir. Nov. 24, 2025). On December 26, 2019, Stephen Benavides was shot by Deputy Jose Nunez of the Harris County Sheriff's Office after responding to a 911 call about a suspected home invasion. Benavides, who was unarmed, had arrived at the scene before the police and determined there was no intruder, but this information was not communicated to the deputies in time to prevent his being shot. Benavides subsequently filed a lawsuit against Deputy Nunez under 42 U.S.C. § 1983 for excessive force and against Harris County under the Texas Tort Claims Act (TTCA) for vicarious liability due to Nunez's alleged negligence. Deputy Nunez claimed the shooting was accidental and sought summary judgment based on qualified immunity, while Harris County sought summary judgment citing governmental and official immunity. The district court denied both motions, finding a genuine issue of material fact regarding Nunez's intent, which precluded summary judgment. The court's decision was based on the possibility that Nunez either intentionally or accidentally discharged his firearm, a determination crucial to the claims of excessive force and negligence. Harris County appealed, arguing that Benavides' negligence claim fell under the TTCA's intentional tort exception, which would bar the claim.

The appellate court dismissed Harris County's appeal for lack of jurisdiction, as the district court's denial of summary judgment was based on genuine issues of material fact, which are not reviewable on interlocutory appeal. The court emphasized that the factual dispute over whether the shooting was intentional or accidental was material to the claims and Harris County's immunity defenses. The court also noted that Harris County's appeal did not present a dispositive legal issue that could be decided within the limited scope of appellate jurisdiction.

Recent Texas Cases of Interest to Cities

Note: Included cases are from November 1, 2025, through November 30, 2025. *These case summaries have been prepared with the assistance of AI.*

Tort Claims Act: *City of Houston v. Wright*, 2025 WL 3071579 (Tex. App.—Houston [1st Dist.] Nov. 4, 2025) (mem. op.). Myauna Wright filed a lawsuit against the City of Houston and its employee, S. Obando, after a city fire engine collided with her vehicle. The City moved to dismiss the case under Texas Rule of Civil Procedure 91a, arguing that Wright failed to plead facts establishing a waiver of governmental immunity under the Texas Tort Claims Act (TTCA) and did not negate the 9-1-1 and emergency exceptions to the waiver. The trial court denied the City's motion, leading to this appeal.

The appellate court affirmed, holding that Wright's pleadings sufficiently alleged a waiver of immunity under the TTCA and negated the statutory exceptions plausibly implicated by her claims. The court found that Wright's allegations demonstrated that the city's employee acted with reckless disregard, which negated the emergency exception, and that the 9-1-1 exception was also not applicable based on the facts pleaded. Consequently, the appellate court overruled the city's sole issue on appeal and remanded the case for further proceedings.

Tort Claims Act: *Harris County v. Doe*, No. 01-24-00096-CV, 2025 WL 3165392 (Tex. App.—Houston [1st Dist.] Nov. 13, 2025) (mem. op.). Jane Doe, an employee at the Harris County Jail, filed a lawsuit under the Texas Tort Claims Act (TTCA) against Harris County, the Harris County Commissioners Court, Lina Hidalgo, and Edward Gonzalez, alleging that understaffing at the jail led to her being sexually assaulted by an inmate, Jeremiah Williams, on December 6, 2021. Doe claimed that the county failure to adequately fund and staff the jail created dangerous conditions, citing a history of assaults on staff and public statements by Sheriff Gonzalez acknowledging staffing concerns. The county filed a plea to the jurisdiction, arguing lack of capacity to be sued, exclusive jurisdiction of the Texas Department of Insurance, no waiver of immunity under the TTCA, and the TTCA's election of remedies provision barring suit against Hidalgo and Gonzalez. The trial court denied the plea, and the county filed an interlocutory appeal.

The appellate court reversed the trial court's decision and rendered a judgment of dismissal. The appellate court found that the TTCA's election of remedies provision barred the suit against Hidalgo and Gonzalez, as they were sued in their official capacities and the suit could have been brought against the county. Additionally, the court determined that Doe's allegations did not establish a waiver of immunity under the TTCA, as her injuries were not caused by a condition of real property but rather occurred with the jail as a mere backdrop. Consequently, the court concluded that the trial court should have granted the county’s plea to the jurisdiction.

Governmental Immunity: *Harris County v. Anderson*, No. 01-25-00239-CV, 2025 WL 3236297 (Tex. App.—Houston [1st Dist.] Nov. 20, 2025) (mem. op.). This case involves a car accident between Owen Anderson and Sergeant B. J. Johnson, a Harris County Sheriff's Office employee, who was driving a county-owned police cruiser at the time of the collision. Anderson sued the county, alleging negligence and claiming that the county had waived its governmental immunity because Sgt. Johnson was acting within the scope of his employment during the accident. The county filed a plea to the jurisdiction, arguing that Sgt. Johnson was not acting within the scope of his employment, and thus, the county's immunity was not waived. The trial court denied the county's plea, and the county appealed.

The appellate court affirmed, holding that the county did not conclusively establish that Sgt. Johnson was outside the scope of his employment at the time of the accident. The appellate court found that the presumption that Sgt. Johnson was acting within the scope of his employment was not rebutted by the county's evidence, as Sgt. Johnson was on duty and driving a county-issued vehicle during his shift. The court concluded that the county failed to prove that Sgt. Johnson's

actions served no purpose for his employer, and therefore, the trial court did not err in denying the county's plea to the jurisdiction.

Tort Claims Act: *City of Houston v. Tapia,* No. 01-25-00016-CV, 2025 WL 3275141 (Tex. App.—Houston [1st Dist.] Nov. 25, 2025) (mem. op.). Javier Tapia and Jennifer Welborn, individually and as personal representatives of the estate of their daughter, A.W.T., filed a wrongful death lawsuit against the City of Houston. Their daughter, a seventeen-year-old girl, was struck and killed by a Union Pacific train running through Memorial Park. Tapia and Wellborn alleged premises liability and gross negligence, claiming the city owned and controlled the park and was aware of the dangers posed by the active train tracks. The city filed a Rule 91a motion to dismiss, arguing that the claims did not fall within the Texas Tort Claims Act's (TTCA) waiver of immunity and that the city did not have formal or actual notice of the claims. The trial court denied the motion, leading to this interlocutory appeal.

The appellate court affirmed, holding that the Tapia and Wellborn sufficiently pled facts to show the city had actual notice of the claims against it, thus satisfying the notice requirement under the TTCA. The court found that the allegations, taken as true, demonstrated the city's subjective knowledge of the death, its alleged fault, and the identity of the parties involved. Additionally, the court concluded that Tapia and Wellborn pled sufficient facts for their premises liability claim to survive the city's Rule 91a motion, as they alleged the city created the dangerous condition that led to their daughter's death.

Tort Claims Act: *City of Houston v. Stephens*, No. 01-25-00180-CV, 2025 WL 3275142 (Tex. App.—Houston [1st Dist.] Nov. 25, 2025) (mem. op.). This case involves a motor vehicle collision where Eric Stephens, with passengers Edwin Stephens and L.S., was side-swiped by a Houston Police Department officer's vehicle while the officer was pursuing an unknown driver. The Stephens filed a negligence suit against the city, claiming jurisdiction under the Texas Tort Claims Act (TTCA) due to the officer's negligent operation of a motor vehicle. The city filed a Rule 91a motion to dismiss, arguing that the Stephens did not allege facts sufficient to waive the city's governmental immunity under the TTCA and failed to negate the emergency or 9-1-1 exceptions to the waiver. The trial court denied the city's motion, leading to this appeal.

The appellate court reversed the trial court's decision, ruling that the Stephens did not sufficiently plead facts to negate the emergency or 9-1-1 exceptions to the TTCA's waiver of immunity. The appellate court determined that the Second Amended Petition was the operative pleading and found that it did not allege any violation of applicable laws or ordinances by the officer, nor did it claim the officer acted with conscious indifference or reckless disregard for safety. Consequently, the appellate court rendered judgment dismissing the Stephens' claims against the city for lack of jurisdiction.

Contracts: *City of Cibolo v. Cibolo Turnpike, LP*, No. 04-24-00532-CV, 2025 WL 3223755 (Tex. App.—San Antonio Nov. 19, 2025) (mem. op.). The City of Cibolo appealed the trial

court's denial of its plea to the jurisdiction regarding Cibolo Turnpike, LP's (CTLP) breach of contract claim. The city argued that CTLP lacked standing and that the requested relief was not recoverable under the city's waiver of governmental immunity. The court held that CTLP had standing because it alleged a concrete injury traceable to the city's breach of the development agreement for a toll road project. The court also determined that the city's waiver of governmental immunity allowed for a suit seeking specific performance, thus granting the trial court jurisdiction over the case. The court did not address whether CTLP could recover monetary damages, as the focus was solely on jurisdiction. Consequently, the court affirmed the trial court's order denying the city's plea to the jurisdiction.

Official Immunity: *Hudman v. Dunn*, No. 06-25-00020-CV, 2025 WL 3171169 (Tex. App.—Texarkana Nov. 13, 2025) (mem. op.). Denea Hudman sued Randy C. Dunn, the mayor of Quitman, Texas, after he accessed her personal emails on a city computer, which led to her removal as the executive director of the Quitman Development Corporation (QDC). Dunn was granted summary judgment on the basis of official immunity, which Hudman appealed, arguing that genuine issues of material fact existed. The court found that Dunn was entitled to official immunity as he was performing discretionary duties in good faith and within the scope of his authority as mayor. Dunn's investigation into Hudman's emails was deemed within his authority because it related to potential conflicts of interest and misuse of city funds. The appellate court concluded that Hudman failed to raise a genuine issue of material fact to counter Dunn's claim of official immunity, affirming the trial court's judgment.

Zoning: *Babcorp 200, LTD. v. City of Grand Prairie*, 2025 WL 3276426 (Tex. App.—Texarkana Nov. 25, 2025) (mem. op.). Babcorp 200, Ltd. appealed a trial court's decision that a 16.9-acre parcel of land it owned was zoned as single-family rather than multi-family, as Babcorp believed. The dispute centered around a water well clause in Ordinance 3549, which required a water well to be under construction within one year of the ordinance's enactment, or the zoning would revert to single-family. Babcorp argued that the clause was void and that the City of Grand Prairie should be estopped from enforcing it due to the city's conduct over the years. The Court of Appeals found that Babcorp presented sufficient evidence for estoppel, noting that the city had consistently treated the parcel as multi-family for decades and had misled Babcorp's predecessor about the ordinance's requirements. Consequently, the appellate court reversed the trial court's judgment, ruling that the city is estopped from enforcing the reversionary clause against Babcorp.

Employment Discrimination: *Univ. of Tex. at El Paso v. Aranda*, No. 08-25-00083-CV, 2025 WL 3164675 (Tex. App.—El Paso Nov. 12, 2025). Aranda applied for a Police Communications Operator position with the University of Texas at El Paso Police Department (the "department") but was allegedly disqualified during the application process due to his amaxophobia, a fear of driving. Aranda claimed that during a phone call, the department's background investigator informed him that a driver's license was required, which led to his disqualification. Aranda filed a discrimination charge with the Equal Employment Opportunity Commission, alleging disability discrimination, and subsequently sued the department under the

Texas Commission on Human Rights Act for regarding him as disabled. The department filed a combined plea to the jurisdiction and summary judgment motion, arguing that Aranda failed to establish a prima facie case of discrimination and that his fear of driving was not a qualifying disability. The trial court denied the department's motion. The department appealed the trial court's denial.

On appeal, the appellate court affirmed the trial court's decision, holding that Aranda raised a genuine issue of material fact regarding whether the department perceived him as impaired and disqualified him based on that perception. The court found that Aranda's testimony and the evidence supported the inference that the department regarded him as having a mental impairment. The court also determined that the department's stated reason for disqualifying Aranda—a requirement for a driver's license—was potentially pretextual, as the job description did not list driving as a requirement. The court concluded that Aranda met his burden of establishing a prima facie case of discrimination, and the department's legitimate, nondiscriminatory reason was insufficient to dismiss the case at this stage.

Whistleblower Act: *El Paso Cnty. Juvenile Bd. v. Mena*, No. 08-24-00128-CV, 2025 WL 3212051 (Tex. App.—El Paso Nov. 17, 2025). Mena, an employee of the El Paso County Juvenile Probation Department, alleged she was terminated for making a good faith report under the Texas Whistleblower Act (TWA). She claimed that during her probationary employment, she was forced to disclose confidential juvenile information to the El Paso Police Department during a traffic stop, which she believed violated specific provisions of the Texas Family Code. She reported this incident to her supervisors and later to the Texas Rangers, expressing concerns about directives from her employer that she believed would lead to future violations of the law. Mena was later terminated from her position, with the county citing poor job performance and policy violations as the reasons for termination. Mena filed suit against the county and the board, alleging retaliation under the TWA. The trial court denied the county's plea to the jurisdiction. The county appealed the trial court's denial.

On appeal, the appellate court reversed the trial court's decision, holding that Mena did not raise a genuine issue of material fact regarding a qualifying report under the TWA. The court found that Mena's reports did not constitute an actionable violation of law by her employer or another public employee, as required by the TWA. In addition, Mena's concerns about potential future violations did not meet the standard for a good faith report of an existing or past violation. As a result, the appellate court concluded that the county's immunity from suit was not waived under the TWA, and thus, the trial court lacked jurisdiction. Consequently, the appellate court rendered judgment dismissing Mena's suit for lack of jurisdiction.

Tort Claims Act: *Baskin v. Presidio County*, No. 08-24-00325-CV, 2025 WL 3237086 (Tex. App.—El Paso Nov. 19, 2025). Baskin alleged that the Presidio County's negligent maintenance and use of motor-driven equipment over several years, including improper work on a detention pond and dam, led to a flood in May 2023 that damaged her property. The county filed a plea to the jurisdiction, arguing that the property damage did not arise from the operation or use of its

motor-driven equipment to support a waiver of immunity under the Texas Tort Claims Act. The trial court granted the county's plea. Baskin appealed the trial court's denial.

On appeal, the appellate court affirmed the trial court's decision, concluding that Baskin's allegations did not establish a sufficient nexus between the county's use of motor-driven equipment and the flood damage to her property. The appellate court found that the alleged negligent acts occurred well before the flood, lacking the necessary temporal and geographic proximity to the damages. The appellate court also determined that Baskin had already been given a reasonable opportunity to amend her pleadings and that her claims were barred by sovereign immunity, rendering the defect incurable.

Whistleblower Act: *City of Montgomery v. McCorquodale*, No. 09-25-00265-CV, 2025 WL 3101347 (Tex. App.—Beaumont Nov. 6, 2025) (mem. op.). David McCorquodale, the former Assistant City Administrator and Planning/Development Director for the City of Montgomery, filed a wrongful termination suit against the city under the Texas Whistleblower Act (TWA), alleging retaliation for reporting fraudulent activity by the city's police chief. The city denied the allegations, asserting governmental immunity, and filed a plea to the jurisdiction, arguing that McCorquodale failed to initiate a grievance as required by the TWA. McCorquodale contended that the city's grievance process was discretionary and that his attempts to file a grievance were frustrated by the city. The trial court denied the city's plea, leading to this interlocutory appeal.

The appellate court reversed the trial court's decision, finding that McCorquodale did not raise a genuine issue of material fact regarding the initiation of a grievance as required by the TWA. The court concluded that McCorquodale failed to provide evidence that he initiated a grievance related to his termination and thus the city's plea to the jurisdiction should have been granted. Consequently, the appellate court rendered a dismissal of McCorquodale's claims against the city for lack of jurisdiction.

Procedure: *In re Texas Gov't Accountability Ass'n*, No. 11-25-00324-CV, 2025 WL 3165384 (Tex. App. —Eastland Nov. 12, 2025) (mem. op.). The Texas Government Accountability Association (TGAA) filed a petition for writ of mandamus against Judge Lori Ruiz-Crutcher, alleging abuse of discretion in granting the City of Odessa's motion for protection, which prevented the deposition of the city's mayor and councilmembers, and in denying TGAA's motion to continue the hearing on the city's motion for summary judgment. TGAA also sought emergency temporary relief to stay all trial court proceedings, including a summary judgment hearing scheduled for November 13, 2025.

The court of appeals determined that TGAA had not demonstrated a lack of an adequate remedy by appeal, as the issues could be addressed through appellate review if the city's motion for partial summary judgment was granted. The court concluded that the benefits of mandamus review were outweighed by the detriments and thus declined to issue mandamus relief. Consequently, the court denied both the petition for writ of mandamus and the motion for

emergency temporary relief, without expressing any opinion on the merits of the trial court's rulings.

Age Discrimination: *Brownsville Pub. Util. Bd. v. Gamez*, No. 13-25-00272-CV, 2025 WL 3100994 (Tex. App.—Corpus Christi-Edinburg Nov. 6, 2025) (mem. op.). This case involves an appeal by the Brownsville Public Utility Board (BPUB) against Encarnacion Gamez, Federico Flores, Jesus Galvan, and Ramon Garcia, who alleged age discrimination after being constructively discharged from their positions at BPUB. Gamez, Flores, Galvan, and Garcia claimed they were demoted or forced to retire due to their age, despite having extensive experience and qualifications for their roles. BPUB filed a plea to the jurisdiction, asserting governmental immunity and arguing that Gamez, Flores, Galvan, and Garcia failed to establish a prima facie case of age discrimination, as they lacked the necessary licenses for their positions. The trial court denied BPUB's plea, leading to this accelerated interlocutory appeal.

The appellate court reversed the trial court's decision, finding that BPUB had presented undisputed evidence that the appellees were unqualified for their positions due to lacking required licenses, which were in place years before the alleged discriminatory actions. The court concluded that the Gamez, Flores, Galvan, and Garcia failed to produce any evidence to create a fact issue regarding BPUB's legitimate non-discriminatory reasons for their employment actions. Consequently, the appellate court rendered judgment dismissing the case for lack of jurisdiction.

Civil Service Act: *City of Edinburg v. Campos*, No. 13-24-00313-CV, 2025 WL 3171064 (Tex. App.—Corpus Christi-Edinburg Nov. 13, 2025) (mem. op.). In this case, Rodolfo Campos, a former police officer for the City of Edinburg, Texas, sought judicial review of a decision by the city's Civil Service Commission that affirmed his termination. Campos was hired as a non-certified police officer on March 19, 2021, and was terminated one year and nine days later. He appealed to the commission, arguing that his termination violated Chapter 143 of the Texas Local Government Code, which stipulates a one-year probationary period for entry-level officers. The city contended that Campos was still on probation under Rule 6.01, which mandates an 18-month probationary period. The commission dismissed Campos's appeal, leading him to seek judicial review in district court, where he argued that Rule 6.01 was invalid due to an existing meet-and-confer agreement. The district court granted Campos's motion for summary judgment, declaring Rule 6.01 void and awarding him back pay and benefits, but did not address his claim for attorney's fees. The city appealed, challenging the denial of its plea to the jurisdiction and the summary judgment in Campos's favor.

The appellate court dismissed the city's appeal regarding the summary judgment for lack of jurisdiction, as the judgment did not dispose of all claims, specifically Campos's claim for attorney's fees, making it interlocutory. However, the court affirmed the trial court's denial of the city's plea to the jurisdiction. The court found that the trial court had jurisdiction because Campos's claims were viable under the Civil Service Act, which waives immunity for such claims. The court concluded that the Commission's application of Rule 6.01 was invalid as it

contradicted the statutory probationary period outlined in the Civil Service Act, and the trial court was correct in setting aside the Commission's decision.

Open Meetings: *Webb County v. Mares*, No. 14-23-00617-CV. 2025 WL 3165692 (Tex. App.—Houston [14th Dist.] Nov. 13, 2025). Mares, the director of Webb County's Administrative Services Department, filed suit against the county alleging a violation of the Texas Open Meetings Act (TOMA) due to inadequate notice that her department might be restructured, her position changed, and her salary reduced during a Commissioners Court meeting. Mares was later terminated from her position. After Mares was terminated, she added claims for age discrimination, First Amendment retaliation under Section 1983, and retaliation under the Texas Whistleblower Act (TWA). The county removed the case to federal court. The federal trial court granted the county's motion for summary judgment on all of Mares's claims except the TOMA and TWA claims, remanding those claims back to state court. Mares dropped the TWA claims and proceeded only on the TOMA claim. The state trial court granted Mares's motion for summary judgment on the TOMA claim, awarding her back pay, lost retirement benefits, and attorney's fees. The county appealed the state trial court's decision.

On appeal, the appellate court affirmed in part and reversed in part the trial court's judgment. The appellate court affirmed the trial court's ruling that: (1) the TOMA claim was not moot because the employee failed to seek immediate relief through a mandamus or injunction; (2) the county's notice at issue was inadequate under TOMA; (3) the county's statutory power to make changes to the proposed budget did not insulate it from a TOMA claim. However, the appellate court overturned the trial court's ruling regarding governmental immunity and the availability of monetary damages under TOMA. Specifically, the appellate court held that: (1) TOMA does not waive the county's immunity for a terminated employee's claim for declaratory judgment for back pay and lost retirement benefits; and (5) monetary damages are not available for TOMA violations through injunctive or mandamus relief. Accordingly, the appellate court reversed the state trial court's award of back pay and lost retirement benefits. In addition, the appellate court affirmed the trial court's award of attorney's fees and costs to Mares.

Tort Claims Act: *City of Houston v. Manning*, No. 14-23-00087-CV, 2025 WL 3165693 (Tex. App.—Houston [14th Dist.] Nov. 13, 2025). This case involves a personal injury suit arising from a collision between a Houston Fire Department truck and a vehicle driven by Manning, with three minor passengers. Manning and the passengers sued the city under various negligence theories, asserting that the Texas Tort Claims Act waived the city's immunity and that the emergency exception did not apply because the city driver failed to slow the fire truck and exceeded the speed limit, acting with conscious indifference or reckless disregard for safety. The trial court denied the city's motion for summary judgment on various governmental-immunity grounds. The city appealed the trial court's denial.

On appeal, the appellate court affirmed the trial court's denial, but the Supreme Court of Texas remanded the case for reconsideration of certain immunity arguments. On remand, the appellate court reaffirmed the denial of the city's summary judgment motion, concluding that issues of material fact existed regarding the city's claims of official immunity, the emergency exception, and the 9-1-1 exception. Specifically, the appellate court found that the city failed to

conclusively establish that the city driver's good faith related to whether he slowed down before entering the intersection and whether the traffic signal was red. The appellate court also found that the city failed to demonstrate that the city driver complied with all applicable statutory requirements regarding operating an emergency vehicle, thus precluding summary judgment on the emergency and 9-1-1 exceptions.

Tort Claims Act: *City of Houston v. Gutierrez*, No. 14-24-00811-CV, 2025 WL 3523082 (Tex. App.—Houston [14th Dist.] Dec. 9, 2025). This case involves an automobile collision where a city fire chief, driving a city-owned truck, struck a car while commuting to work. Gutierrez, Davilla, and Jimenez sued the city, claiming the fire chief was acting within the scope of his employment, thus waiving the city's immunity under the Texas Torts Claims Act. The city filed a motion for summary judgment asserting governmental immunity based on the coming-and-going rule. The trial court denied the city's motion. The city appealed the trial court's denial.

On appeal, the appellate court reversed the trial court's decision, finding that the accident occurred during the fire chief's morning commute to work, and thus, as a matter of law, the coming-and-going rule for governmental immunity applied. Accordingly, the appellate court reversed the trial court's decision and rendered judgment dismissing the claims against the city.

Whistleblower Act: *Harris Cnty. v. Noriega*, No. 14-24-00359-CV, 2025 WL 3458627 (Tex. App.—Houston [14th Dist.] Dec. 2, 2025). Noriega, formerly employed by Harris County, filed suit against the county, alleging that he was terminated in retaliation for reporting a false sexual harassment complaint against him, which he claimed violated the Texas Whistleblower Act (TWA). Noriega's report to the county attorney's office cited violations of the Harris County Personnel Policies and Procedures and the Code of Conduct, which he argued were "laws" under the TWA. The county filed a plea to the jurisdiction, asserting that Noriega's claims did not meet the TWA's requirements because the internal policies cited were not "laws" under the Act, and thus, the trial court lacked subject-matter jurisdiction. The trial court denied the county's motion. The county appealed the trial court's denial.

On appeal, the appellate court reversed the trial court's decision, finding that the county's internal policies and code of conduct cited by Noriega do not qualify as "laws" under the TWA. As a result, the appellate court concluded that Noriega failed to establish a violation of the TWA, as the provisions he cited were not adopted under any applicable statutes or ordinances. Consequently, the appellate court reversed the trial court's decision and rendered judgment dismissing Noriega's case with prejudice.

Reverse Condemnation: *Pawn TX, Inc. v. City of Houston*, No. 14-24-00869-CV, 2025 WL 3458626 (Tex. App.—Houston [14th Dist.] Dec. 2, 2025). Pawn TX owns a pawn shop in Houston, Texas, with parking spaces that were rendered unusable due to a city improvement project that included installing curbs and a bike lane. Pawn TX sued the city for inverse condemnation, claiming that the loss of parking and restricted access constituted a material and substantial impairment of its property, and thus constituted a taking under the Texas Constitution. The trial court granted the city's plea to the jurisdiction without a hearing. Pawn TX appealed the trial court's denial.

On appeal, the appellate court reversed the trial court's decision, finding that the city had not demonstrated that the remaining parking spaces were sufficient for the pawn shop's functionality. The appellate court noted that the city's evidence did not address the impact of losing the eleven parking spaces or the higher traffic counts at the location. As a result, the court concluded that Pawn TX's claim should proceed, as the city had failed to show that the remaining access was not unreasonably deficient. The case was remanded for further proceedings.

Medical Liability Act: *City of Houston v. Umana*, No. 14-24-00911-CV, 2025 WL 3481343 (Tex. App.—Houston [14th Dist.] Dec. 4, 2025). Umana sued the city after being injured in a traffic accident while riding in a city-owned van driven by a city employee, who was transporting him home from a city-run medical clinic. The city filed a motion to dismiss, arguing that Umana's claim constituted a healthcare liability claim (HCLC) under the Texas Medical Liability Act (TMLA) and that Umana failed to file the required expert report. The trial court denied the city's motion to dismiss. The city appealed the trial court's denial.

On appeal, the appellate court affirmed the trial court's decision, concluding that Umana's allegations did not constitute an HCLC under the TMLA. The appellate court found that the alleged negligence stemmed from a simple car accident and did not involve a substantive nexus between healthcare and the safety standards allegedly violated. The appellate court also determined that expert medical or healthcare testimony was not necessary to prove or refute the applicable standard of care and its breach.

October 2025

First Amendment: *Hershey v. City of Bossier City*, No. 21-30754, 2025 WL 2836908 (5th Cir. Oct. 7, 2025). Richard Hershey, a pamphleteer, brought a § 1983 action against the City of Bossier City, its police officers, and private security guards, alleging that they violated his First Amendment rights by threatening to arrest him for distributing religious pamphlets on a public sidewalk outside a city-owned facility managed by a private corporation. The district court dismissed Hershey's claims, granting qualified immunity to the officers and ruling that the security guards were not state actors under § 1983, and found no municipal policy or custom to hold the city liable under *Monell*. Hershey appealed the dismissal.

The appellate court reviewed whether Hershey's First Amendment rights were clearly established, which is necessary to overcome qualified immunity. The court found that it was not clearly established that Hershey had a right to evangelize on the sidewalk outside the city-owned facility, thus affirming qualified immunity for the officers. However, the court found that Hershey sufficiently alleged that the city acted with deliberate indifference by failing to train its officers and security guards, which could support a *Monell* claim. The court noted that the city's complete lack of training on First Amendment rights could be seen as the cause of Hershey's injury.

The court was divided, with Judge Ho concurring in part and dissenting in part, expressing disagreement with the court's approach to qualified immunity and First Amendment rights. Judge Dennis also concurred in part and dissented in part, arguing that the district court erred in dismissing the *Monell* claim and that the security guards acted under color of state law. Judge Richman dissented, arguing against expanding *Monell* liability and supporting the dismissal of claims against the individual defendants. Ultimately, the appellate court affirmed the district court's judgment in part, granting qualified immunity to the officers, and reversed in part, allowing Hershey's *Monell* claim against the city to proceed.

Short Term Rentals: *Hignell-Stark v. City of New Orleans*, 154 F.4th 345 (5th Cir. 2025). Homeowners and rental-property supervisors (Property Owners) in New Orleans challenged the city's licensing scheme for short-term rentals (STRs), claiming it violated the First Amendment, due process, equal protection, and the dormant commerce clause. The United States District Court for the Eastern District of Louisiana granted summary judgment to the city, upholding the regulations. The Property Owners appealed, arguing that the city lacked authority to regulate STRs and that the regulations were unconstitutional.

The court found that the city had the authority under state law to regulate STRs, as municipalities can regulate the use of land for various purposes, including short-term rentals. However, the court determined that the Property Owners did not establish a protected property interest under Louisiana law necessary for their due process claims. The court also found that the city's prohibition on business entities obtaining STR permits violated the Equal Protection Clause, as business entities and natural persons were similarly situated. The court concluded that the city's rationale for the business ban was not rationally related to its legitimate interests. Regarding the First Amendment, the court held that the city's advertising restrictions on STRs were unconstitutional, as they did not directly advance a substantial governmental interest. The court also addressed the dormant commerce clause, interpreting the city's requirement that an operator must reside on the property while guests were present as not requiring permanent residency, thus not violating the clause. The appellate court affirmed the district court's judgment in part, reversed it in part, specifically regarding the prohibition on business entities obtaining permits and the advertising restriction, and remanded the case for further proceedings.

Breach of Contract & Open Meetings: *Jones v. City of Hutto*, 154 F.4th 332 (5th Cir. 2025). Odis Jones, a Black man, served as the city manager of Hutto, Texas, and entered into a separation agreement with the city that included a severance payment and a non-disparagement clause. The agreement was rescinded by the city council, allegedly due to a legal opinion that it was void, but Jones claimed it was due to racial animus. Jones filed a lawsuit under 42 U.S.C. § 1981 for racially motivated impairment of contract rights and a breach of contract claim under Texas law. The jury found in favor of Jones on both claims, awarding him $8 million for the § 1981 claim and $4.5 million for breach of contract. The city appealed, arguing insufficient evidence of racial animus and the invalidity of the separation agreement.

The appellate court held that the city council's resolution rescinding the agreement was an official policy under § 1983, but there was insufficient evidence of racial animus by a majority of council members to support the § 1981 claim. The court found that the cat's paw theory, which imputes discriminatory motives from one actor to another, was incompatible with *Monell's* bar on *respondeat superior* in § 1983 actions. Additionally, the court affirmed the district court's ruling that the separation agreement was valid under the Texas Open Meetings Act, as the public notice was sufficient. The city's argument that the agreement was void under the city charter's overspending provision was forfeited because it was not raised in earlier motions. The court agreed with the district court that the city breached the agreement by attempting to rescind it, despite Jones retaining the $412,000 payment. The court noted that Jones was entitled to attorney fees as he prevailed on his right to retain the separation payment. However, the court found no evidence that the City breached the non-disparagement provision, as disparaging remarks by individual council members did not constitute actions by the city or the council as a body. The judgment was affirmed in part, reversed in part, and remanded for further proceedings regarding attorney fees.

Employment Discrimination: *Chhim v. City of Houston*, No. 24-20469, 2025 WL 2851872 (5th Cir. Oct. 8, 2025). Joseph Chhim, a seventy-nine-year-old Asian man of Cambodian descent, filed a lawsuit against the City of Houston, alleging national origin discrimination, age discrimination, and retaliation under Title VII, the ADEA, and the TCHRA. Chhim claimed that from July to September 2023, he applied for various positions with the city but was neither interviewed nor hired. At the district court, Chhim did not provide evidence that the city rejected him due to his race, national origin, or age, nor did he know the qualifications of those hired instead. For his retaliation claims, Chhim failed to show that any decisionmaker knew of any protected activity or that there was a causal connection between his activity and the city's actions. The district court noted that a five-month lapse between his protected activity and the city's refusal to interview him was insufficient to establish a causal connection. Ultimately, the district court dismissed all claims with prejudice, finding that Chhim failed to plead sufficient facts to make a plausible claim of discrimination or retaliation, and Chhim appealed.

On appeal, Chhim did not address the district court's analysis or explain any errors, effectively forfeiting his argument, so the appellate court affirmed the district court's dismissal of Chhim's claims.

Malicious Prosecution: *Sessanga v. City of DeSoto*, No. 24-11050, 2025 WL 2848715 (5th Cir. Oct. 8, 2025). Charles Kakembo Sessanga was prosecuted and acquitted for continuous sexual abuse of a child, after which he sued the City of DeSoto Police Department, a detective, two police officers, and a prosecutor, claiming malicious prosecution. The district court dismissed the case *sua sponte* as Sessanga was proceeding *in forma pauperis*, and Sessanga appealed.

The appellate court found that Sessanga failed to state a claim for malicious prosecution, because the independent intermediary doctrine shielded the police defendants, as a grand jury had

indicted Sessanga, and Sessanga did not sufficiently allege that the grand jury's deliberations were tainted by the defendants' actions. The prosecutor was found to be absolutely immune from the suit as she acted in her role as an advocate for the state. The appellate court also affirmed the district court's decision to deny Sessanga leave to amend his complaint, as he had already pleaded his best case. Consequently, the judgment of the district court was affirmed.

ADA Accommodations: ***Rolando Vasquez v. Union Pacific Railroad Company,*** **No. 24-50852, 2025 WL 3034706 (5th Cir. Oct. 30, 2025).** Rolando Vasquez, an employee of Union Pacific Railroad Company (UPRC), suffered a traumatic brain injury (TBI) from an off-duty motorcycle accident, leading UPRC to require a fitness-for-duty (FFD) evaluation and impose work restrictions on him. Vasquez sued UPRC for disability discrimination under the ADA, alleging disparate treatment and failure to accommodate, but the district court granted summary judgment in favor of UPRC. The district court found that UPRC had established a direct threat defense, which negated the need to address whether Vasquez presented direct evidence of discrimination. Vasquez appealed, arguing that the district court erred in its conclusions regarding direct evidence of discrimination and the burden of proof for the direct threat defense.

The appellate court reviewed the summary judgment de novo, applying the same standards as the district court. The ADA prohibits discrimination against qualified individuals with disabilities, but allows a direct threat defense if an employee poses a significant risk to health or safety that cannot be mitigated by reasonable accommodation. The court found that UPRC conducted an individualized assessment of Vasquez's ability to perform his job safely, involving multiple doctors and evaluations, and reasonably concluded that he posed a direct threat. Vasquez's arguments that UPRC's reliance on certain federal guidance and the opinions of his medical providers were insufficient were rejected, as the court found UPRC's process reasonable. The court also addressed Vasquez's failure-to-accommodate claim, noting that he did not demonstrate he was qualified for his position or other positions he sought, such as signal construction, clerk, and manager roles. Vasquez failed to prove the existence of available positions for which he was qualified, and his driving restrictions were a significant barrier. Ultimately, the appellate court affirmed the district court's grant of summary judgment in favor of UPRC on both the disparate treatment and failure-to-accommodate claims.

Land Use Regulation & Takings: ***Legacy Hous. Corp. v. City of Horseshoe Bay, Tex.*****, No. 24-50462, 2025 WL 3040870 (5th Cir. Oct. 31, 2025).** Legacy Housing Corporation purchased several hundred lots in Horseshoe Bay, Texas, zoned for manufactured housing as well as adjacent land in the city's extraterritorial jurisdiction (ETJ) to build a road connecting the lots to a highway. The land was subject to restrictions, including a two-permit cap on speculative housing and requirements for contractor registration, utility hookup fees, and setback requirements. Legacy built a road over the ETJ property and development lots, allegedly violating these restrictions, and claimed a conspiracy among the city, a property owners' association (POA), and other developers to prevent its development. The district court granted summary judgment to the city and the other defendants, dismissing Legacy's claims and granting

the city's counterclaims for breach of an ETJ development agreement and restrictive covenant. Legacy appealed.

On appeal, Legacy argued errors in the district court's rulings on regulatory takings, breach of agreements, and other claims. The appellate court reviewed the regulatory takings claims under the *Penn Central* factors, finding Legacy's claims regarding subcontractor restrictions, permit caps, utility hookup fees, and setback requirements unsupported. The court found the subcontractor restrictions did not impose heightened requirements on manufactured housing contractors. The two-permit cap claim was not ripe, as Legacy had not requested additional permits. Utility hookup fees were classified as user fees, not takings. And the setback requirements did not interfere with Legacy's investment-backed expectations, as Legacy could still build on the lots. Additionally, the court upheld the district court's finding that Legacy breached the ETJ development agreement by building a road without the city's consent, and the city did not commit a prior material breach. The court also affirmed summary judgment for the remaining defendants on Legacy's strips and gores, negligence, Section 1983, civil conspiracy, and breach of fiduciary duty claims. Ultimately, the trial court judgment was modified to dismiss the regulatory takings claim without prejudice regarding the two-permit cap and affirmed as modified.

Recent Texas Cases of Interest to Cities

Note: Included cases are from October 1, 2025, through October 31, 2025. *These case summaries have been prepared with the assistance of AI.*

Wrongful Termination: *La Villa Indep. Sch. Dist. v. Hinojosa*, No. 13-25-00290-CV, 2025 WL 2985002 (Tex. App.—Corpus Christi-Edinburg Oct. 23, 2025). Marlene Hinojosa, employed as the "Dean of Instruction" by La Villa Independent School District (LVISD) since 2019, alleged that Sonia M. Lopez, a board member of LVISD, retaliated against her after Hinojosa refused to place Lopez's daughter on the dean's list. Hinojosa claimed Lopez acted outside her official duties, violating fiduciary responsibilities, and sought damages and injunctive relief for wrongful termination, tortious interference, and breach of fiduciary duty. After LVISD and Lopez filed pleas to the jurisdiction, the trial court denied these pleas, leading to this interlocutory appeal.

The appellate court reversed the trial court's decision, granting Lopez's plea to the jurisdiction and dismissing Hinojosa's claims with prejudice. The court found that Hinojosa's claims for tortious interference and breach of contract failed due to the lack of a valid contract subject to interference, as her employment contract had expired. Additionally, the court concluded that Hinojosa did not establish a fiduciary relationship between Lopez and herself, nor did she suffer an adverse employment decision necessary for her constitutional wrongful termination claim.

Breach of Contract: *City of Pasadena v. Sepulveda*, No. 01-24-00327-CV, 2025 WL 3006553 (Tex. App.—Houston [1st Dist.] Oct. 28, 2025). Azael Sepulveda purchased property in Pasadena, Texas, intending to open an automobile repair shop. The City of Pasadena rejected his preliminary site plan, which was necessary for obtaining a certificate of occupancy, due to non-compliance with parking and paving ordinances. Sepulveda sued the city for breach of contract and constitutional violations after a mediated settlement agreement was reached, which included specific conditions for approval. The trial court denied the city's plea to the jurisdiction, which argued that Sepulveda's claims were not ripe and were barred by governmental immunity. Sepulveda did not apply for variances or appeal the site plan denial, leading to the city's argument that his claims were premature.

The appellate court reversed the trial court's decision, concluding that Sepulveda's claims were not ripe for adjudication. The court held that Sepulveda had not obtained a final decision from the city regarding his site plan, as he had not submitted a revised plan or sought variances for the City's requirements. The court determined that without a final determination, Sepulveda's constitutional and breach-of-contract claims were speculative and contingent on future events. Consequently, the appellate court rendered judgment dismissing Sepulveda's claims for lack of jurisdiction.

Contracts: *City of Colleyville v. Mart, Inc.*, No. 02-25-00276-CV, 2025 WL 2989769 (Tex. App.—Fort Worth Oct. 23, 2025) (mem. op.). This case involves an appeal by the City of Colleyville against Mart, Inc., regarding a liquidated damages provision in a construction contract for renovations to the city's senior center. The trial court declared the liquidated damages provision, which allowed the city to withhold $5,000 per day for delays, as an unenforceable penalty. Mart argued that the provision was intended as a penalty and that the actual damages incurred by the city were much less than the liquidated damages imposed. The city contended that the liquidated damages were a reasonable forecast of just compensation due to the difficulty in estimating actual damages. However, the court found that the city failed to provide evidence that the liquidated damages were a reasonable forecast, as there was no documentation or analysis supporting the $5,000 per diem amount. Consequently, the court affirmed the trial court's decision, ruling the provision as an unenforceable penalty.

Municipal Court: *John B. Gordon v. The State of Texas*, No. 03-25-00618-CR, 2025 WL 2857104 (Tex. App.—Austin Oct. 9, 2025) (mem. op.). John B. Gordon was found guilty by a jury in municipal court for violating a City of Round Rock ordinance by constructing an accessory building without the necessary permit. The municipal court ordered Gordon to pay a $500 fine and court costs. Gordon attempted to appeal the judgment to the county court at law by filing an appeal bond after the judgment, but because his appeal bond was untimely (filed four days after the 10-day deadline), the county court at law dismissed his appeal for want of jurisdiction and remanded the case to the municipal court for execution of the sentence.

The court of appeals subsequently dismissed Gordon's appeal for want of jurisdiction, as the county court at law's dismissal left the appellate court without jurisdiction to consider the merits of the appeal.

Land Use: *City of Wilmer v. EDD RD RV Park LLC*, No. 05-24-00252-CV, 2025 WL 2842388 (Tex. App.—Dallas Oct. 7, 2025) (mem. op.). EDD RD RV Park LLC (EDD) purchased land in Dallas County to develop an RV park, believing part of the land was within the City of Wilmer's extraterritorial jurisdiction, where such development was permitted. However, the city claimed the land was within its corporate limits due to a 2008 annexation ordinance, which led to a dispute over the validity of the ordinance versions presented by both parties. EDD filed suit challenging the city's denial of its plat application under Local Government Code Section 212.0099, and the trial court ruled in favor of EDD, finding the city's plat conditions invalid.

On appeal, the city argued the trial court lacked subject matter jurisdiction and awarded excessive attorney's fees. The appellate court affirmed the trial court's decision, holding that the trial court had jurisdiction under Chapter 212 of the Local Government Code to determine the validity of the plat conditions and that the award of attorney's fees was supported by sufficient evidence. The court found that EDD's claims were not an improper challenge to the annexation but rather a valid challenge to the city's decision to withhold plat approval. The appellate court overruled both of the city's issues on appeal.

Liability: *Texas Municipal League Intergovernmental Risk Pool v. Fierro*, No. 06-25-00015-CV, 2025 WL 3009033 (Tex. App.—Texarkana Oct. 28, 2025) (mem. op.). Ernesto Fierro, a former police officer, was involved in an off-duty altercation that led to the death of William Howard Livezey, Jr., resulting in criminal charges against Fierro and a federal lawsuit filed by Livezey's family. The Texas Municipal League Intergovernmental Risk Pool initially provided Fierro with legal defense but withdrew after he pled guilty to the charges. The Livezeys obtained a summary judgment against Fierro for over $6 million, and Fierro, through a turnover order, filed a petition against the Risk Pool for breach of duty to defend and indemnify. The trial court ruled in favor of Fierro, awarding $1 million in policy limits and attorney fees, but the Risk Pool appealed, arguing that coverage exclusions applied. The Court of Appeals found that the criminal acts exclusion applied, negating the Risk Pool's duty to defend or indemnify Fierro, and reversed the trial court's judgment.

Sale of Municipal Real Property: *124 S. Oak St. LLC v. Town of Pecos City*, No. 08-24-00418-CV, 2025 WL 2918426 (Tex. App.—El Paso Oct. 14, 2025). The Town of Pecos City sold property to Willmar Land LLC without soliciting sealed bids or conducting a public auction. Pecos City later sued Willmar and subsequent purchasers, 124 South Oak Street LLC and John Lanahan, seeking declaratory judgment that the initial deed and any subsequent conveyances of the property were void. Lanahan also filed a counterclaim arguing that the city's actions constituted inverse condemnation. The trial court found that the city's sale of the property to Willmar Land did not comply with all state law requirements and therefore ruled that the initial

deed and any subsequent conveyances were void. The trial court also denied Lanahan's inverse condemnation claim.

124 South Oak and Lanahan appealed the trial court's ruling, arguing that: (1) the sale fell under an exception for low-income housing, and (2) because they were bona fide purchasers for value, the subsequent conveyance from Willmar Land should be upheld. The appellate court found that: (1) there was no evidence that the property was intended for low-income housing, thus the exception did not apply; and (2) title cannot pass from an original deed that is void. As a result, the appellate court affirmed the trial court's ruling that the original conveyance was void because the city did not comply with all statutory requirements, so therefore, title could not pass to subsequent purchasers. The appellate court also affirmed the trial court's rejection of Lanahan's inverse condemnation claim.

Pensions: *In re City of Dallas*, No. 08-25-00246-CV, 2025 WL 2997025 (Tex. App.—El Paso Oct. 24, 2025). The Dallas Police and Fire Pension System (System) filed against the City of Dallas seeking declaratory judgment to affirm a funding plan setting contribution requirements and cost-of-living adjustments (COLAs) for the System's members. The city filed a counterclaim seeking to invalidate the plan, arguing that it was adopted in violation of statutory requirements. The trial court ruled in favor of the System, declaring the plan valid unless preempted or amended by the Legislature. The city appealed and filed a motion for emergency relief to suspend the trial court's judgment and prevent COLA payments during the appeal.

The appellate court granted the city's request to suspend the judgment, suspending the COLA payments pending appeal.

Jurisdiction: *Morris v. City of Midland*, No. 11-25-00265-CV, 2025 WL 2933615 (Tex. App.—Eastland Oct. 16, 2025) (mem. op.). Paula Morris filed a pro se notice of appeal from the trial court's fourth order finding her in contempt for violating a permanent injunction based on her repeated violations of municipal ordinances, including accumulations of debris, parking a trailer or recreational vehicle in a residential area, and holding garage sales in excess of the number permitted by city ordinance. The trial court's order imposed a $500 fine for each violation and instructed the removal of prohibited items from her property, with the city of Midland authorized to enforce compliance if necessary. Morris sought to appeal the contempt order, arguing that the trial court abused its discretion and that the injunction did not prohibit her from conducting garage sales.

The court of appeals dismissed Morris's appeal for want of jurisdiction, as it lacked jurisdiction to review a contempt order that does not impose confinement. The court also declined to construe Morris's response as a petition for writ of mandamus because it did not meet the requirements of Rule 52 of the Texas Rules of Appellate Procedure. Consequently, the court concluded that Morris's notice of appeal did not invoke its appellate jurisdiction.

Tort Claims Act: *City of Houston v. Huerta*, No. 14-24-00767-CV, 2025 WL 2907034 (Tex. App.—Houston [14th Dist.] Oct. 14, 2025). Claudia Huerta sued the City of Houston for personal injuries and property damage resulting from a collision with a Houston Police

Department officer, who was allegedly negligent while operating a police vehicle. Huerta claimed that the city's governmental immunity was waived under the Texas Tort Claims Act (TTCA) and that no valid exceptions to this waiver applied. The city filed a motion to dismiss under Texas Rule of Civil Procedure 91a, arguing that Huerta's pleadings did not: (1) establish a waiver of governmental immunity, (2) overcome the officer's official immunity; or (3) overcome the emergency or 911 exceptions to TTCA's waiver of immunity. The trial court denied the city's motion to dismiss, and the city appealed.

The appellate court affirmed the trial court's decision, finding that Huerta's allegations were sufficient to identify a waiver under the TTCA. However, the court held that Huerta was not required to negate the city's claim of official immunity, as it is an affirmative defense that must be pleaded and proven by the city. Additionally, the court found that Huerta's pleadings sufficiently alleged facts that, if true, would negate the emergency and 911 exceptions to the TTCA waiver of governmental immunity, as the officer's actions were not in compliance with state law. Consequently, the appellate court overruled the city's contentions and affirmed the trial court's order denying the motion to dismiss.

Property Tax Delinquency: *Cantu v. Pasadena Indep. Sch. Dist.*, 2025 WL 2934048 (Tex. App.—Houston [14th Dist.] Oct. 16, 2025). Artemio Cantu appealed a trial court judgment ordering him to pay delinquent property taxes to the Pasadena Independent School District, City of Houston, San Jacinto Community College District, and Harris County. Cantu argued that he had previously made payments sufficient to cover the taxes owed and that the taxing authorities' petition was deficient for not accounting for these payments. He also contended that the taxing authorities lacked standing and that the trial court lacked jurisdiction.

The appellate court affirmed the trial court's judgment, concluding that the taxing authorities had standing and the trial court had jurisdiction. The court found no requirement for the taxing authorities to include an accounting of prior payments in their petition, as such matters are typically the taxpayer's responsibility to prove. The court rejected Cantu's additional arguments due to a lack of supporting legal authority.

Tort Claims Act: *Holloway v. Harris Cnty.*, No. 14-24-00618-CV, 2025 WL 2962586 (Tex. App.—Houston [14th Dist.] Oct. 16, 2025). Darla Holloway and others sued Harris County following a collision between a Harris County Sheriff's Office patrol vehicle and Holloway's vehicle. The Holloways alleged negligence on the deputy's part and claimed that governmental immunity was waived under the Texas Tort Claims Act (TTCA). The county filed a motion for summary judgment and plea to the jurisdiction, arguing that the deputy had official immunity and that the emergency exception to the TTCA applied. The trial court granted the county's motion and dismissed the lawsuit.

On appeal, the appellate court affirmed the trial court's dismissal, concluding that the deputy retained official immunity, which preserved the county's governmental immunity. The court found that the deputy acted in good faith while performing their discretionary duties, as they were responding to an emergency call involving a potentially armed suspect. The court

determined that the need for the deputy's actions outweighed the risks, and the Holloways failed to meet the elevated standard of proof required to defeat the claim of official immunity. The appellate court did not address the emergency exception issue.

Statutory Takings: *San Jacinto River Authority v. Ross*, et al., 2025 WL 2934051 (Tex. App.—Houston [14th Dist.] 2025). During Tropical Storm/Hurricane Harvey in 2017, the San Jacinto River Authority (SJRA) released water from Lake Conroe into the West Fork of the San Jacinto River. A group of downstream property owners, including Thomas E. and Beth F. Ross, filed a statutory takings suit against the SJRA alleging that the release, which caused or worsened flooding on their properties, constituted a taking of their property.

SJRA filed a plea to the jurisdiction, asserting governmental immunity and an exclusion from liability for an action taken out of a reasonable good faith belief that the act is necessary to present a grave and immediate threat to life or property. The trial court denied SJRA's plea to the jurisdiction. SJRA appealed the denial of its plea to the jurisdiction.

The appellate court reversed the trial court's decision, concluding that SJRA had established conclusively that the reasonable good faith exclusion applied, meaning that SJRA had no liability under state law. The court held that SJRA acted with a reasonable good faith belief that releasing water was necessary to prevent a grave and immediate threat to life or property during Hurricane Harvey, and thus, the trial court lacked jurisdiction over the statutory takings claims. Consequently, the appellate court rendered judgment dismissing the property owners' statutory takings claims with prejudice.

September 2025
Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from September 1, 2025 through September 30, 2025. *These case summaries have been prepared with the assistance of AI.*

Permitting; Immunity: *Rupe v. City of Jacksboro, Tex.*, No. 24-10758, 2025 WL 2556265 (5th Cir. Sept. 5, 2025). On September 22, 2023, a tree branch fell on the power line supplying electricity to Johnny D. Rupe and Sherry J. Rupe's home. Mr. Rupe cut the power line, repaired the damage, and requested Oncor to restore service. Oncor informed him that a licensed electrician needed to obtain a building permit and inspect the repairs before service could be restored, as per the City of Jacksboro's ordinances. The Rupes contacted the police and the City Manager, Michael Smith, but were told that the permitting and inspection requirements had to be met. On September 24, a licensed electrician inspected the repairs, and a city building inspector approved them on September 25, restoring electricity to the Rupes' home. The Rupes, proceeding pro se, sued the City of Jacksboro and Michael Smith, alleging violations of various constitutional amendments and state laws, including claims of elder abuse, fraud, and extortion. They also challenged the city's ordinances as unconstitutionally vague. The city and Smith

moved to dismiss the complaint, and the trial court dismissed all claims, finding no constitutional violations, that the ordinances were not vague, and that Smith was entitled to qualified immunity.

The Rupes appealed the trial court's judgment, challenging the city's inspection and permitting requirements, the validity of the city's contract with Oncor, and Smith's alleged failure to provide emergency assistance. The appellate court found that the city's electrical regulations were not unconstitutionally vague and that the Rupes failed to identify any state statute requiring an exemption for homeowners. The court also determined that the trial court did not rule the Rupes' actions illegal but assessed the sufficiency of their claims. The court rejected the Rupes' argument about the city's contract with Oncor, finding no illegal actions. Finally, the court upheld Smith's qualified immunity, as the Rupes failed to demonstrate a violation of a clearly established right, ultimately affirming the trial court's judgment.

Open Meetings: *Story v. Gravell*, No. 24-50646, 2025 WL 2602550 (5th Cir. Sept. 9, 2025). Jeremy Story, a local activist in Williamson County, Texas, was arrested after being removed from a school board meeting and later expelled from a county commissioners court meeting, during which he violated the court's rules of decorum forbidding applause, outbursts, and speaking beyond one's 3-minute allotment. Although Story was initially permitted to state his views without interruption, he engaged in an extended colloquy with Judge Gravell and continued his protestation despite being warned to discontinue the interruption. This behavior led to his expulsion from the meeting. He filed a civil-rights complaint alleging violations of his First and Fourth Amendment rights, claiming his arrest was without probable cause and in retaliation for his speech, and that his expulsion was due to his viewpoint. Story alleged that local officials conspired with the school district to target him, but the court found his allegations to be threadbare and lacking factual support; consequently, the district court dismissed his complaint for failure to state a claim. Story appealed. For a false arrest claim under the Fourth Amendment, Story needed to show he was arrested without probable cause, but the appellate court found the arrest warrant valid and the deputies acted in good faith. His First Amendment claim failed because the video evidence showed he was expelled for violating decorum rules, not for his viewpoint. The court did not need to address qualified immunity due to the lack of a constitutional violation. The judgment of the district court was affirmed, and Story's parallel state-law claim under the Texas Open Meetings Act was also dismissed.

Excessive Force: *Barnes v. Felix*, No. 22-20519, 2025 WL 2674139 (5th Cir. Sept. 18, 2025). The case involves Janice Hughes Barnes, representing the estate of Ashtian Barnes, who was fatally shot by Deputy Roberto Felix during a traffic stop on the Sam Houston Tollway. Barnes's parents filed a § 1983 action against Felix and Harris County, alleging excessive force in violation of the Fourth Amendment. The district court granted summary judgment in favor of the defendants, and the Fifth Circuit initially affirmed this decision based on the "moment-of-threat" rule. The Supreme Court vacated and remanded the case, rejecting the "moment-of-threat" rule and emphasizing the need to consider the totality of the circumstances in excessive force claims. On remand, the Fifth Circuit reviewed the case de novo and affirmed the summary judgment, finding that Felix acted reasonably under the circumstances. Felix had stopped Barnes for a

misdemeanor traffic violation, and when Barnes attempted to flee, Felix used deadly force, believing Barnes posed a threat to others on the road. The court concluded that no genuine dispute of material fact existed regarding the reasonableness of Felix's actions, and Barnes failed to meet their burden to defeat Felix's qualified immunity defense. Consequently, the claims against Harris County also failed, and summary judgment was affirmed.

Takings: *Mesquite Asset Recovery Group, L.L.C. v. City of Mesquite, Tex.*, No. 24-11025, 2025 WL 2700591 (5th Cir. Sept. 23, 2025). In 2008, development groups purchased land from the City of Mesquite and entered into a public improvement contract, which included a waiver from obtaining a Conditional Letter of Map Revision from FEMA. The city later refused to honor this waiver, citing a new ordinance, leading to the termination of the contract and the city's reimbursement obligations. The development groups sued the city, claiming a taking under federal and Texas constitutions, breach of contract, and other state-law violations, seeking compensation and declaratory relief. The district court dismissed the takings claim, finding the city acted in a commercial capacity, not sovereign, and remanded state-law claims to state court. The development groups appealed, arguing that the city's actions were sovereign and thus constituted a taking. The appellate court affirmed the district court's decision, agreeing that the city's actions were contractual, not sovereign, and thus did not support a takings claim. The court also upheld the dismissal of the federal Declaratory Judgment Act claim, as the core issues were better resolved in state court, ultimately affirming the district court's dismissal.

Recent Texas Cases of Interest to Cities

Note: Included cases are from September 1, 2025, through September 30, 2025. *These case summaries have been prepared with the assistance of AI.*

Ballot Language: *In re Bowen*, No. 25-0754, 2025 WL 2628176 (Tex. Sept. 12, 2025). The Supreme Court of Texas denied a petition for a writ of mandamus concerning the Austin city council's 2025–2026 budget, which requires a significant tax increase subject to voter approval. The tax increase must comply with the Texas Tax Code, necessitating voter approval and requiring specific ballot language detailing the tax increase's purpose. Mr. Bowen argued that the ballot language did not meet legal standards, as it included a broad catch-all provision that could obscure the actual allocation of increased revenue. Although the city has allocated a meaningful portion of the revenue to specific programs, the broader implications of the tax increase could affect future tax rates. The court noted that while the ballot language is not technically false, it could be misleading, but the high burden for mandamus relief was not met. The decision to deny mandamus does not set a precedent or comment on the merits of the case, and the court may need to provide further guidance on ballot language standards in the future. The city's voters will ultimately decide on the tax increase, with both sides having the opportunity to debate the city council's ballot language.

Governmental Immunity: *City of Mineral Wells v. QAR Indus., Inc.*, No. 02-25-00002-CV, 2025 WL 2552346 (Tex. App.—Fort Worth Sept. 4, 2025). The case involves an appeal by the City of Mineral Wells against QAR Industries, Inc., concerning a lease agreement for hangar space at Mineral Wells Regional Airport. The City denied QAR's request to renew the lease, citing non-compliance with the original lease terms and federal regulations requiring aeronautical use of airport hangars. QAR sued, arguing that the city was performing a proprietary function, not a governmental one, thus lacking immunity from suit. The trial court denied the city's plea to the jurisdiction, but the appellate court reversed this decision, holding that the lease was a governmental function under Texas law, specifically under the Texas Transportation Code, which designates airport-related activities as governmental functions. Consequently, the appellate court ruled that the trial court lacked jurisdiction over QAR's claims, leading to the dismissal of the case with prejudice.

Tort Claims Act: *City of Dallas v. Boggs*, No. 05-24-01458-CV, 2025 WL 2723278 (Tex. App.—Dallas Sept. 24, 2025) (mem. op.). Willie Boggs filed a lawsuit against the City of Dallas, alleging that Dallas Police Corporal Carlos Rodriguez negligently collided with his vehicle, causing injury, while responding to an emergency call without activating his emergency lights or siren. Boggs claimed that the Texas Tort Claims Act waived the city's governmental immunity. The city filed a plea to the jurisdiction, asserting immunity based on Rodriguez's official immunity, which the trial court denied, leading to the city's accelerated appeal.

Withdrawing and vacating its July 28, 2025, opinion and judgment, the court of appeals reversed the trial court's order, concluding that Rodriguez was performing a discretionary duty in good faith during an emergency response, thus entitling him to official immunity. As a result, the city was shielded from vicarious liability, and Boggs failed to raise a fact issue regarding the jurisdictional challenge. The appellate court rendered judgment dismissing Boggs' claims for lack of jurisdiction.

Employment: *Dallas Cnty. v. Lewis*, No. 05-25-00271-CV, 2025 WL 2783559 (Tex. App.—Dallas Sept. 30, 2025) (mem. op.). Emmanuel Lewis began working as a detention service officer at Dallas County Jail on September 3, 2019, and voluntarily resigned on August 18, 2021. On March 21, 2022, Lewis filed a charge of discrimination with the EEOC, alleging age, race, and retaliation discrimination under Title VII and the Age Discrimination in Employment Act (ADEA), with the alleged discrimination occurring between September 1, 2019, and August 18, 2021. He received a Right to Sue letter from the EEOC on August 31, 2022, and filed a state court action on November 30, 2022, initially asserting state law claims under the Texas Commission on Human Rights Act (TCHRA) but no claims under Title VII, ADEA, or the Americans with Disabilities Act (ADA). After the trial court granted Dallas County's plea to the jurisdiction but permitted Lewis to replead, he filed a second amended petition continuing to assert state law claims only. The county filed a second plea to the jurisdiction, arguing Lewis failed to meet the 180-day deadline for state law claims under TCHRA. Before the hearing, Lewis filed a third amended petition, abandoning state law claims and asserting federal claims

under Title VII and the ADA. The trial court denied the county's second plea, leading to this interlocutory appeal.

The court of appeals reversed the trial court's order, concluding that Lewis failed to exhaust his administrative remedies under state law by not filing a complaint within the 180-day deadline, which is mandatory and jurisdictional under the TCHRA. The court also determined that the federal 300-day deadline for filing an EEOC complaint did not extend the state law deadline, and the relation-back doctrine could not create jurisdiction where none existed. Consequently, the appellate court rendered judgment dismissing the case against Dallas County for lack of jurisdiction.

Inverse Condemnation: *Tex. Dep't of Transp. v. FamFive Holdings, LLC*, No. 07-25-00113-CV, 2025 WL 2655983 (Tex. App.—Amarillo Sept. 16, 2025) (mem. op.). In this interlocutory appeal, the Texas Department of Transportation (TxDOT) challenged the trial court's denial of its plea to the jurisdiction in an inverse condemnation claim brought by FamFive Holdings, LLC. FamFive alleged that TxDOT's construction project, which diverted traffic and increased travel time to its convenience store, Bernard's, resulted in lost profits due to a material and substantial impairment of access. However, the court found that FamFive failed to establish that direct access to Bernard's was impaired, as the construction did not limit ingress and egress to the property. The court concluded that damages from traffic diversion or increased travel distance are not compensable under inverse condemnation, as reasonable access remained. Consequently, the court reversed the trial court's order and dismissed FamFive's claim for lack of jurisdiction.

Takings: *Jones v. Port Freeport*, No. 14-23-00948-CV, 2025 WL 2666066 (Tex. App.—Houston [14th Dist.] Sept. 18, 2025). The case involves a dispute between the landowners and Port Freeport, regarding the condemnation of the landowners' property for the expansion of port facilities and business development. Port Freeport filed a petition to condemn the property, claiming it was for public use, but failed to specify the exact public use intended. The trial court granted Port Freeport's motion for partial summary judgment, holding that the Port had the power of eminent domain and a plan for public use, and awarded the Landowners $100,000 in compensation.

On appeal, the Landowners argued that the taking was unconstitutional because it did not meet the public use requirement and that Port Freeport failed to plead a specific public use. The appellate court held that Port Freeport's condemnation petition did not meet the requirement to state with specificity the public use for which Port Freeport intended to acquire the property and reversed the trial court's judgment. The appellate court remanded the case, allowing Port Freeport to replead with the required specificity or face dismissal, and instructed the trial court to consider awarding the landowners attorney's fees if the case is dismissed.

Marijuana Decriminalization: *Paris v. State*, No. 15-24-00082-CV, 2025 WL 2647030 (Tex. App. [15th Dist.] Sept. 16, 2025)(mem. op.). Courtenay Paris, Chairperson for Decriminalize Elgin, led a campaign resulting in the City of Elgin voters approving an ordinance prohibiting local law enforcement from issuing citations or making arrests for misdemeanor marijuana

possession. The State of Texas sued Elgin and its officials, claiming the ordinance was preempted by state law and unconstitutional. Paris intervened to defend the ordinance and filed a plea to the jurisdiction to dismiss the state's petition, arguing that the state lacked standing and that the attorney general did not have the authority to file the lawsuit. The trial court struck Paris's petition and granted the state's and Elgin's joint motion for a consent decree and final judgment, declaring the ordinance void. Paris appealed, arguing that the trial court erred by striking her petition before deciding her plea to the jurisdiction and that she had a justiciable interest in the case.

The appellate court held that the trial court acted within its discretion in striking Paris's petition because she lacked a justiciable interest in the state's suit. The court noted that Paris's interest as an initiative sponsor did not extend beyond the election, as she was in the same position as any other voter post-election. The court also found that the trial court did not err in addressing the state's motion to strike before Paris's plea to the jurisdiction, as it was reasonable to determine whether Paris was an interloper before considering her defenses. The appellate court affirmed the trial court's judgment, concluding that Paris lacked standing to appeal issues related to the merits of the state's suit, as she did not demonstrate a distinct injury. The court emphasized that the state has the right to enforce its laws and that the attorney general is authorized to prosecute such suits.

Recent Texas Attorney General Opinions of Interest to Cities

Note: Included opinions are from September 1, 2025, through September 30, 2025.

KP-0499 **(County Authority):** While Chapter 181 of the Texas Utilities Code authorizes counties to supervise the installation or designate the appropriate location of certain utility facilities in the rights-of-way for public roads, this chapter does not authorize a county to impose permitting or minimum-depth requirements on a telephone or telegraph corporation that buries cable in a county road right-of-way. A county would not be liable for the costs to repair and rebury a telephone or telegraph corporation's cable, under the Texas Tort Claims Act, unless property damage is proximately caused by the wrongful act, omission, or negligence of a county employee and it arises from the operation or use of motor-driven vehicles or equipment. That determination, however, is a fact question beyond the scope of this opinion.

KP-0500 **(Conflicts):** Under Government Code section 572.058, an elected or appointed official must recuse themselves from a vote or decision in which they have a personal or private interest originating from a familial relationship that has the potential to influence the public official in the exercise of their duties and responsibilities. Thus, a Nueces River Authority board member whose brother-in-law is an executive staff member of the water supply entity for the City of Corpus Christi should recuse themselves from a vote and otherwise refrain from participating in a decision about Authority business regarding water supply activities that have common or competing interests with the City of Corpus Christi.

August 2025

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from August 1, through August 31. *These case summaries have been prepared with the assistance of AI.*

Civil Rights & Standing: *Lane v. City of Houston*, No. 24-20490, 2025 WL 2238590 (5th Cir. Aug. 6, 2025). Courtney Lane, an African-American man, was injured when a driver fleeing police in a high-speed chase struck him in a predominantly Black neighborhood. Lane sued the City of Houston under 42 U.S.C. § 1983 and Title VI of the Civil Rights Act of 1964, alleging that the city maintained a racially discriminatory policy of pursuing high-speed chases in predominantly Black neighborhoods and profiling Black drivers. The district court dismissed Lane's claims for lack of standing, and Lane appealed. The Fifth Circuit reviewed the dismissal de novo and applied the Article III standing test, which requires a plaintiff to show an injury in fact, that the injury is fairly traceable to the defendant's conduct, and that it is likely to be redressed by a favorable decision. The court relied on its recent decision in *Jackson v. City of Houston*, which held that innocent bystanders injured by fleeing suspects lacked standing to bring equal protection claims. The court reasoned that Lane's injuries were not the result of being personally denied equal treatment and thus failed the injury-in-fact requirement. The court also concluded that the traceability requirement was not satisfied because the injuries were caused by the independent actions of the fleeing suspect, not the city. The same reasoning applied to Lane's Title VI claim. The Fifth Circuit therefore held that Lane lacked standing and affirmed the district court's dismissal.

Civil Rights & Frivolous Litigation: *Ferrara v. Swonke*, No. 25-50272, 2025 WL 2256905 (5th Cir. Aug. 7, 2025). John David Ferrara, proceeding pro se, filed a series of lawsuits in the Western District of Texas under 42 U.S.C. § 1983, alleging that public officials had conspired for decades to place him under unlawful surveillance. His early claims were dismissed as frivolous under 28 U.S.C. § 1915(e)(2) because the court found them "fantastic and delusional," and he did not appeal. Ferrara later filed a fee-paid suit raising the same allegations, which was dismissed as precluded under the exceptions recognized in *Marts v. Hines*. He continued to file additional lawsuits based on the same conspiracy and arrest, leading to the present case, where he alleged that the probable-cause affidavit supporting his arrest warrant was false. The district court dismissed the suit on several grounds, including claim and issue preclusion, qualified immunity, and the statute of limitations, and entered a pre-filing injunction requiring Ferrara to obtain permission before filing new suits.

On appeal, the Fifth Circuit reviewed his claims under the standards established in *Franks v. Delaware* and *Malley v. Briggs*. For a *Franks* claim, a plaintiff must make a substantial preliminary showing that the affiant knowingly or recklessly included false statements necessary to the probable cause finding. For a *Malley* claim, the test is whether a reasonably well-trained officer would have known the affidavit was so lacking in indicia of probable cause as to render belief in its validity unreasonable. The court found that Ferrara's complaint failed to meet either

standard, as it did not plausibly allege any false or misleading statements, any intent to mislead, or the absence of probable cause. The court also applied issue preclusion, concluding that Ferrara's conspiracy allegations had been conclusively adjudged frivolous in prior suits and could not be re-litigated. Finally, the court upheld the pre-filing injunction as a proportionate sanction, noting that Ferrara had been warned multiple times not to bring duplicative claims. The Fifth Circuit affirmed the district court's dismissal and the imposition of the injunction.

Takings: *DM Arbor Court, Ltd. v. City of Houston*, No. 23-20385, 2025 WL 2314650 (5th Cir. Aug. 12, 2025). In *DM Arbor Court, Ltd. v. City of Houston*, DM Arbor Court, Limited (DMAC) owned Arbor Court, a multifamily apartment complex in Houston that operated under a Housing Assistance Payment Contract with HUD. After Hurricane Harvey in 2017, the City of Houston denied DMAC's application for repair permits, citing a flood ordinance requiring elevation of buildings that sustained substantial damage. DMAC sued the city, alleging that the permit denial constituted a regulatory taking under the Fifth Amendment. The district court ruled against DMAC, holding that the property retained economic life despite the denial.

On appeal, the Fifth Circuit reversed, finding that the city's denial of repair permits amounted to a categorical taking under the standard set out in *Lucas v. South Carolina Coastal Council*. The court explained that a categorical taking occurs when a regulation deprives a property owner of all economically beneficial use, and it determined that the cost of complying with the flood ordinance rendered redevelopment economically unfeasible, effectively leaving the property idle. The panel rejected the district court's reasoning that the potential to hold the property for future investment qualified as an economically beneficial use. Because it found a categorical taking, the appellate court did not consider DMAC's alternative claim under the *Penn Central* test. The case was remanded for further proceedings consistent with the Fifth Circuit's opinion. Judge Dennis dissented, arguing that the district court properly applied both *Lucas* and *Penn Central* and that DMAC had not shown that the denial deprived it of all economically beneficial use, since the property could still be sold or put to other uses.

Religious Freedom & Free Exercise: *Perez v. City of San Antonio*, No. 23-50746, 2025 WL 2335132 (5th Cir. Aug. 13, 2025). Gary Perez and Matilde Torres, members of the Lipan-Apache Native American Church, challenged the City of San Antonio's development plan for Brackenridge Park, alleging violations of their religious rights under the First Amendment, the Texas Religious Freedom Restoration Act (TRFRA), and the Texas Constitution. They sought continued access to a sacred area of the park for religious ceremonies, preservation of trees, and protection of cormorant nesting, which they argued were essential to their religious practices. The district court granted them access for ceremonies on certain dates but declined to enjoin the city's tree removal and rookery management, holding that the city's actions did not impose a substantial burden on religious exercise and were justified by compelling interests in public health and safety.
On appeal, the Fifth Circuit reviewed the denial of a preliminary injunction, applying the four-factor test that requires a movant to show a likelihood of success on the merits, a substantial threat of irreparable injury, that the injury outweighs harm to the non-movant, and that the

injunction would not disserve the public interest. The court held that the Perez and Torres failed to demonstrate a likelihood of success on the merits. Under TRFRA, the court found no substantial burden because the city's measures did not meaningfully curtail their religious practices, and even if a burden existed, the city had shown that its tree and rookery management furthered compelling interests in safety and health through the least restrictive means. Applying strict scrutiny under the Free Exercise Clause, the court reached the same conclusion, emphasizing that the city's actions were narrowly tailored and that less intrusive measures would not suffice. The court also dismissed the access claims as moot after the city removed fencing and hazardous limbs that had restricted entry. Finally, the court noted that the Texas Supreme Court has clarified that the Texas Constitution's religious-service protections do not apply to public land management, further supporting the city's position. Ultimately, the Fifth Circuit affirmed the district court's decision.

Employment Law & Race Discrimination: *Glover v. Lafayette City-Par. Consol. Gov't*, No. 24-30546, 2025 WL 2364963 (5th Cir. Aug. 14, 2025). Thomas Glover, a Black man, served as Chief of Police for the Lafayette Police Department for ten months before being terminated by the Lafayette City-Parish Consolidated Government (LCG), which cited a "loss of confidence" in his leadership as the reason for dismissal. Glover alleged that his termination was racially motivated and filed claims under various anti-discrimination laws, including Title VII. The district court granted summary judgment for LCG, finding that Glover failed to establish a prima facie case of discrimination because his immediate replacement was also Black and there was insufficient evidence of discriminatory intent.

On appeal, Glover challenged only the dismissal of his Title VII claim. The Fifth Circuit applied the *McDonnell Douglas* burden-shifting framework, which first requires a plaintiff to establish a prima facie case, then shifts the burden to the employer to articulate a legitimate nondiscriminatory reason, and finally shifts the burden back to the plaintiff to prove pretext. The court held that even if Glover could establish a prima facie case, LCG provided a legitimate reason for termination—alleged misrepresentations he made to government officials—and Glover failed to show that this reason was pretextual. His supporting evidence, including testimony from a former sergeant, did not demonstrate that race was a motivating factor in his dismissal. The court therefore affirmed the district court's judgment. Judge Higginson dissented, arguing that LCG's shifting explanations for the termination warranted further consideration as possible evidence of pretext.

Gender Discrimination & Adverse Employment Actions: *Loyd v. City of Ruston*, No. 24-30736, 2025 WL 2375237 (5th Cir. Aug. 15, 2025). Kayla Loyd, a Road Patrol officer with the Ruston Police Department, sued the city under Title VII of the Civil Rights Act of 1964, alleging gender discrimination after her transfer requests to the Criminal Investigation Division (CID) were denied. At trial, the jury found in favor of the city, concluding that the denial of the transfer was not an adverse employment action.

On appeal, Loyd challenged the sufficiency of the evidence supporting the verdict, but she had not preserved this challenge by filing the required pre-verdict or post-verdict motions. As a result, the appellate court reviewed her claim only for plain error, meaning that the verdict had to be upheld if *any* evidence supported it.

The court explained that a denial of transfer does not constitute an adverse employment action unless the position sought is "objectively better" than the current one. Relevant factors in determining whether a position is objectively better include whether it offers higher pay or tangible benefits, provides greater responsibility or advancement opportunities, requires greater skill or education, or carries more prestige. The city presented evidence that the CID role did not meet these criteria: it offered no pay increase, fewer overtime opportunities, less independence, no additional educational requirements, and no greater potential for advancement. Because the jury instructions—unchallenged by Loyd—reflected this standard, and the record contained evidence supporting the verdict, the appellate court affirmed the judgment, holding that Loyd had not suffered an adverse employment action.

Same-sex Sexual Harassment: *Lanier v. Wise Cnty.*, No. 24-10962, 2025 WL 2419612 (5th Cir. Aug. 21, 2025). Chad Lanier, a former sheriff's deputy, sued Wise County, Sheriff Lane Akin, and Captain Wes Wallace under Title VII and the Texas Commission on Human Rights Act, alleging same-sex sexual harassment, sex discrimination, constructive discharge, and retaliation. Lanier claimed that over an eighteen-month period, Wallace, his male supervisor, repeatedly subjected him to explicit and unwanted sexual comments, including remarks suggesting oral sex with another officer, calling offensive names, and referring to him as his lover. Lanier alleged that when he reported the harassment, his superiors acknowledged Wallace's conduct but failed to act, and when told Wallace would continue to supervise him, Lanier retired rather than remain in the hostile environment. The district court dismissed the claims, finding Lanier failed to allege discrimination or harassment "because of sex," and denied him leave to amend as futile.

On appeal, the Fifth Circuit applied the framework for same-sex sexual harassment claims under *Oncale v. Sundowner Offshore Services*, which requires plaintiffs first to show that the alleged conduct was sex discrimination and then to establish a hostile work environment. The court explained that there are three evidentiary paths for proving sex discrimination in same-sex harassment cases: (1) showing the harasser was homosexual and motivated by sexual desire, (2) demonstrating that the harassment was framed in sex-specific, derogatory terms indicating hostility to a particular gender, or (3) providing comparative evidence of how the harasser treated members of both sexes. The court held that Lanier's allegations did not satisfy any of these evidentiary paths, as they did not suggest Wallace was motivated by sexual desire, anti-male hostility, or differential treatment based on gender. Because Lanier failed to show harassment "because of sex," the court concluded that he did not state a claim under Title VII or Texas law, which applies the same standard. The court also upheld the district court's exercise of supplemental jurisdiction over the state-law claims and its denial of leave to amend, finding amendment would have been futile. The dismissal was affirmed.

Employment Law & Unequal Pay: *Jacqueline Jones v. City of Dallas*, No. 24-10803, 2025 WL 2491127 (5th Cir. Aug. 29, 2025). Jacqueline Jones, an African-American woman and disabled veteran, sued the City of Dallas after her termination, alleging retaliation and unequal pay under Title VII and claims under the ADA for failure to accommodate and retaliation. The district court granted summary judgment for the city, finding that Jones failed to exhaust her administrative remedies for all but her Title VII unequal pay claim, and that she could not establish a prima facie case on that claim. On appeal, Jones challenged the decision, but the Fifth Circuit affirmed.

The court explained that Jones forfeited appellate review of her ADA failure-to-accommodate claim and her Title VII retaliation claim by failing to address the exhaustion issue in her response to the city's summary judgment motion. Her ADA retaliation claim also failed because her EEOC charge did not contain specific facts necessary for analysis. That left only her Title VII unequal pay claim. Under the *McDonnell Douglas* framework, a plaintiff must first establish a prima facie case by showing membership in a protected class and that she was paid less than a non-member for substantially similar work. The burden then shifts to the employer to provide a legitimate nondiscriminatory reason for the pay differential, after which the plaintiff must show pretext. The court held that Jones never established the prima facie case because she failed to identify a valid comparator. Her proposed comparator differed materially in education, responsibilities, and career trajectory, and the positions were not "nearly identical" for purposes of pay comparison. Because Jones could not make this threshold showing, her unequal pay claim failed. The appellate court concluded that the district court and magistrate judge had applied the law correctly and affirmed the judgment for the city.

Recent Texas Cases of Interest to Cities

Note: Included cases are from August 1, 2025, through August 31, 2025. *These case summaries have been prepared with the assistance of AI.*

Nuisance Abatement: *Davidson v. City of Houston*, No. 01-23-00914-CV, 2025 WL 2347528 (Tex. App.—Houston [1st Dist.] Aug. 14, 2025). Matthew Davidson purchased a 1.29-acre property in Houston, Texas, in May 2013, which he improved by planting various trees and crops. In July 2019, the city conducted an emergency abatement on the property, cutting trees and shrubs without Davidson's authorization, and placed a lien of approximately $17,000 on the property to cover the costs. The city justified the abatement under Texas Health and Safety Code section 342.008 and the city's code of ordinances section 10-453(e), claiming the property posed an immediate danger due to overgrown vegetation and the presence of snakes and rats. Davidson filed a lawsuit seeking to remove the lien and claimed the city's actions constituted a taking without just compensation, violating the Texas Constitution. The trial court ruled in favor of the

city, and Davidson appealed, arguing that the city's actions were unlawful and that the trial court erred by not issuing findings of fact and conclusions of law.

The appellate court affirmed the trial court's judgment. The appellate court held that Davidson was not harmed by the trial court's failure to issue findings of fact and conclusions of law, as the case was simple and Davidson was able to fully brief his issues on appeal. The court also found that the city's emergency abatement was lawful under Texas Health and Safety Code section 342.008, as the evidence supported a finding that the property's condition posed an immediate danger to the community. Additionally, the court rejected Davidson's inverse condemnation claim, concluding that the city's actions did not constitute an unconstitutional taking because the abatement addressed a public nuisance.

Property Tax Collections: *Trinh T. Ho v. Harris Cnty*, No. 01-24-00740-CV, 2025 WL 2446038 (Tex. App.—Houston [1st Dist.] Aug. 26, 2025). In this case, Harris County, along with several other taxing units, filed a lawsuit against Williams Walls and named Trinh T. Ho as a defendant "In Rem Only" to recover approximately $8,000 in unpaid property taxes, penalties, and interest for the tax years 2002 through 2006. Ho responded by asserting counterclaims against the county and Ann Harris-Bennett, the then Harris County Tax Assessor-Collector, alleging wrongful debt collection, ultra vires actions, and a takings claim, among others. The county and Harris-Bennett filed pleas to the jurisdiction, arguing that governmental immunity had not been waived for Ho's counterclaims. The trial court granted these pleas, dismissing Ho's counterclaims, and Ho appealed the decision.

The appellate court affirmed the trial court's decision. The appellate court held that the county's suit was not a claim for monetary damages but rather a suit for foreclosure of a lien, and thus, governmental immunity was not waived. Regarding the claims against Annette Ramirez, the court found that Ho failed to allege any specific statutory violation or ultra vires conduct by the tax assessor-collector, nor did she provide sufficient facts to support a takings claim. Consequently, the court upheld the trial court's orders granting the pleas to the jurisdiction.

Eminent Domain: *Louis A. Tsakiris Family Partnership*, Ltd. v. Waller County Road Improvement District No. 1, 2025 WL 2445992 (Tex. App.—Houston [1st Dist.] Aug. 26, 2025). This case involves an eminent domain proceeding initiated by Waller County Road Improvement District No. 1 ("the district") against Louis A. Tsakiris Family Partnership, Ltd. and Alex Tsakiris Family Limited Partnership Ltd. ("the Tsakiris Partnerships") to condemn property for a permanent easement to extend Kingsland Boulevard in Waller County, Texas. The district claimed that the Tsakiris Partnerships were not entitled to compensation because the easement existed by express dedication and estoppel. The trial court granted summary judgment in favor of the district, awarding it possession and ownership of the easement without compensation to the Tsakiris Partnerships. The Tsakiris Partnerships appealed, arguing that the trial court erred on several grounds, including the district's lack of standing and failure to prove express dedication and easement by estoppel.

The appellate court reversed the trial court's judgment and remanded the case for further proceedings. The appellate court found that there were material fact issues regarding the

district's claims of express dedication and easement by estoppel. Specifically, the court concluded that the evidence did not conclusively establish that the Tsakiris Partnerships had dedicated the realigned Kingsland Easement to Waller County or that Waller County had accepted such a dedication. Additionally, the court determined that there were questions of material fact regarding the district's reliance on representations made by the Tsakiris Partnerships, which precluded summary judgment on the easement by estoppel claim.

Municipal Court: *Tucker v. State*, No. 02-24-00468-CR, 2025 WL 2458628 (Tex. App.—Fort Worth Aug. 26, 2025) (mem. op.). Allen Marshall Tucker was convicted in municipal court for violating multiple ordinances related to his properties, with fines ranging from $100 to $1,500. He appealed to the county criminal court, which affirmed the convictions, and then to the Fort Worth court of appeals, which also affirmed the convictions. Tucker's appeal raised issues regarding the denial of his motions to quash and suppress and the sufficiency of the evidence. The court found that the complaints against Tucker were sufficient and that the municipal court did not err in its rulings, including the denial of Tucker's suppression motions, as the code officer's entry onto his commercial property was deemed lawful. The court also determined that the evidence was sufficient to support Tucker's convictions, as the jury was entitled to believe the testimony of the code officer and the evidence presented.

Tort Claims Act: *Leonard v. Dallas Cnty*., No. 05-24-00368-CV, 2025 WL 2430775 (Tex. App.—Dallas Aug. 22, 2025) (mem. op.). Keith Leonard was involved in a rear-end collision with a Dallas County employee, Devin McDonald, and sued the county for personal injuries, claiming the Texas Tort Claims Act waived governmental immunity. The trial court dismissed Leonard's claims, agreeing with the county's argument that it retained immunity under an emergency exception in the Act. Leonard contended that the trial court erred, arguing that McDonald was not reacting to an emergency situation at the time of the accident. The appellate court found that Leonard raised a fact issue about whether McDonald was reacting to an emergency, as McDonald's initial descriptions of the accident did not mention an emergency situation. The court concluded that the evidence presented by Leonard called into question the credibility of McDonald's account of an emergency, and thus, a fact finder should resolve the jurisdictional fact issue. Consequently, the appellate court reversed the trial court's order granting the plea to the jurisdiction and remanded the case for further proceedings.

Inverse Condemnation/Tort Claims Act: *Hickory Creek Special Utility District v. Mastellar*, No. 06-25-00040-CV, 2025 WL 2487107 (Tex. App.—Texarkana Aug. 29, 2025) (mem. op.). This case involves an interlocutory appeal concerning a plea to the jurisdiction filed by Hickory Creek Special Utility District and its board of directors against Henry Mastellar. Mastellar had granted an easement to Hickory Creek for water services, but later sued for inverse condemnation when Hickory Creek used his property to provide water to a neighbor without his consent. The trial court partially granted and denied the plea, dismissing claims for declaratory and injunctive relief and breach of contract, but allowing claims for inverse condemnation and violation of the Texas Tort Claims Act to proceed. The Court of Appeals affirmed the trial court's decision, concluding that the easement was not a blanket easement and that Mastellar properly alleged a taking. Additionally, the court found that Mastellar's negligence claim under

the TTCA for the use of motor-driven equipment was sufficient to establish a waiver of immunity. The court also determined that Mastellar's declaratory judgment action was essentially a breach of contract claim, for which immunity was not waived.

Employment Discrimination: *Texas Health and Human Services Commission v. Rojas*, No. 13-24-00588-CV, 2025 WL 2252576 (Tex. App.—Corpus Christi-Edinburg Aug. 7, 2025). Cristal Rojas began her employment at the Rio Grande State Supported Living Center (RGSSLC) on April 1, 2022, as a Direct Support Professional, under the oversight of the Texas Health and Human Services Commission (HHSC). Rojas alleged that she was subjected to sex discrimination and a hostile work environment orchestrated by her supervisors, including being assigned to a male patient known for sexually harassing female staff. She claimed that despite reporting the harassment, no action was taken, leading to her resignation on July 28, 2022, which she described as a constructive discharge. HHSC filed a plea to the jurisdiction, asserting immunity under the Texas Commission on Human Rights Act, arguing that Rojas failed to present evidence for her claims. The trial court denied HHSC's plea, finding genuine issues of material fact and jurisdiction under the Texas Labor Code, Chapter 21.

The appellage reversed the trial court's decision, concluding that Rojas failed to establish a prima facie case for both her hostile work environment and sex discrimination claims. The court found that Rojas did not provide sufficient evidence to show that the harassment was severe or pervasive enough to alter her employment conditions or that she was treated less favorably than similarly situated employees outside her protected class. Consequently, the appellate court rendered judgment dismissing Rojas's claims for lack of jurisdiction.

Tort Claims Act: *City of McAllen v. Gonzalez*, No. 13-24-00361-CV, 2025 WL 2252571 (Tex. App.—Corpus Christi-Edinburg Aug. 7, 2025). Francisco J. Gonzalez filed a negligence suit against the City of McAllen under § 101.021 of the Texas Tort Claims Act (TTCA), alleging that Officer Jocelyn Reyes, a city police officer, negligently ran a red light, resulting in a collision with Gonzalez's vehicle and causing him injuries. The city filed a plea to the jurisdiction and motions for summary judgment, asserting governmental immunity under the TTCA, which provides an exception to the waiver of immunity when an officer is responding to an emergency call without violating the law or acting recklessly. The trial court denied the city's motion, leading to this interlocutory appeal.

The appellate court reversed the trial court's decision, finding that Gonzalez failed to raise a fact issue regarding whether Officer Reyes was responding to an emergency under and whether she acted with conscious indifference or reckless disregard for the safety of others. The court held that the city retained its immunity because Gonzalez did not demonstrate that Officer Reyes failed to comply with laws applicable to emergency actions or acted recklessly. The case was remanded to allow Gonzalez an opportunity to amend his pleadings and present evidence sufficient to create a fact issue.

Tort Claims Act: *City of Houston v. Griner*, No. 14-24-00530-CV, 2025 WL 2485781 (Tex. App.—Houston [14th Dist.] Aug. 29, 2025). Christopher Griner filed a lawsuit against the City

of Houston after slipping on water in a restroom at Bush Intercontinental Airport, claiming negligence and premises liability. The city argued it was immune from the suit under the Texas Tort Claims Act, asserting it lacked actual knowledge of the dangerous condition at the time of the accident. The trial court denied the city's plea to the jurisdiction, leading to this appeal.

The appellate court affirmed the trial court's decision, holding that Griner's pleadings sufficiently alleged the city's actual knowledge of the dangerous condition, thus demonstrating a waiver of immunity. The appellate court found that the city's evidence, including an affidavit and records from the Airport Safety and Operations Compliance System, did not conclusively prove a lack of actual knowledge, as the records were incomplete and were untrustworthy, because they did not include reports of known prior flooding or Griner's incident. Consequently, the city failed to meet its burden to negate actual knowledge, and Griner was not required to present further evidence of the City's knowledge.

Tort Claims Act: *City of Houston v. Jose Martinez Villareal*, No. 14-24-00824-CV, 2025 WL 2450500 (Tex. App.—Houston [14th Dist.] Aug. 26, 2025). Jose Martinez Villareal sued Tracy Spriggs and the City of Houston, alleging that Spriggs, while driving a city-owned vehicle and acting within the scope of her employment, collided with his vehicle. Spriggs filed a motion to dismiss under Texas Tort Claims Act (TTCA), arguing that Villareal had elected his remedy by suing both her and the city, which should result in the dismissal of the claims against her. The trial court denied Spriggs' motion, and both Spriggs and the city filed an interlocutory appeal.

The appellate court concluded that the trial court erred in denying Spriggs' motion to dismiss, as Villareal's suit against both the city and Spriggs triggered the election-of-remedies provision under the TTCA, requiring dismissal of the claims against Spriggs. The court reversed the trial court's order in part, dismissing Villareal's claims against Spriggs for lack of subject matter jurisdiction, and remanded the claims against the city for further proceedings. The court also determined that Villareal should be given an opportunity to replead, as his original petition did not demonstrate incurable jurisdictional defects and the litigation was at an early stage.

Public Information: *City of Dallas v. Paxton*, No. 15-24-00081-CV, 2025 WL 2413927 (Tex. App. [15th Dist.] Aug. 21, 2025). The City of Dallas disputed whether it was required to release information under the Texas Public Information Act (PIA) relating to its Low Income Housing Tax Credit Program to the Dallas Morning News. The city had provided the same information to the U.S. Department of Housing and Urban Development (HUD) during an investigation into allegations of discriminatory housing practices raised by Darryl Baker. When responding to a public information request, the city asked the Attorney General to rule that the information was exempt under the PIA's litigation exception but did not identify Baker as a potential litigant or provide factual detail supporting litigation concerns. The Attorney General ruled that the records were not exempt because they had already been disclosed to HUD. The city then filed suit against the Attorney General, and the Dallas Morning News intervened, seeking a writ of mandamus to compel disclosure.

The trial court granted summary judgment for the Dallas Morning News, denied the city's motion, and awarded attorney fees. On appeal, the court applied the PIA's litigation exception, which requires a governmental body to demonstrate that litigation is pending or reasonably anticipated by providing specific facts to the Attorney General. The appellate court held that the city failed to meet this requirement because it did not identify Baker as a potential litigant and did not provide sufficient factual detail about likely litigation. As a result, the litigation exception was waived. The court also upheld the award of attorney fees, finding that the city did not reasonably rely on any legal authority in withholding the documents. The judgment for the Dallas Morning News was affirmed.

Payment for Jail Costs: *Erwin v. Dallas Cnty.*, No. 15-24-00013-CV, 2025 WL 2429525 (Tex. App. [15th Dist.] Aug. 22, 2025). Dallas County sued officials of the Texas Health and Human Services Commission (HHSC) over the costs of detaining criminal defendants who had been found incompetent to stand trial and were awaiting transfer to state hospitals. The county argued that HHSC's use of a waitlist for hospital beds violated state law and constitutional provisions, and it sought declaratory, injunctive, and mandamus relief, including reimbursement for jail expenses. HHSC and its officials filed a plea to the jurisdiction, asserting that the county lacked standing and failed to state valid claims. The trial court denied the plea, and HHSC appealed.

The appellate court held that the county failed to allege ultra vires or unconstitutional acts. Applicable sections of the Texas Code of Criminal Procedure do not impose deadlines for transfer of incompetent defendants to state hospitals, nor does it prohibit HHSC from maintaining a waitlist. The court rejected the county's constitutional claims, including arguments that the waitlist created an unconstitutional state ad valorem tax, state debt, or taking of the county's jail facilities, and that it violated separation of powers. The court emphasized that counties are required by law to maintain jails and to pay all expenses associated with housing prisoners, and no statutory exception applied to shift those costs to the State. Because HHSC's actions were authorized by law and the County retained discretion over its own tax rate and expenditures, the claims failed. The court concluded that responsibility for housing and related expenses rests with the county, and that any remedy must come from the Legislature, not the courts; consequently, the court reversed the trial court's ruling and dismissed the case.

Recent Texas Attorney General Opinions of Interest to Cities

Note: Included opinions are from August 1, 2025, through August 31, 2025.

KP-0498 **(Zoning):** The owner of real property within 200 feet of a proposed change in zoning classification is entitled to written notice of a hearing before the zoning commission if the owner is indicated as such on the most recently approved municipal tax roll.

The plain text of the Local Government Code does not require that an owner be listed on the most recently approved municipal tax roll to count toward the protest calculation regarding a proposed classification change before the governing body.

Other than use of the municipal tax roll to identify an owner entitled to written notice of a hearing before the zoning commission, Local Government Code subsections 211.006(d) and 211.007(c) neither direct nor prohibit the use of external records or a specific method or course of action to verify an owner.

July 2025

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from July 1, 2025, through July 31, 2025. *These case summaries have been prepared with the assistance of AI.*

Federal Preemption; Water Utilities: *Crystal Clear Special Utility District v. Jackson*, 142 F.4th 351 (5th Cir. 2025): Crystal Clear Special Utility District ("Crystal Clear") filed a lawsuit against the Texas Public Utility Commission ("PUC") officials, alleging that the decertification of River Bend Ranch from its certificate of convenience and necessity ("CCN") was preempted by federal law, specifically 7 U.S.C. § 1926(b), which protects federally indebted utility providers. HK Baugh Ranch, LLC ("HK Baugh"), the landowner, intervened in the case. The district court granted a preliminary injunction in favor of Crystal Clear, preventing the PUC from decertifying the land, based on the "physical ability" test from *Green Valley Special Utility District v. City of Schertz,* and concluded that § 1926(b) likely expressly preempted applicable sections of the Texas Water Code.

The Fifth Circuit Court of Appeals affirmed the district court's finding that Crystal Clear likely satisfied the "physical ability" test, as its infrastructure was proximate to River Bend Ranch and could supply water within a reasonable time. However, the appellate court found that the district court erred in concluding that § 1926(b) expressly preempted applicable sections of the Texas Water Code, as the federal statute did not contain express preemption language. The case was remanded to the district court to determine whether conflict preemption applied and to reassess the preliminary injunction factors. The preliminary injunction was to remain in place during the remand.

Employment Discrimination: *Whittington v. Harris County, Tex.*, No. 24-20172, 2025 WL 1864956 (5th Cir. July 7, 2025). Bert Whittington, an African American former deputy constable with Harris County, sued the county for employment discrimination, alleging a hostile work environment, discriminatory termination, and retaliation based on race. Whittington claimed that he was subjected to racist comments and unequal treatment by his coworkers and superiors, which included being placed in dangerous situations and denied resources provided to

white officers. After raising concerns, Whittington faced investigations and disciplinary actions, which he argued were pretextual. The district court granted summary judgment in favor of Harris County on all claims except for Whittington's 42 U.S.C. § 1985 conspiracy claim, which was not addressed.

The Fifth Circuit Court of Appeals affirmed in part and reversed in part the district court's decision. The court affirmed the summary judgment on Whittington's § 1983 claim, as he failed to identify a Harris County policymaker responsible for the alleged discrimination. The court also affirmed the summary judgment on the color discrimination claim, as Whittington did not exhaust his administrative remedies for this claim. However, the court reversed the summary judgment on Whittington's claims of discriminatory termination, retaliation, and hostile work environment, finding that there were genuine issues of material fact regarding pretext and the existence of a hostile work environment. The case was remanded for further proceedings consistent with the opinion.

Immunity: ***Frias v. Hernandez*****, 142 F.4th 803 (5th Cir. 2025).** In August 2019, a shooting occurred outside The Green Elephant, a bar owned by Shannon McKinnon at which Guadalupe Frias provided private security. Detective Genaro Hernandez, a Dallas Police Department officer, allegedly inserted himself into the investigation at the behest of his private employer, the neighboring Stainback Organization, to pursue charges against McKinnon and Frias, despite no evidence linking them to the shooting. Hernandez allegedly submitted misleading reports to the Dallas County District Attorney, resulting in indictments for tampering with evidence. During Frias's trial, Hernandez's conflict of interest was revealed, leading to the dismissal of charges. McKinnon and Frias then sued Hernandez, asserting federal and state-law claims. The district court dismissed the federal malicious-prosecution claim but denied dismissal of the state-law claims, prompting Hernandez to appeal, arguing for immunity under the Texas Tort Claims Act (TTCA).

The Fifth Circuit Court of Appeals reversed the district court's decision, holding that Hernandez acted within the scope of his employment, thus entitling him to immunity under the TTCA. The court found that Hernandez's actions, including investigating and submitting reports, were connected to his duties as a detective, even if motivated by personal interests. The court emphasized that Texas law provides broad immunity for state actors performing duties within their employment scope, regardless of subjective intent. Consequently, the court instructed the dismissal of the state-law claims and remanded the case for further proceedings on the remaining federal claim.

Sexually Oriented Businesses; Employment: ***Ass'n of Club Executives of Texas, Inc. v. Paxton*****, No. 24-50434, 2025 WL 1923013 (5th Cir. July 14, 2025).** The Association of Club Executives of Texas, Lone Starr Multi-Theaters, XTC Cabaret, and RCI Dining Services (collectively, "plaintiffs") challenged the constitutionality of Texas Senate Bill 315, which prohibits individuals under 21 from working at sexually oriented businesses (SOBs), arguing it violated their First Amendment rights. The plaintiffs filed a § 1983 action against Ken Paxton,

Attorney General of Texas, and Ed Serna, Executive Director of the Texas Workforce Commission, seeking declaratory and injunctive relief. The district court denied a preliminary injunction, and after a bench trial, upheld the law as constitutional, leading the plaintiffs to appeal.

The Fifth Circuit Court of Appeals affirmed the district court's decision, holding that Senate Bill 315 withstands intermediate scrutiny and is not overbroad under the First Amendment. The court found that the law serves a substantial governmental interest by linking SOBs to sex trafficking and sex crimes, and it allows for reasonable alternative avenues of communication. The court also concluded that the law does not prohibit or chill a substantial amount of protected speech, thus it is not overbroad.

Standing; Immunity: *Jackson v. City of Houston*, 143 F.4th 640 (5th Cir. 2025). The case involves the families of Michael Jackson, Carl Wiley, Jr., and Rashad Henderson, who were innocent bystanders struck and killed during high-speed police chases in Houston, Texas. Wiley and Henderson were hit by fleeing suspects, while Jackson was struck by a Houston Police Department officer. All three incidents occurred in predominantly Black neighborhoods, and the decedents were Black men. The families sued the City of Houston, alleging that the Houston Police Department had a policy of racial profiling that led to more high-speed chases in Black neighborhoods, ultimately causing the deaths. They brought federal municipal liability claims for violations of equal protection, Title VI, 42 U.S.C. § 1982, and substantive due process, along with state tort claims. The district court dismissed all claims except the equal protection claims and Jackson's state law claims. The City of Houston filed an interlocutory appeal, challenging the plaintiffs' standing to bring federal claims, the sufficiency of the federal claims, the plaintiffs' capacity to sue on behalf of the decedents' estates, and the denial of governmental immunity for Jackson's state law claims.

At the appellate level, the Fifth Circuit Court of Appeals addressed the interlocutory appeal filed by the City of Houston. The court determined that it lacked jurisdiction to review the district court's orders on the city's motion for judgment on the pleadings, as the district court had not entered a final judgment. The court also lacked jurisdiction to decide whether the plaintiffs had standing to assert Title VI claims, as resolving that question would not materially advance the termination of the litigation. The appellate court focused on whether the plaintiffs had standing to assert their equal protection claims. It concluded that the plaintiffs failed to plausibly allege the injury-in-fact element of Article III standing for their equal protection claims, as they did not demonstrate that the decedents were treated differently than similarly situated individuals because of their race. Consequently, the court reversed the district court's order regarding the plaintiffs' standing to assert equal protection claims and vacated the order concerning governmental immunity for Jackson's negligence claim, remanding the case for further proceedings.

Employment Discrimination: *Amstutz v. Harris County*, No. 24-20286, 2025 WL 1981281 (5th Cir. July 17, 2025). Jose E. Amstutz, a former police officer, filed a lawsuit against Harris

County and Constable Sylvia Trevino, alleging age discrimination under the Age Discrimination in Employment Act (ADEA) and violations of constitutional rights under 42 U.S.C. § 1983 following his termination in July 2022. Amstutz was placed on administrative leave and later terminated after his wife filed a police report alleging domestic abuse, which led to an internal investigation by the constable's office. The district court dismissed Amstutz's ADEA claims for failure to exhaust administrative remedies and for being untimely, and dismissed his § 1983 claims for not pleading a protected property interest in his at-will employment. Amstutz appealed these determinations.

The Fifth Circuit Court of Appeals affirmed the district court's dismissal of Amstutz's claims. The court found that Amstutz waived his opposition to the argument that his ADEA claim was untimely by failing to address the district court's analysis of waiver. Additionally, the court held that Amstutz did not have a protected property interest in his at-will employment, as he failed to identify any independent source of law establishing such an interest. Consequently, Amstutz's § 1983 claims were dismissed, and his Monell claim against Harris County failed because he did not assert a violation of a constitutional right. The court also found no abuse of discretion in the district court's denial of leave to amend.

First Amendment; Immunity: *Institute for Free Speech v. Johnson*, No. 24-50712, 2025 WL 2104354 (5th Cir. July 28, 2025). The Institute for Free Speech (IFS), a nonprofit organization offering pro bono legal services for First Amendment litigation, sought to represent a Texas politician, Chris Woolsey, and the Texas Anti-Communist League in challenging a Texas election law requiring political advertising signs to include a specific notice. IFS refrained from entering into representation agreements due to fear of prosecution under the Texas Election Code, which prohibits corporations from making political contributions, including in-kind contributions like pro bono legal services. IFS requested an advisory opinion from the Texas Ethics Commission, which concluded that such services would be prohibited. IFS then sued the commissioners of the Texas Ethics Commission, seeking a declaratory judgment that the law and the advisory opinion violated the First Amendment. The district court dismissed the case for lack of standing and ripeness, and also found that qualified immunity barred individual-capacity claims.

On appeal, the Fifth Circuit Court of Appeals reversed the district court's decision regarding standing and ripeness, finding that IFS had demonstrated a serious intent to engage in proscribed conduct, faced a credible threat of enforcement, and that its claims were ripe for adjudication. The court held that IFS had Article III standing because its injury was traceable to the commissioners' potential enforcement of the law and redressable by a favorable decision. However, the court affirmed the district court's dismissal of the individual-capacity claims based on qualified immunity, as the alleged First Amendment right was not clearly established. The case was remanded for further proceedings consistent with the appellate court's opinion.

Recent Texas Cases of Interest to Cities

Note: Included cases are from July 1, 2025, through July 31, 2025.

Employment Discrimination: *Gantt v. Harris County*, No. 01-23-00582-CV, 2025 WL 1942950 (Tex. App.—Houston [1st Dist.] July 15, 2025) (mem. op.). Kimberly Gantt, representing the estate of her deceased husband Amier Gantt, appealed a summary judgment granted in favor of Harris County. Amier, an African-American IT specialist, was terminated by the county two days after a physical altercation with a White co-worker. He filed a discrimination claim under the Texas Commission on Human Rights Act (TCHRA) after receiving a "right to sue" letter from the EEOC. The trial court dismissed claims against other defendants and later granted summary judgment to the county, citing Amier's failure to file the lawsuit within the limitations period and lack of due diligence in serving the county.

The appellate court affirmed the trial court's summary judgment, concluding that Amier failed to present evidence that he and his co-worker had similar disciplinary records, which was necessary to establish a prima facie case of race discrimination. The court noted that Amier did not provide evidence of preferential treatment given to a similarly situated employee outside his protected class. The court did not address other arguments for summary judgment since the failure to establish a prima facie case was sufficient to uphold the trial court's decision.

Immunity: *Nortex Reg'l Planning Comm'n v. City of Bellevue*, No. 02-24-00498-CV, 2025 WL 1840472 (Tex. App.—Fort Worth July 3, 2025) (mem. op.). This case involves an interlocutory appeal by Nortex Regional Planning Commission following the trial court's denial of its plea to the jurisdiction regarding claims made by the City of Bellevue. The city had retained Nortex to assist with obtaining a $275,000 grant for infrastructure improvements, but the grant was terminated due to a violation of federal law when the city executed a construction contract before completing the required environmental review. The city sued Nortex for negligence, breach of contract, and promissory estoppel, claiming Nortex's failure to submit proper environmental review paperwork led to the grant's denial. Nortex argued it was immune from suit under governmental immunity, as the city's claims did not fall within any waiver of immunity under the Texas Local Government Code. The appellate court agreed with Nortex, finding no waiver of immunity for the city's breach of contract and promissory estoppel claims, and reversed the trial court's decision, granting Nortex's plea to the jurisdiction. The court concluded that the city's claims were barred by governmental immunity, as they did not meet the statutory requirements for a waiver of immunity.

Tort Claims Act: *Barron v. Thomason*, No. 02-25-00059-CV, 2025 WL 2005516 (Tex. App.—Fort Worth July 17, 2025) (mem. op.). Corie Lance Barron appealed the trial court's denial of his motion to dismiss a negligence suit filed by Markus Thomason following a motor-vehicle collision involving a Fort Worth Police Department vehicle driven by Barron. Thomason initially sued only the City of Fort Worth, claiming the city was responsible for Barron's actions as he was acting within the scope of his employment, but later amended the petition to include Barron as a defendant. Barron argued that Thomason's initial decision to sue only the city constituted an irrevocable election of remedies under the Texas Tort Claims Act, barring any subsequent suit against him individually. The court of appeals agreed with Barron, concluding

that the election-of-remedies provision required dismissal of Thomason's claims against Barron, as the initial suit against the city barred any recovery against Barron. The court reversed the trial court's denial of Barron's motion to dismiss and rendered judgment dismissing Thomason's claims against Barron for want of jurisdiction.

Employment: *Tex. Health and Hum. Servs. Comm'n v. Rodriguez*, No. 04-24-00684-CV, 2025 WL 1823176 (Tex. App.—San Antonio July 2, 2025) (mem. op.). The Texas Health and Human Services Commission (HHSC) appealed the trial court's denial of its plea to the jurisdiction in a lawsuit filed by Virginia Rodriguez, who alleged disability discrimination and retaliation under Chapter 21 of the Texas Labor Code. Rodriguez, a former employee at Kerrville State Hospital, claimed she was not selected for a position due to discrimination and faced retaliation after filing a civil rights complaint. The investigation found no evidence of discrimination, and Rodriguez was later terminated for unprofessional conduct. The court held that Rodriguez failed to establish a prima facie case of retaliation, as she could not demonstrate a causal link between her complaint and termination. Additionally, Rodriguez did not prove disability discrimination, as she did not assert a disability or show that HHSC regarded her as disabled. Consequently, the court reversed the trial court's decision and dismissed the case for lack of jurisdiction.

Zoning: *City of San Antonio v. Southside Affordable Dev., LLC*, No. 04-24-00371-CV, 2025 WL 1943951 (Tex. App.—San Antonio July 16, 2025). The City of San Antonio appealed the trial court's denial of its plea to the jurisdiction regarding Southside Affordable Development, LLC's claims. Southside challenged the constitutionality of several ordinances, asserting they improperly delegated city's zoning authority to Toyota and violated the Texas Constitution. The appellate court found that Southside lacked standing because it acquired the property after the ordinances were enacted and had not suffered a new injury or received an assignment of a cause of action. Additionally, Southside's claims under the Private Real Property Rights Protection Act were dismissed due to lack of standing, as Southside was not the property owner at the time of the alleged governmental action. The court reversed the trial court's order and dismissed Southside's claims with prejudice.

Public Information Act: *Uvalde Consol. Indep. Sch. Dist. v. Tex. Tribune*, No. 04-24-00509-CV, 2025 WL 1970278 (Tex. App.—San Antonio July 16, 2025). This case involves a dispute under the Texas Public Information Act (PIA) following the 2022 shooting at Robb Elementary School, where Texas Tribune and other media companies requested various records from the Uvalde Consolidated Independent School District and Uvalde County. The school district and county sought open records decisions from the Texas Attorney General, who directed them to disclose certain documents, withhold confidential information, and exercise discretion on other information. However, the county produced only a single-page incident report, and the school district disclosed limited information, leading Texas Tribune to file a suit for a writ of mandamus to compel disclosure. The trial court granted summary judgment for Texas Tribune, ordering the release of the requested information, subject to statutory redactions. On appeal, the school district and county argued governmental immunity and the trial court improperly granted

summary judgment. But the appellate court affirmed the trial court's decision, finding no genuine issue of material fact regarding the applicability of any exception to disclosure, including that disclosure would interfere with an ongoing criminal investigation. The court concluded that the school district and county had refused to provide public information, thus waiving governmental immunity under the PIA.

Housing Authorities: *Hous. Auth. of the City of San Antonio v. Zambrano*, No. 04-24-00288-CV, 2025 WL 2058090 (Tex. App.—San Antonio July 23, 2025) (mem. op. on r'hng). In this forcible detainer case, the Housing Authority of the City of San Antonio (SAHA) appealed a trial court's take-nothing judgment in favor of Zacherie Zambrano. SAHA argued the appeal was moot because Zambrano did not have a potentially meritorious claim to current possession of the property, and that the trial court erred in requiring a thirty-day eviction notice under the CARES Act. Zambrano had vacated the apartment voluntarily, and SAHA subsequently leased it to new tenants. The court determined the appeal was moot because Zambrano voluntarily relinquished possession, and no potentially meritorious claim to current possession existed. Consequently, the court vacated the trial court's judgment and dismissed the appeal.

Short-Term Rentals: *City of Dallas v. Dallas Short-Term Rental All.*, No. 05-23-01309-CV, 2025 WL 2022063 (Tex. App. —Dallas July 18, 2025) (mem. op.). The City of Dallas enacted two ordinances in 2023 to regulate short-term rentals, banning them in single-family residential zones and imposing regulations on others. The Dallas Short-Term Rental Alliance (DSTRA) and four other individuals challenged these ordinances, claiming they were unconstitutional, and obtained a temporary injunction from the trial court to prevent enforcement. The city appealed, arguing the trial court abused its discretion in granting the injunction and that the ordinances were not preempted by H.B. 2127.

The court of appeals affirmed the trial court's decision in part and reversed it in part. The court found that DSTRA and three of the individuals demonstrated a probable right to relief concerning the zoning ordinance under their due-course-of-law argument. They had well-established rights to lease their property, which the city would deny by enforcing the zoning ordinance. Regarding the registration ordinance, the court concluded that the city failed to show legitimate governmental interests associated with restricting maximum occupancy in short-term rentals, making the ordinance likely unconstitutionally oppressive.

As for H.B. 2127, the court found the city's argument irrelevant to the review of the trial court's order for an abuse of discretion concerning the due-course-of-law point. Additionally, the court overruled the city's argument that DSTRA's alleged failure to pay hotel occupancy taxes constituted unclean hands, preventing equitable relief as the city did not show that DSTRA had a duty to pay or enforce such taxes among its members.

However, the court reversed the injunction concerning Danielle Lindsey, as she failed to show a probable right to relief. Her business interest in providing services to rental properties did not constitute a vested property interest protected from legislative changes. As a result, the appellate

court affirmed the trial court's order granting the temporary injunction for the Dallas Short-Term Rental Alliance, Sammy Aflalo, Vera Elkins, and Denise Lowry, while reversing the order concerning Danielle Lindsey.

Tort Claims Act: *Town of Prosper v. Harper*, No. 05-24-01029-CV, 2025 WL 1909496 (Tex. App. —Dallas July 8, 2025) (mem. op.). On March 16, 2020, police officers with the Town of Prosper pursued suspects in a high-speed chase across multiple cities, resulting in a collision that injured Geoffrey S. Harper. Harper filed a negligence suit against the town, claiming the officers' actions during the pursuit proximately caused his injuries and that governmental immunity was waived under the Texas Tort Claims Act (TTCA). The town filed a plea to the jurisdiction, arguing no reckless conduct occurred and that the officers' actions were not the proximate cause of Harper's injuries. The trial court denied the town's plea, leading to this interlocutory appeal.

The appellate court reversed the trial court's decision, concluding that Harper failed to establish a fact issue regarding the proximate cause of his injuries. The court emphasized that the officers' pursuit did not directly cause the collision; rather, it was the suspect driver's decision to flee and drive recklessly that led to the accident. The court found that the officers' actions were too attenuated from the injuries to establish a causal nexus required for waiving governmental immunity under the TTCA. Consequently, the court rendered judgment dismissing Harper's claims against the town.

Tort Claims Act: *City of Dallas v. Bird*, No. 05-24-01377-CV, 2025 WL 2097652 (Tex. App. —Dallas July 25, 2025)(mem. op.). John Bird and Lakresha Oatis sued the City of Dallas under the Texas Tort Claims Act (TTCA) after their vehicle fell into a concealed sinkhole on a Dallas roadway, claiming premises liability, negligence, and gross negligence. The city filed a plea to the jurisdiction, arguing that the claims did not trigger a waiver of governmental immunity because the city did not have prior knowledge of the sinkhole. The trial court denied the plea, leading to this interlocutory appeal.

The court of appeals reversed the trial court's decision, concluding that Bird and Oatis failed to establish that the city had actual or constructive knowledge of the sinkhole before the accident. The court found no evidence that the sinkhole existed long enough for the city to discover it upon reasonable inspection. Additionally, the court determined that the claims of negligence and gross negligence could not be pursued separately from the premises liability claim under the TTCA. Consequently, the appellate court rendered judgment dismissing Bird's and Oatis's claims for lack of subject matter jurisdiction.

Tort Claims Act: *City of Dallas v. Boggs*, No. 05-24-01458-CV, 2025 WL 2108828, (Tex. App. —Dallas July 28, 2025) (mem. op.). Willie Boggs filed a lawsuit against the City of Dallas, claiming that Dallas Police Corporal Carlos Rodriguez negligently collided with his vehicle, causing injury, and that the Texas Tort Claims Act (TTCA) waived the city's

governmental immunity. The city filed a plea to the jurisdiction, asserting immunity based on Rodriguez's official immunity, but the trial court denied the plea, leading to the city's appeal.

The court of appeals reversed the trial court's decision, finding that Rodriguez was performing a discretionary duty in an emergency situation and acted in good faith, thus entitling him to official immunity. Consequently, the city was also immune from vicarious liability under the TTCA. The appellate court concluded that Boggs failed to raise a fact issue regarding Rodriguez's good faith, and therefore, the city's plea to the jurisdiction should have been granted.

Tort Claims Act: *City of Dallas v. Hawkins*, No. 05-24-01280-CV, 2025 WL 1937389, (Tex. App. —Dallas July 14, 2025) (mem. op.). Phyllis Hawkins sued the City of Dallas after a collision with a police car driven by Officer Arthur Mathews, alleging negligence as Mathews ran a red light without emergency lights and sirens activated. The city filed a plea to the jurisdiction, claiming immunity based on Mathews's official immunity, which the trial court denied. The city appealed, arguing that Mathews was performing discretionary duties in good faith, thus preserving the city's sovereign immunity.

The appellate court reversed the trial court's decision, concluding that the city met its burden to establish all elements of the official immunity defense. The court found that Mathews was performing a discretionary function in an emergency situation and acted in good faith, as a reasonably prudent officer could have believed the need to respond outweighed the risk of harm. Consequently, the court rendered judgment dismissing Hawkins's claims for lack of jurisdiction.

Tort Claims Act: *Reyes v. Montgomery County*, 2025 WL 2079092 (Tex. App.—Beaumont 2025) (mem. op.). Olga Reyes and Daniela Bonilla filed a lawsuit against Montgomery County after a patrol car driven by Brent Guidry, a county patrol deputy, collided with their vehicle. Reyes and Bonilla alleged that Guidry was acting within the scope of his employment at the time of the accident, and the county was liable under the doctrines of agency and respondeat superior. The county denied these allegations and asserted sovereign immunity under the Texas Tort Claims Act (TTCA), arguing that Guidry was not acting within the scope of his employment. The trial court granted the county's plea to the jurisdiction, dismissing the case with prejudice, and overruled Reyes' and Bonilla's motion for reconsideration and motion for a new trial.

The Court of Appeals of Texas, Beaumont, affirmed the trial court's judgment, holding that the county successfully rebutted the presumption that Guidry was acting within the scope of his employment at the time of the accident. The court found that the evidence showed Guidry was commuting home after his shift and not conducting county business, thus not acting in furtherance of the county's business. Reyes and Bonilla failed to present evidence raising a fact issue on whether Guidry was within the scope of his employment, and the trial court did not abuse its discretion in denying the motion for reconsideration or a new trial.

Permits for Development: K*endall County v. Waring Land Investments, LLC*, No. 13-23-00328-CV, 2025 WL 1833379 (Tex. App.—Corpus Christi-Edinburg July 3, 2025) (mem.

op.). In 1887, R.P.M. Waring established the town of Waringsford, later renamed Waring, in Kendall County, Texas, and filed documents similar to a plat in the county's records. In July 2020, Waring Land Investments, LLC acquired forty-nine undeveloped lots in Waring to develop homes, planning to build twelve houses in Block 19, each with its own septic tank and shared water wells. In November 2021, Waring Land Investments applied for an on-site sewage facility (OSSF) permit, which the county denied, citing health and safety standards. The denial was upheld by the Kendall County Commissioners Court, leading Waring Land Investments to file a petition and application for a permanent injunction in February 2023, claiming the county acted ultra vires and seeking to compel the issuance of permits. The trial court denied the county's plea to the jurisdiction, prompting this appeal.

The Court of Appeals of Texas, Corpus Christi-Edinburg, affirmed the trial court's decision, concluding that Waring Land Investments' allegations were sufficient to invoke the trial court's supervisory jurisdiction over the county's decision. The appellate court found that the Waring's claims of ultra vires actions, which are not protected by governmental immunity, and the failure of the county to perform mandatory duties or act within its authority, supported the trial court's jurisdiction. The county failed to challenge the trial court's jurisdiction under Article V, § 8 of the Texas Constitution, which provides the district court with supervisory control over the county. Consequently, the appellate court overruled the county's issues and affirmed the trial court's judgment.

Immunity: *United Concerts Int'l v. City of Hidalgo*, Tex. Mun. Facilities Corp. d/b/a Payne Arena, No. 13-24-00356-CV, 2025 WL 1833378 (Tex. App.—Corpus Christi-Edinburg July 3, 2025) (mem. op.). United Concerts International (UCI), a concert promoter based in New York, entered into a contract with Payne Arena for a concert scheduled on September 8, 2022. A conflict arose, leading UCI to initiate arbitration proceedings in New York, where an arbitrator awarded UCI $52,765 plus interest. UCI domesticated the judgment in Texas and filed an application for a writ of garnishment against Lone Star National Bank (LSNB), which denied holding any property belonging to Payne Arena. UCI then amended its application, naming the City of Hidalgo, Texas Municipal Facilities Corporation (MFC) as the judgment debtor, asserting that MFC owned and operated Payne Arena. MFC filed a plea to the jurisdiction, arguing it was not a party to the arbitration or the New York suit and was immune from garnishment.

The appellate court affirmed the trial court's decision to grant MFC's plea to the jurisdiction, dismissing UCI's claims with prejudice. The court concluded that MFC, as a local government corporation, retained immunity from garnishment proceedings, as public policy exempts political subdivisions performing governmental functions from such actions. The court noted that subject matter jurisdiction can be raised for the first time on appeal and is not waivable by the parties. Consequently, the trial court did not err in dismissing UCI's amended application for writ of garnishment.

Procedure: *City of Hidalgo v. Saldana*, No. 13-24-00587-CV, 2025 WL 1982807 (Tex. App.—Corpus Christi-Edinburg July 17, 2025) (mem. op.). Anita Saldana filed a lawsuit

against the City of Hidalgo and AEG Presents Productions, LLC, alleging premises liability and negligence for injuries she sustained at a concert at Payne Arena on October 1, 2022. The city responded by asserting special exceptions, sovereign immunity, and affirmative defenses, and filed a plea to the jurisdiction and motion for summary judgment, seeking dismissal of Saldana's claims for lack of jurisdiction based on sovereign immunity. The trial court issued a docket control order on November 25, 2024, setting dates for pre-trial and jury trial, which the city contended implicitly denied its plea to the jurisdiction. The city filed a notice of interlocutory appeal, arguing that the docket control order was an appealable interlocutory order.

The Court of Appeals of Texas, Corpus Christi-Edinburg, dismissed the appeal for want of jurisdiction, concluding that the docket control order was not a final appealable order nor an appealable interlocutory order under Texas Civil Practice and Remedies Code § 51.014(a)(8). The court found no explicit or implicit denial of the city's plea to the jurisdiction in the trial court's orders, as there were no rulings on the merits of any claims. Additionally, the court noted that the trial court had not provided permission for an appeal under § 51.014(d), and there was no order regarding the city's motion to limit discovery. Consequently, the appeal was dismissed due to the absence of an appealable order or final judgment.

Economic Development Agreements: *Jimmy Changas, Inc. v. City of League City*, 2025 WL 1960189 (Tex. App.—Houston [14th Dist.] July 17, 2025). Jimmy Changas, Inc. sought to build a restaurant in League City and entered into a "Chapter 380 Economic Incentives Grant Agreement" with the city to provide economic incentives under Chapter 380 of the Texas Local Government Code. The agreement required Jimmy Changas to invest at least $5 million and create eighty full-time jobs within ninety days of receiving a certificate of occupancy to qualify for the incentives. Jimmy Changas failed to meet these conditions within the specified timeframe, leading the city to consider the agreement revoked. Jimmy Changas sued for breach of contract, arguing that the terms were ambiguous and that the city waived the conditions by continuing to request agreement-related documentation after the ninety-day deadline passed. The trial court granted summary judgment in favor of the city, ruling that the conditions were not met and awarding the city attorney's fees.

On appeal, the Court of Appeals of Texas, Houston (14th Dist.), affirmed the trial court's decision in part and modified it in part. The court agreed with the city that the contract was automatically revoked due to Jimmy Changas's failure to meet the conditions precedent, and that the city did not waive these conditions. However, the court sided with Jimmy Changas regarding the attorney-fee provision, ruling that the contract's revocation rendered the attorney-fee provision unenforceable, and thus, the city's award of attorney's fees was eliminated.

Collective Bargaining: *City of Houston v. Martinez*, 2025 WL 1934177 (Tex. App.—Houston [14th Dist.] 2025). The case involves a dispute between the City of Houston and the Houston Professional Fire Fighters' Association, Local 341 (the Association), regarding firefighter compensation during a period without a collective bargaining agreement. After the city and the Association reached a settlement agreement, a group of assistant fire chiefs impacted by a proposed settlement agreement intervened (the Assistant Fire Chiefs), seeking back pay and

declaratory relief, claiming they were excluded from the settlement agreement. The trial court denied the city's and the Association's jurisdictional pleas, leading to an interlocutory appeal by the city and a petition for a writ of mandamus by the Association. The city argued that its governmental immunity was not waived for the Assistant Fire Chiefs' claims, while the Association contended that the Assistant Fire Chiefs lacked standing.

The appellate court partially affirmed and partially reversed the trial court's decision. It concluded that the city's governmental immunity was waived only for claims necessary to enforce the Fire and Police Employee Relations Act (FPERA) against it, dismissing the Assistant Fire Chiefs' claims for settlement proceeds and certain declaratory relief. However, the court affirmed the Assistant Fire Chiefs' standing to pursue claims against the Association, denying the Association's petition for mandamus relief. The court emphasized that the Assistant Fire Chiefs could seek enforcement of the city's statutory duties under the FPERA, but not claims related to the settlement agreement or non-statutory rights.

Tort Claims Act: *City of Houston v. Matthews*, No. 14-24-00433-CV, 2025 WL 1982874 (Tex. App.—Houston [14th Dist.] July 17, 2025) (mem. op.). Ronnie R. Matthews filed a lawsuit against the City of Houston under the Texas Tort Claims Act (TTCA), alleging injuries from an automobile accident involving a city-owned vehicle driven by a city employee. Matthews filed the suit on February 23, 2023, but did not serve the city with citation until October 25, 2023, which was almost two years and four months after the accident. The trial court initially dismissed the suit for want of prosecution but reinstated it after Matthews served the city. The city filed a motion for summary judgment, arguing that the suit should be dismissed due to governmental immunity and that Matthews failed to serve the city within the two-year limitations period. The trial court denied the city's motion.

On appeal, the Court of Appeals of Texas, Houston (14th Dist.) reversed the trial court's decision, agreeing with the city that the trial court lacked subject-matter jurisdiction because Matthews did not timely serve the city. The appellate court relied on recent Texas Supreme Court decisions, which clarified that both filing a petition and achieving service of process are required to "bring suit" and satisfy the statute of limitations. Matthews's argument that the city had actual notice of his claims was rejected, as actual notice does not satisfy the requirement for timely service. The court concluded that Matthews's lack of diligence in serving the city was established as a matter of law, and thus, the city was entitled to summary judgment. The court also determined that Matthews was not entitled to amend his petition, as he did not suggest any way to cure the jurisdictional defect.

Immunity: *City of Houston v. Guzman*, No. 14-23-00957-CV, 2025 WL 2048198 (Tex. App.—Houston [14th Dist.] July 22, 2025) (mem. op.). Magdalena Guzman filed a lawsuit against the City of Houston. Officer Jessica Lee Moore, and Harris County following a car accident involving Moore, who was operating a city-owned vehicle. Guzman alleged negligence and negligent entrustment, seeking damages between $250,000 and $1,000,000. Guzman later nonsuited Harris County. The city did not respond to the lawsuit, leading Guzman to obtain an interlocutory default judgment. The city appealed, arguing the trial court lacked subject matter jurisdiction due to Guzman's failure to plead a waiver of governmental immunity and because

the court lost plenary power after Guzman nonsuited Harris County. The city also filed a petition for writ of mandamus, claiming the trial court should have dismissed the case entirely. The trial court's default judgment did not award damages, and no final judgment was rendered.

The appellate court affirmed the trial court's interlocutory default judgment and denied the city's petition for writ of mandamus. The court found that the nonsuit did not constitute a final judgment, as it was not signed by the trial judge and did not dismiss the entire case. The court also held that Guzman was not required to plead facts negating official immunity or the emergency and 911 exceptions under the Texas Tort Claims Act, as these were not plausibly implicated by the nature of the dispute. Consequently, the city's arguments regarding governmental immunity and the trial court's jurisdiction were rejected.

***Ultra Vires* Acts; Immunity: *Williams v. MMP Properties*, LLC, 2025 WL 1909795 (Tex. App.—15th Dist. 2025) (mem. op.).** MMP Properties, LLC owns 17 acres of land adjacent to Loop 1604 in Bexar County, Texas, and sought to develop it in 2017. During the platting process, MMP learned that the Texas Department of Transportation (TxDOT) planned to expand the highway, potentially affecting their property. MMP's plat included a 4.171-acre area designated as a "Future R.O.W. Dedication," which TxDOT interpreted as a public dedication. In 2020, TxDOT offered to purchase the land, but negotiations failed, and TxDOT later claimed the dedication allowed them to use the land without purchase. MMP filed a lawsuit seeking a declaratory judgment that it had not dedicated the land for public use, while TxDOT officials claimed sovereign immunity. The trial court denied the officials' plea to the jurisdiction and granted MMP's motion for summary judgment.

The Court of Appeals of Texas, 15th District, affirmed the trial court's decision, holding that the trial court did not err in denying the plea to the jurisdiction. The appellate court found that unresolved fact issues remained regarding whether MMP intended to dedicate Lot 7 to public use, which precluded the dismissal of the case on jurisdictional grounds. The court also determined that the TxDOT officials' actions could be considered ultra vires, allowing the suit to proceed despite claims of sovereign immunity. The court concluded that the trial court correctly denied the TxDOT officials' plea to the jurisdiction, allowing the case to proceed to resolve the fact issues.

June 2025

Employment Discrimination: *York v. Ezell*, No. 24-50770, 2025 WL 1577822 (5th Cir. June 4, 2025). Delton York, a former employee of the United States Office of Personnel Management (OPM), filed an employment discrimination lawsuit against the Director of OPM under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967. York, an African-American man in his forties, alleged that he was denied a promotion due to his race and age. He claimed that his colleague, Jason Hohman, a white male under 40, was promoted under similar circumstances, which York argued demonstrated discrimination. The district court granted summary judgment in favor of the Director, finding that York failed to establish a *prima*

facie case of discrimination and did not show that the reason for not promoting him was pretextual. York appealed.

York argued that the decision was pretextual, citing testimony from acting supervisors who believed he was ready for promotion, but the court found these opinions irrelevant as these supervisors were not decision-makers. Additionally, the appellate court noted that York and Hohman were not similarly situated due to differences in job performance and that the decision not to promote York was based on his inability to perform complex tasks and manage basic job functions, which were considered legitimate, non-discriminatory reasons. Ultimately, the appellate court affirmed the district court's decision, concluding that York could not demonstrate that the refusal to promote him was a mask for discrimination.

First Amendment Retaliation: *Hamilton v. City of Wilmer, Tex.*, No. 23-10881, 2025 WL 1681133 (5th Cir. June 16, 2025). Mark Hamilton, the former Chief of the Fire Department of Wilmer, Texas, was terminated after testifying at a probation revocation hearing for a former employee who had hidden recording devices in fire station bathrooms. Hamilton claimed his termination was in retaliation for engaging in protected First Amendment activity, but the trial court found he did not state a valid claim and dismissed his complaint. Hamilton appealed the decision.

To succeed in a First Amendment retaliation claim, a public employee must show, among other things, they spoke as a citizen on a matter of public concern. The court found that Hamilton testified as part of his official duties, not as a citizen, and thus his speech was not protected under the First Amendment. Even if Hamilton's speech were protected, the City of Wilmer had adequate justification for treating him differently due to his use of city resources, including his uniform, during the testimony. The court affirmed the district court's dismissal, as Hamilton failed to demonstrate a violation of his constitutional rights.

Religious Display: *Roake v. Brumley*, No. 24-30706, 2025 WL 1719978 (5th Cir. June 20, 2025). A group of multi-faith and non-religious parents and their children challenged the constitutionality of a Louisiana statute which required the display of the Ten Commandments in public school classrooms. The plaintiffs argued that the statute violated the Establishment Clause and the Free Exercise Clause of the First Amendment. The district court granted a preliminary injunction to prevent the enforcement of the statute, finding it facially unconstitutional. Louisiana appealed the decision, arguing that the plaintiffs' claims were unripe, lacked standing, and that the defendants were entitled to sovereign immunity.

The Fifth Circuit Court of Appeals affirmed the district court's decision, holding that the plaintiffs' claims were ripe and that they had standing to sue. The court found that the statute's requirement to display the Ten Commandments constituted a religious display, violating the Establishment Clause. The court also determined that the purported secular purpose of the statute was a sham, as the legislative history revealed a religious objective. The court applied the precedent set by *Stone*

v. Graham, which struck down a similar statute in Kentucky, to conclude that the state law was unconstitutional.

Recent Texas Cases of Interest to Cities

Note: Included cases are from June 1, 2025, through June 31, 2025.

Religious Services: *Perez v. City of San Antonio*, No. 24-0714, 2025 WL 1675639 (Tex. June 13, 2025). Gary Perez and Matilde Torres, members of the Lipan-Apache Native American Church, challenged the City of San Antonio's development plan for Brackenridge Park, arguing it violated their religious rights under the Free Exercise Clause, the Texas Religious Freedom Restoration Act (RFRA), and the Religious Services Clause of the Texas Constitution. The district court partially granted a preliminary injunction, allowing limited access for religious ceremonies but not halting the city's tree-removal and bird-deterrence plans. The Fifth Circuit initially rejected Perez's claims but later certified a question to the Texas Supreme Court regarding the scope of the Religious Services Clause. The Texas Supreme Court concluded that while the clause imposes a categorical bar on governmental limitations of religious services, its scope does not extend to actions taken for the preservation and management of public lands. The Court emphasized that the clause does not require the government to provide or maintain natural elements necessary for religious services on public property. The decision leaves the application of this interpretation to the federal courts.

Texas Tort Claims Act: *City of Houston v. Gomez*, No. 23-0858, 2025 WL 1716878 (Tex. June 20, 2025). In the case of *City of Houston v. Maria Christina Gomez*, the Supreme Court of Texas addressed whether the city retained immunity under the Texas Tort Claims Act's emergency exception after a police officer collided with a motorist while responding to an armed robbery. The officer, Bobby Joe Simmons, was driving within the speed limit and applied his brakes before entering an intersection but collided with Maria Christina Gomez's vehicle due to wet road conditions. The city argued that the emergency exception applied, as the officer's actions did not demonstrate "conscious indifference or reckless disregard for the safety of others." The court of appeals initially found a fact question regarding the officer's recklessness, but the Supreme Court disagreed, concluding that the officer's actions amounted to ordinary negligence rather than recklessness. Consequently, the Supreme Court reversed the court of appeals' decision and rendered judgment dismissing Gomez's claim, as the city's immunity was not waived.

Declaratory Judgment: Gulfton Area Municipal Management District v. APT Villa Contento LLC, No. 01-23-00703-CV, 2025 WL 1657764 (Tex. App.—Houston [1st Dist.] June 12, 2025) (mem. op.). The Gulfton Area Municipal Management District and its directors appealed a trial court's order denying their pleas to the jurisdiction in a suit brought by APT Villa Contento LLC and APTFP LLC (the companies). The companies challenged the district's authority to assess and collect property taxes, alleging that the directors were unlawfully

appointed and that the district failed to meet legal requirements for tax assessments. The companies sought a refund of tax payments, injunctive relief, and a declaration that the tax assessments were unlawful. The district and directors argued they were immune from suit and that the companies lacked standing to challenge the directors' authority.

The appellate court affirmed the trial court's order regarding the companies' claim for injunctive relief from the exclusion order but reversed the order concerning the remaining claims, dismissing them for lack of jurisdiction. The court held that the companies' claims for a tax refund were moot because the district had refunded the payments. It also determined that the companies lacked standing to challenge the directors' authority to hold office, as such a challenge could only be brought by the state in a quo warranto proceeding. The court found that the district and directors were immune from the companies' claims for declaratory relief under the Uniform Declaratory Judgment Act, as the claims did not involve a challenge to the validity of a statute or ordinance. However, the court allowed the companies' claim for injunctive relief challenging their exclusion from the district to proceed, as it involved allegations of constitutional and statutory rights violations.

Tort Claims Act: City of Houston v. Page, No. 01-24-00329-CV, 2025 WL 1688425 (Tex. App.—Houston [1st Dist.] June 17, 2025) (mem. op.). Michael Wayne Petitt died in a bicycle accident allegedly caused by an uncovered storm drain on a sidewalk in Houston. His daughter, Ciara Page, sued the City of Houston, among others, claiming that the city was liable for the condition of the sidewalk under the Texas Tort Claims Act (TTCA). The city filed a motion to dismiss under Texas Rule of Civil Procedure 91a, arguing that Page failed to plead facts showing a waiver of governmental immunity, specifically that the city owned or controlled the premises or that the condition was a special defect. The trial court denied the city's motion, and the city appealed.

The Court of Appeals affirmed the trial court's decision, holding that Page's pleadings sufficiently alleged that the city either owned or controlled the premises through an easement, meeting the fair-notice pleading standard. The court also found that the city's ordinance requiring abutting landowners to maintain sidewalks did not preclude the city's liability. Additionally, the court concluded that Page adequately pleaded facts to demonstrate that the uncovered storm drain was a special defect under the TTCA and that the city had actual or constructive knowledge of the defect. Therefore, the appellate court overruled the city's arguments and affirmed the trial court's order denying the motion to dismiss

Eminent Domain: *Burgess v. City of Westworth Vill.*, No. 02-24-00252-CV, 2025 WL 1717142 (Tex. App.—Fort Worth June 19, 2025). This case involves an eminent domain dispute between Jim Burgess and the City of Westworth Village. The city sought to condemn Burgess's land to lease it to UnderPar Life, LLC for a golf course development, but Burgess challenged the condemnation, arguing it was not for a public use as required by the Texas Constitution and Government Code. The trial court granted partial summary judgment in favor of

the city, but Burgess appealed, contending that recent constitutional amendments supersede prior judicial deference to legislative declarations of public use.

The appellate court found that the legislative deference rule does not apply in this case due to the constitutional and statutory limitations on eminent domain for private benefit or economic development purposes. The court concluded that the evidence was conflicting regarding whether the primary purpose of the land transfer was for economic development, which is a fact issue that should be resolved by a jury. Consequently, the appellate court reversed the trial court's judgment and remanded the case for further proceedings.

Tort Claims Act: *City of Laredo v. Rodriguez*, No. 04-24-00493-CV, 2025 WL 1648206 (Tex. App.—San Antonio June 11, 2025) (mem. op.). In this premises liability case, the City of Laredo appealed the trial court's denial of its plea to the jurisdiction based on governmental immunity. Ramiro Rodriguez sued the city under the Texas Tort Claims Act after tripping on uneven bricks and sustaining injuries. The city argued it had no actual knowledge of the premises defect, which is required to waive governmental immunity. The city presented evidence, including affidavits from its Director of Public Works and a police sergeant, showing it had not received any reports of prior injuries or potential dangers related to the bricks. Rodriguez's evidence, including testimony about the area's foot traffic and post-accident repairs, failed to demonstrate the city's actual knowledge of the dangerous condition at the time of the accident. The court concluded that the city did not have actual knowledge of the danger, reversed the trial court's decision, and dismissed the case for lack of jurisdiction.

Jurisdiction: *San Antonio Family Ass'n v. City of San Antonio*, No. 04-24-00300-CV, 2025 WL 1789180 (Tex. App.—San Antonio June 30, 2025). In this case, plaintiffs sued the City of San Antonio, its mayor, and its city manager, seeking declaratory and injunctive relief concerning a $500,000 allocation in the city's fiscal year 2024 budget for a "Reproductive Justice Fund." The plaintiffs argued that the fund would illegally provide grants to organizations that assist with abortion travel, violating Texas laws. The trial court dismissed the case on the grounds of lack of standing and ripeness, and the plaintiffs appealed, arguing that their claims were ripe and that they had taxpayer standing. The appellate court affirmed the trial court's decision, holding that the claims were not ripe because the city's plans for the fund were contingent and speculative, with no concrete decision made on how the funds would be spent. The court also found that the trial court did not abuse its discretion by ruling on the plea before the plaintiffs completed jurisdictional discovery.

Civil Service: *Thornton v. City of Plano*, No. 05-24-01330-CV, 2025 WL 1798642 (Tex. App.—Dallas June 30, 2025) (mem. op.). Erin Thornton, a peace officer employed by the City of Plano, was terminated from her position after suffering multiple line-of-duty injuries, which prevented her from working as a police officer. Thornton sued the city and police chief, claiming violations of Local Government Code Section 177A.003, which she argued precludes the city from terminating her employment while she is recovering from her injuries. She sought declaratory, injunctive, and mandamus relief, including reinstatement and a proper grievance hearing. The city and police chief filed pleas to the jurisdiction, contending that the provisions of Chapter 177A do

not apply as the city is a civil service municipality governed by Chapter 143, which contains separate leave provisions. The trial court granted the pleas to the jurisdiction, dismissing Thornton's claims against both the city and police chief. This interlocutory appeal followed.

The court of appeals, in upholding the lower court's rulings, determined that Thornton failed to address each independent ground asserted in the pleas. The court emphasized that when a trial court sustains a plea to the jurisdiction without specifying its grounds, the appellant must challenge each independent ground asserted in the plea. Thornton failed to challenge the argument that the city and police chief were governed only by Chapter 143, which could have independently supported the trial court's judgment. The court also chose not to request additional briefing on the issue, as it was not "fairly included" in or "inextricably entwined" with the issues Thornton's appellate brief addressed.

Tort Claims Act: *Dangtran v. Courses at Watters Creek*, No. 05-24-00663-CV, 2025 WL 1698133 (Tex. App.—Dallas June 17, 2025) (mem. op.). Quang Dangtran and Ha Nguyen own a home adjacent to The Courses at Watters Creek, a golf course owned and operated by the City of Allen. The homeowners alleged that stray golf balls frequently landed on their property, causing damage to and preventing the use and enjoyment of their home. They sued the city, asserting claims for trespass, mental and emotional suffering, and diminishment of property value, among others, seeking damages and an injunction. The city, in response, filed a plea to the jurisdiction based on governmental immunity, which the trial court granted, dismissing the homeowners' claims for lack of subject matter jurisdiction. The homeowners appealed, contending that the operation of the golf course was a proprietary function, not a governmental one, and thus not protected by immunity.

The court of appeals disagreed, citing its previous ruling, and determined that operating a golf course is a governmental function under the Texas Tort Claims Act (TTCA). The appellate court also found that the homeowners failed to demonstrate a waiver of governmental immunity. Their claims, primarily based on trespass, were considered intentional torts, which are not covered by the limited waiver of immunity in the TTCA. Further, the homeowners did not allege any facts that would fall under the TTCA's waiver provisions for negligence, such as use of motor vehicles, equipment, tangible personal property (as the city was not the user of the golf balls), or premises defects. For those reasons the court of appeals affirmed the trial court's decision and dismissed the appellants' claims.

Open Government: *Jesus Christ Open Altar Church, LLC v. City of Hawkins*, No. 06-24-00091-CV, 2025 WL 1752507 (Tex. App.—Texarkana June 25, 2025) (mem. op.). The church appealed a take-nothing judgment from the trial court in its lawsuit against the City of Hawkins and various city officials. The church's claims included violations of the Texas Open Meetings Act, the Texas Public Information Act, unlawful seizure of property, and breach of fiduciary duty, among others. The trial court granted the city's plea to the jurisdiction and summary judgment motions, finding no evidence to support the church's claims. On appeal, the church's arguments were found to either raise unpled issues or be inadequately briefed, leading to a waiver of all issues on appeal. The appellate court affirmed the trial court's judgment, noting the church's failure to provide a clear and concise argument with appropriate citations.

Tort Claims Act: Amber Cervantes v. City of Corpus Christi, No. 13-23-00311-CV, 2025 WL 1702709 (Tex. App.—Corpus Christi-Edinburg June 18, 2025) (mem. op.). Amber Cervantes was injured on December 13, 2013, when Hector Garcia, fleeing from a high-speed police chase, collided with her vehicle. Cervantes sued the City of Corpus Christi, alleging that the police officers' negligence during the pursuit caused her injuries and that the city's immunity was waived under the Texas Tort Claims Act (TTCA). The trial court granted the city's plea to the jurisdiction, finding no causal connection between the officers' conduct and Cervantes's injuries, leading to this appeal.

On appeal, Cervantes argued that the officers' actions during the pursuit created a fact issue regarding causation. However, the Court of Appeals affirmed the trial court's decision, concluding that the pursuit had been terminated before the collision and that the officers' actions did not proximately cause Cervantes's injuries. The court found that the officers' conduct was too attenuated from the accident to establish causation under the TTCA, as the pursuit had ended and the officers were not in close proximity to Garcia at the time of the collision. The court also rejected Cervantes's argument that Officer Sotello's actions should be considered in assessing causation, as Sotello was not pursuing Garcia at the time of the accident.

City of Houston v. Polk, No. 14-23-00360-CV, 2025 WL 1692588 (Tex. App.—Houston [14th Dist.] June 17, 2025) (mem. op.). This case involves a motor vehicle accident between Betram Polk and Officer Fabian Garcia, a police officer employed by the City of Houston. Polk filed a lawsuit against the city, alleging that Officer Garcia, while within the course and scope of his employment with the city, negligently and recklessly failed to control his speed and collided with Polk's vehicle. Notably, Polk did not allege any facts suggesting that Garcia was responding to an emergency at the time of the accident. In its answer, the city generally denied Polk's allegations and asserted official and governmental immunity. The city filed a Rule 91a motion to dismiss on the same grounds. The trial court denied the city's motion, leading to this interlocutory appeal.

On appeal, the city asserted that the trial court made two main errors in denying its Rule 91a motion. First, the city contended that Polk did not allege sufficient facts to overcome Officer Garcia's official immunity. Second, the city claimed it was immune to Polk's claim under the TTCA's emergency response exception. The appellate court issued a memorandum opinion on January 30, 2025, but withdrew it and substituted this memorandum in its stead. The appellate court rejected the city's arguments and affirmed the trial court's decision, explaining that: (1) the city has the burden to establish the affirmative defense of official immunity; and (2) Polk's pleadings did not plausibly implicate the TTCA's emergency exception because he did not allege any facts suggesting that Garcia was responding to an emergency at the time of the accident.

May 2025

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from April 1, 2025, through April 30, 2025. *These case summaries have been prepared with the assistance of AI.*

Texas Tort Claims Act: *Payne v. City of Houston, Tex.*, No. 24-20150, 2025 WL 999085 (5th Cir. Apr. 3, 2025). Officer Christopher Cabrera, a Houston police officer, collided with Charles Payne, Sr.'s car while returning to his station after booking a DWI suspect, resulting in Payne's death. Payne's relatives filed a claim against the City of Houston, which moved to dismiss the claim based on governmental immunity, and the district court denied this motion. The city appealed the denial, arguing that Officer Cabrera's actions fell under the Texas Tort Claims Act's emergency and 9-1-1 exceptions to the waiver of governmental immunity. The appellate court reviewed the district court's denial of the motion to dismiss de novo.

The court analyzed whether Officer Cabrera was "reacting" to an emergency situation or "responding" to an emergency or 9-1-1 call at the time of the collision. It concluded that Cabrera was not "reacting" to an emergency situation, as the emergency exception should not broadly apply to any attempt to avoid a car wreck. The court also determined that Cabrera was not "responding" to an emergency or 9-1-1 call, as his response to the DWI call had ended once the suspect was booked. Even if Cabrera was responding to an emergency, his actions were reckless, violating applicable laws and causing the collision. Consequently, the court affirmed the district court's decision, holding that the city was not entitled to governmental immunity.

Firearms: *Bay Area Unitarian Universalist Church v. Ogg*, No. 23-20165, 2025 WL 1066187 (5th Cir. Apr. 9, 2025). This case involves a First Amendment challenge by Bay Area Unitarian Universalist Church and Antidote Coffee (Bay Area) against Texas Penal Code §§ 30.06 and 30.07, which regulate signage requirements for prohibiting firearms on private property. Bay Area, a church and a coffee shop, argue that these laws impose burdensome signage requirements that infringe on their rights to exclude firearms, contrasting with the more lenient requirements for excluding other items. The district court dismissed the case for lack of standing, ruling that Bay Area failed to demonstrate an injury. Bay Area appealed, seeking to establish standing based on an "asymmetrical treatment" injury, arguing that the statutory scheme treats their speech differently from other property owners. The Fifth Circuit reviewed the district court's dismissal de novo, focusing on whether the plaintiffs had standing to sue. The court found that Bay Area suffered an ongoing injury due to the statutory scheme's differential treatment of their speech, which is traceable to the enforcement of the laws by Harris County District Attorney Kim Ogg and others in local law enforcement. The court also determined that the injury could be redressed by a favorable judicial decision, which would allow Bay Area to use less burdensome signage. Consequently, the Fifth Circuit reversed the district court's dismissals, vacated the order denying leave to amend, and remanded the case for further proceedings.

Employment: *Way v. City of Missouri City*, 133 F.4th 509 (5th Cir. 2025). Jamilah Way, a former First Assistant City Attorney for Missouri City, Texas, developed anxiety and fibroids during her employment with the city and requested accommodations and time off under the Family and Medical Leave Act (FMLA). She was terminated shortly after returning from FMLA leave, prompting her to sue the city under the FMLA, the Americans with Disabilities Act (ADA), and the Texas Commission on Human Rights Act (TCHRA). The district court granted summary judgment in favor of the city on all claims, leading Way to appeal.

On appeal, the Fifth Circuit analyzed Way's claims of discrimination and retaliation under the ADA and TCHRA, as well as interference and retaliation under the FMLA. For the ADA and TCHRA discrimination claims, the court found sufficient evidence that Way's anxiety was a qualifying disability and that the city failed to accommodate her, reversing the summary judgment on this issue. However, the court upheld the summary judgment regarding her fibroids, as the city had reasonably accommodated this condition.

Regarding ADA and TCHRA retaliation claims, the court found no causal link between Way's accommodation requests and her termination, affirming the summary judgment. For the FMLA interference claim, the court determined that Way did not provide evidence of a pay reduction upon her return from leave, thus affirming the summary judgment. However, the court found a genuine issue of material fact regarding the FMLA retaliation claim, as the timing of her termination and the city's inconsistent explanations suggested pretext, leading to a reversal of the summary judgment on this claim. Ultimately, the court affirmed in part, reversed in part, and remanded the case for further proceedings, expressing no view on the ultimate merits.

Racial Discrimination in Land Use: *Inclusive Louisiana v. St. James Par.*, 134 F.4th 297 (5th Cir. 2025). The case involves two faith- and community-based organizations and a church in St. James Parish, Louisiana ("Inclusive Louisiana"), who sued the parish, alleging racial and religious discrimination in land use practices that directed hazardous industrial development towards majority-Black districts and Black churches. Inclusive Louisiana claimed these practices desecrated cemeteries of their enslaved ancestors and violated their constitutional and statutory rights. The district court dismissed the claims, holding that Inclusive Louisiana lacked standing for certain claims and that others were time-barred. On appeal, Inclusive Louisiana argued that the district court erred in dismissing their claims on statute of limitations grounds, in finding a lack of standing for religious injuries, and in not recognizing standing based on property and stigmatic injuries.

The appellate court reviewed the district court's dismissal de novo, focusing on whether the claims were timely and whether Inclusive Louisiana had standing. The court found that Inclusive Louisiana's claims were not time-barred because they alleged discriminatory acts – such as the parish's rejection of a moratorium on polluting industries in Black communities – within the applicable limitations periods. The court also determined that Inclusive Louisiana had standing for religious injuries, as the alleged desecration of cemeteries was traceable to the parish's land use decisions. Additionally, the court found that Inclusive Louisiana sufficiently alleged property

injuries traceable to the parish's conduct, as well as stigmatic injuries due to unequal treatment in land use decisions.

The appellate court reversed the district court's dismissal of the claims and remanded the case for further proceedings, holding that Inclusive Louisiana had adequately pleaded their claims and established standing.

First Amendment: *Umphress v. Hall*, 133 F.4th 455 (5th Cir. 2025). Brian Umphress, a Texas county judge, challenged the application of Canon 4A(1) of the Texas Code of Judicial Conduct, which requires judges to conduct their extra-judicial activities without questioning their impartiality, after refusing to officiate same-sex marriages on religious grounds while continuing to perform opposite-sex marriages. The district court dismissed his case for lack of subject matter jurisdiction, citing lack of standing and ripeness, and suggested abstention under the *Pullman* doctrine. Umphress appealed, arguing that he faced a substantial threat of enforcement from the State Commission on Judicial Conduct, which had previously issued a warning to another judge, Dianne Hensley, for similar conduct. The Fifth Circuit found that Umphress had standing because he demonstrated an imminent injury-in-fact, caused by the Commission's potential enforcement, which could be redressed by the requested relief. The court also determined that his claims were ripe for review, both constitutionally and prudentially, as they presented purely legal issues, and denying review would impose hardship on Umphress. The court declined to abstain under *Pullman*, noting that state court proceedings were unlikely to resolve the state-law question at issue. Instead, the Fifth Circuit certified the question to the Supreme Court of Texas, asking whether Canon 4A(1) prohibits judges from refusing to perform same-sex weddings on moral or religious grounds while continuing to perform opposite-sex weddings. The court reversed the district court's dismissal for lack of subject matter jurisdiction and retained jurisdiction pending the Texas Supreme Court's response.

Judicial Bias & Recusal: *Jimenez v. Guerrero*, 133 F.4th 483 (5th Cir. 2025). Jesus Jaime Jimenez, a member of the Mexican Mafia, was convicted of engaging in organized crime involving violent robbery and sentenced to 50 years in prison. His conviction was challenged on the grounds of judicial bias, as the presiding judge, Emil Karl Prohl, had received misappropriated travel reimbursements from the district attorney, Ron Sutton, who prosecuted Jimenez. Jimenez's state *habeas* application included claims of ineffective assistance of counsel, Brady violations, and judicial bias, but the Texas Court of Criminal Appeals denied relief without a written order. Jimenez then filed a federal *habeas* petition, which was initially dismissed as time-barred but was later remanded for consideration of equitable tolling. On remand, the district court denied relief, finding the judicial-bias claim was adjudicated on the merits and not entitled to de novo review. The Fifth Circuit Court of Appeals affirmed, holding that the state court's decision was not contrary to or an unreasonable application of clearly established federal law. The court found that Jimenez's judicial-bias claim did not meet the high threshold required to overcome the relitigation bar under the Antiterrorism and Effective Death Penalty Act (AEDPA). The court also denied Jimenez's motion to expand the certificate of appealability to include his ineffective-assistance-of-counsel and Brady claims, as they did not

make a substantial showing of the denial of a constitutional right. Ultimately, the court affirmed the district court's judgment and denied habeas relief.

Water & Sewer Discounts Based on SNAP Participation: *Mississippi v. JXN Water*, 134 F.4th 312 (5th Cir. 2025). The United States and Mississippi filed enforcement actions against the City of Jackson, Mississippi, alleging violations of state and federal environmental laws due to issues with the city's water and sewer systems. The district court appointed a federal receiver as interim third-party manager to manage the city's water systems and approved a motion to compel disclosure of Supplemental Nutrition Assistance Program (SNAP) recipient data to implement a tiered-rate plan with discounted rates for SNAP recipients being implemented by the receiver. The United States and Mississippi challenged these disclosures, arguing that they violated the Food and Nutrition Act (FNA) since the water discounts were not a "federal assistance program."

The court analyzed whether the tiered-rate plan constituted a federal assistance program under the FNA and concluded that it did not, as it was not administered by an arm of the federal government. The court rejected the argument that the volume of federal involvement transformed the plan into a federal assistance program. Ultimately, the appellate court reversed the district court's disclosure order and remanded the case for further proceedings.

Disability and Employment Discrimination: *Ray v. Columbia Brazoria Indep. Sch. Dist.,* No. 24-20227, 2025 WL 1219191 (5th Cir. Apr. 28, 2025). Annie Ray, a Black woman aged 63, worked as a teacher for Columbia Brazoria Independent School District (CBISD) and did not return to in-person teaching during the 2020-2021 school year due to COVID-19 concerns related to her health conditions. CBISD did not renew her contract in May 2021, citing her exhaustion of leave and failure to report to work, which coincided with a district-wide reduction in force. Ray sued CBISD and others for retaliation and discrimination based on disability, race, sex, and age, but the district court granted summary judgment to CBISD. Ray appealed, arguing that CBISD failed to accommodate her disability by not allowing her to teach remotely, not transferring her to a position with less student contact, and not relocating her to a more isolated part of the school.

The appellate court affirmed the district court's decision, finding that in-person attendance was an essential function of Ray's teaching role, and she failed to provide evidence of available alternative positions. The court also held that Ray did not adequately communicate her limitations or suggest reasonable accommodations, thus failing to engage in the interactive process required by the ADA. Regarding her claims of race, sex, and age discrimination, the court found that Ray did not establish a prima facie case or show pretext, as she did not apply for the positions she claimed she was denied. The court also rejected Ray's retaliation claim, noting a lack of causal connection between her protected activities and the nonrenewal of her contract. Ultimately, the appellate court affirmed the district court's grant of summary judgment in favor of CBISD.

Recent Texas Cases of Interest to Cities

Note: Included cases are from April 1, 2025, through April 30, 2025. *These case summaries have been prepared with the assistance of AI.*

Tort Claims Act: *City of Killeen–Killeen Police Department v. Terry*, No. 22-0186, 2025 WL 1196743 (Tex. Apr. 25, 2025) (per curiam) (mem. op.). Aamir Terry sued the City of Killeen's police department after a police cruiser, responding to a 9-1-1 call, struck his vehicle. The court of appeals initially affirmed the trial court's denial of the city's plea to jurisdiction, applying a rule that governmental entities are immune from suits unless the operator acted recklessly. However, the Supreme Court of Texas clarified in *City of Austin v. Powell* that the emergency exception to the Tort Claims Act requires a two-step inquiry: first, determining if any laws or ordinances apply to the emergency action, and second, assessing recklessness only if no laws or ordinances apply. The court of appeals failed to consider whether the officer complied with applicable laws, such as Section 546.001 of the Transportation Code, before addressing recklessness. Additionally, the case involves Section 101.062, which pertains to 9-1-1 emergency services and does not include a recklessness prong, potentially affecting the immunity waiver. The Supreme Court vacated the court of appeals' judgment and remanded the case for further proceedings in light of these considerations.

Tort Claims Act: *City of Houston v. Johnson*, No. 01-23-00938-CV, 2025 WL 1033754 (Tex. App.—Houston [1st Dist.] Apr. 8, 2025) (mem. op.). Mary Johnson sued the City of Houston for negligence after a tree limb fell from a city-operated heavy trash truck and struck her car, causing personal injury and property damage. Johnson claimed that the Texas Tort Claims Act (TTCA) Section 101.021(1) waived the city's governmental immunity because her damages arose from the operation or use of a motor-driven vehicle. The city filed a motion to dismiss under Texas Rule of Civil Procedure 91a, arguing that Johnson's claims did not fall within this immunity waiver. The trial court denied the city's motion, and the city appealed.

At the appellate court, the city contended that Johnson failed to plead sufficient facts to establish a waiver of immunity under section 101.021(1). The court reviewed the case de novo and affirmed the trial court's decision, concluding that Johnson's allegations were sufficient to establish that her damages arose from the operation and use of a motor-driven vehicle due to a government employee's negligence. The court also noted that the city did not specify any TTCA exceptions that Johnson's allegations plausibly implicated, so she was not required to negate them.

Civil Service: *Harris County Sheriff Ed Gonzalez v. Harris County Sheriff's Civil Service Commission*, No. 01-23-00411-CV, 2025 WL 1033748 (Tex. App.—Houston [1st Dist.] April 8, 2025) (mem. op). This case involves an employment dispute where the Harris County Sheriff's Office terminated William Perry, a human-resources manager, for not returning to work after exhausting his Family and Medical Leave Act benefits. Perry appealed his termination to the Harris County Sheriff's Civil Service Commission, which reinstated him with back pay.

Sheriff Ed Gonzalez challenged the commission's authority to hear Perry's appeal, citing a rule that prohibits appeals from administrative dismissals related to FMLA and leave of absence policies. Gonzalez also alleged that the Commission violated the Texas Open Meetings Act (TOMA) by deliberating in a closed session. The district court dismissed Gonzalez's claims for lack of jurisdiction, citing governmental immunity.

The appellate court reversed the district court's dismissal of the Sheriff's TOMA claims, finding that the Sheriff's petition alleged sufficient jurisdictional facts to establish the district court's jurisdiction over these claims. The appellate court held that TOMA provides an express waiver of governmental immunity for actions seeking mandamus or injunctive relief to reverse a violation of the Act. However, the court affirmed the dismissal of the Sheriff's claims regarding the alleged ultra vires acts, concluding that the commissioners' actions were discretionary and not ministerial, thus not falling within the ultra vires exception to governmental immunity. The case was remanded for further proceedings on the TOMA claims.

Ordinances: *City of Killeen v. Bell Cnty*., No. 03-23-00316-CV, 2025 WL 1118583 (Tex. App. Apr. 16, 2025) (mem. op.). The City of Killeen and Ground Game Texas appealed the trial court's denial of their pleas to the jurisdiction in a lawsuit filed by Bell County, the 27th Judicial District Attorney's Office, and Bell County Attorney's Office. The lawsuit challenged the constitutionality and validity of Killeen's ordinance decriminalizing misdemeanor marijuana possession, which was adopted following voter approval in 2022. Bell County argued that the ordinance was preempted by state law, including Texas Local Government Code Section 370.003 and Texas Health & Safety Code Section 481.121, and that it interfered with the prosecutorial discretion of the DA's Office. The city and Ground Game contended that Bell County lacked standing, failed to establish a waiver of governmental immunity, and had a defective jurat and verification of their petition.

The court of appeals, in affirming the trial court's order denying the pleas to the jurisdiction, concluded that the DA's office had standing because the ordinance interfered with its prosecutorial discretion, a legally protected interest. The court also determined that the Uniform Declaratory Judgments Act (UDJA) waived the city's governmental immunity for claims challenging the validity of the ordinance, including claims for injunctive relief. Additionally, the court found that the issue of capacity did not affect subject-matter jurisdiction and that the alleged defective jurat did not deprive the trial court of jurisdiction.

Elections: *EPISD Bd. of Dirs. v. Diaz*, No. 04-24-00771-CV, 2025 WL 1119707 (Tex. App.—San Antonio Apr. 16, 2025) (mem. op.). Enriqueta Diaz filed an "Emergency Petition for Writ of Election Mandamus" against the EPISD Board of Directors, claiming they violated Texas Education Code § 11.060 by not opening a vacant board position for election. The trial court granted Diaz's petition, ordering the position to be placed on the ballot for a special election. The EPISD Board appealed, arguing Diaz lacked standing as she did not allege a particularized injury distinct from the general public. The Court of Appeals agreed, noting Diaz's claims did not demonstrate a specific injury to her, but rather a general grievance shared with the public.

Consequently, the appellate court reversed the trial court's order and dismissed the case for lack of jurisdiction.

Takings: *Bigelow Arizona TX-344, LP v. Town of Addison*, No. 05-23-00642-CV, 2025 WL 1018715 (Tex. App. —Dallas Apr. 4, 2025) (mem. op.). In this case, Bigelow Arizona TX-344, LP (Bigelow) operated a hotel under the trade name Suites of America in the Town of Addison since 1998, primarily offering long-term rentals exceeding thirty days. In 2015, Addison amended its zoning code, and in 2019, it passed a hotel occupancy tax (HOT) ordinance, which limited the percentage of rooms that could be exempt from hotel occupancy tax based on long-term stays. Bigelow filed claims for inverse condemnation and declaratory judgment, arguing that the ordinance constituted a regulatory taking and violated due process. The trial court granted Addison's plea to the jurisdiction, and this appeal followed.

The appellate court affirmed the trial court's decision, concluding that Bigelow failed to establish a valid inverse condemnation claim as Addison's conduct did not constitute a "taking" under the *Penn Central* factors. The court of appeals also held that Bigelow's declaratory judgment claim was redundant, as it was subsumed within its compensatory takings claim. Additionally, the court held that the HOT ordinance was rationally related to Addison's legitimate interest in tax collection, dismissing Bigelow's due course of law claim.

Tort Claims Act: *Nelson v. City of Lubbock*, No. 07-23-00209-CV, 2025 WL 1230467 (Tex. App.—Amarillo Apr. 28, 2025) (mem. op.). Jeremy Scot Nelson sued the City of Lubbock for negligence after a city garbage truck, operated by Gavin Martinez, ran over his legs while he was lying next to a dumpster in a public alley on February 24, 2020. Nelson alleged that Martinez was negligent for failing to stop the truck before running over debris that concealed him and that the City was negligent in hiring and supervising its employees. The city filed a motion for summary judgment, a no-evidence motion for summary judgment, and a plea to the jurisdiction, arguing it retained immunity from suit as it owed no legal duty to Nelson. The trial court granted all three motions, leading Nelson to appeal.

On appeal, the Court affirmed the trial court's decision, concluding that the City of Lubbock owed no legal duty to Nelson. The court analyzed whether a duty existed for drivers to inspect alley debris for concealed persons and found no such duty under common law, considering factors like risk, foreseeability, and social utility. Consequently, the court determined that the trial court correctly dismissed Nelson's claims due to lack of subject matter jurisdiction.

Conflict of Interest Disclosures: *Buford-Thompson Co., LLC v. Rankin Indep. Sch. Dist.,* No. 08-24-00040-CV, 2025 WL 1161459 (Tex. App.—El Paso Apr. 21, 2025) (mem. op.). Buford-Thompson Company (BTC) was awarded a construction contract by Rankin Independent School District but failed to disclose gifts given to district officials, as required by Chapter 176 of the Texas Local Government Code. The district declared the contract void after discovering these undisclosed gifts, which BTC claimed were cured by later disclosures. BTC filed a lawsuit for breach of contract, arguing that the district's delay in voiding the contract and BTC's

subsequent disclosures created a fact issue regarding the waiver of governmental immunity. The trial court dismissed BTC's claims, agreeing with the district that the contract was void from inception due to BTC's non-compliance with disclosure requirements, thus barring any breach of contract claim.

On appeal, BTC argued that the district's actions were invalid and that Chapter 176 did not authorize the contract to be voided from inception. The appellate court reviewed the case de novo, focusing on whether BTC complied with Chapter 176 and whether the district had the authority to void the contract. The court found that BTC knowingly failed to disclose gifts and did not cure the violation within the statutory period, thus failing to meet Chapter 176's requirements. The court also determined that Chapter 176 allowed the district to void the contract from inception, meaning no valid contract existed for BTC to claim a breach. Consequently, the appellate court affirmed the trial court's dismissal of BTC's claims, upholding the district's plea to the jurisdiction.

Contracts: *City of Ranger v. Ranger Airfield Maint. Found.*, No. 11-23-00204-CV, 2025 WL 994022 (Tex. App. Apr. 3, 2025). The case involves a dispute between the City of Ranger and the Ranger Airfield Maintenance Foundation concerning a lease agreement and its amendment related to the operation and maintenance of Ranger Airfield. The Foundation sued the city for breach of contract, anticipatory breach of contract, specific performance, and declaratory judgment under the Texas Uniform Declaratory Judgments Act (UDJA), alleging the city's failure to convey property and refusal to permit third-party construction of hangars. The city argued that the lease and its amendment pertained to governmental functions, thus not waiving its immunity, and that the contract lacked essential terms, was not for goods or services, and was not properly executed. The city filed a plea to the jurisdiction based on governmental immunity, which the trial court denied.

The court of appeals, in reversing the trial court's order, held that the city was acting in a governmental capacity when it entered into the lease and amendment, as the operation of an airport is a governmental function, and governmental immunity applied, barring the Foundation's claims. The court further concluded that the lease amendment contained essential terms necessary to enforce the lease, and the purpose of the lease amendment was for the Foundation to provide goods and services to the city. However, the Foundation failed to establish that the amendment was properly executed under the city code, as it did not comply with notice and bidding requirements, nor did it establish the fair market value of the property. Because of this, the city's governmental immunity was not waived under Chapter 271 of the Local Government Code, as the lease amendment was not properly executed. Lastly, the court found that official immunity applied to shield the city from the Foundation's ultra vires claims against city commissioners, as these claims must be brought against the officials in their official capacity, not the city itself.

Land Use: *City of Bee Cave v. Citizens for Pres. of Brown Prop.*, No. 13-24-00092-CV, 2025 WL 996429 (Tex. App.—Corpus Christi–Edinburg Apr. 3, 2025) (mem. op.). The case

involves the City of Bee Cave appealing the trial court's denial of its plea to the jurisdiction against the Citizens for the Preservation of the Brown Property (Citizens). The city purchased the 45-acre Brown property in 2017, designating it for "municipal purposes." Citizens sued the city, alleging violations of Chapter 26 of the Texas Parks and Wildlife Code (TPWC), claiming the city council committed to preserving the property as open space but later voted to cede part of it for a road project without following Chapter 26's notice and hearing requirements. The city argued that the property was not designated as a park and thus not subject to Chapter 26, and that it had complied with Chapter 26 requirements, rendering Citizens' claims moot.

The trial court denied the city's plea to the jurisdiction and the city appealed. The appellate court reviewed the trial court's decision de novo, focusing on whether the city had designated and used the Brown property as a park or recreation area, which is necessary for Chapter 26 to apply. The court found that the city had not used the property as a park or recreation area, as evidenced by affidavits and studies showing the property was undeveloped and not listed as a park. Citizens failed to provide evidence of prior use as a park, and the court concluded that Chapter 26 did not apply. Consequently, the appellate court reversed the trial court's judgment and rendered judgment dismissing the Citizens' suit for lack of jurisdiction.

Employment: *Raymondville Indep. Sch. Dist. v. Ruiz*, No. 13-23-00231-CV, 2025 WL 1075059 (Tex. App.—Corpus Christi-Edinburg Apr. 10, 2025) (mem. op.). Ruben Ruiz, a former truancy officer for Raymondville Independent School District (Raymondville ISD), filed a lawsuit under the Texas Whistleblower Act (TWA), alleging that he was terminated in retaliation for reporting misconduct by a coworker, Officer Maribel Herrera. Ruiz claimed that Herrera's actions constituted "official oppression" as she allegedly used her position to belittle and mistreat him. Raymondville ISD argued that Ruiz was terminated for insubordination and other misconduct, including bringing a handgun onto school property. The jury found in favor of Ruiz, awarding him $212,000 in damages. Raymondville ISD appealed, challenging the jury's verdict and the trial court's jurisdiction.
The appellate court reversed the trial court's judgment, concluding that Ruiz failed to demonstrate a good-faith belief that Herrera's conduct was a violation of law, which is necessary to establish subject-matter jurisdiction under the TWA. The court found that Ruiz's report did not provide sufficient information to identify any law that Herrera could have violated, and his belief was not reasonable given his training and experience. Consequently, the appellate court rendered a dismissal of Ruiz's suit against Raymondville ISD for lack of subject-matter jurisdiction.

***Ultra Vires* Act: *Piney Point Homes, LLC v. Burgess*, No. 14-24-00137-CV, 2025 WL 1162711 (Tex. App.—Houston [14th Dist.] Apr. 22, 2025) (mem. op.).** Piney Point Homes, LLC filed a lawsuit against District Clerk Marilyn Burgess after over $1 million from the court's registry was disbursed to an unauthorized account due to fraudulent wire instructions. The funds were intended for a settlement but were diverted to an account controlled by another entity and subsequently converted to cryptocurrency, leaving the intended recipient unpaid. Piney Point alleged that Burgess committed an *ultra vires* act by not following the trial court's disbursement

order, which specified a different account. Burgess filed a plea to the jurisdiction, claiming immunity, which the trial court granted, leading to Piney Point's appeal.

On appeal, the court examined the *ultra vires* claim, and determined that Burgess acted within her legal authority when she failed to follow the provided wiring instructions, as required by the court's order. Because Piney Point failed to prove that Burgess acted without legal authority or failed to perform a ministerial act, they failed to meet the criteria for an *ultra vires* action. Consequently, the appellate court affirmed the trial court's decision, upholding Burgess's plea to the jurisdiction.

Elections: *Daniel v. Burgess*, No. 14-23-00936-CV, 2025 WL 1162708 (Tex. App.—Houston [14th Dist.] Apr. 22, 2025) (mem. op.). In the November 2022 election for Harris County District Clerk, Democrat Marilyn Burgess defeated Republican Chris Daniel by 25,640 votes. Daniel filed an election contest, claiming that the election's true outcome could not be determined due to polling locations opening late, running out of paper, and voting machine malfunctions. Burgess moved for summary judgment, arguing there was no evidence that the number of voters prevented from voting was at least as large as her margin of victory. The trial court granted the motion, and Daniel appealed.

On appeal, Daniel argued that he was not required to quantify the number of voters prevented from voting to have the election declared void. The court noted that historically, Texas law requires proof that the number of voters denied the right to vote could materially affect the election result. Daniel failed to provide evidence that at least 25,640 voters were prevented from voting, which was necessary to challenge the election outcome. The court affirmed the trial court's judgment, holding that Daniel did not meet the burden of producing legally sufficient evidence to show the election result was unascertainable.

Tort Claims Act: *City of Houston v. Chourng*, No. 14-24-00251-CV, 2025 WL 1187191 (Tex. App.—Houston [14th Dist.] Apr. 24, 2025) (mem. op.). Sokmen Chourng sued the City of Houston following a collision on U.S. Highway 59 with an ambulance driven by a city employee transporting a stabbing victim. Chourng alleged negligence under the Texas Tort Claims Act (TTCA), claiming the city's employee failed to safely pass his vehicle, causing the collision. The city sought dismissal, arguing it retained governmental immunity under the TTCA's emergency response and 9-1-1 emergency services exceptions. The trial court denied the City's plea to the jurisdiction and no-evidence motion for summary judgment.

On appeal, the city challenged the trial court's denial, asserting it retained immunity under the emergency response exception. The appellate court reviewed the case de novo, focusing on whether the emergency response exception applied. The court found that the ambulance driver, Sanders, was responding to an emergency situation, as the stabbing victim required immediate medical attention despite being stable at the scene. The court also determined that Sanders did not act with reckless disregard for safety, as he used emergency lights and sirens and drove carefully on the shoulder.

The court concluded that the emergency response exception applied, preserving the city's immunity; thus, the TTCA did not waive immunity for Chourng's claims. Consequently, the appellate court reversed the trial court's order and dismissed the lawsuit for lack of jurisdiction.

Code Enforcement: *Quion Investors, Inc. v. City of Wallis, Texas*, No. 14-23-00965-CV, 2025 WL 1232343 (Tex. App.—Houston [14th Dist.] Apr. 29, 2025) (mem. op.). The City of Wallis issued Quion Investors, Inc. a "Notice of Violation" alleging violations of city ordinances related to excessive vegetation and requiring compliance within seven days. Quion filed an application for a writ of *habeas corpus*, claiming the notice unlawfully restrained its liberty and violated its due process and equal protection rights. The city filed a plea to the jurisdiction, arguing the notice did not constitute unlawful restraint. The trial court granted the plea and dismissed Quion's application with prejudice. Quion appealed. The court analyzed whether the notice constituted a restraint under *habeas corpus* statutes, ultimately concluding that the notice neither accused Quion of a crime nor imposed unlawful restraint. The court found the notice merely informed Quion of potential future fines and did not constitute a misdemeanor accusation. Additionally, the court held that speculative future events, such as potential fines or complaints, were insufficient for *habeas* relief. The appellate court affirmed the trial court's decision, concluding Quion's liberty was not restrained by the notice. Quion's arguments regarding due process and equal protection were deemed appropriate for future legal proceedings if a misdemeanor charge were filed.

Public Information Act: *City of Houston v. Estrada*, No. 14-23-00035-CV, 2025 WL 1225845 (Tex. App.—Houston [14th Dist.] Apr. 29, 2025). In 1998, Larry Edgar Estrada was convicted of capital murder and sentenced to death. Estrada, represented by Mayer Brown LLP, filed a mandamus suit under the Texas Public Information Act (TPIA) in 2004, seeking information from the City of Houston for his federal *habeas* petition. The city filed a plea to the jurisdiction, arguing that Estrada, being incarcerated, was not a "requestor" under the TPIA, and thus the trial court lacked subject-matter jurisdiction. Mayer Brown argued that it, too was a "requestor" for purposes of the TPIA. The trial court granted the city's plea, dismissing Estrada's claims, but the court denied a similar plea regarding Mayer Brown's claims. Mayer Brown was awarded attorney's fees by the trial court, which the city appealed, arguing that Mayer Brown did not "incur" fees as required by the TPIA.

The appellate court found the evidence legally insufficient to support the award of attorney's fees to Mayer Brown, as Mayer Brown did not charge itself fees and, therefore, had not incurred any as required by the TPIA. The court also held that the grounds for the city's jurisdictional plea were non-jurisdictional, reversing the trial court's dismissal of Estrada's claims and remanding for further proceedings. The appellate court's decision highlights the requirement that attorney's fees must be "incurred" to be recoverable under the TPIA, impacting cases involving pro bono or in-house counsel.

Due Process: *Burns v. City of San Antonio by & Through City Pub. Serv. Bd. of San Antonio*, No. 15-24-00009-CV, 2025 WL 996377 (Tex. App. [15th Dist.] Apr. 3, 2025). The City of San Antonio, through its Public Service Board, filed an action under the Expedited Declaratory Judgment Act (EDJA) to validate certain public securities and ordinances, arguing that a citizens' initiative petition threatened these securities by proposing changes to the Board's structure. The trial court declared the securities and ordinances valid and incontestable, and no party appealed the judgment. Later, Terry Burns and other people who were involved in the initiative petition (collectively "the petitioners"), filed a motion for a new trial, claiming lack of notice and due process violations, but their appeal was dismissed as untimely. Subsequently, the petitioners filed a petition for a bill of review, asserting the EDJA judgment was void for lack of subject matter jurisdiction and due process violations. The trial court granted summary judgment for the city, dismissing the bill of review, and the petitioners appealed.

The appellate court reviewed the trial court's summary judgment de novo, focusing on whether the EDJA barred the petitioner's challenges. The court held that the EDJA permanently enjoins challenges to adjudicated matters, including subject matter jurisdiction, thus barring the claims. However, the court found that the EDJA does not bar challenges based on due process violations due to lack of notice. The court concluded that the city's notice by publication was constitutionally sufficient under the EDJA, as it was an *in rem* proceeding concerning public interest, not private rights. Consequently, the appellate court affirmed the trial court's judgment, rejecting the petitioners' claims of due process violations and lack of subject matter jurisdiction.

Preemption: *State v. City of San Marcos*, No. 15-24-00084-CV, 2025 WL 1142065 (Tex. App. [15th Dist.] Apr. 17, 2025). The City of San Marcos passed an ordinance prohibiting police officers from issuing citations or making arrests for certain low-level marijuana offenses, which the State of Texas argued was preempted by state law. The state sued the city and its officials under the Uniform Declaratory Judgment Act (UDJA) for a declaration that state law preempts the ordinance and sought injunctive relief. The trial court dismissed the state's suit for lack of jurisdiction and denied the state's request for a temporary injunction. On appeal, the state argued that the trial court erred in dismissing its UDJA claim and in denying the temporary injunction. The appellate court held that the city, except for the city manager, was not immune from the state's declaratory judgment action and that the trial court abused its discretion in denying some of the relief sought in the state's request for a temporary injunction. The court found that the ordinance conflicted with Section 370.003 of the Texas Local Government Code, which prohibits municipalities from adopting policies that prevent the full enforcement of drugs laws. Consequently, the state had a probable right to relief on its preemption claim, and the ordinance was preempted by state law. The court reversed the trial court's order granting the plea to the jurisdiction, except for the claim against the city manager, and remanded the case for entry of a temporary injunction prohibiting enforcement of the ordinance pending a final trial on the merits. The court allowed the state an opportunity to replead its claims against the city manager to present evidence that she personally took action to prevent enforcement of state law.

Preemption: *State v. City of Austin*, No. 15-24-00077-CV, 2025 WL 1200903 (Tex. App. [15th Dist.] Apr. 24, 2025). The State of Texas sued the City of Austin and its officials, challenging a local ordinance, approved by Austin voters and the city council, that prohibits law enforcement from making citations or arrests for low-level marijuana possession misdemeanors, except in specific circumstances. The state argued that the ordinance is preempted by Section 370.003 of the Texas Government Code, which prohibits municipalities from adopting policies that do not fully enforce drugs laws. The trial court granted the city's plea to the jurisdiction and denied the state's request for a temporary injunction, leading to this appeal.

On appeal, the state contended that the trial court erred in granting the plea to the jurisdiction and in denying the temporary injunction. The appellate court agreed, finding that the ordinance is preempted by state law, as it creates a barrier to the full enforcement of drugs laws, as stated above. The court held that the Uniform Declaratory Judgment Act waives the city's immunity from the state's declaratory judgment action. The court also found that the state's *ultra vires* claims against city officials were improperly dismissed, as the officials acted without legal authority by adopting the ordinance.
The court rejected the city's argument that the state lacked standing, clarifying that the state is not seeking to compel more arrests but is challenging the ordinance's validity. The appellate court concluded that the state established a probable right to relief and an irreparable injury, which justifies a temporary injunction. The court reversed the trial court's judgment and remanded the case for proceedings consistent with its opinion, including entering a temporary injunction prohibiting enforcement of the ordinance.

April 2025

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from March 1, 2025, through March 31, 2025.

Civil Rights: *Langiano v. City of Fort Worth, Tex*., 131 F.4th 285, 288 (5th Cir. 2025). Tracy Langiano alleged that he was shot and injured by Officer Landon Rollins in violation of the Fourth Amendment, and that the violation was the result of the City of Fort Worth's policies. The district court denied a motion by Langiano to stay his civil suit while criminal charges were pending against him. The district court granted summary judgment in favor of Officer Rollins and the City of Fort Worth.

The court of appeals affirmed, finding that Langiano had failed to state a claim that either the use of force or the warrantless entry violated his Fourth Amendment rights. Because Langiano failed to show a violation of his constitutional rights, the city's actions or inactions could not have led to such a violation.

Employment Discrimination: ***Rodriguez v. City of Corpus Christi*****, 129 F.4th 890 (5th Cir. 2025).** A former director of the city public health district filed a § 1983 action alleging that the city had, without due process, deprived her of a property right in her continued employment, withheld her overtime wages and retaliated against her in violation of the Fair Labor Standards Act (FLSA), and discriminated and retaliated against her in violation of the Equal Pay Act and Title VII. After dismissing due process claim, the district court entered summary judgment in the city's favor on the remaining claims. The director appealed.

The court of appeals affirmed, holding that: (1) the district court did not abuse its discretion in denying the director's motion to strike the assistant city manager's declaration; (2) the director's e-mail to an assistant city manager did not constitute protected activity under FLSA; (3) assistant director of city's public health district was not proper comparator to director; and (4) the city's decision to terminate the director due to employee complaints was not pretext for retaliation; and (5) the fact that the city chose to voluntarily pay the director overtime compensation during the COVID-19 pandemic did not destroy the director's exempt status under the FLSA.

Civil Rights: ***Rubin v. De La Cruz*****, No. 24-20015, 2025 WL 764603 (5th Cir. Mar. 11, 2025).** Juan De La Cruz, a City of Baytown police officer, attempted to arrest Pamela Turner on three warrants when Turner took De La Cruz's taser during a ground struggle and tased him in the testicles. In shock and fearing for his life, De La Cruz jolted back, unholstered his firearm, and fired at Turner, who died at the scene. Turner was known to have some "mental health issues" that caused her to be "aggressive," but no one involved in this case knew of any specific conditions or her medical history. Turner's daughter and son, Chelsie Rubin and Cameron January, sued De La Cruz under 42 U.S.C. § 1983, alleging violations of Turner's Fourth Amendment rights. They also sued the City of Baytown, alleging violations of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 and a myriad of state laws. The district court dismissed all claims on summary judgment.

On appeal, the court of appeals affirmed, finding that that De La Cruz's use of deadly force was reasonable and that it did not violate clearly established law. Thus, De La Cruz was entitled to qualified immunity.

Civil Rights: ***Rusanowsky v. City of Dallas*****, No. 24-10455, 2025 WL 855317 (5th Cir. Mar. 19, 2025).** Rusanowsky sued the City of Dallas and Sergeant Rudloff in his individual and official capacity for deprivation of his civil rights. Specifically, Rusanowsky claimed that Sergeant Rudloff arrested him without probable cause and in retaliation of his First Amendment "right to record the police in the exercise of their official duties." His municipal liability claims against the City of Dallas alleged a failure to train and supervise Rudloff. The district court found that probable cause existed for Rusanowsky's arrest and that the arrest was not retaliatory. Accordingly, Sergeant Rudloff was entitled to qualified immunity. The court granted his motion for summary judgment and denied Rusanowsky's cross-motion. Rusanowsky appealed.

The court of appeals determined that Rusanowsky failed to raise genuine disputes of fact as to whether Sergeant Rudloff was entitled to qualified immunity. Because Sergeant Rudloff had probable cause to arrest Rusanowsky, and because the arrest was not retaliatory, the court affirmed the district court's summary judgment for Rudloff.

Recent Texas Cases of Interest to Cities

Note: Included cases are from March 1, 2025, through March 31, 2025.

Takings: *Commons of Lake Houston, Ltd. v. City of Houston*, No. 23-0474, 2025 WL 876710 (Tex. Mar. 21, 2025). A developer of a master-planned community in the floodplain brought an inverse condemnation action against the city, alleging that the city's amendment of its floodplain ordinance following a historic hurricane, to require residences to be built at least two feet above the 500-year floodplain, was a regulatory taking under the Texas Constitution.

The trial court denied the city's plea to the jurisdiction, but the court of appeals reversed and dismissed, holding that the developer cannot establish a valid takings claim because the city amended the ordinance as a valid exercise of its police power and to comply with a federal flood-insurance program. The developer petition for review.

The Supreme Court, reversed and remanded, holding that: (1) amendment of the ordinance as an exercise of the city's police power did not preclude a regulatory takings claim; (2) amendment of the ordinance to ensure compliance with the federal flood insurance program did not preclude a regulatory takings claim; (3) the regulatory takings claim was ripe for adjudication; and (4) the developer had standing to assert a regulatory takings claim.

Tort Claims Act: *City of Houston v. Corrales*, No. 01-23-00416-CV, 2025 WL 676650 (Tex. App.—Houston [1st Dist.] Mar. 4, 2025). Corrales sued the City of Houston for a car accident for which a municipal employee was at fault and was awarded damages and court costs. The city appealed, arguing that the waiver of immunity in the Texas Tort Claims Act (TTCA) does not permit the award of court costs.

As a matter of first impression, the appellate court held that the scope of the legislature's waiver of immunity under the TTCA does not include court costs.

Employment Discrimination: *Lakeview Police Dep't v. Moody*, No. 01-24-00072-CV, 2025 WL 714974 (Tex. App.—Houston [1st Dist.] Mar. 6, 2025) (mem. op.). Moody sued the City of Lakeview and the Lakeview Police Department for sex discrimination after she was denied additional leave following the birth of her child. The city and police department filed a plea to the jurisdiction, claiming that Moody had failed to exhaust her administrative remedies because her charge of discrimination to the Texas Workforce Commission was not timely and that

Moody had no claim against the city because she had not worked for the city. The trial court denied the plea and the city and police department appealed.

The appellate court reversed in part and affirmed in part, holding that: (1) Moody had not worked for the city and therefore had no claim against the city; and (2) even though Moody's charge of discrimination against the police department was not timely, her initial complaint to the TWC was timely, so there was a fact issue regarding whether she has exhausted her administrative remedies.

Tort Claims Act: *City of Houston v. Sandoval*, No. 01-23-00806-CV, 2025 WL 863777 (Tex. App.—Houston [1st Dist.] Mar. 20, 2025) (mem. op.). Sandoval sued the City of Houston under the Texas Tort Claims Act (TTCA) for bodily injury and property damage she allegedly sustained when a city-owned "run-away" garbage truck struck her house and vehicles parked in her driveway. The city filed a motion for summary judgement claiming governmental immunity, arguing that Sandoval's injuries were caused by a mechanical malfunction and therefore the waiver of immunity in the TTCA did not apply to her claim. The trial court denied the motion and the city appealed.

The appellate court affirmed in part and reversed in part, holding that: (1) the city was entitled to governmental immunity with regard to Sandoval's claims for negligent maintenance, negligent entrustment, and negligent hiring, training, and supervision; and (2) there was a genuine issue of material fact regarding whether the city employee was operating or using the city truck for the purposes of the TTCA's waiver of immunity when it struck Sandoval's house.

Elections: *In re Arnold*, No. 05-25-00250-CV, 2025 WL 746720 (Tex. App. Mar. 7, 2025) (mem. op.). On January 24, 2025, the city secretary for the City of Dallas determined and notified Carolyn King Arnold that she was ineligible for candidacy based on a recent amendment to the City of Dallas's charter which imposes a term limit. Arnold later filed a petition for a writ of mandamus on March 3, 2025, challenging the determination. The city filed a motion to dismiss, and the court of appeals granted the motion and dismissed the original proceeding as moot. The court reasoned that because it had been filed too close to the deadline for printing ballots, the court could not take action on her request as it would interfere with the orderly process of the election. Additionally, the "capable of repetition, yet evading review" exception to the mootness doctrine did not apply where Arnold failed to show that she could not have challenged the determination sooner.

Contracts: *Baylor Cnty. Special Util. Dist. v. City of Seymour*, No. 11-24-00071-CV, 2025 WL 863771 (Tex. App. Mar. 20, 2025). This case involves a breach of contract suit filed by the City of Seymour against Baylor County Special Utility District. The city alleged that Baylor violated their contract by purchasing water from a third party instead of exclusively from the city. Baylor claimed governmental immunity and argued that the contract was not a "requirements contract." In its opinion affirming the trial court's dismissal of the city's claims for declaratory judgment, injunctive relief, and attorney's fees, the Fifth Court of Appeals held that the parties' contract

was a "requirements contract" and the city could not seek a determination of its rights and responsibilities against Baylor, a governmental entity. Thereafter, Baylor filed a motion for rehearing in which it requested that the court modify its opinion by removing the following statements to avoid confusion on remand: (1) "Importantly, Baylor presented no evidence that Seymour could not fulfill its water supply requirements or that its acquisition of water from other sources was due to Seymour's inability to provide same;" and (2) "Moreover, because our decision today includes that the contract is a requirements contract, Seymour's claim for declaratory judgment is moot." In denying Baylor's motion for rehearing, the court held that nothing in the statements prevents Baylor from providing evidence in support of its defenses in further proceedings or suggests that the city has already prevailed on its substantive claims.

Employment Discrimination: *City of McAllen, v. Rodriguez*, No. 13-24-00063-CV, 2025 WL 924691 (Tex. App.—Corpus Christi–Edinburg Mar. 27, 2025) (mem. op.). Rodriguez sued the City of McAllen for age, race, and disability discrimination and for retaliation under the Texas Commission on Human Rights Act after his employment with the McAllen Public Utility was terminated. The city filed a plea to the jurisdiction and a motion for summary judgment, arguing that Rodruguez had failed to produce evidence generating a fact issue as to whether the city's governmental immunity to suit was waived. The trial court denied the plea and motion, and the city appealed.

The appellate court reversed, holding that: (1) Rodriguez's age discrimination claim failed because he had not alleged that he was replaced by someone similarly situated to him or significantly younger; (2) his race discrimination claim failed because he had not alleged that similarly situated employees who were of a different race were treated more favorably than he was; (3) his disability discrimination claim failed because the city met its burden to produce evidence demonstrating a legitimate, non-discriminatory reason for his termination; and (4) his retaliation claim failed because he did not allege that he had engaged in any protected conduct that would support a claim of retaliation.

Open Meetings Act: *City of San Benito v. Rios*, No. 13-24-00579-CV, 2025 WL 945566 (Tex. App.—Corpus Christi–Edinburg Mar. 28, 2025) (mem. op.). The City of San Benito posted notice for a meeting to approve an election order for the purpose of voting on amendments to the city charter. Rios, a resident, sued the city, claiming the city violated the Texas Open Meetings Act (TOMA) by failing to provide proper notice of the substance of the election. The trial court issued a temporary injunction enjoining the city from adopting or confirming the election results and voiding all votes regarding the propositions. The city appealed the order, claiming that Rios was not entitled to the temporary injunction.

The appellate court reversed the temporary injunction, holding that the: (1) the notice adequately informed the public of the proposed charter amendments; (2) the trial court's orders improperly interfered with the elective process, once it had begun, in violation of the doctrine regarding separation of powers and the judiciary's deference to the legislative branch; and (3) Rios had not shown that he had a probable right to relief on the merits of his claim.

March 2025

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from February 1, 2025, through February 28, 2025.

Campaign Contributions: *Virden v. City of Austin, Tex.*, 127 F.4th 960 (5th Cir. 2025). Virden, an Austin resident and political candidate, challenged a City of Austin ordinance that restricted candidates from soliciting or receiving campaign contributions until one year before an election. She argued that this ordinance violated her First Amendment free speech rights. The trial court held that the ordinance was unconstitutional and the city appealed.

The appellate court affirmed, holding that the one-year window limiting campaign fundraising was a violation of the First Amendment right to free speech.

Employment: *Hawthorne v. Birdville Indep. Sch. Dist.*, No. 24-10398, 2025 WL 457312 (5th Cir. Feb. 11, 2025). Hawthorne sued his former employer, Birdville Independent School District, under Title VII for a hostile work environment and retaliation, claiming that his supervisor made inappropriate comments about her personal life, which made him uncomfortable at work. Additionally, he suspected he was being paid less because of his gender. He made an inquiry into his salary and was later reassigned to a lower-paying position. The school district moved for summary judgment, the trial court granted the motion, and Hawthorne appealed.

The appellate court affirmed, holding that: (1) Hawthorne failed to establish a prima facie case of a hostile work environment, as he did not allege that his supervisor's comments affected the terms, conditions, or privileges of his employment; and (2) his salary inquiry was not a protected activity for the purpose of his retaliation claim.

Regulatory Takings: *Money v. City of San Marcos*, No. 24-50187, 2025 WL 429980 (5th Cir. Feb. 7, 2025). The façade of a home in the Burleson Historic District of San Marcos, Texas bears the initial of a previous owner who was notoriously associated with the Ku Klux Klan. Money, the current homeowner, wished to remove this emblem but could not do so without permission from the city's historic commission. After the Commission denied the application requesting such permission, Money sued the city, alleging facial and as-applied takings claims. Money claimed that the ordinance requiring they seek permission from the commission before making changes to their home violated the Texas Constitution and that the refusal of permission to remove the emblem constituted a regulatory taking. The district court first determined that the claims were not ripe because Money had not appealed the decision to the zoning board and then *sua sponte* dismissed all claims for failure to state a claim

The appellate court reversed and remanded, holding that: (1) the facial takings claim was ripe for review because Money was not obligated to exhaust administrative relief; and (2) Money had stated a prima facie as-applied takings claim because regulations of property for purely aesthetic reasons violates the Texas Constitution.

Civil Rights: *Bakutis v. Dean*, No. 24-10271, 2025 WL 603694 (5th Cir. Feb. 25, 2025). A City of Fort Worth police officer approached Jefferson's home in response to an open structure call from a neighbor. Without identifying himself as a police officer, he commanded her to show her hands and then fired a shot, killing her. The administrator of Jefferson's estate filed suit under 42 U.S.C. § 1983, claiming unlawful search and seizure and excessive force. The officer filed a motion to dismiss based on qualified immunity, which the trial court denied, and he appealed.

The appellate court affirmed in part and reversed and remanded in part, holding that: (1) the officer's use of deadly force without warning was objectively unreasonable under clearly established law; and (2) because the officer was performing a community caretaking function, there was no clearly established law indicating his actions in approaching the house were unreasonable.

Civil Rights: *Rincon v. City of Laredo*, Tex., No. 24-40168, 2025 WL 603883 (5th Cir. Feb. 25, 2025). Rincon, a property owner in Laredo, Texas, sued the City of Laredo after he was detained and handcuffed at his property near the Mexican border. An officer, mistaking Rincon for a potential suspect due to a recent gun battle across the border, detained and searched him, later handcuffing him and temporarily confiscated the phone on which Rincon was recording the meeting. Rincon alleged unlawful search and seizure, a violation of First Amendment right to record, excessive force, and failure to train. The trial court dismissed most of Rincon's claims and later granted summary judgment on the remaining claims and Rincon appealed.

The appellate court affirmed, holding that: (1) the officer's search of Rincon did not violate clearly established law; (2) the temporary confiscation of Rincon's phone was not a clear violation of his First Amendment rights; (3) Rincon's resistance to being handcuffed justified the officer's use of force against him; (4) Rincon had failed to plead any facts to support his failure-to-train claim; and (5) Rincon was unable to show any evidence of injury to support his excessive force claim.

Employment: *Thornton v. Univ. of Tex. Southwestern Med. Center*, No. 24-10594, 2025 WL 619166 (5th Cir. Feb. 26, 2025). Thornton filed a racial discrimination claim against UT Southwestern Medical Center. Thornton claimed that his manager subjected him to demeaning behavior and differential treatment compared to his non-black colleagues, which he complained of internally. After getting terminated following a leave period, Thornton sued, alleging racial discrimination and retaliation. UT Southwestern filed a motion to dismiss for failure to state a claim. The trial court granted the motion, and Thornton appealed.

The appellate court affirmed, holding that: (1) Thornton had not alleged a prime facie case of discrimination because he failed to identify similarly situated non-black employees who were treated more favorably; and (2) he had not alleged a prima facie case of retaliation because he did not convincingly demonstrate a causal connection between his internal complaints and his termination.

Fair Labor Standards Act: *Branch v. Harris Co. Sherriff's Office*, No. 24-20120, 2025 WL 636313 (5th Cir. Feb. 27, 2025). A group of employees sued the Harris County Sheriff's Office and Harris County, alleging that the county's policy requiring an employee to use compensatory time off before any other form of accrued leave violated their right to equal protection, the state law prohibition on wage garnishment, and the Fair Labor Standards Act (FLSA). The trial court granted summary judgment in favor of the county and the employees appealed.

The appellate court affirmed, holding that: (1) the county's policy did not constitute a garnishment because it did not result in a net change to wages; (2) the employees did not show that they were part of a protected class or were being singled out; (3) the FLSA does not prohibit a public employer from compelling the use of compensatory time.

Employment: *Long v. City of Llano*, No. 24-50663, 2025 WL 655800 (5th Cir. Feb. 28, 2025). Long, the former Director of Public Works for the City of Llano, sued the city following his termination, alleging that his termination violated the Age Discrimination in Employment Act and the Texas Commission on Human Rights Act. Because his position was later eliminated by the city, his duties were dispersed among his former colleagues, one of which was significantly younger. He claimed that his termination was due to age discrimination and that younger, less qualified employees were treated more favorably. The trial court granted summary judgment in favor of the City of Llano, concluding that Long failed to provide sufficient evidence to support his claims of age discrimination.

The appellate court affirmed, holding that that Long failed to show that he was replaced by someone younger than he was or that similarly situated younger employees were treated more favorably than he was.

Civil Rights: *Tinoco v. City of Hidalgo*, No. 23-40543, 2025 WL 655079 (5th Cir. Feb. 28, 2025). City of Hidalgo police officers arrested and interrogated Tinoco following an incident at the high school where Tinoco worked as the principal in which a soccer coach was alleged to have assaulted a student. One of the teachers at the school told police that Tinoco had instructed him to change his statement to police regarding the incident. Tinoco was arrested for witness tampering and interrogated. The criminal charges against Tinoco were dropped, and Tinoco sued under 42 U.S.C. § 1983, claiming the city violated his constitutional rights by falsely arresting him. The trial court dismissed Tinoco's claim.

The appellate court affirmed, holding that the arrest warrant and probable cause affidavit, which recounted the teacher's statement to police that Tinoco instructed him to change his statement, were sufficient to show that police had not abused their discretion by arresting Tinoco.

Recent Texas Cases of Interest to Cities

Note: Included cases are from February 1, 2025, through February 28, 2025.

Tort Claims Act: *City of Denton v. Rodriguez-Rivera*, No. 02-24-00393-CV, 2025 WL 421227 (Tex. App.—Fort Worth Feb. 6, 2025). A driver brought action against the city for negligence and negligence per se, seeking compensatory damages for personal injuries he sustained when a city employee backed a bulldozer into his pickup truck while he was waiting to dump a container of trash at the city's landfill as part of his trash rental container business. The trial court denied the city's plea to jurisdiction based on governmental immunity under the Tort Claims Act.

On appeal, the city argued that because Rodriguez-Rivera was engaged in the recreational activity of "off-road automobile driving" at the time of the collision, the city maintained its immunity due to his failure to meet the heightened evidentiary threshold of "gross negligence" established by the Texas Recreational Use Statute. The appellate court affirmed, holding that (1) the city's governmental immunity was waived, and (2) as a matter of first impression, commercial activity was excluded from the Recreational Use Act's limitations on governmental liability for "pleasure driving."

Inverse Condemnation: *City of Highland Vill. v. Deines*, No. 02-24-00431-CV, 2025 WL 494695 (Tex. App.—Fort Worth Feb. 13, 2025) (mem. op.). This case arises from flood damage to the home of Deines and Palumbo (Homeowners). During the month prior to the flood, the city had used skid-steer-type vehicles to place rocks near the Homeowners' property. On the day of the flood, the city delivered skid-steer-type equipment to the area adjacent to the Homeowners' home so that the city could begin its Sewer Line Stabilization Project. That evening, over three inches of rain fell, and the Homeowners' home flooded.

The Homeowners sued the city, alleging a claim under the Texas Tort Claims Act and, in the alternative, a claim for inverse condemnation. The city answered, asserting a general denial and the affirmative defense of governmental immunity, and later filed a plea to the jurisdiction, arguing (1) that its immunity was not waived because it did not use motor-driven equipment and (2) that the Homeowners had failed to properly plead an inverse-condemnation claim. After additional filings by the parties and a hearing, the trial court denied the plea.

The appellate court reversed the trial court's denial of the city's plea to the jurisdiction and remanded the case to the trial court to provide the Homeowners with an opportunity to replead.

Short-Term Rentals: *City of Dallas v. Dallas Short-Term Rental All.*, No. 05-23-01309-CV, 2025 WL 428514 (Tex. App. Feb. 7, 2025) (mem. op.). In 2023, the City of Dallas adopted two ordinances regulating short-term rentals. The first ordinance banned short-term rentals in single-family residential zones, and the second established a permit process for other areas. Shortly thereafter, the Dallas Short-Term Rental Alliance (DSTRA) and several individuals sued the city, claiming the ordinances were unconstitutional and seeking injunctive relief. The trial court granted DSTRA's request for a temporary injunction, preventing the city from enforcing the ordinances, and the city appealed. In affirming the lower court, the court of appeals held that DSTRA met their burden to establish a probable right of recovery under their due-course-of-law argument by showing: (1) they possessed well-established rights to lease their property; (2) the city would deny them those rights by enforcing the two ordinances within six months; and (3) DSTRA would suffer probable, imminent, and irreparable injury without injunctive relief.

Employment: *Donna Indep. Sch. Dist. v. Quintanilla*, No. 13-23-00395-CV, 2025 WL 504276 (Tex. App.—Corpus Christi–Edinburg Feb. 14, 2025) (mem. op.). Quintanilla, a former child nutrition director for the Donna Independent School District, filed a whistleblower suit against the district after her employment contract was not renewed. Quintanilla alleged that the school district chose not to renew her contract in retaliation for reporting her suspicions that the district's chief financial officer had improperly transferred child nutrition funds for other uses. The school district filed a motion for summary judgement claiming governmental immunity. The trial court denied the motion and the school district appealed.

The appellate court reversed and remanded, holding that Quintanilla had failed to produce evidence showing a causal link between her report and the nonrenewal of her contract.

Tort Claims Act: *City of Houston v. Gremillion*, No. 14-24-00130-CV, 2025 WL 380524 (Tex. App.—Houston [14th Dist.] Feb. 4, 2025) (mem. op.). Brandon Gremillion sued the City of Houston for negligence after a collision with a police vehicle driven by Officer Alberte Chrisphonte-Lovince. The officer was responding to an emergency call with lights and siren activated. She entered an intersection against a red light and struck Gremillion's vehicle, which was proceeding on a green light. The investigating officer concluded that the officer failed to exercise due care in clearing the intersection. The city moved for summary judgment in the case, arguing that it retained governmental immunity, because Officer Chrisphonte-Lovince had official immunity. The trial court denied the motion, and the city appealed. A government employee like Officer Chrisphonte-Lovince may be immune from a lawsuit that arises from the performance of their discretionary duties in good faith, provided the employee was acting within the scope of their authority. The test for official immunity is not whether the officer acted negligently; rather, it is whether no reasonable officer in the same or similar circumstances could have believed that Officer Chrisphonte-Lovince's actions were justified. In this case, the appellate court held that Officer Chisphonte-Lovince's actions in response to the emergency call conclusively established her immunity from liability. Because Officer Chisphonte-Lovince retained immunity, the city was immune from suit; therefore, the court in this case reversed the trial court and dismissed Brandon Gremillion's claims against the city.

Tort Claims Act: *City of Houston v. State Farm Mut. Auto. Ins. Co*., No. 14-24-00133-CV, 2025 WL 554191 (Tex. App.—Houston [14th Dist.] Feb. 20, 2025). State Farm sued the City of Houston for property damage after an automobile collision involving a Houston police officer. The original petition alleged that a city employee, driving negligently, caused the collision while acting within the scope of employment. The city moved to dismiss the claims, arguing that State Farm's petition failed to allege facts demonstrating a waiver of governmental immunity. The trial court denied the motion, and the city appealed. In this case, State Farm's petition contained only conclusory allegations that the city's employee was negligent without stating specific facts about the collision, the officer's actions, or any circumstances negating possible immunity defenses. State Farm filed an amended petition; however, the amended petition was untimely and could not be considered. Ultimately, the court held that a mere assertion of negligence is insufficient to establish a waiver of immunity under the TTCA. Because State Farm had an opportunity to amend its petition but failed to cure the deficiencies, the court dismissed its claims with prejudice.

Tort Claims Act: *City of Houston v. Mohamed*, No. 14-24-00169-CV, 2025 WL 556452 (Tex. App.—Houston [14th Dist.] Feb. 20, 2025) (mem. op.). Kebret Mohamed, a taxi driver, sued the City of Houston for injuries sustained when he jumped from a wooden deck to escape a fire in the taxi drivers' lounge area at George Bush Intercontinental Airport. He alleged negligence, negligent hiring, and premises liability, claiming the city failed to provide adequate fire safety measures and a safe means of egress. The city moved to dismiss Mohamed's claims, asserting that it retained governmental immunity. The trial court dismissed the city's motion, and the city appealed. A city is generally immune from suit and liability unless the city's governmental immunity is clearly waived. The Texas Tort Claims Act (TTCA) contains waivers of governmental immunity applicable in certain situations. With regard to claims involving injuries caused by a condition or use of tangible property or real property, governmental immunity may be waived for claims in circumstances where the city would be liable for the injuries, if the city were a private person. The TTCA also contains exceptions to the waiver for certain discretionary functions as well as an exception for police or fire protection. Because Mr. Mohamed's claims either failed to establish a valid waiver of city immunity or exceptions to the waiver applied, the appellate court reversed the trial court's judgment and rendered judgment dismissing Mr. Mohamed's claims.

February 2025

Recent Federal Supreme Court Cases of Interest to Cities

Note: Included cases are from January 1, 2025, through January 31, 2025.

Fair Labor Standards Act: *E.M.D. Sales, Inc. v. Carrera*, No. 23-217, 2025 WL 96207 (U.S. Jan. 15, 2025). In this case, sales representative employees of E.M.D. Sales, Inc. sued the food distributor for failing to pay overtime wages, arguing they were not exempt under the Fair Labor Standards Act (FLSA). The employer claimed the employees fell into the "outside sales" exemption to the FLSA and were not entitled to overtime. Ruling in favor of the employees, the district court found that because E.M.D. failed to prove by clear-and-convincing evidence that the sales representatives were salesmen, the company was liable for the overtime. E.M.D. appealed arguing that the district court should have used the preponderance-of-the-evidence standard rather than the clear-and-convincing evidence standard, but the Fourth Circuit Court of Appeals affirmed the decision.

In a unanimous decision, the Supreme Court reversed the lower court, clarifying that the appropriate standard of proof in FLSA exemption cases is the less stringent preponderance-of-the-evidence standard, not the clear-and-convincing standard. The Court reasoned that the preponderance-of-the-evidence standard was the default standard in civil litigation and the Court has only deviated from this standard in three distinct circumstances, none of which applies to cases involving exemptions to the FLSA. The three circumstances include: (1) when a statute provides for a heightened standard of proof; (2) when the U.S. Constitution requires a heightened standard of proof; and (3) if the case involves coercive government action against an individual, such as taking away a person's citizenship.

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from January 1, 2025, through January 31, 2025.

Civil Rights: *Bailey v. Ramos*, 125 F.4th 667 (5th Cir. 2025). David Bailey and his friends went to downtown San Antonio to film the police and encountered Officers Oscar Ramos and Christopher Dech, who were guarding an ambulance. After an altercation where he allegedly failed to comply with police instructions and engaged in physical contact with Officer Ramos, Bailey was arrested. Bailey brought a 42 U.S.C. § 1983 action against Officer Ramos alleging unlawful arrest, excessive force, malicious prosecution, and First Amendment retaliation, among others. In district court, Ramos moved for summary judgment based on qualified immunity, but the court denied the motion and Ramos appealed. In reversing the lower court, the Fifth Circuit held that Officer Ramos was entitled to qualified immunity on Bailey's unlawful arrest and excessive force claims. The court concluded that Ramos could have reasonably believed he had probable cause for the arrest for interference with a public duty where Bailey continued to talk over officers and failed to follow officers' instructions to move behind the line at the active crime scene. Further, to Bailey's claim that Ramos illegally seized his cell phone and belongings, Ramos was also entitled to qualified immunity as a warrantless search incident to a lawful arrest is a permissible exception to the warrant requirement. The court also determined that Ramos's takedown procedures and leg sweep maneuver were not clearly excessive or unreasonable given

Bailey's noncompliance. Lastly, the court determined there was no evidence of a retaliatory motive for the arrest, precluding Bailey's First Amendment retaliation claim.

Civil Rights: *Stapleton v. Lozano*, 125 F.4th 743 (5th Cir. 2025). Joshua Stapleton was arrested for public intoxication and later died in jail from combined drug toxicity. His family filed a 42 U.S.C. § 1983 action against the City of Progreso, two police officers, and the police chief, alleging deliberate indifference to Stapleton's serious medical needs while in jail in violation of the Fourteenth Amendment. In response, the officers and police chief filed a motion to dismiss based on qualified immunity, which the district court later denied. In reversing the lower court, the Fifth Circuit reasoned that the evidence showed Stapleton's symptoms were initially ambiguous and did not indicate a need for immediate medical attention, and Stapleton himself never requested medical assistance. The court held that even reviewing the facts in the light most favorable to the Stapletons, the facts alleged against the officers and police chief did not rise to the level of "wanton disregard" or deliberate indifference to Stapleton's serious medical needs.

Civil Rights: *Cantu v. Austin Police Dep't*, No. 24-50397, 2025 WL 229490 (5th Cir. Jan. 17, 2025). In January 2019, Austin Police Department officers encountered Paul Cantu, who was experiencing suicidal and mental distress. After repeatedly being instructed to drop his weapon, Cantu exited his car with a handgun and pointed it at officers. Officers then fired sixteen rounds, striking Cantu five times, which led to his death after being transported to the hospital. Cantu's parents sued Austin Police Department and seven of its police officers asserting a failure to accommodate claim under Title II of the Americans with Disabilities Act (ADA) and a 42 U.S.C. § 1983 claim alleging a Fourth Amendment violation for excessive force. The city and officers sought summary judgment. The district court granted the motion, and the Cantus appealed. The Fifth Circuit Court of Appeals, in affirming the lower court, held that the officers' use of force was not objectively unreasonable given the tense and uncertain circumstances. Further, the court concluded that the ADA does not apply to officers' on the street responses to incidents involving individuals with mental disabilities prior to securing the scene and ensuring no threat to human life.

Search and Seizure: *United States v. Turner*, 125 F.4th 693 (5th Cir. 2025). When San Antonio police officers responded to two calls reporting gunshots at an apartment complex, officers discovered a bullet hole in the wall of an apartment. Jonte Turner, who identified himself as a resident of the apartment, denied consent for a search, prompting officers to conduct a warrantless entry and protective sweep. During this time, they found firearms and magazines in plain view and arrested Turner. A subsequent search warrant led to the seizure of firearms, magazines, and marijuana. Turner moved to suppress the physical evidence arguing their warrantless entry, sweep, and subsequent search violated his Fourth Amendment rights. The district court denied Turner's motion, and he appealed. In affirming the lower court, the Fifth Circuit held that because exigent circumstances and probable cause existed, the officers' warrantless entry into Turner's apartment did not violate the Fourth Amendment. The court reasoned that the potential danger posed by an unaccounted-for firearm and the possibility of an

injured person or shooter inside the apartment suggested exigent circumstances, and the officers' belief that immediate action was necessary to ensure safety was reasonable. Further, probable cause existed to believe that a firearm had been discharged in Turner's apartment. As for the sweep of the apartment, the court determined it was limited in scope and duration, lasting approximately one and a half minutes covering only areas where a person could be hidden, and firearms and magazines found in plain view during the sweep were lawfully observed. Because the record showed officers' protective sweep was lawful and they obtained and executed the search warrant in good faith, the court dismissed Turner's claim that the affidavit was based on deliberately or recklessly false information or unlawfully obtained evidence.

Recent Texas Cases of Interest to Cities

Note: Included cases are from January 1, 2025, through January 31, 2025.

Tort Claims Act: *Harris Cnty. v. McFarland*, No. 01-24-00331-CV, 2025 WL 51847 (Tex. App.—Houston [1st Dist.] Jan. 9, 2025) (mem. op.). McFarland filed a premises liability claim against Harris County under the Texas Tort Claims Act after she caught her sandal on the corner of an entryway mat at a county office and fell. The county filed a plea to the jurisdiction claiming governmental immunity. McFarland subsequently amended her appeal. The trial court denied the county's plea and the county appealed.

The appellate court reversed and rendered, holding that: (1) the county's plea to the jurisdiction was not moot merely because it was filed prior to McFarland's amended pleading because the amended pleading did not advance any new claims; and (2) McFarland did not establish a waiver of the county's immunity because she had not demonstrated a fact issue as to whether the county had actual knowledge of a dangerous condition.

Tort Claims Act: *City of Houston v. Tran*, No. 01-24-00235-CV, 2025 WL 309723 (Tex. App.—Houston [1st Dist.] Jan. 28, 2025) (mem. op). Tran sued the City of Houston and Houghlen, a city employee, under the Texas Tort Claims Act (TTCA) after a collision involving her vehicle and a city police vehicle driven by Houghlen. Houghlen filed a motion to dismiss, claiming that he was entitled to dismissal under the TTCA's election-of-remedies provision because Tran had sued both him and the city. The trial court denied the motion and Houghlen appealed. The appellate court affirmed, holding that Houghlen was not entitled to dismissal because the motion to dismiss had been filed on his own behalf only and the TTCA's election-of-remedies provisions require a court to dismiss an employee only on a motion by the city.

Tort Claims Act: *City of Garland v. Pena*, No. 05-24-00133-CV, 2025 WL 99785 (Tex. App. Jan. 15, 2025). Benjamin David Pena, a temporary worker for a staffing agency, sued the City of Garland, alleging premises liability and negligence after being crushed by a dump truck at the city's landfill. The city, in response, filed a plea to the jurisdiction, which the trial court initially granted. Pena appealed the decision, and the court of appeals remanded the case to the lower

court to allow Pena to amend his pleading. After Pena filed his amended petition, the city filed its plea to the jurisdiction claiming immunity under the Texas Tort Claims Act (TTCA). After a hearing, the trial court denied the city's plea, and the city appealed.

In reversing the lower court, the court of appeals held that: (1) Pena's allegations constituted a negligence claim rather than a premises liability claim where his injuries were caused by an act or activity, specifically the backing up of the dump truck by a third party, not by the condition or use of the city's tangible real property; (2) although Pena alleged the city's landfill was generally dangerous and the city could have found safer ways to operate the facility, he failed to sufficiently plead any facts that the city had actual knowledge of a specific condition posing an unreasonable risk of harm that caused his injuries; (3) public policy did not support extending sovereign immunity to include general allegations that a location was dangerous which would subject a landowner to premises liability for all injuries occurring on his property; (4) the city had no duty to protect another from the negligent acts of a third person; and (5) on his negligence claim, Pena failed to establish how a city employee waiving a truck driver in specific direction constituted "operation" or "use" of a motor-driven vehicle as required by the TTCA.

Contracts: *Baylor Cnty. Special Util. Dist. v. City of Seymour*, No. 11-24-00071-CV, 2025 WL 336966 (Tex. App. Jan. 30, 2025). The City of Seymour filed a breach of contract suit against Baylor County Special Utility District, alleging that Baylor violated their contract by purchasing water from a third party instead of exclusively from the city. Baylor claimed governmental immunity and argued that the contract was not a "requirements contract." The trial court partially granted Baylor's plea to the jurisdiction, dismissing the city's claims for declaratory judgment, injunctive relief, and attorney's fees but allowed the breach of contract claim to proceed. Both parties appealed the lower court's order.

Although the court of appeals affirmed the lower court's dismissal of the city's claims for declaratory and injunctive relief, it remanded the case to the trial court with instructions to exclude any damage claims for which there is no statutory immunity and to allow the city to amend its pleadings to specify permissible damages, if any. In reaching its holdings, the court concluded Baylor is a governmental entity entitled to governmental immunity where it had converted its entity type under Chapter 65 of the Texas Water Code which governs the creation of a special utility district and was not subject to Chapter 10 of the Business Organizations Code. However, in reviewing the plain language of the contract, the court determined that the contract in question was a "requirements contract" obligating Baylor to purchase all its required water from the city for which the city could seek recovery, as statutorily permitted (not including lost profits, which are considered consequential damages for which governmental immunity is not waived). Further, the contract was executed by Baylor County Special Utility District, not in 1994 when it was executed by Baylor Corporation, but when it accepted the assignment and operated in accordance with the contract's terms. Because this occurred after June 19, 2009, Local Government Code Section 271.153(c) applied, and the city was permitted to recover reasonable and necessary attorney's fees.

Tort Claims Act: *Lincoln Property Company v. Herrera*, No. 13-23-00276-CV, 2025 WL 339036 (Tex. App.—Corpus Christi–Edinburg Jan. 30, 2025) (mem. op.). Herrera filed a premises liability claim under the Texas Tort Claims Act against Lincoln Property Company (Lincoln), SP II Limited Partnership (SP II), and the San Antonio Housing Authority Foundation (SAHA) after her mother, Maria, fell on the sidewalk at a public housing apartment complex operated on behalf of SAHA by Lincoln and SP II. Maria later died of her injuries. Lincoln, SP II, and SAHA filed a plea to the jurisdiction claiming governmental immunity. The trial court denied the plea and this appeal followed.

The appellate court reversed and remanded, holding that: (1) although Lincoln and SP II are private entities, they were entitled to governmental immunity because they were subsidiaries of SAHA, a housing authority, with no independent discretion; and (2) Maria was an invitee rather than a licensee because she paid rent to live at the complex; and (3) the pleadings neither demonstrated nor negated jurisdiction because they did not address the question of whether there was constructive knowledge of the alleged premises defect, so the claim was remanded to the trial court for further proceedings.

Tort Claims Act: *Sanchez v. City of Houston*, 2025 WL 271313 (Tex. App.—Houston [14th Dist.] Jan. 23, 2025). Melissa Sanchez sued the City of Houston, alleging that a mounted police officer recklessly charged into her with his horse during a protest, causing injuries. The trial court granted the city's motion for summary judgment and plea to the jurisdiction based on governmental immunity, while Sanchez's motions for a new trial and continuance were denied. Sanchez appealed. Cities are generally immune from suit and liability, unless that immunity has been waived by the Legislature. The Texas Tort Claims Act (TTCA) waives governmental immunity in certain circumstances, including circumstances where the use of tangible personal property causes injury or death. In this case, Sanchez alleged that the city's immunity was waived by the TTCA due to the use of a horse to cause her injuries. The TTCA, however, does not apply to claims when the injury is connected to an act or omission arising from civil disobedience. Because the events occurred during a protest, which the court concluded was an act of civil disobedience, the TTCA's waiver of governmental immunity did not apply; therefore, the trial court's rulings were affirmed in the city's favor.

***Heck* Doctrine: *City of Houston v. Busby*, 2025 WL 336968 (Tex. App.—Houston [14th Dist.] Jan. 30, 2025).** Following a collision with a City of Houston fire truck, Randy Busby pleaded no contest to a charge of failure to yield to an emergency vehicle. Later, Busby sued the city for injuries sustained during the same collision, alleging that the driver of the fire truck negligently ran a red light without using his emergency lights or sirens. The city sought summary judgment, arguing, among other things, that Busby's claims were barred because he had pleaded no contest in the previous criminal case stemming from the same incident. The trial court denied the city's summary judgment motion, and the city appealed. The *Heck* doctrine prevents civil claims that would imply the invalidity of a prior criminal conviction unless that conviction has been reversed, expunged, or invalidated. Busby's claims against the city were based on allegations that the driver failed to use emergency lights and sirens, which, if true, would

contradict Busby's prior no contest plea, making his claims impermissible under *Heck*. Following *Heck*, the appellate court reversed the trial court's ruling and rendered judgment dismissing Busby's claims against the city.

Tort Claims Act: *City of Houston v. Polk*, 2025 WL 339175 (Tex. App.—Houston [14th Dist.] Jan. 30, 2025) (mem. op.). Betram Polk sued the City of Houston after a collision with a police officer's vehicle, alleging the officer negligently failed to control his speed. Rather than filing a plea to the jurisdiction, the city moved to dismiss Polk's claims arguing (1) Polk failed to provide timely notice under the Texas Tort Claims Act (TTCA), (2) the officer was protected by official immunity, and (3) the emergency exception to the TTCA applied. The trial court denied the city's motion to dismiss, and the city appealed. When ruling on the motion to dismiss, a court must rely on the content of the pleadings without considering extrinsic evidence. Because Polk's pleadings sufficiently alleged facts establishing that timely notice was made and negating the emergency exception, while the city's pleadings failed to conclusively establish the defense of official immunity, the appellate court affirmed the trial court's dismissal of the city's motion.

Contracts: *City of Rio Vista v. Johnson County Special Utility Dist*., 2025 WL 309937 (Tex. App.—15th Dist. Jan. 28, 2025) (mem. op.). The Johnson County Special Utility District (District) sued the City of Rio Vista for breach of an interlocal agreement resolving water service boundary disputes. The agreement included provisions regarding emergency water connections and a requirement for notice and consent before extending water lines into the other party's service area. The District alleged that the city violated the agreement by extending water lines into the District's service area and misusing an emergency connection agreement to calculate its water service capacity. The city filed a plea to the jurisdiction, arguing governmental immunity. The trial court denied the city's plea, and the city appealed. Cities are generally immune from lawsuit or liability unless immunity has been waived by the Legislature. Chapter 271 of the Texas Local Government Code waives a city's immunity from suit for contract disputes related to the provision of goods or services to the city. In this case, the court held the interlocal agreement not to be a contract for goods or services; therefore, the city's immunity was not waived from the District's breach of contract claim. Consequently, the appellate court reversed the trial court's order and rendered judgment dismissing the District's claims.

January 2025

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from December 1, 2024, through December 31, 2024.

Environmental Law: *Ondrusek v. U.S. Army Corps of Engineers*, 123 F.4th 720 (5th Cir. 2024). Timpy Ondrusek and Barbara Ann Ondrusek Wolfe owned property affected by a joint flood protection project being undertaken by the U.S. Army Corps of Engineers (Corps) and the City of Dallas. The project began in 1999 with an Environmental Impact Statement under the National Environmental Policy Act (NEPA) and was supplemented in 2003. The plaintiffs claimed that the Corps failed to prepare a Supplemental EIS (SEIS) to address updated flood risks, climate change data, and engineering guidance which changed following Hurricane Katrina. They argued that the oversight violated NEPA and the Clean Water Act and posed risks of flooding and contamination to their property, so the plaintiffs filed suit against the Corps and the city seeking declaratory and injunctive relief. Because the design phase of the project was only 35% complete, the district court dismissed the plaintiffs' claims as unripe, so the plaintiffs appealed. Because NEPA claims ripen when the alleged procedural failure occurs – here the Corps' failure to file the SEIS, the court found no further factual development was necessary and concluded judicial review would not interfere with the Corps' actions. Therefore, the claims against the Corps were ripe. The city was dismissed from the suit, because there were no claims against the city on appeal. Ultimately, the Fifth Circuit reversed and remanded the dismissal of claims against the Corps, holding that the claims ripe and the plaintiffs had standing, while the dismissal of claims against the City of Dallas was affirmed.

Qualified Immunity: *Jack Miller, et al. v. Chief Joseph Salvaggio, et al.*, No. 23-50894, 2024 WL 5116799 (5th Cir. Dec. 16, 2024). Jack Miller entered Leon Valley City Hall in 2018 openly carrying a device resembling a Glock handgun. The municipal building, which includes a courtroom, prohibits weapons per Texas Penal Code § 46.03. After observing the gun-like device, officers secured search and arrest warrants for Miller, who was later arrested. The gun was later revealed to be a painted rubber replica, and the prosecution against Miller was dismissed for lack of evidence. Miller, joined by family members, filed a § 1983 lawsuit against the city alleging violations of their Fourth Amendment rights to be free from illegal search and seizure and First Amendment rights to be free from retaliatory arrest. Both sides filed motions for summary judgement. The district court granted qualified immunity to the officers on all claims, granted the city's motion for summary judgment, and dismissed Miller's motion. Miller appealed. Qualified immunity protects government officials, including police officers, from civil liability unless they violate a clearly established constitutional right at the time of the conduct. In this case, the city showed through video and other evidence that the officers had probable cause to believe that Miller was carrying a firearm in violation of the law. The court emphasized that the officers' reasonable belief that the gun was real precluded liability, even if the gun was later discovered to be fake. Ultimately the appellate court upheld the trial court's dismissal of Miller's claims against the city.

Recent Texas Cases of Interest to Cities

Note: Included cases are from December 1, 2024, through December 31, 2024.

Employment: *City of Buffalo v. Moliere*, No. 23-0933, 2024 WL 5099112 (Tex. Dec. 13, 2024). Moliere, a police officer, engaged in a high-speed chase while a civilian was riding along in his patrol vehicle, resulting in an accident that damaged the patrol vehicle. Moliere reported the accident to the city's chief of police, who issued Moliere a written reprimand. Moliere did not appeal the reprimand; he accepted and signed it. About two weeks later, during a regularly scheduled meeting, the city council met in closed session to discuss Moliere's employment. The city council then reconvened in open session and voted to terminate Moliere. Moliere brought action against the city, the mayor, and the city council members, seeking declaration that the city council acted without authority in terminating his employment, and alleging the termination violated his due process rights.

The trial court dismissed the suit, but the Waco Court of Appeals reversed and remanded, concluding that a fact issue existed as to whether the city council had authority to terminate the officer. The Supreme Court granted the petition for review and reversed the court of appeals's judgement, finding that the city council had authority to fire the officer. Additionally, the Court remanded the case for further proceeding because the court of appeals did not address whether the officer alleged a valid due process claim against members of the city council.

Tort Claims Act: *City of Houston v. Rodriguez*, No. 23-0094, 2024 WL 5249666 (Tex. Dec. 31, 2024). A city police officer engaged in a high-speed pursuit of another vehicle struck the driver and the passenger of a truck who subsequently sued the city, alleging that the officer's negligent driving caused them personal injuries for which the Tort Claims Act (Act) waives governmental immunity from suit. The city filed a motion for summary judgement arguing that: (1) the Act waives immunity only when the employee would be personally liable, and official immunity shields the officer from liability because he was acting in good faith; and (2) the Act's emergency exception to the waiver applies because the officer was not acting recklessly in responding to an emergency. The trial court denied the motion and the court of appeals affirmed.

The Supreme Court reversed the Houston Court of Appeals's judgement, holding that because the officer acted in good faith during the pursuit, he was protected from personal liability by official immunity, and the city's governmental immunity was not waived under the Act.

Tort Claims Act: *City of Austin v. Powell*, No. 22-0662, 2024 WL 5249451 (Tex. Dec. 31, 2024). A motorist, who was injured when a police officer involved in high-speed chase collided with the motorist's vehicle, sued the city to recover damages for his injuries. The trial court denied the city's plea to the jurisdiction, and the city appealed. The Austin Court of Appeals affirmed.

The Supreme Court granted the city's petition for review. The Supreme Court reversed, holding that: (1) the statute requiring the operator of motor vehicle to maintain distance between vehicles was a law of general applicability and was not specifically applicable to emergency action, for purposes of whether the emergency exception to waiver of immunity under Tort Claims Act (Act) applied to the motorist's action; (2) the statute permitting certain conduct in operating an

emergency vehicle did not make all other traffic laws binding in emergency contexts, for purposes of whether the emergency exception applied to immunity waiver under Act; (3) whether the police officer violated department policy was immaterial to the inquiry of whether a law or ordinance existed specifically addressing the emergency response at issue, for purposes of whether the emergency exception applied to immunity waiver under the Act; (4) the motorist did not establish that the police officer's failure to control his speed was reckless to obviate the emergency exception to immunity waiver under the Act; (5) the motorist did not establish that the police officer's failure to maintain distance with the police vehicle that the officer was following was reckless to obviate the emergency exception to immunity waiver under the Act; (6) the motorist did not establish that the police officer's inattentiveness leading up to accident was reckless to obviate the emergency exception to immunity waiver under the Act; and (7) the motorist did not establish that a combination of the police officer's acts was reckless, as required not to apply the emergency exception to immunity waiver under the Act.

Employment: *Dallas Cnty. Hosp. Sys. v. Kowalski*, No. 23-0341, 2024 WL 5249566 (Tex. Dec. 31, 2024). A former county hospital employee filed suit alleging that the hospital eliminated her position because she was disabled, and in retaliation for her earlier complaints about the accommodation process. The trial court denied the hospital's plea to the jurisdiction, and the Dallas Court of Appeals affirmed. The Supreme Court granted the hospital's petition for review.

The Supreme Court reversed finding that: (1) the employee failed to establish a disability within the meaning of the Labor Code's prohibition against disability discrimination; (2) the hospital did not discriminate against the employee based on disability; (3) the hospital did not regard the employee as having an impairment; and (4) the hospital did not retaliate against the employee for her earlier complaints about its accommodation process.

Tort Claims Act: *Harris County v. Jones*, No. 01-24-00214-CV, 2024 WL 5160516 (Tex. App.—Houston [1st Dist.] Dec. 19, 2024) (mem. op.). Jones sued Harris County under the Texas Tort Claims Act (TTCA) after a motor vehicle collision involving Sutton, a county deputy. Sutton was pursuing a suspect in a stolen vehicle with his lights and siren activated when he maneuvered his vehicle across a highway on-ramp. Jones, who was driving on the on-ramp, struck Sutton's vehicle. The county filed a plea to the jurisdiction, claiming governmental immunity under the emergency-response exception to the TTCA's limited waiver of immunity. The trial court denied the plea and the county appealed.

The appellate court reversed and rendered judgement dismissing Jones's claims, holding that the emergency-response exception applied because Sutton was responding to an emergency, he had his lights and siren activated, and Jones had not offered evidence sufficient to create a genuine issue of material fact as to whether Sutton acted with reckless disregard for the safety of others.

Procedure: *Dallas Police & Fire Pension Sys. v. Townsend Holdings, et al.*, No. 05-23-00099-CV, 2024 WL 5134654 (Tex. App. Dec. 17, 2024) (mem. op.). In 2015, after the Dallas Police & Fire Pension System (DPFP) faced significant real-estate investment losses and its actuary

reported DPFD was insolvent, DPFD authorized its new executive director to hire a law firm to review possible claims related to prior investment transactions. After the investigation concluded, DPFD sued its real estate investment consultant, Townsend Holdings LLC, its principals, and its former attorney, Gary Lawson, for a breach of fiduciary duty, breach of contractual duty, and negligence. At trial, Townsend's attorney argued to the jury that DPFD attorneys had been deceptive, coached witnesses before trial, and manufactured the case. While DFPD's lawyers did not immediately object, they notified the court and Townsend the next morning of their position that Townsend's attorney had engaged in incurable jury argument but did not request a ruling or curative instruction. After the jury found that Townsend had not breached its fiduciary duties or contractual duties, both parties were negligent, and awarded a take-nothing judgment, DFPD moved for a new trial. The motion was later denied by operation of law, and DPFD appealed.

In upholding the denial of DPFD's motion for new trial, the court of appeals first addressed whether the comments made by Townsend's attorney were incurable. Noting that while some comments were improper, the court concluded the evidence supported some of the complained-of jury arguments and as a whole were not shown to be incurably "extreme," "inflammatory," and "prejudicial." As to DPFD's second issue that the evidence was factually insufficient to support a jury finding that Townsend did not breach a fiduciary or contractual duty, the court of appeals disagreed and determined that evidence at trial presented by both parties could have supported the jury's findings. As a result, DPFD failed to show that the evidence was so weak or that the jury's findings were so against the great weight and preponderance of the evidence that they were clearly wrong and unjust.

Condemnation: *Edukid, LP v. City of Plano*, No. 05-23-00269-CV, 2024 WL 5244613 (Tex. App. Dec. 30, 2024) (mem. op.). In 2017, the City of Plano initiated condemnation proceedings to acquire an easement on a portion of Effat Saifi's property (later transferred to Edukid, LP) for the construction of a hike-and-bike trail after negotiations with Saifi failed. After a hearing, special commissioners assessed damages, and Saifi objected to the award. In 2021, during the trial court proceedings, the city filed a traditional and no evidence motion for partial summary judgment on jurisdictional issues, and the trial court granted the motion. Then, in February 2023, the trial court granted a directed verdict for the city on the remaining issue relating to the value of the property, and Edukid appealed. Affirming the lower court's judgment, the court of appeals concluded as to the partial summary judgment ruling that the city was authorized under Local Government Code § 273.001 to acquire property for public purposes, including for parks, and the city's evidence was sufficient to show it intended to use the property for public use as a hike-and-bike trail to reduce pedestrian traffic related accidents, for which the taking was necessary. Further, nothing in the record supported Edukid's argument that the city's condemnation determination was fraudulent, made in bad faith, or arbitrary and capricious. Addressing Edukid's due process argument, the court of appeals held that Edukid failed to cite to any legal authority mandating personal notice of the council meeting at which the council authorized the city manager and city attorney to acquire the easement, whether through negotiations or

condemnation proceedings. As for the directed verdict, the court of appeals similarly held that Edukid failed to produce evidence on the value of the property or damages to the remainder.

Condemnation: *Milberger Landscaping, Inc. v. City of San Antonio*, No. 08-23-00283-CV, 2024 WL 5099206 (Tex. App.—El Paso Dec. 12, 2024) (mem. op.). Milberger Landscaping, Inc. challenged the City of San Antonio, acting through the San Antonio Water System (SAWS), over its condemnation of a portion of land for a permanent easement to construct a sewer pipeline and additional temporary construction easements. After the parties failed to agree on compensation, SAWS filed a condemnation petition, citing the public purpose of upgrading public infrastructure. Following a special commissioner's hearing, Milberger was awarded $230,000 as compensation, which the city deposited with the court in order to obtain possession of the property and continue the project. Milberger filed objections to the award, and SAWS moved for partial summary judgment, seeking to establish its compliance with procedural requirements and to dismiss Milberger's affirmative defenses of fraud, bad faith, and arbitrary and capricious action. The trial court granted SAWS's motion, leaving only the question of adequate compensation for trial. Milberger appealed the dismissal under a permissive interlocutory appeal. On appeal, the court analyzed the public use, fraud, bad faith, and evidentiary claims, ultimately affirming the trial court's partial summary judgment and remanded the case solely for determination of the appropriate compensation for the taking.

Standing and Jurisdiction: *Donalson v. Houston Mennonite Fellowship Church, Inc., et al.*, No. 12-24-00194-CV, 2024 WL 5158419 (Tex. App.—Tyler Dec. 4, 2024) (mem. op.). This case arises from long-running disputes among a number of parties over ownership and use of some real property in Canton, Texas. In this case, Barney Jo Donalson, Jr. (acting *pro se*) claimed an ownership interest in a room on the property and challenged a 2020 stipulated permanent injunction governing the property's use. The Houston Mennonite Fellowship Church, Inc. (HMFC) and Robert Coyle, who essentially was claiming to represent the public's interest, also asserted claims against the City of Canton and sought an injunction. The city filed a plea to the jurisdiction, arguing that Donalson, HMFC, and Coyle lacked standing to file any of their claims. The trial court granted the plea, dissolved a preliminary injunction obtained by Donalson in a different Harris County court, and severed Donalson's unrelated breach of contract claims concerning a separate Houston property. Donalson, HMFC, and Coyle appealed. After analyzing the different standing issues, the appellate court ultimately affirmed the lower court's ruling, holding that: (1) Donalson, HMFC, and Coyle all lacked standing; (2) the trial court lacked subject matter jurisdiction over their claims; and (3) dissolution of the preliminary injunction and severance of unrelated claims were proper.

Tort Claims Act: *Hernandez v. Cameron County*, No. 13-23-00098-CV, 2024 WL 5087387 (Tex. App.—Corpus Christi–Edinburg Dec. 12, 2024) (mem. op.). Hernandez sued Cameron County after a motor-vehicle collision involving Gonzalez, a county deputy. The county filed a plea to the jurisdiction claiming governmental immunity, arguing that the emergency-response exception under the Texas Tort Claims Act (TTCA) applied because Gonzalez was responding to a burglary in progress when the collision occurred. The trial court granted the county's plea to

the jurisdiction. Hernandez appealed, arguing that there was a genuine issue of material fact regarding whether Gonzalez acted recklessly when responding to the emergency, which would negate the emergency-response exception. Hernandez claimed that Gonzalez disregarded a red light and entered the intersection at high speed without using his siren, while Gonzalez claimed he slowed down and had his siren and lights activated.

The appellate court reversed and remanded, holding that there was a genuine issue of material fact as to whether Gonzalez acted with reckless disregard for the safety of others.

Inverse Condemnation: *Litinas v. City of Houston*, No. 14-23-00746-CV, 2024 WL 4982561 (Tex. App.—Houston [14th Dist.] Dec. 5, 2024). Nicholas Litinas, owner of a flower shop in the City of Houston, filed an inverse condemnation claim against the city and another local redevelopment authority. He alleged that modifications they were planning, including curbing and driveway reductions, would eliminate the head-in parking spaces essential to his business, damaging the market value of his property. The city filed a plea to the jurisdiction, arguing that the planned modifications were entirely within the city's right-of-way and did not materially impair access to Litinas's property. The trial court granted the plea, dismissing the case for lack of jurisdiction, and Litinas appealed.

Governmental immunity from suit can be waived if a taking, damaging, or destruction of property is established. Additionally, if access is materially and substantially impaired, it can constitute a compensable taking. In this case, while alternative access points and parking spots would remain after the project, the remaining access is incompatible with the property's specific use as a flower shop, which is reliant on convenient, head-in parking, which was completely eliminated by the project. Ultimately the appellate court reversed and remanded the trial court's decision, holding that Litinas presented sufficient evidence of material and substantial impairment of access to survive the city's plea to the jurisdiction.

Tort Claims Act: *LaRose v. City of Sugar Land*, No. 14-24-00198-CV, 2024 WL 5053216 (Tex. App.—Houston [14th Dist.] Dec. 10, 2024) (mem. op.). Pshatoia LaRose filed a *pro se* lawsuit against the City of Sugar Land, alleging negligence and failure by its police department to investigate her reports of stalking, harassment, theft of phone data, property damage, and other misconduct. She claimed damages of $161,822, asserting that the city failed to adhere to state law requiring a fair investigation of her complaints. The trial court dismissed the case for lack of subject-matter jurisdiction after the city filed a plea to the jurisdiction based on governmental immunity. Cities in Texas are generally immune from suit unless a valid statutory or constitutional waiver of immunity applies. The court discussed how the Texas Tort Claims Act waives immunity in limited circumstances involving (1) injuries caused by motor vehicles, (2) the use of tangible property, or (3) real property, but since LaRose's claims did not fall into any of these categories, the court found no such waiver in LaRose's claims. Moreover, LaRose did not cite any other statutory basis to support waiving the city's governmental immunity. Consequently, the judgment dismissing LaRose's case for lack of subject-matter jurisdiction was affirmed.

Tort Claims Act: *LaRose v. City of Missouri City*, No. 14-24-00197-CV, 2024 WL 5051187 (Tex. App.—Houston [14th Dist.] Dec. 10, 2024) (mem. op.). Pshatoia LaRose filed a *pro se* lawsuit against the City of Missouri City, alleging negligence and failure by its police department to investigate her reports of stalking, harassment, theft of phone data, property damage, and other misconduct. She claimed damages of $253,900, asserting that the city failed to adhere to state law requiring a fair investigation of her complaints. The trial court dismissed the case for lack of subject-matter jurisdiction after the city filed a plea to the jurisdiction based on governmental immunity. Cities in Texas are generally immune from suit unless a valid statutory or constitutional waiver of immunity applies. The court discussed how the Texas Tort Claims Act waives immunity in limited circumstances involving (1) injuries caused by motor vehicles, (2) the use of tangible property, or (3) real property, but since LaRose's claims did not fall into any of these categories, the court found no such waiver in LaRose's claims. Moreover, LaRose did not cite any other statutory basis to support waiving the city's governmental immunity. Consequently, the judgment dismissing LaRose's case for lack of subject-matter jurisdiction was affirmed.

Workers' Compensation: *Joseph Andre Davis v. City of Houston*, No. 14-24-00070-CV, 2024 WL 5087687 (Tex. App.—Houston [14th Dist.] Dec. 12, 2024) (mem. op.). Joseph Andre Davis, a firefighter/paramedic for the City of Houston, sustained a compensable work-related injury in 2015. The city paid him temporary income benefits until August 2016. The parties disputed the extent of Davis's injury, the date he reached maximum medical improvement (MMI), and his impairment rating. In February 2017, the Division of Workers' Compensation issued a decision regarding the extent of Davis's injuries and determining that Davis reached clinical MMI on August 20, 2016, with a 5% impairment rating. Davis unsuccessfully appealed this decision to an appeals panel. Subsequent administrative rulings in 2022 and 2023 established December 16, 2017, as the statutory MMI date and noted Davis had a disability through this period. Davis filed suit seeking enforcement of these later decisions, arguing he was entitled to additional benefits. The city filed a motion for summary judgment, arguing that it had complied with all enforceable orders, and the trial court granted the city's motion. Davis appealed. Under Texas workers' compensation law, MMI defines when an injured employee is no longer entitled to temporary income benefits. MMI can occur either clinically, based on medical evidence, or statutorily, 104 weeks after income benefits begin to accrue. The city argued that Davis's clinical MMI date of August 20, 2016, was final and binding, and the court agreed. Therefore, Davis could not claim temporary income benefits after August 20, 2016, regardless of any later findings regarding statutory MMI or disability ratings. Ultimately, the appellate court affirmed the trial court's judgment.

Open Meetings Act: *Webb County v. Mares*, No. 14-23-00617-CV, 2024 WL 5130862 (Tex. App.—Houston [14th Dist.] Dec. 17, 2024). Cynthia Mares sued Webb County, alleging the commissioners court violated the Texas Open Meetings Act (TOMA) by inadequately notifying the public before their decision to restructure the county's Administrative Services Department. During the meeting in question, the commissioners court split the department into two,

reassigned Mares to a new position, and reduced her salary from $105,000 to $75,000. The agenda for the meeting included an item which referenced general discussion and adoption of the county's budget but did not mention departmental restructuring or salary reductions. Mares filed a claim following the meeting, and was later terminated by the county. In her lawsuit, among other things, Mares sought back pay and lost retirement benefits and attorney's fees and costs. The trial court ruled in Mares's favor, finding a TOMA violation, awarding her $39,000 in back pay and lost retirement benefits, and granting $69,650 in attorney's fees and costs. Webb County appealed.

TOMA requires specific notice of the subject to be discussed at government meetings. To be sufficient, such notice must fairly identify the meeting and be sufficiently descriptive to alert a reader that a particular subject will be addressed. The agenda item at issue referenced general budget discussions but did not alert the public to the restructuring of the Administrative Services Department or Mares's salary reduction. Comparing the notice to the actions taken, the appellate court concluded the notice fell short of TOMA's requirements. TOMA does not waive governmental immunity for claims seeking money damages; therefore, the court concluded that Mares could not recover back pay or retirement benefits essentially stemming from this violation. The court reversed the portion of the judgment awarding back pay and lost retirement benefits and rendered judgment that Mares take nothing on her monetary damages claim, while affirming the trial court's findings of a TOMA violation and the award of attorney's fees and costs.

December 2024

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from November 1, 2024, through November 30, 2024.

Civil Rights: *Benfer v. City of Baytown, Tex*., 120 F.4th 1272 (5th Cir. 2024). Officer Calvert pulled over Benfer and his wife for allegedly running a red light and because their vehicle appeared to match the description of a car that had been reported as stolen. As the officer exited his patrol car, Benfer and his wife also exited their vehicle, and a confrontation ensued, ending with Calvert's siccing his K-9 on Benfer. Benfer and his wife were arrested and prosecuted for resisting arrest and interference with public duties, but all charges were later dismissed. Benfer brought action against Officer Calvert and the city under § 1983 and state law.

Officer Calvert and the city moved to dismiss for failure to state a claim. The district court granted that motion, finding that the officer had not violated Benfer's constitutional rights, that Benfer's state tort claim was not cognizable under Texas law, and that Benfer had pleaded insufficient facts to support liability for the city.

The appellate court affirmed, finding that: (1) the traffic stop was justified by reasonable suspicion at its inception and reasonable in duration; (2) the officer had probable cause to arrest Benfer and his wife for resisting arrest under Texas law; (3) the officer was not liable under § 1983 for malicious prosecution; (4) the officer's decision to release a police dog which bit Benfer during the traffic stop did not constitute clearly excessive force under the circumstances; (5) the officer's use of a police dog to subdue Benfer until he was handcuffed was objectively reasonable use of force that was not clearly excessive under the circumstances; and (6) Benfer failed to state a claim for city liability.

Civil Rights: *Lupis v. City of Tex. City*, No. 23-40445, 2024 WL 4678880 (5th Cir. Nov. 5, 2024). Nikola Lupis was detained by Texas City police officers in an incident related to the execution of an arrest warrant for Lupis's son. He alleged under § 1983 that the detention was unconstitutional, in addition to various Texas state law tort allegations. The district court dismissed the case after it determined that Lupis failed to plausibly state a claim and denied his motion for leave to amend his complaint. The appellate court affirmed finding that that Lupis failed to state a claim for relief and that the district court did not abuse its discretion in denying Lupis leave to amend his complaint.

Civil Rights: *Monacelli v. City of Dallas, Tex.*, No. 24-10067, 2024 WL 4692025 (5th Cir. Nov. 6, 2024). Monacelli, a freelance journalist, was on assignment during the George Floyd protests in downtown Dallas when Dallas police officers allegedly surrounded the demonstration and deployed chemical irritants and less-than-lethal munitions at demonstrators. Monacelli's leg was struck with one such round, and Dallas officers detained him for two and a half hours, despite his donning "Press" insignia and his self-identification as a journalist. Monacelli sued the city under § 1983 for unlawful arrest, excessive force, First Amendment violations, inadequate police training, and failure to adopt policies that would have prevented his injuries. The district court granted the city's motion to dismiss after Monacelli twice amended his complaint. Monacelli timely appealed.

The appellate court affirmed the dismissal finding that Monacelli's complaint did not plausibly allege facially unconstitutional policies, inadequate training or policies, or deliberate indifference on the part of the city.

Zoning: *Brookwood Development, L.L.C. v. City of Ridgeland*, No. 24-60017, 2024 WL 4835244 (5th Cir. Nov. 20, 2024). In 2018, the City of Ridgeland, Mississippi, amended its zoning ordinance to prohibit climate-controlled storage units in certain districts while also imposing spacing restrictions to prevent oversaturation. The city, nevertheless, approved a conditional use permit for StorageMax to construct a climate-controlled storage facility in another area of the city without objection or moratorium. Brookwood Development (Brookwood) submitted an application in October 2020 to the city for a conditional use permit seeking approval to develop a large climate-controlled storage facility in an area zoned as a commercial district. The zoning board approved the application but before the council could act

on the application, the council imposed a temporary moratorium on the issuance of conditional use permits for climate-controlled storage facilities to study the potential effects of such facilities on its primary retail zones and transportation corridors. Eventually the city denied Brookwood's application.

Brookwood sued the city and city officials under § 1983 arguing that the city's denial of its permit application violated its substantive due process and equal protection rights. The district court granted summary judgment in favor of the city finding that Brookwood had failed to establish a protected property interest and that the city's denial of the conditional use permit was rationally related to a legitimate governmental interest. The court also explained that StorageMax was not a similarly situated comparator to Brookwood. Brookwood appealed.

The appellate court affirmed finding that: (1) Brookwood does not have a protected property interest in the conditional use permit under Mississippi law or the zoning ordinance; and (2) StorageMax and Brookwood are not similarly situated comparators and the court need not determine whether the city's differentiation between the applications would withstand rational basis review.

Recent Texas Cases of Interest to Cities

Note: Included cases are from November 1, 2024, through November 30, 2024.

Tort Claims Act: *In Re City of Houston*, No. 01-24-00629-CV, 2024 WL 4846843 (Tex. App.—Houston [1st Dist.] Nov. 21, 2024) (mem. op.). Tapia and Welborn sued the City of Houston following the death of their daughter, who was struck and killed by a train. The city filed a Rule 91a motion to dismiss, asserting it was entitled to dismissal under several provisions in the Texas Tort Claims Act and that Tapia and Welborn had no standing to bring the suit. The city also filed a motion for summary judgment in the alternative, claiming that the trial court lacked subject-matter jurisdiction due to Tapia and Welborn failing to timely deliver notice of their claim to the city. Tapia and Welborn filed a motion for continuance as to the city's motion for summary judgment, which the trial court granted. The trial court did not make a ruling on the city's Rule 91a motion to dismiss. The city filed a petition for a writ of mandamus in the appellate court, asking the court to compel the trial judge to rule on the motion to dismiss.

The appellate court conditionally granted the motion to dismiss, holding that the trial court's failure to rule on the motion to dismiss within 45 days as required under the rules of procedure was an abuse of discretion.

Jurisdiction: *City of McLendon-Chisholm v. City of Heath, et al.*, No. 05-23-00881-CV, 2024 WL 4824113 (Tex. App.—Dallas Nov. 19, 2024) (mem. op.). This case stems from a development agreement between the City of McLendon-Chisholm and MC Trilogy Texas, LLC, which provided for the development of land within the city limits and extraterritorial jurisdiction

(ETJ) bordering the City of Heath. The agreement allowed for minimum lot sizes incompatible with McLendon-Chisolm's 2015 Comprehensive Plan. Heath claimed the drastic change in the residential density requirements near its border with McLendon-Chisholm would cause it substantial harm as it would create a 358% increase in traffic on its roads, require additional public safety personnel, decrease its property values and tax revenues, and disrupt its future development plans. Heath sued the McLendon-Chisolm seeking declaratory and injunctive relief and additionally claimed the city violated the Texas Open Meetings Act (TOMA) in 11 specific instances. In response, McLendon-Chisolm filed a plea to the jurisdiction on the basis that Heath lacked standing. While the trial court granted McLendon-Chisolm's plea to the jurisdiction stating that Heath lacked standing to sue over "issues, ordinances, regulations, and agreements pertaining to development, land use, zoning, governance, and related matters involving land within the city limits and ETJ," the court denied the plea with regard to Heath's standing to bring TOMA claims. In reversing the lower court in part, the court of appeals concluded that because Heath presented sufficient evidence of concrete and particularized, actual and imminent injuries traceable to McLendon-Chisolm's agreement with Trilogy which could be redressed by a favorable ruling, Heath met its burden to show it has standing. As for Heath's standing as it relates to the TOMA claims, the court of appeals affirmed the lower court's ruling that Heath sufficiently alleged standing to support a showing that it is an "interested person" as required under the TOMA.

Governmental Immunity: *City of San Antonio v. Bailey*, No. 08-23-00302-CV, 2024 WL 4849351 (Tex. App.—El Paso Nov. 20, 2024) (mem. op.). Alvin Bailey allegedly sustained personal injuries while riding his bicycle on a city-owned trail. He claimed to have hit a yellow rope that had been stretched across the trail, causing him to fall and sustain injuries. He also alleged that a broken pipe had leaked water across the trail and that a light on the trail had burned out. Consequently, Bailey sued the City of San Antonio and the San Antonio Water System (SAWS) for negligence and premises liability. The city and SAWS filed a joint plea to the jurisdiction, asserting governmental immunity under the Texas Tort Claims Act (TTCA) and Recreational Use Statute. The trial court denied the plea, and the city and SAWS appealed.

Bailey argued that SAWS was performing a proprietary function in maintaining the water pipe, because a provision of the TTCA states that maintenance and operation of a public utility is a proprietary rather than a governmental function, which would preclude governmental immunity. However, the court held that SAWS's alleged negligence arose from its governmental function of providing water and sewer services, which are governmental functions; therefore, SAWS maintained its immunity from Bailey's negligence claim. Additionally, because there was no evidence of a defect in the yellow rope itself nor allegations related to use of the yellow rope by a government employee at the time Bailey sustained his injuries, Bailey was unable to sustain a premises liability claim. Furthermore, when a plaintiff engages in recreation on government property, a claim for premises liability may be maintained only when malicious intent, gross negligence, or bad faith on the part of the governmental entity can be shown, which Bailey failed to plead. Ultimately the appellate court reversed the trial court's order and rendered judgment in favor of the city and SAWS.

Constitutional Takings: *San Jacinto River Authority v. Medina*, No. 01-23-00013-CV, 2024 WL 4885853 (Tex. App.—Houston [1st Dist.] Nov. 26, 2024) (mem. op.). Several dozen homeowners (the homeowners) sued the San Jacinto River Authority (the authority) alleging a constitutional taking of their properties after the authority released water from Lake Conroe following Hurricane Harvey in a manner that caused flooding and damage to their properties. The authority filed a plea to the jurisdiction based on governmental immunity, which the trial court denied. The authority appealed.

The appellate court reversed and rendered judgment, holding that the homeowners had not produced evidence sufficient to raise a fact issue as to whether the authority's water releases were a substantial factor in causing the flood damage on their properties.

Contracts: *Graham Constr. Services, Inc. v. City of Corpus Christi*, No. 13-22-00536-CV, 2024 WL 4707819 (Tex. App.—Corpus Christi–Edinburg Nov. 7, 2024) (mem. op.). Graham Construction Services (Graham) and the City of Corpus Christi sued each other after various disputes arose when the city hired Graham to construct a new wastewater treatment plant. After Graham claimed completion of the first phase of the two-phase project, the city refused to issue a certificate of substantial completion, claiming the first phase had not been completed. Graham vacated the project site without performing the second phase. Graham sued the city for breach of contract and the city counterclaimed for breach of contract. The trial court awarded damages to both parties, which were offset, resulting in Graham owing the city $1.29 million. The trial court also awarded attorney's fees to both parties, which were wholly offset. Graham appealed, claiming that the trial court erred in its award of damages to the city for failure to complete the second phase of the project because the certificate of substantial completion was a condition precedent to Graham's obligations in the second phase, and that the city breached the contract first, excusing Graham's obligations. Graham also claimed that the trial court's award failed to fairly compensate it for city-related delays. The city cross-appealed, contending that the trial court erred by failing to award the city liquidated damages under the contract, by awarding Graham damages related to delays out of the city's control, and by awarding Graham attorney's fees.

The appellate court affirmed in part and reversed in part, holding that: (1) Graham was not excused from its obligations under the contract because the issuance of the certificate of completion of the first phase was not a condition precedent to the performance of the second phase of the project and the city had not breached the contract; (2) the city was entitled to liquidated damages under the contract; (3) Graham had not shown with evidence as a matter of law that the trial court's damages award did not fairly compensate it for city-related delays; (4) because a provision in the contract provided that Graham was not entitled to damages arising from delays outside the city's control, the trial court had erred by awarding those damages; and (5) affirmed the trial court's award of attorney's fees to Graham.

Ballot Eligibility: ***Derrick Broze v. The State of Texas*****, No. 15-24-00020-CV, 2024 WL 4676452 (Tex. App.—15th Dist. Nov. 5, 2024) (mem. op.).** Derrick Broze applied for a place on the mayoral election ballot in Houston. Mr. Boze's application was denied because of an unpardoned felony conviction in his past. Mr. Broze sued the city, arguing that the state statute violates the Texas Constitution and federal due process protections. The trial court dismissed his suit, and Broze appealed. The appellate court reviewed Mr. Boze's claims and ultimately affirmed the trial court's dismissal order, holding that Boze's allegations lacked a basis in law or fact.

November 2024

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from October 1, 2024, through October 31, 2024.

Code Enforcement: ***Hershner v. City of Dallas*****, No. 23-11214, 2024 WL 4471503 (5th Cir. Oct. 11, 2024).** Hershner, owner of a bar in the City of Dallas, sued the city, three Dallas police officers, a code enforcement officer, a code inspector, and Swanson, a private citizen, for several claims under state and federal law, alleging that the city officials conspired with each other and Swanson to harass him, issue several code violations, and deny the bar a dance hall license. He also alleged a takings claim with regard to the city's denial of his application for a dance hall license. The city, city officials, and Swanson filed a motion to dismiss for failure to state a claim, which the trial court granted. Hershner appealed.

The appellate court affirmed, holding that: (1) his claim against Swanson for defamatory statements to customers of the bar were not cognizable under 42 U.S.C. § 1983 because she was private citizen; (2) Hershner's conspiracy claim failed because he did not allege an agreement between the parties; (3) in the absence of a conspiracy with a government actor, all of Hershner's constitutional claims against Swanson failed; (4) Hershner's equal protection claims failed because he failed to plead facts showing that similarly situated businesses were treated differently than his bar; (5) because Hershner failed to allege facts to raise an inference that the government violated his right to associate under the First Amendment by patrolling the neighborhood around the bar, his First Amendment claims against the police officers failed; (6) the code officials' inspection of the bar could not have been an unlawful search and seizure in violation of the Fourth Amendment because the rule against warrantless search and seizures is attenuated in closely regulated industries, such as bars; and (7) Hershner's takings claim failed because he could not show a property interest or longstanding interest in a dance hall license for his bar.

Recent Texas Cases of Interest to Cities

Note: Included cases are from October 1, 2024, through October 31, 2024.

Employment: *Bering v. Tex. Dep't of Criminal Justice-PFCMOD*, No. 02-24-00033-CV, 2024 WL 4455843 (Tex. App.—Fort Worth Oct. 10, 2024) (mem. op.). Cassandra Bering filed an administrative complaint against her former employer—the Texas Department of Criminal Justice—PFCMOD (the Department)—for alleged retaliation. When filling out the standardized form to file the complaint, Bering did not check the checkbox options—race, color, sex, disability, and retaliation—to identify what the complained of discrimination was based on, instead she checked the box for "other" without filling in the corresponding blank to identify what the "other" basis was. In the main body of the complaint, she explained that she had been retaliated against. Then, relying on that administrative complaint, Bering sued the Department under the Texas Commission on Human Rights Act (TCHRA) for alleged race, gender, and disability discrimination.

The Department pointed out the discrepancy between Bering's complaint and TCHRA claims, and it filed a combination plea to the jurisdiction and motion for summary judgment seeking dismissal of Bering's claims due to her failure to exhaust her administrative remedies. The trial court granted the plea.

The appellate court affirmed the trial court's order, finding that because Bering's TCHRA claims for race, gender and disability discrimination were not within the scope of her administrative complaint, she had failed to exhaust her administrative remedies for those TCHRA claims, and the trial court lacked jurisdiction over them.

Tort Claims Act: *City of San Antonio v. Burch*, No. 05-24-00078-CV, 2024 WL 4379951 (Tex. App.—Dallas Oct. 3, 2024) (mem. op.). This case involves a premises-liability suit brought by Drana Burch after she fell as a result of uneven brick pavers while attending an event at the Alamodome. The City of San Antonio, in response to the suit, filed a combined motion for no-evidence and traditional summary judgment asserting, among other things, governmental immunity. The trial court denied the city's motion, ruling in favor of Burch, and the city appealed. The court of appeals, in addressing the no-evidence motion only, concluded that: (1) Burch failed to show that the slight unevenness of the brick pavers was unreasonably dangerous; (2) Burch failed to show the city had actual knowledge of the condition where there was no evidence of prior reports of injuries or complaints; and (3) evidence of nonspecific paver repair service invoices was insufficient to directly show actual knowledge of the specific issue. For those reasons, the court reversed trial court's decision and dismissed the suit for lack of jurisdiction.

Tort Claims Act: *Buenrostro v. Tex. Dep't of Transp.*, No. 07-24-00048-CV, 2024 WL 4511214 (Tex. App.—Amarillo Oct. 16, 2024) (mem. op.). The Texas Department of Transportation (TxDOT) applied a brine solution to a road in advance of a winter storm. TxDOT

subsequently received reports of "slick roads" and then applied sand to the road. After the sand had been applied, a TxDOT employee noticed an oily contaminate floating on the top of the brine in the tank, so the tank was flushed. After the sand was applied, Buenrostro lost control of his vehicle and was fatally injured. His heirs filed a lawsuit. TxDOT filed a plea the jurisdiction, which the trial court granted.

On appeal, the court affirmed the grant of the plea and found: (1) there was no evidence of TxDOT's actual knowledge of the dangerous condition because TxDOT did not know the contaminant from the brine made it onto the road, there were intervening fourteen hours between the brine and the accident; and (2) there was no evidence the contaminant in the brine made it onto the roadway or caused the accident.

Retaliation: *City of San Antonio v. Carnot*, No. 08-24-00034-CV, 2024 WL 4589814 (Tex. App.—El Paso Oct. 28, 2024) (mem. op.). Alfred Carnot filed suit against the City of San Antonio following his termination in January 2022 from his position as an airport police officer. Carnot, who was diagnosed with dyslexia and dyscalculia, alleged retaliation, claiming the city discharged him for filing a disability discrimination complaint with the Texas Workforce Commission and U.S. Equal Employment Opportunity Commission in 2020. The city filed a plea to the jurisdiction and motion for summary judgment (MSJ), arguing Carnot did not establish a prima facie case of retaliation and that legitimate, non-retaliatory reasons existed for his termination. The trial court denied the city's plea and MSJ and the city appealed.

Ultimately, the appellate court reversed the trial court's decision, holding that Carnot failed to show his termination was based on retaliation rather than legitimate, non-retaliatory reasons. The city provided evidence that Carnot's termination resulted from documented violations, including multiple procedural errors during arrests and failure to adhere to department standards. The appellate court held that Carnot did not meet his burden of proving pretext or but-for causation for retaliation, thus failing to waive governmental immunity; therefore, it reversed the lower court's denial of the city's plea to the jurisdiction and MSJ and rendered judgment dismissing Carnot's claim.

Procurement: *Double H Contracting, Inc. v. El Paso Water Utilities Public Service Board, et al.*, No. 08-23-00345-CV, 2024 WL 4611957 (Tex. App.—El Paso Oct. 29, 2024). Double H Contracting, Inc. (Double H) sued the El Paso Water Utilities Public Service Board (EPWater), the City of El Paso, among other parties, after EPWater awarded multiple contracts for road repair work through a single public procurement process. Historically, EPWater had used a single contractor to address road repairs following utility line work, but with growing repair backlogs and resident complaints, EPWater sought bids to secure multiple contractors through a competitive sealed proposal process. Double H, the highest-ranking proposer, argued that Texas law limited EPWater to awarding the contract solely to the highest-ranked proposer. The trial court disagreed, granting EPWater's motion for summary judgment. Double H appealed.

Ultimately, the appellate court affirmed the trial court's grant of summary judgment in favor of EPWater, holding that EPWater's contract awards were lawful under the public health and safety exemption in Chapter 252 of the Texas Local Government Code. This exemption allows municipalities to bypass competitive bidding requirements if the procurement is necessary to preserve or protect public health or safety. EPWater provided evidence, including affidavits and data, showing that delays in road repairs after utility work posed risks to public safety and justified retaining multiple contractors to handle repair work more quickly and efficiently. The court found this evidence sufficient to support EPWater's determination that the exemption applied to the instant procurement, rendering competitive bidding requirements inapplicable. Additionally, EPWater acted within its discretion by retaining multiple contractors for efficient road repair work through the competitive sealed proposal process. The court concluded that the terms of the proposal explicitly allowed awarding contracts to multiple qualified proposers, and EPWater had followed the solicitation's procedures, which allowed contracting with additional entities beyond the highest scorer.

Immunity: *City of Waco v. Page*, No. 10-24-00039-CV, 2024 WL 4562815 (Tex. App.—Waco Oct. 24, 2024) (mem. op.). Page and Matthew Vasquez sued the City of Waco when a Waco police officer who was responding to a 9-1-1 call of a home invasion in progress shot and killed their dog, Finn. The officer unknowingly arrived at the wrong address when the city's GPS system gave the officer the wrong address for the home invasion and approached the back door of residence with his weapon drawn. The officer shot and killed Finn when five or six dogs charged out of the door, and Finn rushed toward the officer as he backed up, forcing him to retreat into a fenced side yard when Finn continued to lunge and bark at the officer. The city filed a plea to the jurisdiction, which was denied after a hearing.

The appellate court found that the Vasquez's constitutional claim – deprivation of property – does not waive the city's immunity because they did not plead or establish an independent constitutional waiver of immunity. Additionally, because the Vasquezes did not allege any facts that Finn's death was proximately caused by the city's operation or use of a motor-driven vehicle or motor-driven equipment, they did not pled facts establishing a valid waiver of immunity. Accordingly, the court reversed the trial court's decision.

Employment: *Tex. Dep't of Pub. Safety v. Callaway*, No. 13-23-00166-CV, 2024 WL 4511216 (Tex. App.—Corpus Christi–Edinburg Oct. 17, 2024) (mem. op.). Callaway sued the Texas Department of Public Safety (DPS) for disability discrimination and retaliation. He claimed he was subject to a hostile work environment, DPS failed to accommodate his disability, and he lost overtime after returning from leave associated with his alcohol problem. Years after his return to work, Callaway was terminated from DPS as discipline for various off-duty violations of departmental policies during an altercation with officials at his daughter's school. Callaway sued under the Texas Commission on Human Rights Act (TCHRA), claiming that termination was not appropriate discipline for the violations and that he was terminated because of his alcoholism and PTSD. DPS filed a plea to the jurisdiction claiming sovereign immunity as well as a no-evidence

motion for summary judgment. The trial court denied both the plea and the motion, and DPS filed an interlocutory appeal.

The appellate court affirmed the trial court's denial of DPS's motion for summary judgment, holding that there was a fact issue regarding whether Callaway's termination was in retaliation for Callaway's complaint about discrimination related to his PTSD. The appellate court reversed and rendered with regard to Callaway's claims of disability discrimination based on his alcoholism and his claims of hostile work environment, failure to accommodate, and lost overtime, holding that: (1) alcoholism is not a disability under the TCHRA, so Callaway's claim of disability discrimination under that act was not viable; and (2) Callaway had failed to make his other claims within the applicable statute of limitations.

October 2024

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from September 1, 2024, through September 30, 2024.

Civil Rights: *Ambler v. Nissen*, 116 F.4th 351 (5th Cir. 2024). This case stems from the death of a suspect, Javier Ambler II, who led law enforcement on a 20-minute high-speed chase and was subsequently detained. However, during the altercation, Ambler told officers he had congestive heart failure and could not breathe which contributed to his death. Ambler's family members sued Williamson County, the City of Austin, and City of Austin police officer, Michael Nissen, among others under 42 U.S.C. § 1983 claiming Ambler's constitutional rights were violated because of Officer Nissen's use of excessive force and failure to intervene in other officers' use of force. In response, Nissen filed a motion for summary judgment, arguing he was entitled to qualified immunity. However, the district court denied his motion concluding that Ambler's family raised genuine fact issues about whether: (1) the level of force used by Nissen was appropriate given the circumstances of his encounter with Ambler, (2) a reasonable officer would have believed that Ambler posed an immediate threat to safety, (3) reasonable officers in the same situation would have credited Ambler's statements of his medical emergency, and (4) Nissen's actions, although lasting ninety seconds, constituted excessive force where a reasonable officer could have been aware of Ambler's health issues given his size and struggle to breathe. As to bystander liability, the district court also determined that a genuine dispute of fact existed as to whether Nissen failed to reasonably intervene where officers tased and continued to use force while Ambler was suffering medical distress. Ultimately, the Fifth Circuit held that it lacked jurisdiction to review the lower court's denial of qualified immunity as the district court's factual findings were material and justified its legal conclusions. As a result, the court dismissed the appeal and remanded the case for further proceedings.

Civil Rights: *Cantu v. Tamez*, No. 23-40673, 2024 WL 4057575 (5th Cir. Sept. 5, 2024) (per curium). Ruben Cantu sued City of Weslaco police officers Tamez, Rodriguez, and Ochoa under 42 U.S.C. § 1983 alleging Tamez and Rodriguez used excessive force when they slammed him into a wall causing a fracture to his clavicle, and when Ochoa unreasonably failed to intervene. All three officers filed summary judgment motions based on qualified immunity, but the district court denied their motions finding that there was a genuine dispute of fact as to whether the force used by the officers was reasonable. The officers appealed. The Fifth Circuit affirmed the lower court's denial of summary judgment as to Tamez and Rodriguez reasoning that with no other contradictions or video footage of the event in the record, it would not disturb the court's determination that genuine disputes of material fact existed. However, as to Ochoa's motion for summary judgment for qualified immunity, the Fifth Circuit reversed the district court's denial concluding Cantu failed to establish that a reasonable officer would have known to intervene in a similar situation or that Ochoa had a reasonable opportunity to act when the acts took place.

ADA: *King v. DFW Int'l Airport Bd.*, No. 23-11084, 2024 WL 4132676 (5th Cir. Sept. 10, 2024). Nathaniel King, a former Civilian Security Officer, sued the DFW International Airport (DFW) for discrimination and retaliation based on his disabilities in violation of the Americans with Disabilities Act (ADA) after DFW officials failed to reassign him to a vacant position and later terminated him in 2020. Specifically, King asserted a disparate-treatment and retaliation claim under the ADA. In response, DFW filed a motion for summary judgment arguing, among other things, that King did not establish that: (1) he was qualified for his position, (2) a causal connection existed between his disability and the alleged adverse employment action by DWF, and (3) DFW's failure to reassign him was an adverse employment action. Further, DFW argued that it had a legitimate nondiscriminatory and nonretaliatory reason for terminating King. The district court granted DFW's summary judgment motion, and King appealed. In his appeal, King additionally alleged DFW failed to accommodate his disabilities. The Fifth Circuit affirmed the district court holding that King failed to: (1) preserve a failure-to-accommodate claim in district court and could not assert it for the first time on appeal, and (2) rebut DFW's legitimate, nondiscriminatory reasons for not reassigning him and later terminating him where King did not use DFW's online portal to apply for any open positions and where King failed to return to work after exceeding his short-term disability leave.

FLSA: *Mayfield v. United States Dep't of Labor*, No. 23-50724, 2024 WL 4142760 (5th Cir. Sept. 11, 2024). In 2019, the U.S. Department of Labor (DOL) issued a new "minimum salary rule" raising the minimum salary threshold for the executive, administrative, and professional exemptions (EAP exemption) to the overtime requirement under the Fair Labor Standards Act. The new rule increased the minimum salary threshold to qualify for the EAP exemption from $455 to $684 per week. Mayfield, an owner of several Austin-area restaurants, sued the DOL alleging that the DOL lacked the authority to define the EAP exemption in terms of salary level. After the district court granted the DOL's motion for summary judgment, Mayfield appealed. The Fifth Circuit affirmed, holding that: (1) the major questions doctrine did not apply, (2) the DOL has statutory authority to adopt a minimum salary threshold rule, and (3) the DOL's exercise of this authority did not violate the nondelegation doctrine where the DOL's authority to

define and limit the terms of the EAP exemption is guided by an intelligible principle found in the FLSA's language and directive to eliminate substandard labor conditions detrimental to the wellbeing of workers.

Recent Texas Cases of Interest to Cities

Note: Included cases are from September 1, 2024, through September 30, 2024.

Charter Amendments: *In re Dallas HERO,* No. 24-0678, 2024 WL 4143401 (Tex. Sept. 11, 2024). This case involves citizens' power to propose amendments to their city's charter, the city council's power to do likewise, and the council's responsibilities in preparing the ballot for an election to approve proposed amendments.

Relators organized a citizen petition drive and signed petitions to place three proposed charter amendments on the upcoming election ballot, and the city council submitted three proposed amendments of its own that relators contend would effectively nullify their proposed amendments. The council-initiated propositions included primacy provisions specifying that they control in the event of a conflict. Relators have filed a mandamus petition raising four challenges to the council-initiated propositions.

The court addressed one principal question – whether the ballot language the city council selected to describe the various propositions satisfies the standard of clarity and definiteness articulated by the court. The court determined that the language did not because the propositions contradict each other, and the ballot language as a whole will confuse and mislead voters because it does not acknowledge these contradictions or address the effect of the primacy provisions, which are chief features central to the character and purpose of the council-initiated propositions. Because the citizen-initiated propositions must appear on the ballot and the parties had agreed to the ballot language for those propositions, the court concluded that the proper remedy is to direct the city council not to include its duplicative propositions on the ballot.

Water Utilities: *Rooney & Nacu v. City of Austin, Watson, Roalson, & Lucas*, No. 03-23-00053-CV, 2024 WL 4292040 (Tex. App.—Austin Sept. 26, 2024) (mem. op.). Michael Rooney sued the City of Austin and city officials seeking declaratory and injunctive relief after he was denied a certificate of occupancy for failing to connect to the city's water system. Rooney had previously been denied a waiver of the connection requirement as well as a building permit after requesting that the property be served by a water well he installed in 2017. Rooney claimed, among other things, that (1) the city's ordinance connection requirement did not apply to his property as it was not "a structure served by the city's water utility," (2) city officials engaged in ultra vires conduct in applying these requirements to his property and denying his request for a waiver, and (3) the connection requirement as applied to his property was unconstitutional. In response, the city filed a plea to the jurisdiction. Although the trial court denied the city's motion, a bench trial resulted in a ruling in favor of the city to which Rooney appealed.

The court of appeals affirmed the lower court concluding: (1) that because Rooney sought a declaration of his rights under the city's ordinance, rather than a declaration of its validity, the Unform Declaratory Judgment Act did not waive the city's governmental immunity, (2) the plain language of the ordinance indicated "a structure served by" meant a structure located within a certain proximity to the city's water system not a structure already "connected to" the system, (3) under this construction of the ordinance language, city officials did not act ultra vires in requiring Rooney to comply with the city's connection requirement; (4) city officials did not act ultra vires in denying Rooney's waiver of the connection requirement as the ordinance granted city officials the discretion to grant an exemption; and (5) Rooney failed to show that the city's connection requirement was not rationally related to a legitimate governmental interest.

Condemnation: *Tran v. City of Haskell*, No. 11-23-00186-CV, 2024 WL 4292222 (Tex. App.—Eastland Sept. 26, 2024) (mem. op.). Long Tran owned four properties in the City of Haskell, and because of their dilapidated condition the city condemned the structures. A few months later the city's code enforcement officer resigned, and the city chose to rescind the condemnation orders and instead tried to work with Tran to establish a repair plan to preserve his properties. Tran thereafter sued the city claiming that the city's condemnation orders, although rescinded, constituted a "temporary" regulatory taking of his property for which he was entitled compensation under the Texas Constitution. Relying on the U.S. Supreme Court case *Arkansas Game & Fish Comm'n v. United States* and a concurring opinion in Texas Supreme Court case *City of Baytown v. Schrock*, Tran argued that because the federal takings clause provides for compensation for "temporary takings" in certain circumstances and the Texas takings clause language is even broader than federal law, his inverse-condemnation claim based on the city's temporary action was compensable under the Texas takings clause. In response, the city argued Tran's claims were not ripe or moot, and Tran failed to sufficiently allege a taking or a claim for property damages by the city. The trial court ruled in favor of the city, and Tran appealed. The court of appeals upheld the lower court's ruling concluding that although the Texas Constitution may very well provide for compensation for temporary takings, because Tran failed to comprehensively brief the court on the "precise scope of the right to compensation that the Texas Constitution affords" beyond its federal counterpart, it could not address the issue. Additionally, the court held that Tran's claims were not ripe for judicial review as there was no final governmental decision regarding his asserted claims.

September 2024

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from August 1, 2024, through August 31, 2024.

Civil Rights: *Wade v. City of Houston*, 110 F.4th 797 (5th Cir. 2024). The plaintiffs in this case were arrested during the George Floyd protests in Houston. They sued the city and its former police chief, Art Acevedo, under 42 U.S.C. § 1983, alleging violations of their First, Fourth, Fifth, and Fourteenth Amendment rights. They claimed they were falsely arrested after being "kettled" by police. The district court granted summary judgment to the city and the other defendants, finding that the police had probable cause to arrest the plaintiffs for obstructing roadways in potential violation of the Texas Penal Code. The plaintiffs appealed.

The Fifth Circuit affirmed the district court's decision, holding that there was probable cause to arrest the participants for obstructing a roadway or sidewalk under Texas law. Because the officers had probable cause, the court held that the arrests did not violate the participants' First, Fourth, or Fourteenth Amendment rights. Without an underlying constitutional violation, the claims of municipal and supervisory liability against the city and Acevedo also failed. Ultimately, the Fifth Circuit affirmed the dismissal of the plaintiffs' § 1983 claims, ruling that the police had probable cause for the arrests; thus, there was no constitutional violation.

Voting Rights Act: *Petteway v. Galveston Cnty.*, 111 F.4th 596, 599 (5th Cir. 2024). African American and Latino voters, advocacy organizations, and the United States sued Galveston County, Texas, challenging its 2021 redistricting plan, which eliminated the county's sole majority-minority precinct. Plaintiffs claimed the plan violated Section 2 of the Voting Rights Act (VRA), as well as the Fourteenth and Fifteenth Amendments, by diluting minority voting power. The district court ruled in plaintiffs' favor under the VRA and existing Fifth Circuit precedent. The county appealed, and the Fifth Circuit initially affirmed but then granted a rehearing en banc.

The question in front of the court was whether distinct racial or language minority groups, African Americans and Latinos in this case, could aggregate their populations to claim vote dilution under Section 2 of the VRA. The Fifth Circuit overruled prior opinions to hold that the distinct groups cannot aggregate their populations. Relying on the language of the VRA and Supreme Court precedent, the Fifth Circuit ultimately held that Section 2 of the VRA does not permit minority coalition claims.

Civil Rights: *Rhone v. City of Texas City*, No. 22-40551, 2024 WL 3664535 (5th Cir. Aug. 6, 2024). Thomas E. Rhone, owner of three apartment buildings, appealed a municipal court's nuisance abatement order. Rhone brought claims under 42 U.S.C. § 1983 for inverse condemnation, denial of procedural due process, and unconstitutional seizure, and the City of Texas City removed the case to federal court. The district court granted summary judgment in favor of the city, and Rhone appealed. During the appeal, the Fifth Circuit ordered a limited remand to investigate the city attorney's role in finalizing the municipal court's abatement order and its effect on the municipal court judge's independence. After conducting the hearing, the district court found that the city attorney's role was limited to drafting the order and that the municipal judge did not require the city attorney's approval to enter it. The phrase "approved as to form, substance, and entry" under the city attorney's signature was deemed a standard legal

formality, not a grant of permission. Rhone argued that the district court should examine broader systemic issues regarding municipal court independence, but the district court rejected these arguments as outside the scope of the remand. Ultimately, the Fifth Circuit affirmed the district court's finding that the municipal judge acted independently and that the city attorney's involvement in drafting the abatement order was proper under Texas law.

Mootness: *Arms of Hope v. City of Mansfield*, No. 23-10656, 2024 WL 3872899 (5th Cir. Aug. 20, 2024). In 2023, the City of Mansfield passed two ordinances meant to address visual clutter and blight due to graffiti and poor maintenance of unattended donation boxes in the city. Arms of Hope (AOH), a charitable organization operating unattended donation boxes, filed a declaratory judgment action against the city challenging the ordinances. AOH claimed the ordinances violated its First Amendment rights by imposing overly restrictive zoning and permitting requirements. The district court granted a preliminary injunction in favor of AOH, halting enforcement. The city appealed the injunction, and AOH cross-appealed.

After the parties filed their briefs, the city revised its ordinances in 2024, addressing most of the concerns raised in the district court's ruling and repealing the challenged provisions. The court found that because the 2023 ordinances were no longer in effect, the preliminary injunction against those ordinances had no ongoing impact; therefore, while the underlying case remained live, the pending interlocutory appeal was moot. The court did not rule on the merits of the underlying First Amendment claim, allowing the case to proceed in district court under the updated ordinances.

Takings: *Porretto v. City of Galveston Park Board of Trustees*, No. 23-40035, 2024 WL 3886181 (5th Cir. Aug. 21, 2024). Sonya Porretto, the owner of a private beach in Galveston, Texas, sued the City of Galveston, the city's park board, and the Texas General Land Office (GLO) alleging an unconstitutional taking of her property without compensation under the Fifth Amendment. Her claims were based on flooding and sand excavation allegedly caused by public drainage projects, which damaged her property. The district court dismissed her claims for lack of standing and jurisdiction.

The Fifth Circuit affirmed the district court in part while also vacating part of its judgment. The court agreed that Porretto lacked standing to sue the GLO and its Commissioner, because her complaint failed to establish a causal connection between their actions and her alleged injuries. However, the court vacated the district court's dismissal of Porretto's claims against Galveston and the park board, holding that the court had federal question jurisdiction as well as supplemental jurisdiction over Porretto's state law claims. Those claims were remanded back to the trial court for further consideration, including whether governmental immunity applies.

Judicial Abuse of Discretion: *Sims v. City of Jasper*, No. 23-40369, 2024 WL 3964352 (5th Cir. Aug. 28, 2024). Frances Sims sued the City of Jasper and several officers under 42 U.S.C. § 1983 after her son, Steven Qualls, died in police custody due to a methamphetamine overdose. Sims claimed the officers were deliberately indifferent to Qualls' serious medical needs,

violating his Fourteenth Amendment rights. The district court granted summary judgment for the city and one officer but allowed claims against three officers to proceed. Sims moved to bifurcate liability and damages at trial, fearing that evidence of Qualls's criminal history and personal issues would prejudice the jury. The district court denied the motion, and the jury found for the defendants.

On appeal, Sims argued that the district court's refusal to bifurcate was an abuse of discretion and prejudiced the liability phase by allowing irrelevant, prejudicial evidence. Applying factors such as judicial convenience, expediency and economy, and the avoidance of prejudice, the Fifth Circuit found no abuse of discretion and affirmed the district court's judgment.

Recent Texas Cases of Interest to Cities

Note: Included cases are from August 1, 2024, through August 31, 2024.

Jurisdiction: *City of Houston v. Meka*, No. 23-0438, 2024 WL 3995735 (Tex. Aug. 30, 2024) (per curiam). This case stems from a personal-injury lawsuit arising out of a motor-vehicle accident involving a City of Houston employee. The city sought dismissal and argued that post-filing diligence in effecting service of process is a jurisdictional requirement that, under Section 311.034 of the Texas Government Code, may be challenged in a plea to the jurisdiction or summary-judgment motion based on governmental immunity.

The Fourteenth Court of Appeals, relying on a Third Court of Appeals opinion, rejected the city's contention and concluded that timely service of process does not implicate subject-matter jurisdiction. The Supreme Court subsequently overturned the Third Court's opinion, clarifying that service that would otherwise be untimely will relate back to a timely-filed original petition if the plaintiff exercised diligence in attempting service from the point that limitations expired until service was achieved.

Accordingly, because the Fourteenth Court of Appeals relied on what it regarded as the state of law at the time, the Supreme Court granted the city's petition for review, vacated the court's judgment, and remanded.

Procurement: *City of Houston v. 4 Families of Hobby*, LLC, No. 01-23-00436-CV, 2024 WL 3658049 (Tex. App.—Houston [1st Dist.] Aug. 6, 2024). The City of Houston issued a request for proposals (RFP) to enter a contract to provide concessions at the city's three airports. At the time the city issued the RFP, Pappas provided concessions at the airports. The city awarded a new contract to Areas, and Pappas sued the city for breach of contract based on the RFP, breach of its existing contract with the city, violation of the Texas Open Meetings Act (TOMA), violation of the equal protection clause under the Texas Constitution, and for a declaratory judgment that the award of the contract to Areas was void. Another company, Four Families, which had also submitted a proposal, later joined the suit as a plaintiff. Pappas claimed the city's

governmental immunity was waived under Chapter 252 and Chapter 271 of the Local Government Code. The city filed a plea to the jurisdiction asserting governmental immunity, which the trial court denied, and the city appealed.

The appellate court affirmed in part and reversed and rendered in part, holding that: (1) because the concessions contract was a revenue contract rather than an expenditure contract, Chapter 252 did not apply; (2) the RFP did not constitute a contract subject to Chapter 271; (3) the city's initial contract with Pappas for airport concessions was a contract subject to Chapter 271, and therefore as to Pappas claim of breach of that contract, the city's immunity was waived; (4) notice under the TOMA was sufficient and therefore the city's action was not voidable under that act; (5) Pappas had presented a facially valid equal protection claim; and (6) declaratory judgment relief was proper based on Pappas's allegations of violations of the equal protection clause. The appellate court remanded the claims for breach of the existing contract, the equal protection claim, and the claim for declaratory judgment back to the trial court for further proceedings.

Tort Claims Act: *City of Houston v. Hernandez*, No. 01-24-00031-CV, 2024 WL 3817374 (Tex. App.—Houston [1st Dist.] Aug. 15, 2024) (mem. op.). Hernandez sued the City of Houston after a police car collided with the trailer attached to the truck he was driving. At the time of the collision, the police car had its sirens activated, and Hernandez had pulled over to the shoulder of the road to allow the police car to pass him. The city filed a motion to dismiss, claiming immunity under the Texas Tort Claims Act (TTCA) and claiming that the emergency exception to the TTCA's waiver of immunity applied. The trial court denied the motion, and the city appealed.

The appellate court affirmed, holding that Hernandez's allegations that the police officer was not responding to an emergency and acted with reckless disregard for the safety of others were sufficient to establish a waiver of the city's immunity and the inapplicability of the emergency exception.

Public Improvement Districts: *River Creek Dev. Corp. & City of Hutto v. Preston Hollow Capital, LLC, et al.*, No. 03-23-00037-CV, 2024 WL 3892448 (Tex. App.—Austin Aug. 22, 2024) (mem. op.). In 2018, the City of Hutto authorized the creation of a public improvement district (PID) and a local government corporation, River Creek Development Corporation (River Creek), to assist with the financing of the improvements. To that end, the city and River Creek entered into several agreements including: (1) a loan agreement and promissory note in which River Creek borrowed $17.4 million from Public Finance Authority (PFA); (2) an interlocal agreement in which the city promised to purchase the public improvements from River Creek through levied assessments paid in installments which would be used to pay off River Creek's promissory note; and (3) a contract with 79 HCD Development to build the public improvements. Rather than the city or River Creek issuing bonds themselves, River Creek entered into an agreement with PFA (a Wisconsin based governmental entity) to issue the bonds, which it later did. Preston Hollow Capital, LLC (Preston Hollow) purchased those bonds and

was to be paid from the River Creek promissory note funds. U.S. Bank National Association was to act as the trustee for the transactions.

In 2021, after concerns arose about whether the city had lawfully entered into the agreements, the city and River Creek filed a lawsuit seeking declaratory relief under the Uniform Declaratory Judgment Act that the related agreements, bonds, and note were void and unenforceable because: (1) the "installment sales contract" provision in the interlocal agreement does not authorize the installment payments to be allowable costs of improvements under the PID Act (Local Government Code Section 372.024); (2) the bonds issued did not comply the PID Act as they had not been issued by an authorized issuer; and (3) promissory notes must be submitted to the attorney general for examination as required by state law. Preston Hollow filed counterclaims and a motion for summary judgment, which the court granted. The city and River Creek then filed this appeal.

The court of appeals affirmed the trial court's judgment holding that: (1) Sections 372.026(f) and 372.023(d) specifically authorize a city to enter into an interlocal agreement that serves as an installment sales agreement in which the city pledges assessments it receives as installment payments to secure a corporation's indebtedness which it issued to finance construction of the public improvements; (2) because the bonds were not issued to fund the city's payment of its costs to purchase the public improvements from River Creek, the requirement in Section 372.024 that the issuer be a political subdivision of this state did not apply; and (3) because the legislature did not expressly provide for a remedy or consequence, failing to obtain attorney general approval under Transportation Code Section 431.071 does not render the agreements, bonds, or promissory note void or unenforceable. ++

Recreational Use: *City of San Antonio v. Nadine Realme*, No. 04-23-00885-CV, 2024 WL 3954217 (Tex. App.—San Antonio Aug. 28, 2024) (mem. op.). The plaintiff participated in a Turkey Trot and tripped over a metal object protruding in the ground and broke her arm. She brought a premises liability claim against the city and the city filed a no evidence summary judgment motion claiming it was immune under the recreational use statute. The trial court denied it and the city appealed. The appellate court affirmed the denial, finding that: (1) the recreational use statute did not expressly include a footrace; (2) a footrace did not include "enjoying nature or the outdoors" under the catchall definition; and (3) a footrace did not fall in the common usage of recreation.

Tort Claims Act: *City of Whitesboro v. Diana Montgomery*, No. 05-23-00979-CV, 2024 WL 3880627 (Tex. App.—Dallas Aug. 20, 2024) (mem. op.). In this interlocutory appeal, the City of Whitesboro challenged the trial court's order denying its plea to the jurisdiction in a premises liability and premises defect suit. Diana Montgomery sued the city after she fell while using restroom facilities at the city's swimming pool. In her suit she claimed the city was grossly negligent when it, among other things, removed slip mats in the restrooms and refinished the floors with an epoxy that contained a gritty, non-slip additive. In addition, Montgomery claimed a pool activity instructor told her lifeguards had been having a "shampoo or soap fight" in the

restroom earlier in the day making the floor slick. The city objected to the testimony as hearsay filing a motion to strike, but the trial court denied the motion. The court of appeals, in reversing the trial court's order, held that no exceptions to the hearsay rule applied to the witness's testimony, including statements made by a party's agent as the witness was an independent contractor, excited utterance, present sense impression, and statements against interest. In addition, Montgomery failed to provide evidence that the city had actual or subjective knowledge that the new epoxy floor presented a serious hazard or that there was a dangerous condition on the restroom floor at the time of her fall.

Elections: ***Lamar "Yaka" Jefferson and Jrmar "JJ" Jefferson v. Adam Bazaldua and Eric Johnson,*** **No. 05-23-00938-CV, 2024 WL 3933886 (Tex. App.—Dallas Aug. 26, 2024) (mem. op.).** In May 2023, the City of Dallas held an election in which the mayor and District 7 councilmember positions were on the ballot. Lamar Jefferson and Jrmar Jefferson filed for a place on the ballot for these positions but were later disqualified for failing to meet the candidate requirements. After Adam Bazaldua and Eric Johnson were elected to the positions, the Jeffersons filed a joint lawsuit to contest the election results under Title 14 of Election Code.

Bazaldua and Johson both filed a plea to the jurisdiction arguing the Jeffersons lacked standing as they were not "candidates" as required in Election Code Section 232.002. The trial court granted both motions and dismissed the cases, and the Jeffersons appealed. Interpreting the legislature's intent, the court of appeals concluded that rather than the broader definition of "candidate" in Title 15 of the Election Code ("a person who knowingly and willingly takes affirmative action for the purpose of gaining nomination or election to public office"), a more limited definition—"a person whose name appears on the ballot for an office on Election day"—was consistent with the purpose of an election contest. Because the Jeffersons did not appear on the ballot, they were not candidates and lacked standing for election contest purposes. For those reasons, the court of appeals affirmed the trial court's judgment.

Board of Adjustment: ***TCHDallas2, LLC v. Espinoza*****, No. 05-22-01278-CV, 2024 WL 3948322 (Tex. App.—Dallas Aug. 27, 2024) (mem. op).** In 2020, the city's building official issued TCHDallas2 (TCH) a certificate of occupancy (CO) for commercial amusement use. Later in 2022, an assistant building official revoked TCH's CO after determining it had been issued in error as TCH, according to its original land use statement, had been operating a gambling establishment in violation of Texas Penal Code Section 47.04. TCH appealed the revocation to the city's Board of Adjustment (BOA), and the BOA subsequently reversed the building official's decision and reinstated TCH's CO. In its decision, the BOA presumed TCH's use of its property was legal as its operations may have fallen within the "safe harbor" provision of Section 47.04(b). Further, TCH had worked with the city attorney and city council for two years to obtain the CO and had not been prosecuted by the district attorney or found by a court to have been operating illegally.

Shortly thereafter, the city appealed the BOA's decision to the trial court. In reversing the BOA's decision, the trial court found that based on evidence presented at trial the BOA had abused its

discretion by reversing the building official's revocation as she was obligated to revoke the CO because TCH had been operating an illegal gambling establishment. TCH appealed, and the court of appeals held that the trial court had impermissibly substituted its own discretion in place of the BOA's. Because the BOA could have reasonably reached more than one decision in the case, the trial court was required to give deference to the BOA's decision. As such, the court reversed the trial court's judgment and affirmed the BOA's reinstatement of TCH's CO.

Property Tax Delinquency; *Bodine v. City of Vernon*, No. 07-24-00089-CV, 2024 WL 3879520 (Tex. App.—Amarillo Aug. 20, 2024) (mem. op.). The city and other governmental entities obtained a judgment to foreclose on a property to recover delinquent ad valorem taxes, naming the record owners, the heirs of the record owners, and other unknown persons who may have a claim of ownership to the property. Bodine filed a petition for a bill of review to vacate the judgment because she was not named as a defendant and had entered into an executory contract to purchase the property from the record owner's brother. The city filed a plea to the jurisdiction, which the trial court granted.

In affirming the plea to the jurisdiction, the appellate court found Bodine did not have standing because there was no evidence of any conveyance, deed, or other instrument transferring title to the property at any point before the sheriff's sale. The appellate court also found: (1) Bodine had no interest in the property so her due process rights were not violated; and (2) Bodine was not entitled to personal service of the suit.

Tort Claims Act: *Wolf v. Mickens*, No. 09-21-00382-CV, 2024 WL 3980616 (Tex. App.—Beaumont Aug. 29, 2024) (mem. op.). Wolf sued Mickens, Verret, and Pierre (employees) in their individual capacities under the Texas Tort Claims Act (TTCA) for ultra vires actions, for fraud and civil conspiracy, and for an unlawful taking of her commercial building after the city ordered it demolished. She alleged that the employees required a bribe of $25,000 in exchange for issuing a permit for Wolf to rehabilitate the building and, when she did not give them the money, ordered the building demolished. The trial court granted the employees' plea to the jurisdiction claiming immunity, and Wolf appealed.

The appellate court affirmed in part and reversed and remanded in part, holding that: (1) since Wolf was suing for monetary damages rather than prospective injunctive relief, her claims were not actionable as ultra vires acts; (2) because the TTCA does not waive liability for intentional torts alleged against employees in their individual capacity, the employees were not immune to Wolf's claims of fraud and civil conspiracy related to the $25,000 bribe; and (3) Wolf's takings claim should have been pursued in a direct appeal from her administrative hearing. The court remanded the claims for fraud and civil conspiracy and dismissed the remaining claims.

Tort Claims Act: *Jefferson Cnty. v. Hadnot*, No. 09-23-00052-CV, 2024 WL 3973070 (Tex. App.—Beaumont Aug. 29, 2024) (mem. op.). Hadnot sued Jefferson County for injuries she received after Nguyen, a sheriff's deputy, rear-ended the vehicle she was driving. The county filed a plea to the jurisdiction, claiming governmental immunity was not waived under the Texas

Tort Claims Act (TTCA) because Nguyen was responding to an emergency at the time of the collision.

The appellate court affirmed in part and reversed and rendered in part, holding that: (1) Hadnot's failure to negate the emergency exception to the TTCA's waiver of immunity in her pleading was a pleading defect, not a jurisdictional defect, and so there was a genuine issue of material fact as to whether the emergency exception applied; and (2) Hadnot had not established the trial court's jurisdiction over the part of her claim alleging that Nguyen had operated her vehicle with reckless disregard for the safety of others because her pleadings did not allege facts supporting that allegation.

Terms of Office: *In re Moreno*, No. 13-24-00404-CV, 2024 WL 3843520 (Tex. App.—Corpus Christi–Edinburg Aug. 16, 2024) (mem. op.). Moreno filed a petition for writ of mandamus to compel the City of Donna to order an election for two council seats that had come up for election after the expiration of their three-year terms. At the same election in which those two seats had been filled, the voters had approved a charter amendment to extend the terms of council members to four years each. The city did not order an election when the three-year terms expired, and Moreno petitioned for mandamus to compel the city to order the election.

The appellate court granted the petition, holding that the language of the charter amendment did not specifically state that the length of terms would change retrospectively, and therefore the presumption that laws are enacted prospectively applied so that the councilmembers elected at that election were elected to the three-year terms applicable at the time of the election.

Mandamus: *In re Starnes*, No. 13-24-00408-CV, 2024 WL 3843483 (Tex. App.—Corpus Christi–Edinburg Aug. 16, 2024) (mem. op.). Starnes filed a petition for writ of mandamus to compel the County Judge of Victoria County to order an election to incorporate the Village of Bloomington as a municipality. The appellate court denied the petition, holding that Starnes had not met his burden to obtain relief.

Utilities: *McAllen Public Utility v. Brand*, No. 13-23-00020-CV, 2024 WL 4001814 (Tex. App.—Corpus Christi–Edinburg Aug. 30, 2024) (mem. op.). McAllen Public Utility (MPU) sued the board of the Hidalgo County Water Improvement District No. 3 (the district) for ultra vires actions after the district changed the rates it charged MPU for delivery of raw water from the Rio Grande. MPU claimed that the district had changed its rates in violation of Section 11.036, Water Code, which requires that a person that supplies conserved or stored water must follow certain rules about prices and terms. MPU also sought a declaration that the district violated S.B. 2185 (2021), legislation that requires the district to post certain information on its internet database. The district board members filed a plea to the jurisdiction and the trial court granted the plea. MPU appealed.

The appellate court affirmed, holding that: (1) Section 11.036 did not apply because water from the Rio Grande is not stored or conserved; and (2) MPU did not have standing to sue the district for violating S.B. 2185.

Tort Claims Act: *City of Houston v. Moore*, No. 14-23-00316-CV, 2024 WL 3616697 (Tex. App.—Houston [14th Dist.] Aug. 1, 2024) (mem. op.). Michael Moore sued the City of Houston for injuries sustained when he tripped over a steel ground plate while working for Southwest Airlines at Hobby Airport, which is owned by the city. The city moved for summary judgment, arguing that Moore failed to provide timely notice of his claim, as required by both the Texas Tort Claims Act (TTCA) and the city charter, thereby preserving the city's governmental immunity. The trial court denied the motion, and the city appealed.

Moore's injury occurred in February 2022, but the city did not receive notice until July 6, 2022, well past the 90-day deadline in the city's charter. The court found that Moore's failure to provide timely notice barred the suit under the TTCA. Moore then contended that the condition that caused his injury was a special defect, potentially waiving the city's immunity; however, the court rejected this argument, finding that a steel ground plate on an airport tarmac did not meet the TTCA's definition of a special defect, which applies to conditions like excavations or obstructions on roadways. Ultimately, the court reversed the trial court's denial of summary judgment and dismissed the case for lack of subject-matter jurisdiction due to Moore's failure to provide timely notice.

Tort Claims Act: *City of Houston v. Sanchez*, No. 14-23-00152-CV, 2024 WL 3713206 (Tex. App.—Houston [14th Dist.] Aug. 8, 2024) (mem. op). Lorraine Sanchez sued the City of Houston for negligence after a city-owned vehicle driven by Lisa Thom, a city fire department employee, rear-ended Sanchez's SUV. The city moved for summary judgment, arguing that governmental immunity barred the claim, because Thom was not acting within the scope of her employment at the time of the accident. The trial court denied the city's motion, and the city appealed.

When a city vehicle is involved in a collision, there is a presumption that the employee was acting in the scope of their employment so the city would be liable under the Texas Tort Claims Act. This presumption can be rebutted with evidence showing the employee was engaged in personal activities. Under the "coming-and-going" rule, the act of commuting to or from work is excluded from an employee's scope of employment. In this case, the city provided an affidavit from Thom stating that she had completed her duties for the day and was commuting home at the time of the collision. This rebuttal successfully shifted the burden to Sanchez to demonstrate that Thom was, in fact, within the scope of her employment, which she was unable to do. The court concluded that the city's governmental immunity was not waived, and the court reversed the trial court's denial of summary judgment, dismissing Sanchez's claims.

Dangerous Dogs: *City of Baytown v. Jovita Lopez*, No. 14-23-00593-CV, 2024 WL 3875941 (Tex. App.—Houston [14th Dist.] Aug. 20, 2024) (mem. op.). Three pitbulls owned by Jovita

Lopez attacked and killed a neighbor's Labrador. The City of Baytown seized the pitbulls and classified them as "dangerous dogs" under its ordinance, ordering them to be euthanized. Lopez appealed to the county court, which affirmed the dangerous dog designation but vacated the euthanasia order while also modifying other conditions applicable to Lopez. The county court lowered the insurance liability requirement applicable to Lopez from $300,000 to $100,000, to bring it in line with Harris County regulations, and limited her financial responsibility to the city for the boarding of the dogs to $2,500. The city appealed, arguing that the county court's orders violated its ordinance. The appellate court agreed, ruling that such deviations were improper as Lopez failed to prove that the city's ordinance was arbitrary or unreasonable. The court of appeals reversed the county court's order and remanded the case, instructing the lower court to enforce the $300,000 insurance requirement per dog and recalculate the boarding fees owed by Lopez in accordance with the city ordinance.

Tort Claims Act: City of Houston v. Rogelio Cervantes Hernandez, 2024 WL 3867828 (Tex. App.—Houston [14th Dist.] Aug. 20, 2024) (mem. op.) Rogelio Cervantes Hernandez sued the City of Houston after a collision with a police officer who was responding to an emergency. Cervantes claimed the officer negligently caused the crash and that the city was negligent in hiring, training, and supervising the officer. The city filed a Rule 91a motion to dismiss, asserting immunity under the Texas Tort Claims Act's (TTCA) emergency and 9-1-1 exceptions. The trial court denied the motion, and the city appealed.

After the city provided evidence that the emergency and 9-1-1 exceptions applied, the burden shifted to Cervantes to plead facts sufficient to overcome these exceptions, which he failed to do. The court also rejected Cervantes's negligent hiring and supervision claims, as they are not covered by the TTCA's waiver of immunity. Ultimately, the court reversed the trial court's denial of the motion to dismiss and rendered judgment dismissing Cervantes's suit with prejudice for lack of jurisdiction.

Tort Claims Act: *City of Houston v. Morris*, No. 14-23-00570-CV, 2024 WL 3980209 (Tex. App.—Houston [14th Dist.] Aug. 29, 2024) (mem. op.). Rachel Morris and Mia Sanders, daughters of Steve Sanders, sued the City of Houston after Sanders was struck and killed by a Houston police officer who was participating in a prostitution sting operation at the time. The officer was driving above the speed limit without activating emergency lights or sirens when Sanders, dressed in black and crossing the street, was hit and killed. The city moved for summary judgment, claiming governmental immunity, asserting that the officer was protected by official immunity, and arguing that the Texas Tort Claims Act's (TTCA) emergency exception applied. The trial court denied the city's motion, and the city appealed.

The court applied the test for official immunity, which protects city employees from suit while they are performing discretionary duties in good faith and within the scope of their authority. The officer testified that he exercised discretion in deciding not to activate lights and sirens to avoid compromising the undercover operation and that he believed his speed was reasonable under the circumstances. The court found this sufficient to show that a reasonably prudent officer could

have believed his actions were justified. The appellees then faced the burden of presenting evidence sufficient to raise a genuine issue of material fact to counter the officer's claim of good faith, which they were unable to do. Because the officer was, therefore, entitled to official immunity, the city retained its governmental immunity under the TTCA, which shields municipalities from liability when their employees are immune from suit. Ultimately, the appellate court reversed the trial court's denial of summary judgment and dismissed the claims for lack of subject matter jurisdiction.

August 2024

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from July 1, 2024, through July 31, 2024.

Civil Rights: ***Verastique v. City of Dallas*****, 106 F.4th 427 (5th Cir. 2024).** Protestors participating in "George Floyd" demonstrations in Dallas filed a Section 1983 action against city, county, and county sheriff's office asserting municipal liability claims in connection with officers' use of force during protest. The district court dismissed the claims, and the protestors appealed.

The court of appeals affirmed, holding that: (1) the protestors failed to plausibly establish a pattern of conduct that would form the basis for their Section 1983 claims; (2) the protestors failed to plausibly plead the city's deliberate indifference to its officers' alleged use of excessive force; and (3) the city's general order permitting officers to conduct arrests as they saw necessary to quell a civil unrest incident was not unconstitutional on its face.

Civil Rights: ***Terrell v. Harris Cnty.,*** **107 F.4th 452, 455 (5th Cir. 2024).** Terrell, a victim of sexual assault by an off-duty county sheriff's deputy who took her home from a bar, brought a Section 1983 action against the deputy, a second deputy who allegedly helped force her into a patrol vehicle, the sheriff, and the county, alleging constitutional violations against the deputies, supervisory liability against the sheriff, and municipal liability against the county. The district court: (1) found that the second deputy was entitled to qualified immunity; (2) dismissed without prejudice claims against second deputy, sheriff, and county for failure to state a claim; and (3) following amendment of the complaint, dismissed such claims with prejudice. Terrell appealed.

The court of appeals affirmed, holding that: (1) the second deputy was entitled to qualified immunity from unreasonable seizure claim; (2) the sheriff was not liable on the supervisory liability claim; and (3) the county was not liable to Terrell based on a failure to adopt adequate training.

Civil Rights: ***Nat'l Fed'n of the Blind of Tex., Inc. v. City of Arlington*****, No. 23-10034, 2024**

WL 3434407 (5th Cir. July 17, 2024). Charities brought a Section 1983 action against the city alleging that an ordinance regulating donation collection boxes was a facially unconstitutional speech restriction under the First Amendment. The ordinance prohibited the placement of a donation box in the city without a permit, regulated the donation boxes' aesthetics and size, and through zoning, limited the placement of donation boxes to three zoning districts and imposed setback requirements. Both parties moved for summary judgment. The district court granted the charities' motion in part and denied it in part, and granted the city's motion in part and denied it in part. The city appealed and the charities cross-appealed.

The court of appeals affirmed in part, and vacated in part, holding that: (1) as a matter of first impression, regulation of donation boxes' placement was content-neutral; (2) regulation on placement of boxes was constitutional; (3) the setback provision was constitutional; and (4) the permitting provisions were not an unconstitutional prior restraint on speech.

Civil Rights: *Springs-Hutchinson v. City of Austin*, No. 23-50471, 2024 WL 3451890 (5th Cir. July 18, 2024). Following their son's death after exchanging gunfire with police officers during the South by Southwest musical festival, the Hutchinsons filed a Section 1983 claim against the officers and the City of Austin, alleging violations of their son's constitutional rights and failures to properly train police officers. The district court dismissed their case at summary judgment, finding that no constitutional violation occurred.

Civil Rights: SO Apartments, L.L.C. v. City of San Antonio, Tex., No. 23-50706, 2024 WL 3506191 (5th Cir. July 23, 2024). Apartment complex owners challenged the city's Proactive Apartment Inspection Program (PAIP) which was enacted to address property owners who were not maintaining their property to minimum building code standards on the grounds that: (1) the PAIP violated the Fourth Amendment because it authorized frequent and "warrantless inspections" of private property; (2) the PAIP's $100 per unit administrative fee violates the Eighth Amendment's prohibition against excessive fines; and (3) the PAIP denied them the procedural and substantive due process protections of the Fourteenth Amendment. The district court denied the owners' request for a preliminary injunction.

On interlocutory appeal, the court of appeals affirmed, finding that: (1) the owners were not likely to succeed on claim that city apartment inspection program for problem properties on its face violated the Fourth Amendment; (2) the owners were not likely to succeed on claim that registration fees for city apartment inspection program for problem properties on its face violated the Eighth Amendment; (3) the owners failed to establish a likelihood of success on either of their procedural due process claims; and (4) the owners failed to show that program registration fee constituted a substantive due process violation.

First Amendment; Employment: *Washington v. Sunflower Cnty., Mississippi*, No. 23-60072, 2024 WL 3510116 (5th Cir. July 23, 2024). County Administrator Washington filed suit against the County Board of Supervisors alleging that he was wrongfully discharged for disclosing a bid-rigging scheme by the county board members to the clerk of the board. The

district court found for the county. The appellate court affirmed finding that Washington's speech was not protected by the First Amendment because he was not speaking as a private citizen on a matter of public concern.

Recent Texas Cases of Interest to Cities

Note: Included cases are from July 1, 2024, through July 31, 2024.

Tort Claims Act: *City of Houston v. Zuniga*, No. 01-23-00853-CV, 2024 WL 3259847 (Tex. App.—Houston [1st Dist.] July 2, 2024) (mem. op.). Zuniga sued the City of Houston for injuries she suffered in a car accident with a city vehicle. The city filed a plea to the jurisdiction and a motion for summary judgment, claiming that because Zuniga had not provided the city with the notice required under the Texas Tort Claims Act, the city's immunity had not been waived. The trial court denied the city's plea and motion, and the city appealed.

The appellate court affirmed, holding that although Zuniga had not provided formal notice, the city had actual notice that Zuniga believed the city was liable for her injuries based on her statements in the police report and crash investigation, despite the report and investigation determining that the city was not at fault.

Tort Claims Act: *City of Houston v. Stoffer*, No. 01-23-00335-CV, 2024 WL 3417137 (Tex. App.—Houston [1st Dist.] July 16, 2024) (mem. op.). Stoffer sued the City of Houston for injuries she suffered in a car accident with a city vehicle driven by Tollet. At the time of the accident, Tollet had been turning into a gas station to refuel the city-owned vehicle on her commute home from work. The city filed a motion for summary judgment, claiming that immunity had not been waived because Tollet was not acting in the course and scope of her employment when she was commuting home from work. The trial court denied the city's motion and the city appealed.

The appellate court affirmed, holding that because Tollet had been refueling the city-owned vehicle, the city had not effectively rebutted the presumption that an employee driving a city-owned vehicle is acting in the course of scope of her employment.

Defamation: *Joiner v. Wiggins*, No. 01-23-00026-CV, 2024 WL 3503065 (Tex. App.—Houston [1st Dist.] July 23, 2024) (mem. op.). Joiner, mayor of the City of Kemah, sued his campaign opponent, Wiggins, for defamation after Wiggins displayed signs reading that Joiner had pleaded guilty to spending public funds for political advertising. Wiggins filed a no-evidence motion for summary judgment and the trial court granted the motion. Joiner appealed.

The appellate court reversed and remanded, holding that Joiner had raised an issue of material fact regarding: (1) whether the statement was false, because it referred to an ethics complaint rather than an actual crime; and (2) whether Wiggins had made the statement with actual malice.

Inverse Condemnation: *City of Kemah v. Crow*, No. 01-23-00417-CV, 2024 WL 3528440 (Tex. App.—Houston [1st Dist.] July 25, 2024) (mem. op.). Crow applied for a city building permit to build a barndominium and two cottages on her land for use as short-term rentals and as a residence for herself. The city issued the permit but then took a series of actions afterward to halt and delay construction, including requiring her to submit a drainage plan. Crow sued the city, claiming inverse condemnation because the city had made it impossible for her to use and enjoy her land. The city filed a plea to the jurisdiction, claiming the trial court had no jurisdiction because the city had not made a final determination denying Crow's drainage plan. The trial court denied the plea and the city appealed.

The appellate court affirmed, holding that: (1) Crow's pleading was sufficient to establish a facially valid takings claim because the pleading asserted that the city had issued a permit and then took a series of actions to prevent her from developing her property; and (2) Crow was not required to plead that the city had made a final determination with regard to the drainage plan.

Tort Claims Act: *City of Houston v. Rios*, No. 01-23-00794-CV, 2024 WL 3571649 (Tex. App.—Houston [1st Dist.] July 30, 2024) (mem. op.). Rios sued the City of Houston for injuries she suffered after her vehicle was hit by a city-owned vehicle driven by George, who was on her way to a work site at the time of the accident. The city filed a motion for summary judgment claiming governmental immunity which the trial court denied. The city appealed.

The appellate court affirmed, holding that the Texas Tort Claims Act's waiver of immunity for negligent operation of a motor vehicle applied because the city had not offered evidence to rebut the presumption that George was acting in the course and scope of her employment when driving the city vehicle to a city work site.

Habeas Corpus: *Kleinman v. State*, No. 03-23-00708-CR, 2024 WL 3355046 (Tex. App.—Austin July 10, 2024). In late 2021, Cedar Park code compliance officers learned Michael Kleinman and AusPro Enterprises, L.P. were operating a head shop in violation of the city's zoning ordinances. After a warning, Kleinman and AusPro failed to come into compliance with the city's codes, and as a result were issued 15 citations over several months. The violations were Class C misdemeanors and were punishable by fines only. Kleinman and AusPro were found guilty of the violations in municipal court but later appealed. During this time, they also filed a pretrial application for writ of habeas corpus challenging the city's zoning ordinance as unconstitutionally vague on its face and additionally alleging their prosecution was unconstitutionally selective and in violation of their rights to equal protection. Although the trial court determined Kleinman and AusPro were restrained in their liberty, the court denied their application for writ of habeas corpus.

In affirming the lower court's order, the court of appeals concluded that Texas habeas relief could not be extended to applicants who have been charged with fine-only offenses and are not

in custody or have not been released from custody on bond. As a such, Kleinman and AusPro failed to satisfy the restraint requirement for habeas relief.

Procedure: *Kleinman v. State*, No. 03-23-00665-CR, 2024 WL 3355069 (Tex. App.—Austin July 10, 2024). This case stems from the same shop in which Kleinman was cited multiple times by code compliance officers for violating various Cedar Park ordinances and a provision in the Texas Health and Safety Code. In 2023, Kleinman was found guilty of those violations in municipal court but appealed his convictions to the trial court. As part of the process, Kleinman filed the required appeal bonds but did not personally sign them, instead granting his attorney a limited power of attorney to do so. Because Kleinman did not personally sign them as required by Tex. Code of Criminal Procedure Art. 17.08(4), the municipal court denied the bonds. The State then filed an application for a writ of procedendo arguing the trial court lacked jurisdiction because Kleinman's appeal bonds were insufficient to perfect the appeals and that the court should remand them to the municipal court for enforcement of the final judgments. The trial court granted the State's application, and Kleinman appealed.

Evaluating Articles 44.14 and 45.0426 of the Code of Criminal Procedure and citing to a sister court's decision, the Court of Appeals concluded that a court in which an appeal is taken cannot dismiss a defendant's appeal for lack of jurisdiction for a deficient appeal bond without first providing the defendant notice and an opportunity to cure by filing a new amended bond. Because the trial court did not provide Kleinman this notice or opportunity to cure, the court of appeals reversed the trial court's order and remanded the case for further proceedings.

Tort Claims Act: *City of Dallas v. Perez,* No. 05-23-00376-CV, 2024 WL 3593740 (Tex. App.—Dallas July 31, 2024) (mem. op.). Brandie Perez, individually and as next friend of her minor children, A.P., G.P., and S.P., sued the city of Dallas for damages suffered due to a vehicle collision caused by Officer Jose Gamez while in pursuit of a fleeing suspect. The city filed a plea to the jurisdiction based on official immunity and claimed the officer's actions satisfied the emergency exception under the Tort Claims Act. After a hearing, the trial court denied the plea, and the city appealed. The court of appeals held that the city met its burden in establishing Officer Gamez was entitled to official immunity because: (1) he was performing a discretionary function as a matter of law when he was engaged in a suspect pursuit to conduct a traffic stop; (2) a reasonably prudent officer under the same or similar circumstances could have believed Officer Gamez's actions were justified; (3) no genuine issue of material fact was raised as to whether Officer Gamez acted in good faith; and (4) he acted within the scope of his authority. Without addressing the city's remaining issue on the emergency exception, the court of appeals reversed the trial court's order and rendered judgment in favor of the city.

Takings: *City of Buda v. N. M. Edificios, LLC*, No. 07-23-00427-CV, 2024 WL 3282100 (Tex. App. July 2, 2024) (mem. op.). The city entered into a drainage easement agreement with a developer where the city was to "construct, operate, maintain, replace, upgrade, and repair" drainage improvements that convey surface water from the subject property and other nearby properties. The developer then sold the property to another developer. The second developer

submitted updated plans for the property and the city instructed the developer to provide for additional drainage improvements before the application could proceed. The developer sued the city based on either an investment-backed or regulatory taking. The city filed a plea to the jurisdiction.

On appeal, the appellate court: (1) found the developer's claims were ripe; (2) rejected the city's arguments that the claim was really a contract dispute and not a taking; (3) rejected the city's challenges to the takings claims based on investment-backed expectations because regulatory takings claims may involve decisions by a governmental authority that do not directly implicate a regulation; and (4) found the statute of limitations for a takings claim is ten years so the claims could proceed.

Tort Claims Act: *City of Stinnett v. Price*, No. 07-24-00095-CV, 2024 WL 3588589 (Tex. App. July 30, 2024) (mem. op.). The plaintiff sued the city for injuries she sustained when she was exiting city hall, ran into a glass panel abutting the glass door, and the glass panel shattered. The trial court denied the city's plea to the jurisdiction and the city appealed. On appeal, the court found that the evidence was conclusive that the danger posed by the glass panels bracketing the door was so open and obvious that it should be known and appreciated by the plaintiff. Therefore, because the plaintiff could not prove that she did not know of the condition (it was open and obvious), she could not establish a waiver of the city's immunity. The appellate court reversed the trial court and granted the city's plea.

Dangerous Dogs: *Jaramillo v. City of Odessa Animal Control*, No. 11-23-00117-CV, 2024 WL 3362927 (Tex. App.—Eastland July 11, 2024) (mem. op.). In 2022, City of Odessa animal control officers took custody of Allie Jaramillo's dogs after they attacked several teenage minors. The city subsequently requested a hearing in municipal court for a determination of the dogs' dangerousness. At the hearing, the court ordered Jaramillo to comply with the dangerous dog requirements under Texas Health and Safety Code Section 822.042 before the dogs could be returned to her. After more than 30 days, the municipal court held a second hearing and determined that Jaramillo had failed to comply with the applicable requirements and ordered the dogs to be euthanized pursuant to Section 822.042(e). Jaramillo appealed to the county court at law, but the court affirmed the municipal court's findings. Jaramillo further appealed arguing, among other things, that: (1) the municipal court lacked subject-matter jurisdiction to hear and decide the case; (2) her constitutional right to due process was violated where city animal control officers did not inform her that her dogs were considered dangerous dogs under Section 822.042(g)(3) and she did not receive notice of the hearing to determine whether her dogs would be euthanized; and (3) the municipal court erred in determining all of the dogs were dangerous under Section 822.041 because only one of the dogs was alleged to have bitten the minor-victims.

The court of appeals, overruling all of Jaramillo's issues, first pointed out that a municipal court's authority over the matter could be found in Section 822.042(c) and (g)(2). Second, the court noted that Section 822.042(g) only requires that the owner be notified in one of the three

ways, and Jaramillo learned she was the owner of a dangerous dog when she learned of the attack and signed owner-surrender forms applicable to when dogs make unprovoked attacks. Therefore, Jaramillo's due process rights were not violated as the record also indicated she had in fact received notice of the hearings. Lastly, the court of appeals held that neither the municipal court nor the county court at law had erred in determining Jaramillo's were dangerous under the applicable statute because the minor-victims were attacked and reasonably believed they would suffer harm or bodily injury from all the dogs.

Immunity*: **Bellamy v. Allegiance Benefit Plan Mgmt., Inc.*, No. 11-23-00105-CV, 2024 WL 3528535 (Tex. App.—Eastland July 25, 2024).** Amanda Bellamy sued the city of Midland and Allegiance Benefit Plan Management Inc., the city's "plan supervisor," after her initial medical claim and subsequent appeals for coverage under the city's self-funded insurance plan were denied. Both the city and Allegiance filed a plea to the jurisdiction based on governmental immunity, and in its initial order, the trial court granted the city's plea but denied Allegiance's plea. After filing a motion for reconsideration, Allegiance's plea was granted, and Bellamy appealed. Bellamy argued, among other things, that: (1) because Allegiance did not submit its motion for reconsideration within 30 days of the trial court's initial denial, the trial court abused its discretion by reconsidering and later granting Allegiance's plea; and (2) because Allegiance was not the city's "plan administrator" it was not entitled to governmental immunity.

The court of appeals affirmed the trial court holding that state law contains no such requirement that a motion for reconsideration be filed within 30 days of a trial court signing an interlocutory order. It further held that the trial court did not abuse its discretion by reconsidering its interlocutory order denying Allegiance's plea to the jurisdiction as it retained the plenary power to do so until the judgment became final. The court also concluded that the record sufficiently showed Allegiance served as a third-party administrator of the city's plan entitling it to derivative governmental immunity.

Contracts: *City of Pharr v. Garcia*, No. 13-23-00120-CV, 2024 WL 3370666 (Tex. App.—Corpus Christi–Edinburg July 11, 2024) (mem. op.). Garcia sued the City of Pharr for breach of written and oral contracts, alleging the city had failed to pay for services rendered by Garcia in association with a Toby Keith concert. The city filed a plea to the jurisdiction, claiming that concerts are a governmental function rather than proprietary, and that Garcia's claims did not fall under Chapter 271's waiver of immunity for contract claims because the claims relied in part on alleged oral contracts. The trial court denied the plea and the city appealed.

The appellate court reversed, holding that: (1) concerts are a governmental function for the purposes of Garcia's claims against the city; and (2) because an oral contract is not included in the definition of contract under Chapter 271, there was no applicable waiver of the city's governmental immunity.

Employment: *City of Houston v. Leslie G. Wills*, No. 14-23-00178-CV, 2024 WL 3342439 (Tex. App.—Houston [14th Dist.] July 9, 2024) (mem. op.). Leslie Wills was an expert

horsewoman and sergeant in the Houston Police Department (HPD) Mounted Patrol for more than a decade, where she was in charge of a number of managerial decisions concerning the training and treatment of horses within the HPD. When Lieutenant Dean Thomas was appointed as the new mounted patrol commander, he made policy changes affecting several areas of Wills's managerial oversight. Wills complained to the chief of police alleging that Thomas subjected her to a hostile work environment and gender bias. HPD reassigned Thomas and later transferred Wills to downtown patrol, which she claimed was retaliatory and amounted to constructive discharge. After having her grievances dismissed by the city, Wills resigned her position with the HPD and filed suit, and the City of Houston filed a plea to the jurisdiction. The trial court denied the city's plea, and the city appealed.

The appellate court held that Wills did not provide *prima facie* evidence of an adverse employment action necessary for her discrimination and retaliation claims. The actions she identified, including reassignment of duties, transfer out of mounted patrol, and constructive discharge, were not supported by evidence sufficient to show they were adverse employment actions under the applicable legal standards. Additionally, even if adverse employment actions had occurred, the city provided legitimate, nondiscriminatory reasons for its actions, which Wills failed to prove were pretextual. Ultimately, the appellate court reversed the trial court's denial of the city's plea to the jurisdiction and rendered judgment dismissing Wills' suit for lack of subject-matter jurisdiction.

Immunity: *Dahl v. Vill. of Surfside Beach*, No. 14-23-00218-CV, 2024 WL 3447472 (Tex. App.—Houston [14th Dist.] July 18, 2024) (mem. op.). Todd Dahl, Ted Dahl, and Tina Dahl sued the Village of Surfside Beach after being required to pay $4,000 for a water connection to a house they were constructing, which they claimed violated the city's ordinance mandating the city to cover costs for the first 100 feet of waterline extensions. After paying the money under protest, the Dahls sought reimbursement and a declaratory judgment, and the city asserted governmental immunity. The trial court dismissed the Dahls' claims with prejudice for lack of jurisdiction, and the Dahls appealed.

On appeal, the Dahls argued that the Texas Tort Claims Act (TTCA) waives the city's governmental immunity for claims related to water and sewer services and that the Uniform Declaratory Judgment Act (UDJA) likewise waives immunity from a suit to declare rights under a municipal ordinance. Unfortunately for the Dahls, the appellate court disagreed. The TTCA waives immunity only for tort claims involving property damage, personal injury, or death, none of which were claimed by the Dahls. Likewise, the UDJA waives immunity for actions that challenge the validity of an ordinance rather than its application. In this case, the Dahls challenged the city's application of the ordinance; therefore, the city's immunity was not waived. Ultimately, the appellate court determined that while the trial court correctly dismissed the claims, the Dahls should be given the opportunity to amend their pleadings. The trial court's order dismissing the case was reversed, and the case was remanded for further proceedings to allow such amendments.

Tort Claims Act; Economic Development: *Hitchcock Industrial Development Corporation v. Cressman Tubular Products Corporation*, No. 14-23-00254-CV, 2024 WL 3447475 (Tex. App.—Houston [14th Dist.] July 18, 2024). The City of Hitchcock sued Cressman Tubular Products Corporation ("Cressman") for breach of an economic development agreement, unjust enrichment, and fraud. Cressman filed third-party claims against Hitchcock Industrial Development Corporation (the "EDC"), a Type A economic development corporation, for breach of the development agreement, negligent misrepresentation, and fraud. The EDC filed a plea to the jurisdiction, asserting governmental immunity under Texas Local Government Code § 504.107(b). The trial court denied the plea, and the EDC appealed. While the EDC, as a Type A economic development corporation, is a governmental unit for purposes of the Texas Tort Claims Act and therefore qualifies for interlocutory appeal, economic development corporations do not enjoy governmental immunity from tort claims. The enabling legislation for economic development corporations does not confer immunity; rather, it imports the Texas Tort Claims Act's limitations on liability and damages. Ultimately, the appellate court affirmed the trial court's denial of the EDC's plea to the jurisdiction, holding that Type A economic development corporations do not have governmental immunity from tort claims under the current statutory framework. Note that this opinion extends a holding the Texas Supreme Court made regarding Type B EDCs to Type A EDCs. *See Rosenberg Development Corporation v. Imperial Performing Arts, Inc.*, 571 S.W.3d 738 (Tex. 2019).

Tort Claims Act: *City of Missouri City v. Hampton*, No. 14-23-00111-CV, 2024 WL 3507415 (Tex. App.—Houston [14th Dist.] July 23, 2024) (mem. op.). Allanias and Damita Hampton sued Missouri City for injuries their daughter Alaina sustained when she collided with a metal fence post while playing in a city park. They alleged negligence and premises liability claims under the Texas Torts Claims Act. Missouri City argued governmental immunity and filed a plea to the jurisdiction, which the trial court denied, prompting the city to appeal.

The appellate court focused much of its analysis on whether Alaina was an invitee, licensee, or trespasser in the city park, because a higher duty is owed by a landowner to an invitee than to either a licensee or trespasser. The Hamptons argued that Alaina should be considered an invitee. The court indicated that Alaina could be considered an invitee if: (1) she had paid for entry to the facility, or (2) the defect to the fence post was considered a legal "special defect." Alaina had not paid for entry to the facility, and based on its location, the fence post could not be considered a special defect; therefore, as a matter of law, the court held that she was a licensee and not an invitee. If the Hamptons could establish that the city had actual knowledge of the dangerous condition, the city still could have been liable for the damages, even though Alaina was a licensee; however, they were unable to make the required showing. Therefore, the appellate court reversed the trial court's order and dismissed the case for lack of subject matter jurisdiction.

July 2024

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from June 1, 2024, through June 30, 2024.

Civil Rights: *Cope v. Coleman Cnty.*, No. 23-10414, 2024 WL 3177781 (5th Cir. June 26, 2024). Cope sued Coleman County and three jail guards under 42 U.S.C. § 1983 after her son, Monroe, committed suicide using a telephone cord while confined in the county jail. The trial court found that the guards were entitled to qualified immunity, and Cope's claim proceeded against the county. The county filed a motion for summary judgment, arguing that because the guards were entitled to qualified immunity, the county was not liable for their actions.

The appellate court affirmed in part and vacated and remanded in part, holding that: (1) Cope had raised a genuine dispute of material fact as to whether the conditions of Monroe's confinement violated Monroe's civil rights and caused his death; and (2) because the guards were entitled to qualified immunity, the county was not liable for their actions.

Civil Rights: *Hall v. Trochessett*, 105 F.4th 335 (5th Cir. 2024). Trochessett, a police officer for the City of League City, filed criminal charges against Hall after Hall advised Hall's wife over the telephone not to provide Trochessett with her driver's license and insurance information during Trochessett's investigation of a car wreck. Hall was arrested for interference with a police investigation, and his charges were subsequently dropped. Hall sued Trochessett and the City of League City under 42 U.S.C. §1983, alleging Trochessett had arrested him without probable cause. The trial court granted Trochessett's and the city's motion to dismiss for failure to state a claim, and Hall appealed.

The appellate court affirmed, holding that Trochessett had qualified immunity and that because Hall's civil rights had not been violated, there was no municipal liability.

Recent Texas Cases of Interest to Cities

Note: Included cases are from June 1, 2024, through June 30, 2024.

Collective Bargaining; Gifts: *Borgelt v. Austin Firefighters Ass'n, IAFF Local 975*, No. 22-1149, 2024 WL 3210046 (Tex. June 28, 2024). Taxpayers brought action against the firefighters' union and the City of Austin, asserting claims including that a provision of the collective bargaining agreement between the city and the union which provided a shared bank of paid leave for city firefighters to use for union activities, subject to contractual requirements and restrictions on its use, violated the Texas Constitution's Gift Clauses. The state intervened in support of the taxpayers' challenge. The trial court: (1) granted the union's motion to dismiss;

(2) granted the union's motion for attorney fees and sanctions under the Texas Citizens Participation Act (TCPA); (3) granted partial summary judgment to the city and the union; and (4) after a bench trial, entered judgement in favor of the city and the union. The taxpayers and the state appealed. The Austin Court of appeals affirmed. The Supreme Court granted petition for review.

The Supreme Court affirmed the appellate court's order finding that the agreement did not violate the gift clauses, but reversed the order of dismissal and its award of sanctions and fees against the taxpayers.

Contracts: *Edland v. Town of Cross Roads*, No. 02-23-00416-CV, 2024 WL 2854878 (Tex. App.—Fort Worth June 6, 2024) (mem. op.). James Edland was the former police chief of the Northeast Police Department (NEPD), which was created by agreement between Town of Cross Roads and the City of Krugerville. After NEPD was dissolved, Edland became police chief of Krugerville and sued the town for breach of contract, alleging that he was entitled to severance pay. The contract was signed by Edland and Mike Starr as the chair of the NEPD Commission; it was not signed by either the town or the city. Cross Roads filed a plea to the jurisdiction and a motion for summary judgement. Edland filed a motion for partial summary judgement. The trial court denied Edland's motion and granted the town's motion.

The court of appeals affirmed, finding that Starr did not have the authority to bind Cross Roads and Cross Roads did not, by written resolution or ordinance adopted by its council, agree to the obligations set out in the contract.

Permits; Ordinances: *Maciejack v. City of Oak Point,* No. 02-23-00248-CV, 2024 WL 3195851 (Tex. App.—Fort Worth June 27, 2024) (mem. op.). This case stems from a dispute between the Maciejacks and the City of Oak Point, and Winston Services, Inc. over permits that the Maciejacks had sought from the city to build a fence and pool on their property. The Maciejacks sued the city and Winston Services, and the city countersued for remedies related to alleged violations of city ordinances. After a bench trial, the trial court entered judgment for the city and Winston Services, and awarded the city trial and conditional attorney's fees. On appeal, the Maciejacks raise five issues related to findings on their equitable-estoppel affirmative defense, findings that they had received proper notice of ordinance violations, and the attorney's-fees award.

The appellate court reversed and remanded the award of conditional attorney's fees. The court affirmed the rest of the trial court's judgement, finding that equitable estoppel was inapplicable to the city.

Jurisdiction: *Lost Pines Groundwater Conservation Dist., et. al., v. Lower Colorado River Auth*., No. 03-23-00303-CV, 2024 WL 3207472 (Tex. App.—Austin June 28, 2024) (mem. op.). In 2018, the Lower Colorado River Authority (LCRA) applied for operating and transport permits from the Lost Pines Groundwater Conservation District (LPGCD). After a State Office

of Administrative Hearings (SOAH) contested case hearing, LPGCD approved LCRA's permits with modifications in November 2021. Later that month, LCRA filed a motion for rehearing, and in May 2022, LPGCD issued an order adopting its final decision. LCRA then filed a second motion for rehearing, and while the motion was pending with LPGCD, also filed suit in district court. In response, LPGCD filed a plea to the jurisdiction based on governmental immunity, but the trial court denied the motion. At issue in this interlocutory appeal was whether LCRA timely filed its petition for judicial review within the deadline under Water Code Section 36.251 as the trial court's jurisdiction is only invoked if LCRA files its petition after all administrative appeals to LPGCD are final and if it files within 60 days after the date on which LPGCD's decision becomes final. LPGCD's decision becomes final when a motion for rehearing is denied or it is overruled by operation of law. LCRA, LPGCD, and intervenors (including the city of Elgin), disagreed on when LPGCD's order became final, and which statutory timeframe (either 91 days under Water Code Section 366.412(e) or 55 days under Sections 2001.144 and 2001.146(c) of the Administrative Procedure Act (APA) and Section 36.416(a) of the Water Code) applies when a decision is considered final by operation of law.

The court of appeals held that the 55-day deadline in Section 2001.146(c) applied because LPGCD had contracted with SOAH to conduct the contested case hearing, subjecting it to the APA provisions. Because LPGCD's November 2021 decision became final by operation of law under the 55-day deadline in January 2022 and LCRA did not file its lawsuit within 60 days of that date, it failed to comply with the statutory prerequisites for seeking judicial review. As such, the court of appeals reversed the lower court's order and dismissed LCRA's suit for lack of jurisdiction.

Jurisdiction: ***City of Castle Hills v. Robinson*****, No. 04-22-00551-CV, 2024 WL 819619 (Tex. App.—San Antonio Feb. 28, 2024) (mem. op.).** The appellate court previously issued a ruling in February 2024 but withdrew the ruling and substituted this one.

The city filed maintenance liens against the Robinson's property before she obtained ownership and eventually sued along with other taxing entities filed suit against Robinson to recover delinquent property taxes. Robinson counter-claimed against the city, claiming the city had failed to notify her and the previous owners of the code violations and maintenance liens and that her constitutional rights were violated by the failure to provide proper notice. The city filed a motion for summary judgment on the grounds that the trial court lacked jurisdiction over the counterclaims as well as non-jurisdictional grounds, which the trial court denied.

Affirming the denial of the city's motion, the appellate court interpreted the summary judgment motion on jurisdiction as a plea to the jurisdiction and addressed only those arguments. The court dismissed some of the city's arguments because the plaintiff did not make claims against which the city argued. The court determined the injunctive claims could proceed and that the city's statute of limitations argument failed because the evidence did not establish when Robinson's claims accrued.

On the federal constitutional claims, the court determined that the city did not support its argument that Robinson could not establish the claims as a matter of law with any citations to evidence in the record. As for the statute of limitations argument, the court determined that since the pleadings only contained federal claims, the statute of limitations was not a jurisdictional requirement.

Tort Claims Act; Declaratory Judgment: *City of Cibolo v. LeGros*, No. 08-23-00291-CV, 2024 WL 3012508 (Tex. App.—El Paso June 14, 2024) (mem. op.). Deborah LeGros, a property owner, sued the City of Cibolo, alleging unlawful replatting of a subdivision and failure to enforce land-use restrictions. LeGros claimed that the city's replatting action removed covenants and restrictions, allowing her neighbors to maintain their property contrary to the original restrictions, resulting in potential health and safety hazards. She sought declaratory relief under the Texas Tort Claims Act (TTCA) and the Uniform Declaratory Judgment Act (UDJA). The city filed a plea to the jurisdiction asserting governmental immunity from the suit, which the trial court denied. The city appealed. Cities are generally immune from lawsuit unless the city's governmental immunity has been specifically waived by statute. Neither the TTCA nor the UDJA contain waivers of governmental immunity applicable to the instant case; therefore, neither waived the city's immunity. Ultimately, the appellate court reversed the trial court's order and rendered judgment for the city, dismissing LeGros' claims for lack of jurisdiction.

Tort Claims Act: *City of San Antonio v. Garcia*, No. 08-23-00329-CV, 2024 WL 3066051 (Tex. App.—El Paso June 20, 2024) (mem. op.). Joel Garcia, individually and as next friend of his minor son J.G., sued the City of San Antonio, alleging that Police Officer Kevin Wilkinson negligently caused a vehicular collision. The collision occurred while Wilkinson was responding to a 9-1-1 call with his lights and sirens activated. The city filed traditional and no-evidence motions for summary judgment, asserting governmental immunity based on Wilkinson's official immunity and the emergency response and 9-1-1 exceptions under the Texas Tort Claims Act. The trial court denied the motions, and the city appealed. Because Garcia failed to provide evidence raising an issue of fact challenging the application of the emergency or the 9-1-1 exceptions, the appellate court held that the city was entitled to summary judgment. The appellate court reversed the trial court's order and rendered judgment in favor of the city.

Contracts: *City of San Antonio v. Spectrum Gulf Coast, LLC*, No. 13-23-00342-CV, 2024 WL 3199166 (Tex. App.—Corpus Christi–Edinburg June 27, 2024) (mem. op.). Spectrum sued the City of San Antonio's utility, CPS Energy, for breach of a 2005 contract that governed the fees Spectrum paid to CPS Energy for the use of its utility poles. Section 54.204(c), Utilities Code, was enacted in the intervening years while the contract was in force. That statute prohibited a city from charging any utility company a higher price than any other company. Spectrum contended that because CPS Energy charged AT&T a lower fee for the use of its utility poles, it had breached the contract provision requiring compliance with all applicable laws. The trial court granted partial summary judgment in favor of Spectrum, and CPS Energy appealed.

The appellate court reversed and remanded, holding that by the contract's language, the contract had continued in effect rather than renewing from year to year. Therefore, the applicable statutes were the ones in effect at the time the contract was initially executed, and the constitutional prohibition on statutory impairment of contract operated to prevent the intervening passage of Section 54.204(c), Utilities Code, from affecting the contract's terms.

Tort Claims Act: *City of Houston v. Boodoosingh*, No. 14-23-00220-CV, 2024 WL 3188617 (Tex. App.—Houston [14th Dist.] June 27, 2024). Delisa Boodoosingh sued the City of Houston after a fire truck, driven by city employee Kevin Goodie, collided with her stopped vehicle. She alleged the crash resulted from Goodie's failure to maintain the vehicle's speed and direction, causing her personal injuries and property damage. Boodoosingh claimed the city had actual or constructive notice of her claims. The city filed a Rule 91a motion to dismiss, asserting lack of required notice under the Texas Tort Claims Act and invoking the "emergency exception" to maintain governmental immunity. The trial court denied the city's motion to dismiss, and the city appealed. Unlike a plea to the jurisdiction, Rule 91a motions to dismiss must be decided based solely on the face of the pleadings and not on the weight of evidence. Because Boodoosingh's pleadings asserted that proper notice had been given, and application of the "emergency exception" would require evidentiary rulings inappropriate to Rule 91a motion analysis, the appellate court affirmed the trial court's order denying the city's motion to dismiss.

June 2024

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from May 1, 2024, through May 31, 2024.

Procedure: *Greenwald v. Murrill*, No. 23-30429, 2024 WL 1929012 (5th Cir. May 2, 2024). This case stems from the repeated arrests of Kendra Greenwald for failing to comply with Louisiana's Sex Offender Registration and Notification Act (SORNA). After serving her sentence for the initial convictions, she was subsequently arrested for violating SORNA again. During these proceedings, she argued that she had mental disabilities that prevented her from complying with SORNA, and after multiple hearings was declared to be an "unrestorable incompetent." Following this determination, she was subsequently arrested for failing to register under SORNA. Greenwald then filed a lawsuit against city officials and state officials for violating her procedural and substantive due process rights and alleged she was subjected to cruel and unusual punishment in violation of the Eighth Amendment. The district court ultimately dismissed all claims except for Greenwald's substantive due process claim against the state officials and granted Greenwald's leave to amend her complaint. Greenwald then filed her amended complaint, and the state appealed. The state's appeal challenged the district court's decision to deny their motion to dismiss the substantive due process claim as pleaded in Greenwald's *original complaint*. Because Greenwald's original complaint was superseded by an amended complaint and she had not specifically incorporated the original complaint (thereby

rendering the original complaint a legal nullity), the Fifth Circuit concluded that it lacked jurisdiction to hear the state's appeal.

Immunity: *Med Care Emergency Med. Services, Inc. v. Flores*, No. 23-40340, 2024 WL 2271841 (5th Cir. May 20, 2024). In 2021, the City of Pharr passed resolutions involving the purchase of emergency medical assets and later passed an ordinance declaring the city's ambulance services the sole provider for the city. In response, Med Care Emergency Medical Services (Med Care), sued the city, its mayor, and its commissioners for, among other things, violations of the Fifth and Fourteenth amendments. As to the individual city officials, Med Care's complaint alleged they voted for resolutions and held discussions in closed session. The city officials filed a motion to dismiss based on qualified immunity and absolute legislative immunity. The district court effectively denied the motion to dismiss based on *qualified immunity* when it both orally denied the motion "without prejudice" and claimed to "not rul[e] on [the] qualified immunity [claim]." Challenging the denial of its motion to dismiss based on *qualified immunity*, the mayor and commissioners appealed.

In its decision, the Fifth Circuit determined that Med Care's complaint only referenced two acts by the mayor and commissioners, both of which were not discretionary, executive functions protected by qualified immunity. Instead, participating in executive session discussions about the resolutions and ordinance and voting on these measures were legislative functions. Noting that although the officials are likely entitled to *official immunity*, because the city officials' appeal was limited to challenging the denial of its motion to dismiss based on qualified immunity, the Fifth Circuit affirmed the lower court's order.

First Amendment/Employment: *Bevill v. Wheeler*, No. 23-40321, 2024 WL 2762493 (5th Cir. May 30, 2024). In 2017, Terry Bevill, a police captain with the City of Quitman was terminated after he signed an affidavit supporting a motion to transfer in a criminal case involving his friend and former colleague. Bevill claimed the district attorney (DA), judge, and sheriff had a close relationship that would interfere with his friend's ability to receive a fair trial. Because the substance of the affidavit violated the city's police department policies, the mayor, David Dobbs, terminated Bevill. Bevil then sued the city, Mayor Dobbs, among other local officials (DA, judge, and sheriff) under 42 U.S.C. §§ 1983 and 1985(2) alleging that the mayor retaliated against him for exercising his First Amendment rights and along with the other local officials conspired to commit First Amendment retaliation against him. In a second interlocutory appeal, the mayor and local officials challenged the district court's ruling denying their motion for summary judgment asserting that: (1) there was insufficient evidence of a conspiracy between them (mayor, DA, sheriff, and judge) to terminate Bevill in retaliation for his affidavit; and (2) qualified immunity shielded the officials from Bevill's claims. The mayor additionally claimed qualified immunity for the first time at this stage.

The Fifth Circuit, in affirming the district court's ruling, clarified that at the summary judgment stage, it lacked interlocutory jurisdiction to consider a sufficiency-of-the-evidence argument (here, challenging the determination that the officials conspired to terminate Bevill's

employment). Instead, courts of appeals are limited in considering only whether a particular course of action would be objectively unreasonable in light of clearly established law. In addition, because Bevill met his summary judgment burden for establishing his First Amendment retaliatory-discharge claim where: (1) he suffered an adverse employment decision; (2) even though statements in his affidavit were for the benefit of his friend and colleague, Bevill spoke as a citizen on a matter of public concern; (3) Bevill's protected speech related to potential governmental misconduct, specifically the criminal justice system, which outweighed the city's interest in the efficient provision of public services; (4) his protected speech motivated the adverse employment action; and (5) the officials had "fair warning" that terminating Bevill for his affidavit alleging official misconduct in a judicial proceeding would violate his First Amendment rights. Therefore, the officials were not entitled to qualified immunity.

Recent Texas Cases of Interest to Cities

Note: Included cases are from May 1, 2024, through May 31, 2024.

Whistleblower: *City of Denton v. Grim*, No. 22-1023, 2024 WL 1945118 (Tex. May 3, 2024). Former city employees filed suit against the city under the Whistleblower Act (Act), based on allegations that they were terminated for having reported violations of law by a city council member who leaked confidential vendor information to a local newspaper reporter in the context of a story about a controversial plan for the construction of new power plant. The trial court denied the city's motions, and the Dallas Court of Appeals affirmed.

The Texas Supreme Court reversed, finding: (1) alleged violations by the city council member, who was not a public employee, of the Public Information Act and the Open Meetings Act, could not be imputed to city, and thus, the council member's violations of law were not violations of law by the city, as an employing governmental entity, within the meaning of the Act; (2) the council member was not acting as an agent for city when she allegedly violated the law, and thus, council member's violations of law were not violations of law by the city, as an employing governmental entity; (3) whether a government official who had no authority to act on behalf of the government entity was acting in his or her individual or official capacity at the time of the violation of law had no bearing on the issue of whether the official's violation of law constituted a violation of law by employing government entity, within the meaning of the Act, and (4) the goal of the Act to encourage public employees' reports of violations of law that were detrimental to public good or society in general without fear of retribution had no bearing on whether a violation of law by a governmental official who had no authority to act on behalf of a governmental entity constituted a violation of law by an employing governmental entity, within the meaning of Act.

Tort Claims Act: *City of Houston v. Sauls*, No. 22-1074, 2024 WL 2096554 (Tex. May 10, 2024). This is an interlocutory appeal in which the court is asked to decide whether the city is

immune from a wrongful-death suit after its police officer, while responding to a suicide call, had an automobile accident with a bicyclist crossing the road.

The bicyclist's heirs sued the city for wrongful death, alleging that the city's employee negligently and proximately caused the bicyclist's death while operating a motor vehicle, such that the employee would be personally liable. The city moved for traditional summary judgment, asserting that its immunity from suit was not waived under the Tort Claims Act because the officer was entitled to official immunity. The trial court denied the motion, and the city appealed. A divided court of appeals affirmed.

The Texas Supreme Court reversed and held: (1) the officer was performing a "discretionary" duty when responding to the suicide call; (2) the city satisfied its burden of making a prima facie showing that the officer acted in good faith based on a need factor; (3) the city satisfied its burden of making a prima facie showing that the officer acted in good faith based on a risk factor; and the (4) heirs and estate failed to controvert city's showing of good faith.

Tort Claims Act/Takings: *Tex. Dep't of Transp. v. Self*, No. 22-0585, 2024 WL 2226295 (Tex. May 17, 2024). Landowners sued the Texas Department of Transportation (TxDOT) and its contractor, alleging inverse condemnation and negligence, after employees of the contractor removed trees from a portion of the landowners' property that was outside TxDOT right-of-way while the contractor was in the process of removing trees from the right-of-way. The trial court denied TxDOT's plea to the jurisdiction, and TxDOT appealed. The Fort Worth Court of Appeals, affirmed in part and reversed in part.

Regarding negligence, the Texas Supreme Court determined that the landowners failed to either show that the subcontractor's employees were in TxDOT's paid service or that TxDOT employees operated or used the motor-driven equipment that cut down the trees, as required to waive immunity under the Tort Claims Act. With respect to inverse condemnation, the court determined that the landowners offered evidence that TxDOT intentionally directed the destruction of trees as part of clearing the right-of-way for public use. Accordingly, the court dismissed the negligence claim, and remanded the cause of action for inverse condemnation to the trial court for further proceedings.

Elections: *In re Rogers*, No. 23-0595, 2024 WL 2490520 (Tex. May 24, 2024). Qualified voters petitioned the board of an emergency services district for a ballot proposition at the next available election to alter the sales tax rates within the district. The board, believing the petition to be legally deficient, refused to place it on the ballot. Relators, three signatories of the petition, sought a writ of mandamus compelling the board to determine whether the petition contains the statutorily required number of signatures or, alternatively, ordering the board to call an election on the petition.

The Texas Supreme Court concluded that: (1) the court had jurisdiction to grant mandamus relief against the board; (2) as long as the petition had the statutorily required number of signatures, the

board had a ministerial, nondiscretionary duty to call an election; and (3) mandamus relief was an appropriate remedy.

Tort Claims Act: *City of Denton v. Ragas*, No. 02-24-00037-CV, 2024 WL 2202051 (Tex. App.—Fort Worth May 16, 2024) (mem. op.). Ragas fell while crossing a street in Denton, Texas, and sued the City of Denton seeking damages for her personal injuries. She alleged that there was a defect in the street's pavement that proximately caused her fall, that the defect was a "special defect," and that the city was negligent in maintaining the street. Alternatively, she alleged that the defect was an ordinary premises defect, that the city had actual knowledge of its existence, and that the city failed to warn her of its existence or remedy the condition. The trial court denied the city's plea to the jurisdiction, and the city filed an interlocutory appeal. The court of appeals reversed, holding that Ragas' claims are barred by governmental immunity.

Zoning: *Arlington v. City of Arlington*, No. 02-23-00288-CV, 2024 WL 2760415 (Tex. App.—Fort Worth May 30, 2024) (mem. op.). Liveable Arlington, Jade Cook, and Gibran Farah Esparza (collectively "plaintiffs") sued the City of Arlington; the Assistant Director of the Planning and Development Services Department; the Mayor; and City Council Members (collectively the "city") seeking injunctive, mandamus, and declaratory relief based upon the city council's approval of the establishment of a drilling zone and new gas-drilling permits on land known as the Fulson Drill Site. The plaintiffs further alleged that the council failed to provide proper notice of its actions. The city filed a plea to the jurisdiction alleging governmental immunity. The trial court granted the plea. The plaintiffs appealed.

The appellate court affirmed in part, finding that governmental immunity protected the city from claims they violated the Texas Constitution due-course-of-law provision, Section 253.005 of the Local Government Code or a city ordinance. But the court reversed and remanded, finding that the plaintiffs' claim under the Open Meetings Act survives the city's plea. The court also affirmed the trial court's order denying the application for temporary injunction.

Condemnation: *The City of Dripping Springs, Tex. v. Lazy W Conservation Dist.*, No. 03-22-00296-CV, 2024 WL 2787270 (Tex. App.—Austin May 31, 2024) (mem. op.). In 2019, the city of Dripping Springs sought to install an underground wastewater pipeline under property owned by Bruce Bolbock and Barbara Wiatrek (the Bolbocks). To protect the property in question from condemnation, the Bolbocks conveyed it to the Lazy W Conservation District. The city proceeded with the condemnation suit against Lazy W and the Bolbocks, and special commissioners ruled in favor of the city. In response, Lazy W and the Bolbocks filed counterclaims, general denials, and objections to the ruling, arguing that: (1) the court lacked subject matter jurisdiction as Lazy W was entitled to governmental immunity, and (2) the paramount public importance doctrine prevented the city from condemning the property. After a hearing on the matter, the trial court granted Lazy W's plea to the jurisdiction, and the city filed an interlocutory appeal thereafter. In reversing the trial court's order, the court of appeals concluded that: (1) even assuming Lazy W is entitled to it, governmental immunity does not

apply in eminent domain proceedings between two governmental entities; and (2) the doctrine of paramount public importance does not implicate a jurisdictional issue.

Employment: *City of San Antonio v. Diaz*, No. 07-23-00275-CV, 2024 WL 2195443 (Tex. App.—Amarillo May 15, 2024) (mem. op.). Diaz sued the city claiming sex and age discrimination and retaliation when she was terminated because she was succeeded by a man who was in his late 30s. However, the city claimed it terminated Diaz because, as a supervisor, she had a subordinate employee help her with a personal project while on the clock. The trial court denied the city's plea to the jurisdiction and the city appealed.

On appeal, the court reversed the trial court. The appellate court found that: (1) Diaz did not provide any comparators for her disparate discipline claim because none of the comparators put forward by Diaz were accused of violating the same city policy or using their position to obtain free labor from a subordinate employee so her claims of discrimination failed; (2) Diaz's evidence failed to show that she engaged in any protected activity of opposing an illegal practice so her retaliation claim failed; and (3) Diaz's request for a "name clearing hearing" was not included in the relief she sought so that claim also failed.

Contracts: *Quadvest, L.P. v. San Jacinto River Auth.*, No. 09-23-00167-CV, 2024 WL 2064487 (Tex. App.—Beaumont May 9, 2024) (mem. op.). The San Jacinto River Authority (SJRA) and Quadvest, L.P. and Woodland Oaks Utility, L.P., (the Utilities) entered into a series of contracts which were used by SJRA to secure payment of seven bond issuances. The contracts were based on a water conservation plan that was later declared void in court, and the Utilities then stopped making payments under the contracts. SJRA sued the Utilities and the Utilities asserted several affirmative defenses, including that the contract failed for lack of consideration. SJRA filed a motion for partial summary judgment, claiming that the Utilities' affirmative defenses could not be raised because three statutes in the Government Code and the Water Code made the contracts incontestable after they had been approved by the Attorney General and Comptroller of Public Accounts. The trial court granted SJRA's motion for partial summary judgment and the Utilities appealed.

The appellate court affirmed, holding that: (1) Sections 1202.006(a) and 1371.059(a), Government Code, and Section 49.184(e), Water Code, operated to prevent the Utilities' affirmative defenses contesting the contract because those statutes provided that a contract to secure the payment of bonds that has been approved by the Attorney General is incontestable; and (2) the Utilities had not reserved those affirmative defenses in the contract.

Employment: *Adams v. City of Pineland*, No. 12-23-00289-CV, 2024 WL 2064384 (Tex. App.—Tyler May 8, 2024) (mem. op.). Robert Adams III, a probationary patrol officer for the City of Pineland, was terminated due to his inability to perform essential job functions. Adams

sued the city, alleging disability discrimination, claiming the city regarded him as disabled due to his pancreatitis and related medical treatments. The trial court granted the city's motion for summary judgment, and Adams appealed. To prevail, Adams needed to show he was qualified for his position and that he was terminated due to his perceived disability. Evidence showed Adams was often unable to perform required tasks like patrolling and initiating traffic stops due to his medical condition and that he was frequently in pain, not actively patrolling, and even sleeping on duty. Ultimately the appellate court affirmed the trial court's summary judgment in favor of the city, concluding that Adams failed to establish a prima facie case of disability discrimination.

Employment: *Hadnot v. Lufkin Indep. Sch. Dist.*, No. 12-23-00144-CV, 2024 WL 2334631 (Tex. App.—Tyler May 22, 2024). The Lufkin Independent School District posted openings for two school resource officer positions, and Mickey M. Hadnot, a black applicant, applied. Hadnot, with a bachelor's degree in criminal justice, had extensive law enforcement experience including working for the Lufkin Police Department, the district as a school resource officer, and the Texas Department of Public Safety, where he was a Lieutenant at the time of his application. Juan Tinajero, who is Hispanic and fluent in Spanish, also applied. Tinajero had an associate's degree in criminal justice and diverse experience, including working as a reserve officer and private investigator. Despite Hadnot's extensive qualifications, the district hired Tinajero and Jeffrey Taylor, another black applicant. Hadnot filed a race discrimination complaint with the EEOC, which was dismissed, and subsequently filed a lawsuit under the Texas Commission on Human Rights Act. The district filed a motion for summary judgement, which the trial court granted, and Hadnot appealed. Hadnot alleged multiple instances of racial discrimination and cronyism within the hiring process. He claimed another lieutenant, David Rodriguez, accused him of attempting to take Rodriguez's job; manipulated the interview panel to favor Tinajero; and insisted on hiring a Spanish-speaking candidate. Hadnot argued that the district's stated preference for Tinajero's personality and interaction skills with students was a pretext for racial discrimination. The court focused on whether Hadnot presented more than a scintilla of evidence for his claims, finding that he had. Upon meeting this burden, the district had to provide legitimate, nondiscriminatory reasons for their decision, which it did. Hadnot then needed to demonstrate that these reasons were pretextual, which the court found he failed to do. Despite suggesting potential cronyism, Hadnot did not establish that race-based discrimination influenced the hiring decision; therefore, the trial court's summary judgment in favor of the district was affirmed.

Easements: *Johnson v. Town of Fulton*, No. 13-23-00436-CV, 2024 WL 2198665 (Tex. App.—Corpus Christi–Edinburg May 16, 2024) (mem. op.). In 2012, the Town of Fulton by ordinance granted a 30-foot-wide portion of an easement to Johnson, who owned the underlying fee, so that Johnson could erect a building in the portion of the city's right-of-way that was not being used as a road. Subsequently Johnson erected a fence that blocked the portion of the

easement that was being used as a public road. The city sued Johnson for injunctive relief and a declaration stating that the fence constitutes a nuisance and that the city's right-of-way had not been abandoned. Johnson argued that previous surveys, except for one, had been mistaken about the size of the block associated with the easement. He argued that under that survey, the 30-foot-wide grant of the easement extended into the paved portion of the road. The city filed a motion for summary judgment and attorney's fees, which the trial court granted. Johnson appealed.

The appellate court affirmed in part and reversed in part, holding that: (1) the 2012 ordinance relied on a certain survey when the city granted the 30-foot-wide portion of the easement to Johnson, and therefore Johnson could not try to enforce that ordinance by reliance on a different survey; and (2) because the declaratory relief added nothing to the judgment, the lower could not rely on the Uniform Declaratory Judgment Act for statutory authority to award attorney's fees.

Tort Claims Act: *City of San Antonio v. Magri*, No. 13-23-00280-CV, 2024 WL 2340826 (Tex. App.—Corpus Christi–Edinburg May 23, 2024) (mem. op.). Magri sued the City of San Antonio under the Texas Tort Claims Act (TTCA) after she slipped at the public library while walking over a grate. She claimed the slippery grate was a dangerous condition and that her claim fell under the TTCA's waiver of immunity for premises liability. The city filed a plea to the jurisdiction, which the trial court denied, and the city appealed.

The appellate court reversed and rendered judgment, holding there was no genuine issue of material fact as to whether the city had actual knowledge of the defect because the city had submitted an affidavit from an employee stating that there had been no previous reports of the dangerous condition of the grate in the preceding two years.

Employment: *Clifton v. City of Pasadena*, No. 14-23-00143-CV, 2024 WL 2206056 (Tex. App.—Houston [14th Dist.] May 16, 2024) (mem. op.). Susan Clifton, the first female assistant chief in the Pasadena Police Department, sued the City of Pasadena for gender discrimination and retaliation under the Texas Commission on Human Rights Act (TCHRA) after being demoted by acting chief Al Espinoza. Clifton alleged her demotion was due to her gender and in retaliation for reporting sexual harassment involving Espinoza's son. The trial court granted the city's plea to the jurisdiction and dismissed Clifton's suit, so she appealed. The appellate court considered whether Clifton provided sufficient evidence to create a fact issue on her discrimination and retaliation claims under the TCHRA, applying the *McDonnell Douglas* burden-shifting framework. Ultimately the appellate court reversed the trial court's dismissal, finding that Clifton produced sufficient evidence to create fact issues on both her claims and remanded the case for further proceedings.

Code Construction: *Albertson Companies, Inc. v. Cnty. of Dallas*, No. 14-23-00279-CV, 2024 WL 2279191 (Tex. App.—Houston [14th Dist.] May 21, 2024). Dallas and Bexar counties sued various pharmaceutical manufacturers, distributors, and pharmacies, alleging negligence in dispensing opioids and ignoring red flags of abuse and diversion. The pharmacies moved to dismiss the suits under the Texas Medical Liability Act (TMLA), arguing that the counties failed

to serve expert reports within 120 days as required by the TMLA. The pharmacies' motions to dismiss hinged on whether a county is a "person" for purposes of the TMLA. Because "person" is a legal term of art, it must be construed according to common law rather than simply looking to the Code Construction Act. The court examined numerous court precedents and definitions and held that in most cases under the common law, "person" does not include governmental entities; therefore, the counties in this case were not subject to the TMLA's expert report requirement.

May 2024

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from April 1, 2024, through April 30, 2024.

Religious Freedom: *Perez v. City of San Antonio*, 98 F.4th 586 (5th Cir. 2024). Gary Perez and Matilde Torres, members of the Lipan-Apache Native American Church, sued the City of San Antonio over a park development plan at Brackenridge Park. They alleged the plan interfered with their ability to conduct religious ceremonies, as it involved the removal of trees and the management of bird populations which are integral to their religious beliefs. They claimed violations of the Free Exercise Clause, the Texas Religious Freedom Restoration Act (TRFRA), and the Texas Constitution. The district court granted limited injunctive relief allowing access for certain ceremonies but denied broader requests to halt tree and bird management activities. Perez and Torres appealed and filed an emergency motion for an injunction pending appeal. The appellate court determined the request for injunction to restore access for routine personal worship was moot since the city had already removed obstructions allowing access. The court also found that the city's tree and bird management plans did not substantially burden the plaintiffs' religious practices. The city demonstrated a compelling governmental interest in its park management plans, including public safety and environmental protection, and successfully demonstrated that the tree and bird management plans are integral to the park's continued structural and environmental management and narrowly tailored to achieve these interests without excessively infringing on religious practices. With regard to the injunction request, the plaintiffs failed to show a likelihood of success on the merits for their claims under the Free Exercise Clause, TRFRA, and Texas Constitution; consequently, the court denied their emergency motion.

Building Codes: *Schnell v. State Farm Lloyds*, 98 F.4th 150 (5th Cir. 2024). The roof of Carl and Mary Ellen Schnell's home experienced damage in a hailstorm. The roof was covered with tiles that were no longer available on the market; consequently, their homeowners association required a full roof replacement to ensure proper aesthetics, leading the Schnells to file a claim with their homeowner's insurance policy holder, State Farm. The policy included coverage for increased costs due to enforcement of building codes ("Option OL"). After an appraisal, State

Farm paid for direct physical losses but denied the building code upgrade costs, stating that the HOA's requirements did not constitute "enforcement" under Option OL. The Schnells ultimately sued State Farm, with the district court subsequently granting summary judgment in favor of State Farm. The Schnells appealed.

Of interest to cities, a determination by Evan Roberts, the Fort Worth Building Code Administrator, was central to the appeal. Roberts indicated that if the new tiles could not interlock with the existing, undamaged tiles, this would cause improper water drainage, and the roof would not meet the city's building code requirements. The appellate court focused on whether Roberts's decision constituted a building code enforcement under the insurance policy. The Fifth Circuit vacated the summary judgment holding that genuine issues of material fact existed about whether Roberts's position constituted "building code enforcement" triggering a full roof replacement and whether State Farm's payment was delayed under the Texas Prompt Payment of Claims Act and remanded the case to district court for further proceedings.

Civil Rights: *Castro v. Kory*, No. 23-50268, 2024 WL 1580175 (5th Cir. Apr. 11, 2024). Jose Castro, a delivery driver, was awakened and arrested by San Antonio police officers while napping in his truck during a work break. The officers suspected Castro of wrongdoing but found no evidence of any criminal activity after searching his truck and personal effects. Castro sued the officers for violations of his Fourth and Fourteenth Amendment rights, claiming unlawful seizure, illegal search, excessive force, and failure to intervene. The district court granted the officers qualified immunity on the initial seizure but denied it concerning the prolonged arrest, the truck search, the use of excessive force, and failure to intervene. The officers appealed these denials. The Fifth Circuit reviewed the denial of qualified immunity. The court accepted Castro's version of facts as true for the purpose of this appeal and assessed whether the officers' actions violated clearly established constitutional rights.

The appellate court reversed the district court's decision in part and affirmed in part. It reversed the district court and granted qualified immunity on the prolonged arrest claim. The court noted that even though the officers detained Castro for about 45 minutes post-clearance of the scene, such detention did not constitute a significant restraint on liberty that would violate the Fourteenth Amendment, as Castro was arrested with probable cause. The court affirmed the denial of qualified immunity on the illegal search claim. It rejected the applicability of the search-incident-to-arrest and inventory search exceptions, noting that Castro was not within reaching distance of the vehicle during the search and that the search was conducted for investigatory rather than inventory purposes. The Fifth Circuit affirmed the denial of qualified immunity for the excessive force claim. It emphasized that the officers used disproportionate force, including pointing firearms at an unarmed and confused Castro who posed no credible threat to their safety. The court also affirmed the denial of qualified immunity on the failure to intervene claim, noting that the officers had the opportunity and obligation to prevent the constitutional violations but did not act.

Civil Rights; Employment: *Anderson v. Harris Cnty.*, 98 F.4th 641 (5th Cir. 2024). Marcus Anderson and Reed Clark, current and former employees of Harris County, filed a § 1983 lawsuit against Harris County, claiming their First Amendment rights were violated by Constable Christopher Diaz, who allegedly made employment decisions based on the employees' participation in and contributions to his election campaign. The district court dismissed the claims, ruling that Diaz was not a policymaker for Harris County; therefore, the county could not be held liable under § 1983 for his actions. The court affirmed that a constable serving a single precinct, like Diaz, does not have policymaking authority over employment-related decisions for the entire county. As such, Diaz's actions did not represent official county policy. The court also rejected the plaintiffs' argument that Harris County could be liable under a delegation or rubber-stamp theory. It found no evidence that the county delegated authority to Diaz to make county-wide employment decisions or that the Harris County Commissioners Court rubber-stamped Diaz's decisions. Finally, the court held that Diaz's alleged violations of the plaintiffs' First Amendment rights did not implicate Harris County because there was no county policy or custom endorsing such violations. Ultimately, the Fifth Circuit affirmed the district court's dismissal of the claims against Harris County, agreeing that Diaz was not a county policymaker and his actions did not reflect county policy or custom.

Civil Rights: *Dawes v. City of Dallas*, No. 22-10876, 2024 WL 1434454 (5th Cir. Apr. 3, 2024). Genevieve Dawes and Virgilio Rosales were sleeping at an apartment complex in a parked vehicle that had been reported stolen. City of Dallas police officers approached the vehicle, which was boxed in by other cars and fences. After failing to see inside due to fogged windows and mistakenly believing the vehicle was unoccupied, officers were surprised to find it occupied. They demanded that Rosales and Dawes show their hands, but they started the vehicle and it began to move forward and in reverse. Two officers opened fire, and Genevieve Dawes was fatally shot. Rosales and Dawes' estate filed excessive force suits against the two officers and the City of Dallas, and the officers prevailed on qualified immunity grounds at summary judgment. The plaintiffs appealed. For its qualified immunity analysis, the Fifth Circuit focused on whether the officers violated a constitutional right that was clearly established at the time. Ultimately, the court upheld the district court's summary judgment in favor of the officers, concluding that they were entitled to qualified immunity as no clearly established law was violated. This decision was based on the specifics of the confrontation, including the presence of a reportedly stolen vehicle, the nighttime setting, the officers' warnings, and the immediate circumstances leading to the use of deadly force. The court emphasized the high threshold for overturning qualified immunity, noting that plaintiffs must point to specific precedent showing a clear violation under similar circumstances, which they failed to do. With regard to the case against the City of Dallas, that was remanded to the trial court for further consideration, suggesting that the district court may need to reassess or expand on its findings regarding the city's potential liability under different theories, such as failure to train or municipal liability.

Recent Texas Cases of Interest to Cities

Note: Included cases are from April 1, 2024, through April 30, 2024.

Contractual Immunity: *San Jacinto River Auth. v. City of Conroe*, No. 22-0649, 2024 WL 1590001 (Tex. Apr. 12, 2024). This case looks at the scope of the statutory waiver of immunity under Chapter 271 of the Local Government Code (Chapter 271) for contractual claims against local government entities.

At issue were contracts that obligated two cities to buy surface water from a river authority. When a dispute over fees and rates arose, the cities stopped paying their complete balances, and the authority sued the cities to recover those amounts. The trial court granted the cities' plea to the jurisdiction, and the court of appeals affirmed on the ground that the authority did not engage in pre-suit mediation as the contracts required. The river authority petitioned for review.

The Supreme Court held that neither the contractual procedures for alternative dispute resolution, which are enforceable against local governments under Section 271.154 of the Local Government Code, serve as limits on the waiver of immunity set out in Section 271.152, nor does the parties' agreement to mediate apply to the authority's claims. The Court also rejected the cities' alternative argument that the agreements did not fall within the waiver because they failed to state their essential terms. Accordingly, the Court reversed and remanded to the trial court for further proceedings to resolve the authority's claims on the merits.

Contractual Immunity: *Campbellton Rd., Ltd. v. City of San Antonio by & through San Antonio Water Sys.*, No. 22-0481, 2024 WL 1590000 (Tex. Apr. 12, 2024). A property developer, which owned 585 acres within city's extra-territorial jurisdiction, brought a breach of contract and declaratory judgment action against the city by and through the city's water utility, arising from utility's agreement with the developer that the utility would provide sewer service for proposed residential developments on the developer's property. The trial court denied the city's plea to the jurisdiction and motion to dismiss for lack of subject matter jurisdiction. On appeal, the San Antonio Court of Appeals reversed and remanded, finding Chapter 271 of the Local Government Code (Chapter 271) did not apply to waive the city's immunity. The developer filed a petition for review.

The Supreme Court reversed and remanded, finding that the following supported waiver of the city's sovereign immunity under Chapter 271: (1) the developer sufficiently pleaded that a written, bilateral contract was formed; (2) the developer sufficiently pleaded that a written, unilateral contract was formed; (3) the contract terms contemplated that the utility had a right to the developer's participation in the project upon contract signing, as would support waiver of city's sovereign immunity under the Chapter 271; (4) the contract terms contemplated provision of payment to the developer; and (5) the developer sufficiently pleaded that the contract contemplated provision of services to the utility, as required to trigger waiver of sovereign immunity.

Employment: *Harris Ctr. for Mental Health & IDD v. McLeod*, No. 01-22-00947-CV, 2024 WL 1383271 (Tex. App.—Houston [1st Dist.] Apr. 2, 2024) (mem. op.). McLeod sued the Harris Center for Mental Health & IDD for disability discrimination under the Texas Commission on Human Rights Act (TCHRA). She alleged that the Harris Center retaliated against her after she decided not to accept an offer to accommodate her disability by transferring to a different clinic. She also claimed Harris Center failed to accommodate her request for consistent lunch breaks. The Harris Center filed a plea to the jurisdiction claiming governmental immunity, a response raising various defenses to McLeod's claims, and a motion for summary judgment. The trial court denied Harris Center's plea to the jurisdiction and motion for summary judgment, and Harris Center appealed.

The appellate court reversed, holding that: (1) the Harris Center was a governmental entity under the TCHRA and therefore was entitled to immunity; and (2) because McLeod did not raise a fact issue regarding whether she engaged in a protected activity for her retaliation claim, her claims did not fall under the TCHRA's waiver of immunity.

Employment: *Tex. Woman's Univ. v. Casper*, No. 02-23-00384-CV, 2024 WL 1561061, (Tex. App.—Fort Worth Apr. 11, 2024). This case presents an issue of first impression: whether, under the election-of-remedies provision in the Texas Commission on Human Rights Act (TCHRA), a plaintiff who has filed a federal action based on allegedly unlawful employment practices is barred from filing a duplicative TCHRA complaint even if she abandons her earlier-filed federal action.

Texas Woman's University (TWU) argued yes and filed a plea to the jurisdiction. Casper contended that the election-of-remedies provision bars a TCHRA complaint only if the earlier-filed federal action remains pending or has been resolved. The trial court denied TWU's plea. TWU filed an interlocutory appeal.

The appellate court determined that under the plain language of the TCHRA's election-of-remedies provision, an "initiated" federal action is what triggers the prohibition on filing a duplicative TCHRA complaint. Because Casper did not dispute that she "initiated" her federal action before filing her TCHRA complaint, and because she did not dispute that both challenged the same allegedly unlawful employment practices, the court reversed the trial court's order.

Immunity: *City of Springtown v. Ashenfelter*, No. 02-23-00204-CV, 2024 WL 1792380 (Tex. App.—Fort Worth Apr. 25, 2024) (mem. op.). Kalie Ashenfelter sued the City of Springtown after she was involved in an automobile collision with a city police officer. The city appealed the trial court's denial of its combined motion for no-evidence and traditional summary judgment, asserting that it was entitled to immunity based on (1) the police officer's official immunity and (2) the emergency exception to the Texas Tort Claims Act's (TTCA) waiver of immunity. The appellate court affirmed the trial court's order denying the city's combined motion concluding that the city was not entitled to a no-evidence summary judgement and that evidence attached to

the city's traditional motion for summary judgement raised a fact issue as to whether governmental immunity was waived.

Employment: *Mendoza v. City of Round Rock*, No. 03-23-00235-CV, 2024 WL 1642920 (Tex. App.—Austin Apr. 17, 2024) (mem. op.). In 2019, Irma Mendoza retired from the city of Round Rock in lieu of termination after the city conducted an internal investigation into complaints it had received about Mendoza. Claiming the city's action against her involved age discrimination in violation of the Texas Commission on Human Rights Act (TCHRA), she filed an administrative charge with the Equal Employment Opportunity Commission (EEOC). After reviewing the charge, the EEOC notified Mendoza it would not investigate further and issued her a right-to-sue letter dated June 10, 2020. In its letter, the EEOC noted it had received her administrative charge on June 2, 2020. Then, on June 9, 2022, Mendoza sued the city. In response, the city filed a plea to the jurisdiction claiming governmental immunity, arguing Mendoza's lawsuit was untimely as she failed to file her lawsuit within two years of submitting her charge to the EEOC. The district court granted the city's plea, and Mendoza appealed thereafter. In affirming the lower court's decision, the court of appeals concluded that although Mendoza claimed a discrepancy with the date on the EEOC letter, there was sufficient evidence in the record to support a finding that Mendoza's administrative charge was submitted to the EEOC on June 2, 2020, and by filing her lawsuit on June 9, 2022, she failed to strictly satisfy the TCHRA procedural requirements.

***City of Austin v. Kalamarides*, No. 07-23-00400-CV, 2024 WL 1422741 (Tex. App.—Amarillo Apr. 2, 2024) (mem. op.).** The plaintiff sued the city for injuries he suffered in a car accident with a city police officer who was responding to an emergency call. The plaintiff claimed his light was green and that the police officer did not have lights or sirens on. The city claimed the officer did have the vehicle's lights and sirens activated. The city filed a plea to the jurisdiction based on the "emergency exception." The trial court denied the plea.

On appeal, the court reversed and rendered judgment in favor of the city. The court found the city retained its immunity under the emergency response exception because record did not reveal a fact issue as to whether the officer acted in a way that posed a high degree of risk or serious injury to others when responding to an emergency. The video evidence capturing the minutes preceding the collision confirmed that as the officer entered the intersection, she was proceeding slowly, with her vehicle's lights and siren activated.

Immunity: *City of Dallas v. Ahrens*, No. 10-23-00315-CV, 2024 WL 1573388 (Tex. App.—Waco Apr. 11, 2024 (mem. op.). Following a sniper shooting that resulted in the death of five Dallas police officers, the city contracted with a charitable organization, Assist the Officer Foundation (ATO), to process and distribute mail, including checks and cash, received by the city for the benefit of the families of the officers who were killed. Believing that ATO mishandled the funds, and because ATO refused to release cash they claim to be legally entitled to, Katrina Ahrens and her children sued ATO, the city and others seeking damages in

connection with the city's handling of donations sent to the city after her husband's line of duty death.

In its plea to the jurisdiction, the city contended that it was immune from suit arising out of its governmental functions. The city specifically asserted that the complained-of activities, its handling of mail sent to the city, fell within the governmental function of police protection and control. The trial court denied the plea, and the city appealed. The appellate court affirmed the trial court's order, finding when the city entered into an agreement with ATO it engaged in a proprietary function.

Tort Claims Act: *City of Houston v. Taylor*, No. 14-22-00629-CV, 2024 WL 1403949 (Tex. App.—Houston [14th Dist.] Apr. 2, 2024) (mem. op.). Percy Taylor sued the City of Houston after being involved in a collision with a city ambulance. The city claimed immunity under the Texas Tort Claims Act, arguing that the ambulance was responding to an emergency, which if proven, exempts the city from liability. The trial court denied the city's motion for summary judgment and plea to the jurisdiction. The Texas Tort Claims Act may waive immunity for injuries caused by the operation of motor-driven vehicles unless the injury arises from actions taken during emergency responses. The question in this case was whether the ambulance was actively responding to an emergency when the collision occurred. The evidence presented showed conflicting accounts of the situation. The ambulance driver indicated that they were transporting a critically ill patient with possible sepsis to the hospital under emergency conditions with lights and sirens activated. Contradictory testimony and a Houston Fire Department incident report suggested that the patient was stable and that the transportation was at the patient's choice, without emergency lights and sirens. The appellate court affirmed the trial court's decision, finding that factual disputes about the emergency status of the ambulance trip precluded summary judgment. The court concluded that the trial court correctly denied the city's plea to the jurisdiction and MSJ.

Tort Claims Act: *City of Houston v. Caro*, No. 14-23-00319-CV, 2024 WL 1732278 (Tex. App.—Houston [14th Dist.] Apr. 23, 2024) (mem. op.). Lucy Caro, a flight attendant, was injured at Bush Intercontinental Airport, which is owned by the City of Houston, when she slipped on water beneath an air conditioning vent. In response to Caro's lawsuit, the City of Houston filed a plea to the jurisdiction, which the trial court denied. On appeal, the city challenged the trial court's denial of its plea to jurisdiction, arguing that it did not have actual knowledge of the hazard, and thereby maintained its immunity under the Texas Tort Claims Act. The court evaluated whether the City of Houston had actual knowledge of the hazard. Evidence showed longstanding issues with condensation at the airport, which were known to city staff. Despite prior observations of water accumulation and temporary remediation measures, no permanent solution was implemented, and no warning signs were present at the time of Caro's fall. The appellate court held that evidence of the city's awareness of the recurring condensation issue, combined with the specific observations made by city staff shortly before Caro's injuries, established a fact issue regarding the city's knowledge of the dangerous condition. The court also found fact issues regarding whether Caro knew about the hazard and whether the city failed in its

duty of care. Ultimately, the court affirmed the trial court's decision, holding that the evidence raised sufficient fact issues to deny the city's plea to the jurisdiction, allowing Caro's suit to proceed against the City of Houston for her injuries. The case was remanded for further proceedings concerning the city's knowledge and the adequacy of its remedial actions.

Charter; Property Tax: *Jones v. Whitmire*, No. 14-23-00550-CV, 2024 WL 1724448 (Tex. App.—Houston [14th Dist.] Apr. 23, 2024). The dispute centers on whether the City of Houston's City Council correctly allocated ad valorem tax revenues to the Dedicated Drainage and Street Renewal Fund (Drainage Fund) as mandated by the city's charter. Taxpayers James Robert Jones and Allen Watson contested that the city council underfunded the Drainage Fund by applying incorrect methodology to calculate the required allocation. The city disagreed, resulting in lengthy litigation. Houston's Charter requires an allocation to the Drainage Fund based on proceeds from $0.118 per $100 of the city's ad valorem tax levy, adjusted for debt service for certain bonds. The Taxpayers argued that the city council allocated significantly less than what was required, while the city council contended that their allocation methodology was aligned with the charter and influenced by another charter provision which limits growth in tax revenue collections (Revenue Cap). After the case was escalated to the Texas Supreme Court and remanded back, the trial court ruled in favor of the city. The Taxpayers appealed, disputing the council's methodology, arguing that it deviated from the charter's directives. The appellate court in this case sided with the Taxpayers, determining that the city's methodology of allocating funds to the Drainage Fund was incorrect. The court ruled that the full 11.8 cents per $100 of taxable property value should be allocated to the Drainage Fund before deducting debt service obligations, and without the application of the Revenue Cap to the allocation formula. The appellate court reversed the trial court's decision, instructed the city to follow the charter's explicit allocation formula, and enjoined the city from using an incorrect methodology. The Taxpayers' request for mandamus relief was denied as they obtained an adequate remedy by appeal.

April 2024

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from March 1, 2024, through March 31, 2024.

Free Speech: *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263 (5th Cir. 2024). An adult industry trade association, domestic and foreign corporations that produced, sold, and hosted pornography, and individual adult content creator brought action (collectively the "plaintiffs") alleging that the Texas legislation requiring commercial pornographic websites to verify the age of their visitors and to display health warnings about effects of consumption of pornography violated the First Amendment and was preempted by Communications Decency Act (CDA). The district court granted the plaintiffs' motion for preliminary injunction, and the state appealed.

The Fifth Circuit affirmed in part and vacated in parting, holding that: (1) the proper standard for review of whether age-verification requirement violated the First Amendment is rational basis; (2) the age-verification requirement did not violate First Amendment; (3) the health warning requirement was regulation of commercial speech for First Amendment purposes, and plaintiffs were likely to succeed on the merits of their claim that the health warning requirement violated the First Amendment; (4) the CDA did not preempt the Texas legislation; and (5) because plaintiffs faced irreparable harm in absence of preliminary injunction, the balance of harms and the public interest weighed in favor of granting a preliminary injunction.

Civil Rights: *Espinal v. City of Houston*, No. 23-20075, 2024 WL 981839 (5th Cir. Mar. 7, 2024). Following a heated interaction with a Houston police officer, security guard Maximo Espinal was arrested for aggravated assault. Though a grand jury subsequently indicted Espinal, the charges were later dropped. Espinal then sued the officers involved and the City of Houston (collectively the "defendants"), alleging they subjected him to false arrest, malicious prosecution, and assault, violating the Fourth and Fourteenth Amendments and state law. The district court granted the defendants' motion to dismiss all of Espinal's claims based on qualified immunity and immunity under Texas law.

The Fifth Circuit affirmed, holding that: (1) the independent intermediary doctrine shielded officers from liability under Section 1983 for false arrest; (2) the officers were not cause of security guard's prosecution; and (3) it was not clearly established in 2020 that there was a Fourth Amendment right to be free from malicious prosecution.

Civil Rights: *Woods v. Harris Cnty*., Tex., No. 22-20482, 2024 WL 1174185 (5th Cir. Mar. 19, 2024). This is a civil-rights action arising from the fatal shooting of Thomas by Brewer, a deputy for Harris County, Texas. The deputy was at an intersection when he observed Thomas, who was unarmed and with his pants down to his ankles, banging his hands on a vehicle's hood, prompting the driver to exit the vehicle and confront Thomas. The deputy exited his vehicle and Thomas immediately pointed at him and began to walk quickly towards the deputy. Thomas continued to approach the deputy despite his multiple orders to get down and warnings that he would shoot him. A bystander's cell phone video captured the deputy steadily retreating as Thomas approached him. Thomas was four feet away from the deputy when he was shot in the lower chest area and died at the scene. Thomas's autopsy's toxicology report detected phencyclidine (PCP) and substances associated with marijuana in his blood.

Members of Thomas's family brought claims against the deputy under Section 1983 for excessive force and under state law for wrongful death, survival, negligence, and gross negligence. They also brought claims against the county under *Monell,* the Americans with Disabilities Act, and the Rehabilitation Act. The district court granted the deputy's and county's motion for summary judgement.

The Fifth Circuit determined that the deputy had qualified immunity as his conduct did not amount to a constitutionally right that is clearly established. The court also found that the plaintiffs' claims failed under *Monell* because: (1) the plaintiffs' failed to show that the county was deliberately indifferent with respect to any failure to review use-of-force policies; (2) uncontroverted evidence shows that the county did equip officers with less-lethal force options (specifically, a taser); (3) plaintiffs failed to demonstrate a pattern of sufficiently similar excessive-force violations or a pattern of failing to render medical aid; and (4) plaintiffs failed to show that the deputy was inadequately trained or that the county was deliberately indifferent with respect to his training. Finally, the court found that the plaintiffs failed to show a prima facie ADA claim.

Recent Texas Cases of Interest to Cities

Note: Included cases are from March 1, 2024, through March 31, 2024.

Appellate Procedure: *City of Laredo v. Rodriguez*, No. 04-24-00093-CV, 2024 WL 950627 (Tex. App.—San Antonio Mar. 6, 2024) (mem. op.). The trial court granted the plaintiff's continuance on the city's plea to the jurisdiction to allow for the taking of pertinent discovery. The city appealed that ruling. The appellate court rejected the city's argument that the appellate court had jurisdiction because of the implicit denial of its plea to the jurisdiction. The appellate court found it did not have jurisdiction to hear the appeal because: (1) the trial court's order was not a final judgment; (2) the trial court did not grant or deny the city's plea to the jurisdiction. Additionally, the city had filed a contemporaneous petition for writ of mandamus, which remained pending.

Tort Claims Act: *City of Dallas v. McKeller*, No. 05-23-00035-CV, 2024 WL 980356 (Tex. App.—Dallas Mar. 7, 2024) (mem. op.). In 2019, the City of Dallas was notified through a service request that one of its water meter boxes was missing the lid leaving a hole in the sidewalk. Because the repairs could not be made that day, city staff placed a large orange cone over the hole. However, the cone was later removed by an unknown third party, and Evelyn McKeller sustained injuries when she fell into the hole. McKeller then sued the city on the basis of negligence and premises liability. In response, the city filed a plea to the jurisdiction claiming immunity under the Texas Tort Claims Act (TTCA). After a hearing on the matter, the trial court denied the city's plea to the jurisdiction, and the city appealed.

In its appeal, the city claimed McKeller could not overcome the TTCA's waiver of immunity for the premises liability claim because it had no actual knowledge that the cone had been removed by a third party. The city relied on Texas Civil Practice & Remedies Code Section 101.060 which states a governmental unit retains its immunity for claims based on the removal of a traffic warning device unless the governmental unit fails to correct the removal within a reasonable period of time after having actual notice. The city further argued that the trial court did not have

subject matter jurisdiction over McKeller's negligence claim separate from the premises defect claim.

As to the premises liability claim, the court of appeals concluded the city had actual knowledge of the defective condition – an open water meter hole. The court reasoned that McKeller's claim was not based on the failure to replace the cone, and it did not qualify as a "warning device" where it was placed on a sidewalk and not a roadway as required by Section 101.060. As a result, the lower court's denial of the city's plea to the jurisdiction was affirmed. However, as to McKeller's negligence claim, the court of appeals held that because the claim relied on the premises defect in this case, immunity was not waived under the TTCA. For that reason, the court of appeals granted the city's plea to the jurisdiction and rendered judgment dismissing the negligence claim for lack of subject matter jurisdiction.

Zoning: *Badger Tavern LP, 1676 Regal JV, and 1676 Regal Row v. City of Dallas*, No. 05-23-00496-CV, 2024 WL 1340397 (Tex. App.—Dallas Mar. 29, 2024) (mem. op.). This case stems from a certificate of occupancy issued to Badger Tavern, which operated a cabaret in Dallas called La Zona Rosa. In 2021, Badger Tavern applied to the city of Dallas for a certificate of occupancy record change to rename its business to La Zona Rosa dba Poker House of Dallas. During the approval process, there was some indication that Badger Tavern was changing its business operations from a cabaret to a private membership-based poker club. While the city issued the certificate of occupancy record change, it later sent Badger Tavern two notices that it was in violation of the city's ordinances by failing to obtain the proper certificate of occupancy before changing the use of the property. When Badger Tavern failed to cease operations as a poker club and apply for a new certificate of occupancy, the city sued Badger Tavern seeking injunctive relief.

After a hearing, the trial court granted the city's request, and Badger Tavern appealed. Badger Tavern argued that: (1) the trial court lacked jurisdiction because the city failed to first exhaust its administrative remedies by appealing to the city's Board of Adjustment (BOA); (2) the court erred in granting an injunction under Texas Local Government Code Sections 54.016 (applicable to municipal health and safety ordinances) and 54.018 (an action for repair or demolition of a structure) when the city did not request relief under Section 54.018; and (3) the city failed to present sufficient evidence of a "substantial danger of injury or adverse health impact" to support a temporary injunction under Section 54.016.

In affirming the lower court, the court of appeals concluded that because the city was not alleging an error in a zoning decision but instead was enforcing a zoning ordinance violation by Badger Tavern, it was not required to appeal to the BOA. As for the grounds for injunctive relief, the court held that although the city did not present evidence as required under Section 54.016, it also sought temporary and permanent injunctive relief under Texas Local Government Code Section 211.012(c) (zoning ordinance violations and remedies). Because the record reflected that Badger Tavern changed the use of its property without first obtaining the proper certificate of

occupancy and failed to cease operations as such, the evidence was sufficient to support temporary injunctive relief under Section 211.012(c).

Immunity: *P'ship v. AHFC Pecan Park PSH Non-Profit Corp.*, No. 07-23-00362-CV, 2024 WL 1185132, at *1 (Tex. App.—Amarillo Mar. 19, 2024) (mem. op.). The city, in partnership with a nonprofit, planned to put in housing for the homeless in a hotel. The Chaudhari Partnership (the "Partnership") and the county attorney sued in separate actions. Once the Partnership learned that the county attorney filed a separate lawsuit, the Partnership intervened and nonsuited the action it initiated with prejudice. The city filed a plea to the jurisdiction, which the trial court granted. Only the Partnership appealed.

On appeal, the court found that: (1) the Partnership failed to address the ground implicating that the Partnership had failed to state a cause of action against the city in its cause of action; and (2) the provision of public housing is a governmental function. The appellate court affirmed the trial court's dismissal with prejudice.

Workers' Compensation: *City of Stephenville v. Belew*, No. 11-22-00273-CV, 2024 WL 968970 (Tex. App.—Eastland Mar. 7, 2024). In 2014, Michael Belew, a firefighter and EMT for the City of Stephenville, passed away after developing pancreatic cancer. His spouse and legal beneficiaries (the Belews) applied for workers' compensation death benefits under the Texas Workers' Compensation Act (TWCA), asserting Michael's cancer originated from his service as a city firefighter. To apply for the death benefit, a claimant proceeds through a benefits review conference, a contested-case hearing, and an appeal, if applicable, through the Texas Department of Insurance's Division of Workers' Compensation (TDI-DWC). During the contested hearing stage of the proceedings, a TDI-DWC officer determined that Michael had sustained a qualifying injury in the form of an occupational disease during the course of his employment with the city. The hearing officer relied on the "Firefighter's Presumption" in Texas Government Code Chapter 607 which allows state governments to shift the burden of proving causation from a claimant to an employer. The officer also relied on a similar decision in which a firefighter suffered from pancreatic cancer and was determined to be eligible for workers' compensation benefits. After appealing the administrative decision, the TDI-DWC upheld the hearing officer's decision, and the city appealed to the district court.

The city argued that the presumption did not apply in Michael's case, because pancreatic cancer did not meet the requirements under Section 607.055. The district court ruled in favor of the Belews, and the city appealed to the court of appeals. At the time of Michael's death, the "Firefighter's Presumption" statute required a claimant to show that: "the cancer was known to be associated with fire fighting or exposure to heat, smoke, radiation, or a known or suspected carcinogen … or a type of cancer that may be caused by exposure to heat, smoke, radiation, or a known or suspected carcinogen as determined by the International Agency for Research on Cancer [IARC]."

After a thorough analysis of the statutory construction and plain meaning of the language, the court of appeals concluded that for the "Firefighter's Presumption" to apply, Section 607.055 required a claimant to show by exclusively relying on IARC materials and determinations, a general causal link between the cancerous condition originating from the course and scope of the person's employment and the specific exposures listed in the statute (heat, smoke, radiation, or a known suspected carcinogen). Ultimately, because the Belews failed to establish this causal link, providing no evidence of IARC determinations, the court held that Michael did not sustain a compensable injury under Texas Government Code Chapter 607. The court further held that the "Firefighter's Presumption" did not apply to the pancreatic cancer Michael developed. As a result, the court reversed the trial court's decision and rendered judgment in favor of the city.

Tort Claims Act: *City of Mission v. Aaron Cervantes*, No. 13-22-00401-CV, 2024 WL 1326396 (Tex. App.—Corpus Christi–Edinburg Mar. 28, 2024) (mem. op.). Cervantes sued the City of Mission under the Texas Tort Claims Act (TTCA) after he was injured on a city-maintained bike path, claiming the city's failure to warn the public of the dangerous condition of the trail was grossly negligent. The city filed a plea to the jurisdiction claiming governmental immunity under the TTCA and the recreational use statute. The city argued that the dangerous condition at issue was not a special defect, so the city owed only a licensee standard of care and therefore the city's immunity was not waived under the TTCA. The trial court denied the city's plea and the city appealed.

The appellate court affirmed the trial court's denial of the city's plea to the jurisdiction, holding that because the city had not produced evidence to negate Cervantes' contention that the dangerous condition at issue was a special defect, it had failed to carry its burden to negate the existence of jurisdictional facts.

Elections: *In re Coon*, No. 09-24-00091-CV, 2024 WL 1134038 (Tex. App.—Beaumont Mar. 15, 2024) (mem. op.). Coon and Arthur, two candidates for public office in the City of Conroe, filed petitions for writs of mandamus in the appellate court to compel the city secretary to reject applications of two other candidates to appear on the city ballot. Coon and Arthur contended that the two candidates were not physically present when the city secretary notarized their applications, and that because the applications were not properly notarized, the city secretary had a ministerial duty to reject them. The court denied the petitions, holding that Coon and Arthur had not shown that mandamus relief was warranted.

Tort Claims Act: *City of Houston v. Manning*, No. 14-23-00087-CV, 2024 WL 973806 (Tex. App.—Houston [14th Dist.] Mar. 7, 2024) (mem. op.). In a case involving a collision between a City of Houston Fire Department truck driven by Wilhelm Schmidt and a car carrying Chelsea Manning and three minors, the appellate court previously affirmed the denial of the city's initial motion for summary judgment on negligence claims. In *Manning I*, the city argued for immunity, citing the driver's official status and exceptions under the Texas Tort Claims Act (TTCA), but

failed to conclusively prove absence of negligence or that the emergency and 9-1-1 exceptions applied. The Supreme Court declined to review the appellate court's decision in *Manning I*.

This appeal originates from a second summary judgment motion in which the city reiterated its immunity defense, added additional TTCA arguments, and challenged certain plaintiffs' standing. The trial court denied this motion and allowed two additional plaintiffs to join the case, leading to the city's current appeal.

Generally, a city cannot be vicariously liable for the negligent acts of its employees unless its governmental immunity has been waived. The TTCA contains waivers of governmental immunity when the negligence of a city's employee, acting within the scope of their employment, proximately causes personal injury to another person, arising from the use or operation of a motor driven vehicle, if the employee would be personally liable for the injuries. The city argued that Schmidt would not have been liable for the injuries, since he was protected by official immunity, which can protect government employees from liability from lawsuit if at the time of the injury, they were performing discretionary job functions with good faith. As in *Manning I*, the court in this case held that there were fact questions surrounding Schmidt's good faith and overruled the city on this issue.

There are also exceptions to the TTCA's immunity waiver when an employee is responding to an emergency situation or a 9-1-1 call for assistance, if the employee's actions are essentially reasonable, lawful, and not taken with reckless disregard for the safety of others. The city raised each of these exceptions, but again, the court overruled these issues, pointing to evidence that Schmidt may have been operating the truck recklessly at the time of the collision.

The only issue on which the court found in favor of the city was a standing issue. Two of the claimants who were minors at the time of the collision had reached the age of majority by the time the appeals in *Manning I* were decided, after which, a Second Amended Petition was filed seeking additional damages for medical expenses by these claimants. Because claims for the medical expenses of minors belong to the minors' parents, the appellate court overruled the trial court on this issue. Ultimately, the court overruled all the city's claims other than the standing issue and remanded the case to the trial court for further proceedings.

Tort Claims Act: *Rebeca Garcia v. The City of Austin*, No. 14-23-00241-CV, 2024 WL 1326113 (Tex. App.—Houston [14th Dist.] Mar. 28, 2024) (mem. op.). Rebeca Garcia and Mike Ramos were in a car when the police, responding to a 9-1-1 call about drug use and a possible gun, commanded them to exit the vehicle. Ramos, after initially complying, became non-compliant and was fatally shot while attempting to drive away. Garcia, who was in the car but not physically injured, sued the City of Austin for negligent infliction of emotional distress, claiming severe shock and emotional distress from witnessing the incident.

The City of Austin filed a plea to the jurisdiction, asserting immunity from Garcia's suit. The trial court granted the plea, dismissing Garcia's suit. Garcia appealed, arguing the trial court

erred in granting the plea and that the city did not meet its burden to establish governmental immunity. Generally, a city is protected from liability from lawsuit by governmental immunity, but that immunity may be waived by statute. The Texas Tort Claims Act provides limited waivers of immunity for certain negligent conduct, but it does not waive immunity for injuries arising from intentional torts. Garcia argued that her injuries sounded in negligence; however, neither the trial court nor the appellate court agreed, since the shooting in question was clearly an intentional act. Consequently, the appellate court affirmed the trial court's final judgment, dismissing the case for lack of jurisdiction.

March 2024
Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from February 1, 2024, through February 29, 2024.

Substandard Buildings: *Rhone v. City of Tex. City, Tex.*, No. 22-40551, 2024 WL 617246 (5th Cir. Feb. 14, 2024). Rhone sued the City of Texas City following the municipal court's ruling that his apartment buildings were substandard. Rhone sought review of the ruling, but the buildings were demolished during the pendency of the review. Rhone argued that his right to due process was violated because it was the city attorney who brought the complaint against him for substandard buildings, and the city's policy provided that the municipal court's rulings were subject to review and approval by the city attorney. The trial court granted summary judgment on Rhone's claims because the demolition of the building rendered the case moot. Rhone appealed.

The appellate court affirmed, holding that the appeal of the municipal court ruling was moot because the buildings were demolished and Rhone could bring a takings claim instead. Further, the appellate court remanded the case to the district court for more proceedings based on Rhone's contention that the city's municipal court scheme that provided for review of the municipal court's rulings by the city attorney violated due process rights.

Civil Rights: *Grisham v. Valenciano*, No. 22-50915, 2024 WL 769485 (5th Cir. Feb. 26, 2024). Grisham filed suit under 42 U.S.C. § 1983 against the City of Olmos Park and several police officers following their arrests for disorderly conduct, which involved carrying firearms in a reportedly unsafe manner and filming the police. Grisham claimed his First and Fourteenth Amendment rights had been violated, and also claimed municipal liability based on what he claimed was a city policy to arrest people in retaliation for exercising their Second Amendment rights. The city and officers moved for summary judgment which the trial court granted, and Grisham appealed.

The appellate court affirmed, holding that: (1) the officers were entitled to qualified immunity because Grisham could not point to any clearly established law showing the force used by the police officers was unreasonable; and (2) Grisham's municipal liability claim failed because

Grisham had failed to show a policy of retaliatory arrests against people who exercised their Second Amendment rights to carry firearms.

Civil Rights: *York v. City of Beaumont,* No. 20-40580, 2024 WL 775179 (5th Cir. Feb. 26, 2024). Chaz York's family and estate brought a claim for municipal liability under 42 U.S.C. § 1983 after an off-duty police officer from the City of Beaumont shot and killed York following an altercation in a bar. The Yorks alleged that the city was liable for York's death because the city's policies and customs caused the shooting. The trial court granted the city's motion to dismiss, and the Yorks appealed.

The appellate court affirmed, holding that the Yorks had not plausibly pled any of the following: (1) that the city's policies of instructing officers to shoot to kill and disallowing off-duty carry of tasers caused the constitutional violation; (2) that the city maintained a policy of using excessive force; (3) that the city's inadequate training of the officer caused the constitutional violation; (4) that the city ratified the officer's conduct by failing to discipline previous complaints of excessive force against the officer; or (5) that the city covered up instances of excessive force.

Employment Law: *Mason v. City of Waco*, No. 23-50108, 2024 WL 775508 (5th Cir. Feb. 26, 2024). Mason, a police officer for the City of Waco for over 20 years, sued the city for constructive discharge following his resignation from the force, claiming that in retaliation for a radio show in which he criticized the police force, he was placed under investigation three times in relation to the radio show, other officers delayed responding to his calls for backup, and one officer failed to properly and timely report a death threat against Mason. The trial court granted the city's motion for summary judgment and Mason appealed.

The appellate court affirmed, holding that Mason had not presented a fact issue on his First Amendment claim because a reasonable jury could not have concluded that the complained-of events rose to the level of a constructive discharge.

Recent Texas Cases of Interest to Cities

Note: Included cases are from February 1, 2024, through February 29, 2024.

Alcohol Permits: *ASC Beverages, LLC v. Tex. Alcoholic Beverage Comm'n*, No. 01-22-00297-CV, 2024 WL 628870 (Tex. App.—Houston [1st Dist.] Feb. 15, 2024). ASC Beverages sued the Texas Alcoholic Beverages Commission (TABC) over the City of Houston's denial of a permit to sell alcohol in its package store. TABC filed a plea to the jurisdiction, arguing that because it hadn't denied the permit, there was no justiciable controversy between it and ASC. The trial court granted the plea and ASC appealed.

The appellate court affirmed, holding that a city is not acting as an arm of the TABC in granting or denying a beer and wine license, and that therefore the city's denial of the permit did not create a justiciable controversy between ASC and the TABC.

Jurisdiction: *City of Castle Hills v. Robinson*, No. 04-22-00551-CV, 2024 WL 819619 (Tex. App.—San Antonio Feb. 28, 2024) (mem. op.). The city filed maintenance liens against the Robinson's property before he obtained ownership and eventually sued along with other taxing entities filed suit against Robinson to recover delinquent property taxes. Robinson counter-claimed against the city, claiming the city had failed to notify her of and the previous owners of the code violations and maintenance liens and that her constitutional rights were violated by the failure to provide proper notice. The city filed a motion for summary judgment on the grounds that the trial court lacked jurisdiction over the counterclaims as well as non-jurisdictional grounds, which the trial court denied.

Affirming the denial of the city's motion, the appellate court interpreted the summary judgment motion on jurisdiction as a plea to the jurisdiction and addressed only those arguments. The court addressed some of the city's arguments and dismissed them because the plaintiff did not make claims against which the city argued. On the federal constitutional claims, the court determined that the city did not support its argument that Robinson could not establish the claims as a matter of law with any citations to evidence in the record. As for the statute of limitations argument, the court determined that since the pleadings only contained federal claims, the statute of limitations was not a jurisdictional requirement.

Tax Rate: *Wommack v. City of Lone Star*, No. 06-23-00086-CV, 2024 WL 367601 (Tex. App.—Texarkana Feb. 1, 2024) (mem. op.). A councilmember sued the city for injunctive relief for violating state law when the city adopted its tax rate. The trial court dismissed his case without a hearing on the date the defendants filed their answer and a specific denial. The councilmember appealed. On appeal, the court determined that the councilmember was entitled to notice and a hearing before the trial court dismissed the appeal because the trial court misconstrued the specific denial as a Rule 91 motion to dismiss. The appellate court reversed the trial court's judgment and remanded the matter for further proceedings.

Claims Preclusion: *In re City of Beaumont*, No. 09-23-00197-CV, 2024 WL 377833 (Tex. App.—Beaumont Feb. 1, 2024) (mem. op.). James Mathews, a firefighter with the City of Beaumont, was suspended indefinitely following his involvement in a vehicle collision, after which he was accused of assaulting the driver of the other vehicle. He appealed his suspension under the Civil Service Act, and the hearing examiner upheld his suspension. Mathews sued the city, challenging the hearing examiner's ruling, and added several constitutional claims to his suit, including an equal protection claim, a retaliation claim, and a claim for declaratory judgment that the city had deprived him of his constitutionally protected interest in employment with the city. The trial court severed Mathews's appeal of the Civil Service Act ruling from his constitutional claims. Then, the city filed a motion for summary judgment in the severed case, relying on res judicata, claims preclusion, and law-of-the-case doctrine based on a ruling from a

federal court dismissing Mathews's constitutional claims. The district court denied the city's motion and the city filed a petition for a writ of mandamus in the appellate court challenging the trial court's denial of its motion for summary judgment.

The appellate court denied the city's petition for writ of mandamus, holding that the record the city had provided was too unclear for the court to determine whether Mathews's claims were barred because of the federal court's ruling.

Issue Preclusion: *Union Pacific Railroad v. Anderson Cty.*, No. 12-23-00152-CV, 2024 WL 739110 (Tex. App.—Tyler Feb. 22, 2024). The City of Palestine and Anderson County filed suit in state court seeking to enforce a state court judgment from 1955 that approved an agreement from 1954 that Union Pacific Railroad maintain a certain number of offices and employees in the city. The parties filed cross-motions for summary judgment regarding the continued validity of the 1954 agreement and 1955 judgment. Union Pacific also argued that the city's arguments were estopped by issue preclusion after a federal court ruling, and that the agreement and judgment were both preempted by the Interstate Commerce Commission Termination Act (ITTCA).

The appellate court reversed the judgment of the trial court and rendered judgment, holding that: (1) the city's arguments were barred by collateral estoppel based on identical litigation in federal court, despite the fact that the previous federal litigation concerned the validity of the agreement while the current litigation concerned the validity of the judgment; and (2) because the requirement that Union Pacific maintain employees and offices related to the movement of property by rail, it was expressly preempted by the ITTCA and therefore the requirement was void.

Contracts: *City of Houston v. Aptim Envtl. & Infrastructure, LLC*, No. 14-22-00616-CV, 2024 WL 848417 (Tex. App.—Houston [14th Dist.] Feb. 29, 2024). Aptim LLC sued the City of Houston for unpaid invoices issued to the city under a contract for flood projects that included two amendments. The city filed a plea to the jurisdiction, claiming that it was immune to suit because the waiver of immunity in Chapter 271, Local Government Code, did not apply to claims arising under the second amendment to the contract because that amendment had been signed by an Aptim representative under its previous corporate name, Aptim Inc., which had been changed to Aptim LLC following a corporate restructuring. The trial court denied the city's plea and the city appealed.

The appellate court affirmed, holding that the failure of Aptim to sign the second amendment to the contract using its current corporate name went to the merits of the case rather than the jurisdiction, and that Aptim had sufficiently pleaded the elements of Chapter 271's waiver of immunity.

February 2024

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from January 1, 2024, through January 31, 2024.

Contracts: *Am. Precision Ammunition, L.L.C. v. City of Mineral Wells*, 90 F.4th 820 (5th Cir. 2024). In 2016, American Precision Ammunition (APA) and the City of Mineral Wells entered into a tax abatement agreement in which APA agreed to relocate to the city in exchange for the city providing 10 years of tax abatements. In addition, one of the terms in the agreement stated that the city would "gift" APA $150,000 toward the cost of its improvements to the new site that would be in the city limits. However, in 2017 after determining the payment would be an illegal gift in violation of Article III, section 52(a) of the Texas Constitution, the city council voted to terminate the agreement without paying APA the $150,000. APA sued the city for breach of contract, violating the Texas Open Meetings Act (TOMA), denial of federal due process, and denial of due course of state law under the Texas Constitution. After various motions were filed by the city and APA, the trial court ultimately: (1) dismissed with prejudice APA's breach of contract, federal due process, and state law due course of law claims; (2) dismissed without prejudice APA's TOMA claim as moot; and (3) entered a final judgment in favor of the city. After the trial court denied APA's motion to alter or amend the final judgment dismissing its breach of contract claim, APA appealed.

The court of appeals, in affirming the lower court, determined that the city's contract provision to "gift" APA $150,000 constituted a gratuitous payment of public funds thereby rendering the contract illegal under the Texas Constitution. Reaching this conclusion, the court considered the plain meaning of the terms of the agreement which continuously referred to the $150,000 as a gift or a "voluntary transfer of property to another without compensation" according to Black's Law Dictionary. In addition, the court found no consideration built into the agreement in exchange for the $150,000. In holding that the city's agreement was illegal, the court also affirmed the trial court's decision to dismiss APA's TOMA claim as moot. Lastly, the court addressed APA's Fourteenth Amendment and state law due course of law claims. APA argued that the notice-and-cure provision in the agreement created a protected property interest in the $150,000 and the tax abatements. However, the court reiterated that because the gift was illegal under the Texas Constitution, APA could not have a protected property interest in it. And as for the tax abatements, APA was afforded due process and due course of law through its breach of contract lawsuit.

Civil Rights: *Johnson v. City of San Antonio*, No. 23-50476, 2024 WL 50463 (5th Cir. Jan. 4, 2024). April A'Mynae Roberts sued the city of San Antonio and three of its police officers for falsely arresting her and using excessive force after a birthday party in which an altercation broke out. In her suit against the City of San Antonio, she argued the city violated 42 U.S.C. § 1983 by negligently hiring, retaining, supervising, and training its officers. In addition, Roberts brought state law claims against the city involving intentional

infliction of emotional distress as well as negligent hiring, supervision, training, and retention.

At the trial court level, Roberts's state law and § 1983 claims against the city were ultimately dismissed. Roberts appealed the court's decision and argued that, as to the § 1983 claims, there were genuine disputes of material fact. However, in affirming the district court, the Fifth Circuit concluded that because a previous panel of the court determined Roberts suffered no constitutional harm, city liability under § 1983 could not be established utilizing the *Monell* framework which requires the plaintiff to "show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right." As for the state law claims, the Fifth Circuit agreed with the city that because the Texas Tort Claims Act (TTCA) does not waive a city's immunity for intentional torts such as intentional infliction of emotional distress, the city was entitled to judgment as a matter of law. In addition, the court held that Roberts's claim for negligent hiring, supervision, and training was barred because she failed to show that physical property was used in causing the injuries she sustained, as required by the TTCA.

Qualified Immunity: *Villarreal v. City of Laredo, Tex.*, No. 20-40359, 2024 WL 244359 (5th Cir. Jan. 23, 2024). In 2017, Priscilla Villarreal, a citizen journalist, was arrested by City of Laredo Police Department (LPD) officers for misuse of official information in violation of Texas Penal Code Section 39.06(c). Under this provision, "a person commits an offense if, with intent to obtain a benefit…he solicits or receives from a public servant information that: (1) the public servant has access to by means of his office or employment; and (2) has not been made public." Villarreal, through LPD Officer Barbara Goodman, received and posted on social media nonpublic information about a local suicide and traffic fatality. After her release, Villarreal filed for a writ of habeas corpus, arguing Section 39.06(c) was facially invalid. The district court in a bench ruling granted her petition and held that the statute was unconstitutionally vague.

Later in 2019, Villarreal sued, among other local officials, the City of Laredo, LPD officers, and the chief of police under 42 U.S.C. § 1983 alleging direct and retaliatory violations of free speech and freedom of the press, wrongful arrest and detention, selective enforcement in violation of equal protection, civil conspiracy, and supervisory and municipal liability. In response, the city officials filed a motion to dismiss to which the district court granted, dismissing all claims. Villarreal appealed the decision (as to the LPD officers and chief of police) to the Fifth Circuit, and a panel of the court initially reversed in part then later replaced its opinion with another but similarly concluded that defendants were not entitled to qualified immunity. The Fifth Circuit subsequently vacated the panel opinion, and the case was ordered to be reheard *en banc*.

In a split 9-7 decision, the court affirmed the district court's ruling and held that the officers (and the other local officials) were entitled to qualified immunity. With regard to her claims

based on violations of her Fourth Amendment rights, Villarreal was required to show that "(a) each defendant violated a constitutional right, and (b) the right at issue was 'clearly established' at the time of the alleged misconduct." The court concluded that she failed to satisfy either prong because: (1) the police officers and other local officials took action to arrest Villarreal for violating Section 39.06(c) based on their reasonable belief that probable cause existed which was confirmed by a neutral magistrate; and (2) no clearly established precedent gave officials fair notice that their actions violated Villarreal's constitutional rights or that the statute was unconstitutional. In response to her First Amendment retaliation and Fourteenth Amendment selective enforcement claims, the court determined Villarreal's pleadings were insufficient because she failed to allege officers restricted her exercise of free speech and failed to provide examples of similarly situated individuals who were treated differently. Lastly, because the officers were held to be immune from suit, the court further held that Villarreal's § 1983 conspiracy claim could not be sustained.

Recent Texas Cases of Interest to Cities

Note: Included cases are from January 1, 2024, through January 31, 2024.

Civil Rights: *Harris Cnty. v. Deary*, No. 01-23-00516-CV, 2024 WL 234755 (Tex. App.—Houston [1st Dist.] Jan. 23, 2024). Deary sued Harris County under the Texas Tort Claims Act (TTCA) and 42 U.S.C. § 1983 after a county sheriff allegedly slammed her to the ground and arrested her without probable cause. The county filed a plea to the jurisdiction, claiming governmental immunity, and additionally filed a Rule 91a motion to dismiss, claiming Deary's suit had no basis in law and fact. The trial court denied both the plea and the motion, and the county appealed.

The appellate court affirmed in part and reversed in part, holding that: (1) because Deary had alleged only intentional torts in her pleading, the Texas Tort Claims Act did not waive the county's immunity with regard to those claims; (2) a county has no immunity to Section 1983 claims because Section 1983 creates a cause of action against government actors who deprive a plaintiff of their constitutional rights; and (3) even if the trial court erred by denying the Rule 91a motion to dismiss, the appellate court lacked jurisdiction to review that interlocutory order because it did not implicate the court's subject matter jurisdiction.

Tort Claims Act: *City of Houston v. Branch*, No. 01-21-00255-CV, 2024 WL 332993 (Tex. App.—Houston [1st Dist.] Jan. 30, 2024) (reh'g en banc). Branch sued the City of Houston for negligence under the Texas Tort Claims Act (TTCA), claiming negligent operation of a motor vehicle when a golf cart occupied by a city council member rolled forward over Branch's foot, allegedly when the councilmember accidentally hit the gas. The city filed a motion for summary judgment claiming governmental immunity, which the trial court denied. The city appealed.

The appellate court affirmed, holding that Branch had raised a fact issue regarding the application of the TTCA's waiver of immunity for negligent operation of a motor vehicle because if the councilmember hit the gas pedal on the golf cart, even inadvertently, it might constitute operation of a motor-driven vehicle within the meaning of the waiver.

Takings: *Selinger v. City of McKinney*, No. 05-23-00180-CV, 2024 WL 260500 (Tex. App.—Dallas Jan. 24, 2024) (mem. op.). Developer Stephen Richard Selinger sued the City of McKinney after his plat application to subdivide his 82-acre property into 331 lots was denied. His plans included construction of necessary sewer infrastructure including a package treatment plant, and because the tract of land was not served by the city's water and sewer services, Seliger would contract with a special utility district to supply water to the subdivision. However, the city's subdivision ordinance required developments in the extraterritorial jurisdiction to connect to the city's water and sewer systems and to pay water and sewer impact fees, approximately $482,000 in his case. After declining to alternatively enter into a facilities agreement with the city which would include waivers to some of the city's subdivision ordinance requirements and require him to pay the impact fees if and when the city's water and sewer transmission lines were extended to the development, the city denied Selinger's plat application. Seliger then sued the city arguing, among other things, that the city's actions constituted an illegal taking of his property. However, the trial court ruled in favor of the city, issuing 118 findings of fact and 30 conclusions in law supporting its judgment. Selinger subsequently appealed the court's decision.

The court of appeals held that based on the factual findings at trial, the city's exaction of impact fees did not constitute a compensable taking. In so holding, the court concluded that the city's impact fees bore an essential nexus to the substantial advancement of a legitimate government interest because (1) the city had developed a capital improvements plan based on extensive engineering and land use studies, and (2) had established a formula which determined Selinger's projected impact to the city's water and sewer systems. In addition, the impact fees were roughly proportional to the projected impact of Selinger's proposed development. To Selinger's claim that that the city's exaction lacked the required essential nexus and rough proportionality because he never intended to use the city's water and sewer systems in his development, the court stated that his unilateral decision did not impact the city's exclusive right to provide water service to properties (like Selinger's) located within its certificate of convenience and necessity (CCN). The city also offered evidence at trial that Selinger's property would likely become more marketable with reliable city utilities. For those reasons, the court of appeals affirmed the lower court's decision.

PURA: *In re Disney DTC, LLC N/K/A Disney Platform Distribution, Inc., Hulu, LLC and Netflix, Inc.*, No. 05-23-00485-CV, 2024 WL 358117 (Tex. App.—Dallas Jan. 31, 2024). This case stems from a lawsuit in which 31 cities sued streaming providers Disney, Hulu, and Netflix for, among other things, failing to obtain state-issued certificates of

franchise and refusing to pay the associated city franchise fees for use of city rights-of-way in providing their services pursuant to Chapter 66 of the Texas Public Utility Regulatory Act (PURA). In response to the lawsuit, the streaming providers filed a motion to dismiss arguing that: (1) cities lack the authority to enforce PURA's franchise requirements against non-franchise holders like Disney, Hulu, and Netflix, and (2) because they do not build or operate facilities in city rights of way, they are not required to obtain state-issued certificates of franchise. After the trial court denied the streaming providers' motion, they filed a writ of mandamus.

In ruling in favor of the streaming providers, the court concluded that although PURA provides cities with a limited cause of action against franchise holders, it does not allow for a cause of action against non-franchise holders. The Public Utilities Commission, through the attorney general, is the only entity authorized to determine who must be a franchise holder and how to enforce compliance for failure to obtain a franchise certificate. Because the streaming providers are not franchise certificate holders, the court held that the denial of the motion to dismiss was an abuse of discretion and ordered the trial court to vacate the denial order and to grant the streaming providers' motion.

Government Immunity; Prompt Payment Act: *San Antonio Water Sys. v. Guarantee Co. of N. Am. USA*, No. 08-23-00123-CV, 2024 WL 42357 (Tex. App.—El Paso Jan. 3, 2024) (mem. op.). The San Antonio Water System (SAWS) entered into two separate contracts with Thyssen for the construction of the Mel Waiters Project and the Westpointe Project. GCNA served as the surety for Thyssen on both projects. A dispute arose over the Mel Waiters Project, leading SAWS to sue Thyssen for breach of performance and GCNA for breach of its performance bond obligations. In response, GCNA filed counterclaims related to the Westpointe Project, alleging several breaches of contract by SAWS and additional claims under the Texas Prompt Payment Act. SAWS then filed a plea to the jurisdiction and motion to dismiss GCNA's counterclaims based on governmental immunity. The trial court denied the plea, and SAWS appealed.

Generally, cities have immunity from liability and lawsuits unless that immunity has been waived. Chapter 271 of the Texas Local Government Code contains a limited waiver of governmental immunity for breach of contract claims arising under certain contracts. Even though GCNA was not a signatory to the contract at issue, as an insurer of signatory (Thyssen), GCNA was subrogated to the rights of the insured, and could bring the claims under the contract. Unfortunately for GCNA, the court ultimately held that the terms of the contract were not violated by SAWS as GCNA argued. With regard to Prompt Payment Act counterclaim, it failed as well, due to SAWS not being an "owner" as defined by the Texas Property Code for purposes of GCNA's claims. The court ultimately reversed the trial court's judgment and dismissed GCNA's claims with prejudice.

Tort Claims Act: *City of Fredericksburg v. Boyer*, No. 08-23-00236-CV, 2024 WL 101878 (Tex. App.—El Paso Jan. 9, 2024). Susanna Boyer was injured by a falling branch

from a Bradford pear tree maintained by the City of Fredericksburg while walking on a sidewalk. She accused the city of negligence in maintaining the sidewalk and the tree, failing to warn the public about the tree's danger, and not removing or mitigating the hazard. The city filed a plea to the jurisdiction claiming immunity under the Texas Tort Claims Act (TTCA), arguing it lacked actual knowledge of the tree's dangerous condition. The trial court denied the city's plea, so the city appealed.

Generally, cities have immunity from liability and lawsuits unless that immunity has been waived. The TTCA contains a limited waiver of governmental immunity. For premises defects, a city owes the same duty to a claimant that a private person owes to a licensee on private property; therefore, in premises defect cases like this one, the TTCA would waive immunity if the city would be liable under a licensee theory of premises liability. To be successful in her claim, absent willful, wanton, or grossly negligent conduct by the city, Boyer had to prove, among other elements, that the city had actual knowledge of the dangerous condition. Mere hypothetical or constructive knowledge is not sufficient to satisfy this element. Boyer presented expert testimony related to the Bradford pear's species-specific failure profile; however, the court found that the testimony did not rise to the level of actual knowledge on the part of the city. Consequently, the trial court's order was reversed, and the case was dismissed for want of jurisdiction.

Tax Abatement Agreements: *Corsicana Indus. Found., Inc. v. City of Corsicana,* No. 10-17-00316-CV, 2024 WL 118969 (Tex. App.—Waco Jan. 11, 2024). The City of Corsicana and Navarro County entered into a sales tax abatement agreement with the developer of a retail center and a retail store that operated a location in the retail center under which the city and county granted the use of portions of the sales taxes generated by the store location to pay for the development of a facility in the retail center to house the store location. The city and county brought a declaratory action against the developer and the retail store, seeking to invalidate sales tax abatement agreements, due to closing of the store location at the retail center. The developer and the store brought counterclaims seeking declaratory relief regarding the city's and county's obligations. The lender for the loan on the facility for the store location, who was named as third-party beneficiary in the agreements, intervened. The trial court granted summary judgment for the city and county. Following the store's Chapter 11 bankruptcy barring it from participating in the appeal and developer's assignment of all of its rights in action and appeal to the lender, the lender appealed, both individually and as assignee of the developer.

The court of appeals affirmed, finding that: (1) that the public purpose, under the Texas constitutional provisions limiting use of governmental resources for public purposes, which authorized grant of sales tax revenue was the opening and continued operation of store location in the center; (2) the closure of the store location extinguished the public purpose of the agreements so after closure, the agreements' predominant purpose was no longer to accomplish a public purpose, and thus, rendered agreements unconstitutional; (3) the city and county did not retain control over sales taxes, and thus, agreements were

unconstitutional; and (4) the agreements were unconstitutional at the time they were entered into, and thus, presumption of validity did not apply to the city and county resolutions authorizing them to enter into the agreements.

Takings: *Capps v. City of Bryan*, No. 10-21-00130-CV, 2024 WL 118470 (Tex. App.—Waco Jan. 11, 2024). Landowner brought action against the city for inverse condemnation, alleging that (1) the city committed a new taking when it constructed a new electric transmission line outside of the areas of a right-of-way easement previously granted to city and across the landowner's property in which he owned full interest at the time and (2) the city abandoned original easement when the old transmission line was removed. The trial court granted the city's plea to the jurisdiction in part finding that the landowner did not have standing to bring an inverse condemnation action against the city. The landowner filed an interlocutory appeal.

The court of appeals reversed and remanding finding that the landowner had standing to bring an inverse condemnation proceeding based on allegations of a taking and damages to property he owned.

Recall Elections: *In re Gerdes*, No. 11-23-00283-CV, 2024 WL 187234 (Tex. App.—Eastland Jan. 18, 2024) (mem. op.). This case stems from a petition to recall two commissioners from the City of Ranger. One of the commissioners, Samantha McGinnis, was seated on the commission after she ran unopposed, and the city cancelled her election. The other commissioner, Kevan Moize, was appointed to a vacant seat on the commission. In accordance with the city's charter provision which requires the city to call an election no later than 30 days from the time a petition is presented to the commission, Steve Gerdes submitted two petitions to recall McGinnis and Moize. After five months elapsed, Gerdes filed a petition for mandamus requesting the court to order the city to call the election.

The commissioners argued they lacked the authority to call the election because the petitions were defective. Based on the city's charter language, at least one-fifth of the voters who sign the petition must indicate that they voted for the officer at an election. Because neither McGinnis nor Moize was voted for at an election, the commission determined they could not be subject to recall. However, the court disagreed holding that the commissioners, absent an express charter provision, had no authority to refuse to call an election based on their findings that the petitions were defective. Instead, the commissioners were required to call the election, but could have simultaneously sought declaratory relief in district court to determine if the petitions were defective under the terms of the charter.

The commission also argued that the uniform election requirements in Election Code Section 41.001 preempt the city's charter provision regarding the timing of holding a recall election. The next general election date at which the recall election could be held would fall on May 2024. However, McGinnis's and Moize's terms will conclude by then, and the

seats will already be on the ballot. Therefore, the city did not need to hold a recall election. The court noted if the commission had ordered the election when it had received the recall petitions, it could have held the recall election in November 2023. For these reasons, the court granted Gerdes's petition, and under its authority in Election Code Section 41.001(b)(3), ordered the city to schedule a special election on the recall of the commissioners not less than 15 days and not more than 30 days from the date its ruling.

Tort Claims Act: *City of Corpus Christi v. Nickerson*, No. 13-22-00040-CV, 2024 WL 48181 (Tex. App.—Corpus Christi–Edinburg Jan. 4, 2024) (mem. op.). Nickerson sued the City of Corpus Christi under the Texas Tort Claims Act (TTCA) after she was struck by a John Deere tractor operated by a coworker. The city filed a plea to the jurisdiction arguing that the TTCA did not waive the city's immunity with respect to Nickerson's claim because she received worker's compensation benefits under the Texas Workers Compensation Act (TWCA). The trial court denied the plea and the city appealed.

The appellate court reversed, holding that when the TWCA applies, it acts as a bar to the waiver of immunity contained in the TTCA.

Texas Commission on Human Rights Act: *City of Brownsville v. Gamez*, No. 13-23-00159-CV, 2024 WL 48185 (Tex. App.—Corpus Christi–Edinburg Jan. 4, 2024) (mem. op.). Gamez sued the City of Brownsville under the Texas Commission on Human Rights Act for age and disability discrimination and retaliation based on his transfer and subsequent termination after his position was eliminated for budgetary reasons. The city filed a plea to the jurisdiction, arguing that its governmental immunity was not waived because the city had a nondiscriminatory reason to terminate Gamez, Gamez's cancer did not constitute a disability, and Gamez had not alleged that he had opposed a discriminatory practice as required for a claim of retaliation. The trial court denied the city's plea and the city appealed.

The appellate court affirmed the portion of the trial court's judgment granting the city's plea to the jurisdiction as to Gamez's age and disability discrimination claims, holding that: (1) cancer is not a disability unless it impaired him in some way, which his did not; and (2) another employee with no authority over Gamez asking him when he would retire does not alone constitute evidence of age discrimination. However, the appellate court reversed the portion of the trial court judgment granting the city's plea as to Gamez's retaliation claim and remanded the case to allow Gamez an opportunity to replead, holding that he had not clearly pleaded a retaliation claim but that his petition did not demonstrate incurable defects in his claim.

Tort Claims Act: *City of Hidalgo–Tex. Mun. Facilities Corp. v. Rodriguez*, No. 13-23-00163-CV, 2024 WL 119245 (Tex. App.—Corpus Christi–Edinburg Jan. 11, 2024) (mem. op.). Rodriguez sued the City of Hidalgo–Texas Municipal Facilities Corporation (the city) under the Texas Tort Claims Act (TTCA), alleging a premises defect at a city-

owned arena that was leased to the school district for which Rodriguez worked after she stepped into a sewage connection point (which she identified as a pothole or protruding steel cover) and fell, injuring her knee. The city filed a plea to the jurisdiction, claiming that: (1) Rodriguez could not identify a dangerous condition as required for a premises defect claim under the TTCA because she was unsure what she tripped over, had not seen it before she tripped, and it was not unreasonably dangerous; and (2) Rodriguez was a licensee and not an invitee, and therefore the city owed her a lower duty of care. The trial court denied the city's plea and the city appealed.

The appellate court affirmed, holding that there were genuine issues of material fact as to: (1) whether the sewage connection point was an unreasonably dangerous condition; and (2) whether Rodriguez was an invitee or a licensee because although she had not paid to be on the premises, the school district for which she worked had paid.

Tort Claims Act: *City of Houston v. Salazar*, No. 14-23-00061-CV, 2024 WL 117384 (Tex. App.—Houston [14th Dist.] Jan. 11, 2024). Sammy Salazar, among others, was in a vehicle which was hit by a patrol car driven by Officer Seidel of the Houston Police Department while he was pursuing another individual. The appellees sued the City of Houston and Officer Seidel for negligence. The city moved for summary judgment, claiming governmental immunity, which the trial court denied, leading to this interlocutory appeal.

Generally, cities have immunity from liability and lawsuits unless that immunity has been waived. The Texas Tort Claims Act provides a limited waiver of governmental immunity for torts committed by city employees "acting within the scope of their employment" arising from the operation or use of motor-driven vehicles if the employee would be personally liable to the claimant under Texas law. Officer Seidel would have official immunity from this suit if he could prove the lawsuit arose from (1) the performance of discretionary duties, (2) undertaken in good faith, (3) provided he was acting in the course and scope of his authority. In this case, the "good faith" element was in question, and to prevail on this element, Officer Seidel needed to show that a reasonably prudent police officer, under the same or similar circumstances, could have believed his actions were justified based on the information he possessed at the time. The city presented evidence related to Seidel's use of sirens and lights throughout his pursuit and other evidence demonstrating his considerations of the needs of the pursuit versus its risks. The appellate court determined that Officer Seidel did establish the affirmative defense of official immunity and therefore reversed the trial court's ruling and dismissed the claims against Houston for lack of subject matter jurisdiction.

Tort Claims Act: *City of Houston v. Gonzales*, No. 14-21-00482-CV, 2024 WL 187418 (Tex. App.—Houston [14th Dist.] Jan. 18, 2024) (on reh'g). In January 2016, while driving with his training officer, Houston Police Department probationary peace officer Daniel Iwai collided with the rear bumper of another vehicle while responding to a priority-two call for assistance. Jonathan Gonzalez, who was in the other vehicle, sued the city for

injuries he sustained in the collision and was awarded $250,000 at the conclusion of trial. Houston raised several issues on appeal, but the only one reached by the court was regarding an abuse of discretion by the trial court for not dismissing the case for lack of jurisdiction.

Generally, cities have immunity from liability and lawsuits unless that immunity has been waived. The Texas Tort Claims Act provides a limited waiver of governmental immunity for torts committed by city employees "acting within the scope of their employment" arising from the operation or use of motor-driven vehicles under certain circumstances. However, an exception to this waiver exists when a city employee is responding to an emergency. To prevail in this case, Gonzales needed to present evidence establishing at least one of the following: (1) the officer was not responding to an emergency, (2) the officer's actions were not in compliance with laws or ordinances applicable to emergency action, or (3) the officer's actions reflected a conscious indifference or disregard for the safety of others. At trial, both sides presented evidence regarding whether or not Iwai was responding to an emergency situation, and although the appellate court found the evidence to be inconclusive on this point, because the trial court rendered judgment for Gonzales, the appellate court held that the lower court's findings were "not factually insufficient" to support the judgment against the city. Ultimately, the appellate court affirmed the trial court's ruling; however, due to a procedural rule, the award to the plaintiff was lowered from $250,000 to $100,000.

January 2024

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from December 1, 2023, through December 31, 2023.

Due Process: *Wilson v. Midland Cnty., Tex.*, No. 22-50998, 2023 WL 8642226 (5th Cir. Dec. 14, 2023). In 2001, Erma Wilson was convicted of cocaine possession in Midland County, Texas, after police officers reported finding crack cocaine in her vicinity. She received an eight-year suspended sentence, and her conviction was affirmed on appeal. Decades later, in 2019, it was revealed that Weldon Petty, a long-time assistant district attorney in Midland County, concurrently served as a law clerk for Midland County judges while prosecuting cases in their courts, including over 300 where he had been lead prosecutor. Although Wilson's case was not directly handled by Petty, she claimed his conflict of interest violated her due process rights and filed § 1983 claims. Her cases were dismissed by the trial court, and Wilson appealed.

Wilson's appeal faced the challenge of the "favorable termination" rule established in *Heck v. Humphrey*, necessitating a conviction reversal or sentence invalidation before seeking § 1983 damages. As Wilson's sentence was already served, habeas relief was not an option. A split among the circuits exists, with some effectively waiving the favorable termination rule when compliance would prove impossible as it would in this case. The Fifth Circuit, however, adheres strictly to this rule even when habeas relief is unattainable, and consequently upheld the dismissal of Wilson's claims.

Recent Texas Cases of Interest to Cities

Note: Included cases are from December 1, 2023, through December 31, 2023.

Contracts: *City of League City v. Galveston Cnty. Mun. Util. Dist. No. 6*, No. 01-23-00007-CV, 2023 WL 8814635 (Tex. App.—Houston [1st Dist.] Dec. 21, 2023) (mem. op.). The Galveston County Municipal Utility District No. 6 (the MUD) and the City of League City entered a contract in which the city agreed to make certain payments to the MUD to fund the bonded indebtedness incurred by the MUD in the construction of facilities for a water and sewer system. Under the contract, the MUD agreed to expand the water, sewage, and drainage systems and the city agreed to take title to the improvements in phases, take over the maintenance of them, and make payments. Near the end of the 40-year term of the contract, the MUD issued a series of bonds without seeking approval from the city in contravention of the terms of the contract, and proposed another bond issuance, both of which the city objected to. The city and the MUD reached a settlement agreement over that dispute in which the city agreed to continue making payments to the MUD until 2024 and approved the MUD's bond issuances. A dispute arose over the city's payments to the MUD and the MUD sued the city for underpayment, delayed payments, and a unilateral offset of one payment taken by the city. The MUD sued for declaratory judgment and breach of contract. The city filed a plea to the jurisdiction claiming governmental immunity, which the trial court denied. The city appealed.

The appellate court reversed in part and affirmed in part, holding that: (1) the contract was a contract for goods and services as defined by Chapter 271 of the Local Government Code, so the waiver of immunity in that chapter applied; and (2) the city was immune to a suit seeking declaratory judgment because Chapter 271 does not expressly waive immunity from suit for adjudicating a claim for declaratory relief.

Utility Fees: *City of Pasadena v. APTVV, LLC*, No. 01-20-00287-CV, 2023 WL 8814640 (Tex. App.—Houston [1st Dist.] Dec. 21, 2023) (mem. op.). Two apartment owners sued the City of Pasadena and two city officials seeking the repayment of fees paid to the city through a third-party utility and trash-collection billing. The third party added a 25 percent fee on nonresidential bills for trash-collection, which was then forwarded to the city in exchange for the exclusive right to collect trash in the city. The apartments owners alleged that the fee was an impermissible tax. The city moved for dismissal claiming government immunity and pointing to the failure of the apartment owners to identify a statutory waiver of immunity. The trial court denied the city's motion and the city appealed.

The appellate court affirmed, holding that the apartment owners were not required to show a statutory waiver of immunity because no legislative consent to sue is needed when a plaintiff seeks reimbursement of an unlawful tax.

Tort Claims Act: *City of Houston v. Huff*, No. 01-22-00496-CV, 2023 WL 8938406 (Tex. App.—Houston [1st Dist.] Dec. 28, 2023) (mem. op.). Two City of Houston police officers made an improper left turn and struck a vehicle driven by Huff. Huff sued the city asserting negligence under the Texas Tort Claims Act (TTCA). The city filed a motion for summary judgment, claiming

governmental immunity because Huff had failed to provide the city timely notice as required by the TTCA and the city's charter. The trail court denied the motion and the city appealed.

The appellate court affirmed, holding that although Huff had not provided formal notice of his claim for personal injury, the city had actual notice of Huff's possible injuries due to Huff lying in the road complaining of injuries and being carried away on a backboard, and the city had actual notice of the officers' alleged fault in contributing to the injury because the city's accident report expressly assigned fault to the officers.

Tort Claims Act: *City of Houston v. Cruz*, No. 01-22-00647-CV, 2023 WL 8938408 (Tex. App.—Houston [1st Dist.] Dec. 28, 2023) (mem. op.). Cruz sued the City of Houston under the Texas Tort Claims Act (TTCA) when the car she was driving collided with a vehicle driven by Jamison, an animal control officer who was responding to a call about an animal bite. Jamison's view was partially blocked by a dump truck, but she proceeded into the intersection and was struck by Cruz's vehicle. The city filed a motion for summary judgment claiming governmental immunity, and the trial court denied the motion. The city appealed, arguing that it was entitled to government immunity because Jamison did not breach a legal duty as required to trigger the wavier of immunity under the TTCA, the TTCA's emergency exception applied because Jamison was responding to an animal bite when the collision occurred, and the TTCA does not waive immunity for negligence per se.

The appellate court affirmed, holding that: (1) there was an issue of fact as to whether Jamison breached a legal duty by proceeding into the intersection with her view partially blocked; (2) the city did not meet its burden to establish the applicability of the emergency exception to the TTCA's waiver of immunity; and (3) negligence per se is not a separate claim, but a method of proving negligence, and because Cruz had adequately alleged negligence under the TTCA she was not required to establish a separate waiver for negligence per se.

Immunity: *Town of Little Elm v. Climer*, No. 02-23-00250-CV, 2023 WL 8467513 (Tex. App.—Fort Worth Dec. 7, 2023) (mem. op.). Climer filed a negligence suit against the Town of Little Elm for injuries he received when he fell from his bicycle on a concrete pathway subject to the town's control, asserting that he did not see the hole in the concrete prior to his fall. In its plea to the jurisdiction, Little Elm stated that it was aware of the condition of the pathway, had closed that section of the pathway to conduct an investigation prior to repairing the pathway, and it had checked the trail weekly and warned users of the condition of the trail. The trial court denied the plea, and Little Elm appealed. The court of appeals reversed the trial court's order, finding that Little Elm's decision to close the damaged portion of the trail and conduct a geotechnical distress investigation prior to repairing the pathway was a discretionary decision protected by governmental immunity. Further, the court determined that Climer's factual allegations did not establish c negligence as Little Elm presented evidence that it erected barricades to protect the public.

Employment Discrimination: Tex. Workforce Comm'n v. Seymore, No. 02-23-00036-CV, 2023 WL 8467373 (Tex. App.—Fort Worth Dec. 7, 2023) (mem. op.). The Texas Workforce Commission (Commission) challenged the trial court's denial of its plea to the jurisdiction asserting that Seymore's discrimination and retaliation claims should have been dismissed because

there was no evidence that it failed to provide a reasonable accommodation for Seymore's disability, no evidence that it constructively terminated her employment, and no evidence that it paid her less than similarly situated white employees.

The court of appeals reversed finding that: (1) the breakdown of the interactive process was attributable to Seymore as she unilaterally withdrew from the interactive process when she resigned when the accommodation negotiations had been ongoing for seven months; (2) there was no evidence that the Commission forced her to resign so as to create a constructive discharge claim; and (3) Seymore did not establish a prima facie case of race-based disparate-pay discrimination.

Employment Law: *Leonard v. City of Burkburnett,* No. 02-22-00266-CV, 2023 WL 8940816 (Tex. App.—Fort Worth Dec. 28, 2023) (mem. op.). Following the filing of motions for rehearing by both parties, the court withdrew its November 2, 2023, opinion and substituted it with this opinion to clarify its holding on Leonard's claim based on Section 614.023(c) of the Government Code.

Following his termination of employment as a police officer with the city, Leonard filed a lawsuit against the city and two city officials, alleging the following: (1) denial of his rights without due course of law; (2) denial of equal protection under the law; (3) denial of his right to free speech; (4) denial of his right to freely associate and assemble; (5) wrongful termination; (6) denial of his right to petition; (7) violation of section 617.005 of the Government Code because no hearing was held and no one in a position of authority seriously considered his appeal; (8) civil conspiracy; (9) official oppression by the two officials; and (10) violations of the Texas Open Meetings Act. Leonard sought declaratory relief, injunctive relief, mandamus relief, and attorney's fees, but he expressly denied "seeking money damages." The city filed pleas to the jurisdiction, requesting dismissal for lack of subject matter jurisdiction. The trial court granted the pleas, and Leonard appealed.

The appellate court affirmed in part and reversed and remanded in part. Specifically, the court noted that no authority requires a full-blown hearing under Section 617.005 of the Government Code. The court remanded the following claims to the trial court: (1) that the city violated Leonard's rights to free speech and assembly by wrongfully terminating his employment because of his support of civil-service implementation at the police department and related involvement in the police association; and (2) that one of the city officials failed to comply with Section 614.023(c) of the Government before terminating Leonard's employment. The court also remanded the case so that Leonard may be given the opportunity to replead his equal-protection and due-course-of-law claims and the claim that he is entitled to additional rights pursuant to the "formal appeal procedure" delineated in the city's personnel handbook. The court affirmed the remainder of the trial court's judgement.

Tort Claims Act: *Trevino v. City of San Antonio*, No. 04-22-00193-CV, 2023 WL 8607040 (Tex. App.—San Antonio Dec. 13, 2023). A city police officer was pursuing a suspect who stole a truck with activated sirens and emergency lights when the suspect hit the plaintiff's car, injuring the plaintiff and killing a passenger in the plaintiff's car. Plaintiff sued and the city filed a plea to the jurisdiction on three grounds, which the trial court granted. The plaintiff appealed. The

appellate court affirmed the trial court because the plaintiff failed to address all grounds for the city's plea to the jurisdiction.

Emergency Orders: *Carlin v. Bexar County, et al.*, No. 04-22-00427-CV, 2023 WL 8793095 (Tex. App.—San Antonio Dec. 20, 2023) (mem. op.). Carlin filed a suit against county defendants alleging minimum health standard protocols issued by Bexar County judge regarding masking violated the Texas Religious Freedom Restoration Act (TRFRA). The county defendants filed motions to dismiss on the grounds of sovereign and government immunity and on the grounds that Carlin had not complied with the pre-suit notice provisions under TRFRA. The trial court granted the motions and Carlin appealed.

On appeal, the court rejected Carlin's argument that he did not need to provide notice if the substantial burden on his free exercise of religion was eminent. The appellate court affirmed the grant of the motions and found the trial court did not err in dismissing the claims with prejudice.

***Department of Transportation v. Sonefeld*, No. 07-22-00307-CV, 2023 WL 8856215 (Tex. App.—Amarillo Dec. 21, 2023) (mem. op.).** This is a lawsuit over whether a four to six inch deep, six to seven inch wide, and up to two-hundred-foot-long separation in the road is a special defect. The plaintiff was injured when his motorcycle wheel got stuck in the separation on the road. The trial court granted his motion for summary judgment finding the separation was a special defect, and the case proceeded to a jury trial based upon the special defect. TxDOT appealed the verdict on the grounds that the separation was not a special defect.

The appellate court affirmed the judgment and: (1) overruled TxDOT's argument that the defect could have been avoided so it was not an impediment to an ordinary user of the road; and (2) overruled TxDOT's argument that the trial evidence was insufficient to demonstrate the separation existed for so long to reasonably discover the existence of the condition and make the condition reasonably safe.

Jurisdiction: *Holda v. City of Waco*, No. 07-23-00341-CV, 2023 WL 8939230 (Tex. App.—Amarillo Dec. 27, 2023) (mem. op.). The city seized the plaintiff's animals based on animal cruelty. The plaintiff did not appear at the municipal court hearing to determine if the animals had been cruelly treated and the municipal court issued an order divesting the plaintiff of her ownership of the animals. The plaintiff appealed to the county court and the county court issued a de novo order affirming all of the findings of the municipal court. The plaintiff appealed.

The plaintiff claimed the appellate court had jurisdiction under the federal Servicemembers' Civil Relief Act, which protects servicemembers from default judgment, and that the SCRA preempts the Texas law governing the animal cruelty case. The appellate court rejected the plaintiff's argument that the state law actually conflicts with the federal law because the plaintiff still had the option of filing a bill of review in the state trial court.

Tort Claims Act: *Texas* Civil Service Act: *City of Beaumont v. Fenter*, No. 09-22-00413-CV, 2023 WL 8817684 (Tex. App.—Beaumont Dec. 21, 2023) (mem. op.). Fenter, an EMT with the City of Beaumont, sued the city and the city manager for a declaration that Fenter was a "firefighter" for purposes of the Civil Service Act. Fenter moved for summary judgment for a

declaration that he was a firefighter under the Civil Service Act and the trial court granted his motion. The city filed a plea to the jurisdiction, claiming immunity for itself and the city manager. The trial court granted the city's plea with respect to the city but denied it with respect to the city manager. The city appealed.

The appellate court affirmed in part and reversed and remanded in part, holding that the trial court should not have decided Fenter's motion for summary judgment because Fenter's pleadings were insufficient to show that the city manager's immunity from suit was waived based on his ultra vires act of failing to classify Fenter as a firefighter. Because Fenter's pleadings did not affirmatively negate jurisdiction, the court remanded the case to the trial court to allow Fenter to replead.

Employment Discrimination: *City of Pharr v. De Leon*, No. 13-23-00033-CV, 2023 WL 8642683 (Tex. App.—Corpus Christi–Edinburg Dec. 14, 2023) (mem. op.). DeLeon sued the City of Pharr for employment discrimination, alleging that the city failed to provide reasonable accommodations for his disability. He also sued under the Whistleblower Act, claiming the city terminated him in retaliation for a report he made to the Texas Commission on Environmental Quality (TCEQ) about a wastewater spill, and under the Texas Commission on Human Rights Act (TCHRA), claiming the city denied his appeal of his termination in retaliation for a report he made to the Texas Workforce Commission. The city filed a plea to the jurisdiction and a motion for summary judgment, which the trial court denied. The city appealed.

The appellate court affirmed in part and reversed in part, holding that: (1) DeLeon had alleged a prima facie case of disability discrimination; (2) DeLeon's TCHRA claim failed because the denial of his appeal of his termination did not constitute an adverse employment action within the meaning of the Act; and (3) DeLeon's Whistleblower claim survived because he was entitled to a presumption that his report to the TCEQ was the cause of his termination.

Eminent Domain: *JRJ Pusok Holdings, LLC v. State*, No. 14-22-00559-CV, 2023 WL 8939318 (Tex. App.—Houston [14th Dist.] Dec. 28, 2023). In 2013, the Texas Department of Transportation (State) approached Joyce Hutcherson, Rudolph Pusok, and Jimmie Pusok (Owners) with an intent to acquire part of their property for a highway project. The State offered to buy the property for over $496,000, which the Owners rejected. After negotiations failed, the State initiated condemnation proceedings; however, a settlement was quickly reached, and the Owners sold the property to the State for over $680,000 and signed special warranty deeds and Rule 11 agreements, stating they would not seek further compensation. Years later, the Owners inquired about the status of the property, suspecting that part of it had become surplus due to project rerouting. They sought to repurchase this surplus property under Texas Property Code Chapter 21, which allows repurchase at the original eminent domain price if the property is no longer needed for public use. The State declined the repurchase request, arguing that the property was acquired through settlement, not eminent domain, and hence Chapter 21 did not apply. The Owners sued the State, asserting, among other things, violations of Chapter 21. The State filed a plea to the jurisdiction, which the trial court granted, dismissing the case with prejudice. The Owners appealed.

While other aspects of the case were also appealed, it is the court's analysis of the Owners' repurchase rights following condemnation that are most interesting. The court considered whether

Chapter 21 waives the State's immunity from suit for claims based on the right of repurchase. While Chapter 21 contains no explicit waiver language, the court agreed that it implicitly allows for such suits. Central to the case was the definition of "eminent domain," with the State arguing that property is only acquired through eminent domain following a specific legal process culminating in a court judgment. However, the court, referencing common law and Black's Law Dictionary, determined that eminent domain does not require a judicial decree and occurs when property is taken for public use with compensation. The court concluded that the nature of the instant property acquisition remained eminent domain despite the eventual settlement to avoid litigation. The involuntary nature of the transaction and the compensation involved underscored this conclusion. Ultimately, the court concluded that the Owners presented a valid waiver of immunity under Chapter 21; therefore, the trial court's granting of the State's plea to the jurisdiction was deemed erroneous.

December 2023

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from November 1, 2023, through November 31, 2023.

Sexual Harassment: *Doe v. Burleson Cnty., Tex*., 86 F.4th 172 (5th Cir. 2023). A county employee who worked as a criminal clerk in a county attorney's office brought a Section 1983 action against the county and the county judge arising from the judge's alleged sexual misconduct towards her. The federal district court vacated the trial date based on a finding that the judge lacked requisite final policymaking authority to hold the county liable, and subsequently, granted the county's motion for judgment on the pleadings. The county employee appealed.

The court of appeals affirmed, holding that the judge lacked requisite final policymaking authority to hold the county liable under Section 1983 for his alleged sexual misconduct.

Fair Housing Act: *Women's Elevated Sober Living L.L.C. v. City of Plano, Tex.*, 86 F.4th 1108 (5th Cir. 2023). The operator of a sober-living home and home resident brought action against city, alleging the city's refusal of the operator's request for a zoning accommodation that would allow 17-20 residents in the home violated the Fair Housing Act (FHA). The city's zoning ordinance allows only two types of residences in single family zones, either a "household" or a "household care facility," and limits the household care facility to eight unrelated disabled individuals and two caretakers. The federal district court held that the city violated the FHA after concluding that the operator's proposed accommodation was therapeutically necessary as compared to the offered alternative, considering the disabilities of the residents.

The court of appeals reversed and remanded, holding that the district erred by applying a standard accepting that "therapeutically beneficial treatment" constitutes necessity under the FHA, and the evidence was insufficient to support finding that requested accommodation was necessary to support a failure-to-accommodate claim.

Administrative Law: *Port Arthur Cmty. Action Network v. Tex. Comm'n on Envtl. Quality*, 86 F.4th 653 (5th Cir. 2023). A nonprofit environmental organization petitioned for judicial review of a determination by the Texas Commission on Environmental Quality (TCEQ), pursuant to the federal Clean Air Act and the Texas Clean Air Act, granting a Prevention of Significant Deterioration (PSD) permit to an applicant that planned to build a liquefied natural gas (LNG) plant and export terminal. The applicant interven

The court of appeals found that the organization's member had Article III standing to challenge the permit decision. Additionally, the court determined that TCEQ failed to explain its departure from prior policy requiring PSD applicants to adhere to emissions limits in prior permits regardless of prior-permitted facilities' operational status. The court determined that when a Texas state agency departs from its own administrative policy, or applies a policy inconsistently, Texas law requires it to adequately explain its reasons for doing so. In this case, the TCEQ declined to impose certain emissions limits on a new natural gas facility that it had recently imposed on another such facility. In doing so, it contravened its policy of adhering to previously imposed emissions limits, but it did not adequately explain why. It therefore acted arbitrarily and capriciously under Texas law. Accordingly, the court vacated TCEQ's order granting the emissions permit at issue and remanded for proceedings consistent with the court's opinion.

Qualified Immunity*: Bailey v. Iles*, No. 22-30509, 2023 WL 8062239 (5th Cir. Nov. 21, 2023). An arrestee brought a Section 1983 action against a detective and sheriff, alleging false arrest under the Fourth Amendment, First Amendment retaliation, as well as state law claims for malicious prosecution and false arrest, arising from his arrest for a social media post he made stating that sheriff's deputies would shoot COVID-19 "infected" persons "on sight." Both sides moved for summary judgment. The federal district court granted the detective's and the sheriff's motion. The arrestee appealed.

The court of appeals reversed and remanded, holding that: (1) the social media post did not rise to the level of incitement outside of First Amendment protection; (2) the post was not a "true threat" that was unprotected by the First Amendment; (3) the detective did not have probable cause to make a warrantless arrest under Louisiana terrorizing statute; (4) the detective was not entitled to qualified immunity from the false arrest claim; (5) the arrestee satisfied elements for retaliation under the First Amendment; and (6) the detective was not entitled to qualified immunity from the arrestee's First Amendment retaliation claim.

Qualified Immunity: *Sligh v. City of Conroe, Tex.*, No. 22-40518, 2023 WL 8074256 (5th Cir. Nov. 21, 2023). After an arrestee with a mental health condition was injured by a prolonged bite from a city police officer's police dog, the arrestee brought a Section 1983 action against the officer, county sheriff's deputy, city, and county, alleging a violation of the Fourth Amendment, and asserting excessive-force claim against the officer, failure-to-intervene/bystander liability claim against the deputy, a *Monell* claim against the city, and

claims against the city and the county for failure to accommodate her mental health condition under the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The officer and deputy asserted qualified immunity. The federal district court dismissed the case for failure to state a claim. The arrestee appealed.

The Court of Appeals affirmed, finding that the: (1) the officer's decision to deploy the police dog against the arrestee constituted an excessive use of force, thus violating a constitutional right; (2) the officer was entitled to qualified immunity from the excessive-force claim; (3) the deputy was entitled to qualified immunity for bystander liability; (4) the city was not liable for the Section 1983 claim based on inadequate policies; (5) the arrestee failed to state a Section 1983 claim against the city for failure to train; and (6) the arrestee failed to state a claim against the city and county for failure to accommodate her alleged mental health disability.

Recent Texas Cases of Interest to Cities

Note: Included cases are from November 1, 2023, through November 31, 2023.

Uniform Declaratory Judgment Act: *City of Kemah v. Joiner*, No. 01-23-00105-CV, 2023 WL 8041040 (Tex. App.—Houston [1st Dist.] Nov. 21, 2023) (mem. op.). Carl Joiner, the former mayor of the City of Kemah, sued the city for a declaratory judgment compelling the city to release the results of an investigative report relating to Joiner's conduct in a renovation and expansion project for city hall and related infrastructure. Joiner, as mayor, saw the report but the city chose not to release the report to the public. The city filed a plea to the jurisdiction, claiming governmental immunity and challenging Joiner's standing to sue. The trial court denied the plea and the city appealed.

The appellate court reversed and remanded, giving Joiner an opportunity to replead. The appellate court held that: (1) the Uniform Declaratory Judgment Act provides a waiver of immunity only for challenges to the validity of an ordinance or statute; (2) The Texas Open Meetings Act provides a waiver of immunity only for suits brought by mandamus or injunction; and (3) the Public Information Act provides a waiver of immunity only for suits brought by a district or county attorney or the attorney general. Therefore, Joiner had not met his burden to show a waiver of immunity.

Employment Law: *Leonard v. City of Burkburnett*, No. 02-22-00266-CV, 2023 WL 7210339 (Tex. App.—Fort Worth Nov. 2, 2023) (mem. op.). Following his termination of employment as a police officer with the city, Leonard filed a lawsuit against the city and two city officials, alleging the following claims: (1) denial of his rights without due course of law; (2) denial of equal protection under the law; (3) denial of his right to free speech; (4) denial of his right to freely associate and assemble; (5) wrongful termination; (6) denial of his right to petition; (7) violation of section 617.005 of the Government Code; (8) civil conspiracy; (9) official oppression by the two officials; and (10) violations of the Texas Open Meetings Act. Leonard sought declaratory relief, injunctive relief, mandamus relief, and attorney's fees, but he expressly denied "seeking

money damages." The city filed pleas to the jurisdiction, requesting dismissal for lack of subject matter jurisdiction. The trial court granted the pleas, and Leonard appealed.

The appellate court affirmed in part and reversed and remanded in part. The court remanded the following claims to the trial court: (1) that the city violated Leonard's rights to free speech and assembly by wrongfully terminating his employment because of his support of civil-service implementation at the police department and related involvement in the police association; and (2) that one of the city officials failed to comply with Chapter 614 of the Government before terminating Leonard's employment. The court also remanded the case so that Leonard may be given the opportunity to replead his equal-protection and due-course-of-law claims and the claim that he is entitled to additional rights pursuant to the "formal appeal procedure" delineated in the city's personnel handbook. The court affirmed the remainder of the trial court's judgement.

Tort Claims Act/Takings: *Voorhies v. Town of Hollywood Park*, No. 04-22-00658-CV, 2023 WL 7171494 (Tex. App.—San Antonio Nov. 1, 2023) (mem. op.). Plaintiffs sued the city claiming: (1) the city did not use land dedicated "for recreational purposes only" for recreational purposes because it generated revenue by leasing the facility to private individuals for weddings, parties, and other events; and (2) the city's use of the land diminished the value of plaintiffs' property. The city filed a plea to the jurisdiction because its operation of a park was a governmental function and the challenged actions did not constitute a taking of the plaintiffs' property. The trial court granted the plea and the plaintiffs appealed.

The appellate court affirmed and determined: (1) the city's decisions about how, when, and by whom the property may be used are discretionary as part of an enumerated governmental function in operating a civic or community center; (2) the plaintiffs' claims did not state a taking because they did not allege the noise rendered their home unusable or affected their property in a unique way different from the community as a whole; (3) plaintiffs' claims for declaratory relief failed because they only alleged the city violated their own noise ordinances, not that an ordinance was invalid; and (4) the plaintiffs did not have standing to challenge the deed restriction on the city's property.

Elections: *Rodriguez v. Rangel*, No. 04-23-00099-CV, 2023 WL 7474976 (Tex. App.—San Antonio Nov. 13, 2023). This case arises from an election dispute where Rodriguez received six more votes than Rangel in an election for city council. At trial, the court ruled that seven votes for Rodriguez were illegally cast and declared Rangel the winner. Rodriguez appealed. The appellate court addressed numerous challenges to the trial evidence and affirmed all but one of the trial court's findings.

Contracts: *Travis Cnty. Mun. Util. Dist. No. 10 v. Waterford Lago Vista, LLC*, No. 07-23-00182-CV, 2023 WL 8042570 (Tex. App.—Amarillo Nov. 20, 2023) (mem. op.). A developer entered into an agreement with the municipal utility district (MUD) to provide for construction of water, sewer, and drainage facilities to serve property owned by the developer and it included rights to reimbursement for costs of the project. The developer defaulted on its loan and on foreclosure, the rights ultimately were assigned to Waterford. Waterford requested reimbursement under the agreement, which the MUD denied because it argued the terms of the agreement regarding assignment were not followed. Waterford sued and the MUD filed a plea to the jurisdiction,

arguing there was no waiver of sovereign immunity under Local Government Code Sections 271.151 and 271,152. The trial court denied the plea and the MUD appealed.

In affirming the trial court's denial, the appellate court found: (1) prior cases with similar facts found that sovereign immunity was waived when a governmental entity agrees to reimburse a developer for costs associated with projects like the one in this case and the contract fell into a contract for "goods and services"; and (2) the MUD's argument that Waterford did not have standing to sue was really a capacity to seek reimbursement issue, not a standing issue.

***Morris v. City of Midland*, No. 11-22-00209-CV, 2023 WL 8262750 (Tex. App.—Eastland Nov. 30, 2023).** Paula Morris was fined by the city of Midland's municipal court for multiple city ordinance violations including: (1) illegally parking a trailer or recreational vehicle in a residential area; (2) holding garage sales in excess of what was allowable; and (3) accumulating debris on her property. After failing to pay all the court ordered fines and continuing to violate city ordinances, the city sought a temporary injunction, permanent injunction, and civil penalties in district court. After a number of continuances, the trial court granted the city's request for a temporary injunction, but Morris continued to violate city ordinances and the temporary injunction. Thereafter the city filed a motion for summary judgment, and the trial court granted the city's motion and entered a final judgment for a permanent injunction. Morris subsequently appealed. Morris claimed, among other things, that: (1) the permanent injunction was unconstitutionally vague and violated Rule 683 of the Texas Rules of Civil Procedure; (2) the city failed to make a showing of irreparable harm and the lack of an adequate remedy at law; and (3) the city's nuisance ordinance was invalid. The court held that because Morris failed to raise her constitutional claim and did not present any objections to the city's nuisance ordinance at trial, she waived appellate review on these issues. To Morris's claim that the permanent injunction violated Rule 683, the court clarified that the rule is only applicable to temporary injunctions. However, the court disagreed that the permanent injunction was unclear, and determined that the injunction clearly stated which activities she was enjoined from committing. Lastly, because the city offered ample evidence that Morris had repeatedly violated city ordinances and caused irreparable harm to her neighbors' use and enjoyment of their property, the court upheld the trial court's permanent injunction.

Whistleblower Act: *City of Valley Mills v. Chrisman*, No. 13-22-00144-CV, 2023 WL 7851699 (Tex. App.—Corpus Christi–Edinburg Nov. 16, 2023) (mem. op.). Chrisman and Troxell sued the City of Valley Mills under the Whistleblower Act, claiming they were terminated in retaliation for making a police report alleging that city officials stole their deer feeders that they had installed on city property. The city filed a plea to the jurisdiction claiming governmental immunity, which the trial court denied. The city appealed.

The appellate court reversed, holding that because Chrisman and Troxell knew that personal deer feeders were not permitted on city property, they could not show that the police report they made was in good faith. Therefore, their Whistleblower Act claim failed and the city's governmental immunity was not waived.

Tort Claims Act: *City of Corpus Christi v. Rios*, No. 13-21-00414-CV, 2023 WL 7851900 (Tex. App.—Corpus Christi–Edinburg Nov. 16, 2023) (mem. op.). Rios sued the City of Corpus Christi under the Texas Tort Claims Act (TTCA) after she was injured in a traffic accident

involving a stolen city police vehicle driven by a suspect who had been placed under arrest and left inside the vehicle. The city filed a plea to the jurisdiction arguing that it was protected by governmental immunity, which the trial court denied. The city appealed.

The appellate court reversed and rendered judgment, holding that the officers were performing a discretionary function when they arrested the suspect and placed him in the vehicle, so the officers were entitled to official immunity. Therefore the city's governmental immunity had not been waived.

Immunity: *Edney v. City of Waco*, No. 13-22-00152-CV, 2023 WL 8270628 (Tex. App.—Corpus Christi–Edinburg Nov. 30, 2023) (mem. op.). Edney sued the city of Waco claiming an illegal search and seizure after he was arrested at a mall for trespass and illegal carrying of a weapon. The city filed a motion to dismiss and a plea to the jurisdiction, claiming governmental immunity for the city and official immunity for the police officers who arrested Edney. The trial court granted the city's motion to dismiss and the city's plea to the jurisdiction, reasoning that the city's governmental immunity had not been waived for Edney's claim. Edney appealed the trial court's grant of the city's motion to dismiss.

The appellate court affirmed, holding that on appeal Edney had only challenged the trial court's grant of the city's motion to dismiss and did not challenge the trial court's grant of the city's plea to the jurisdiction. Because both dispositive motions relied on the city's governmental immunity, the appellate court could not reverse the trial court regardless of whether the grant of the motion to dismiss was proper.

November 2023

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from October 1, 2023, through October 31, 2023.

Family Medical Leave Act: *Murillo v. City of Granbury*, No. 22-11163, 2023 WL 6393191 (5th Cir. Oct. 2, 2023). Murillo, a public works employee of the City of Granbury, sued the city under the Family Medical Leave Act (FMLA), for retaliation after she was terminated for failing to report to work on the first day following the end of her FMLA leave. Murillo also made a claim under 42 U.S.C. § 1983 and alleged a conspiracy to interfere with her rights. The city moved for summary judgment and the trial court granted the motion, reasoning that Murillo's FMLA claim failed because she was no longer on FMLA leave when she was terminated, her § 1983 claim failed due to her failure to identify a constitutional violation, and her conspiracy claim failed due to her failure to show an agreement between multiple people to violate her rights. Murillo appealed only the court's grant of summary judgment on her FMLA retaliation claim.

The appellate court reversed, holding that because Murillo had met her prima facie burden to show FMLA retaliation, the burden then shifted to the city to offer a legitimate reason for her termination. The city's personnel manual stated that an employee would be terminated after three consecutive days of failure to appear at work, so the city's reason for terminating Murillo on the first day after her leave ended was not a legitimate reason.

Civil Rights: *Walker v. City of Houston*, No. 22-20537, 2023 WL 6457926 (5th Cir. Oct. 4, 2023). Walker sued the City of Houston and several police officers under 42 U.S.C. § 1983, alleging that they used excessive force against him during an arrest. The district court granted summary judgment in favor of the city and Walker appealed.

The appellate court affirmed, holding that the force used against Walker was objectively reasonable under the circumstances because the record showed that the crime Walker was arrested for was a severe crime, Walker posed an immediate threat, and Walker was actively resisting arrest at the time the force was used.

Civil Rights: *Fuhr v. City of Sherman, Tex.*, No. 23-40116, 2023 WL 6518159 (5th Cir. Oct. 5, 2023). Fuhr sued the City of Sherman for racial discrimination after the city hired an outside applicant, Coleman, instead of promoting Fuhr to an open supervisory position. Fuhr alleged that the city chose not to promote him because he was white, in violation of the Civil Rights Act. The trial court granted the city's motion for summary judgment and Fuhr appealed.
The appellate court affirmed, holding that although Fuhr had met his prima facie burden for his racial discrimination claim so the burden shifted to the city to show a nonpretextual reason for choosing not to promote Fuhr, the city easily met its burden because Coleman was significantly more qualified for the position than Fuhr.

Takings Clause: *Baker v. City of McKinney, Tex.*, 84 F.4th 378 (5th Cir. 2023). Baker sued the City of McKinney for violations of the takings clauses of the United States and Texas Constitutions after her home was severely damaged when the police used multiple tools, including explosive devices and gas grenades, to rescue a child being held hostage by an intruder inside her home. The city filed a motion to dismiss based on governmental immunity and Baker filed a motion for partial summary judgment on the matter of the city's liability. The trial court denied the city's motion to dismiss and granted Baker's motion for summary judgment. A jury trial on the matter of damages followed, and a jury awarded Baker damages for her home and personal property. The city appealed both the trial court's denial of its motion to dismiss and the trial court's grant of Baker's motion for summary judgment.

The appellate court reversed, holding that history and precedent established the necessity exception to the takings clauses in both state and federal law, which allows the government to damage or destroy property without compensation in the case of public emergency.

Tax Injunction Act: *Harward v. City of Austin*, 84 F.4th 319 (5th Cir. 2023). Harward, along with several other property owners along the shore of Lake Austin, sued the City of Austin under the due process, equal protection, takings, and ex post facto clauses of the federal Constitution, together with state law claims, seeking declarations, injunctions, and writs of mandamus following a City of Austin ordinance that (1) declared the properties to be within the city's limited-purpose jurisdiction; (2) repealed a 1986 ordinance promising not to tax the properties until the city provided services; and (3) announced that the properties are subject to taxation regardless of whether the city provides services. In the lawsuit, the property owners alternatively sought an award of just compensation for the taking of their properties' jurisdictional status, provision of city services, or disannexation. The trial court dismissed all the claims as barred by the Tax Injunction Act (TIA), and Harward appealed.

The appellate court affirmed in part and reversed and remanded in part, holding that: (1) the TIA did not preclude the property owner's claim to invalidate the ordinance or alternative claims for just compensation, provision of services, or disannexation because these did not directly challenge the taxing power of the city; (2) the TIA barred the property owners' request for a declaration that the city's notices to the appraisal district that the properties were in the taxing boundaries were invalid; and (3) the TIA barred the property owners' request for a writ of mandamus directing the city to instruct the appraisal district and tax collected that the properties were in the city's extraterritorial jurisdiction.

Sexually Oriented Businesses: *Ass'n of Club Executives of Dallas, Inc. v. City of Dallas, Tex.*, 83 F.4th 958 (5th Cir. 2023). The owners of several sexually oriented businesses and their trade organization (SOBs) sued the City of Dallas challenging the constitutionality of a city ordinance that barred SOBs from operating between the hours of 2:00 am and 6:00 am, alleging that their free speech rights were violated because the ordinance impermissibly restricted speech. The trial court granted the SOBs request for a preliminary injunction and the city appealed.

The appellate court reversed, holding that the city was likely to show that the ordinance was designed to further a substantial government interest because it was backed by ample data and that the SOBs were unlikely to succeed on a claim that the ordinance substantially restricted speech because the ordinance left the SOBs free to operate for 20 hours a day.

Civil Rights: *Dusterhoft v. City of Austin*, No. 23-50313, 2023 WL 6785842 (5th Cir. Oct. 13, 2023). Dusterhoft, a City of Austin assistant police chief, sued the city and the chief of police after he was demoted and subsequently fired, alleging that he was demoted and fired as retaliation for statements alleging wrongdoing in the police department that he made during the meeting in which he was demoted. Dusterhoft claimed that the city and several city officials conspired against him and retaliated against him for exercising his First Amendment right to free speech by making the statements about the department. The city moved to dismiss both claims, the trial court granted the motion, and Dusterhoft appealed.

The appellate court affirmed, holding that because Dusterhoft was speaking as a public employee rather than a private citizen when he made the statements about the department at the private meeting that resulted in his demotion, the speech was not protected by the First Amendment and therefore his claims failed.

Recent Texas Cases of Interest to Cities

Note: Included cases are from October 1, 2023, through October 31, 2023.

Employment: *City of Pasadena v. Poulos*, No. 01-22-00676-CV, 2023 WL 7134974 (Tex. App.—Houston [1st Dist.] Oct. 31, 2023) (mem. op.). Poulos sued the City of Pasadena under the Texas Commission on Human Rights Act, asserting claims for hostile work environment, alleging that her supervisor treated her unfavorably compared to her white co-workers. She also asserted claims for retaliation, alleging that she received adverse employment actions such as

having leave denied in retaliation for raising the issue of her unfavorable treatment and racial discrimination. The city filed a motion to dismiss, claiming governmental immunity. The trial court denied the motion and the city appealed, arguing that Poulos had not timely filed suit or served the city with process and that her charge of discrimination was not actionable under the TCHRA.

The appellate court reversed in part and affirmed in part, holding that: (1) Poulos's racial discrimination claim was not actionable under the TCHRA because being denied leave on a specific day did not constitute an adverse employment action; (2) Poulos had not made a prima facie case for her hostile work environment claim because she had not shown that the treatment she received was related to her race or that is was so severe and pervasive that it affected a term, condition, or privilege of her employment; and (3) because the city failed to state why Poulos's cause of action for her retaliation had no basis in law in its motion to dismiss, there was no grounds to dismiss the retaliation claim.

Tort Claims Act: *City of Arlington v. Taylor*, No. 02-22-00325-CV, 2023 WL 6631533 (Tex. App.—Fort Worth Oct. 12, 2023) (mem. op.). Taylor sued the City of Arlington after he was in a vehicular collision with a city police officer who was responding to an emergency. The city filed a plea to the jurisdiction, asserting it was entitled to immunity under the emergency exception to the Texas Tort Claims Act (TTCA). The trial court denied the city's plea, and the city appealed. After considering the city's motion for rehearing en banc, the appellate court withdrew its May 18, 2023, memorandum opinion and substituted it with this October 12, 2023, opinion. The appellate court reversed and rendered the judgement dismissing Taylor's claims, finding that Taylor bore the burden of negating the application of the TTCA's emergency exception and had failed to do so.

Tort Claims Act: *City of Laredo v. Torres*, No. 04-22-00453-CV, 2023 WL 6453823 (Tex. App.—San Antonio Oct. 4, 2023) (mem. op.). The plaintiff sued the city on February 18, 2021, for damages for a light pole that fell on him on February 18, 2019. The city filed a plea to the jurisdiction. The trial court denied the city's plea and the city appealed.

The appellate court reversed and found: (1) there was a fact issue about the plaintiff's timely notice of claim letter that identified the plaintiff, his injuries, and that a city lamp post fell on him; (2) the light pole was not a special defect; and (3) the city had no prior knowledge of the light pole as a dangerous condition so the plaintiff could not establish a premises defect.

Tort Claims Act: *City of Uvalde v. Pargas*, No. 04-23-00150-CV, 2023 WL 7005872 (Tex. App.—San Antonio Oct. 25, 2023) (mem. op.). The plaintiff sued the city for a premises defect and/or special defect when she fell in a hole and fractured her ankle while walking along FM 1435. The city filed a plea to the jurisdiction on multiple grounds, including that it did not owe a legal duty to the plaintiff because it did not own, control, or maintain the premises where she fell. At the hearing on the city's plea, Texas Department of Transportation's attorney represented that she believed the hole was in TxDOT's right-of-way. The trial court denied the plea.

On appeal, the appellate court found that: (1) there was some evidence that the city controlled the premises because: (a) the agreement between the city and TxDOT still required the city to require repairs of utility services and the hole was from a removed utility pole; and (b) the city made the repair after the plaintiff fell which shows control; (2) the plaintiff failed to present evidence that the city had actual knowledge of the hole for an ordinance premises defect; (3) there was a fact issue about whether the hole was a special defect and the city should have known about it; and (4) the city had a duty to repair the hole if it owned or controlled the land where the special defect is. The appellate court reversed the denial of the plea on the ordinary premises defect claim but affirmed on the other grounds.

***City of Laredo v. Moreno*, No. 04-22-00624-CV, 2023 WL 7005871 (Tex. App.—San Antonio Oct. 25, 2023) (mem. op.).** This case involves a lot of procedural history. The plaintiff sued the city when he was terminated from his job as the water treatment superintendent, which is subject to the city's civil service rules and regulations. He alleged federal and state due process violations and sought an injunction to be reinstated. The trial court granted the request for a temporary injunction and ordered the city to reinstate the plaintiff. The city filed a plea to the jurisdiction, which the trial court denied. The appellate court affirmed the denial.

Then the trial court extended the preliminary injunction and ordered the plaintiff to pay $5,000 in a bond. The city requested the trial court increase the bond and the trial court denied the city's motion. The city appealed the bond amount and appealed the trial court's further order requiring the city to reinstate the plaintiff.

The appellate court dissolved the trial court's injunction and found: (1) the trial court abused its discretion in granting the plaintiff's request for a temporary injunction to reinstate him because he did not demonstrate an irreparable injury and did not demonstrate why monetary damages would not compensate him; and (2) the city did not demonstrate the amount of the supersedeas bond was improper.

Tort Claims Act: *City of Dallas v. Holmquist*, No. 05-23-00276-CV, 2023 WL 6547911 (Tex. App.—Dallas Oct. 9, 2023). Remy Holmquist sued the city of Dallas for negligence after falling into a hole in a grassy area after stepping off a sidewalk in one of the city's parks at night. Holmquist originally claimed the hole was a premise defect under Tex. Civil Practice & Remedies Code Sec. 101.022(a). After the city filed a plea to the jurisdiction, Holmquist amended his petition claiming the hole was a special defect under Sec. 101.022(b). After a hearing, the trial court denied the city's plea, and the city filed an interlocutory appeal.

The court of appeals, in reversing the trial court's order, held that the hole was neither a special defect nor a premise defect where: (1) it was in a grassy area off the walking path not intended for use by pedestrians in the park and Holmquist did not act as an ordinary user when he walked in this area; and (2) Holquist presented no evidence the city had any actual knowledge of the hole or was grossly negligent.

Tort Claims Act: *Wilson v. City of Houston*, No. 14-22-00666-CV, 2023 WL 6561249 (Tex. App.—Houston [14th Dist.] Oct. 10, 2023) (mem. op.). Brian Wilson was involved in a collision with a City of Houston fire truck on September 29, 2017. He filed a lawsuit against the City on September 27, 2019, claiming negligence and other causes of action under the Texas Tort Claims Act (TTCA). The city responded with a motion for summary judgment, citing, among other defenses, Wilson's failure to provide timely notice of his claims, as required by the TTCA as well as the city's charter. The trial court granted the city's motion, and Wilson appealed.

The city's charter mandates that written notice of a claim must be given within 90 days of the incident. Wilson attempted to overcome the city's motion by submitting a letter expressing his intent to file a claim, a police report, and various pieces of evidence he claimed showed the city had actual notice of the incident, which the appellate court examined. The court stressed that for the city to have actual notice, it must have subjective awareness of its potential culpability. Ultimately, evidence submitted by Wilson was deemed insufficient to establish actual notice as it did not suggest the city was at fault. Wilson's argument that the city had actual knowledge due to the involvement of its employees and the resulting damages and the fact that city employees knew he was injured was unconvincing, as the accident report charged Wilson with traffic violations rather than attributing fault to the city's fire truck driver. Consequently, the appellate court affirmed the trial court's judgment, dismissing Wilson's lawsuit.

October 2023

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from September 1, 2023, through September 30, 2023.

Civil Rights: *Guerra v. Castillo*, No. 22-40196, 2023 WL 5764278 (5th Cir. Sept. 7, 2023). Guerra, a sergeant at the City of Alamo police department, sued the city's former Chief of Police, Baudelio Castillo, the city, and other officers, following a series of events that led to Guerra's termination and arrest on theft charges. The charges against Guerra were eventually dismissed on May 2, 2019, for lack of evidence, and Guerra filed a lawsuit under 42 U.S.C. § 1983, claiming violations of his Fourth and First Amendment rights and citing malicious prosecution and false arrest against Castillo. The lawsuit also implicated the city under a *Monell* claim, citing Castillo and the City Manager as the required "policymakers." The district court granted motions to dismiss filed by the city and other officers. One of Castillo's motions to dismiss was denied while another was granted due to qualified immunity, with the court finding that Guerra's claims did not overcome the immunity and other established legal precedents. Guerra appealed the district court's dismissal orders.

The court focused first on Guerra's false arrest claim against Castillo under the backdrop of Castillo's qualified immunity defense. Guerra alleged that Castillo had orchestrated a conspiracy to file false affidavits, manipulating the criminal justice system to unjustly target him in a series of incidents spanning 2018 and 2019. This accusation hinges on the violation of Guerra's Fourth Amendment right to be free from false arrests. The court held that Castillo's deliberate perpetuation of false affidavits and his cognizance of the lack of probable cause in Guerra's arrest violated established legal principles and ruled against granting Castillo qualified immunity. Consequently, the court reversed the previous dismissal of Guerra's claim against Castillo and remanded the case to the trial court for further proceedings.

Guerra also argued that Castillo should be held accountable for malicious prosecution under § 1983; however, the district court dismissed this argument, emphasizing that the current jurisprudence in the Fifth Circuit did not recognize a constitutional right to be protected from malicious prosecution at the time of these incidents. The appellate court agreed and affirmed the district's dismissal of Guerra's malicious prosecution claims. Additionally, the court affirmed the dismissal of Guerra's First Amendment claims against Castillo for lack of sufficient evidence.

Finally, Guerra asserted a claim against the city under § 1983 based on the *Monell* standard. According to this standard, to establish municipal liability under § 1983, three elements must be established: (1) the existence of a policymaker, (2) an official policy, and (3) a constitutional rights violation directly influenced by said policy or custom. Guerra's complaint names Castillo and the City Manager as policymakers, contending that the city granted unrestrained authority to Chief Castillo, resulting in consistent due process violations under the Fourth Amendment. The city charter, however, rests policy-making authority with the Board of Commissioners, not with the Police Chief or City Manager. Despite Guerra highlighting sections of the city charter that indicate a potential delegation of authority to other individuals, including the Police Chief, the court found that Guerra failed to convincingly demonstrate that Castillo or the City Manager had the level of policy-making authority required.

Ultimately, the judgment reversed the district court's dismissal of Guerra's Fourth Amendment false arrest claim against Castillo, mandating further proceedings, while affirming all other aspects of the district court's judgment.

Civil Rights: *Frank v. Parnell*, No. 22-30408, 2023 WL 5814938 (5th Cir. Sept. 8, 2023). In October 2017, Armando Frank parked his tractor in a Walmart parking lot before being approached by Avoyelles sheriff's deputies and, later, a Marksville police officer. The officers indicated Frank had an outstanding arrest warrant and was going to be taken to the police station. During the encounter Frank had complied with the officers' requests, but when officers declined to show Frank the arrest warrant at the scene, he resisted. This led to Frank being tased multiple times, placed in a chokehold, and rendered unconscious. Paramedics were called and attempted lifesaving measures, but Frank was later pronounced dead as a result of his injuries.

Frank's family filed suit against the officers under 42 U.S.C. § 1983, claiming the officers used excessive force. In turn, the officers claimed qualified immunity and moved for summary judgment. The district court granted the officers' motion for summary judgment, and Frank's family appealed.

The Fifth Circuit, applying the *Graham* factors for determining whether the force was reasonable, concluded that: (1) Frank posed no immediate threat to the officers' or public's safety because he was unarmed, had no ability to evade arrest, and was disabled; (2) officers made no attempt to deescalate or use lesser force options before quickly resorting to a violent response; (3) the severity of the crimes associated with the outstanding warrant were not for violent crimes; and (4) there was a factual dispute about whether Frank was resisting arrest. The appellate court further determined that a jury could conclude the officers used excessive force and had reasonable warning that their conduct violated Frank's clearly established Fourth Amendment rights. For those reasons, the court vacated the district court's grant of summary judgment and remanded the case for further proceedings.

Civil Rights: *Walton v. City of Verona*, No. 22-60231, 2023 WL 5946152 (5th Cir. Sept. 13, 2023). This case stems from a drive-by shooting in which the shooter, Latavious Bettes, shot and killed Annie Walton after being suspected by the Verona Police Department for his involvement in prior shooting instances. Following her death, Walton's family filed suit against the city of Verona and the police chief, claiming abuse of executive power and state-created danger under 42 U.S.C. § 1983, as well as additional claims under the Mississippi Tort Claims Act (MTCA). The city and police chief claimed sovereign and qualified immunity and moved for summary judgment. Initially, the district court granted the city's and the police chief's motion for summary judgment reasoning that: (1) the Fifth Circuit had never recognized a claim for state-created-danger; (2) the police chief's actions did not "shock the conscience" in a manner to establish liability under a claim for abuse of executive power; and (3) there was no evidence the police chief acted with reckless disregard. However, after the Waltons filed a motion to reconsider, the district court granted the motion in part and denied the motion in part. The district court declined to revise its prior ruling as to the § 1983 claims, but as to the claims under the MTCA, it determined that the city was not entitled to sovereign immunity because a genuine dispute of material fact existed relating to whether the police chief acted with reckless disregard in handling the shootings. Thereafter, the city appealed the district court's order on the MTCA claims, and the Waltons cross-appealed the order dismissing the federal claims.

The Fifth Circuit first addressed the issue of jurisdiction to hear the interlocutory appeals by the city and the Waltons. As the court explained, courts of appeals are limited to reviewing final decisions by the district court only. However, under the collateral-order doctrine, the court may review the denial of claims of qualified immunity but not interlocutory orders granting qualified immunity. In this case, the district court held that because the Waltons did not show the police chief violated a constitutional right, he was entitled to qualified immunity and the city was, therefore, entitled to sovereign immunity as to the federal claims. Reaching this conclusion, the court dismissed the Waltons' cross-appeal and proceeded to review the city's appeal. In doing so,

the court reversed the district court's order and rendered summary judgment in the city's favor. The appellate court held that the city was entitled to sovereign immunity under the MTCA because, under a theory of negligence, the Waltons failed to show the police chief owed a special duty to protect the victims from the shooter outside of the general duty to protect the public as a whole or that the police chief had a duty to control the shooter's actions.

Civil Rights: *Robinson v. Midland Cnty*., Tex., 80 F.4th 704 (5th Cir. 2023). While incarcerated at Midland County Jail, Savion Hall was treated by nurses employed by the jail's medical services contractor, Soluta, for asthma. In June 2019, Hall began to experience serious breathing issues and requested medical assistance. The guard on duty, Daniel Stickel, was new to his position but sought advice from other guards and an on-duty nurse, all of whom confirmed protocol which involved Hall receiving breathing treatments every four hours. Hall was sent back to his cell. After another guard arrived to relieve Stickel, Hall was sent to the hospital. He died several days later as a result.

During a Texas Rangers criminal investigation into Hall's medical care, it was determined that nurses employed by Soluta had consistently left Hall to administer his own medication, failed to record Hall's oxygen-saturation levels, and in some cases, even fabricated his vital signs and medical checks relating to his oxygen and breathing levels.

Hall's family filed suit against the county and Stickel for deliberate indifference to medical needs under 42 U.S.C. § 1983. In turn, the county and Stickel filed a motion for judgment on the pleadings. The district court subsequently dismissed the suits for failure to state a claim upon which relief could be granted under Federal Rules of Civil Procedure, Rule 12(b)(6). Hall's family appealed.

On appeal, the Fifth Circuit affirmed the lower court concluding that: (1) Hall's family failed to establish that the county had any actual knowledge of a pattern or policy to deprive Hall of adequate medical care and thus could not be held liable based on the actions of the Soluta nurses; and (2) Stickel's actions did not rise to the level of deliberate indifference where Stickel ensured Hall had access to his inhaler, confirmed Hall's prescribed course of medical treatment for his asthma, and informed his superiors and medical staff about Hall's situation.

Procurement: *United States ex rel. Miniex v. Houston Hous. Auth.*, No. 21-20435, 2023 WL 6174416 (5th Cir. Sept. 22, 2023). Karen Miniex, former Vice President, General Counsel, and Director of Procurement for the Houston Housing Authority (HHA) filed a qui tam suit under the False Claims Act against the city of Houston, HHA, and later, through an amended complaint, five of its property management companies for procurement violations related to the hiring and management of contractors and services under 31 U.S.C. § 3729(a)(1)(A), (a)(1)(B), and (a)(1)(G). She alleged the city of Houston was vicariously liable for the fraudulent conduct of HHA. Before the suit was commenced, the U.S. Department of Housing and Urban Development (HUD) completed its audit of HHA concluding that HHA failed to conduct federal requirements with regard to obtaining cost estimates prior to procuring contractors and services.

HHA, the city, and the property management companies filed motions to dismiss the case, and the district court granted their motions based on: (1) the government action bar under 31 U.S.C. § 3730(e)(3), (2) Miniex's failure to plead fraud with particularity under Federal Rules of Civil Procedure, Rule 9(b); and (3) her failure to state a claim under Rule 12(b)(6). Thereafter, Miniex moved for reconsideration and for leave to amend her complaint for a fourth time. After the court denied both motions, Miniex appealed.

On appeal, the Fifth Circuit affirmed the district court's dismissal of the claims against the city and property management companies but reversed the dismissal of the claims against HHA. With respect to the claims against HHA, the court reasoned that: (1) the HUD audit was not a civil action suit or an administrative civil money penalty proceeding to which the government action bar would apply; (2) because Miniex sufficiently outlined the identity of the person who made false representations and the time, place, and contents of the misrepresentations, she satisfied Rule 9(b); and (3) she also alleged sufficient facts to survive a 12(b)(6) motion to dismiss where she claimed HHA submitted false claims to HUD, certified future compliance with procurement regulations, violated those regulations, and provided the HUD audit indicating HHA did not comply with cost-estimate regulations to which HUD sought repayment.

As for Miniex's claims against the city, the Fifth Circuit affirmed the lower court holding that Miniex failed to establish that the city was vicariously liable under an agency theory where the pleadings did not show HHA was acting with actual or apparent authority.

The appellate court further upheld the lower court's denial of Miniex's motion to amend, finding no abuse of discretion where she had already amended her complaint three times.

Recent Texas Cases of Interest to Cities

Note: Included cases are from September 1, 2023, through September 30, 2023.

Tort Claims Act: *Ferebee v. Law Office of Frank Powell*, No. 01-22-00681-CV, 2023 WL 5918110 (Tex. App.—Houston [1st Dist.] Sept. 12, 2023) (mem. op. on re'hg.). Powell filed a motion for rehearing after the appellate court issued an opinion on his case against the City of Shenandoah for slander. Among other things, Powell alleged that Ferebee, the city attorney, made defamatory statements about him at a city council meeting. Ferebee filed a motion to dismiss under the Texas Tort Claims Act (TTCA), arguing that because Powell's pleadings affirmatively demonstrated that Ferebee was acting within the scope of his employment and the lawsuit could have been brought against the city, Ferebee was entitled to dismissal of the claims against him under the TTCA's election-of-remedies provision.

The appellate court reversed the trial court, holding that Powell's pleadings affirmatively demonstrated that the city officials, including Ferebee, who were defendants in the original suit

were acting within the scope of their employment by making the statements during and after a city council meeting. Powell requested rehearing and the appellate court granted it. On rehearing, the appellate court reversed the trial court, again holding that Powell's pleadings had affirmatively demonstrated that Ferebee was acting within the scope of his employment at the time he made the allegedly defamatory statement.

Public Information Act: *Johnson v. Bastrop Cent. Appraisal Dist.*, No. 07-23-00173-CV, 2023 WL 6389411 (Tex. App.—Amarillo Sept. 29, 2023) (mem. op.). Johnson requested records from the appraisal district. The appraisal district either failed to provide the information or notify Johnson it was requesting an attorney general opinion and Johnson filed a writ of mandamus, which the trial court denied. The appellate court withdrew its opinion from August 2023 and substituted this one.

In affirming the trial court's denial of the plaintiff's petition for writ of mandamus, the appellate court found that: (1) the plaintiff failed to establish that he requested "public information" from the appraisal district and instead, he requested specific answers to general inquiries; and (2) even accepting the factual allegations in the plaintiff's petition as true, the petition did not present a justiciable controversy between the parties.

Delinquent Tax Collection: *Rodriguez v. City of El Paso*, No. 08-23-00004-CV, 2023 WL 6319337 (Tex. App.—El Paso Sept. 28, 2023) (mem. op.). The City of El Paso sued Eldon and Maria Rodriguez in October 2020 for unpaid property taxes from 2018 and 2019 and any other year taxes that became overdue during the case's duration. In September 2021, while the city's case was still pending, the defendants initiated a separate lawsuit to contest the valuation of their property by the El Paso Central Appraisal District for 2020 and 2021. This move halted the city's ongoing tax collection case. The city intervened in the defendants' valuation case, challenging the court's right to hear it. The court sided with the city and dismissed the defendants' valuation challenge. In July 2022, the city resumed its tax delinquency case, now including taxes from 2020 and 2021 which had also become overdue. The defendants argued that they had paid the 2018 and 2019 taxes and that their property was uninhabitable and worthless in 2020 and 2021. They provided a partial payment receipt and other supporting documents. While the city conceded the receipt of payment, they clarified that the provided check bounced due to insufficient funds. Ultimately, the trial court granted the city's motion for summary judgment, ordering payment of unpaid taxes for 2018-2021 and authorizing the seizure of the property to cover the debt.

Defendants appealed the trial court's ruling, asserting that the city and county appraisal district wrongly denied their 2018 and 2019 tax payments and raised issues related to tax notifications and property valuation, claiming genuine material fact issues that should prevent a summary judgment in the city's favor. Reviewing the record, the appellate court held that the city stated a prima facie case for a suit to collect delinquent taxes, which shifted the burden to the defendants to show that they have paid all taxes, penalties, and interest that would be due or that there is another defense. The defendants raised five issues against the city, including payment, lack of

notice, overvaluation of the property, and two claims related to rejected protests. The court rejected each of defendants' arguments in turn and affirmed the trial court's judgment.

Employment: *Moliere v. City of Buffalo*, No. 10-22-00391-CV, 2023 WL 6307992 (Tex. App.—Waco Sept. 28, 2023). Gregory Moliere, a City of Buffalo Police Department police officer, violated city policy when he engaged in a high-speed chase with a civilian ride-along in his police vehicle. Subsequently, the Chief of Police issued Moliere a written reprimand, which was placed in his personnel file. Moliere did not appeal the reprimand, and the police chief, in an affidavit, considered the disciplinary action resolved. A few weeks later, the city council voted to terminate Moliere's employment as a police officer with the city.

Moliere filed suit against the city and the mayor, seeking declarations that the city council lacked authority as a Type A general-law municipality to terminate his employment and that the termination of his employment violated the city's policies. The city and the mayor filed a joint plea to the jurisdiction and motion for summary judgment, asserting governmental immunity under the Uniform Declaratory Judgements Act and that the city had the authority to terminate Moliere's employment. The trial court granted the plea. Moliere appealed.

The court of appeals reversed and remanded, concluding that a fact issue exists regarding the authority of the city council to terminate Moliere's employment as a police officer under Section 341.001(a) of the Local Government Code and the city employee manual.

Mediation Procedure: *In re City of McAllen*, No. 13-23-00370-CV, 2023 WL 6065087 (Tex. App.—Corpus Christi–Edinburg Sept. 18, 2023). The trial court ordered the mayor and a councilmember of the City of McAllen to personally attend mediation in an ongoing inverse condemnation suit. The city appealed the order. The appellate court reversed, holding that while the trial court does have the authority to require parties to send representatives with full authority to settle the case, it does not have the authority to choose which representatives a party must attend.

September 2023
Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from August 11, 2023, through August 31, 2023.

Takings, Immunity: *St. Maron Properties, L.L.C. v. City of Houston*, No. 22-20019, 2023 WL 5346633 (5th Cir. Aug. 21, 2023). The plaintiffs owned property (the "Property") in the City of Houston that had previously been used by the city as a dumping ground for debris and construction material. As a result, the land was elevated, and the ground was compacted and unable to soak up rainwater. When it would rain, water from the property would flow into the backyards homes in a neighboring subdivision. After years of neighborhood complaints, the city took action to remediate the drainage issues, ultimately suing the Property's owners for injunctive relief on behalf of the neighbors. The city obtained a permanent injunction which,

among other things, ordered the Property's owners to remediate the flooding issues in the neighborhood, which, according to the opinion, would have required the Property's owners to trespass onto their neighbor's property. After the Property's owners failed to fix the issues, the city entered the Property to attempt to remediate the watershed issues there. Allegedly, the city's actions to try to remediate the issues have not fixed the watershed issues, have resulted in repeated flooding and vermin infestations of the Property, and deprived the landowners of their property. In turn, the owners of the Property sued the city, accusing Houston's mayor, city council, and city attorney of orchestrating a plan to use their vacant lots for dumping construction materials, causing frequent flooding. This, they allege, was done without their consent, compensation, or due process. Their case against the city invokes several constitutional grounds including the Takings Clause, the Due Process Clause, and the Equal Protection Clause, along with state law tort and statutory claims. Initially, the district court dismissed both the state law claims - citing sovereign immunity - and the federal § 1983 claims, stating they did not meet the criteria for municipal liability as per *Monell v. Department of Social Services*, a precedential case, and the owners appealed.

Federal Claims

Section 1983 serves as a mechanism to vindicate federal rights, allowing individuals to hold cities accountable in case of violations of rights secured by the constitution.

The *Monell* doctrine is applied to determine the liability of the city. To make a claim under this doctrine, the plaintiffs need to prove: (1) the existence of an official policy, (2) created by the municipal policymaker, (3) which was the driving force behind the constitutional violation. In this case, the court acknowledged that the criteria for an official policy as defined by *Monell* were met because the decisions made by the city were clear acts of government policy. The plaintiffs present various instances demonstrating that the mayor and city council actively and deliberately chose a particular course of action, thus establishing an official policy. Moreover, they argue that the mayor and city council were the final policymakers in this matter, as defined by the city charter, and were responsible for directing and endorsing the actions taken by the city departments. Further, the plaintiffs claimed that there was a direct causal link between the municipal policy and the alleged violations of constitutional rights, emphasizing the infringement of rights under the Fifth and Fourteenth Amendments. The Fifth Amendment claim is based on the unlawful taking of their properties without just compensation, whereas the Fourteenth Amendment claim focuses on the violation of procedural due process and equal protection rights. They argued that the city used an unjust injunction to intrude and alter their properties, depriving the Property owners of their due process rights by failing to notify them or allow them an opportunity to defend themselves against the injunction.

Consequently, the Fifth Circuit concludes that the plaintiffs have adequately detailed each element required for a *Monell* claim, indicating that the district court made an error in dismissing the § 1983 claims previously.

State Claims:

Sovereign immunity generally protects cities from lawsuits seeking monetary damages. Whether immunity attaches can be influenced by whether the city was acting in a governmental or proprietary capacity, with the latter generally not protected by immunity. Generally speaking, a city's proprietary functions are those conducted in its private capacity, for the benefit only of those within its corporate limits, and not as an arm of the government, while its government functions are in the performance of purely governmental matters solely for the public benefit. The plaintiffs contend that Houston was acting in a proprietary capacity when it was representing the neighborhood group. However, the Texas Tort Claims Act (TTCA) clearly lists "sanitary and storm sewers" as governmental functions, which the court recognizes as decisive in classifying the actions of the municipality as governmental, thereby negating the plaintiffs' argument for a waiver of immunity. Alternatively, the plaintiffs argue that Houston waived immunity by involving itself in litigation to assert claims for monetary damages. Yet, the cited precedent establishes only a narrow exception to sovereign immunity for counter-claims to negligence suits filed by government entities, and the court held that this narrow exception did not apply in this case. Furthermore, the court affirmed the lower court's decision to dismiss claims for negligence and other intentional torts (trespass and civil conspiracy) under the TTCA, as the TTCA only provides limited waivers which do not encompass the types of claims brought forth by the plaintiffs.

In conclusion, the district court's dismissal of the state tort and statutory claims against Houston was affirmed, but the dismissal of the § 1983 claims against Houston was reversed and remanded for further consideration.

Recent Texas Cases of Interest to Cities

Note: Included cases are from August 11, 2023, through August 31, 2023.

Tort Claims Act: *City of Houston v. Ledesma*, No. 01-22-00377-CV, 2023 WL 5535668 (Tex. App.—Houston [1st Dist.] Aug. 29, 2023) (mem. op.). Ledesma sued the City of Houston after she was allegedly injured in a collision with a Houston Police Department vehicle driven by Suarez, who was off-duty and travelling to her second job but was wearing an HPD uniform. The city filed a motion under the Texas Tort Claims Act's (TTCA) election-of-remedies provision to dismiss Suarez from the suit, which the trial court granted, and then the city filed a motion for summary judgment claiming immunity under the TTCA, arguing that Suarez was not acting in the scope of her employment at the time of the collision. The trial court granted the motion for summary judgment and Ledesma appealed.

The appellate court reversed the grant of the motion for summary judgment and remanded to the trial court, holding that by moving to dismiss the claims against Suarez under the TTCA's election-of-remedies provision, the city had judicially admitted that Suarez was acting in the scope of her employment. The city filed a motion for en banc rehearing which was denied and a

petition to the Supreme Court which was also denied. The city then filed a plea to the jurisdiction in the trial court, the trial court denied the plea, and the city appealed.

The appellate court affirmed, holding that its prior decision had addressed all aspects of the city's arguments concerning the judicial admission issue and so the law-of-the-case doctrine applied. The appellate court denied Ledesma's request for sanctions against the city, holding that although it was a close question whether the city's appeals was frivolous, sanctions were not appropriate under the circumstances.

Tort Claims Act: *Wheeler v. Law Office of Frank Powell*, No. 01-22-00479-CV, 2023 WL 5535670 (Tex. App.—Houston [1st Dist.] Aug. 29, 2023) (mem. op.). The Law Office of Frank Powell sued five employees of the city of Shenandoah alleging defamation based on statements they made during and after a city council meeting, and sued one city employee for defamation based on statements she made on a social media platform. The city employees filed a motion to dismiss under the election-of-remedies provision of the Texas Tort Claims Act (TTCA), arguing that Powell's pleadings affirmatively demonstrated they were acting within the scope of their employment when they made the statements and were therefore entitled to dismissal of the claims. The trial court denied the motion and the city employees appealed.

The appellate court reversed the trial court and rendered judgment dismissing the claims against the five city employees, holding that Powell's pleadings affirmatively demonstrated they were acting within the scope of their employment by making the statements during and after a city council meeting. The appellate court remanded the claim against the final city employee, holding that a fact issue remained as to whether the statements made on the social media platform were made in the scope of that employee's employment.

Tort Claims Act: *City of Houston v. Wilson*, No. 01-22-00796-CV, 2023 WL 5615817 (Tex. App.—Houston [1st Dist.] Aug. 31, 2023) (mem. op.). Wilson sued the City of Houston after allegedly being injured in a vehicle collision with Williams, a city employee. The city filed a combined motion to dismiss and motion for summary judgment, claiming immunity under the Texas Tort Claims Act (TTCA) because the city had not received timely formal or actual notice of Wilson's claims. The trial court denied the motion and the city appealed.

The appellate court reversed and rendered judgment dismissing the claims, holding that: (1) although Wilson's claim letter included a date within the ninety day notice period required by the city charter, the letter was not sent in the mail until after the period expired, so the city did not receive timely formal notice of her claims; and (2) because there was no indication at the time of the collision that Wilson was injured and the existence of property damage to the vehicles does not constitute notice of a possible personal injury, the city did not have timely actual notice of Wilson's claims.

Land Use/Tort Claims Act: *Stone v. Harris County*, No. 01-21-00384-CV, 2023 WL 5615812 (Tex. App.—Houston [1st Dist.] Aug. 31, 2023) (mem. op.). Stone sued the City of Houston and Margaret Brown in her official capacity as director of the city's planning department, alleging the planning commission had violated Chapter 212, Local Government Code, by approving a replat that created problems on her property. Stone argued that the city's immunity was waived because Brown's approval of the replat was an ultra vires act. The city filed a plea to the jurisdiction alleging immunity under the Texas Tort Claims Act which the trial court granted, and Stone appealed.

The appellate court affirmed, holding that the city was immune from suit, and that Brown's ultra vires claim failed because while a ministerial duty exists to approve a conforming plat, there is no corresponding ministerial duty to deny a nonconforming plat. Therefore, Brown had not acted without clear authority nor failed to perform a purely ministerial act as would have been required to support a claim that a government official acted ultra vires.

Civil Service Act: *City of Houston v. Spann*, No. 01-22-00848-CV, 2023 WL 5615801 (Tex. App.—Houston [1st Dist.] Aug. 31, 2023) (mem. op.). Fire fighter Spann appealed to the Firefighters' and Police Officers' Civil Service Commission of the City of Houston to reverse a disciplinary action taken against him by the fire department. The commission upheld the disciplinary action and Spann appealed to the district court. Spann filed a motion for summary judgment, arguing that because the commission did not provide him the required 15 days' notice of the hearing, the commission's order upholding the disciplinary action was void. The district court granted the motion and the commission appealed.

The appellate court affirmed, holding that: (1) the Code Construction Act's computation of time rules applied; (2) additional days of notice from previously scheduled and continued hearings could not be counted for the statutorily required notice; and (3) Spann was not required to show prejudice to be entitled to summary judgment because he did not receive the full 15 days' notice.

Jurisdiction: *City of Kyle, et al., v. Lila Knight et al.,* No. 03-21-00378-CV, 2023 WL 5597360 (Tex. App.—Austin Aug. 30, 2023). This case stems from a development agreement between the city and three landowners for the development and voluntary annexation of 3,268.6 acres of land in Kyle. The individual plaintiffs in the case, Lila Knight, Timothy A. Kay, Helen Brown-Kay as well as Save Our Springs Alliance, Inc., (collectively "SOS") sued the city of Kyle and city officials for, among other things: (1) acting ultra vires in adopting amendments to the city's comprehensive plan and transportation plan; (2) violating statutory and procedural rights granted to SOS under Chapter 211 of the Local Government Code; and (3) unconstitutionally contracting away the council's legislative authority under the terms of the agreement. In response, the city filed a plea to the jurisdiction, a Rule 91a motion to dismiss, and a partial summary judgment

motion. With respect to the above-mentioned claims, the trial court denied the city's motions, and this interlocutory followed.

On appeal, the city argued that: (1) the trial court erred in denying the city's plea to the jurisdiction with respect to SOS's claim that the city acted ultra vires in approving the development agreement; and (2) SOS lacked standing to bring the claims. On the standing claim, the city relied on the court of appeals' decision in *Save our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871 (Tex. App.—Austin, 2010) to support its argument that, like in *Dripping Springs*, SOS, Inc. lacked associational standing. However, the court distinguished the cases, explaining that unlike in *Dripping Springs*, the evidence in the record showed that SOS, Inc.'s members owned land near, and in some cases, obtained their groundwater through wells adjacent to and near the property that would "very likely increase their exposure to water contamination and pollution." Addressing individual standing, the court of appeals concluded that SOS pleaded sufficient facts showing the individuals also lived close to the property to be developed, and one of the individuals, Mr. Kay, served on the planning and zoning committee and would no longer have discretion over voting decisions because of specific provisions in the development agreement.

The court of appeals also concluded that SOS pleaded sufficient facts showing city officials acted without legal authority in approving the development agreement. Specifically, the agreement included provisions adopting specific amendments to the city's comprehensive and transportation plans in violation of procedural, notice, and hearing requirements under the Open Meeting Act and the city's charter. For those reasons, the court of appeals affirmed the trial court's order denying the city's motions.

Emergency Orders: *Galovelho LLC v. Abbott*, No. 05-21-00965-CV, 2023 WL 5542621 (Tex. App.—Dallas Aug. 29, 2023). In March 2020, Galovelho, LLC operated a restaurant in Frisco. During this time when Covid-19 was spreading throughout the state, the governor, Collin County judge, and city of Frisco issued emergency orders that encouraged patrons to avoid eating or drinking at restaurants and bars and, in some cases, limited restaurants to serving patrons via take-out, drive-through, or delivery only. As a result of the emergency orders, Galovelho alleged its restaurant suffered, and it sued the governor, county, and city. After a hearing on a joint plea to the jurisdiction by the governor, county, and city, the trial court determined that: (1) Galovelho's claims were barred by sovereign or governmental immunity and that it lacked standing; (2) it did not have a viable takings claim; and (3) its due process and equal protection claims were moot. Galovelho appealed, but the court of appeals ultimately affirmed the trial court's decision.

The court of appeals reasoned that, with regard to the takings claim, the effect of the emergency orders was neither a categorical (per se) taking nor a taking under the factors outlined in the Supreme Court decision *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), because the emergency orders were temporary and did not destroy all economic value in

Galovelho's property. In addition, the court concluded that the character of the governmental action (the third factor in Penn Central) was not akin to a physical invasion but instead an example of a regulation that "adjusts the benefits and burdens of economic life to promote the common good."

Addressing Galovelho's equal protection and due process claims, the court agreed that the recission of the emergency orders rendered Galovelho's claims moot. Further, the court disagreed that the exception to the mootness doctrine (for an issue "capable of repetition, yet evading review") applied to the issuance of the emergency orders in this manner because a mere theoretical possibility that Galovelho may be subjected to similar restrictions in the future was insufficient to claim this exception.

Extraterritorial Jurisdiction: *Elliott v. City of Coll. Station*, No. 06-22-00078-CV, 2023 WL 5617344 (Tex. App.—Texarkana Aug. 31, 2023). Two plaintiffs sued the city, the mayor, and the city manager under Article I Section 2, of the Texas Constitution to challenge the concept of extraterritorial jurisdiction (ETJ), arguing that unless residents of the ETJ can vote, any city regulation in the ETJ is void. The city and its officials filed a plea to the jurisdiction, asserting that the residents lacked standing, their claims were not ripe, and that the suit presented a political question. The trial court granted the plea and the plaintiffs appealed.

The court of appeals discussed in-depth the nature of Texas cities and concluded that the plaintiffs' challenge presents a political question, which the court may not address without violating the separation of powers of doctrine. Accordingly, the court of appeals upheld the trial court's decision.

Open Meetings Act: *In re City of Amarillo*, No. 07-22-00341-CV, 2023 WL 5279473 (Tex. App.—Amarillo Aug. 16, 2023) (mem. op.). Voters in Amarillo defeated a bond proposition for expansion of the city's civic center. In response, the city created a three-step plan: (1) create a tax increment reinvestment zone (TIRZ) to fund the improvements; (2) issue tax anticipation notes; and (3) issue 30-year refunding bonds in the future to refinance the debt. The plaintiffs sued seeking to void the ordinances creating the TIRZ and the anticipation notes based on alleged violations of the Open Meetings Act. The case went to bench trial where the court invalidated the ordinances and the anticipation notes and awarded attorneys' fees.

On appeal, the appellate court found: (1) the district court possessed jurisdiction to hear the plaintiff's Open Meetings Act claims; (2) the city's notice regarding the ordinance issuing the anticipation notice failed to substantially comply with the Open Meetings Act because it failed to give the reader adequate notice of the action the city sought to take and therefore the notes were void; (3) the award of attorneys' fees was appropriate; and (4) there was no basis for reversal on the plaintiff's issue that the ordinance did not comply with Government Code section

1431.008(b) because it would not afford plaintiff greater relief than what he had already received. The appellate court affirmed the trial court's judgment.

Public Information Act: *Johnson v. Bastrop Cent. Appraisal Dist.*, No. 07-23-00173-CV, 2023 WL 5628653 (Tex. App.—Amarillo Aug. 30, 2023) (mem. op.). Johnson requested records from the appraisal district. The appraisal district either failed to provide the information or notify Johnson it was requesting an attorney general opinion and Johnson filed a writ of mandamus, which the trial court denied. On appeal, the court found that the trial court did not abuse its discretion in denying the writ of mandamus.

Employment: *Limuel, v. City of Austin*, No. 08-23-00041-CV, 2023 WL 5761303 (Tex. App.—El Paso Sept. 6, 2023) (mem. op.). Alan Limuel was an employee in the Austin Resource Recovery Department. His tenure at the city was marked by various conflicts and corrective actions, which the city attributes to Limuel's performance or behavioral issues, while Limuel claims they were instances of illegal retaliation. Limuel filed five discrimination charges with the Equal Employment Opportunity Commission (EEOC), alleging sexual harassment, discrimination, and retaliation and ultimately sued the city for retaliation and sexual harassment, representing himself in the action. After pretrial practice, including the dismissal of Limuel's sexual harassment claim on summary judgment, there was a five-day jury trial on the merits of Limuel's claims. At the conclusion of the trial, the jury affirmed some of Limuel's claims, but awarded him zero damages related to emotional distress and other non-economic losses. Discontent with the outcome, Limuel sought to dismiss the jury's damages verdict, arguing that there was no basis for the zero damages awarded. The trial court rejected his motion. Following this, Limuel moved for a new trial, which was also denied by the court, prompting him to appeal.

The appellate court took some time in the opinion to explain that the standards for pro se litigants who represent themselves in court without an attorney dictate that courts must interpret the pleadings of these litigants in a way that ensures they have a fair opportunity to present their case. This principle is grounded in the intention to prevent any miscarriage of justice due to a litigant's lack of legal expertise or representation. However, these litigants must comply with procedural requirements. In his appeal, Limuel challenged a number of aspects of the city's case, including rulings related to evidence, jury selection, disqualification of the city's attorney, improper jury argument, post-trial motions, and overarching constitutional claims. For various reasons, each of Limuel's arguments was overruled, and the trial court's judgment was affirmed.

Land Use: *City of Rusk, Texas, et al. v. 260 Office Park, Inc., et al.,* No. 12-22-00312-CV, 2023 WL 5663227 (Tex. App.—Tyler Aug. 31, 2023) (mem. op.). The Rusk Hotel in Rusk, Texas was being renovated and redeveloped. Once complete, the property was to be used for both commercial and residential uses. By September 2021, much of the work had been finished, and the city had issued a temporary certificate of occupancy for four of the second-floor residential units. Soon thereafter, the city enacted an ordinance which restricted residential use in the "Old Town Center" district, where the Rusk Hotel is located, and based on this ordinance, the city took steps to halt the redevelopment work at the hotel. The property owners filed a lawsuit in June 2022 alleging the city violated certain legal requirements in the passage of the ordinance

and interfered with their vested property rights. The city filed a plea to the jurisdiction, countering that aspects of the case were either not ripe or were moot, and that the plaintiffs have not exhausted all administrative remedies. The trial court denied the city's plea to the jurisdiction, and the city appealed. In the opinion the court analyzed alleged violations of state law related to local zoning ordinances, vesting issues, and the Texas Open Meetings Act (TOMA). After analyzing whether certain aspects of the property owners' case were moot or ripe, the court ultimately sustained the trial court's denial of the plea to the jurisdiction in part and overruled it in part. The court found that the owners had standing to pursue their TOMA and zoning claims, but that their vesting claims failed for lack of ripeness. Ultimately, the case was remanded back the trial court for further proceedings.

Tort Claims Act: *City of Huntsville v. Valentine*, No. 13-22-00528-CV, 2023 WL 5282954 (Tex. App.—Corpus Christi–Edinburg Aug. 17, 2023) (mem. op.). The Valentines sued the City of Huntsville alleging that the city negligently issued a building permit for construction that ended up flooding the Valentines' property with stormwater runoff. The city filed a plea to the jurisdiction claiming governmental immunity and the trial court denied the plea. The city appealed.

The appellate court affirmed, holding that because issuance of a building permit is a governmental rather than proprietary function of a city, the Texas Tort Claims Act would have waived the city's immunity only if the claim arose from property damage caused by the negligent operation of a motor vehicle.

Tort Claims Act: *City of Houston v. Wilson*, No. 14-22-00368-CV, 2023 WL 5368101 (Tex. App.—Houston [14th Dist.] Aug. 22, 2023) (mem. op.). Emmitt Wilson sued the City of Houston following a collision that occurred involving a city fire engine. Engine 43, being driven by Jason Carroll, was responding to a collision and needed to reverse due to heavy traffic. Wilson encountered Engine 43 at an intersection. Wilson, being behind the engine and seeing it reversing, also began reversing but had to stop to avoid hitting another vehicle. Engine 43 continued reversing and collided with Wilson's vehicle. The city sought summary judgment, claiming Carroll was protected by official immunity as he was performing his discretionary duties in good faith at the time of the accident. Because of factual disputes between the parties, the trial court denied the city's motion for summary judgment, resulting in this appeal.

Cites are generally immune from being held liable for an employee's actions unless this immunity is waived. In the context of this case, a potential waiver of immunity is guided by the Texas Tort Claims Act, which stipulates that a governmental unit may be held liable for damage or injury caused by an employee's wrongful act or negligence when operating a motor-driven vehicle, provided the employee would be personally liable according to Texas law. A governmental employee is entitled to official immunity: (1) for the performance of discretionary duties; (2) within the scope of the employee's authority; (3) provided the employee acts in good faith. An action is considered discretionary if it necessitates personal deliberation, decision, and judgment, contrasted with ministerial acts which entail adhering to orders or performing a duty

where the employee has no choice. The focus is on whether the employee was performing a discretionary function rather than the discretion involved in potentially wrongful acts during that function or the job description including discretionary duties. The court concluded that Carroll was indeed engaged in discretionary duties at the time of the incident, given the undisputed evidence that he was responding to an emergency and making several critical decisions while navigating to the accident site. Therefore, the appellate court held that the trial court erred in its finding that the city failed to definitively establish that Carroll was undertaking discretionary duties during the collision.

The court then moved on to analyze whether the driver acted in good faith while taking these discretionary decisions. The court outlines that good faith is to be determined based on an objective standard of what a "reasonably prudent fire engine operator" could have believed in similar circumstances, emphasizing that it is not about what any reasonable person would have done but instead focuses on the possible beliefs of a reasonable operator in that profession. The legal framework utilized mandates considering both the "need" and the "risk" aspects of the situation, encompassing factors such as the urgency of the situation, the potential for injury or loss of life, alternative courses of action, the potential for harm caused by the fire engine operator's actions, and whether a reasonably prudent operator would have been aware of the risk of harm. After analyzing the facts, the court found that the city met its burden of proving conclusively that Carrol was acting in good faith at the time of the incident, citing the detailed account provided by Carrol in an affidavit, which clearly addressed both the need and risk sides of the legal balancing test.

Finally, the court analyzed whether Wilson had provided evidence sufficient to raise a question of fact challenging the city's good faith evidence. While Wilson did provide an additional piece of evidence, the court concluded that it failed to rebut the city's proof of good faith. Ultimately, the court decided to reverse the trial court's decision and render a judgment dismissing Wilson's action, effectively siding with the city and concluding that Carroll was protected by official immunity and acting in good faith at the time.

Tort Claims Act: *City of Houston v. Gomez*, No. 14-21-00761-CV, 2023 WL 5535824 (Tex. App.—Houston [14th Dist.] Aug. 29, 2023). On a cold and rainy Christmas Eve, Maria Christina Gomez was involved in a collision with a City of Houston police car driven by Officer Bobby Joe Simmons at an intersection in Houston. At the time, Simmons was responding to a robbery-in-progress call. Gomez sued the city alleging negligence, and the city filed a plea to the jurisdiction asserting governmental immunity. Conflicting testimony exists with regard to certain facts about the collision. According to Simmons, he was driving with his emergency lights activated but no siren and claimed to have been following the speed limit. Gomez disputed Simmons's use of emergency lights. Ultimately, the trial court granted the plea to the jurisdiction dismissing the case, and Gomez appealed.

The appellate court at that time held that the city had not conclusively demonstrated that Simmons acted in good faith and that there were unresolved fact issues related to the emergency exception to waiver of immunity. The trial court's decision was overruled, and the case was remanded for further proceedings. The lower court ultimately denied a supplemental plea filed

by the city, leading to the instant appeal. In this appeal, the city raised two issues: (1) that the city established Simmons acted in good faith, and (2) that Gomez failed to raise a genuine issue of material fact regarding Simmons's good faith.
Cities are generally protected from lawsuits by governmental immunity unless that immunity is waived. The Texas Tort Claims Act provides a waiver of governmental immunity for damage or injury caused by an employee's negligent act during the scope of their employment, especially when it involves the use of a motor vehicle. The standard for evaluating official immunity hinges on the officer's good faith and whether a "reasonably prudent officer" in similar circumstances might have acted the same way based on the information available at the time. This assessment considers the necessity of the officer's response and the associated risks, evaluating the urgency and alternative actions available as well as the potential harm and likelihood of adverse outcomes. In this case, the city's evidence failed to conclusively establish Simmons's good faith, as the city's position is based on a disputed fact concerning the use of emergency lights, which was a significant aspect influencing the needs and risk analysis. Given that the city did not definitively prove Simmons acted in good faith, the court upheld the trial court's decision not to dismiss the case. Additionally, in order to reverse the court's earlier opinion on the question of whether the emergency exception applied in this case, the city would have needed to demonstrate that the court's earlier opinion was clearly erroneous. In the prior opinion, the court held that that Gomez, the plaintiff, successfully raised a fact issue defeating the application of the emergency exception to the waiver of governmental immunity. The court highlighted that because the city produced no new evidence to counter Gomez's claim of recklessness by Simmons, the original decision of the court would stand.

Ultimately, the court overruled the city's arguments on appeal and upheld the trial court's judgment denying the plea to the jurisdiction, which essentially means that the case will continue in the trial court, with the city unable to claim governmental immunity at this time.

August 2023

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from July 11, 2023, through August 10, 2023.

USERRA: *Garcia-Ascanio v. Spring Indep. Sch. Dist.,* No. 22-20363, 74 F.4th 305 (5th Cir. July 17, 2023). This case stems from allegations of violations of the Uniformed Services Employment and Reemployment Rights Act (USERRA) based on alleged constructive discharge.

Garcia was employed as an Assistant Principal at Spring ISD. During his tenure at Spring ISD, he also served in the Army Reserve and took leave to fulfill his military duties. Following complaints about him by parents, Spring ISD's management personnel met with Garcia to discuss his performance and at the meeting asked Garcia about how he would manage his work responsibilities with his military responsibilities and that he needed to have a plan for ensuring his military duties did not negatively affect his co-workers. Soon after, Garcia was reassigned to

oversee another grade level of students, but his job responsibilities stayed the same. Following further complaints from parents, Garcia was written up related to his professionalism. Thereafter, he was investigated on how he handled student discipline and was placed on "home duty." Soon thereafter, the Spring ISD Board voted not renew his contract at the end of the school year.

Garcia sued, alleging violations of his rights under USSERA. A jury found that Garcia's military status and his engaging in USERRA-protected activity was a motivating factor in his constructive discharge (Jury Questions 1-3), but also found that Spring ISD would have constructively discharged him even if it had not taken his military services and protected activity into account (Jury Questions 4 and 5). Garcia moved to have the court disregard Jury Questions 4 and 5 arguing for the first time that the jury should not have been asked those questions because Spring ISD's affirmative defense was not available in a constructive discharge context. The court entered judgement for Spring ISD based on the jury's answers to Questions 4 and 5, and Garcia appealed, alleging that the "mixed motive defense"—meaning the employer's affirmative defense that it would have taken the same action in the absence of an employee's military status or protected activity—is "inapplicable" in a constructive discharge case because "there is an inherent disconnect between [the] mixed-motive defense and constructive discharge."

The court of appeals affirmed the trial court's ruling, finding that the text of USERRA clearly provides employers with a mixed-motive defense and provides no carve-out for constructive discharge claims.

Employment: ***January v. City of Huntsville,*** **No. 22-20380, 2023 WL 4698905 (5th Cir. July 24, 2023).** This case stems from a claim of disability discrimination based on alleged failure to reinstate or promote January, a former city firefighter.

Ten years ago, January, a City of Huntsville firefighter, had gall bladder surgery and thereafter suffered complications from the surgery. The city and its fire department accommodated him for his need for medication and treatment of the complications. Not long after the surgery, he was caught asking his fellow employee for leftover prescription painkillers. He was placed on probation. Two years later, he submitted and then rescinded a letter of resignation. The fire department took him back but passed him over for open officer positions and declined to reinstate him to a trainer position he'd previously held. He met with city officials and accused the city of discriminating against him on the basis of his age and disability by not selecting him as an officer and removing him as a trainer. He also made it clear that he was considering suing the city and was going to complain to the EEOC.

A month later he got into an alleged altercation with a city employee who suspected him of being intoxicated. He was repeatedly asked to take a drug test, and when he declined, he was placed on administrative leave. Following an investigation, his employment with the city was terminated. January sued claiming discrimination under the Americans with Disabilities Act (ADA) and

retaliation under the ADA, the Rehabilitation Act, and the Age Discrimination in Employment Act (ADEA). The court, over January's request for a continuance, granted summary judgement for the city on all claims. January appealed his denied continuance and the city's summary judgement.

The court of appeals held that: (1) the trial court did not abuse its discretion in denying January's motion for continuance; (2) the six-week time period between January's protected activity and the city's decision to fire him was sufficient to demonstrate causal connection required to support his retaliation claims; and (3) the decision to fire January for intoxication was not pretext for retaliation.

Small Cell Nodes: *Crown Castle Fiber, L.L.C. v. City of Pasadena, Tex.,* No. 22-20454, 2023 WL 4994300 (5th Cir. Aug. 4, 2023). The issue in this case is whether the city's small cell node regulations are preempted by federal law.

Castle Crown entered into a contract with T-Mobile to provide network "nodes" and "fiber" to transport T-Mobile's voice and data signals through these nodes and fiber networks in the City of Pasadena. To build out a small cell network, Crown Castle must install the physical infrastructure, and alleges that it must have access to public rights-of-way to accomplish that task, which requires a permit from the city. The city adopted a design manual to comply with state law that requires new support poles for a network be spaced at least 300 feet from existing utility poles or other node support poles and prohibiting a network provider from installing above ground on an existing pole a network node and related equipment in a public right of way in a residential area.

Crown Castle applied for a permit, and the city rejected its applications because they violated the spacing requirement. Additionally, Crown Castle alleged that placing the required radio equipment underground in Pasadena is technologically impossible because of concerns with overheating and Pasadena's regular flooding. Crown Castle sued for declaratory and injunctive relief, alleging that the minimum spacing restrictions violated, and was preempted by, both the federal Telecommunications Act (FTA) and Texas law.

The court of appeals held that: (1) the FTA preemption claim presented a federal question; (2) Castle Crown was a "telecommunications provider" under FTA; (3) the action was ripe for adjudication; (4) the FTA preempted spacing and undergrounding requirements in the city's small cell node regulations; (5) the FTA's safe harbor provision was inapplicable; and (6) Caste Crown was entitled to a permanent injunction.

Recent Texas Cases of Interest to Cities

Note: Included cases are from July 11, 2023, through August 10, 2023.

Exhaustion: *Drew v. City of Houston*, No. 01-22-00212-CV, 2023 WL 4872979 (Tex. App.—Houston [1st Dist.] Aug. 1, 2023). Drew sued the City of Houston for sexual harassment, retaliation, and constructive discharge after a co-worker tried to kiss her and masturbated in front of her. The co-worker was placed on leave, Drew was reassigned, and several months later Drew resigned her position and filed a complaint with the EEOC. She filed suit against the city eight months later. The city filed a plea to the jurisdiction, claiming that Drew had not exhausted her administrative remedies with the EEOC because she filed her complaint more than 180 days after the incident occurred. The trial court granted the city's plea based on the untimeliness of Drew's complaint, and Drew appealed.

The appellate court affirmed, holding that: (1) the continuing violation doctrine did not apply because there was no evidence in the record to support Drew's claim that the first incident was part of a series of harassment and retaliation incidents that continued into the period of time that would make her EEOC complaint timely; and (2) there was no evidence in the record to support Drew's claim of constructive discharge.

Tort Claims Act: *City of Baytown v. Fernandes*, No. 01-22-00924-CV, 2023 WL 4937059 (Tex. App.—Houston [1st Dist.] Aug. 3, 2023). Fernandes sued the City of Baytown for negligence after he was injured on a waterslide at a city-owned waterpark. The City filed a plea to the jurisdiction contending that because Fernandes was engaging in a recreational activity on city-owned land, the TTCA's recreational use statue applied and Fernandes had to plead and prove gross negligence to establish a waiver of governmental immunity. The trial court denied the city's plea.

The appellate court reversed the trial court and dismissed Fernandes's claims for lack of subject matter jurisdiction, holding that: (1) riding down a waterslide constitutes recreational use for the purposes of the recreational use statute; and (2) there was no evidence that the city knew of the danger or that the waterpark's employees acted with conscious indifference to Fernandes's safety. Therefore, Fernandes had not shown the gross negligence that would be required to defeat governmental immunity under the recreational use statute.

Tort Claims Act: *Ferebee v. Law Office of Frank Powell*, No. 01-22-00681-CV, 2023 WL 4937501 (Tex. App.—Houston [1st Dist.] Aug. 3, 2023) (mem. op.). Powell sued the City of Shenandoah and Ferebee, the city attorney, for defamatory statements Ferebee allegedly made while giving the city council an update on separate litigation filed against the city by Powell. Ferebee moved to be dismissed from the lawsuit under Section 101.106(f) of the TTCA claiming that because he was acting within the scope of his employment and the suit could have been brought against the city, he was entitled to dismissal of the claims against him. The trial court denied Ferebee's motion to dismiss and Ferebee appealed.

The appellate court reversed, holding that because Ferebee was acting within the scope of his employment by giving the litigation update, the suit could have been brought against the city and therefore Ferebee in his individual capacity was entitled to dismissal under the TTCA.

Tort Claims Act: *City of Houston v. Walker*, No. 01-22-00632-CV, 2023 WL 4937495 (Tex. App.—Houston [1st Dist.] Aug. 3, 2023) (mem. op.). Walker sued the City of Houston after her husband died in a collision at an intersection in which he and a car coming in the opposite direction both thought they had green lights. Walker alleged that the collision was caused by the misuse of safety louvers, which are devices designed in traffic lights to deliberately obscure the color of the light until the driver is a certain distance away.

Walker alleged that governmental immunity was waived under the TTCA because her husband's death was caused by a condition of tangible property. The city filed for summary judgment based on governmental immunity, arguing that the TTCA does not waive a government's immunity for discretionary acts and that the TTCA's waiver of immunity for unsafe conditions of personal property is restricted by Section 101.060 of the Act, which generally provides that the TTCA does not waive governmental immunity for claims about the condition of a traffic light unless the city was notified of the condition at issue and failed to correct it within a reasonable time. The trail court denied the city's motion for summary judgment.

The appellate court reversed, holding that the TTCA did not waive immunity for Walker's claims because: (1) the use of the louvers was a discretionary act by the city; and (2) Section 101.060 applied because Walker had not provided any evidence showing that the city was notified of the condition of the traffic light.

Tort Claims Act: *City of Houston v. Edwards*, No. 01-22-00709-CV, 2023 WL 5021217 (Tex. App.—Houston [1st Dist.] Aug. 8, 2023) (mem. op.). Edwards sued the City of Houston for injuries he received when a city police car driven by a police officer who was rushing to get to another location to assist an officer in a foot pursuit of a suspect collided first with a city fire engine that was responding to a medical emergency and then with her vehicle. Edwards claimed that the emergency-response exception to the Tort Claims Act did not apply because both the fire engine driver and the police officer would not have been entitled to official immunity. The city filed a plea to the jurisdiction, claiming governmental immunity. The trial court denied the plea and the city appealed.

The appellate court reversed, holding: (1) that the fire engine driver was entitled to official immunity because he was acting in his discretion in determining that the need to respond to a medical emergency outweighed the risk of harm to the public; and (2) the police officer was entitled to official immunity because he was acting in his discretion in determining that the need to assist another officer outweighed the risk of harm to the public; and (3) because both employees would have been entitled to official immunity, the emergency-response exception to the TTCA's waiver of immunity to suit applied.

Administrative Rulings: *City of Houston v. Jared Waldhoff*, No. 01-22-00825-CV, 2023 WL 5110981 (Tex. App.—Houston [1st Dist.] Aug. 10, 2023) (mem. op.). Waldhoff sued the City of Houston seeking to overturn an administrative decision by the city that he had violated the Houston Airport System Operation Instructions, a decision that resulted in the permanent revocation of his access badge and the loss of his employment. He had entered the secure area of the airport through a nonstandard entrance but contended that it was not relevant because he submitted to a security check by a TSA agent before boarding. A reviewing trial court reversed the decision, reinstated Waldhoff's badge, and issued an order stating that the conclusion that Waldhoff had violated the rule was not supported by substantial evidence nor was it free from legal error. The city appealed the judgment of the trial court, arguing that its administrative decision was supported by substantial evidence.

The appellate court affirmed, holding that the city's argument amounted to a sufficiency of the evidence challenge, but that the city had not addressed the part of the trial court's order stating that the administrative decision was not free from legal error. The appellate court reasoned that the evidentiary basis and the legal basis were independent grounds for the trial court's ruling, so because the city had not challenged the legal basis it had waived any error.

Tort Claims Act: *City of Houston v. Bustamante*, No. 01-22-00699-CV, 2023 WL 5110982 (Tex. App.—Houston [1st Dist.] Aug. 10, 2023) (mem. op.). Bustamante sued the City of Houstin after she, Elisondo, and their children were injured in a collision with a city emergency vehicle when the vehicle entered an intersection without slowing and struck Bustamante's vehicle. Bustamante gave notice of her claim under the TTCA about five months after the incident. The city filed a motion for summary judgment claiming governmental immunity, arguing that Bustamante had not provided notice of her claim within ninety days as required by the city charter. The trial court denied the city's motion and the city appealed.

The appellate court affirmed, holding that although Bustamante had not provided timely notice as required by the city charter, there was a genuine issue of material fact as to whether city had actual notice of a possible claim against it because the city had undertaken an investigation as a result of the incident, showing that the city had the necessary information to alert it of its potential liability.

Civil Service: *Nix v. City of Beaumont*, No. 09-22-00042-CV, 2023 WL 4781212 (Tex. App.—Beaumont July 27, 2023) (mem. op.). Nix sued the City of Beaumont in district court, seeking review of the City's Fire Fighters' and Police Officers' Civil Service Commission's order permanently dismissing him from the fire department. The Civil Service Act requires that a petition for review of a commission's order must be filed within 10 days after the date the final decision is received by the firefighter or his or her designee. Here, Nix's attorney filed the petition 15 days after receiving the final decision. The trial court dismissed Nix's petition for review and Nix appealed.

The appellate court affirmed, holding that although the Supreme Court's orders providing deadline extensions related to Covid-19 were in place, those orders did not extend a jurisdictional deadline to file suit so Nix's failure to timely appeal the commission's order deprived the trial court of jurisdiction over the appeal.

Employment: *Univ. of N. Tex. Health Sci. Ctr. v. Paul,* No. 02-22-00305-CV, 2023 WL 4779480 (Tex. App.—Fort Worth July 27, 2023). This is an age-and sex-related employment discrimination case.

Paul, a nontenure-track assistant professor sued the University of North Texas Health Science Center (UNTHSC) after her assistant-professor contract was not renewed. She alleged age discrimination, sex discrimination, and retaliation related to UNTHSC's (1) failure to hire her for the tenure-track position that another younger woman was hired for, (2) failure to promote her to Department chair, and (3) failure to renew her one-year teaching contract. UNTHSC filed a plea to the jurisdiction on sovereign-immunity grounds, which the trial court denied. UNTHSC filed an interlocutory appeal.

The court of appeals reversed the trial court's denial of UNTHSC's plea to the jurisdiction on Paul's sex-discrimination claim related to UNTHSC's nonrenewal of her contract and on her retaliation and age-and sex-discrimination claims related to UNTHSC's failure to hire her for the Department Chair position. However, the court affirmed the trial court's denial of UNTHSC's plea to jurisdiction as to (1) retaliation and age discrimination for the contract renewal and (2) retaliation, age discrimination, and sex discrimination for the failure to hire Paul for the tenure-track position.

Clean Air Act: *Tex. Comm'n on Envtl. Quality v. Vecinos Para El Bienestar De La Comunidad Costera*, No. 03-21-00395-CV, 2023 WL 4670340 (Tex. App.—Austin July 21, 2023). After the Texas Commission on Environmental Quality (TCEQ) issued an air permit to Texas LNG Brownsville, LLC (Texas LNG) for construction of a liquefied natural gas terminal along the Brownsville Ship Channel, the city of Port Isabel sought judicial review under Texas Government Code Sec. 2001.171. In response, TCEQ and Texas LNG filed a joint plea to the jurisdiction arguing the federal National Gas Act (NGA) provided exclusive jurisdiction to review challenges to state agency permits required by federal law for natural-gas terminals to federal courts under 15 U.S.C. § 717r(d)(1). The trial court denied their plea, and TCEQ and Texas LNG appealed to the court of appeals.

The appellate court reversed, holding that although TCEQ issued the order, it was carrying out its responsibility under the federal Clean Air Act to implement federal standards, and under 15 U.S.C. § 717r(d)(1), the United States Fifth Circuit Court of Appeals has exclusive jurisdiction over permit decisions relating to liquefied natural gas facility construction.

Tort Claims Act: *Hous. Auth. of City of Austin v. Garza*, No. 03-22-00085-CV, 2023 WL 4872981 (Tex. App.—Austin July 31, 2023). In 2017, the Housing Authority of the City of

Austin (HACA) started a renovation project at one of its apartment complexes to comply with the Americans with Disabilities Act (ADA). As part of the project, HACA contracted with a project developer who subcontracted with S. Cook Construction Company, L.P. (Cook) for construction services. Cook then subcontracted with Specialty Tractor Landscaping, L.L.C. (Specialty Tractor) for landscaping and porch construction services. After the work commenced, Julia Garza, a tenant at the apartment complex, injured herself after stepping on loose dirt concealing thin wooden planks covering landscaping trenches. As a result, Garza sued HACA (and Cook and Specialty Tractor) under the theory of premises liability under the Texas Tort Claims Act (TTCA). Denying HACA's plea to the jurisdiction, the trial court ruled in favor of Garza. Thereafter, HACA filed an interlocutory appeal asserting governmental immunity and arguing Garza failed to present sufficient evidence for her premises-defect claim.

Citing to the Texas Supreme Court, the court of appeals explained that for a premises liability claim where a subcontractor is working, Garza would need to show HACA either (1) had a contractual right or (2) actually exercised control over the means, methods, or details of the independent contractor's work. Because Garza failed to show HACA had a contractual right to control the premises where she fell and only alleged that Cook and Specialty Tractor exercised actual control over the premises, the appellate court concluded HACA's sovereign immunity had not been waived under the TTCA and reversed the trial court's order.

Takings/Ultra Vires: *Consol. Towne E. Holdings, LLC v. City of Laredo*, No. 04-22-00130-CV, 2023 WL 4482391 (Tex. App.—San Antonio July 12, 2023). Consolidated Towne East Holdings, LLC ("Consolidated") sued the city to develop land in the city's extraterritorial jurisdiction. Consolidated sought water and sewer services from the city as part of its proposed development. The city required annexation before it would provide the services. Consolidated sued on the grounds that the city's precondition for water and sewer services amounts to an unconstitutional taking and that denial of services is an *ultra vires* act by the city manager and the city's director of utilities. The trial court granted the city's summary judgment motion and dismissed Consolidated's claims. Consolidated appealed.

The appellate court affirmed and dismissed the case without prejudice, finding: (1) the case was not ripe because whether annexation costs are roughly proportional to their asserted purposes is not ripe for resolution until those costs are authoritatively set; (2) Consolidated's declaratory judgment claim on the city ordinance requiring annexation likewise failed because it was premature; and (3) Consolidated's *ultra vires* claim failed because the city manager and director of utilities had authority in the city's ordinances to deny providing water and sewer services to Consolidated.

Purchasing: *City of Dallas v. Gadberry Constr. Co., Inc.*, No. 05-22-00665-CV, 2023 WL 4446291 (Tex. App.—Dallas July 11, 2023). This case involves a construction project in which the city of Dallas issued a request for sealed bids. After disqualifying a bidder, Gadberry Construction Company (Gadberry), for lack of experience and mixed reviews from its references, Gadberry sued the city. The trial court, ruling in favor of Gadberry, denied the city's

plea to the jurisdiction and granted a temporary injunction based on Sec. 252.061 of the Texas Local Government Code. The city subsequently appealed, arguing that Sec. 252.043(f) grants cities the authority to reject any and all bids for procurement contracts and Gadberry failed to establish a waiver of immunity. Because the city's bid documents specifically notified bidders that it reserved the right to reject bidders for lack of experience for equivalent projects within the past three years and the city rejected Gadberry's bid for that reason, the court determined the city did not violate the competitive bidding requirements of Chapter 252 and reversed the trial court's order.

Municipal Court: *State v. Villa*, No. 05-22-00220-CR, 2023 WL 4571923 (Tex. App.—Dallas July 18, 2023). After Whitney Villa was convicted of assault by contact and assessed a fine by the city of Mesquite Municipal Court (a municipal court of record), she appealed the judgment to the County Criminal Court of Appeals No. 1. The county court subsequently reversed the municipal court's judgment and remanded the case for a new trial. The municipal prosecutor's office (the State) then appealed the County Criminal Court's order to the Dallas Court of Appeals.

In its opinion, the appellate court reasoned that Texas Government Code Sec. 30.00014(a) only governs an appeal from a municipal court of record to certain courts such as county courts of appeals, but it does not apply to subsequent appeals from these courts to the courts of appeals. Further, appeals to the courts of appeals, which are governed by Sec. 30.00027, only grant an appellant the right to appeal if: (a) the fine assessed against the defendant exceeds $100 and the judgment is affirmed by the appellate court; or (2) the sole issue is the constitutionality of the statute or ordinance on which a conviction is based. Because this case did not fit within these two categories, the court ultimately concluded that it lacked jurisdiction to hear appeals by the State in these instances.

Immunity/Takings: *City of Canton v. Lewis First Monday, Inc.*, No. 06-23-00027-CV, 2023 WL 4945085 (Tex. App.—Texarkana Aug. 3, 2023) (mem. op.). The plaintiff co-owns property with the city where a flea market operates. The market has an entrance through the historical main gate owned by the city. The city voted to restrict access to the historic main gate to vendors during the flea market and the plaintiff sued for: (1) declaratory judgment for an easement by estoppel; (2) declaratory relief for a taking; and (3) injunctive relief to prevent the city from locking the main gate. The city filed a plea to the jurisdiction, which the trial court denied.

On appeal, the appellate court reversed the trial court and found: (1) the plaintiff had no easement interest in a public roadway; (2) regulating traffic is a municipal governmental function; (3) the Private Real Property Rights Preservation Act only applies in the extraterritorial jurisdiction and the city's act did not take place in the ETJ; and (4) the plaintiff did not have a takings claim because the act took place on city-owned property, the city did not restrict access to the plaintiff's property, and the city did not deny plaintiff a permit. The appellate court

vacated the trial court's temporary injunction, reversed the denial of the plea, and rendered judgment for the city.

Tort Claims Act: *Buchanan v. City of Bogata*, No. 06-23-00011-CV, 2023 WL 4980974 (Tex. App.—Texarkana Aug. 4, 2023). Plaintiff sued the city over a car accident with a city employee when she was a passenger in a car. The city filed a plea to the jurisdiction based on lack of notice, which the trial court granted. The appellate court affirmed, finding that: (1) the city did not receive statutory notice under the Tort Claims Act; and (2) the city did not have actual notice because nothing in the police report provided notice to the city that the plaintiff was injured or that her injuries were caused by the employee's negligence.

Immunity: *El Paso Water Utilities Sys.-Pub. Serv. Bd. v. Marivani*, No. 08-23-00071-CV, 2023 WL 4771207 (Tex. App.—El Paso July 26, 2023) (mem. op.). Aryan Marivani sued the City of El Paso and the El Paso Water Utilities System-Public Service Board (collectively "EPWU") for negligence after a vehicle being driven by Gabriel Ramirez, an employee of EPWU, collided with Marivani's parked car. EPWU answered the complaint with a plea to the jurisdiction, arguing that the case should be dismissed because Ramirez was commuting home at the time of the collision and was therefore not acting within the scope of his employment. The trial court denied the plea to the jurisdiction, and EPWU appealed. Municipalities generally have immunity from lawsuits unless the immunity has been waived. The Texas Tort Claims Act can provide such an immunity waiver for property damage caused by employee negligence, if the damage is caused by a motor vehicle being operated by an employee who is acting within the scope of their employment. An employee is typically not acting within the scope of their employment while they are commuting to and from work. This rule is known as the "coming-and-going" rule and can apply even when the employee is driving a city-owned vehicle. Exceptions exist if the employee is on a special mission for the employer or performing another service for the employer. Despite driving a company vehicle at the time of the collision, evidence supported the fact that Ramirez was merely commuting home at the time of the collision. Marivani argued that certain company policies might indicate that Ramirez was in his employment scope; however, the court found otherwise, taking pains to analyze and distinguish this case from other relevant cases. Ultimately, the appellate court reversed the trial order denying EPWU's plea and rendered judgment in favor of EPWU.

Tort Claims Act: *Franz and South Texas Elderly Services, Inc., v. Interim Police Chief Romero Rodriguez and City of Hidalgo*, No. 13-22-00413-CV, 2023 WL 5108966 (Tex. App.—Corpus Christi–Edinburg Aug. 10, 2023) (mem. op.). Franz sued the City of Hidalgo under the TTCA and Rodriguez and Sanchez in their individual capacity after Rodriguez and Sanchez removed a political sign located on Franz's property under the Election Code's prohibition on certain placement of political signs. Franz alleged that Rodriguez and Sanchez had violated 42 U.S.C. Section 1983. The trial court dismissed the individual claims against Rodriguez and Sanchez under Section 106.101(e) of the Texas Tort Claims Act, which requires that an employee be dismissed from a lawsuit that could have been brought against the city.

Franz appealed, arguing that the trial court should not have dismissed his Section 1983 claims against the employees individually.

The appellate court affirmed, holding that because Franz had not pleaded any of the elements of a Section 1983 claim, the trial court correctly dismissed the claims under Section 106.101(e) of the Texas Tort Claims Act.

July 2023

Recent Texas Cases of Interest to Cities

Note: Included cases are from June 11, 2023, through July 10, 2023.

Immunity: CPS Energy v. Elec. Reliability Council of Tex., No. 22-0056, 2023 WL 4140460 (Tex. June 23, 2023). This case stems from claims against ERCOT related to Winter Storm Uri.

Action was brought in two separate proceedings against the Electric Reliability Council of Texas (ERCOT)—first by CPS Energy (CPS), a municipally owned electric utility, alleging breach of contract, negligence, gross negligence, negligence per se, breach of fiduciary duty, and violations of Texas Constitution, and second, by Panda Power Companies (Panda) for fraud, negligent misrepresentation, and breach of fiduciary duty—alleging that ERCOT's electricity capacity, demand, and reserves reports misled the power company to invest $2.2 billion in building new power plants.

ERCOT filed a plea to the jurisdiction, arguing that the claims are barred by sovereign immunity and, alternatively, that the Public Utility Commission (PUC) has exclusive jurisdiction over the claim. The trial court denied the plea. ERCOT appealed, asserting that it is a governmental unit entitled to an interlocutory appeal from the denial of a plea to the jurisdiction. ERCOT also sought review by petition for writ of mandamus in the event it is not entitled to an interlocutory appeal. After one court of appeals panel summarily denied mandamus relief, ERCOT filed its petition for writ of mandamus in the Supreme Court to continue the alternative path to review. A different court of appeals panel then held that ERCOT is a governmental unit entitled to take an interlocutory appeal, that the PUC has exclusive jurisdiction over CPS's claims, and that CPS's claims should be dismissed. The Supreme Court granted review.

The Supreme Court determined that: (1) ERCOT is a governmental unit as defined in the Texas Tort Claims Act and thereby entitled to pursue an interlocutory appeal from the denial of a plea to the jurisdiction; (2) the PUC has exclusive jurisdiction over the parties' claims against ERCOT; and (3) ERCOT is entitled to sovereign immunity. Accordingly, in the CPS case, the court affirmed the appellate court's judgment, dismissing CPS's motion to stay the trial court's temporary restraining as moot. In the case related to Panda, the court reversed the court of appeals's judgement and dismissed the case for lack of jurisdiction.

Emergency Management: *Abbott v. Harris Cnty*., No. 22-0124, 2023 WL 4278763 (Tex. June 30, 2023). This case addresses the scope and constitutionality of the governor's authority under the Texas Disaster Act to prohibit local governments from imposing mask requirements.

Harris County filed suit against the governor and attorney general, alleging that the governor exceeded his authority under the Texas Disaster Act by issuing an executive order that prohibited local governmental entities and officials from requiring face coverings as part of their COVID-19 mitigation efforts and purported to suspend several laws that county officials relied on to issue such face covering requirements. The trial court denied the defendants' plea to the jurisdiction and granted the county's motion for temporary injunction. On appeal, the Austin Court of Appeals affirmed.

The Supreme Court of Texas granted the defendants' petition for review, and held that: (1) the county had standing to bring seek injunctive relief against the attorney general; (2) the state's appeal was not rendered moot by executive order's expiration; (3) the county judge was governor's designated agent under Disaster Act; (4) the executive orders were valid exercise of the governo"s authority under Disaster Act; and (5) the county was not likely to succeed on merits of its claim that governor lacked authority to issue the executive orders. The court vacated the judgment of the court of appeals, dissolved the temporary injunction, and remanded the case.

(The court reached the same conclusion in the following four separate cases related to the governor's authority to prohibit local mask mandates: *Abbott v. Jenkins*, No. 21-1080, 2023 WL 4278505 (Tex. June 30, 2023); *Abbott v. City of San Antonio,* No. 21-1079, 2023 WL 4278501 (Tex. June 30, 2023); *Abbott v. La Joya Indep. Sch. Dist.,* No. 22-0328, 2023 WL 4278488 (Tex. June 30, 2023); and Abbott v. Fort Bend Cnty., No. 22-1056, 2023 WL 4278491 (Tex. June 30, 2023).)

Disability Discrimination: *Tex. Tech Univ. Health Scis. Ctr. - El Paso v. Niehay,* No. 22-0179, 2023 WL 4278585 (Tex. June 30, 2023). This is a case of first impression in which the court determines whether morbid obesity, without an underlying physiological disorder or condition, is an impairment under the Texas Commission on Human Rights Act (TCHRA).

Following her dismissal from medical residency program administered by Texas State University's medical school, the medical resident filed suit against the university, asserting that she was terminated because her morbid obesity was regarded as an impairment, and alleging a claim for unlawful disability discrimination in violation of the TCHRA. The trial court denied the university's plea to the jurisdiction and motion for summary judgment. On appeal, the court of appeal's affirmed, and the Supreme Court granted the university's petition for review.
The Supreme Court determined that (1) the resident's morbid obesity was not an impairment for purposes of her TCHRA disability discrimination claim; (2) morbid obesity does not qualify as

an impairment under the TCHRA absent an underlying physiological disorder or condition; and (3) there was no evidence that the resident had a disability as defined by the TCHRA.

Tort Claims Act: *City of Houston v. Green*, No. 22-0295, 2023 WL 4278246 (Tex. June 30, 2023). The primary issue in this case is whether the record contains evidence that a city police officer was driving "with reckless disregard for the safety of others" at the time of the accident.

A motorist brought an action against the city seeking to hold it vicariously liable for a police officer's alleged negligence and independently liable for negligently hiring, training, and supervising the officer following a motor vehicle accident involving the officer while he was responding to an emergency call.

The Supreme Court held that the officer did not act with reckless disregard when the accident occurred, and thus, the emergency exception to waiver of governmental immunity under the Tort Claims Act applied.

Texas Medical Liability Act: *City of Alvin v. Fields*, No. 01-22-00572-CV, 2023 WL 4003522 (Tex. App.—Houston [1st Dist.] June 15, 2023) (mem. op.). Fields was injured when the ambulance in which she was being transported was struck by a truck at an intersection after the ambulance driver entered the intersection at a yellow light to avoid jostling Fields. Fields sued the city, claiming the city's governmental immunity had been waived under the Texas Tort Claims Act. The city filed a plea to the jurisdiction claiming governmental immunity and a motion to dismiss under the Texas Medical Liability Act. The trial court denied both, and the city appealed.

The appellate court affirmed the trial court's denial of the city's plea to the jurisdiction, holding that because Fields stated she was experiencing whiplash immediately after the accident, a fact issue existed as to whether the city had actual knowledge of Fields's claim. The appellate court reversed the trial court's denial of the city's motion to dismiss, holding that because the accident occurred while Fields was in an ambulance receiving care, the Texas Medical Liability Act applied to the claim, and therefore Fields would have had to file an expert report addressing standard of care, breach, and causation.

Texas Citizens Protection Act: *Conrad v. Joiner*, No. 01-22-00450-CV, 2023 WL 4356187 (Tex. App.—Houston [1st Dist.] July 6, 2023) (mem. op.). Joiner, mayor of Kemah, Texas, sued Conrad for defamation based on a series of critical Facebook posts, billboards, and posted signs alleging that Joiner had abused power, violated the Texas Open Meetings Act, acted ultra vires as mayor, and engaged in criminal activity. Conrad moved to dismiss the suit under the Texas Citizens Protection Act and the trial court denied the motion.

The appellate court reversed, holding that because Joiner's claims were in reaction to Conrad's exercise of free speech, the burden then shifted to Joiner to present evidence to show a prima

facie case of defamation. Joiner had not presented evidence to show actual malice, so Conrad was entitled to dismissal of the claims against him under the TCPA.

Employment: *Beebe v. City of San Antonio by & through CPS Energy*, No. 04-22-00033-CV, 2023 WL 3985171 (Tex. App.—San Antonio June 14, 2023). A former employee of city-owned CPS Energy (CPS) sued CPS alleging discrimination based on race and disability, retaliation for reporting discriminatory treatment, and harassment based on national origin and disability. CPS filed a plea to the jurisdiction, which the trial court granted.

The appellate court found that: (1) the plaintiff failed to establish disparate treatment because he failed to show an example of a similarly situated coworker not being similarly fired for sexual harassment; (2) the plaintiff presented sufficient evidence to establish a prima facie case for retaliation; (3) CPS presented sufficient evidence for a legitimate, non-discriminatory explanation for the plaintiff's termination; and (4) there was some evidence of a legitimate reason for plaintiff's termination rather than pretext for discriminatory intent. Based on the findings, the appellate court affirmed the trial court's order granting the plea to the jurisdiction.

Attorney's Fees: *Suarez v. Silvas*, No. 04-22-00540-CV, 2023 WL 4337717 (Tex. App.—San Antonio July 5, 2023) (mem. op.). This is the third appeal in the case where the city removed councilmember Silvas for violating a charter provision and Silvas sued the city and city employees. The city and city employees filed a plea to the jurisdiction on remand the second time, claiming the trial court should dismiss all of Silvas's claims for attorney's fees and costs under the Texas Tort Claims Act (TTCA) against the city employee defendants and that Silavas did not have a proper Uniform Declaratory Judgment Act (UDJA) claim because her ultra vires claims were moot. The trial court denied the plea and the city and city employees appealed.

On appeal, the appellate court affirmed the denial of the plea and held that: (1) while the city is immune from Silvas's ultra vires claim, the city employees were not because they were acting in their official capacities and therefore were not immune from attorney's fees under the TTCA; and (2) the decision to award attorney's fees under the UDJA is at the discretion of the trial court.

Variances/Land Use: *City of Live Oak v. Lee*, No. 04-23-00022-CV, 2023 WL 4338957 (Tex. App.—San Antonio July 5, 2023) (mem. op.). The city erroneously issued a building permit to a homeowner to build in violation of the city's setback requirements. When the city received notice from the plaintiffs of the error, the board of adjustment issued a variance for the homeowner and the plaintiffs sued. The city filed a plea to the jurisdiction and the trial court denied it. The city appealed.

The appellate court found that: (1) the plaintiffs did not need to obtain a writ of certiorari because they filed their petition within ten days after the date the board granted the variance request; (2) the city was not a proper party; and (3) the city failed to raise the issue of whether

attorney's fees were proper in the plea. The appellate court affirmed the plea but the appellate court remanded to the trial court to dismiss the city.

Variances/Land Use: ***City of Dallas v. PDT Holdings, Inc.*****, No. 05-22-00730-CV, 2023 WL 4042598 (Tex. App.—Dallas June 16, 2023).** In this case, PDT Holdings, Inc. (PDT) sought to build a duplex on its property in Dallas. After submitting plans showing the building heights and being issued permits to build, PDT was later cited by a city inspector and issued a stop work order because the duplex's parapet height exceeded the city's 36-foot building height restriction. After correcting the violation, the city approved PDT's amended building plans but later issued a second stop work order because the duplex's overall height did not comply with city's Residential Proximity Slope (RPS) ordinance which limited the height to 26 feet. PDT later applied for a variance from the Board of Adjustment on three separate occasions but was denied. Ultimately, the trial court ruled in favor of PDT barring the city's enforcement of the RPS ordinance on the basis of the equitable estoppel doctrine. The city appealed thereafter.

Reversing the trial court, the court of appeals held that the case did not meet the threshold of "an exceptional case where manifest justice demanded departure from the general rule precluding estoppel against a municipality." Although there were factors that weighed in favor of estoppel, PDT failed to establish the doctrine's essential elements including a showing of affirmative misrepresentation on the part of the city and reasonable reliance by PDT on the misrepresentation. The court concluded that nothing in the record suggested the city deliberately calculated to induce PDT's reliance. Rather, the city only mistakenly issued the building permits, and PDT's reliance on those permits was not reasonable because PDT was responsible for reviewing all applicable ordinances, including the RPS ordinance, when it first applied for a building permit. As a result, the court reversed the trial court's judgment and held that PDT was not entitled to relief on the basis of the equitable estoppel doctrine.

Tort Claims Act: ***Barker v. Sam Houston State Univ.*****, No. 06-22-00076-CV, 2023 WL 4113275 (Tex. App.—Texarkana June 22, 2023).** Plaintiff filed a suit against her employer when she was injured by a vehicle driven by another employee. The university filed a plea to the jurisdiction and the plaintiff appealed. The appellate court found that although the plaintiff was going to lunch or running an errand when injured and not on the company's clock, her actions were so closely connected to her employment to render it an incident thereto. Therefore, her exclusive remedy was workers' compensation and she could not sue under the Texas Tort Claims Act. The appellate court affirmed the trial court's judgment.

Takings: ***ATI Jet Sales, LLC v. City of El Paso*****, No. 08-21-00208-CV, 2023 WL 4370471 (Tex. App.—El Paso July 5, 2023).** The City of El Paso filed an original application for a tax warrant against ATI Jet Sales in July 2020 due to tax delinquency for the years 2017 to 2019, amounting to $487,271.67. Consequently, Aircraft N277AL was seized. The city voluntarily returned Aircraft N277AL and moved to nonsuit ATI Jet Sales from the warrant case. In April 2021, ATI Jet Sales filed a lawsuit against the city alleging an unlawful taking and seeking a declaratory judgment that the seizure was unlawful, and the city filed a plea to the jurisdiction.

The trial court dismissed the case due to lack of jurisdiction. ATI Jet Sales appealed, challenging the city's plea to the jurisdiction regarding the collection of taxes, which ATI Jet Sales claimed amounted to an unlawful taking by the city. ATI Jet Sales also argued that the city exceeded its statutory authority, thereby waiving its governmental immunity. The crux of the appeal was jurisdictional, centering on whether the city acted lawfully in its tax collection practices, alleging that the city illegally seized property owned by one taxpayer, the entity ATI Jet West, in satisfaction of delinquent taxes owed by another taxpayer, ATI Jet Sales. The court disagreed, finding that inaccuracies on the appraisal roll did not absolve ATI Jet Sales of its tax liability and that the city acted within the bounds of its taxing authority. Additionally, the court found that ATI Jet Sales failed to raise a fact issue as to whether the city acted lawfully in the collection of taxes, which defeated its takings claim and its governmental-immunity waiver.

Tort Claims Act: *City of Houston v. Flores-Garcia*, No. 14-21-00680-CV, 2023 WL 4196541 (Tex. App.—Houston [14th Dist.] June 27, 2023) (mem. op.). Kevin Lancaster, a Senior Plant Operator at the Houston Public Works Department, ran a stop sign while driving a city-owned car, and hit Flores-Garcia's vehicle. On the day of the accident, Lancaster stopped at a convenience store near the collision site for unknown reasons, but stated that it was not related to his job duties. He also could not recall his destination after leaving the store when the accident occurred. Flores-Garcia sued the city for negligence, alleging that Lancaster failed in a number of respects concerning safe driving and that the city's immunity was waived under the Texas Tort Claims Act (TTCA) due to Lancaster acting within the scope of his employment during the collision. The city contested the claim, arguing through a motion for summary judgment that the limited waiver of governmental immunity under the Texas Tort Claims Act did not apply, because Lancaster was not acting within the scope of his employment when the accident happened. The trial court denied the city's motion, and the city appealed.

A governmental unit is typically not liable for the torts of their agents, unless there is a constitutional or statutory waiver of immunity. The TTCA provides such a waiver, allowing for a governmental unit's immunity to be waived in cases of personal injury arising from the negligent use of a motor vehicle by an employee acting within the scope of their employment and when the employee would be personally liable under Texas law. The determination of whether a person is acting within the scope of their employment depends on whether the act causing the injury was in furtherance of the employer's business and for the accomplishment of the objective for which the employee was employed. In cases where a vehicle involved in a collision is owned by the driver's employer, it is generally presumed that the driver was acting within the scope of their employment; however, evidence of the driver being on a personal errand at the time of the accident can rebut this presumption. An action is considered to be outside the scope of employment if it occurs as part of an independent course of conduct not intended by the employee to serve any purpose of the employer. Nonetheless, mixed motives do not necessarily exclude an action from being within the scope of employment if the action also serves a purpose for the employer. In the current case, Lancaster's regular work duties included driving a city-owned vehicle to inspect water complaints and flush hydrants. The city wanted the court to infer that Lancaster was still deviating from his duties after leaving the convenience store, but the

court pointed out that they must resolve any doubts in favor of the nonmovant during a motion for summary judgment. The court concluded that the evidence did not definitively establish that Lancaster was on a personal errand at the time of the accident. As such, the court rejected the city's sole issue on appeal, upholding the trial court's decision to deny the city's motion for summary judgment.

June 2023

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from May 11, 2023, through June 10, 2023.

Civil Rights: *Baker v. Coburn*, No. 21-10303, 2023 WL 3573302 (5th Cir. May 17, 2023), *as revised* (May 19, 2023). Darion Baker was shot and killed by police officers after he attempted to evade arrest by fleeing in a stolen vehicle. Coburn, one of the officers, fired multiple shots before the car moved, and he and the other officer continued to fire shots after the car drove away. Baker's family filed suit against the officers under § 1983, claiming that the officers used excessive force. The officers claimed qualified immunity and moved for summary judgment. The district court granted the officers' motion for summary judgment, and Baker's family appealed.

The appellate court reversed the district court's grant of summary judgment. The court found that Baker's family presented sufficient evidence to create a genuine issue of material fact to show that: (1) the officers violated Baker's constitutional rights by using excessive force because there was no immediate threat to the officers' safety; and (2) it became unreasonable for the officers to believe that Baker could use the vehicle to harm the officers once he began to drive away in the other direction.

Legislative Privilege: *La Union Del Pueblo Entero v. Abbott*, No. 22-50435, 2023 WL 3494770 (5th Cir. May 17, 2023). The United States and others filed suit, alleging that amendments made to the Election Code were racially discriminatory, and, therefore, violated the Constitution and the Voting Rights Act. When the plaintiffs asked for certain documents from the Texas Legislature during discovery, the legislators withheld some documents, claiming legislative privilege. The district court rejected the legislators' legislative privilege claims, ordering them to produce the documents, so the legislators appealed.

The appellate court reversed, upholding the legislators' legislative privilege. The appellate court rejected the plaintiffs' argument that the legislators waived or must yield their privilege because they participated in outside communication because outside communication is often necessary in modern legislative procedure, and forbidding legislative procedure to apply in this circumstance would protect too little of the legislative process. Therefore, the scope of legislative privilege must extend to outside communications. The court also rejected that this was a situation in which the legislative privilege must yield, for yielding is a rare instance which occurs only when there are important federal interests at stake, and this was not the case here.

Civil Rights: *Wood v. Bexar Cnty., Texas*, No. 22-50888, 2023 WL 3563012 (5th Cir. May 19, 2023). Amanda Wood filed suit against Officer Gerald Gereb and Bexar County for violating her constitutional rights after Officer Gereb pulled her over without providing a basis for the stop, accused her of driving while intoxicated, and then arrested her when she refused to participate in a field sobriety test. The district court granted Gereb and Bexar County's motion to dismiss because the blood-draw warrant affidavit attached to the motion to dismiss showed probable cause to pull Wood over. Wood appealed the dismissal of her claims.

The appellate court found that the magistrate judge erred in relying entirely on the blood-draw warrant affidavit attached to the motion to dismiss because a court may only consider documents attached to a motion to dismiss when such documents are referred to in a plaintiff's complaint and are central to the plaintiff's claims. In addition, the appellate court stated that the district court erred by neglecting to accept the plaintiff's version of the facts as true, which is required at this stage of the case. Therefore, the appellate court reversed and remanded the case.

Civil Rights: *Tuttle v. Sepolio*, No. 22-20279, 2023 WL 3635817 (5th Cir. May 23, 2023). The plaintiffs' estates filed suit against various police officers after one police officer applied for and received a no-knock search warrant for the plaintiffs' home based on a fraudulent affidavit stating that the plaintiffs sold drugs at the home, which resulted in a group of officers entering the home to execute the warrant and shooting and killing the plaintiffs after gunfire broke out.

The district court denied the motions to dismiss the excessive force claims asserted against the individual officers. The appellate court, accepting the plaintiffs' version of the facts as true, found them sufficient at this stage in the suit to establish that the plaintiff was injured as a result of force that was objectively unreasonable in light of the circumstances and affirmed the district court's decision on this aspect of the judgment.

The district court denied one of the supervising officer's motion to dismiss the plaintiff's excessive force and search and seizure claims based on a failure-to-supervise theory. The appellate court found that the facts alleged by the plaintiffs satisfied the requirements for a failure-to-supervise claim to proceed and there was a causal link between his failure to supervise and the injuries that occurred. Therefore, the appellate court affirmed the district court's decision.

The district court denied the motions to dismiss the plaintiffs' excessive force and search and seizure claims based on a failure-to-intervene theory. The appellate court found that the plaintiffs were unable to show that an officer was present while another officer violated the plaintiffs' constitutional rights, was aware of the violation, and had a clear opportunity to intervene but failed to do so. Therefore, the appellate court found that the district court erred in allowing these claims to proceed, and it reversed this part of the decision.

The appellate court reversed the district court's denial of one of the supervising officer's motion to dismiss the plaintiffs' excessive force and search and seizure claims based on a direct liability theory because the supervising officer was not personally involved in obtaining the search warrant or in effectuating the search, so he had no direct role in the activity.

Civil Rights: *Scott v. City of Mandeville*, No. 20-30507, 2023 WL 3592138 (5th Cir. May 23,

2023). The plaintiff was arrested for driving while intoxicated and sued under § 1983, alleging false arrest and excessive force along with the Louisiana state law claims of false arrest, excessive force, negligence, and vicarious liability. The trial court granted summary judgment and the plaintiff appealed.

On appeal, the Fifth Circuit affirmed, finding: (1) the officers were entitled to qualified immunity on the false arrest claims because the officers had probable cause to arrest the plaintiff despite the fact that they did not believe she was under the influence of alcohol; (2) the officers did not use excessive force in handcuffing the plaintiff behind her back when she said she had surgery and asked them to stop because the force used was not clearly unreasonable; and (3) the state law claims failed because there was no evidence to support the plaintiff's claims of negligence.

Civil Rights: *Gorsky v. Deputy Guajardo*, No. 20-20084, 2023 WL 3690429 (5th Cir. May 26, 2023). The plaintiffs sued law enforcement officers under § 1983 based on the officers' unlawful arrest of one of the plaintiffs, illegal entry and search of the plaintiffs' home, and use of excessive force against the plaintiffs. The officers moved for summary judgment and the trial court denied it. The officers appealed.

On appeal, the Fifth Circuit found it lacked jurisdiction to review the district court's decision that a fact issue is genuine as to the illegal entry, illegal search, and excessive force claims; therefore, the court dismissed the appeal regarding those claims. Regarding the false arrest claims, the Fifth Circuit found that the plaintiff presented sufficient facts that the plaintiff was arrested without probable cause and a reasonable officer could not have believed he had probable cause to arrest the plaintiff for failure to comply with instructions to get his wife from inside the house as part of a criminal mischief investigation. The Fifth Circuit affirmed the district court's order denying summary judgment for the false arrest claims.

Civil Rights: *Ellis v. Garza-Lopez*, No. 23-10022, 2023 WL 3723634 (5th Cir. May 30, 2023). The plaintiff brought a § 1983 action against two police officers based on his detention and subsequent search. He also alleged cruel and unusual punishment in violation of his Eighth Amendment rights because he was directed to destroy his marijuana or receive a citation. The district court granted the defendants' motion for summary judgment on the grounds of qualified immunity. Plaintiff appealed.

On appeal, the Fifth Circuit found: (1) the officers had reasonable suspicion to detain the plaintiff and probable cause to conduct a warrantless search because they could smell marijuana coming from the car; and (2) the complaint about being forced to destroy the marijuana did not present an Eighth Amendment claim. Because the officers did not violate any of the plaintiff's constitutional rights, the Fifth Circuit affirmed and found the officers were entitled to qualified immunity.

Civil Rights: *Edwards v. City of Balch Springs, Texas*, No. 22-10269, 2023 WL 3916280 (5th Cir. June 9, 2023). The city employed a police officer who a jury later convicted of murdering a teenage boy while on duty. The boy's father sued the city under § 1983. The trial court granted the city's motion for summary judgment, reasoning that the city's police department's use-of-force policy was constitutional, and also that plaintiff's training, supervisory, and disciplinary theories of liability lacked factual support.

On appeal, the Fifth Circuit affirmed, finding: (1) the city's use-of-force policy did not have to list out every constitutional requirement to be constitutional; (2) the city's use-of-force policy did not affirmatively allow or compel an officer to use deadly force based solely on the officer's own "underlying intent or motivation"; (3) the officer's isolated instances of previous departures from the overall use-of-force policy did not establish a pattern of the city's deliberate indifference and therefore the failure to train claim failed; and (4) the failure to supervise claim failed because the city's lack of a system to track use of force incidents did not amount to a complete disregard of the risk that a violation of a *particular* constitutional right would follow.

Recent Texas Cases of Interest to Cities

Note: Included cases are from May 11, 2023, through June 10, 2023.

Eminent Domain: ***Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Irrigation Dist. No. 1*****, No. 21-0507, 2023 WL 3556685 (Tex. May 19, 2023).** The issue in this case is whether in an eminent-domain proceeding brought by one political subdivision against another, governmental immunity bars such proceeding.

Hidalgo County Water Improvement District No. 3 (Improvement District) offered to purchase a subsurface easement from the Hidalgo County Irrigation District No. 1 (Irrigation District), which rejected the offer. After negotiations failed, the Improvement District filed a condemnation action against the Irrigation District. The Irrigation District filed a plea to the jurisdiction arguing that it had governmental immunity from the condemnation suit and the Legislature had not waived that immunity. The trial court granted the plea and dismissed the suit. The court of appeals affirmed.

The Supreme reversed, holding that governmental immunity does not apply in eminent-domain proceedings and that the Irrigation District is not immune from the Improvement District's condemnation suit. In reaching this conclusion, the court took into consideration the purposes governmental immunity serves, its nature, and the development of the court's immunity and eminent-domain precedent.

Immunity: ***City of Austin v. Quinlan*****, No. 22-0202, 2023 WL 3767092 (Tex. June 2, 2023).** The issue in this appeal is whether the City of Austin had a legal duty to ensure a sidewalk café, to which it had delegated maintenance responsibilities under a permit, fulfilled its maintenance obligations, thus, waiving its governmental immunity.

A restaurant patron brought premises liability action against the City of Austin and a restaurant that operated a sidewalk café following an ankle injury that was sustained when the patron fell more than one foot from the sidewalk to the street. The trial court denied the city's plea to the jurisdiction and the city appealed. The court of appeals affirmed in part and reserved in part.

The Supreme Court granted the petition for review and reversed, holding that: (1) a sidewalk café maintenance agreement between the restaurant and the city did not impose a nondiscretionary duty on the city, and thus, claims against the city did not fall outside the "discretionary function" exception to waiver of immunity under the Texas Tort Claims Act; (2) the city's alleged control

over the sidewalk café, under agreement, had no bearing on the issue of whether the "discretionary function" exception to the city's waiver of immunity applied; (3) the statutes governing a city's authority to issue a permit for use of city street or sidewalk for public convenience or private use did not impose a nondelegable, nondiscretionary duty on a city, for which alleged breach fell outside the "discretionary function" exception to waiver of immunity; and (4) the dismissal of the complaint, rather than remand to allow the patron an opportunity to replead, was appropriate.

Economic Development Agreements: *City of League City v. Jimmy Changas, Inc*., No. 21-0307, 2023 WL 3909986 (Tex. June 9, 2023). This is an interlocutory appeal in which the Supreme Court determined the proper governmental/proprietary dichotomy in a breach-of-contract case.

The City of League City entered into a "Chapter 380 Economic Development Incentives Grant Agreement" with Jimmy Changas, Inc. (Changas) in which the city offered incentives including reimbursements of fees and a percentage of local sales tax payments to Changas to invest $5 million to develop a restaurant facility within the city's entertainment district. After Changas completed the project, the city failed to provide the reimbursements contending that Changas failed to timely submit documentation that it had invested $5 million and created at least 80 full-time jobs. Changas sued the city asserting breach of contract. The court of appeals reversed the trial court's holding, finding that the city engaged in a proprietary function when it entered the contract, and thus, was not immune from suit.

On appeal, the Supreme Court affirmed the appellate court's holding finding that under the *Wasson II* factors, the city was engaging in a proprietary activity. The court determined that: (1) the city's act of entering into the contract was discretionary; (2) the contract primarily benefited the city residents and not the general public; (3) the city was acting on its own behalf and not on the State's behalf when it entered the contract; and (4) the city's decision to enter into the contract was not related to any governmental function.

Tort Claims Act: *Alief Indep. Sch. Dist. v. Velazquez*, No. 01-22-00444-CV, 2023 WL 3555495 (Tex. App.—Houston [1st Dist.] May 18, 2023) (mem. op.). Velazquez sued the Alief Independent School District after he was struck by a vehicle driven by a school cafeteria worker who was on her way to the district office to inquire about her health benefits. The district filed a plea to the jurisdiction, claiming governmental immunity. The trial court denied the plea, and the district appealed.

The appellate court reversed and rendered, holding that the cafeteria worker was not acting within the scope of her employment by driving to ask about her benefits after her shift ended, and therefore the district's governmental immunity was not waived under the TTCA.

Takings: *City of Lake Jackson v. Adaway*, No. 01-22-00033-CV, 2023 WL 3588383 (Tex. App.—Houston [1st Dist.] May 23, 2023) (mem. op.). Property owners sued the City of Lake Jackson, asserting that the city took certain flood mitigation actions that caused their properties to flood. The owners brought claims for constitutional takings, nuisance, trespass, negligence, and a statutory taking under Chapter 2007, Gov't Code. The city claimed that because the owners had

not shown causation, they had failed to allege a claim for which governmental immunity had been waived. The trial court denied the city's plea to the jurisdiction and the city appealed.

The appellate court affirmed in part, reversed and rendered in part, and reversed and remanded in part. As to the constitutional takings claim, the court held that the owners sufficiently pleaded that the city acted with the intent necessary to state a takings claim, the owners produced evidence to raise a fact question on the element of proximate cause, and the public-necessity exception to the waiver was an affirmative defense rather than a jurisdictional defect. As to the nuisance and trespass claims, the court held that because the owners had stated a viable takings claim, they had stated viable trespass and nuisance claims. As to the claims of negligence, the court held that the waiver of immunity in the Texas Tort Claims Act did not apply because there was no fact question with regard to whether the motor-driven equipment had caused the flooding. As to the statutory takings claim, the court held that Chapter 2007 did not apply to an action by a city.

Employment: *City of Houston v. Carter*, No. 01-22-00453-CV, 2023 WL 3632788 (Tex. App.—Houston [1st Dist.] May 25, 2023) (mem. op.). Carter sued the City of Houston when she was sexually harassed at work and then experienced retaliation after being transferred to another location during the sexual harassment investigation. The city filed a combined plea to the jurisdiction and motion for summary judgment, claiming governmental immunity. The trial court denied the city's plea and the city appealed.

The appellate court reversed, holding that: (1) although Carter had exhausted her administrative remedies, she had not established a causal link between her transfer, which was the adverse employment action, and the retaliation she experienced; and (2) Carter had not established a prima facie case of sexual harassment because the conduct was not physically threatening or humiliating and did not unreasonably interfere with her work performance.

Tort Claims Act: *Hall v. City of Jersey Vill.*, No. 01-22-00452-CV, 2023 WL 3873351 (Tex. App.—Houston [1st Dist.] June 8, 2023) (mem. op.). Hall sued the City of Jersey Village when a golf ball struck her forehead while she was working at a restaurant at a city-owned golf course. The trial court granted the city's plea to the jurisdiction claiming governmental immunity and Hall appealed.

The appellate court reversed, holding that: (1) as to the premises liability claim, the city had provided no jurisdictional evidence negating the waiver of immunity, so the issue was pleading sufficiency and Hall should have been given an opportunity to amend her pleading; and (2) a fact issue existed with regard to whether the person who hit the golf ball that struck Hall did so in his capacity as a city employee.

Tort Claims Act: *City of Arlington v. Taylor*, No. 02-22-00325-CV, 2023 WL 3521891 (Tex. App.—Fort Worth May 18, 2023). This is a Texas Tort Claims Act emergency exception case stemming from a motor-vehicle accident.

Taylor sued the City of Arlington after he was involved in a car accident at a four-way intersection with Baskin, a city police officer, who was responding to an emergency call to assist another officer with an occupied stolen vehicle. The city filed a plea to the jurisdiction, which the trial court

denied. The city appealed asserting that it was entitled to immunity under the emergency exception to the Texas Tort Claims Act waiver of immunity.

For an emergency exception to apply, the city has the burden of conclusively showing that Basking (1) was responding to an emergency call or reacting to an emergency situation and (2) complied with the laws applicable to emergency action, if any such law exists. The court of appeals affirmed, finding that the city did not conclusively prove that Baskin proceeded into the intersection and past the red light after slowing as necessary for safe operation.

Contracts: *Tex. Disposal Sys., Inc. v. City of Round Rock*, No. 03-22-00450-CV, 2023 WL 3727963 (Tex. App.—Austin May 31, 2023). In November 2021, the city council of the City of Round Rock approved a resolution authorizing the city manager to give Texas Disposal System (TDS) notice that the city would be terminating its franchise agreement for non-residential garbage and recycling collection services effective April 30, 2022, as well as a resolution approving the mayor to execute an agreement with another vendor to be city's single service provider. In accordance with the contract terms, the city provided the 30-day notice of the contract termination in March 2022.

Upon receiving the notice, TDS sued the city and the city manager seeking declaratory and injunctive relief. After the trial court denied the first request, TDS filed an amended petition which included an *ultra vires* claim against the city manager. After a hearing on the second request for a temporary restraining order the trial court denied TDS's request finding that it had not proven the required elements under the Uniform Declaratory Judgment Act (UDJA). TDS subsequently filed an interlocutory appeal raising two issues. The first issue involved the city's charter provision prohibiting exclusive franchises for public utilities. TDS claimed the city violated its charter by granting an exclusive franchise agreement to the other vendor, which would cause TDS irreparable harm without relief. TDS also claimed the city violated the Texas Open Meetings Act (TOMA) at a July 2021 retreat in which the council first considered possible action regarding commercial garbage collection because the agenda notice was not "sufficiently specific" to give the public notice that it was considering an exclusive franchise agreement. The city responded by challenging the court's subject matter jurisdiction for the claims under the UDJA.

Although the court of appeals determined the trial court had subject matter jurisdiction, it affirmed the trial court's order. The court reasoned that at the time of the hearing on the temporary restraining order, the city had provided the required termination notice under the terms of their contract, and the contract between TDS and the city was no longer in effect. Therefore, TDS failed to establish "probable, imminent, and irreparable injury in the interim that its requested injunctive relief would have prevented."

Takings/Ultra Vires: *Consol. Towne E. Holdings, LLC v. City of Laredo*, No. 04-22-00130-CV, 2023 WL 3606328 (Tex. App.—San Antonio May 24, 2023). Consolidated Towne East Holdings, LLC ("Consolidated") sued the city to develop land in the city's extraterritorial jurisdiction. Consolidated sought water and sewer services from the city as part of its proposed development. The city required annexation before it would provide the services. Consolidated sued on the grounds that the city's precondition for water and sewer services amounts to an unconstitutional taking and that denial of services is an *ultra vires* act by the city manager and the

city's director of utilities. The trial court granted the city's summary judgment motion and dismissed Consolidated's claims. Consolidated appealed.

The appellate court affirmed, finding: (1) the case was not ripe because whether annexation costs are roughly proportional to their asserted purposes is not ripe for resolution until those costs are authoritatively set; (2) Consolidated's declaratory judgment claim on the city ordinance requiring annexation likewise failed because it was premature; and (3) Consolidated's *ultra vires* claim failed because the city manager and director of utilities had authority in the city's ordinances to deny providing water and sewer services to Consolidated.

Takings/Tort Claims Act: *Rivera v. San Antonio Water Sys.*, No. 04-22-00309-CV, 2023 WL 3609233 (Tex. App.—San Antonio May 24, 2023) (mem. op.). This case has some complicated facts surrounding the plaintiffs' claims. Ultimately, some individuals sued the San Antonio Water System (SAWS) because of damage to a park when SAWS's contractor was performing sewer work at the park, claiming: (1) inverse condemnation; (2) waiver pursuant to the Texas Tort Claims Act (the "TTCA"); and (3) waiver under the Texas Uniform Declaratory Judgments Act (the "UDJA"). The trial court granted SAWS's plea to the jurisdiction and the plaintiffs appealed.

The appellate court affirmed, finding: (1) the plaintiffs did not provide SAWS notice of the claim required by the TTCA; (2) because the damages alleged by plaintiffs are at best the accidental or negligent result of SAWS's purported failure to supervise, mitigate, or mediate the contractor's work, there is no public benefit, and the properties cannot be said to be taken or damaged *for public use*; and (3) the individual who conveyed the park to the city does not have a declaratory judgment claim because the deed is not an ordinance or statute that provides a limited waiver of immunity.

Tort Claims Act: *City of Mesquite v. Wagner*, No. 05-22-00826-CV, 2023 WL 3408528 (Tex. App.—Dallas May 12, 2023). After being bitten by an officer's police service dog, Anthony Wagner sued the City of Mesquite asserting a negligence claim under the Texas Tort Claims Act (TTCA). The city denied the allegations of negligence and filed a plea to the jurisdiction raising, among other defenses, governmental immunity. The trial court subsequently denied the city's plea, and the city filed an interlocutory appeal. The city claimed that: (1) the officer was entitled to official immunity which extended to the city; (2) Wagner's injury had not been caused by the use of tangible personal property, as required to invoke a waiver of governmental immunity; (3) the claim did not arise out of negligent acts; and (4) because the officer was responding to an emergency call, the emergency-response exception to the governmental immunity waiver applied.

Affirming the trial court's order, the court of appeals first concluded that the city did not meet its burden to establish that the officer acted in good faith for purposes of official immunity. While the city presented an affidavit explaining the circumstances of the event, the evidence did not show that a reasonably prudent officer faced with the same circumstances could have believed the officer's conduct was justified. The court further held the officer was in possession of the police dog and using him to track burglary suspects when the police dog bit and caused Wagner's injuries; therefore, Wagner's injuries were caused by the officer's use of tangible personal property. To the city's argument that the officer's actions were intentional rather than negligent when using the police dog and excepted from the TTCA's waiver of immunity, the court determined that statements made in the officer's affidavit and his statements in an earlier incident memo raised

fact issues about whether the officer was negligent. Lastly, the court concluded that even if the emergency-response exception applied to a situation involving an officer who is responding to a call for assistance, the evidence raised material fact issues as to whether the officer acted with conscious indifference or reckless disregard for Wagner's safety.

Tort Claims Act: *Martin v. Vill. of Surfside Beach*, No. 14-22-00085-CV, 2023 WL 3476939, (Tex. App.—Houston [14th Dist.] May 16, 2023). On June 28, 2019, Martin was involved in a car accident with Pedro Gutierrez, an employee of the Village of Surfside Beach who was driving a village-owned truck. Martin sued Gutierrez and the village for negligence, claiming that Gutierrez failed to yield the right-of-way. The village argued that it had governmental immunity under the Texas Tort Claims Act because Gutierrez was not acting within the scope of his employment at the time of the accident. The trial court granted the village's plea to the jurisdiction and dismissed Martin's claims, leading to Martin's appeal.

Governmental immunity protects political subdivisions from lawsuits unless immunity has been waived by the legislature. The Texas Tort Claims Act (TTCA) provides a waiver of immunity for cases involving the use of a motor vehicle by an employee within the course and scope of their employment. A presumption exists that a driver is acting within the course and scope of their employment when a collision occurs in an employer-owned vehicle. However, this presumption can be rebutted with evidence of personal errands or actions not in furtherance of the employer's business. Additionally, the "coming-and-going rule" states that employees generally do not act within the course and scope of their employment when traveling to and from work. The village presented a declaration from Gutierrez stating that he was driving home after stopping to do some personal shopping when the collision occurred, which rebutted the presumption that Gutierrez was acting in the course and scope of his employment. Furthermore, the fact that Gutierrez was on call or wearing a village-branded shirt did not establish a connection to the employer's business at the time of the accident. The court held that the evidence demonstrated that Gutierrez was not acting within the course and scope of his employment, thereby concluding that the village's governmental immunity had not been waived. As a result, the trial court lacked jurisdiction over the plaintiff's suit, and the granting of the village's plea to the jurisdiction was not erroneous.

Civil Service: *City of Houston v. Dunbar*, No. 14-21-00570-CV, 2023 WL 3596260 (Tex. App.—Houston [14th Dist.] May 23, 2023). During a public event on September 11, 2019, at HFD Fire Station 84 featuring Houston Rockets basketball players, district chief Dunbar was present when unauthorized personnel drove the station's high-water emergency vehicle, using its lights and sirens. Assistant fire chief Griffin later filed a complaint of misconduct against Dunbar, resulting in a three-day unpaid suspension following an internal investigation. Dunbar appealed the suspension to the civil service commission, which upheld the suspension, and then to the district court, which ruled in his favor.

The city appealed the district court's decision, arguing that the district court's judgment is erroneous because (1) substantial evidence supported the commission's order to suspend Dunbar, and (2) the commission's order was free from any illegality. In its analysis, the appellate court emphasized the substantial evidence standard, in which the trial court may not substitute its judgment for that of the agency on controverted issues of fact but must affirm administrative findings in contested cases if there is more than a scintilla of evidence to support them. The

appellate court determined that there is more than a scintilla of evidence to support the commission's order upholding Dunbar's suspension, siding with the city. A public employer's action can be tainted by illegality if the employer's action is arbitrary or capricious, or a clear abuse of authority. Dunbar's arguments that the commission's decision was tainted by illegality stemmed from alleged notice issues. The court was not persuaded by these arguments, reversed the district court's judgment, and affirmed the commission's order.

May 2023

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from April 11, 2023 through May 10, 2023.

Public Improvement Districts*: Smith v. The City of Bastrop, et al*., No. 21-51039, 2023 WL 2890162 (5th Cir. Apr. 11, 2023). In 2019, the City of Bastrop enacted Ordinance No. 2019-40 creating the Hunters Crossing Public Improvement District (PID), allowing for public improvement projects in a particular 283.001-acre parcel of land. Two Hunters Crossing property owners filed a lawsuit against the city, alleging that the 2019 Ordinance violated federal procedural due process protections by increasing their PID assessments without following state procedural requirements. Additionally, they claimed that the Bastrop City Council failed to annually review and approve the developer's actual capital expenditures and update the PID's service and assessment plan (SAP) accordingly. The district court rejected the federal due process challenges to the 2019 Ordinance, and the landowners appealed. While noting that the Texas Public Improvement District Assessment Act (Act) is not a model of clarity, the court determined that the 2019 ordinance and SAP did not clearly violate the Act. Additionally, the landowners failed to show any actual prejudice resulting from Bastrop's alleged failure to perform annual ministerial duties. Furthermore, the court concluded that the landowners were not deprived of federal due process protections, as they received sufficient notice and opportunity to be heard prior to the passing and approval of the 2019 Ordinance and SAP. Consequently, the appellate court affirmed the lower court's order. With regard to state law claims related to a state constitutional prohibition against retroactive laws, the appellate court remanded the claims back to the district court to develop the record.

Civil Rights: *Allen v. Hays*, 65 F.4th 736 (5th Cir. 2023). After John Allen, Sr. was fatally shot during a routine traffic stop, his survivors filed a § 1983 action against the city of Houston and police officer Justin Hays asserting claims for, among others, unlawful arrest and detention, excessive force, denial of medical care, and racial discrimination. The district court dismissed the complaint, and the plaintiffs appealed. The Fifth Circuit reversed the lower court's judgment regarding the § 1983 claims for excessive force, denial of medical care, and unlawful arrest but affirmed the dismissal of the racial discrimination claim.

The Fifth Circuit found that plaintiffs plausibly alleged that because Hays: (1) had no reason to believe Allen was armed and knew he was seriously injured and likely could not move, a police officer would know that to handcuff Allen was an arrest without probable cause under clearly established law; (2) failed to perform any medical care or call for medical assistance for six minutes knowing he had shot Allen multiple times, his actions were in violation of clearly established law;

and (3) knew Allen was unarmed and not aggressive at the time of the shooting, using deadly force was a constitutional violation. The Fifth Circuit affirmed the lower court's decision with regard to the racial discrimination claim because plaintiffs failed to allege Hays had a discriminatory purpose. Regarding the claims against the city, the Court found that the plaintiffs failed to allege the city had ratified Hays's actions on the night of the shooting.

Civil Rights: *Dave v. O'Carroll*, No. 22-40653, 2023 WL 2983567 (5th Cir. Apr. 18, 2023). Beri Dave, a First Amendment Auditor, brought a § 1983 action against the City of South Padre Island and various city officers (Officer Laird, Detective Rodriguez, and Chief of Police O'Carroll), alleging that his First, Fourth, Fifth, and Fourteenth Amendment rights were violated. The suit stems from an encounter with the officers in which he was temporarily handcuffed after he failed to identify himself and was warned that he was trespassing. The district court, in separate orders, dismissed all of Dave's claims. Dave appealed the district court's order with regard to his claims against Detective Rodriguez.

In affirming the district court, the Fifth Circuit agreed that because Detective Rodriguez died during the litigation and was never properly served, Dave's claims against Rodriguez were properly dismissed. In addition, because supervisors cannot be held vicariously liable under § 1983 and Dave's claims against O'Connell were based on Rodriguez's conduct, the Court affirmed the dismissal of the claims against O'Connell. Regarding the city, the Court concluded that Dave failed to show a widespread practice or policy constituting the moving force behind his alleged constitutional violations.

Civil Rights: *Adams v. City of Harahan*, 65 F.4th 267 (5th Cir. 2023). Manuel Adams, Jr., a former Captain with the City of Harahan police department, filed a § 1983 action against the city alleging, among other things, that his procedural due process rights were violated when he was subject to disciplinary action before he had a chance to exercise his right to an appeal of the chief's determinations. As a result of the disciplinary determinations, his name was added to the district attorney's list (a "Giglio" list) of prosecution witnesses that had evidence which could be used against Adams for impeachment purposes. Adams argued this amounted to a "death knell to a career in law enforcement." As such, he argued that because he was not given his chance to appeal the determination, he was deprived of his liberty interest in his occupation as a law enforcement officer without adequate due process of law. The district court, in denying the city's motion for a judgment on the pleadings, ruled in favor of Adams.

The Fifth Circuit reversed the district court and found that Adams failed to allege a deprivation of a protected liberty interest. The court reasoned that neither Supreme Court nor Fifth Circuit precedent recognized continued employment in law enforcement as a protected liberty interest.

Civil Rights: *Ellis v. Clarksdale Pub. Utilities*, No. 21-60885, 2023 WL 3302839 (5th Cir. May 8, 2023). Bruce and Willie Ellis ("Ellis") sued the City of Clarksdale Public Utilities and Public Works ("the city") for inverse condemnation. They alleged that the city's operation of the sewer and storm water system and the city's transportation of raw sewage and storm water across their private property caused a 17-foot hole under their business, causing damage for which they were not justly compensated. After an evidentiary hearing at which a city expert witness disputed the allegations that the city had caused the damage alleged, Ellis filed a *Daubert* motion after the

deadline had passed. Both parties thereafter filed motions for summary judgment. However, the Ellis motion was three weeks late. The district court granted the city's summary judgment motion and struck both motions by Ellis as untimely. Ellis subsequently appealed.

The Fifth Circuit affirmed the lower court's order and concluded that it was within the district court's discretion to reject the untimely motions. In addition, Ellis failed to offer any evidence to refute the city's expert evidence indicating it did not cause the damage alleged by Ellis, therefore failing to create a factual dispute on the issue of liability.

Civil Rights: *Reynolds v. Wood Cnty., Tex.*, No. 22-40381, 2023 WL 3175467 (5th Cir. May 1, 2023). Dustin Reynolds sued Wood County and jail officers under § 1983 for excessive force, deliberate indifference, and bystander liability stemming from an incident in which he was arrested, strapped into a restraint chair for 14 hours, and allowed to urinate on himself after he attempted to kick, spit, and shout profanities at officers. The district court, in granting the county's motion for summary judgment, found that the jail officers were entitled to qualified immunity and Reynolds had failed to establish liability against the county. As a result, Reynolds appealed.

Affirming the lower court, the Fifth Circuit held that with regard to the excessive force claims and deliberate indifference, Reynolds failed to establish that his restraint was a violation of his clearly established constitutional rights when the record reflected that the officers had checked on him every 15 minutes, had placed him in a climate controlled facility, offered water and medical care, and he was only detained in the chair because of his unsafe behavior. In addition, there was no evidence to suggest the officers acted with deliberate indifference to a substantial risk of serious harm. As a result, Reynolds's bystander liability claims could not be supported. Regarding his deliberate indifference claim against the county, Reynolds was unable to establish a custom or policy of improperly using the restraint chair constituting a constitutional violation.

Recent Texas Cases of Interest to Cities

Note: Included cases are from April 11, 2023 through May 10, 2023.

Charter Amendment: *Hotze v. Turner*, No. 21-1037, 2023 WL 3027869 (Tex. Apr. 21, 2023). On a single ballot, voters considered two proposed amendments to the City of Houston's charter, one submitted at the behest of the city council and the other initiated by local citizens. The election ordinance included a "primacy clause" stating that the council's proposition would prevail over the citizen-initiated proposition if voters approved the council's proposition by more votes than the citizens' proposed amendment.

At the election, voters approved both charter amendments with the council's proposed amendment garnering more votes than the citizen-initiated amendment. After the court of appeals compelled it to do so in separate litigation, the city adopted both charter amendments. However, the city, relying on the primary clause, claimed that the citizen-initiated amendment did not become effective upon its adoption and that it may delay the effectiveness of an amendment at its discretion. The city further argued that it cannot give effect to both amendments because they irreconcilably conflict.

Several citizens who proposed the citizen-initiated amendment sued the city, seeking the amendment's enforcement. They argue that the primacy clause violates a state law requiring cities to adopt proposed charter amendments when voters approve of them by a majority vote. They further claim that the city can and must harmonize the two propositions because voters approved both. The trial court concluded that the two propositions could be harmonized. Relying on the primacy clause, however, the court granted summary judgment in favor of the city. A divided court of appeals affirmed.

The Supreme Court found that because the city's primacy clause requires more than a majority vote to give effect to the citizen-initiated amendment, it conflicts with state law requiring that a city adopt a charter amendment upon its approval by a majority vote. Thus, the city may not rely on the primacy clause to avoid complying with the citizen-imitated proposition. Accordingly, the court reversed and remanded the case to the trial court to determine ~~whether and to~~ the extent to which the two propositions may be harmonized under the city's existing charter provision governing reconciliation of conflicting amendments, and to consider the effect of the citizen-initiated amendment's severability clause for those provisions that conflict.

Whistleblower: *Tex. Health & Human Services Comm'n v. Pope*, No. 20-0999, 2023 WL 3267606 (Tex. May 5, 2023). This case concerns when a public employee "reports a violation of law by an employing governmental entity or another public employee" under the Texas Whistleblower Act.
Former public employees of the Health and Human Services Commission (HHSC) brought action against HHC under the Texas Whistleblower Act alleging that they were terminated in retaliation for their good-faith reports about violations of law by HHSC to various law enforcement agencies. The district court denied HHSC's plea to the jurisdiction and motion for summary judgment. On appeal, the Austin Court of Appeals affirmed.

The Supreme Court granted the petition for review. The court reversed finding that the employees did not expressly report any legal violations by HHSC that could have led to their terminations, and at most voiced disagreement regarding enforcement policies that were within the discretion of HHSC management. As such, their conduct was not protected by the Whistleblower Act.

Tort Claims Act: *City of Houston v. Meka*, No. 01-22-00002-CV, 2023 WL 3063397 (Tex. App.—Houston [1st Dist.] Apr. 25, 2023.). Meka sued the City of Houston for injuries she sustained in a car accident involving a vehicle driven by a city employee. The city moved for summary judgment, claiming that because Meka had not served the city with notice of the suit before the expiration of the statute of limitations, the trial court had no jurisdiction over the suit. The trial court denied the motion.

The appellate court affirmed the judgment of the trial court, holding that service of process is not a jurisdictional prerequisite to suit under the TTCA.

Inverse Condemnation: *City of Webster v. The Moto Kobayashi Trust*, No. 01-22-00628-CV, 2023 WL 3311470 (Tex. App.—Houston [1st Dist.] May 9, 2023.) (mem. op.). The Moto Kobayashi Trust and Misutaro Kobayashi Westside Properties, LP (owners) filed suit against the City of Webster in a Harris County district court, alleging that the city's ordinance requiring

removal or demolition of their properties as a public nuisance was an unconstitutional taking. The city moved to dismiss the claims and the trial court denied the motion.

The appellate court reversed and dismissed the inverse condemnation claim without prejudice, holding that property in Harris County is subject to a provision in the Government Code that grants exclusive jurisdiction over constitutional inverse condemnation claims to the Harris County civil courts at law.

Ultra Vires: ***Officials Acting in Their Official Capacities for City of Austin Dev. Services Dep't v. Austin Nightlife, LLC*****, No. 03-22-00637-CV, 2023 WL 3010766 (Tex. App.—Austin Apr. 20, 2023).** After receiving various noise violation citations, Austin Nightlife, which operates a roof-top lounge in downtown Austin, sued city officials for ultra vires conduct when the Austin city officials: (1) failed to recognize its lounge as a warehouse district venue; (2) required the lounge to apply for a temporary modification of its permit and sound-impact plan during the spring festival season; and (3) for issuing citations when not properly designated as "accountable officials" in Austin's noise ordinances. In response, city officials filed a plea to the jurisdiction asserting that governmental immunity barred Austin Nightlife's suit. After the trial court denied the city officials' plea, the city officials appealed.

Reversing the trial court's order with respect to Austin Nightlife's first and third issue, the court explained that for a successful ultra vires claim, Austin Nightlife would have to prove Austin city officials acted without legal authority or discretion. Reviewing the record, the court of appeals reasoned that because Austin's ordinance regarding district boundaries was not unambiguous, the city officials had discretion to construe the boundaries of the warehouse district as not including Austin Nightlife's roof-top lounge. In addition, the court concluded that nothing in Austin's noise ordinance suggested that only an "accountable official" could enforce violations, such as the issuance of citations. However, as to Austin Nightlife's second issue, the court affirmed the trial court's order stating Austin's ordinance regarding spring festival season did not allow for the exercise of discretion by the city officials because it automatically allowed most venues, including Austin Nightlife's roof-top lounge, to operate at higher decibels during the spring festival season. Therefore, Austin Nightlife's pleadings were sufficient to give the trial court jurisdiction over this claim when the city officials acted ultra vires in requiring Austin Nightlife to obtain a temporary modification of its permit during the spring festival season.

Governmental Immunity: ***Watson v. City of San Marcos*****, No. 03-22-00307-CV, 2023 WL 3010938 (Tex. App.—Austin Apr. 20, 2023).** Watson sued the city of San Marcos alleging tortious interference with a contract and unjust enrichment after he was unable to close on a real estate transaction due to the city's requirement that liens on the property be paid prior to closing. In response, the city filed a plea to the jurisdiction asserting governmental immunity. After the trial court granted the city's motion, Watson appealed. In affirming the trial court's order, the court of appeals concluded, among other things, that governmental immunity could not be waived for intentional torts, such as tortious interference with a contract. In addition, because unjust enrichment was not an independent cause of action, Watson's second claim could not support a waiver of governmental immunity.

Civil Service: *City of San Antonio Fire Fighters' & Police Officers' Civil Serv. Comm'n v. Saenz*, No. 04-22-00347-CV, 2023 WL 3103852 (Tex. App.—San Antonio Apr. 27, 2023). Saenz, a Canyon Lake firefighter, sued when he applied to be a firefighter in San Antonio and his application was disqualified, claiming he was entitled to appeal under Section 143.015 of the Local Government Code. The San Antonio civil service commission filed a plea to the jurisdiction on the grounds that Saenz was not a firefighter entitled to civil service protections and he filed his appeal beyond the 10-day deadline. The trial court denied the plea and the civil service commission appealed.

On appeal, the court determined that Saenz was not a firefighter of the San Antonio fire fighters' civil service commission and his membership to the Canyon Lake civil service commission did not entitle him to the right to appeal the San Antonio civil service commission's decision. The court reversed the trial court order denying the plea and rendered judgment dismissing the claims.

Tort Claims Act/Inverse Condemnation: *Renee Kirchoff Chapa, et al. v. Wyatt Ranches of Texas, LLC*, No. 04-22-00589-CV, 2023 WL 3328195 (Tex. App.—San Antonio May 10, 2023) (mem. op.). Wyatt Ranches sued Chapa, a county commissioner, and the county for trespass, negligence, and inverse condemnation when the county cut down trees on the Ranches' property at the direction of Chapa, contending none of the trees obstructed or otherwise impeded the right-of-way. The county and Chapa filed a plea to the jurisdiction, which the trial court denied.

On appeal, the Court found that: (1) Wyatt Ranches had alleged an injury from the use of motor-driven equipment under the Tort Claims Act by demonstrating proximate cause; (2) Wyatt Ranches' trespass claim was barred by the intentional tort exception; and (3) the inverse condemnation claim failed because Wyatt Ranches failed to allege the county acted with specific intent to take the property for public use.

Tort Claims Act: *City of El Paso v. Cangialosi*, No. 08-22-00155-CV, 2023 WL 2904594 (Tex. App.—El Paso Apr. 11, 2023) (mem. op.). In March 2016, a car driven by suspected burglars Aaron Roacho and Jacob Sanchez, followed by unmarked and marked police vehicles, collided with the car of Joanna Cangialosi at an intersection in El Paso, Texas. The crash resulted in the death of Annette Martinez, and injuries to Cangialosi and her infant daughter. The city of El Paso attempted to argue for governmental immunity, stating that the officers were not personally liable as they were protected by official immunity and that the accident was due to Roacho's actions, not the police pursuit. The trial court denied this plea to jurisdiction, maintaining that there was a sufficient link between the police pursuit and the accident. El Paso filed a second plea, providing officers' affidavits and an expert report arguing that the officers' actions were necessary and reasonable given the circumstances. The trial court denied this plea as well, leading to the current appeal.

El Paso claimed immunity from plaintiffs' claims under the Texas Tort Claims Act (TTCA), arguing that the emergency and intentional tort exceptions applied. The court found that the plaintiffs had raised a fact issue as to whether a city officer violated an El Paso ordinance by speeding in response to an emergency without sounding an audible signal. The officer's decision to speed without a siren in the context of heavy traffic made his actions potentially unreasonable, creating a fact question and preventing dismissal of the case. The court also found the intentional

tort exception inapplicable because the plaintiffs' claims stem from alleged negligence, not intentional tortious conduct by the officers. Ultimately, the appellate court affirmed the trial court's denial of El Paso's plea to the jurisdiction.

Tort Claims Act: ***Massey v. El Paso, Tex. City Attorney's Office*****, No. 08-22-00090-CV, 2023 WL 3138087 (Tex. App.—El Paso Apr. 27, 2023) (mem. op.).** Gus Massey Jr. filed a *pro se* complaint against the El Paso City Attorney's Office in small claims court, alleging a civil rights violation and the loss of $19,250 worth of items due to an encounter with a police officer. The city challenged his standing to sue and his failure to demonstrate a waiver of immunity, also claiming Massey failed to comply with pre-suit notice requirements. The initial trial court upheld the city's plea. Massey then appealed to the County Court, which also ruled it did not have jurisdiction, leading to the dismissal of Massey's claim. Once again, Massey appealed, arguing that the city's immunity was waived under the Texas Tort Claims Act (TTCA). The TTCA permits claimants to sue the state or other government units through a limited waiver of governmental immunity. However, Massey did not cite the TTCA or explain how governmental immunity was waived. Instead, his pleadings only allege an intentional tort of assault, which the Act does not cover. Consequently, the trial court's ruling was affirmed.

Delinquent Tax Claims: ***Michael R. Nevarez, as Tr. of the 1010 S. Oregon Family Tr., in rem only, et. al., Appellants, v. The City of El Paso, Appellee.,*** **No. 08-22-00061-CV, 2023 WL 3325197 (Tex. App.—El Paso May 9, 2023) (mem. op.).** The City of El Paso sued to recover delinquent taxes, penalties, interest, attorney's fees, and costs for three tracts of land in El Paso County, Texas. The city claimed it was owed a total of $41,842.34 for the years specified, including special assessment liens on two of the tracts. The defendants claimed they had not been notified about the delinquent taxes or appraised property values and provided multiple defenses. The city then moved for a summary judgment against the defendants and default judgment against those who did not answer or appear. The court granted the city's motions and awarded a total of $53,029.59. Additionally, the court ordered foreclosure of the liens against the properties. On appeal, the defendants challenged the trial court's grant of the city's combined motion for summary judgment on ten issues. They argued that the city's no-evidence motion was conclusory and did not challenge specific elements of the defendants' defenses. They also claimed that the city failed to prove all elements of a delinquent tax claim and that they had evidence of a genuine issue of material fact on the defense of notice, which would preclude a traditional summary judgment.

The court determined that while the city's no-evidence motion did not meet the specificity requirements to challenge the appellants' defenses, the city was successful in its traditional motion for summary judgment. It proved there was no genuine issue of material fact, and it was entitled to judgment as a matter of law regarding its delinquent tax claim. The court further concluded that the defendants could not raise their notice defenses for failure to exhaust their administrative remedies. Additionally, seven of defendants' issues were dismissed due to insufficient briefing, which lacked citations to legal authorities and the record, violating briefing requirements, resulting in a waiver of these issues. Finally, the defendants lacked standing to argue that the trial court erred in granting default judgment to other named parties, because they failed to show how the default judgement against other parties prejudiced their interests. Ultimately, the court affirmed the judgment of the trial court, rejecting all of the defendants' issues.

Delinquent Tax Claims: ***Montgomery Cnty. v. Mission Air Support, Inc.*****, No. 09-22-00063-CV, 2023 WL 3101508 (Tex. App.—Beaumont Apr. 27, 2023.) (mem. op.).** The City of Conroe, among several other political subdivisions of this state, sued Mission Air Support to recover delinquent property taxes. The city filed a plea to the jurisdiction claiming that the trial court lacked jurisdiction over Mission's three affirmative defenses because Mission had failed to exhaust the administrative remedies provided under the Tax Code and was therefore barred from raising them at trial. Mission responded by asserting that its affirmative defenses were exceptions to the requirement that a taxpayer exhaust its administrative because: (1) it was asserting that it did not own the property on which the tax was imposed; and (2) the property was not located in the taxing unit when the tax was imposed. The trial court denied the city's plea.

The appellate court reversed the judgment of the trial court, holding that Mission's affirmative defenses did not fall into the Tax Code's exceptions to the exhaustion of administrative remedies requirement because: (1) the suit was in rem and not for personal liability, so Mission could not assert that it was not the owner of the property on which the tax was imposed; and (2) the lien was on personal rather than real property, so Mission could not assert that the property was not located in the taxing unit.

Employment: ***Vice v. E. Tex. Mun. Util. Dist.*****, No. 12-21-00225-CV, 2023 WL 3033146 (Tex. App.—Tyler Apr. 20, 2023) (mem. op.).** Tommy Vice, former general manager of the East Texas Municipal Utility District (ETMUD), appealed a trial court ruling in favor of ETMUD, which denied his claim for more than $1,000,000 in compensation through 2028 after his resignation. The court reviewed both parties' motions for summary judgment, affirming that Vice had materially breached his contract, thus excusing ETMUD's continued performance. Vice disputed the court's decision, arguing that the amended employment agreement lacked consideration. However, the court found the agreement to be illusory due to its terms that would obligate ETMUD to pay Vice even if he resigned. Additionally, the court confirmed Vice's material breach of contract through workplace misconduct and destruction of company data, thereby justifying ETMUD's termination of performance upon discovering these breaches. Therefore, the trial court's decision to grant ETMUD's motion for summary judgment and deny Vice's claim was upheld.

Public Property Finance Act: ***City of Harlingen v. Sun Valley Aviation, Inc.*****, No. 13-21-00182-CV, 2023 WL 3238983 (Tex. App.—Corpus Christi–Edinburg May 4, 2023.) (mem. op.).** Sun Valley Aviation (SVA) sued the City of Harlingen for breach of contract arising from an optional provision in a lease of airport land owned by the city, claiming that the city's immunity was waived under the Public Property Finance Act. The lease provided that SVA had the option to lease an additional area subject to terms within the lease. When SVA sought to exercise its option, SVA and the city could not agree on the rent or lease term, and SVA sued. The city filed a plea to the jurisdiction claiming governmental immunity, and the trial court denied the plea.

The appellate court reversed the trial court's order and rendered judgment for the city, holding that because rent and the term of the lease were essential terms of the contract and those terms had been expressly left open for future negotiation, the city's immunity to suit had not been waived.

Contracts: *The City of Houston, Appellant v. James Construction Group, LLC, Appellee*, No. 14-21-00322-CV, 2023 WL 3301739 (Tex. App.—Houston [14th Dist.] May 8, 2023) (mem. op.). The City of Houston entered into contracts with James Construction Group, LLC (JCG) in 2016 for repairs at Bush Intercontinental Airport, totaling $64,445,036.30. After setbacks, the city terminated the contracts for its own convenience. JCG sought payment for services rendered and termination expenses. After payments totaling $2,081,365.63 from the city, JCG claimed it was still owed $13,416,633. The city moved for summary judgment on *res judicata* grounds and asserted its immunity. The trial court denied both motions, and the city appealed.

A city cannot be sued without a waiver of its governmental immunity. The Local Government Contract Claims Act can create such a waiver when a city enters into a contract. In this case, the contracts' provisions required resolution of certain disputes by the City Engineer. The court considered whether the City Engineer was guilty of fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an honest judgment when resolving the disputes. Because the court found no such malfeasance by the City Engineer, the city's immunity was not waived. Additionally, the appellate court lacked jurisdiction to review the denial of summary judgment as it was not based on a jurisdictional challenge. The trial court's order denying the plea to the jurisdiction was reversed, and the remainder of the City's appeal was dismissed due to lack of jurisdiction.

April 2023

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from March 11, 2023 through April 10, 2023.

***Tejas Motel, L.L.C. v. City of Mesquite*, 63 F.4th 323 (5th Cir. Mar. 22, 2023).** Tejas Motel, LLC (Tejas) purchased the Tejas Motel property in 2006. Since then, the City of Mesquite's regulation of hotels has changed, and ultimately the motel was classified as a nonconforming use under the city's zoning regulations. In 2018, after receiving complaints about poor conditions and criminal activity, the city revised the process for "amortizing" nonconforming establishments and targeted five motels, including Tejas. Facing pressure from the city, Tejas agreed to cease operations or conform to zoning regulations by May 1, 2019, but later sued in state court, claiming it had suffered a taking in violation of the state and federal constitutions. The suit was dismissed by the court, and a state appellate court affirmed the dismissal holding that Tejas failed to raise its state law claims in a timely manner and failed to state a viable federal constitutional claim. Tejas then sued in federal court, but the district court dismissed the case based on the *Rooker-Feldman* doctrine and res judicata. Tejas appealed, and while the appeal was ongoing, there was more activity in state court, but Mesquite argued that it had no impact on the federal appeal.

The key issue on appeal was whether the state court judgment prevents Tejas from bringing a federal takings claim against the city. According to Texas law, a claim would be barred by res judicata if the city could establish that there is a prior final judgment on the merits by a court of competent jurisdiction, among parties in privity with them, and the second action is based on the same claims as the first action. The parties focused on the first element, with Tejas arguing that

the state court lacked jurisdiction over the federal claim. Ultimately, the appellate court determined that the state court was competent to adjudicate the dispute, and all elements of res judicata were present. Consequently, the judgment of dismissal was affirmed.

Elections: *Shemwell v. City of McKinney.*, 63 F.4th 480, 485 (5th Cir. Mar. 28, 2023). In May 2017, La'Shadion Shemwell was elected to the McKinney City Council, but his term was cut short when voters recalled him in November 2020. Shemwell sought a declaration that McKinney's voting procedures were unlawful. However, the court found the case moot as Shemwell lost a legally cognizable interest when the election ended. The court also determined that the "capable of repetition, yet evading review" exception to mootness did not apply, as Shemwell never included a claim for damages and abandoned claims for injunctive relief. The trial court's judgment was affirmed.

Sign Regulations: *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 64 F.4th 287 (5th Cir. Mar. 30, 2023). Two outdoor advertising companies, Reagan National Advertising of Austin and Lamar Advantage Outdoor Company, filed applications to digitize their existing off-premises billboards in the City of Austin. Austin denied their applications based on its Sign Code, which prohibited the upgrade of off-premises signs. The companies sued, arguing that the distinction between on-premises and off-premises signs in the Sign Code violated the First Amendment. The district court upheld the Sign Code, but the appeals court reversed the decision, ruling that the distinction was content-based and unable to survive strict scrutiny. The U.S. Supreme Court reversed the appeals court's decision, holding that Austin's Sign Code was facially content-neutral and subject to intermediate scrutiny, absent an impermissible purpose. The case was remanded for further consideration. Applying the Supreme Court's new guidance, the appeals court concluded that the Sign Code survives intermediate scrutiny and affirmed the district court's decision.

Excessive Force: *Williams v. City of Greenwood*, No. 22-60192, 2023 WL 2733467 (5th Cir. Mar. 31, 2023). The case stems from an incident in 2019 when Gianni Williams was arrested by Greenwood Police Department officers for turning without signaling. Williams sued the City of Greenwood, the Chief of Police, and the arresting officers for violating his constitutional rights through the use of excessive force and false imprisonment and for various state law violations. The district court granted summary judgment for the city defendants on Williams' federal claims and dismissed the state law claims without prejudice. Williams appealed. The appellate court found that the evidence did not show his constitutional rights were violated, and thus, his federal claims failed. Additionally, the court rejected Williams's excessive force claim, as his resistance to arrest made the officers' actions reasonable, and his false arrest claim was barred as it arose from the same facts as his conviction. Finally, his Fifth Amendment claim failed, because it can only be asserted against federal officers. Ultimately, the court affirmed the district court's decision, upholding summary judgment for the city and dismissal of Williams's claims.

Recent Texas Cases of Interest to Cities

Note: Included cases are from March 11, 2023 through April 10, 2023.

Citizen Initiative: *In re Morris,* No. 23-0111, 2023 WL 2543047 (Tex. Mar. 17, 2023). This is a petition for writ of mandamus related to a citizen-led initiative to amend the city's charter in which the Supreme Court denied the petition.

Advocacy organizations in San Antonio collected sufficient signatures to place a proposed charter amendment before the voters on the city's May 2023 election ballot. If adopted, the proposed charter amendment would prohibit local enforcement of certain state laws related to marijuana possession, theft offenses, and abortion, ban no-knock warrants and chokeholds, replace warrants for certain nonviolent offenses with citations, and create the position of a "Justice Director" to implement and enforce its prohibitions. The city ordered the proposed amendments be placed on the ballot as part of the May general election.

A prospective voter and advocacy organization filed a writ of mandamus arguing that the proposed amendment violates a state law requiring that citizen-initiated charter amendments be confined to a single subject. Specifically, they sought pre-election relief directly from the court to: (1) move the vote on the proposition from the May to the November election; (2) compel the city clerk and city council to separate the proposed amendment into single-subject parts; and (3) order alterations to the ballot language.

The Supreme Court denied the petition, holding that: (1) city council's failure to call an election on the proposed amendment within 78 days of the May election was not a reason to grant pre-election mandamus relief enjoining the vote on the amendment from being held in May; (2) the inability of city's voters to amend the charter for another two years if the allegedly void election on the proposed amendment were held was not a reason to grant pre-election mandamus relief enjoining the vote on the amendment from being held in May; (3) pre-election mandamus relief was not available to have city clerk or council ordered to separate the proposed amendment into "single issue" amendments; and (4) pre-election mandamus relief to order modification of the allegedly misleading ballot language was not available.

Immunity: ***Fraley v. Tex. A&M Univ. Sys.*****, No. 21-0784, 2023 WL 2618532 (Tex. Mar. 24, 2023)**. This case stems from a premise-defect action brought by a motorist against a public university following injuries sustained at an accident.

The motorist proceeded straight through a T-shaped intersection, leaving the roadway and landing in a shallow ditch on the other side. He sued the university charged with maintaining the road, claiming that a lack of lighting, barricades, and warning signs around the intersection caused his injuries. He further alleged that the Texas Tort Claims Act (TTCA) waived the university's immunity from suit.

The Supreme Court affirmed the court of appeals decision, finding that: (1) the ditch was not a "special defect" and thus did not support application of the TTCA exception to governmental immunity for discretionary decisions about design and signage; (2) the university's decision to redesign a four-way intersection to a three-way T-shaped intersection and place a yield sign, rather than a stop sign or some other signal, was discretionary and thus subject to governmental immunity under Tort Claims Act; and (3) the court of appeals properly ordered the suit dismissed rather than remanded for re-pleading.

Collective Bargaining: ***City of Houston v. Houston Prof'l Fire Fighters' Ass'n, Local 341*****, No. 21-0518, 2023 WL 2719477 (Tex. Mar. 31, 2023)**. When the city firefighters' union (Firefighter

Union) and the City of Houston reached a collective-bargaining impasse, the Firefighter Union filed suit against the city claiming that the city violated the Fire and Police Employee Relations Act, codified in Chapter 174 of the Local Government Code (Chapter 174) by failing to provide firefighters with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment. The Firefighter Union also requested a declaration of compensation and conditions of employment for one year pursuant to Chapter 174. The city responded by challenging Chapter 174's judicial-enforcement provisions, claiming that such enforcement violates the Texas Constitution's separation of powers clause. The city also claimed it was immune from suit.

While the suit was pending, city voters approved an amendment to the city charter (the pay-parity amendment) that would require the city to set firefighter compensation commensurate with police officer compensation at similar ranks. Upon the amendment's passage, the Houston Police Officer's Union (Police Union) sued the Firefighter Union, seeking a declaration that Chapter 174's state-law compensation standards and collective-bargaining process preempt the pay-parity amendment, rendering it unenforceable. The city joined the Police Union's claim against the Firefighter Union in the second suit.

In the first suit, the trial court rejected the city's constitutional and immunity challenges, and the court of appeals affirmed. In the second suit, the trial court ruled that Chapter 174 preempts the pay-parity amendment, and the court of appeals reversed, concluding that state law does not preempt the local amendment.

The Supreme Court held that: (1) Chapter 174 establishes reasonable standards for judicial enforcement such that it does not violate the constitutional separation of powers; (2) the Firefighter Union met all prerequisites for seeking Chapter 174 enforcement and thus, Chapter 174 waives the city's immunity from suit for Chapter 174 compensation; and (3) Chapter 174 preempts the pay-parity amendment, finding that local law may not supplant Chapter 174's rule of decision by requiring an inconsistent compensation measurement. Accordingly, the court remanded to the trial for further proceedings to establish whether the city has complied with Chapter 174's compensation standards, and if not, to set appropriate firefighter compensation.

Immunity: *City of Houston v. Houston Metro Sec.*, No. 01-22-00532-CV, 2023 WL 2602520 (Tex. App.—Houston [1st Dist.] Mar. 23, 2023) (mem. op.). Houston Metro Services (HMS), a private security company providing security services in high-crime areas, sued the City of Houston for tortious interference with contract, negligence per se, negligent training and supervision, conspiracy, and ultra vires after HMS lost its contract to provide security at an apartment complex. HMS alleged that the police department wrongfully failed to arrest certain individuals apprehended by HMS and transmitted expunged criminal records of the owner of HMS. The city filed a motion to dismiss, claiming governmental immunity. The trial court denied the motion and the city appealed.

The appellate court reversed, holding that: (1) HMS's various negligence claims did not implicate the TTCA's waiver of immunity; (2) the TTCA does not waive immunity for intentional torts; and (3) an ultra vires claim could be brought only against a government actor in his official capacity, not against the city.

Tort Claims Act: *City of Houston v. Nicolai*, No. 01-20-00327-CV, 2023 WL 2799067 (Tex. App.—Houston [1st Dist.] Apr. 6, 2023) (en banc op.). The Nicolais sued the City of Houston after their daughter was killed in a crash while being transported in a police car to a sobering center with her hands handcuffed and no seatbelt on. The trial court denied the city's motion for summary judgment, and the city appealed. The appellate court held that the officer was entitled to official immunity because in driving Caroline Nicolai to the sobering center, she was acting within the scope of her authority, performing a discretionary duty, and acting in good faith. Because the officer would have been entitled to official immunity, the TTCA does not waive the city's governmental immunity and the trial court lacked subject matter jurisdiction over the claims. The appellate court reversed and rendered judgment for the city, and the Nicolais moved for en banc reconsideration.

On en banc reconsideration, the appellate court affirmed the judgment of the trial court and reversed the judgment of the appellate court, holding that although choosing to take Caroline to the sobering center was a discretionary act, the act of driving may have been a ministerial act, so the city had not established the officer's official immunity as a matter of law.

Texas Tort Claims Act: *City of Groves v. Lovelace*, No. 09-21-00281-CV, 2023 WL 2533188 (Tex. App.—Beaumont Mar. 16, 2023) (mem. op.). The Lovelaces sued the City of Groves when a tree fell on Scott Lovelace, injuring him and causing his son, a bystander, shock and anguish. The tree was in the city's right-of-way on property owned by the Lovelaces' neighbor. The city filed a plea to the jurisdiction claiming governmental immunity. The trial court denied the plea, and the city appealed.

The appellate court reversed, holding that: (1) the claims were properly characterized as a premises defect claim rather than a special defect claim; and (2) the Lovelaces had not established a genuine issue of material fact as to whether the city had actual knowledge of the tree's dangerous condition as required for a waiver of immunity on a premises defect claim.

Development Agreements: *City of Jarrell v. BE Theon E. P'ship No. 3, Ltd.*, No. 03-21-00651-CV, 2023 WL 2588567 (Tex. App.—Austin Mar. 22, 2023) (mem. op.). In 2008, BE Theon entered into a development agreement with the city of Jarrell. In the agreement, BE Theon agreed to voluntarily annex its undeveloped property near the intersection of Ronald Reagan Boulevard, and the city agreed to provide sufficient water and wastewater capacity "within three years after the completion of Ronald Reagan Boulevard at its intersection with IH-35." The agreement also included a provision in which the city agreed to waive its governmental immunity with regard to the development agreement. Later in 2019, after the alleged completion of Ronald Reagan Boulevard, BE Theon provided the city with the "capacities it deemed sufficient for the planned uses of its property" pursuant to the agreement. After receiving no response from the city, BE Theon sued the city seeking specific performance and declaratory relief under Chapter 245 of the Local Government Code to establish the city's obligations under the development agreement. The city then filed a plea to the jurisdiction, which the trial court denied. The city subsequently appealed arguing that: (1) BE Theon's pleadings affirmatively negated the waiver of immunity in Chapter 245; (2) the trial court lacked jurisdiction over the breach of contract and promissory estoppel claims; (3) the separation of powers doctrine does not allow the judiciary to enforce the

water and wastewater provision of the development agreement through specific performance; and (4) BE Theon's claims were not ripe.

With regard to the city's first issue, the court of appeals agreed that while BE Theon's claims allege the city breached the development agreement by not complying with the provision regarding water and wastewater, BE Theon did not assert that the city had *changed* a regulation then tried to apply that change to BE Theon's development of the property as required under Chapter 245. Although the court sustained this issue, it remanded the claim so that BE Theon could have an opportunity to replead. Affirming trial court on the city's remaining issues, the court of appeals held that: (1) the development agreement was a contract that fell within the meaning of Section 212.172 therefore granting the court jurisdiction over the breach of contract claim; (2) BE Theon raised sufficient fact issues with regard to whether the city should be estopped from asserting governmental immunity; (3) the city did not raise a constitutional challenge to Section 212.172 at the trial court level and was barred from raising the issue in this interlocutory appeal; and (4) because facts issue remained with regard to whether Ronald Reagan Boulevard was complete for purposes of the development agreement, the trial court did not err in determining the plea was ripe.

Substandard Building: *Benser v. Dallas Cnty.*, No. 05-21-00725-CV, 2023 WL 2661255 (Tex. App.—Dallas Mar. 28, 2023) (mem. op.). Apex Financial Corporation (Apex) owned a piece of property with a vacant structure in the city of Dallas. When the structure fell into disrepair and the property was unkept, the city assessed maintenance liens and sought a court order requiring Apex to address the substandard building. After a public hearing, the court ordered Apex to demolish the structure within 30 days. When Apex failed to do so, the city obtained an order permitting the city to demolish the structure, which it later did. During this time, Apex's property taxes became delinquent, and Dallas County and the city (the taxing authorities) sued to collect the accrued taxes and to foreclose on maintenance liens for the cost of upkeeping the property and demolition of the vacant structure. In 2016, the court entered a default judgment against Apex, but the taxing authorities later discovered an error with the last known address for Apex. As a result, they obtained an order for nonsuit, and the delinquent taxes continued to accrue. Then, in 2018, the taxing authorities initiated a new lawsuit including the delinquent taxes and additional maintenance liens that accrued after 2016. Apex filed a counterclaim seeking damages for the city's wrongful demolition of its structure and removal of any accrued interest assessed after 2016 because Apex did not properly receive notice of the 2016 proceeding. The trial court ruled in favor of the taxing authorities and denied Apex's counterclaim. Apex subsequently appealed.

In affirming the trial court's rulings, the court of appeals held that Apex was not entitled to equitable relief in the form of vacatur of the penalties and interest that accrued after the 2016 judgment. The court stated that "[w]hen a party seeks equitable relief, it must offer and prove its willingness to do equity." Although Apex claimed that had they been notified properly of the 2016 proceeding, it would have made arrangements to pay the judgement therefore avoiding the additional penalties and interest, the court found no evidence in the record showing Apex had attempted to pay any of its delinquent property taxes. The court of appeals further concluded that Apex was not entitled to damages because: (1) the city complied with the notice requirements under Section 214.001 of the Local Government Code; (2) Apex had actual knowledge of the demolition according to the record; and (3) Apex failed to timely appeal the demolition lien. As to Apex's claim that some of the maintenance liens fell outside the statute of limitations, the court

agreed with the taxing authorities that political subdivisions of the state, including cities, are exempted from statute of limitations defenses with regard to the foreclosure of maintenance liens under Texas Civil Practice & Remedies Code Section 16.061(a).

Employment Discrimination: *Tex. Health & Human Services v. Sepulveda*, No. 08-22-00043-CV, 2023 WL 2529747 (Tex. App.—El Paso Mar. 15, 2023). David Sepulveda sued the El Paso State Supported Living Center and Texas Health and Human Services (collectively, "THHS"), alleging age and gender discrimination and retaliation after being denied a promotion multiple times. The trial court granted a partial plea to the jurisdiction in favor of the defendants, dismissing ten claims and leaving one age discrimination claim and two retaliation claims. THHS appealed the partial denial, arguing that Sepulveda failed to provide sufficient jurisdictional facts to support the three remaining claims under the Texas Commission on Human Rights Act (TCHRA).

Governmental units, such as cities and state agencies, have immunity from lawsuits, except when the Legislature waives this immunity. The Texas Labor Code provides a limited waiver of immunity for claims against governmental units alleging violations of the TCHRA. The waiver applies only to suits where the pleadings state a prima facie claim for a TCHRA violation; otherwise, the governmental unit retains immunity. The TCHRA prohibits employment discrimination based on specific characteristics and protects employees from retaliation for reporting discrimination. Texas courts recognize two methods of proof for TCHRA claims: direct evidence and the *McDonnell-Douglas* burden-shifting framework.

In this case, THHS argued that Sepulveda failed to provide sufficient jurisdictional facts for his retaliation claims and that the trial court made an error in denying their plea. The court applied the *McDonnell-Douglas* burden-shifting framework to assess Sepulveda's retaliation claims under the TCHRA. For a valid retaliation claim, an employee must show engagement in a protected activity, experiencing a material adverse employment action, and a causal link between the two. In the first retaliation claim, while Sepulveda was not selected for a certain position, the court concluded that he could not establish a causal link between a Texas Workforce Commission complaint he had filed and the failure to be selected for the position. In the second retaliation claim, Sepulveda again argued that he was not selected for a position due to his previous complaints, and again the court concluded that he failed to provide sufficient evidence to support the claim. The court did find, however, that Sepulveda did state a prima facie case for age discrimination. Ultimately, the trial court's order denying THHS' plea to the jurisdiction for Sepulveda's age-discrimination claim was affirmed, while the orders denying the pleas for the retaliation claims were reversed, and those claims were dismissed.

Res Judicata: *Wolf v. City of Port Arthur*, No. 09-21-00371-CV, 2023 WL 2802254 (Tex. App.—Beaumont Apr. 6, 2023) (mem. op.). The Wolfs sued the City of Port Arthur in a justice of the peace court after the city demolished a building on their land that had been found to be substandard. At the time the case was filed, a district court had granted the city's plea to the jurisdiction and motion for summary judgment over the same subject matter. The Wolfs claimed that the current case was a different cause of action. The trial court granted the city's plea to the jurisdiction and motion for summary judgment, and the Wolfs appealed.

The appellate court held that because the district court had made a final determination on the merits of the claim, the suit was between the same two parties as the district court case, and the present suit was based on the same claims as those that were or could have been raised in the first action, the Wolfs' suit was barred by res judicata.

Public Information Act: *AIM Media Tex., LLC v. City of Odessa*, No. 11-22-00052-CV, 2023 WL 2530283 (Tex. App.—Eastland Mar. 16, 2023). AIM Media (AIM), a newspaper company, sued the City of Odessa for mandamus relief under the TPIA, asserting that the city failed to timely produce basic information it requested about arrests and crimes that had occurred in the city. The city filed a plea to the jurisdiction alleging that AIM had not adequately pleaded a cause of action for mandamus relief under the TPIA, which was denied by trial court. The court of appeals, in holding that AIM Media had pled the minimum jurisdictional requirements, affirmed the trial court's denial of the city's plea. The city subsequently filed a second plea to the jurisdiction claiming that AIM's cause of action was moot because the city had already produced the responsive documents relevant to AIM's request related to this lawsuit. As a result, the trial court granted the city's second plea to the jurisdiction and denied AIM's motion for summary judgment.

In this second appeal, AIM argued that: (1) because the case fell within two exceptions to the mootness rule, the release of the requested information during the pendency of the lawsuit did not render the controversy moot; (2) it had a right to request prospective mandamus relief compelling the ongoing, timely production of all future requests for basic information under the TPIA; and (3) the court of appeals should remand the case to the trial court for consideration of its request for attorneys' fees. Affirming the trial court's ruling, the court of appeals held that: (1) both the voluntary-cessation doctrine and the review-evasion doctrine did not apply in this case; (2) AIM's request for prospective relief was barred by governmental immunity; and (3) because AIM did not "substantially prevail" in the case even though the city voluntarily released the requested information, the court could not assess reasonable attorneys' fees under the TPIA.

Tort Claims Act: *Garcia v. Guerra*, No. 13-21-00166-CV, 2023 WL 2607729 (Tex. App.—Corpus Christi–Edinburg Mar. 23, 2023) (mem. op.). Garcia sued Guerra, the city manager of Pharr, Texas, for slander and intentional infliction of emotional distress, and sued the City of Pharr for wrongful termination. The trial court severed the claims against the city from the claims against Guerra, dismissed the claim against the city, and dismissed with prejudice the claims against Guerra individually. Garcia appealed the dismissal of his claims against Guerra.

The appellate court affirmed, holding that because Guerra was acting within the scope of his employment when he made the allegedly slanderous statements, the TTCA forecloses suit against him in his individual capacity.

Texas Whistleblower Act: *City of Houston v. Garcia*, No. 14-22-00024-CV, 2023 WL 2603759 (Tex. App.—Houston [14th Dist.] Mar. 23, 2023). Plaintiff Monica Garcia alleged that the City of Houston violated the Texas Whistleblower Act by terminating her employment during her probationary period in retaliation for reporting concerns about the Houston's oversight of policies during the COVID-19 pandemic. Houston appealed the trial court's denial of the city's plea to the jurisdiction, based on Garcia's failure to initiate a grievance with the city. The Texas Whistleblower Act (TWA) protects public employees who report violations of law by their

employers or other public employees to appropriate law enforcement authorities. Governmental entities cannot take adverse personnel action against such employees. If an employer retaliates against an employee for making such a report, the employee may sue the employer; however, the employee must first initiate action under the grievance or appeal procedures of the employing state or local governmental entity. The court concluded that Houston has no formal grievance or appeal procedures for probationary employees like Garcia; however, Garcia was still required to give the city some pre-suit notice that she wanted to administratively challenge her termination, even in the absence of an applicable formal grievance or appeal procedure. The court reversed the trial court's ruling and rendered judgment for Houston.

Tort Claims Act: *City of Houston v. Cardenas*, No. 14-21-00732-CV, 2023 WL 2808044 (Tex. App.—Houston [14th Dist.] Apr. 6, 2023) (mem. op.). Cardenas sued the City of Houston for injuries sustained after falling through an unsecured water meter box opening, alleging negligence and breach of duty of care. The city claimed governmental immunity, arguing they had no prior knowledge of the issue and filed a motion for summary judgement, which the trial court denied. Houston appealed, contending that the trial court wrongly denied its motion for summary judgment, as it did not have any notice of the alleged dangerous condition of the water meter box lid at the time of the incident. Under the Texas Tort Claims Act (TTCA), a governmental unit may be held liable for personal injury or death caused by a condition or use of tangible property if it would be liable as a private person. The parties agree that Houston owed Cardenas the same duty a private person owes to a licensee; therefore, Houston would need to have actual knowledge of the defect to be liable. The city presented evidence that it lacked actual knowledge of any defect or issue with the water meter box or its lid before the incident, which Cardenas argued against. Ultimately the court disagreed with Cardenas, concluding that Cardenas failed to raise a fact question as to whether the City of Houston had actual knowledge of any dangerous condition involving the water meter box at the judgement and rendered judgement dismissing the claims against the city.

March 2023

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from February 11, 2023 through March 10, 2023.

Qualified Immunity: *Grice v. Younger*, No. 22-20144, 2023 WL 2401584 (5th Cir. Mar. 8, 2023). This case stems from an excessive force claim under Section 1983 in which the court of appeals affirmed the lower court's decision.

Grice sued Officer Younger, the City of Bellaire, and a variety of other city-related defendants under 42 U.S.C. § 1983 for excessive force in violation of the Fourth Amendment, intentional infliction of emotional distress ("IIED"), and other claims. The district court first dismissed all Grice's claims except her excessive force and IIED claims against Officer Younger, and later granted summary judgment to Officer Younger on those claims. Grice appealed only as to her excessive force and IIED claims against Officer Younger and her claims against the city.

The court of appeals determined that because every reasonable official in Officer Younger's shoes wouldn't think it obvious that taking a noncompliant, physically resistant suspect to the ground after trying multiple lesser measures violated the Constitution, Officer Younger is entitled to qualified immunity. The court also held that by bringing the Texas Tort Claims Act (TTCA) against both the city and Officer Younger, Officer Younger is statutorily immune from Grice's IIED claim against him under the TTCA. Finally, the court found that Grice's various municipal liability claims against the city under Section 1983 fail because she pled no specific facts to support them.

Recent Texas Cases of Interest to Cities

Note: Included cases are from February 11, 2023 through March 10, 2023.

Tort Claims Act: *Rattray v. City of Brownsville,* No. 20-0975, 2023 WL 2438952 (Tex. Mar. 10, 2023). This is a Texas Tort Claims Act ("TTCA") case regarding property damage arising from the operation or use of motor driven equipment in which the Supreme Court of Texas reversed and remanded.

Homeowners brought a negligence action against the city alleging that the city's negligent use of motor-driven equipment to open and close sluice gates and to pump water resulted in stormwater accumulation that flooded their homes. The trial court denied the city's plea to the jurisdiction and the court of appeals reversed and remanded. The homeowners filed petition for review, which was granted by the Supreme Court of Texas.

The court determined that the gate was used to control water flow in the resaca, the city closed the gate, and it was the use of the gate that immediately preceded and allegedly caused the flooding. As a result, the court held that the sluice gate was put to "operation or use" within meaning of TTCA and the homeowners met their burden at motion to dismiss stage to create a fact issue on whether their property damage arose from city's closure of sluice gate.

Pension Funds: *McGarry v. Houston Firefighters' Relief & Ret. Fund*, No. 01-21-00624-CV, 2023 WL 2415595 (Tex. App.—Houston [1st Dist.] Mar. 9, 2023). McGarry sued the Houston Firefighters' Relief and Retirement Fund to receive the pension of her husband under her informal marriage to him. The Fund requires evidence of the informal marriage, but before McGarry submitted the requested documentation, the board changed its policies with regard to informal marriages such that McGarry was no longer eligible to receive the pension. The trial court granted the Fund's jurisdictional pleadings and dismissed McGarry's claims.

The appellate court reversed and remanded, holding that: (1) the trial court had jurisdiction to hear McGarry's claim that the members acted beyond its authority by refusing to process and render a decision granting or denying her application for survivor's benefits; (2) the trial court had jurisdiction to hear McGarry's claim that the board acted beyond its authority by applying the revised policies and procedures concerning proof of an informal marriage to her application for benefits; and (3) the trial court had jurisdiction to hear McGarry's claim that the Fund's enabling

statute is unconstitutional to the extent it authorizes the board to refuse to process her application or apply the revised policies to her application for benefits.

Tort Claims Act: *City of Wichita Falls v. Preston*, No. 02-22-00265-CV, 2023 WL 2033775 (Tex. App.—Fort Worth Feb. 16, 2023) (mem. op.). This is an interlocutory appeal on a plea to the jurisdiction under the Texas Tort Claims Act (TTCA).

Preston boarded one of the City of Wichita Falls's buses and was on her way to sit down when she fell and broke her right ankle. Preston sued the city for negligence under the TTCA, alleging that the city's bus driver had negligently operated the bus, thereby proximately causing Preston's injuries. The city filed a plea to the jurisdiction, arguing that the city's immunity had not been waived under the TTCA and relying on the recording of the incident by the bus's proprietary surveillance camera system. Preston countered the video with a sworn declaration, and the trial court denied the city's plea. The city filed an accelerated interlocutory appeal on two issues: (1) Preston's declaration failed to raise a fact issue to sufficiently controvert the city's video evidence of causation; and (2) there is no causal nexus between the bus's alleged negligent operation and Preston's injuries, relying on its video to support these arguments.

Because the video does not conclusively show that Preston's injuries were caused by another passenger's act, the court of appeals affirmed the trial court's order and remanded the case for further proceedings.

Governmental Immunity: *San Antonio Water Sys. v. Matiraan, Ltd.*, No. 04-22-00138-CV, 2023 WL 2290301 (Tex. App.—San Antonio Mar. 1, 2023). This case involves a piece of property for which the San Antonio Water System (SAWS) had a conservation easement because the property was on an Edwards Aquifer recharge zone. The city subsequently annexed the property. A company later purchased the property and petitioned to rezone the property to allow for quarrying. The company claimed it had no knowledge of the conservation easement. The city refused the zoning application based on the conservation easement. The company filed a petition to terminate the conservation easement and SAWS filed a plea to the jurisdiction, which the trial court denied.

On appeal, the court analyzed the *Wasson* factors and found in SAWS's favor. The court found that when entering into the easement: (1) SAWS was acting in a discretionary capacity, weighing in favor of the company; (2) the easement benefited the public, weighing in SAWS's favor; (3) SAWS was acting on behalf of the state, weighing in SAWS's favor; and (4) SAWS was performing an enumerated governmental function of reservoirs. The appellate court reversed the denial of the plea to the jurisdiction and ordered the trial court to dismiss the case but also to determine any relief for which SAWS may be entitled, including attorneys' fees and costs.

Employment: *United Indep. Sch. Dist. v. Mayers*, No. 04-22-00424-CV, 2023 WL 2004407 (Tex. App.—San Antonio Feb. 15, 2023). The plaintiff sued her employer, the school district, for discrimination based on sex, national origin, and age and claimed her employer retaliated against her. In her second amended petition, she sued under the Texas Commission on Human Rights Act, the Age Discrimination in Employment Act of 1967, and Title VII of the Civil Rights Act of 1964. The school district filed a plea to the jurisdiction on the grounds that the plaintiff: (1) filed her state

law TCHRA claims after the expiration of the applicable two-year statute of limitations; (2) failed to comply with exhaustion of remedies requirements applicable to her TCHRA, Title VII, and ADEA claims; and (3) did not adequately plead her Title VII and ADEA claims until after the expiration of a deadline imposed by federal law. The trial court denied it and the school district appealed.

On appeal, the court found that: (1) the TCHRA were time-barred as a matter of law; (2) the plaintiff filed her Title VII sex discrimination and retaliation claims within 90 days of receiving her right-to-sue letter from the EEOC; and (3) the plaintiff failed to exhaust her administrative remedies for her federal national origin and age discrimination claims. The appellate court reversed and rendered judgment on the plaintiff's TCHRA, age discrimination, and national origin claims. The appellate court affirmed the denial on the plea for the plaintiff's claims of sex discrimination and retaliation under Title VII.

Takings: *Tex. Dep't of Transp. v. Robert Dixon Tips Properties, LLC*, No. 04-21-00430-CV, 2023 WL 2396807 (Tex. App.—San Antonio Mar. 8, 2023) (mem. op.). The plaintiff sued TxDOT for an unlawful taking for a portion of a road, requested a declaration that the portion a road was not a public road, and sought injunctive relief barring construction on the disputed portion. TxDOT filed a no-evidence motion for summary judgment and motion to dismiss for lack of subject-matter jurisdiction, arguing that the disputed portion of the road was publicly dedicated. The trial court denied both and TxDOT appealed.

On appeal, the court found: (1) the original plat made an express offer of dedication for public use and the offer was accepted; and (2) the trial court lacked subject matter over the declaratory and injunctive relief claims. The appellate court reversed the trial court's order and rendered judgment dismissing all of the plaintiff's claims against TxDOT with prejudice.

Eviction Jurisdiction: *Town of Anthony v. Lopez*, No. 08-22-00052-CV, 2023 WL 2189504 (Tex. App.—El Paso Feb. 23, 2023). In an eviction action, the Town of Anthony, Texas, filed a suit against Robert Lopez for allegedly failing to pay rent on a leased property. The justice court ruled in favor of the town, but Lopez appealed to the county court, claiming that the justice court lacked jurisdiction as he had exercised his purchase option under the lease/purchase agreement. The county court agreed with Lopez, stating that a title issue must be resolved before determining possession of the property. The town appealed the decision. The appellate court found that there was sufficient evidence to suggest a question of equitable title, with the lease/purchase agreement, Lopez's "Down Payment" check, and his payments exceeding the lease amount. As a result, the justice court could not presume jurisdiction. The court overruled the town's sole issue on appeal and affirmed the county court's order granting Lopez's plea to the jurisdiction.

Disaster Orders: *Abbott v. City of El Paso*, No. 08-21-00149-CV, 2023 WL 2265168 (Tex. App.—El Paso Feb. 28, 2023). On July 29, 2021, the Governor of Texas issued GA-38, an executive order prohibiting local governments from mandating face coverings during the COVID-19 pandemic. El Paso filed a lawsuit against the Governor, arguing that GA-38 was outside his authority under the Texas Disaster Act and violated the Texas Constitution. The trial court granted a temporary injunction against enforcing parts of GA-38, leading to this interlocutory appeal. In his appeal, the Governor asserted that the trial court abused its discretion by granting El Paso's

request to temporarily enjoin enforcement of GA-38. He argued that his authority under the Texas Disaster Act allows him to prohibit local governments from implementing face-covering mandates and that his orders preempt local orders. The court disagreed, stating that the Disaster Act does not provide clear guidance on how to resolve conflicts between the Governor's orders and orders of local authorities. Ultimately, the court concluded that the Governor's orders do not automatically supersede local orders. With regard to the Governor's argument that he can suspend local health and safety laws under the Texas Disaster Act, the court also disagreed, stating that the statutes he attempted to suspend are not "regulatory" but rather "grant-of-authority" statutes, which the Governor is not authorized to suspend. Furthermore, the Disaster Act distinguishes between state and local matters, and the court found that the Governor acted *ultra vires* in suspending various health and safety laws, and the trial court did not err in finding that he acted illegally. Finally, the court pointed out that if it Disaster Act allows the Governor to suspend any and all laws that authorize a city to impose a mask requirement, then the statute itself would violate the Separation of Powers and Suspension Clauses of the Texas Constitution. Because of the foregoing, the appellate court affirmed the trial court's order granting El Paso a temporary injunction and denial of the Governor's plea to the jurisdiction.

Employment Discrimination: *Cnty. of El Paso v. Flores*, No. 08-22-00060-CV, 2023 WL 2435669 (Tex. App.—El Paso Mar. 9, 2023). Flores, a Veterans Assistance Manager, sued the County for discrimination based on sex and disability after his termination in February 2017. The trial court denied the County's plea to the jurisdiction, leading to an interlocutory appeal. The appellate court determined that Flores met the jurisdictional deadline and found evidence supporting his disability discrimination claim. However, it concluded that he failed to establish a prima facie case for his sex-discrimination claim and retaliation claim based on a complaint in January 2017. The court affirmed the trial court's order denying the County's plea to the jurisdiction for Flores's disability discrimination claim, but reversed and dismissed the sex-discrimination and retaliation claims.

Public Property Finance Act: *City of Ames v. City of Liberty*, No. 09-22-00092-CV, 2023 WL 2180967 (Tex. App.—Beaumont Feb. 23, 2023) (mem. op.). The City of Liberty sued the City of Ames over a contract under which Ames provided wastewater collection services for Liberty, alleging Liberty had failed to pay service charges due under the contract. Ames filed a plea to the jurisdiction, claiming governmental immunity, and the trial court denied the plea.

The appellate court affirmed the trial court's denial of Ames's plea to the jurisdiction, holding that: (1) a contract for wastewater services is a contract for "services" within the meaning of the Public Property Finance Act's waiver of immunity; (2) the service charges were amounts due and owing under the contract; (3) the contract contained the essential terms of the parties' agreement; (4) there remained a fact issue as to whether the contract was properly executed; and (5) Chapter 271 applies to a contract between two governmental entities.

Property Tax Refunds: *Sundial Owner's Ass'n, Inc. v. Nueces County*, No. 13-21-00069-CV, 2023 WL 2414898 (Tex. App.—Corpus Christi–Edinburg Mar. 9, 2023) (mem. op.). Sundial Owner's Association paid property tax on behalf of the owners of the units comprising the condominium and subsequently requested a refund from each taxing unit for the years 2010-2015, arguing that it was not the owner of the condominiums and therefore not liable for the tax. The

trial court granted summary judgment in favor of the taxing units for tax years 2010, 2011, and 2012 based on Sundial's failure to timely request a refund and for tax years 2013 and 2014 based on Sundial's failure to show the tax was paid erroneously.

The appellate court affirmed the judgement in part and reversed in part, holding that: (1) the plain language of statute provides that a right to a refund is waived if a refund request is not made within three years of payment of the tax; and (2) Sundial paid the taxes voluntarily and did not submit evidence to show the payment was "erroneous" as required by statute. The appellate court remanded for further proceedings as to tax year 2012.

Tort Claims Act: *City of Houston v. Gonzales*, No. 14-21-00482-CV, 2023 WL 2259766 (Tex. App.—Houston [14th Dist.] Feb. 28, 2023) (mem. op.). In January 2016, while driving with his training officer, Houston Police Department probationary peace officer Daniel Iwai collided with the rear bumper of another vehicle while responding to a priority-two call for assistance. Jonathan Gonzalez, who was in the other vehicle, sued the city for injuries he sustained in the collision and was awarded $250,000 at the conclusion of trial. Houston raised several issues on appeal, but the only one reached by the court was regarding an abuse of discretion by the trial court for not dismissing the case for lack of jurisdiction. Generally, cities have immunity from liability and lawsuit unless that immunity has been waived. The Texas Tort Claims Act provides a limited waiver of governmental immunity for torts committed by city employees "acting within the scope of their employment" arising from the operation or use of motor-driven vehicles under certain circumstances. However, an exception to this waiver exists when a city employee is responding to an emergency. Houston argued that it established the emergency response exception and that Mr. Gonzalez failed to present evidence that Officer Iwai was responding to an emergency. The court agreed, dismissed the case for lack of jurisdiction, and reversed the trial court's judgment.

Tort Claims Act: *City of Houston v. Fisher*, No. 14-21-00573-CV, 2023 WL 2322971 (Tex. App.—Houston [14th Dist.] Mar. 2, 2023) (mem. op.). Officer Pinkney of the Houston Police Department was involved in a car crash with Fisher while on duty. Pinkney admitted the crash was his fault as he was distracted while trying to put on his seatbelt. Fisher filed a lawsuit against the city alleging negligence, negligence per se, and gross negligence. The city claimed governmental immunity, arguing that Officer Pinkney was not acting within the scope of his employment during the crash. Fisher responded that a limited waiver of immunity applies as Officer Pinkney was an on-duty officer at the time of the collision. The trial court denied the city's plea to the jurisdiction, leading the city to file a timely notice of interlocutory appeal. The Texas Tort Claims Act provides a limited waiver of governmental immunity if certain conditions are met. The city argued that the trial court should have granted its plea to the jurisdiction as Officer Pinkney was not acting within the scope of his employment during the accident since he was returning from lunch and had not yet performed any official duties. The court examined what the police officer was doing and why he was doing it, considering the connection between the employee's job duties and the alleged tortious conduct. As a patrol officer, Pinkney's responsibilities resumed once he got back to his patrol car. The court could not conclude that the city had rebutted the presumption that Officer Pinkney was acting within the scope of his employment at the time of the crash; therefore, the court rejected the City's contentions and affirmed the trial court's order denying the city's plea to the jurisdiction.

Breach of Contract: ***City of Houston v. James Construction Group, LLC*****, No. 14-21-00322-CV, 2023 WL 2423127 (Tex. App.—Houston [14th Dist.] Mar. 9, 2023) (mem. op.).** The City of Houston signed three contracts with James Construction Group (JCG) for repairs at Bush Intercontinental Airport. The completion of the work was significantly delayed. JCG claimed, in part, that the city's mismanagement caused delays and increased costs, while the city argued that JCG's workers were inexperienced and used inadequate materials. The contract called for the City Engineer to resolve all claims, which the City Engineer attempted to do. After some back-and-forth concerning change orders and contract adjustment, JCG sued the city for an additional $13,416,633 after receiving payments from the City. Houston filed a plea to the jurisdiction and a motion for summary judgment on *res judicata* grounds, due to the City Engineer's involvement in the claim resolution. The trial court denied the city's motions, and Houston appealed. The city's motion summary judgment was based on its assertion of *res judicata* but did not make jurisdictional assertions based on immunity and could therefore not be construed as a plea to the jurisdiction or any other jurisdictional challenge. Because the order denying summary judgment was neither a final judgment nor an order falling within the scope of an interlocutory appeal statute, the appellate court lacked jurisdiction over that aspect of the appeal. With regard to the city's plea to the jurisdiction, the appellate court reversed the trial court, because JCG failed to plead or prove misconduct by the City Engineer, which was required to waive the city's immunity to suit. Ultimately, the court reversed the trial court's ruling on the city's plea to the jurisdiction and dismissed related claims.

February 2023

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from January 11, 2023 through February 10, 2023.

Qualified Immunity: ***Bernabe v. Rosenbaum*****, No. 21-10396, 2023 WL 181099 (5th Cir. Jan. 13, 2023).** Bernabe sued the City of Arlington and two police officers for their use of tasers on him after a foot chase. The trial court granted the officers' motion for summary judgment based on qualified immunity and Bernabe appealed.

The appellate court affirmed the trial court, holding that Bernabe had failed to meet his burden after the defendants claimed qualified immunity because he failed to show that use of the taser was objectively unreasonable.

Tort Claims Act: ***Laborfest, L.L.C. v. City of San Antonio,*** **No. 22-50038, 2023 WL 1434272 (5th Cir. Feb. 1, 2023).** Laborfest sued the City of San Antonio for breach of contract after ticket sales for a planned music festival fell short of expectations, requiring Laborfest to cancel the festival. The trial court granted the city's motion for summary judgment based on governmental immunity, and Laborfest appealed.

The appellate court affirmed the trial court's grant of summary judgment, holding that a contract for a music festival to take place in the city's convention center is defined as a governmental

function under the Texas Tort Claims Act rather than a proprietary function, so immunity was not waived.

Recent Texas Cases of Interest to Cities

Note: Included cases are from January 11, 2023 through February 10, 2023.

Tim Cole Act: ***Brown v. City of Houston*, No. 22-0256, 2023 WL 1486228 (Tex. Feb. 3, 2023) (mem. op**.). In this case of first impression, the Supreme Court answers a certified question from the Fifth Circuit Court of Appeals related to compensation for wrongful imprisonment under the Tim Cole Act (Act).

Brown, a former prisoner, brought a Section 1983 action against the city, county, police detective, and police officers seeking compensation for imprisonment for wrongful conviction for capital murder of a police officer during a robbery. While the action was pending, Brown received compensation under the Act through a state administrative process. The United States District Court for the Southern District of Texas granted summary judgment to the city as to the Section 1983 claim. Brown appealed. The Fifth Circuit Court of Appeals certified a question of state law to the Texas Supreme Court on whether the Act, which does not allow a person who receives compensation under the Act to "bring any action involving the same subject matter … against any governmental unit or an employee of the governmental unit" bars a person from maintaining a suit after receiving compensation under the Act.

The Supreme Court affirmatively certified the question, finding that the Act bars maintenance of a lawsuit involving the same subject matter against any governmental units or employees that was filed before the claimant received compensation under the Act.

Tort Claims Act: ***Christ v. Tex. Dep't of Transp.*, No. 21-0728, 2023 WL 1871560 (Tex. Feb. 10, 2023).** This is a premise liability case in which the Supreme Court affirmed the Court of Appeals decision.

Motorists injured as result of head-on collision in construction zone brought action against Texas Department of Transportation and others (collectively Department), alleging premises liability based on condition of construction zone. The trial court denied the Department's plea to the jurisdiction and no-evidence motion for summary judgment. The Department filed an interlocutory appeal. The appellate court reversed and dismissed for want of jurisdiction. The motorists' petition for review was granted.

The Supreme Court held that use of painted stripes and buttons to separate opposing lanes of traffic when engineer-sealed traffic control plan called for concrete barriers did not create an unreasonably dangerous condition that would allow the motorists to invoke waiver of sovereign immunity under the Texas Tort Claims Act.

Enforcement of Deed Restrictions: ***Creative Chateau, LLC v. City of Houston*, No. 01-21-00327-CV, 2023 WL 162741 (Tex. App.—Houston [1st Dist.] Jan. 12, 2023.) (mem. op.).** The

City of Houston sued Creative Chateau after Creative Chateau operated a photography business out of a property in violation of the applicable deed restrictions. The trial court granted the city's motion for summary judgment and granted a permanent injunction to prohibit Creative Chateau from operating the business out of the property, and Creative Chateau appealed.

The appellate court affirmed the trial court's grant of the city's motion for summary judgment, holding that: (1) because Creative Chateau's evidence was filed with the court by a non-attorney, it was incompetent and could not be considered by the trial court; (2) where the deed restrictions expressly prohibited the operation of a business out of the property, operating the photography business was a substantial violation of the deed restrictions; and (3) a change in circumstances after the trial court's initial order does not qualify as newly discovered evidence to support a motion for a new trial.

Inverse Condemnation: ***City of Houston v. Commons of Lake Houston, Ltd.*, No. 01-21-00369-CV, 2023 WL 162737 (Tex. App.—Houston [1st Dist.] Jan. 12, 2023.) (mem. op.).** The Commons sued the City of Houston for a regulatory taking when the city amended its floodplain ordinance, making the Commons' development financially unfeasible. The trial court denied the city's plea to the jurisdiction and the city appealed.

The appellate court reversed the order of the trial court and dismissed the Commons' takings claim, holding that: (1) floodplain regulations that track the National Flood Insurance Program cannot constitute a taking; and (2) because reasonable minds could conclude that the amended ordinance's elevation requirements were substantially related to the health, safety, or general welfare of the citizens and were reasonable, the regulation was a valid exercise of the city's police power and did not constitute a taking.

Zoning Variance: ***Martinez v. Northern.*, No. 01-22-00435-CV, 2023 WL 162743 (Tex. App.—Houston [1st Dist.] Jan. 12, 2023.) (mem. op.).** Martinez and two neighborhood associations sued various city officials and entities, including the City of Houston, the City of Houston Housing Authority, and the City of Houston Planning Commission to enjoin the development of certain affordable housing, alleging that the city granted zoning variances to the affordable housing development in violation of the city's zoning ordinances. The trial court granted the city's plea to the jurisdiction and Martinez appealed.

The appellate court affirmed the trial court's judgment of dismissal, holding that the city and city officials were protected by governmental immunity because: (1) the waiver of immunity in the Uniform Declaratory Judgment Act did not apply because the claims did not challenge the validity of Houston's zoning ordinance; and (2) the city officials had not acted ultra vires because the grant or denial of a variance was within their discretion.

Tort Claims Act: ***City of Arlington v. Wesson-Pitts*, No. 02-22-00326-CV, 2023 WL 415965 (Tex. App.—Fort Worth Jan. 26, 2023) (mem. op.).** Stacy Wesson-Pitts and Benard Pitts were involved in a car accident with another vehicle near an intersection of two streets. They sued the city alleging that the city was liable for their damages stemming from the car accident because the city had failed to properly maintain a yield sign near the intersection — a yield sign that had previously been located near the intersection but that was missing at the time of the accident. The

city filed a plea to the jurisdiction, arguing that it was immune from the lawsuit. Following a hearing, the trial court denied the city's plea to the jurisdiction.

The city appealed, arguing that the trial court erred by denying its plea to the jurisdiction because: (1) its discretionary decisions as to whether and when to install a yield sign do not waive governmental immunity; and (2) it had no obligation to maintain or replace the yield sign because it neither owned nor exercised control over the sign.

The Court of Appeals determined that there was a fact issue as to whether the city had exercised control over the yield sign and knew of the dangerous condition posed by the missing yield sign but did not correct it within a reasonable time after notice. Accordingly, the court affirmed the trial court's ruling.

Jurisdiction: ***Mushtaler v. City of Austin*, No. 03-22-00655-CV, 2023 WL 1112520 (Tex. App.—Austin Jan. 31, 2023) (mem. op.).** Claiming that the city of Austin's easements on their properties had "expired due to expiration, frustration of purpose, and abandonment," Jennifer and Trent Mushtaler and Joshua Bezoni sued the city of Austin seeking declaratory relief. The trial court subsequently denied their summary judgment motion, and the Mushtalers and Bezoni appealed the decision to the court of appeals indicating that because the denial of their motion was dispositive to their remaining claims, the court of appeals had jurisdiction over the matter. The appellate court held that because the denial of a motion for summary judgment was an interlocutory ruling and did not dispose of their claims which remained pending in the trial court, it lacked jurisdiction and dismissed the appeal.

Tort Claims Act: ***The City of Austin v. Amy-Marie Howard*, No. 03-22-00439-CV, 2023 WL 1869645 (Tex. App.—Austin Feb. 10, 2023).** While attempting to restrain a suspect, Dylan Woodburn, Austin Police Department Officer Patrick Spradlin's duty belt malfunctioned and came loose. During this time, the officer attempted to resecure his belt and the suspect escaped to a nearby restaurant and killed Johnathon Aguilar by stabbing him with a freshly sharpened knife a salesman left on the counter. Amy-Marie Howard sued the City of Austin, among others, under the Texas Wrongful Death Act and claimed the city's governmental immunity was waived under the Texas Tort Claims Act (TTCA) because Aguilar's death was proximately caused by the condition or use of tangible personal property, namely the duty belt. The city subsequently filed a plea to the jurisdiction, which the trial court denied. The appellate court, in reversing the trial court's order, concluded that: (1) the use or condition of Officer Spradlin's duty belt was too causally attenuated to Woodburn's stabbing of Aguilar and could not be considered the proximate cause of his death; and (2) it was not reasonably foreseeable that the officer's belt malfunctioning would cause Aguilar to suffer this type of harm.

Contracts: ***City of San Antonio v. DHL Express (USA), Inc.*, No. 04-22-00603-CV, 2023 WL 380341 (Tex. App.—San Antonio Jan. 25, 2023) (mem. op.).** The city executed a lease agreement with DHL for use of the city's airport that was to "only be used for aeronautical activities or those that directly support aeronautical activities." The city notified DHL it was breaching the agreement because its flights landed in another city and then DHL shipped the items via truck to the city's airport for sorting. DHL sued the city for declaratory judgment and the city

filed a plea to the jurisdiction on the grounds of governmental immunity. The trial court denied the plea and the city appealed.

In overturning the trial court, the appellate court found that: (1) entering into the airport lease agreement was a governmental function; (2) the lease agreement was not one for goods and services to support a waiver under Chapter 271; and (3) the city's immunity was not waived for a declaratory judgment action. The appellate court reversed the trial court's order and rendered judgment for the city.

Employment: ***City of Fort Worth v. Birchett*, No. 05-22-01170-CV, 2023 WL 1501596 (Tex. App.—Dallas Feb. 3, 2023) (mem. op.).** William Birchett sued the city of Fort Worth under the Texas Whistleblower Act (Government Code Section 554.002) claiming he was wrongfully terminated after he reported cybersecurity violations the city failed to remedy to law enforcement agencies. In its first plea to the jurisdiction, the city argued, among other things, that Birchett did not sufficiently allege a causal connection between his reporting the violations and his termination. The court of appeals, in denying the city's first plea, explained that Birchett was not required to present evidence that his supervisor, Kevin Gunn, knew of his reports when Gunn terminated him, instead the city was required to present evidence rebutting the presumption of causation under section 554.004(a). The city subsequently filed a second plea to the jurisdiction providing proof that Gunn had no knowledge of Birchett's reports and that Birchett was instead terminated for other reasons. Concluding that the second plea to the jurisdiction amounted to a motion to reconsider because it also addressed the sufficiency of the evidence on causation which had already been determined in the first plea, the appellate court lacked jurisdiction and dismissed the second plea.

Inverse Condemnation: ***The City of Dallas v. Millwee-Jackson Joint Venture and Stephen M. Millwee*, No. 05-20-00611-CV, 2023 WL 1813499 (Tex. App.—Dallas Feb. 8, 2023).** Stephen M. Millwee sued the city of Dallas after it began development of an arena project, which included abandoning and demolishing a street (Alamo Street) in which Millwee had an easement and construction that resulted in blocking access to and occupying portions of his property. In his lawsuit, Millwee sought an injunction pursuant to Civil Practice and Remedies Code Section 65.015 for the city's street closure, a declaratory judgment, and claims for inverse condemnation. Following a bench trial, the court denied Millwee's inverse condemnation claim and combined his declaratory judgment claim with its final judgment granting relief on his section 65.015 claim. In its final judgment, the court ordered the city to either open the street at issue and maintain it as a public street or compensate Millwee through a condemnation suit for the taking of his property rights caused by the city's abandonment of the street.

The city appealed, challenging: (1) the court's subject matter jurisdiction to enter the permanent injunction, claiming Millwee lacked standing where evidence was insufficient to show a concrete injury; (2) the legal basis for the permanent injunction where Millwee failed to show evidence of a wrongful act by the city; and (3) the court's granting of a partial summary judgment on the declaratory judgment claim under Local Government Code Section 245.0002(a), which concluded that the boundaries drawn in a 2001 FEMA 100-year floodplain applied to Millwee's property.

Affirming the trial court's judgment, the court of appeals first addressed the city's subject matter jurisdiction concluding that because Millwee properly alleged that he owned land abutting Alamo Street, the city closed the street, and as a result, his property could no longer be developed, and he did not acquiesce or receive compensation from the city, Millwee had standing under Civil Practice and Remedies Code Section 65.015. Additionally, the court determined that the evidence at trial was sufficient to show Alamo Street remained closed and the city failed to offer Millwee compensation constituting a wrongful act, which supported the trial court's decision in granting injunctive relief. Lastly, the court agreed that Millwee, by offering substantial evidence of an original 1983 application for a permit to develop the property commercially, was entitled to a summary judgment order declaring which floodplain map would govern the development of his property pursuant to Local Government Code Section 245.0006(a) and thereby determining which regulations would guide the measure of damages if any were to be awarded.

With regard to Millwee's cross appeal challenging the trial court's denial of his inverse condemnation claim, the court of appeals declined to address the substantive merits reasoning that Millwee had already been granted a superior recovery by the trial court in ordering the city to either reopen and maintain the street at issue or to initiate a condemnation suit to compensate him for the street closure.

Employment: ***City of Fort Worth v. Joel Fitzgerald*, No. 05-22-00327-CV, 2023 WL 1813525 (Tex. App.—Dallas Feb. 8, 2023) (mem. op.).** Joel Fitzgerald sued the city of Fort Worth for wrongful termination after he was fired from his position as Chief of Police. In his suit against the city, Fitzgerald claimed that his liberty interests were violated under Art. I, Section 19 of the Texas Constitution. Specifically, he argued that by characterizing his discharge as "general" instead of "honorable," holding a press conference disparaging his name, and releasing his termination paperwork to the press, the city discharged him under "stigmatizing circumstances" and was required to provide him with a hearing to clear his name. In addition, Fitzgerald claimed that because he was not an "at-will" employee he had a right to continued employment, and his termination without a public hearing was an unconstitutional violation of his property interest rights under Art. I, Section 19 of the Texas Constitution and a violation of Local Government Code Section 143.013.

The city, in response, filed a plea to the jurisdiction arguing Fitzgerald did not establish a waiver of the city's governmental immunity. After a hearing on the city's plea, the trial court ruled in favor of Fitzgerald, and the city appealed.

In its decision, the court of appeals first addressed Fitzgerald's liberty interest claim and determined that none of the statements in his termination paperwork or at the press conference were so stigmatizing (i.e., implicating his character for honesty or accusing him of criminal activity) as to create a "badge of infamy." In addition, although the city filed Fitzgerald's separation as a "general" discharge with the Texas Commission on Law Enforcement when it completed the required F-5 form, Fitzgerald's record was later changed to "honorable" after a favorable hearing outcome with the State Office of Administrative Hearings. With regard to his property interest claim, the court determined no employment agreement existed and the evidence did not show that Fitzgerald was not an at-will employee. As a result, the court reversed the trial court's order denying the city's plea to the jurisdiction.

Employment Discrimination: ***El Paso Cnty. Water Improvement Dist. No. 1 v. Trevizo*, No. 08-21-00206-CV, 2023 WL 1069706 (Tex. App.—El Paso Jan. 27, 2023).** Rogelio Trevizo worked as an equipment operator for the El Paso County Water Improvement District No. 1 (District) for over a decade operating heavy equipment and performing a variety of manual labor. He developed a blood clot in his foot which led to numbness in his left leg, causing him to have to take time away from his job. Trevizo returned to light duty and then to full duty, and alleged that after returning to full duty, he was given more physically demanding work to do and older, broken equipment to do it with. He complained to his supervisors and to the EEOC, and after a number of incidents, his employment with the district was terminated. Trevizo filed a lawsuit against the District alleging discrimination based on age and disability, retaliation and creating a hostile work environment. The District filed a plea to the jurisdiction and a motion for summary judgment based on a lack of jurisdiction. The trial court denied the plea and the motion, and the District appealed that order. After consideration of the alleged facts, the appellate court held that Trevizo failed to properly state a case for age or disability discrimination, retaliation, and hostile work environment. The court dismissed most of the claims but remanded the case to the trial court to allow Trevizo to replead facts related to his age discrimination claims.

Jurisdiction: ***Jaramillo v. City of Odessa Animal Control*, No. 11-23-00012-CV, 2023 WL 1826753 (Tex. App.—Eastland Feb. 9, 2023) (mem. op.).** After animal control officials with the city of Odessa determined her dogs were dangerous, Allie Jaramillo filed a pro se notice of appeal with the court of appeals citing to Health and Safety Code § 822.0421 and claiming the court had jurisdiction to review interlocutory orders and judgments in violation of her due process rights. Dismissing the appeal for lack of jurisdiction, the court of appeals concluded that: (1) a municipal court judgment in this case would have to be appealed to the county courts at law of Ector County that have criminal appellate jurisdiction pursuant to Section 30.00771 of the Government Code; (2) no specific statutory authority permits the appellate court to hear interlocutory appeals from municipal court orders; and (3) the Health and Safety Code does not authorize a direct appeal to the court of appeals, but instead provides that a party may appeal the decision to a county court or county court at law in the county in which municipal court is located.

Reappointment of Municipal Judge: ***Bellamy v. City of Brownsville*, No. 13-22-00087-CV, 2023 WL 413583 (Tex. App.—Corpus Christi–Edinburg Jan. 26, 2023.) (mem. op.).** Bellamy sued the City of Brownsville for a temporary injunction requiring the city to reappoint him to his office as municipal judge after the city declined to reappoint him after the expiration of his term arguing that because more than ninety days had elapsed since the expiration of his term, he was reappointed as a matter of law. The trial court denied the temporary injunction and Bellamy appealed.

The appellate court affirmed, holding that Bellamy was not entitled to a temporary injunction because he had failed to show an irreparable injury because his claim amounted to a wrongful termination claim, for which damages would be available.

Tort Claims Act: ***The City of Edinburg v. Maribel Reyna*, No. 13-22-00420-CV, 2023 WL 1831125 (Tex. App.—Corpus Christi–Edinburg Feb. 9, 2023.) (mem. op.).** Reyna sued the City of Edinburg for injuries she received after she tripped and fell on a city-owned sidewalk, claiming

the city was negligent in maintaining the sidewalk. The trial court denied the city's plea to the jurisdiction claiming governmental immunity and the city appealed.

The appellate court reversed the trial court's denial of the city's plea to the jurisdiction and dismissed the claim, holding that the TTCA did not waive the city's immunity for the suit because: (1) Reyna had knowledge of the sidewalks defects; and (2) Reyna did not present evidence that the city had knowledge of the sidewalk's defects.

Tort Claims Act: ***Pardo v. Iglesias*, No. 14-22-00338-CV, 2023 WL 363024 (Tex. App.—Houston [14th Dist.] Jan. 24, 2023).** Rafael Iglesias sued two police officers for damages stemming from an altercation at a night club. At the time of the incident, the police officers were off duty, but they were still in uniform while working security for the night club. The officers moved to dismiss the claims against them pursuant to the Texas Tort Claims Act (TTCA), but the trial court denied their motion. They appealed. Under the election of remedies section of the TTCA, if a suit for damages is: (1) brought against an employee of a governmental entity, (2) based on conduct within the employee's general scope of employment, and (3) the case could have been brought against the employer, then: (1) the suit is considered to be against the employee in their official capacity only, and (2) the employee must be dismissed from the suit. Police officers have a duty to stop crime whenever it occurs; therefore, intervening in a fight at a night club would fall within a police officer's general scope of employment, even if the officer is off duty. Because the officers were employees of a city and were stopping a criminal act, they were immune from personal liability and should have been dismissed from the case. The appellate court reversed the trial court's order and dismissed the cases against the two officers.

January 2023

Recent Federal Fifth Circuit Cases of Interest to Cities

Note: Included cases are from December 11, 2022 through January 10, 2023.

Americans with Disabilities Act: *Wilson v. City of Southlake*, No. 21-10771, 2022 WL 17604575 (5th Cir. Dec. 13, 2022) (per curiam). The plaintiffs sued the city under the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA) over a verbal altercation between an eight-year-old child in school and the school resource officer, after which the city police department terminated the officer. The trial court granted summary judgment in favor of the city on the ADA and RA claims and the Fifth Circuit affirmed.

The Fifth Circuit rejected the plaintiffs' argument that the officer discriminated against the child who had autism, anxiety, and ADHD on the theories of: (1) disparate treatment and (2) failure to provide reasonable accommodations. First, there was no evidence that the office would have interacted differently with a child who did not have a disability if the child was behaving the way the plaintiffs' child did. Second, the officer had never met the child before the child never calmed

down during the interaction, and the parents had to remove the child from school, so the failure to provide a reasonable accommodation theory failed.

Takings: *Dahl v. Vill. of Surfside Beach, Texas*, No. 22-40075, 2022 WL 17729411 (5th Cir. Dec. 16, 2022) (per curiam). Dahl sued the city for inverse condemnation and declaratory judgment. Dahl filed a building permit with the city for a property and did not include a wetlands-delineation report stating if the property sits on any federally protected wetlands. The city notified Dahl that his application was deficient. He did not receive a permit and never appealed the decision. The city argued in its motion to dismiss the lawsuit was not ripe because Dahl never received a determination from a building official nor did he pursue his appeals. The district court granted the motion and Dahl appealed.

The Fifth Circuit affirmed the dismissal on the grounds the claims were not ripe because the city did not render a final decision and Dahl ignored relevant forms of relief.

Civil Rights: *Vardeman v. City of Houston*, 55 F.4th 1045 (5th Cir. 2022). Plaintiff brought a § 1983 action against a police officer and city, alleging that his Fourth Amendment rights were violated when the officer punched him in the face, knocking him to the ground, and stood over him for a time after plaintiff had failed to move his vehicle from an airport's passenger-pickup area. The district court dismissed the claim on the pleadings.

The Fifth Circuit affirmed judgment for the city and reversed judgment for the officer. The Court found that the facts as alleged created a dispute about whether the officer used excessive force in making a seizure. Regarding the city, the Court found that the allegations failed to allege a pattern or practice of assault.

Civil Rights: *Petersen v. Johnson*, 57 F.4th 225 (5th Cir. 2023). The parents of an arrestee (Petersen) who later committed suicide filed § 1983 action against the county, the city, an undercover police detective, and the jail's mental health and medical services providers asserting claims for false arrest, malicious prosecution, municipal liability, and state law negligence. The district court dismissed the complaint and the Fifth Circuit affirmed.

The Fifth Circuit found that the undercover police detective did not violate Petersen's constitutional rights against false arrest because the detective had probable cause to arrest Petersen under Texas law once he solicited a minor on the Internet. Likewise, the detective charged Petersen with the correct crime, so there was no malicious prosecution. Because there were no constitutional violations, the city was not liable. Finally, the claims against the medical personnel failed because when Petersen committed suicide, he was released from custody. The medical personnel had a fleeting interaction with Petersen and the interval of time that passed between that interaction and the suicide could not support a negligence claim.

Recent Texas Cases of Interest to Cities

Note: Included cases are from December 11, 2022 through January 10, 2023.

Tort Claims Act: ***City of Houston v. McGriff*****, No. 01-21-00487-CV, 2022 WL 17684046 (Tex. App.—Houston [1st Dist.] Dec. 15, 2022.) (mem. op.).** McGriff sued the City of Houston for negligence after she was injured when a freightliner driven by a city employee drifted into her lane and collided with the bus she was driving. The city filed a plea to the jurisdiction and a motion for summary judgment. The trial court denied both and the city appealed.

The appellate court affirmed, holding that because the emergency response exception to the Texas Tort Claims Act's waiver of immunity does not apply if the emergency may have been caused by the negligence of the person under inquiry, the city could not conclusively establish the sudden-emergency defense, so summary judgment was not appropriate.

TCEQ Permitting: ***Tex. Comm'n on Envtl. Quality v. Save Our Springs All., Inc.,*** **No. 08-20-00239-CV, 2022 WL 17659907 (Tex. App.—El Paso Dec. 13, 2022).** This is an important case for cities facing increased scrutiny regarding TCEQ wastewater discharge permit applications. It centers around a years-long challenge by the Save Our Springs Alliance (SOS) to the issuance of a wastewater discharge permit to allow the City of Dripping Springs to discharge treated effluent into two waterways. After TCEQ approved a discharge permit, SOS sued, alleging the permit approval was improper as a matter of law and arguing that the administrative record was not sufficient to support approval of the permit. The district court agreed. TCEQ and the city appealed the district court's ruling, arguing that (1) the TCEQ applied the appropriate standards of analysis, and (2) the administrative record supported issuance of the permit. A court may reverse an agency order if the substantial rights of a party are prejudiced by administrative findings or decisions that are: (1) in violation of a constitutional or statutory provision; (2) in excess of the agency's statutory authority; (3) made through unlawful procedure; (4) affected by other error of law; (5) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. The appellate court in this case took pains to review the administrative record in great detail with reference to the applicable legal standards. This is a lengthy opinion, and ultimately the appellate court found that the TCEQ had reviewed the permit application in reference to the appropriate standards and reversed the trial court's judgment denying the permit. This is an important ruling for cities, because SOS was essentially arguing for a different standard for permit review than exists in the law. If the lower court's ruling had been upheld, the applicable standards for discharge permit approval would have been fundamentally altered.

Declaratory Judgment: ***City of El Paso v. Pickett*****, No. 08-21-00147-CV, 2022 WL 17974630 (Tex. App.—El Paso Dec. 28, 2022).** Joseph Pickett sued the City of El Paso after the city increased the "environmental franchise fee" (EFF) charged to customers of El Paso Water. The ordinance creating the fee stated that it was charged in order to reimburse the city for the wear and tear on city streets caused by solid waste utility vehicles. In the city's 2020 budget, EFF funds were allocated not only for street repair but for fire department vehicles and police department major capital equipment. Pickett petitioned the court for a declaratory judgment construing the city's ordinances and whether the city could obtain funds for street maintenance and public safety equipment through a fee for solid waste disposal services. The city filed a plea to the jurisdiction claiming Pickett (1) lacked standing and (2) failed to plead a waiver of government immunity. The trial court denied the city's plea, and the city appealed. To have standing, an individual must be

able to show that (1) they are a taxpayer, and (2) public funds have been spent on an allegedly illegal activity. Being a property owner in the city, Pickett was a taxpayer, and because his allegations were related the validity of the city expenditure rather than validity of the EFF itself, the court found he satisfied the standing requirements. With regard to the city's claim of immunity, the Uniform Declaratory Judgment Act contains a clear waiver of immunity for an action involving a municipal ordinance, so the appellate court overruled the city's second issue as well.

Takings; Immunity: *City of El Paso Tex. v. Torres*, No. 08-22-00058-CV, 2022 WL 17986197 (Tex. App.—El Paso Dec. 29, 2022). Maria Torres owned property on La Senda Drive in El Paso, Texas. The City of El Paso resurfaced an adjacent roadway, and following the road work, Ms. Torres' property flooded during a rainstorm. Water and mud entered her home, which she slipped on, fracturing her arm. She sued the city alleging that her property had been taken, damaged, or destroyed for public use as well as for personal injuries. The city filed a plea to the jurisdiction, asserting that Torres failed to state a viable taking claim and immunity from personal injury liability. The trial court denied the plea in its entirety. To state a viable takings claim, Torres needed to allege (1) an intentional act by the city acting under its lawful authority, (2) which resulted in the taking or damaging of property, (3) for public use. Analyzing the pleadings, the appellate court found that the city's road work was intended to change the flow of water on the roadways, which allegedly increased the intensity of water flowing to the Torres' home and resulted in significant damage to the property. Therefore, the appellate court found a property-pled takings claim and affirmed the trial court's dismissal of the city's plea on this ground. With regard to the city's claim of governmental immunity from the personal injury claims, the appellate court reversed the trial court's order. Torres claimed that the city's alleged negligent act which caused her personal injuries was the city's negligent design of the roadway. The Texas Tort Claims Act does not provide a waiver of governmental immunity for discretionary design decisions. Because immunity is not waived for these claims, the appellate court reversed the trial court and dismissed the claims for personal injury.

Immunity: *Jarnail Sihota and GTHCC, Inc. v. City of Midland*, No. 11-21-00171-CV, 2022 WL 17996996 (Tex. App.—Eastland Dec. 30, 2022) (mem. op.). After the city of Midland issued an order declaring Jarnail Sihota's building to be substandard and requiring abatement action, Sihota obtained a building permit to begin making repairs. Several months later, the building repairs had not been completed so the city notified Sihota of its intent to demolish the building in accordance with the abatement order. As a result, Sihota sought emergency relief pursuant to the Texas Uniform Declaratory Judgment Act, and the city filed a plea to the jurisdiction claiming Sihota failed to timely appeal the abatement order as required by Local Government Code Section 214.0014 and claiming governmental immunity. Following a hearing, the trial court granted the city's plea, and Sihota appealed, arguing the court should have invoked its equitable jurisdiction and estopped the city from the demolition because Sihota believed he had more than thirty days to complete the repairs and had invested $1.8 million on the project. In affirming the trial court's order, the appellate court concluded that because Sihota failed to timely appeal the abatement order, the trial court was precluded from reaching a determination on the estoppel argument because it lacked subject matter jurisdiction.

Right-of-Way Obstructions: *Torres v. Cameron Cnty.*, No. 13-20-00568-CV, 2022 WL 17844210 (Tex. App.—Corpus Christi–Edinburg Dec. 22, 2022.) (mem. op.). Torres built a

fence within a couple of feet of a Harris County road, and the county sued for a declaration that the fence obstructed the road. The trial court declared that the road was properly in the area that had been expressly dedicated to the county and ordered Torres to remove all obstructions with the county's 60-foot right-of-way. Torres appealed, claiming judgment not in conformity with the pleadings and legal and factual insufficiency.

The appellate court affirmed, holding that: (1) the written judgment controls over prior oral statements by the judge and the written judgment was in conformity; and (2) the county did present legally and factually significant evidence that the area had been expressly dedicated to the county.

Whistleblower Act: *City of Pharr v. Bautista*, No. 13-22-00278-CV, 2022 WL 17844214 (Tex. App.—Corpus Christi–Edinburg Dec. 22, 2022.) (mem. op.). Bautista sued the City of Pharr under the Whistleblower Act, claiming his termination was in retaliation for a report he made to the Texas Commission on Environmental Quality. The city filed a plea to the jurisdiction, arguing that Bautista had not filed his suit within the 90-day statutory limitations period after exhausting his administrative remedies with the city. The trial court denied the plea and the city appealed.

The appellate court affirmed, holding that because a letter from the city stating that Bautista's appeal of his termination did not conclusively deny the appeal but merely stated the appeal's deficiencies, a fact issue remained as to whether that letter constituted a final decision on appeal.

December 2022

Contracts: *Borgelt v. Austin Firefighters Ass'n, IAFF Local 975*, No. 03-21-00227-CV, 2022 WL 17096786 (Tex. App.—Austin Nov. 22, 2022) (mem. op.) Mark Pulliam and Jay Wiley as citizen taxpayers sued the City of Austin and the Austin Firefighters Association (AFA), alleging the "shared bank of paid leave" provision of their collective bargaining agreement violated Article III, Sections 50, 51, and 52(a), and Article XVI, Section 6(a) of the Texas Constitution (gift clauses). They argued that the leave constituted an unlawful transfer of public funds to a private entity because the paid leave was not used for city purposes, but instead was used to further private interests of the AFA.

In support of Pulliam and Wiley, a third citizen, Roger Borgelt, later joined the lawsuit, as well as the Texas Attorney General. In response, the AFA filed a motion to dismiss the claims pursuant to the Texas Citizens Participation Act (TCPA), which the trial court granted in addition to awarding sanctions to the AFA. Pulliam and Wiley subsequently appealed the court's granting of the TCPA motion and the award of sanctions, while the Borgfelt and the state appealed the court's final judgment.

The court of appeals upheld the trial court's judgment, concluding the paid leave provision does not violate the gift clauses of the Texas Constitution because: (1) the city's agreement with the AFA was supported by sufficient consideration where the city obtained a policy change with regard to sick leave in exchange for the shared bank of paid leave, which saved the city between $500,000 to $600,000 a year; (2) the agreement, including the shared bank of paid leave

provision, served a legitimate public purpose to facilitate labor relations between the parties, further professional standards for firefighters, and promote firefighter and public safety; (3) the city retained sufficient control over the leave provision by limiting the number of hours, proscribing the allowable purposes for the leave, retaining the ability to terminate the AFD president's city employment, and retaining the right to manage the fire department and its workforce; and (4) the city received a return benefit from the leave provision as indicated by the cost savings from the negotiated sick leave policy change and from AFA's use of the paid leave for purposes such as dispute-resolution, participation in cadet-hiring, and labor-management initiatives which help avoid costly safety and operational issues as well as potential lawsuits.

In addition, the appellate court held that because AFA met its burden under the TCPA, it was entitled to relief where: (1) it showed Pulliam's and Wiley's legal action was based on AFA's exercise of their right of association because it relied upon AFA's communications during their use of the paid leave; (2) Pulliam and Wiley were unable to produce sufficient evidence as a matter of law to establish the paid leave was gratuitous or that the leave provision did not serve a legitimate public purpose and did not provide a direct public benefit in return; and (3) Pulliam and Wiley failed to establish that the TCPA sanctions were a clear abuse of discretion where $75,00 was less than the attorneys' fees and substantially less than what AFA was seeking.

Public Information Act: *Tex. Comm'n on Envtl. Quality v. Sierra Club*, No. 03-21-00256-CV, 2022 WL 17096693 (Tex. App.—Austin Nov. 22, 2022) (mem. op.) On July 1, 2019, the Texas Commission on Environmental Quality (TCEQ) received a public information request from the Sierra Club requesting various agency documents. Believing some of the information requested was exempted from disclosure, TCEQ sent a letter via interagency mail to the Attorney General's Office on July 17, 2019, requesting a ruling. In its calculation, TCEQ claimed that July 5th, the day after Independence Day, was a holiday because the agency was closed, and no employees were expected to work on this day. July 5th was not a state-recognized holiday but instead was an agency observed holiday granted by TCEQ's administration. The Attorney General's Open Records Division, upon receiving TCEQ's letter, determined the request was untimely and, as a result, the information must be released to the Sierra Club. TCEQ disagreed and subsequently filed a lawsuit seeking declaratory relief from compliance with the AG's decision ordering TCEQ to disclose the information. The Sierra club intervened and sought a writ of mandamus compelling TCEQ to disclose the documents. TCEQ later appealed the district court's granting of summary judgment in favor of the Sierra Club.

The court of appeals, upholding the district court's summary judgment, reasoned that none of the various state statutes and their definitions of the word "holiday" contemplated "that a time period may be extended by not counting a day on which the person or entity required to meet the deadline has decided that it will be 'closed.'" The court also noted that the Legislature did not define July 5th as an official state holiday. For those reasons, it concluded that if a state agency decides to close its office in extended observance of a national holiday, it may not count that day as a holiday to extend the 10-day deadline for requesting an open records ruling under Government Code § 552.301(b). In addition, the court held that: (1) TCEQ could not exclude the day it requested clarification from its calculation of the 10-day deadline because it did not include the statutorily mandated statement regarding the consequences for failing to respond to a written request for clarification under Government Code § 552.222; and (2) TCEQ's argument

that the responsive documents were covered by the deliberative process privilege was not a compelling enough reason to withhold the information because the deliberative process privilege is qualified and could be overcome by a sufficient showing of need, unlike the attorney-client privilege.

Contracts: *Valero Dev. Corp. v. City of Laredo*, No. 04-21-00226-CV, 2022 WL 17332601 (Tex. App.—San Antonio Nov. 30, 2022) (mem. op). The city signed a lease with Valero for use of city property. However, the city later discovered that the city employee who negotiated the lease was related to the owners of Valero, which violates the city's charter. The city then notified Valero that it was terminating the lease in 2012, and Valero sued in 2020. The city filed a plea to the jurisdiction, which the trial court granted and Valero appealed. The appellate court affirmed, finding that Valero failed to sue within the requisite four-year statute of limitations, thus denying the trial court of subject matter jurisdiction.

Tort Claims Act: *City of San Antonio v. Trevino*, No. 04-22-00224-CV, 2022 WL 17480550 (Tex. App.—San Antonio Dec. 7, 2022) (mem. op.). Plaintiff sued the city for injuries he sustained when a city police officer hit the plaintiff while making a U-turn when the officer was responding to a "criminal mischief" call. The city filed summary judgment motions, arguing the emergency response exception, the 9-1-1 emergency exception, and official immunity, which the trial court denied. The city appealed. The appellate court concluded that plaintiff failed to show evidence that the police officer: (1) was not responding to an emergency call; (2) violated laws and ordinances applicable to emergency action; and (3) acted with conscious indifference or reckless disregard. Therefore, the appellate court reversed the trial court and rendered judgment for the city based on section 101.055's emergency exception.

Tort Claims Act: *Nelson v. City of Plano*, No. 05-21-00708-CV, 2022 WL 17075883 (Tex. App.—Dallas Nov. 18, 2022) (mem. op.) After Matthew Nelson sustained injuries as a result of riding his bicycle on a sidewalk and colliding with a truck driven by a city of Plano employee, his parents, the Nelsons, sued the city claiming negligence. In response, the city filed a plea to the jurisdiction claiming governmental immunity. The trial court later granted the city's plea and dismissed the case.

The Nelsons subsequently appealed the trial court's ruling on the basis that the city's governmental immunity was waived under the Texas Tort Claims Act (TTCA) and the Recreational Use Statute (RUS) did not and should not bar their claim because Matthew was not riding his bicycle for recreational purposes but instead as his only means of transportation. The city argued the RUS did apply regardless of Matthew's reason for riding his bicycle, and cited to a Texas Supreme Court case, *University of Texas v. Garner*, in which the court ruled that the university's immunity was not waived, and the RUS did apply in a similar incident.

The court of appeals, declining to adopt a different statutory construction, agreed with the city that the plain language of the RUS and the Supreme Court precedent applied in this case and upheld the trial court's judgment.

Procedure: *Stamatina Holdings, LLC v. City of Dallas*, No. 05-21-00840-CV, 2022 WL 17351780 (Tex. App.—Dallas Dec. 1, 2022) (mem. op.) After the city of Dallas obtained

municipal court orders for the demolition of three dangerous structures within the city, Angelos Kolobotos initiated a takings claim suit on behalf of himself and others. After eight amended pleadings by Kolobotos, the court granted the city's motions to: (1) strike based on his unauthorized practice of law; (2) declare Kolobotos a vexatious litigant for attempting to relitigate cases that had been previously finally determined; and (3) dismiss under Rule 91a (dismissal of baseless causes of action). Kolobotos subsequently appealed arguing, among other things, that the court failed to comply with the vexatious litigant statute when it did not order Kolobotos to post security and stay the litigation before considering the motion to dismiss. However, the court of appeals concluded that because Kolobotos did not object to the court's hearing the motion to dismiss and did not raise the issue during the nine days between the court's vexatious litigant order and order granting the motion to dismiss, Kolobotos failed to preserve the argument for appellate review. The court further held that Kolobotos's argument that the vexatious litigant statute violates Texas's open courts doctrine was not preserved for review and, even if it had been, other courts have already decided the issue determining there is no constitutional right to frivolous litigation.

Economic Development: *Martin v. Hopkins Cnty.*, No. 06-22-00022-CV, 2022 WL 16952888 (Tex. App.—Texarkana Nov. 16, 2022). Martin raised an ultra vires claim based on Texas Tax Code violations against the county relating to the county's agreement with a private company to build a solar power plant. The trial court granted the county's summary judgment motion and Martin appealed. The appellate court affirmed the trial court, determining that because the agreement was made under subchapter H of Local Government Code Chapter 381, the Texas Tax Code did not apply and that the county and the officials established that they were entitled to summary judgment on Martin's ultra vires claims, which were all premised on alleged Texas Tax Code violations.

Tort Claims Act: *City of Monahans v. Sw. Bell Tel. Co.*, No. 08-21-00088-CV, 2022 WL 17102372 (Tex. App.—El Paso Nov. 22, 2022). Southwestern Bell Telephone Company ("SBC") sued the City of Monahans alleging an SBC telephone cable was damaged by city employees while repairing a broken water line. Monahans filed a plea to the jurisdiction, which the trial court denied, and Monahans appealed. Generally, governmental immunity protects a city from lawsuits for money damages unless that immunity has been clearly and unambiguously waived by statute. The Texas Tort Claims Act waives this immunity in certain circumstances. One condition of the TTCA is that the governmental entity must receive notice of the claim within six months of the incident giving rise to the claim. In the absence of written notice, actual notice sufficient to (1) identify the particular loss, and (2) alert the governmental entity to something impending to allow preparations to be made can meet the notice requirement. The city did not receive formal written notice from SBC within the required six-month period, but SBC argued that a fact question existed regarding whether Monahans had actual notice of the claim. The court found that Monahans's subjective knowledge of (1) SBC's property damage, (2) the city's fault that produced or contributed to the property damage, and (3) the identity of the parties involved met the actual notice standard; therefore, the court denied this claim. Monahans also argued that since it was involved in a governmental function, its immunity should be upheld. The TTCA waives immunity even for governmental actions under specific circumstances, including when damages are caused during the use of motor-driven equipment. Because the alleged damage was caused by a city employee's use of a backhoe, the TTCA could waive

Monahans's governmental immunity. The court overruled both Monahans's issues and affirmed the trial court's denial of the city's plea.

ESDs: *Walker Cnty. ESD No. 3 v. City of Huntsville*, No. 10-22-00009-CV, 2022 WL 17488327 (Tex. App.—Waco Dec. 7, 2022) (mem. op.). This an ultra vires case stemming from an annexation dispute in which the appellate court reversed the trial court's denial of a motion to dismiss. The appellate court reversed and rendered judgement dismissing the underlying lawsuit.

The City of Huntsville sued the Walker County Emergency Services District No. 3 (the District), along with its officers and commissioners, a day after voters of the District, along with voters residing in a territory to be annexed, approved the District's annexation of the territory. The city alleges that the annexed territory includes territory within the city's extraterritorial jurisdiction (ETJ), which the city has never consented to being annexed by the District. The District and its officers and commissioners moved to dismiss the city's lawsuit for lack of jurisdiction, which the trial court denied. The District and its officers and commissioners filed an interlocutory appeal challenging the denial of their motion to dismiss.

The appellate court determined that language "sue and be sued" in section 775.031 of the Health and Safety Code, standing alone, is unclear and ambiguous and does not amount to a waiver of governmental immunity, and that a seeking relief for ultra vires acts must be brought against state actors in their official capacity and not against the governmental entity. Additionally, the appellate court concluded that section 775.015 of the Health and Safety Code gives an ESD the authority to include within its territory a city's limits or ETJ without the city's consent.

Contracts: *Silva, Otting & Silva, LLC v. Donna Econ. Dev. Corp. 4A*, No. 13-20-00499-CV, 2022 WL 16993563 (Tex. App.—Corpus Christi–Edinburg Nov. 17, 2022) (mem. op.). Silva, Otting & Silva (SOS) sued the City of Donna, the Donna Economic Development Corporation 4A, the Development Corporation of Donna 4B, and the Donna International Bridge Corporation for breach of contract when the city terminated its agreement with SOS for consulting services and payment due from prior agreements. The trial court severed the claim against the city from the claim against the Donna Economic Development Corporation 4A, the Development Corporation of Donna 4B, and the Donna International Bridge Corporation (appellees), denied SOS's motion for a continuance, and granted the appellees' motion for summary judgment. SOS appealed.

The appellate court affirmed the judgment of the trial court, holding that: (1) severance of SOS's claims against the city was proper because they were cognizable separately and the claims against the appellees had been dismissed by summary judgment; (2) the trial court's denial of the motion for continuance was not properly preserved for appellate review because SOS did not bring it to the trial court's attention; and (3) because the city and SOS were the only parties to the contract under which Silva was suing and the appellees were not parties, SOS had not produced evidence for its breach of contract claim, so the trial court's grant of the no-evidence summary judgment was appropriate.

Texas Tort Claims Act: *City of Cedar Park v. Delapena*, No. 13-21-00341-CV, 2022 WL 16993493 (Tex. App.—Corpus Christi–Edinburg Nov. 17, 2022) (mem. op.). The Delapenas filed survival and wrongful death claims against the City of Cedar Park for the drowning death of

their daughter that occurred when the summer camp she attended went swimming at the city pool. The city filed a plea to the jurisdiction, arguing that its governmental immunity was not waived. The trial court denied the plea and the city appealed.

The appellate court reversed the judgment of the trial court, holding that the city's immunity was not waived under the TTCA because: (1) the city's failure to follow its policies with regard to the number of lifeguards and supervisors per swimmer did not constitute a condition or use of tangible personal or real property to support a negligent implementation of policy claim; and (2) the city's failure to provide the child with a life jacket did not constitute the use of tangible personal property to support a claim under the integral safety doctrine.

Federal Jurisdiction: ***City of Port Isabel v. Brownsville Navigation Dist. of Cameron Cnty.*****, No. 13-20-00479-CV, 2022 WL 17260509 (Tex. App.—Corpus Christi–Edinburg Nov. 29, 2022) (mem. op.).** The City of Port Isabel sued the Brownsville Navigation District for injunctive relief, claiming that the district's lease agreements for liquid natural gas production would have a detrimental impact on the environment, harming residents of the city and reducing tourism. The trial court granted the district's plea to the jurisdiction, and the city appealed.

The appellate court affirmed the trial court's grant of the district's plea to the jurisdiction, holding that the federal Natural Gas Act created a consolidated regulatory process for approving liquid natural gas facilities, and therefore the case fell under exclusive federal jurisdiction.

Code Enforcement: ***Rhone v. City of Tex. City*****, No. 14-20-00854-CV, 2022 WL 17491227 (Tex. App.—Houston [14th Dist.] Dec. 8, 2022).** Thomas Rhone owns real property on which he had apartment buildings constructed. The City of Texas City filed suit seeking a temporary injunction against Rhone for alleged ordinance violations, including allowing the apartments to be occupied before receiving a certificate of occupancy. The trial court ordered the temporary injunction, and Rhone appealed. The trial court was authorized to issue a temporary injunction upon a showing of substantial danger of injury or an adverse health impact to any person or to the property of any person other than the defendant, and the injunction could (1) prohibit specific conduct that violates the ordinance; and (2) require specific conduct that is necessary for compliance with the ordinance. To overturn the trial court's ruling, Rhone needed to prove the trial court abused its discretion to issue the temporary injunction. After reviewing the lower court's record in detail, the appellate court found that the trial court had not abused its discretion by issuing the temporary injunction and affirmed the lower court's ruling.

November 2022

Mask Mandates: ***Abbott v. Cnty. of Fort Bend*****, No. 01-21-00453-CV, 2022 WL 7180371 (Tex. App.—Houston [1st Dist.] Oct. 13, 2022.)** Fort Bend County sued Governor Greg Abbott to enjoin enforcement of executive order GA-38, which provided that no governmental entity could mandate the wearing of face masks. The trial court denied Abbott's plea to the jurisdiction and granted a temporary injunction against enforcement of GA-38. Abbott appealed the denial of his plea to the jurisdiction, claiming sovereign immunity to suit, that the county had no standing to

sue, and that the trial court lacked statutory authority to enjoin the governor. Abbott also appealed the temporary injunction, arguing that the trial court had abused its discretion.

The appellate court upheld the trial court's denial of Abbott's plea to the jurisdiction, holding that: (1) the county had alleged ultra vires acts by the governor; (2) the county had alleged a concrete injury caused by GA-38 and therefore had standing to sue; and (3) the trial court did have the authority to enjoin an executive order of the governor. Additionally, the appellate court upheld the temporary injunction, holding that (1) the county was able to show that it had a probably right of recovery because the Texas Disaster Act does not grant the governor preemptive power, the county does not act merely as the governor's agent in disaster mitigation, and the governor's power to suspend statutes does not leave the county without a statutory basis to act; and (2) the county doctor's testimony about the rise in COVID-19 rates and the efficacy of mask mandates was enough to show that the county would suffer irreparable harm in the absence of the temporary injunction.

Criminal Law: ***Felts v. State*, No. 01-21-00545-CR, 2022 WL 14989706 (Tex. App.—Houston [1st Dist.] Oct. 27, 2022.)** Felts pleaded no contest to misdemeanor theft of property in the Pearland Municipal Court, a court of record, and the court assessed a fine of $200. The court deferred the imposition of the fine pending Felts's successful completion of the agreed terms of the deferral, and the court subsequently revoked Felts's deferred disposition and imposed the fine. On appeal, the county court at law affirmed the trial court's imposition of the fine, and Felts appealed to the First Court of Appeals.

The appellate court overruled Felts' 12 points of error and affirmed the county court's affirmance of the trial court. The appellate court held the following:

- The court of appeals had jurisdiction over Felts's appeal from the county court's review of the trial court's disposition of the case;
- The failure of the trial court to create a court reporter's record was not a denial of Felts's due process rights because Felts never requested a court reporter;
- The absence of a record made it impossible for Felts to make the required showing to support his ineffective assistance of counsel claim;
- Because it was an adjudication of guilt after deferred disposition, Felts was not entitled to the same notice to which a defendant is entitled for revocation of community supervision or deferred adjudication community supervision;
- The absence of a record made it impossible for Felts to support his claim of legal insufficiency of the evidence;
- Felts was not harmed by the court's action in holding the show-cause hearing before the expiration of the deferral period;
- Felts could not challenge the condition of his deferred disposition agreement that provided that he could not be charged with any criminal offense during the deferral period because he had voluntarily entered into the agreement; and
- Felts had waived his point of error that the trial court had abused its discretion by failing to raise it in his motion for new trial in the trial court.

Tort Claims Act: ***City of Houston v. Martha Vogel and Maria Escalante*, No. 01-22-00071-CV, 2022 WL 16756378 (Tex. App.—Houston [1st Dist.] Nov. 8, 2022.) (mem. op.).** Vogel and Escalante sued the City of Houston for injuries they received when their truck collided with an ambulance driven by an EMT employed by the city.
The city filed a motion for summary judgment, asserting that because the EMT driving the vehicle was responding to an emergency call, governmental immunity was not waived by the TTCA. The trial court denied the motion and the city appealed.
The appellate court reversed and rendered judgment for the city, holding that because the EMT was proceeding through an intersection with emergency lights and sirens activated in response to an emergency call when the collision occurred, the claim fell within the emergency-response exception to the TTCA's waiver of governmental immunity, so the trial court lacked subject matter jurisdiction over the claims.

Tort Claims Act: ***City of Gainesville v. Sharp*, No. 02-22-00061-CV, 2022 WL 11456903 (Tex. App.—Fort Worth Oct. 20, 2022) (mem. op.).** This is an interlocutory appeal of a trial court's order denying the City of Gainesville's plea to the jurisdiction on Sharp's premises liability claim.

Sharp sued the city for injuries she sustained on the Gainesville airport tarmac. Sharp and her instructor pilot landed their plane at the Gainesville airport to purchase fuel for the plane. Sharp deplaned onto the tarmac with a dog and began walking toward a grassy area where she allegedly tripped on an unmarked tie-down protruding from a depression in the ground. She fell sustaining serious and disabling injuries requiring surgical intervention.

Sharp brought a premises defect claim against the city under the Texas Tort Claims Act (TTCA). The city then filed a plea to the jurisdiction asserting it was immune from suit because Sharp was a licensee, not an invitee, and as a licensee she was unable to prove that the city had actual knowledge of an unreasonably dangerous condition. Sharp argued that by landing at the airport for the sole purpose of purchasing fuel, she paid for the use of the airport and was therefore an invitee. Sharp also argued that regardless of whether she was an invitee or a licensee, the overwhelming evidence established fact issues as to the challenged elements of her TTCA claim, which required the trial court to deny the city's plea. The trial court denied the city's plea, and the city appealed.

The appellate court held that because Sharp did not pay for the use of the premises, she was not an invitee. However, the court affirmed the trial court's ruling finding that Sharp has shown that there is a disputed material fact regarding whether the condition was unreasonably dangerous.

Removal of Official: ***King v. Goodwin*, No. 03-21-00293-CV, 2022 WL 7727906 (Tex. App.—Austin Oct. 14, 2022) (mem. op.).** Bill Goodwin, a councilmember of the city of Bee Cave, sued the city and its officials after the council unanimously voted to remove him from office for violating city charter provisions. Goodwin brought an ultra vires claim, among other claims, arguing city officials failed to comply with the city's charter which did not grant authority to remove him from office. The city then filed a plea to the jurisdiction asserting governmental immunity. After Goodwin's replacement, Courtney Huhl, was sworn in, the city amended its plea to reassert their governmental immunity claim and to argue that because a replacement had

been sworn in, a quo warranto action was the only proper action available to Goodwin. In addition, the city filed a motion to dismiss under the Texas Tort Claims Act (TTCA) and a plea to res judicata after a previous suit had been resolved in which Goodwin sued Huhl to try title to his council seat. After a hearing on the city's plea, the district court, declining to address Goodwin's constitutional claims, rendered a final judgment in his favor and enjoined the city's officials from preventing him from serving out the remainder of his city council term until May 12, 2022. Following the ruling, the city filed an interlocutory appeal. Goodwin subsequently filed a motion to dismiss the city's appeal for want of appellate jurisdiction and to expedite, to which the city filed a motion to dismiss the cause as moot. Reasoning that because Goodwin's city council term had expired and no exception to mootness applied, the appellate court vacated the district court's final judgment and dismissed the case for want of jurisdiction.

Condemnation: ***City of Pflugerville v. 735 Henna, LLC*, No. 03-21-00374-CV, 2022 WL 16841702 (Tex. App.—Austin Nov. 10, 2022) (mem. op.).** The city of Pflugerville sought to condemn a portion of property owned by 735 Henna, LLC (Henna) for roadway improvements under Property Code § 21.012, at which time the court appointed special commissioners to determine the value of the land the city was seeking to condemn. After the commissioners valued the property at $365,000, the city objected to the award as excessive and requested the case be set for trial. During this time, Henna subdivided the land which included the tract the city was seeking to condemn. As a result, the city sued Henna pursuant to Local Government Code § 212.018, seeking damages for the cost of condemning the tract it was seeking to condemn. The city and Henna subsequently came to a Rule 11 Agreement through mediation in which they agreed that all claims and controversies were settled and agreed settlement for the property at issue was $360,000. After the settlement was signed by the court in the first lawsuit, the city filed a motion for summary judgment in the court in the second lawsuit. The city argued that it was entitled to the full $360,000 settlement amount as well as attorneys fees and costs, as a matter of law, for having to institute condemnation proceedings rather than receiving a dedication of a right of way it would have been entitled to if Henna had not illegally subdivided the property. Henna subsequently filed a motion for summary judgment arguing the city forfeited its claim for damages in the second lawsuit after signing the Rule 11 Agreement. The trial court granted Henna's motion for summary judgment concluding the city released its claims brought in the second lawsuit, and the city appealed.

Affirming the trial court, the appellate court agreed that the Rule 11 Agreement released "any and all claims between the parties regarding the condemnation matter." Although the Agreement did not specifically refer to the second lawsuit, the Texas Supreme Court has previously indicated that a claim does not need to be specifically enumerated to fall within the scope of a release. As a result, the Agreement between the city and Henna included the city's claims in the second lawsuit.

Solid Waste Permitting: ***Post Oak Clean Green, Inc. v. Guadalupe Cnty. Groundwater Conservation Dist.*, No. 04-21-00087-CV, 2022 WL 6815191 (Tex. App.—San Antonio Oct. 12, 2022) (mem. op.).** Post Oak applied for a solid waste permit from the Texas Commission on Environmental Quality and the conservation district opposed it, arguing that the permit violates a conservation district's rule because the landfill would be over an aquifer recharge zone. The

conservation district sued Post Oak and TCEQ. Post Oak and TCEQ filed pleas to the jurisdiction, which the trial court denied.

The appellate court reversed, finding that the District's Uniform Declaratory Judgment Act claim is barred by the "redundant remedies" doctrine. The UDJA claim would provide the same remedy as the administrative appeal challenging TCEQ grant of the permit. The appellate court dismissed the conservation districts UDJA lawsuit.

Tort Claims Act: ***Morales v. Wilson Cnty.*, No. 04-21-00338-CV, 2022 WL 14656817 (Tex. App.—San Antonio Oct. 26, 2022) (mem. op.).** The plaintiff was in an accident with a county employee. The plaintiff sent a letter to the Texas Association of Counties as the insurer and the county notifying them of the accident within the time period required by the Texas Tort Claims Act. The county filed a plea, arguing it did not have notice because it had no record of receiving the letter, which the trial court granted. The appellate court reversed, finding that the county had actual knowledge through imputed knowledge to its liability carrier because the liability carrier had a duty to investigate and contact the county regarding the claim.

Public Health: ***Blue Window Cap., LLC v. City of Dallas*, No. 05-22-00042-CV, 2022 WL 9765467 (Tex. App.—Dallas Oct. 17, 2022) (mem. op.).** The city of Dallas sued Blue Window Capital, LLC (Blue Window) after issuing public health and safety ordinance violations at three properties owned by Blue Window. After Blue Window failed to make necessary repairs in compliance with city ordinances, the city sought temporary and permanent injunctions, civil penalties, and requested that the court appoint a receiver to take control of the properties. After appointing a court representative to assist Blue Window in remedying the infractions and ordering Blue Window to deposit funds into an escrow account to fund the required materials and repairs, Blue Window failed to comply with the court's orders. The court then granted the city's motion for supplemental receivership authority, appointing a receiver under Chapter 64 of the Texas Civil Practice and Remedies Code and Local Government Code § 214.003. In its order, the court determined the receiver was necessary because "Blue Window (1) failed to abate Dallas City Code violations, (2) failed to implement reasonable security measures on the properties, (3) violated the court's orders of November 20, 2020, February 3, 2021, May 3, 2021, and June 30, 2021, and (4) lacked sufficient funds to operate the property legally." Blue Window subsequently filed a motion to set aside the order, but it was later denied. Blue Window appealed arguing the court abused its discretion by appointing a receiver based on reports of crime at the properties. Rejecting this claim, the appellate court concluded that an increase in crime was not the reason for appointing a receiver. Rather, the trial court's ruling was based on Blue Window's failure over three years to comply with court orders, pay for repairs, complete necessary maintenance, and to install security cameras. As a result, the appellate court affirmed the trial court's order appointing a receiver for the properties.

Public Information Act: ***Groba v. City of Galena Park*, No. 05-21-00305-CV, 2022 WL 16549068 (Tex. App.—Dallas Oct. 31, 2022) (mem. op.).** After Mark Groba was denied a building permit and failed to receive a response after submitting a public information request for all relevant city ordinances, Groba sought a writ of mandamus compelling the city to issue his building permit and to make all city ordinances available to the public. In response, the city filed a no-evidence motion for summary judgment, which the trial court granted and Groba later

appealed. Because he failed to show his permit application complied with all the relevant laws and building codes, the appellate court upheld the grant of summary judgment as to his claim challenging the city's denial of his permit. However, the appellate court reversed the grant of summary judgment as to his claim for mandamus relief under the Texas Public Information Act (TPIA) after concluding Groba raised a genuine issue of material fact as to whether the city violated the TPIA. The court determined the city: (1) failed to show that having ordinances on "library.municode.com" excuses a city's duties to respond under the TPIA and whether the website was reliable; and (2) could have but never requested clarification or responded under Government Code § 552.222(b) to Groba's second request through his attorneys.

Nuisance: ***City of El Paso v. Varela*, No. 08-21-00116-CV, 2022 WL 14485863 (Tex. App.—El Paso Oct. 25, 2022).** Luis Varela owned a property in El Paso that had been damaged by fire. The City of El Paso through its Building and Standards Commission held a hearing, finding the structure to be a dangerous structure that constituted a health hazard, and ordering the building to be secured and remediated by Mr. Varela. This Demolition Order also ordered demolition of the structure by the city if the other requirements were not met. Ultimately, Mr. Varela failed to remediate the structure according to the order, and the city notified him of its intent to demolish the structure. Mr. Varela filed suit to enjoin the demolition, among other things, and the trial court issued a temporary restraining order ("TRO"). The city responded with a plea to the jurisdiction and a motion to dissolve the TRO. The trial court denied the city's plea, issued a TRO, ordered the city to issue a building permit to allow remediation to begin, and set a trial date. The city appealed. As a threshold issue in its appeal, the city argued that Mr. Vela failed to demonstrate that the trial court had jurisdiction over the case at all, because he failed to appeal the Demolition Order within 30 days, as required by Texas statute. Without timely appealing the underlying order, Mr. Vela's present suit was an unpermitted collateral attack on the Demolition Order, which he failed to directly appeal. Ultimately, the appellate court ruled that the trial court had no jurisdiction over the case and reversed the trial court's order.

Annexation: ***City of Patton Vill. v. Concerned Citizens Against Wrongful Annexation by Patton Vill.*, No. 09-21-00368-CV, 2022 WL 16640620 (Tex. App.—Beaumont Nov. 3, 2022.) (mem. op.).** Concerned Citizens, a coalition of property owners, sued the City of Patton Village challenging the validity of two ordinances annexing territory that included the property they now own, one from 1992 and one from 2004. Concerned Citizens argued that the ordinances were void and that the city's imposition of taxes and fees on the property constituted a constitutional and statutory taking. The city filed a plea to the jurisdiction which the trial court denied, and the city filed an interlocutory appeal.

The appellate court reversed the denial of the city's plea to the jurisdiction and rendered judgment dismissing the case. The court held that the ordinances were not void because the law does not require the territory annexed to be described by metes and bounds and that the evidence showed that, contrary to Concerned Citizens' claim, the described boundaries of the annexed territory formed a closure. Because the ordinances were not void, Concerned Citizens' claims were barred by various applicable statutes of limitation. Further, the jurisdictional evidence showed that Concerned Citizens failed to establish that the legislature waived the city's immunity on their takings claim. Finally, because none of the plaintiffs owned their property at the time the ordinances were passed, they all lacked standing to sue.

Residency: ***In re Guillott*e, No. 10-22-00331-CV, 2022 WL 10893236 (Tex. App.—Waco Oct. 18, 2022) (mem. op.).** This is a petition for writ of mandamus related to a residency issue.

Guillotte filed an application for a place on the ballot for trustee of the Coolidge Independent School District ("CISD") located in Limestone County. The secretary of the CISD board declared him ineligible to be on the ballot, asserting that he was not a resident of the CISD geographic boundaries based on testimony he had provided under oath at another public entity's meeting that he was a resident of Tarrant County and a public document indicating he had filed a homestead exemption for a property located in Tarrant County. Guillotte countered by providing a printout from the Texas Secretary of State voter registration website, which showed his address in Coolidge and that he is registered to vote in Limestone County, Texas.

The appellate court concluded that the public records that secretary referenced did not conclusively establish Guillotte's ineligibility as a candidate for the CISD Board of Trustees. Accordingly, the writ was granted, and the secretary ordered to certify Guillotte's name as a candidate in the general election.

Elections: ***In re Cnty. of Hidalgo*, No. 13-22-00510-CV, 2022 WL 14787073 (Tex. App.—Corpus Christi–Edinburg Oct. 26, 2022.)** The City of Penitas filed suit against the County of Hidalgo to stop the county from proceeding with early voting without opening the Penitas Public Library as a polling location. At an ex parte hearing, the trial court granted a temporary restraining order that ordered the county to add the public library as a polling location. The county appealed, arguing that the cause was moot and that the restraining order was deficient. The appellate court overruled the trial court, holding that (1) because the statutory deadlines for adding a polling place had passed before the city sought relief, the case was moot; and (2) the restraining order was deficient because the trial court did not explain why it was issued without notice to the county and did not adequately explain its conclusion that the city would suffer irreparable harm without the temporary restraining order.

Nuisance: ***Gaddi v. City of Tex. City*, No. 14-20-00655-CV, 2022 WL 11551168 (Tex. App.—Houston [14th Dist.] Oct. 20, 2022).** Mr. and Ms. Gaddi owned a commercial building in Texas City that was in need of repairs. The city started abatement proceedings, and ultimately Mr. Gaddi entered an agreed order in municipal court giving the Gaddis 180 days to make needed repairs. After 180 days, the city could demolish the building if the Gaddis failed to make the agreed repairs. Ms. Gaddi was not a party to the municipal court case. Ultimately, the Gaddis failed to make the repairs agreed by Mr. Gaddi within 180 days, and when Ms. Gaddi learned that the city was planning to demolish the building, she filed the present suit. She argued that while the municipal court order could be effective against Mr. Gaddi, judgment was never taken against her ownership interest in the building. She made state constitutional due process, equal protection, and takings claims, and raised issues related to impossibility of performance due to city inaction on permits as well as violations of the city's COVID-19 emergency order. The city filed a plea to the jurisdiction, including arguments that Ms. Gaddi had failed to timely appeal the court order, *res judicata*, and governmental immunity. The trial court granted the city's plea, and Ms. Gaddi appealed. Because Ms. Gaddi was not a party to the municipal court's agreed order, her suit collaterally attacking that order did not require her to appeal that order. Additionally, *res judicata* is a defense rather than a basis for a plea to the jurisdiction, and the

city failed to properly plead and argue a *res judicata* defense. Finally, the appellate court determined that the city failed to properly plead governmental immunity with regard to all Ms. Gaddi's claims and appeared to have abandoned the immunity arguments altogether in the appellate filings. Ultimately, the appellate court reversed the trial court's order and remanded the case for further proceedings.

Texas Tort Claims Act: ***City of Houston v. Junior*, No. 14-21-00128-CV, 2022 WL 15522096 (Tex. App.—Houston [14th Dist.] Oct. 27, 2022) (mem. op.).** Jimmie Lee Jones, Jr. sued the City of Houston after a vehicle he was driving was struck by a vehicle being driven by Sergeant Kim of the Houston Police Department. Sergeant Kim was planning to initiate a traffic stop on another vehicle when he drove through a red light and struck Jones's car. In response to Jones's suit, the city filed a motion for summary judgment arguing that Sergeant Kim was entitled to official immunity. The trial court denied the city's motion, and the city appealed. A government employee is entitled to official immunity for their good faith performance of discretionary duties within the scope of the employee's authority. The city failed to conclusively establish that Sergeant Kim acted in good faith given that he was focused on the car ahead of him, did not look at the traffic light as he entered the intersection, failed to activate his sirens or lights, and did not brake or slow down as he entered the intersection; therefore, the appellate court affirmed the trial court's denial of the city's motion for summary judgment.

Sexually Oriented Businesses: ***5826 Interests, Ltd. v. City of Houston*, No. 14-21-00682-CV, 2022 WL 16645503 (Tex. App.—Houston [14th Dist.] Nov. 3, 2022) (mem. op.).** 5826 Interests, Ltd. operated an unpermitted sexually oriented business ("Bunny's") at a 6213 Richmond Avenue in Houston, Texas. The city received a large number of complaints of criminal activity around the Bunny's location. After investigating Bunny's, the city filed suit seeking a declaration that no one could receive a permit to operate a sexually oriented business at that location due to its proximity to schools and churches. The city also sought a temporary restraining order against the owners from operating any business at this location. The trial court issued the TRO, and the owners appealed. The appellate court held that the trial court did not abuse its discretion when issuing the TRO and affirmed the lower court's ruling.

Tort Claims Act: ***City of Houston v. Gilbert, et al.*, No. 14-21-00604-CV, 2022 WL 16842193 (Tex. App.—Houston [14th Dist.] Nov. 10, 2022).** Two children suffered electrocution injuries while participating in a little league softball practice at a City of Houston (Houston) park. The incident was witnessed at close range by several bystanders. The representatives of the children and the bystanders sued Houston for personal injuries based on negligence and premises liability. Houston filed a plea to the jurisdiction arguing that Houston should be protected from suit by governmental immunity because (1) the claimants were licensees rather than invitees, (2) Houston had no actual knowledge of the dangerous conditions at the park, and (3) the claimants failed to establish gross negligence. The trial court denied Houston's plea, and Houston appealed. While a city is generally immune from suit when performing a governmental function, the Texas Tort Claims Act (TTCA) waives this immunity under certain circumstances. In a premises liability case, the TTCA waives immunity for a city as to personal injury if the city would have been liable for the injury if it were a private person. After analyzing the facts, the court determined that a fact question remained as to whether the children were invitees on the property, but the court determined that that one bystander was a licensee. Licensees must show

that the city (1) had actual knowledge of the dangerous situation and (2) acted with gross negligence to prevail on a premises liability claim. Because the license-bystander failed to allege facts supporting gross negligence, their claims were dismissed. With regard to the children, the trial court's denial of Houston's plea was upheld by the appellate court, and the case was remanded to the trial court for further proceedings to determine whether the children are invitees.

October 2022

Tort Claims Act: *Leach v. City of Tyler*, No. 21-0606, 2022 WL 4283082 (Tex. Sept. 16, 2022). Leondra Leach alleged that an improperly secured board flew from a city truck and struck her and the truck she was driving. Leach's employer, who owned the vehicle Leach was driving, gave timely notice to the city of the $207.19 claim for minor damage to the vehicle, but the notice did not include claims related to personal injuries suffered by Leach individually. The city moved for summary judgment based on Leach's failure to comply with the pre-suit notice requirements found in the Texas Tort Claims Act (TTCA), and the trial court granted the motion. Leach appealed. The appellate court affirmed the trail court's ruling, determining that the notice given by Leach's employer was inadequate to convey to the city its "perceived peril" due to Leach's potential claim and was therefore inadequate notice under the TTCA.

On appeal, the Supreme Court reversed and remanded, holding that: (1) the claims notice form that Leach's employer filed with city was sufficient to satisfy the TTCA pre-suit notice; (2) personal injury action constituted proper notice to city of claim brought by Leach for purposes of the TTCA; and (3) the claims notice form was sufficient to satisfy city charter provision that required notice of tort claims within 30 days.

Tort Claims Act: *The City of Arlington v. Evans*, No. 02-22-00160-CV, 2022 WL 5240524 (Tex. App.—Fort Worth Oct. 6, 2022) (mem. op.). Evans sued the city for property damage and personal injuries that he claims resulted from a collision in which his vehicle was struck by a vehicle owned by the city. The city filed a plea to the jurisdiction in which it argued that the trial court lacked subject-matter jurisdiction because Evans failed to give the city timely formal notice of his claim as required by the Texas Tort Claims Act and because the city also lacked actual awareness that Evans claimed that he was injured in the accident. The trial court denied the city's plea to the jurisdiction.

The appellate court found that Evans did not provide the city with timely notice of his claim. The court determined that Evans's evidence, which he claims should establish actual awareness of his injuries at the time of the accident or when he was later arrested by an Arlington police officer, fails to support the conclusion that the city had timely actual awareness of Evans's injury claim. Additionally, the court found that the city did not have actual, subjective awareness of Evans's personal injury claim. Thus, the court reversed the trial court's order denying the city's plea to the jurisdiction and dismissed solely the portion of Evans's suit seeking personal-injury damages. The court did not dismiss the portion of Evans's suit seeking property damages.

Annexation: *Diamond Envtl. Mgmt., L.P. v. City of San Antonio*, No. 04-21-00058-CV, 2022 WL 4359085 (Tex. App.—San Antonio Sept. 21, 2022) (mem. op.). The appellate court previously decided this case but withdrew its prior opinion and adopted this one. In 2013, the city entered into a development agreement with Diamond for Diamond to delay annexation. In 2019, the city: (1) notified Diamond that it had breached the agreement; (2) notified the relevant emergency services districts that also served Diamond's property; and (3) passed an ordinance to annex Diamond's property. The emergency services districts and Diamond sued the city, and the city filed a plea to the jurisdiction, which the trial court granted.

In affirming the grant of the plea, the appellate court: (1) found Diamond lacked standing; (2) found that the city's pre-annexation notice to the emergency services district satisfied the statute's requirements; (3) rejected the emergency services districts' argument that the development agreement or the ordinance created a permit because the ordinance is exempted from the state law governing permits and the development agreements did not freeze any land use regulations; (4) rejected the argument that even if the landowners breached the development agreements, the development agreements are void because the city failed to offer development agreements in compliance with state law; and (5) rejected the emergency services districts' argument that the Uniform Declaratory Judgment Act waived the city's immunity.

Nuisance Abatement: *Shannon v. Blair*, No. 04-21-00257-CV, 2022 WL 4492801 (Tex. App.—San Antonio Sept. 28, 2022) (mem. op.). The plaintiff sued the city in a class action seeking a declaratory judgment that the city's ordinance requiring property owners to keep their properties and abutting alleys free of garbage and overgrown brush was invalid and that she is not an "owner" of the alley. The city filed a plea to the jurisdiction on the grounds of governmental immunity and lack of standing, which the trial court denied. The city appealed.

In reversing the trial court, the appellate court found that: (1) the city did not provide sufficient evidence to show that the plaintiff did not have standing; (2) the city did not provide sufficient evidence that the claim was unripe; (3) the city's broad discretion in enforcement of its ordinance was protected by governmental immunity against the plaintiff's declaratory claim based on ultra vires actions of sending notices that it may enforce its ordinance requiring maintenance of the alleys; and (4) the plaintiff's claims that she is not the owner of the alley was a restatement of her other ultra vires claim against the city and the city maintained its governmental immunity. The appellate court denied the plaintiff's request to replead because the city would be entitled to governmental immunity even if plaintiff was given the opportunity.

Tort Claims Act: *City of Dallas v. Monroy*, No. 05-22-00012-CV, 2022 WL 4363836 (Tex. App.—Dallas Sept. 21, 2022) (mem. op.) Marco Anthony Monroy sued the city of Dallas after sustaining an injury while walking on a city sidewalk. His claim alleged his injury was caused by a hazardous condition that was a special defect, or alternatively, a premise defect. In response, the city filed a plea to the jurisdiction asserting immunity under the Texas Tort Claims Act (TTCA). After the trial court denied the city's plea, the city appealed the ruling on the grounds that Monroy was a licensee and the city had no prior knowledge of the dangerous condition and that the alleged hazardous conditions were not special defects. Reversing the trial court order denying the city's plea to the jurisdiction, the appellate court reasoned that the conditions—the raised concrete lip and hole on one side of the sidewalk—were not special defects akin to excavations or obstructions

contemplated by the TTCA. In addition, Monroy failed to show any evidence the city had actual knowledge of the sidewalk's alleged dangerous condition at the time of his injury. In reversing the order, the appellate court also remanded the case to the trial court to consider Monroy's request for a continuance that had not been addressed at the city's plea to the jurisdiction hearing before the court ruled in his favor.

Tort Claims Act: *Varner v. City of Andrews*, No. 08-20-00072-CV, 2022 WL 4538877 (Tex. App.—El Paso Sept. 28, 2022). Jessica Varner was attacked by a pack of dogs while out for a walk in the City of Andrews. After being released from the hospital, she met with city officials and gave a written statement about the attack to the Andrews Police Department. Just shy of the second anniversary of the attack, Varner sued the city claiming that she was attacked, in part, because the city was not following its own animal control ordinances. The city filed a plea to the jurisdiction arguing governmental immunity, which the trial court granted, making several findings, including that Varner (1) failed to give the city notice of the claim as required by the city's charter, and (2) failed to plead facts sufficient to show the city waived its governmental immunity. Varner appealed.

A city is generally immune from suit for tort claims, but the Texas Tort Claims Act (TTCA) provides a waiver of this immunity under certain circumstances. One statutory prerequisite for waiver is that the plaintiff must give the city written notice of the claim within six months of the underlying incident. This statutory notice is in addition to any notice requirements found in the city's charter or ordinances, and the City of Andrews actually has a shorter 90-day notice period. The pleadings in this case show that formal notice was not given to the city until the day the complaint was filed in court – nearly two years after the attack. Varner argues that the city had actual notice of the incident due to her discussions of the incident with city officials, but the appellate court held that these discussions did not satisfy the notice requirements. Because proper notice is a prerequisite to suit, the court did not address any other issues on appeal and affirmed the lower court's ruling.

Tort Claims Act: *Cameron Cnty. v. Sossi*, No. 13-21-00180-CV, 2022 WL 4374994 (Tex. App.—Corpus Christi–Edinburg Sept. 22, 2022) (mem. op.). Sossi filed suit against Cameron County for personal injury and property damage arising from a crash that occurred when a county ranger driving in the bicycle lane struck his vehicle as he was turning left. The county filed a plea to the jurisdiction, claiming governmental immunity under the emergency-response exception to the Texas Tort Claims Act or official immunity. The trial court denied the plea and the county appealed.

The appellate court reversed and rendered, holding that the county was entitled to governmental immunity because the ranger was entitled to official immunity.

September 2022

Governmental Immunity: *City of Pasadena v. APTVV, LLC*, No. 01-20-00287-CV, 2022 WL 3268533 (Tex. App.—Houston [1st Dist.] Aug. 11, 2022) (mem. op.). The owners of two apartment complexes sued the City of Pasadena, claiming that certain fees charged in association with an exclusive waste management contract with a third party were excessive and amounted to

an illegal tax. The city filed a plea to the jurisdiction, claiming governmental immunity from suit, and the trial court denied the plea. The appellate court affirmed, holding that governmental immunity is not available for a suit that alleges an unconstitutional tax.

Tort Claims Act: *City of Houston v. Denby*, No. 01-21-00422-CV, 2022 WL 3588753 (Tex. App.—Houston [1st Dist.] Aug. 23, 2022) (mem. op.). Denby sued the City of Houston for wrongful death after his mother suffered fatal injuries when EMTs dropped the stretcher on which she was being transported. The city filed a plea to the jurisdiction, claiming governmental immunity, and the trial court denied the plea. The city appealed.

The appellate court reversed, holding that Denby's claim fell under the emergency services exception to the TTCA and therefore the city's governmental immunity was not waived.

Pensions: *City of Houston v. Houston Firefighters' Relief & Ret. Fund*, No. 01-20-00710-CV, 2022 WL 3722140 (Tex. App.—Houston [1st Dist.] Aug. 30, 2022). The Houston Firefighters' Relief and Retirement Fund sued the City of Houston for a declaratory judgment that S.B. 2190, a 2017 legislative amendment to the statute that created and governs the Fund, violated the Texas Constitution. The legislation provided certain actuarial assumptions and processes for calculating the contributions required from the city and from the Fund, and the Fund claimed that the legislation was unconstitutional as applied because the Constitution grants exclusive jurisdiction over those actuarial methods to the Fund's board of directors.

The city filed a plea to the jurisdiction, claiming that governmental immunity was not waived because although the city is not entitled to governmental immunity from a suit to declare a statute unconstitutional, the Fund had not stated a facially valid constitutional claim. Both parties filed a motion for summary judgment. The trial court denied the city's plea, denied the city's motion for summary judgment, and granted the Fund's motion for summary judgment.

The appellate court reversed, holding that the provision in Article XVI, Section 67(f) that states that the board "shall ... select ... an actuary and adopt sound actuarial assumptions to be used by the system or program…" does not provide the board exclusive jurisdiction over the process used to calculate the contributions. Therefore, the Fund's claim was not a facially valid constitutional challenge and the city's governmental immunity was not waived.

Tort Claims Act: *City of Houston, Appellant v. Branch, Appellee*, No. 01-21-00255-CV, 2022 WL 3970208 (Tex. App.—Houston [1st Dist.] Sept. 1, 2022.) (mem. op.). Branch sued the City of Houston after he was injured when a privately owned golf cart used to transport a Houston city council member moved forward unexpectedly while it was parked and struck him. Branch claimed that governmental immunity was waived under the TTCA because the council member's failure to engage the emergency brake or ensure the golf cart did not move constitute the negligent operation of a motor vehicle. The city moved for summary judgment, claiming governmental immunity, and the trial court denied the motion.

The appellate court reversed, holding that: (1) the waiver of immunity for claims arising from the negligent operation of a motor vehicle does not extend to privately owned vehicles; and (2) the

motor vehicle exception did not apply because by sitting in the passenger seat, the council member was not "operating" the golf cart at the time of the accident.

Contracts: *Merrell v. City of Sealy*, No. 01-21-00347-CV, 2022 WL 3970078 (Tex. App.—Houston [1st Dist.] Sept. 1, 2022) (mem. op.). After resigning as city manager from the City of Sealy, Merrell sued the city, claiming that that the actions of the city council and mayor amounted to a termination, which entitled Merrell to certain benefits under the contract governing his service as city manager. The city filed a plea to the jurisdiction claiming governmental immunity and a Rule 91a motion to dismiss. The trial court granted both the plea and the motion, and Merrell appealed.

The trial court affirmed, holding that: (1) governmental immunity was not waived for Merrell's breach of contract claim because his resignation was voluntary and therefore he could not show that there was a balance due and owed to him under the contract; (2) Merrell's claim for declaratory relief was not cognizable because it was simply a recharacterization of his breach of contract claim; and (3) the facts alleged by Merrell did not assert an ultra vires claim.

Tort Claims Act: *Valdez v. City of Houston*, No. 01-21-00070-CV, 2022 WL 3970066 (Tex. App.—Houston [1st Dist.] Sept. 1, 2022) (mem. op.). Valdez sued the City of Houston for negligence after an unmarked police car driven by Houston police officer Martinez struck his vehicle from the rear. The city filed a motion for summary judgment, claiming governmental immunity. The trail court granted the city's motion, and Valdez appealed.

The appellate court affirmed, holding that because in listening to the police radio while driving home after having finished work, Officer Martinez was not acting within the scope of her employment, and therefore the TTCA's limited waiver of immunity was not triggered.

Employment: *City of Denton v. Grim*, No. 05-20-00945-CV, 2022 WL 3714517 (Tex. App.—Dallas Aug. 29, 2022) (mem. op.) Michael Grim and Jim Maynard sued the city of Denton on claims arising under the Texas Whistleblower Act after being terminated in retaliation for reporting Open Meetings Act (TOMA) and Public Information Act (TPIA) violations to the city attorney that related to the release of confidential information by a councilmember. After a jury rendered a verdict in favor of Grim and Maynard and the court entered a final judgment against the city, the city moved for a new trial on the grounds that evidence presented at trial was legally and factually insufficient to support the jury's findings. The trial court denied the city's motion for a new trial, and the city appealed, raising four issues including: (1) that the Whistleblower Act does not apply as a matter of law because the reported violation was committed by a councilmember acting in a personal capacity who is not the employing governmental entity; (2) the evidence did not support the findings that Grim's and Maynard's reports caused their terminations; (3) Grim and Maynard did not have a good faith belief the conduct they reported was a violation of law; and (4) the reporting should have been made to an appropriate law enforcement authority rather than the city attorney.

In affirming the denial, the appellate court concluded: (1) the councilmember's actions, from the record, related to public interest and were not purely personal; (2) a reasonable jury could have determined Grim and Maynard had a good faith belief the councilmember violated the TOMA

and TPIA by disclosing confidential competitive public power utility information to the Denton Record-Chronicle newspaper; and (3) that although the terminations occurred ten months after reporting the incident, once the makeup of the city council changed in line with the councilmember who was reported, Grim and Maynard were treated differently than other similarly situated employees and their terminations would not have occurred but for their reporting the councilmember. Because the issue was not properly preserved, the court declined to decide the city's issue on whether the city attorney was "an appropriate law enforcement authority" for purposes of the Whistleblower Act. As a result, the appellate court affirmed the trial court's judgment.

Substandard Buildings: ***Laza v. City of Palestine*****, No. 06-18-00051-CV, 2022 WL 3449819 (Tex. App.—Texarkana Aug. 18, 2022) (mem. op.).** The city sued Laza for violating various city ordinances, including substandard building and junked vehicle ordinances, and a jury found in favor of the city. Laza appealed pro se. The appellate court affirmed the trial court's and jury's findings and rejected Laza's arguments because: (1) the trial court had jurisdiction to enter judgment and post-judgment orders; (2) the trial court did not err in denying Laza's Rule 12 motion to show authority; (3) Laza procedurally waived any complaints regarding the trial court's denial of his special exceptions; (4) Laza failed to preserve his claimed jury charge error; (5) the motion to recuse was properly denied; and (6) there was no basis on which to vacate the judgment.

Wastewater Treatment Permits: ***City of Schertz v. Tex. Comm'n on Envtl. Quality*****, No. 07-20-00167-CV, 2022 WL 3708134 (Tex. App.—Amarillo Aug. 26, 2022).** This case involves a dispute over a permit for a wastewater treatment plant. The city and Cibolo Creek Municipal Authority (CCMA) opposed a Texas Pollutant Discharge Elimination System (TPDES) permit for a wastewater treatment facility by Green Valley at the Texas Commission on Environmental Quality (TCEQ) on the grounds that the plant was located within CCMA's exclusive regional area. After an administrative hearing, TCEQ granted Green Valley's TPDES permit and the district court affirmed.

The appellate court affirmed the grant of the TPDES permit, finding: (1) CCMA and the city made no argument about how their substantial rights had been violated by TCEQ's findings and conclusions; (2) the Commission did not err by concluding that Green Valley's proposed discharge point was not within the CCMA's regional area because the regional area includes all of the listed cities and the air force base, not just one city in the area; and (3) TCEQ did not violate its policy promoting regionalization of waste treatment in Texas because the policy presumes it's met if there is not an existing plant within three miles of a proposed plant, and the Green Valley plant is more than five miles from CCMA's proposed plant.

Immunity: ***Sai Monahans Brother Hosp., LLC v. Monahans Econ. Dev. Corp.*****, No. 08-21-00060-CV, 2022 WL 3646957 (Tex. App.—El Paso Aug. 24, 2022).** The Monahans Economic Development Corporation (MEDC) sold property to Sai Monahans Brother Hospitality, LLC (Sai) for $280,000. The deed contained an option contract giving the MEDC the option to repurchase the property for $280,000 if Sai failed to meet several development and construction deadlines. Sai failed to meet the deadlines, and the MEDC notified Sai that it was exercising its repurchase option. Sai sued the MEDC and the City of Monahans (Monahans) asserting numerous claims

basically seeking a declaration that it would be unjust and unfair to enforce the terms of the deed and the option contract. Monahans and the MEDC filed a plea to the jurisdiction with the city claiming governmental immunity and the MEDC claiming "derivative immunity." Subject to its plea to the jurisdiction, the MEDC also countersued Sai for specific performance of the option contract. The trial court granted the pleas, and Sai appealed. Generally, a city is shielded from lawsuit by governmental immunity when performing governmental functions, unless that immunity has been waived by statute or the constitution. In this case, no allegations were made that the Monahans was a party to any of the agreements between Sai and MEDC; furthermore, Sai failed to allege any action on the part of the city that would overcome the city's governmental immunity. Consequently, the appellate court upheld the trial court's grant of Monahans's plea, subject to Sai's ability to replead facts related to jurisdiction. The appellate court, however, reversed the trial court with regard to the MEDC's "derivative immunity" plea. The MEDC is not a political subdivision, so it does not automatically enjoy the same governmental immunity protections as a city. That said, MEDC made a fairly novel argument that it should be protected by "derivative immunity," a legal theory that has never existed in Texas. Under a "derivative immunity" theory, MEDC argued that because it acts on behalf of the city, Monahan's governmental immunity should extend to the MEDC. Ultimately, the level of control Monahans exerts over the MEDC was not sufficient to entitle the MEDC to derivative immunity, and the appellate court overruled the trial court's grant of the MEDC's plea to the jurisdiction.

Ordinances: *City of Port Arthur v. Thomas*, No. 09-21-00111-CV, 2022 WL 3868106 (Tex. App.—Beaumont Aug. 31, 2022). Thomas sued the City of Port Arthur to enjoin enforcement of two ordinances that prevented heavy trucks from accessing the service Thomas provided on his property, which was the disposal of water-based drilling mud. Thomas claimed tortious interference with his business, violations of the Equal Protection Clause, and regulatory taking. Thomas claimed that the city's actions were ultra vires because the ordinances were preempted by Section 81.0523, Natural Resources Code, which provides the state with exclusive jurisdiction over certain oil and gas operations. The city filed a plea to the jurisdiction claiming governmental immunity. The trial court denied the city's plea and the city appealed.

The appellate court held that: (1) fact issues existed as to whether the city's actions were ultra vires and affirmed the trial court's denial of the city's plea to the jurisdiction claiming governmental immunity; and (2) Thomas's claim under the UDJA for a declaratory judgment against the city and his claims against the city for alleged Equal Protection Clause violations, inverse condemnation, and regulatory takings were barred by governmental immunity.

Governmental Immunity: *Weatherford Int'l, LLC v. City of Midland*, No. 11-20-00255-CV, 2022 WL 3904001 (Tex. App.—Eastland Aug. 31, 2022). Weatherford International, LLC and Weatherford U.S., L.P. (Weatherford) sued the city of Midland, seeking contribution under the Solid Waste Disposal Act (SWDA) for "past and future response costs incurred to remediate the contamination of well water" on Weatherford's property. The city subsequently filed a plea to the jurisdiction based on governmental immunity and the trial court granted the motion. Weatherford appealed, arguing the SWDA waives the city's governmental immunity, and, therefore, the trial court erred when granting the city's plea to the jurisdiction and dismissing its cost-recovery claims for lack of subject matter jurisdiction. However, because the language under the SWDA is unambiguous and the cost-recovery provision is only applicable when a

governmental entity is responsible for the solid waste, the court affirmed the trial court's order reasoning that the claims were not as a result of the city's disposal of solid waste, but instead were limited to the city's operation of a domestic sewer system that "collects domestic sewage for conveyance and subsequent treatment."

Inverse Condemnation: *Pate v. City of Rusk*, No. 12-22-00118-CV, 2022 WL 3754714 (Tex. App.—Tyler Aug. 30, 2022). Pate was hired to demolish a residential structure, and as part of the consideration for this work he was entitled to receive any building materials he was able to salvage. Pate received a demolition permit from the City of Rusk (Rusk) and began demolishing the building and salvaging materials. A few months later, with the demolition still unfinished, Rusk sent a crew to complete the work and dispose of the building materials. Rusk then sent Pate an invoice for the cost of demolition. Pate sued Rusk for a taking and a declaratory judgment that he was not liable for the cost of demolition, and Rusk filed a plea to the jurisdiction. The trial court granted Rusk's plea and dismissed all Pate's claims, and Pate appealed. The Texas Constitution contains an unambiguous waiver of governmental immunity from suit for inverse condemnation or takings claims. In this case, Rusk argued that Pate did not properly state a takings claim, because he was not the owner of the property at issue (the salvaged building materials) and therefore lacks standing to bring an inverse condemnation case. To have standing, a party must have a vested right to the property at issue at the time of the alleged taking.

The appellate court analyzed when Pate would have been entitled to salvage the property, ultimately reversing the trial court's dismissal of Pate's takings claims and allowing for further proceedings in the trial court to clarify any jurisdictional questions. The appellate court affirmed the trial court's dismissal of Pate's declaratory judgment claims against Rusk, because he had failed to exhaust all administrative remedies before petitioning the court.

Contracts: *Tex. Mun. League Intergovernmental Risk Pool v. City of Hidalgo*, No. 13-22-00250-CV, 2022 WL 3651986 (Tex. App.—Corpus Christi–Edinburg Aug. 25, 2022) (mem. op.). The City of Hidalgo sued the Texas Municipal League Intergovernmental Risk Pool for the denial of a claim for property damage arising from a hurricane. The Risk Pool filed a plea to the jurisdiction, claiming that governmental immunity was not waived under Chapter 271 of the Local Government Code because by failing to file suit in Travis County as the insurance contract between the parties required, the city had not abided by the adjudicative processes as required by Chapter 271. The trial court denied the Risk Pool's plea and the Risk Pool appealed.

The appellate court affirmed, holding that the contract's requirement that a party sue in a particular county in Texas was a venue selection clause rather than a forum selection clause and therefore unenforceable.

Contracts*: City of Weslaco v. De Leon*, No. 13-20-00561-CV, 2022 WL 3652501 (Tex. App.—Corpus Christi–Edinburg Aug. 25, 2022) (mem. op.). De Leon sued the City of Weslaco for breach of contract after the city's termination of De Leon's lease of an airport hangar. The city filed a plea to the jurisdiction claiming immunity from suit, and the trial court denied the plea. The city appealed.

The appellate court reversed and rendered, holding that: (1) a lease is not a contract for goods and services, so the waiver of immunity in Chapter 271, Local Government Code, did not apply; (2) the airport director's actions in filing trespass charges against De Leon were not ultra vires; and (3) the city's defensive declaratory judgment claim did not operate to waive the city's immunity to suit.

Tort Claims Act: *City of Houston v. Arellano*, No. 14-21-00117-CV, 2022 WL 3268152 (Tex. App.—Houston [14th Dist.] August 11, 2022). Roberto Arellano sued the City of Houston (Houston) for personal injuries sustained when the vehicle he was travelling in was struck by a Houston employee driving to a fire station to perform HVAC repairs. Houston filed a motion for summary judgment asserting immunity to the claims, which was denied by the trial court. Houston appealed. Generally, cities are protected by governmental immunity from personal injury lawsuits. The Texas Tort Claims Act (TTCA) provides a limited waiver of immunity for damages arising from the operation of a motor-driven vehicle. In this case, Houston first argued its employee was not acting within the scope of his employment rendering the TTCA waiver of immunity ineffective. Because the employee had already clocked in, swapped his personal vehicle for a city vehicle and was responding to the call for service when the collision occurred, the court held that the employee was acting within the scope of his employment and rejected Houston's argument. Additionally, the TTCA has an "emergency exception" which can negate the TTCA waiver of immunity for damages that occur when an employee is responding to an emergency call. After analyzing the facts surrounding the need for the HVAC service, the court ruled that the emergency exception did not apply and ultimately affirmed the trial court's denial of Houston's motion for summary judgment.

Tort Claims Act: *City of Houston v. Gilbert, et al.,* No. 14-21-00604-CV, 2022 WL 3589179 (Tex. App.—Houston [14th Dist.] August 23, 2022). Two children suffered electrocution injuries while participating in a little league softball practice at a City of Houston (Houston) park. The incident was witnessed at close range by several bystanders. The representatives of the children and the bystanders sued Houston for personal injuries based on negligence and premises liability. Houston filed a plea to the jurisdiction arguing that Houston should be protected from suit by governmental immunity because (1) the claimants were licensees rather than invitees, and (2) Houston had no actual knowledge of the dangerous conditions at the park, and (3) the claimants failed to establish gross negligence. The trial court denied Houston's plea, and Houston appealed. While a city is generally immune from suit when performing a governmental function, the Texas Tort Claims Act (TTCA) waives this immunity under certain circumstances. In a premises liability case, the TTCA waives immunity for a city as to personal injury if the city would have been liable for the injury if it were a private person. After analyzing the facts, the court determined that the children were invitees on the property but that one bystander was a licensee. Licensees must show that the city acted with gross negligence to prevail on a premises liability claim, and because the licensee bystander failed to allege facts supporting gross negligence, their claims were dismissed. With regard to the invitee children, the trial court's denial of Houston's plea was upheld by the appellate court, because there was evidence that Houston had actual knowledge of the dangerous condition and failed to correct it or warn the invitees of its existence. The case was remanded to the trial court for further proceedings.

Tort Claims Act: *Krause v. Mayes*, No. 14-21-00656-CV, 2022 WL 2589270 (Tex. App.—Houston [14th Dist.] August 23, 2022). Kenneth Mayes sued the City of Houston (Houston) and Houston police officer Bradley Krause for personal injuries sustained when the vehicle he was travelling in struck Krause's police car, which was performing an unexpected U-turn. The Texas Tort Claims Act (TTCA) contains an election of remedies section that bars recovery against an employee when the employer city is sued on the same basis. Following this section of the TTCA, Houston filed a motion to dismiss its employee Krause from the suit. In his response to Houston's motion to dismiss, Mayes non-suited the city. Krause then filed a motion to dismiss the claims against him based on the election of remedies in the TTCA, but the trial court denied Krause's. Krause appealed. The TTCA is clear in its language, and the Texas Supreme Court has been equally clear in its interpretation: the election of remedies under the TTCA is irrevocable. In this case, by suing both Houston and Krause, Mayes made an irrevocable election under the TTCA to pursue a vicarious liability theory against Houston, and Houston's motion to dismiss Krause from the lawsuit triggered Krause's right to be dismissed, regardless of Mayes' later non-suiting of Houston. The appellate court reversed the lower court's denial of Krause's motion to dismiss and remanded the case back to the trial court for further proceedings.

Tort Claims Act; *City of Houston v. Breckenridge*, No. 14-21-00086-CV, 2022 WL 4103202 (Tex. App.—Houston [14th Dist.] September 8, 2022) (mem. op.). Christyn Breckenridge sued the City of Houston (Houston) for personal injuries sustained when she fell into a water utility hole in downtown Houston. Houston filed motions for summary judgment (MSJs) asserting immunity from the claims, which were denied by the trial court after significant back-and-forth pleading between the parties. Houston appealed. Generally, cities are protected by governmental immunity from personal injury lawsuits. In some cases, the Texas Tort Claims Act (TTCA) provides a limited waiver of governmental immunity for damages arising from premises defects. The TTCA provides different standards for "ordinary" defects and "special" defects. For an ordinary defect, a city owes a duty that a private person owes a licensee: not to injure the licensee by willful, wanton or grossly negligent conduct and to use ordinary care to warn the licensee of a dangerous condition of which the city has actual knowledge. For a special defect, the city would have the same duties a private landowner would have to an invitee, i.e, to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a condition of which the owner should be aware. The appellate court determined that the hole in the sidewalk was a special defect, because it posed an unexpected and unusual danger to ordinary users of the sidewalk; therefore, Houston had a duty to warn pedestrians of the danger. A question of fact exists regarding whether Houston provided sufficient warning; therefore, the trial court's denial of Houston's MSJ was affirmed. Houston also argued that because a Houston employee had placed a cone in the hole, that that employee's official immunity from suit would extend to the city. In some cases, an employee's official immunity can shield a city from liability, but not in the case of a premises defect. Ultimately, the court affirmed the trial court's denial of Houston's MSJs.

Tort Claims Act: *City of Houston v. Rodriguez*, No. 14-21-00107-CV, 2022 WL 4100042 (Tex. App.—Houston [14th Dist.] September 8, 2022). Ruben Rodriguez and Frederick Okon sued the City of Houston (Houston) for personal injuries sustained when the vehicle they were travelling in was struck by a Houston police officer who was engaged in a high-speed vehicle pursuit. Houston filed a motion for summary judgment asserting immunity to the claims, which

was denied by the trial court. Houston appealed. Generally, cities are protected by governmental immunity from personal injury lawsuits. Additionally, a governmental employee is entitled to official immunity for (1) performance of discretionary duties, (2) within the scope of the employee's authority, (3) if the employee is acting in good faith. Governmental and official immunity can be constitutionally or statutorily waived. Under certain circumstances, the Texas Tort Claims Act provides a limited waiver of immunity for damages arising from the operation of a motor-driven vehicle. In a police pursuit the officer acts in good faith if a reasonably prudent officer in similar circumstances could have believed that the need for the officer's actions outweighed a clear risk of harm to the public from those actions. After analyzing the instant fact pattern against good faith and risk factors, the court found that the need to engage in the high-speed pursuit was not reasonable in light of the risk to the public and upheld the trial court's ruling.

August 2022.

Employment: *Pruett v. City of Galena Park*, No. 01-20-00521-CV, 2022 WL 2673238 (Tex. App.—Houston [1st Dist.] July 12, 2022) (mem. op.). Pruett, a long-time employee of the City of Galena Park, sought severance pay after he resigned his position, relying on a 2015 city ordinance that provided for severance benefits to certain long-term employees. The city filed a motion for summary judgment, arguing that the ordinance did not by itself create a contract for severance pay. The trial court granted the city's motion and Pruett appealed.

The appellate court affirmed, agreeing with the trial court that the ordinance did not entitle an employee to severance benefits, but instead required a separate agreement between the city and an employee. Because the agreement between Pruett and the city was void and unenforceable, Pruett was not entitled to severance benefits.

Contracts: *A Status Constr. LLC v. City of Bellaire*, No. 01-21-00326-CV, 2022 WL 2919934 (Tex. App.—Houston [1st Dist.] July 26, 2022) (mem. op.). The City of Bellaire hired A Status Construction to repair and improve two city streets. After delays caused by faulty engineering reports provided by the city, A Status sued for damages under the Local Government Contract Claims Act. The city filed a plea to the jurisdiction, claiming governmental immunity and the trial court granted the plea. A Status appealed.

The appellate court reversed and remanded the case for further proceedings, holding that: (1) because A Status had alleged a breach of contract and was suing for damages under the contract, the LGCCA waived the city's immunity to suit; (2) A Status's claim under the Prompt Payment of Claims Act was not barred because although the act does not waive immunity to suit, it does waive immunity to liability; and (3) even though the city provided faulty engineering reports before the contract took effect, the claim sounds in contract rather than tort.

Tort Claims Act: *City of Houston v. Musyimi*, No. 01-21-00670-CV, 2022 WL 2919724 (Tex. App.—Houston [1st Dist.] July 26, 2022) (mem. op.). Musiyimi sued the City of Houston for personal injury after a city police cruiser struck the vehicle he was driving was struck from behind. The city filed a plea to the jurisdiction, claiming that because Musiyimi had not complied with the

notice requirements of Section 101.101 of the Texas Tort Claims Act, governmental immunity had not been waived. The trial court denied the city's motion and the city appealed.

The appellate court reversed and rendered judgment in favor the city, holding that: (1) because Musiyimi did not provide formal notice by the deadline provided in the TTCA, the city would have had to have actual notice of his personal injury claim for governmental immunity to be waived under the act; (2) the city's knowledge of Musiyimi's property damage claim was not sufficient to constitute actual notice of his personal injury claim.

Tort Claims Act: *City of Houston v. Villafuerte*, No. 01-21-00517-CV, 2022 WL 2976233 (Tex. App.—Houston [1st Dist.] July 28, 2022) (mem. op.). The Villafuertes sued the City of Houston for injuries they received during a four-car pileup that occurred after an ambulance driven by a city employee struck another vehicle. The Villafuertes did not provide their formal notice until after the 90-day notice period required by the city charter and the Texas Tort Claims Act. The city moved for summary judgment, claiming that governmental immunity was not waived because the Villafuertes had not complied with the requirements of Section 101.101 of the TTCA and the city did not have actual notice of the Villafuertes' injuries. The trial court denied summary judgment and the city appealed.

The appellate court reversed and rendered judgment in favor of the city, holding that: (1) the time to serve the city with notice under the charter and the TTCA began to run at the time the injury occurred, not at the time the plaintiff sought treatment for the injury; (2) the Villafuertes' statement to the ambulance driver that they were injured did not constitute actual notice in the absence of evidence that the driver was an agent or representative of the city with a duty to investigate; and (3) the city's knowledge of the Villafuertes' property damage claim was not sufficient to constitute actual notice of their personal injury claim.

Inverse Condemnation: *Prestonwood Estates W. Homeowners Ass'n v. City of Arlington*, No. 02-21-00362-CV, 2022 WL 3097374 (Tex. App.—Fort Worth Aug. 4, 2022) (mem. op.). This case stems from an inverse condemnation and tort claims act suit for an intentional breach of a dam by the city pursuant to a local disaster declaration.

A homeowners association and its members (collectively, Homeowners) sued the city for inverse condemnation and under the Texas Tort Claims Act (TTCA) for an intentional breach by the city of the Prestonwood Lake Dam and alleged resulting damage to residential lots along Prestonwood Lake, which is upstream from the dam. The breach was pursuant to a mayoral emergency order issued in response to severe weather and flooding that threatened injury and property damage due to the possibility of a dam breach on Prestonwood Lake. The city filed a plea to the jurisdiction, arguing that the Homeowners had failed to plead and cannot establish facts to support a viable takings claim because: (1) the city's breaching the dam was an exercise of its police and emergency powers under the "doctrine of necessity" and was thus not a taking for public use under the city's eminent-domain authority; (2) the city lacked the requisite intent; and (3) the city's actions did not proximately cause the Homeowners' damages. The trial court granted the plea, and the Homeowners appealed.

The appellate court determined that: (1) it was improper for the city to raise the "necessity doctrine" in its jurisdictional plea because it is a defense that the city must prove; (2) the Homeowners pled sufficient facts to allege that when the city intentionally breached the damage, it knew that the damage to the Homeowners' property was substantially certain to result from the act; and (3) the Homeowners did not plead sufficient facts to allege that the city's deliberately breaching the dam was the cause in fact of their damages. Accordingly, the court reversed the trial court's order with the exception of proximate causation, and remanded to the trail court to allow the Homeowners the opportunity to replead.

Declaratory Judgment: *City of Conroe v. Attorney Gen. of Tex*., No. 03-21-00137-CV, 2022 WL 2898445 (Tex. App.—Austin July 22, 2022). The San Jacinto River Authority (SJRA) had contracts to sell water to the cities of Conroe, Magnolia, and Splendora (the cities) and used the proceeds from those contracts to pay off its bonds. The contracts were the result of a groundwater reduction plan initiated by the legislature called Lone Star, which required groundwater-usage cutbacks by large-volume groundwater users. After the cutbacks took effect, cities challenged them as unconstitutional and outside the scope of Lone Star's statutory authority. They adopted resolutions accusing SJRA of overcharging for water in violation of the contract, questioning the SJRA's authority to set rates and the rate order, and refusing to make payments to SJRA under the contract. In response, the SJRA sought declaratory judgments under Texas Government Code Sections 1205.001-.151, the Expedited Declaratory Judgment Act (EDJA), which allows issuers of bonds and other public securities to resolve disputes in an expedited manner. After the district court rendered judgment in favor of SJRA, the cities appealed the order arguing the court lacked jurisdiction to make the requested declarations because "SJRA's claims did not seek declarations as to the 'legality and validity' of a 'public security authorization,' but instead sought to litigate what were essentially suits on contracts and were, therefore, beyond the scope of the EDJA." On appeal, the court of appeals affirmed that the groundwater reduction plan contracts were legally and validly executed by SJRA, but denied SJRA's declaratory relief claim that SJRA has contractual authority to issue rate orders because declaratory judgments under the EDJA are limited to the legality and validity of a contract as a matter of law, not conclusions about the meaning or general effect of any of the contract terms.

Jurisdiction: *Ryerson v. City of Plano*, No. 05-21-00344-CV, 2022 WL 2680613 (Tex. App.—Dallas July 12, 2022) (mem. op.). After the city of Plano seized Helen Ryerson's pets and a municipal court judge denied her motion for redemption of the impounded animals divesting her interest in them, she appealed the decision to the county court at law, which affirmed the municipal court's order. In her appeal, among other arguments, she claimed the municipal court lacked jurisdiction over the dispute, and the county court at law, by failing to state the reasons for his ruling against her, violated Government Code Section 30.00014(a). The court of appeals concluded that because the city had an ordinance addressing animals, which it took judicial notice of, the municipal court of record of the city of Plano possessed jurisdiction pursuant to Government Code Sec. 30.00005(d)(2). However, because Government Code Section 30.00014(a) does require the county court to "set forth the reasons for its decision" and did not, the court reversed the judgment and remanded the case to the trial court.

Special Use Permits: *City of Dallas v. Trinity E. Energy, LLC*, No. 05-20-00550-CV, 2022 WL 3030995 (Tex. App.—Dallas Aug. 1, 2022) (mem. op.). The city of Dallas appealed a judgment

that awarded Trinity East Energy damages as a result of the city failing to approve special use permits (SUPs) necessary for drilling gas wells in the city resulting in a regulatory taking of its rights to produce minerals under oil and gas leases within the city. The city argued the evidence at trial was insufficient to support a finding of a regulatory taking because although the city denied Trinity's SUPs, this did not deprive Trinity of all beneficial use of its property as it had other drill sites from which it could have accessed. In addition, Trinity could have drilled on sites that it already had SUPs for or sought SUPs for other sites within the city. However, the court of appeals affirmed the trial court's judgment reasoning that the evidence presented could have led a factfinder to reasonably believe that none of the other drill sites were viable or feasible for economically developing Trinity's mineral property. In addition, the court concluded the evidence supported the jury's finding of the fair market value of Trinity's property before and after the denial of the SUPs.

Tort Claims Act: *City of El Paso v. Pina*, No. 08-20-00159-CV, 2022 WL 3161947 (Tex. App.—El Paso Aug. 8, 2022). Maria Pina sued the City of El Paso (El Paso) alleging she sustained personal injuries when an automatic gate on city property closed on her vehicle as she was attempting to drive through. El Paso filed a plea to the jurisdiction based on sovereign immunity, which was denied by the trial court. El Paso appealed. Texas cities enjoy immunity from liability and lawsuit for personal injuries unless immunity has waived by statute. The Texas Tort Claims Act contains immunity waivers for premises liability cases where a claimant can prove that the city acted with (1) willful, wanton or grossly negligent conduct, or (2) had actual knowledge of an unreasonably dangerous condition and failed to either correct the condition or warn the claimant of the condition. In this case, Ms. Pina failed to provide evidence that the automatic gate created an unreasonably dangerous condition, so the appellate court reversed the trial court's order, granted El Paso's plea to the jurisdiction, and dismissed the case.

Contracts: *Triple B Services, LLP v. City of Conroe*, No. 09-21-00096-CV, 2022 WL 2720451 (Tex. App.—Beaumont July 14, 2022) (mem. op.). Triple B Services sued the City of Conroe for breach of contract and violations of the Texas Public Prompt Pay Act, alleging contract damages due to conditions that were different from what was described in the bid documents on a project to construct and widen a city road. The city filed a plea to the jurisdiction, claiming that its governmental immunity was not waived for the claim because the claim was not for damages owed under the contract and therefore did not meet the limitations set forth in the Local Government Contract Claims Act (LGCCA). The trial court granted the city's plea and Triple B appealed, arguing that the trial court's admission of evidence and testimony in a purely jurisdictional hearing was in error.

The appellate court affirmed, holding that because the LGCCA limits the type of damage claims for which governmental immunity is waived, the trial court's consideration of evidence and testimony to determine the type of damages sought was proper.

Employment: *City of Houston v. Garner*, No. 14-20-00688-CV, 2022 WL 2678850 (Tex. App.—Houston [14th Dist.] July 12, 2022) (mem. op.). Madison Garner was hired as a cadet with the Houston Fire Department and was later terminated during his probationary period for allegedly showing a pattern of failure during the evaluation process. Garner sued the City of Houston (Houston) alleging racial discrimination and a hostile work environment. Houston

responded with a motion for summary judgment arguing immunity and that, for several reasons, Garner failed to state a *prima facie* case for either racial discrimination or a hostile work environment. Houston's motion was denied by the trial court, which Houston appealed. To establish a *prima facie* case of race discrimination, an employee must show, among other things, that they (1) are a member of a protected class and (2) were either replaced by someone outside the protected class, or that others outside the protected class were treated more favorably. Garner did not allege facts that he was replaced by someone outside his protected class and failed to raise a fact issue regarding the treatment of others outside his class. The appellate court also analyzed the elements of a hostile work environment, finally concluding that the conduct Garner complained of was neither extreme nor did it affect the terms and conditions of his employment; therefore, the appellate court reversed the trial court's order and rendered judgment granting Houston's motion for summary judgment.

Tort Claims Act: *City of Houston v. Sauls*, No. 14-20-00485-CV, 2022 WL 3009469 (Tex. App.—Houston [14th Dist.] July 29, 2022). Dwayne Foreman was killed while riding a bicycle when he was struck by a City of Houston (Houston) police vehicle. Mr. Foreman's mother, Catrennia Sauls, sued the Houston, and Houston responded by filing a motion for summary judgment arguing immunity from suit. Houston contended that because the officer was protected by official immunity, Houston would, in turn, be protected by governmental immunity. Additionally, Houston argued that because the officer was responding to an emergency, the emergency exception to the Texas Tort Claims Act barred any immunity waiver. The trial court denied Houston's motion, and Houston appealed. Because Houston's immunity rested on the officer's immunity, the appellate court analyzed whether the officer driving the vehicle acted in good faith during the performance of his duties. After a lengthy analysis of good faith, the court concluded that Houston failed to demonstrate good faith, based in large part on the officer's failure to turn on his sirens and lights while driving 20+ miles over the speed limit. The court also overruled Houston's assertion of the emergency exception. The facts which had been alleged surrounding the handing of the call by dispatched as well as the officers' conduct after receiving the call showed that material fact questions exist with regard to whether this call was, in fact, an emergency. Ultimately, the appellate court affirmed the trial court's order denying Houston's motion for summary judgment.

<u>July 2022</u>

Due Process: *Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, No. 21-1045, 2022 WL 2283170 (Tex. June 24, 2022). In a case of first impression, the Supreme Court considered the constitutionality of House Bill 1325, which prohibits the processing or manufacturing of hemp-containing products for smoking.

Hemp companies brought action against the Texas Department of State Health Services and its commissioners (the Department) alleging that recently enacted legislation (H.B. 1325) and related state regulations, which allow the manufacture and sale of consumable hemp products within the state but expressly prohibit the "processing" or "manufacturing" of hemp-containing products "for smoking," violated the due course of law provision of the Texas Constitution. The companies assert that the ban had no rational connection to any possible governmental interest and its real-world effect is so burdensome as to be oppressive in light of any governmental

interest. They also sought an injunction prohibiting enforcement. After initially granting a temporary injunction against the rule's enforcement, the trial court rendered a final judgement declaring the statute violated the Texas Constitution and the rule invalid in its entirety. The Department appealed directly to the Supreme Court, asserting that the hemp companies have neither a liberty interest nor a vested property interest in manufacturing or processing consumable hemp products for smoking.

The Court reversed the trial court's decision, determining that the due-course clause does not protect the hemp companies' interest in manufacturing or processing smokable hemp products, concluding that the manufacture and processing of smokable hemp products is neither a liberty interest nor a vested property interest the due-course clause protects. It is, instead, "purely a personal privilege" that the people's elected representatives in the legislature may grant or withdraw as they see fit.

Tort Claims Act: *Rivera v. City of Houston*, No. 01-19-00629-CV, 2022 WL 2163025 (Tex. App.—Houston [1st Dist.] June 16, 2022) (mem. op.). Rivera sued the City of Houston for injuries he received from a vehicle collision with Officer Romero, which occurred while Romero was heading to the police station to pick up her partner, after which she intended to respond to a "priority-two" call. The city claimed governmental immunity from suit, arguing that the waiver of immunity in the TTCA did not apply because: (1) Officer Romero would not have been personally liable to Rivera due to her official immunity, so the claim did not fall under the TTCA's waiver of immunity for claims arising from the negligent operation of a motor vehicle by a government employee; and (2) Officer Romero was responding to an emergency at the time of the collision, so the emergency-response exception to the TTCA's waiver of immunity applied. The trial court granted the city's motion for summary judgment.

The appellate court held that Rivera had raised a genuine issue of fact as to whether Officer Romero was performing a discretionary act at the time of the collision, which would entitle her to official immunity, or a ministerial act, in which case she may have been personally liable for negligence. The appellate court also held that a genuine issue of fact existed as to whether Romero driving to the police station to pick up her partner with the intention of responding to a call afterward qualifies as emergency response for the purpose of the emergency-response exception to the waiver of governmental immunity in the TTCA. The appellate court reversed and remanded the case.

Tort Claims Act: *City of Houston v. Sukhta*, No. 01-21-00703-CV, 2022 WL 2203657 (Tex. App.—Houston [1st Dist.] June 21, 2022) (mem. op.). Sukhta filed suit against the City of Houston for injuries he received in a car accident with a city police officer. The city's charter requires that notice of suit be provided to the city within 90 days. The 90th day was a Sunday, and Sukhta provided notice the following day. The city filed a plea to the jurisdiction, claiming that Sukhta did not provide notice of his lawsuit to the city in the 90-day limit required by the city charter. The trial court denied the plea, and the city appealed.

The appellate court upheld the trial court's ruling, holding that Rule 4 of the Texas Rules of Civil Procedure, which extended the deadline by one day, prevails over a conflicting provision in the city charter.

Tort Claims Act: *City of Houston v. Giron*, No. 01-21-00486-CV, 2022 WL 2347745 (Tex. App.—Houston [1st Dist.] June 30, 2022) (mem. op.). Giron sued the City of Houston for injuries he received in a car crash with Officer Lindsay when Officer Lindsay was driving to assist another officer who was holding two suspects alone at gunpoint. The city moved for summary judgment, claiming that the city was entitled to governmental immunity because Officer Lindsay would not have been personally liable to Giron due to his official immunity, so the case would not fall into the TTCA's waiver of immunity for negligent operation of a motor vehicle by a government employee. The trial court denied the city's motion and the city appealed.

The appellate court reversed, holding that Officer Lindsay would not have been personally liable to Giron because in responding to an emergency, he was performing his discretionary duties in good faith and would therefore be entitled to official immunity. Therefore, Giron's claims did not fall into the TTCA's limited waiver of governmental immunity for claims arising from the negligent operation of a motor vehicle by a government employee and the city was entitled to immunity.

Elections; Home Rule: *City of Floresville v. Nissen*, No. 04-21-00042-CV, 2022 WL 2334542 (Tex. App.—San Antonio June 29, 2022). In 2011, Floresville, a home rule city, adopted a resolution moving its elections to November from May pursuant to Election Code § 41.0052 despite its charter providing for elections in May. Then in 2019, after the provision in the Election Code had expired, the city council passed a resolution repealing the 2011 resolution to move its elections back to May. Some residents sued the city, councilmembers, and city secretary on the grounds that the 2019 resolution was passed in violation of the Election Code. After the first appeal on the denial of the city's plea to the jurisdiction, the appellate court dissolved the temporary injunction against the city and instructed the trial court to determine whether the election date change violated the Election Code. On remand, the trial court granted the residents' motion for summary judgment on the grounds that the city violated the Election Code. The city appealed.

The appellate court found: (1) that the plain language of section 41.0052 says home-rule cities were not permitted to change their general election date to the November uniform election date after December 31, 2016; and (2) the statute had no similar limitation on a home rule city to change the election date from November to May. Therefore, the appellate court found city had the authority to change its election date from November to May, reversed the trial court, and rendered judgment that the residents take nothing from the city.

Tort Claims Act: *City of Dallas v. Peltier*, No. 05-21-00760-CV, 2022 WL 2167800 (Tex. App.—Dallas June 16, 2022) (mem. op.). Lynn Peltier sued the City of Dallas and a city garbage truck driver under the TTCA after a garbage truck caught fire and caused damage to her property. Her suit initially alleged the city was negligent in maintaining the garbage truck and the driver acted negligently, but her suit was later amended to include only the driver's negligence claim. At a preliminary hearing on the city's plea to the jurisdiction, Peltier raised an issue of fact about whether the driver was negligent after failing to follow city-prescribed safety protocols that included: (1) pulling the truck over to a safe location, (2) immediately turning off the engine, and (3) grabbing a fire extinguisher before inspecting the truck. As a result, the trial

court denied the city's plea, and the city appealed. In its appeal, the city alleged Peltier's claims did not arise out of the driver's operation of the garbage truck, rather the claims and damage was a result of the fire. However, in upholding the trial court's order denying the city's plea to the jurisdiction, the appellate court concluded Peltier's claims were based on the driver negligently operating the garbage truck before discovering the fire. Additionally, the court stated that because the city's training required employees to shut off the engine and grab a fire extinguisher before investigating a truck malfunction, the driver should have known there was a risk of fire.

Immunity: ***Midland Firemen's Relief & Ret. Fund v. Midland Cent. Appraisal Dist.*****, No. 11-20-00204-CV, 2022 WL 2252654 (Tex. App.—Eastland June 23, 2022) (mem. op.).** Midland Central Appraisal District (MCAD) brought a suit to recover delinquent property taxes for properties acquired by the Midland Firemen's Relief and Retirement Fund (retirement fund). After the retirement fund failed to appear, the trial court entered a default judgment against the retirement fund in the amount of $39,740.48 for delinquent property tax, interest, and attorney's fees. The retirement fund subsequently filed a restricted appeal alleging error in the judgment was apparent on the face of the record because the retirement fund is a statutorily created retirement system entitled to governmental immunity from suit. The appellate court reasoned that because the retirement fund was a statutorily created pension system for the benefit of the City of Midland's municipal firefighters, the court could judicially notice that it was a governmental entity entitled to governmental immunity. As such, because MCAD did not plead a waiver of the fund's governmental immunity, the appellate court reversed the judgment and remanded the case to the trial court.

Municipal Jurisdiction: ***City of Corpus Christi v. City of Ingleside*****, No. 13-20-00513-CV, 2022 WL 2163878 (Tex. App.—Corpus Christi–Edinburg June 16, 2022) (mem. op.).** The City of Ingleside sued the City of Corpus Christi for a declaratory judgment that Ingleside was permitted to exercise jurisdiction over and tax wharves, piers, docks, and similar man-made structures that: (1) originate on certain land which is either within Ingleside's city limits or is within its extra territorial jurisdiction; and (2) project into adjacent waters of Nueces Bay and Corpus Christi Bay. The trial court granted Ingleside's motion for summary judgment and Corpus Christi appealed.

The appellate court affirmed, holding that because the structures are connected to the mainland located in Ingleside, they are under Ingleside's jurisdiction.

Tort Claims Act: ***City of Brownsville v. Nezzer*****, No. 13-21-00150-CV, 2022 WL 2251818 (Tex. App.—Corpus Christi–Edinburg June 23, 2022) (mem. op.).** Lili Nezzer sued the City of Brownsville when a metal structure marking the start of a city-sponsored foot race fell and struck her. The city filed a plea to the jurisdiction, claiming immunity to suit under the TTCA. The trial court denied the city's plea, and the city appealed.

The appellate court reversed, holding that: (1) sponsoring the foot race was a governmental as opposed to proprietary function, so the TTCA applied to Nezzer's claims; and (2) Nezzer failed to plead facts that would support a premises defect claim, so the waiver of governmental immunity for claims based on a premises defect did not apply.

Whistleblower Act: ***City of Edinburg v. Torres*****, No. 13-21-00320-CV, 2022 WL 2513512 (Tex.**

App.—Corpus Christi–Edinburg July 7, 2022) (mem. op.). Torres sued the City of Edinburgh under the Whistleblower Act, claiming he was terminated from his job as Chief of Police by Garza (the city manager) in retaliation for notifying the FBI about an internal affairs investigation involving another officer, and that he experienced various other retaliatory adverse employment actions. The city filed a plea to the jurisdiction, claiming that Torres's claim was filed more than ninety days after the complained-of adverse action and was therefore outside the ninety-day deadline imposed by the Whistleblower Act. The trial court denied the city's motion and the city appealed.

The appellate court affirmed, holding that the ninety-day deadline does not begin to run until a retaliatory action is alleged, so that any adverse action taken before Garza was made aware that Torres had notified the FBI about the internal investigation of the other officer could not have been retaliatory and therefore did not trigger the ninety-day deadline. Because it was not clear from the pleadings which, if any, of the complained-of adverse employment actions took place inside of the ninety-day window, the court remanded the case to allow Torres to amend his pleadings.

June 2022

Inverse Condemnation: *City of Baytown v. Schrock*, No. 20-0309, 2022 WL 1510310 (Tex. May 13, 2022). The issue in this case is whether a city's refusal to reconnect a property owner's utility service due to outstanding utility bills, which prohibited the owner from renting out the property, constitutes a regulatory taking.

From 1993 until the beginning of 2010, Schrock rented out a house to a series of tenants and there was only ever a few weeks between tenants when the house was not occupied. During this time, the city required that tenants renting houses provide a copy of the lease agreement to the city and pay a larger deposit than homebuyers before the city would provide utility services. In 2009, the city informed Schrock that he owed the city $1,999.67 for the unpaid utility bills of his prior tenants dating back to 1993. Schrock requested a hearing and that amount was reduced to $1,157.39 in unpaid bills that had accrued over the prior four years. The city sent notice to Schrock's attorney that he would need to pay within 14 days or the city would place a lien on the property pursuant to a city ordinance. In 2010, a new tenant at the rental attempted to pay a deposit and have the utilities turned on but was told that Schrock had to pay the lien before utilities would be turned on. Schrock attempted to pay the lien but was told that in addition to the adjudicated amount, he would also have to pay for an unpaid bill that had happened after the adjudication. Schrock ultimately did not pay the lien and brought a regulatory-taking and declaratory-judgment claim against the city, alleging that since 2010, the city has refused to provide water service to the property, which has led to damages as the house has remained vacant. With no tenant to maintain the home, it fell into disrepair and became uninhabitable. Schrock sought damages for the loss of the property value and lost revenue from the inability to lease the property.

The trial court held that city's refusal to reconnect property owner's utility service due to outstanding utility bills, which prohibited the owner from renting out the property, did not constitute a regulatory taking. The court of appeals reversed, holding that fact issues exist as to whether the city's utility-enforcement actions resulted in a regulatory taking. The Supreme Court

reversed, holding that the landlord's challenge to the city's enforcement action fails to show the intentional taking or damage for public use necessary to establish a constitutional right to compensation.

General Law City Authority: *Builder Recovery Servs., LLC v. Town of Westlake*, No. 21-0173, 2022 WL 1591976 (Tex. May 20, 2022). This is a declaratory-judgment action challenging a general law city's authority to pass an ordinance requiring construction-site waste hauling businesses to obtain a license to conduct business and seeking a declaration that a license fee based on a percentage of a business's revenue was unlawful.

The town passed an ordinance under Section 363.111 of the Health and Safety Code requiring third-party construction trash haulers to obtain licenses for temporary construction waste services and imposed certain regulations on the license. BRS brought suit asserting, among other things, that: (1) the town as a general law city lacks authority to require BRS to obtain a license to haul construction waste; (2) the town lacks statutory authority to impose a licensing fee based on a percentage of BRS's revenue; (3) the license fee was not tied to actual administrative costs; and (4) the ordinance was preempted by state law. After a bench trial, the trial judge found largely in favor of the town, but invalidated the license fee calculation. BRS appealed.

The appellate court rejected BRS's argument that section 361.113 of the Texas Health and Safety Code does not empower the town to issue licenses as a license is an inherent part of the town's regulatory power. The court further determined the license fee issue was moot due to an amended ordinance, which lowered the licensing fee from 15 percent to 3 percent of gross revenues. However, due to an outstanding issue of attorney's fees, the court remanded to the trial court for disposition. BRS appealed.

The Supreme Court reversed, holding that: (1) the town's downward adjustment of the amount of the fee did not moot the license fee issue; and (2) a general law city's express power to regulate construction trash hauling does not include implied power to charge licensing fees based on a percentage of revenue, and such fees would have to be tethered to the town's administrative costs. However, the court noted that its decision did not implicate the authority of the city to impose franchise fees on non-construction solid waste collectors under Section 364.034 of the Health and Safety Code. The court remanded to the appellate court to determine whether the remainder of the town ordinance is severable from the invalid fee.

Whistleblower Act: *City of Fort Worth v. Pridgen*, No. 20-0700, 2022 WL 1696036 (Tex. May 27, 2022). This case concerns the proper interpretation of a "good faith report of a violation of law" under the Texas Whistleblower Act (Act).

Before they were demoted, Pridgen and Keyes were serving as assistant police chief and deputy chief, respectively, in the Fort Worth Police Department (Department), where they both supervised the Internal Affairs (IA) and Special Investigations Unit (SIU) divisions. Pridgen and Keyes participated in the internal investigation of an arrest conducted by Officer Martin that was shown on Facebook livestream and gained national attention and media coverage leading to allegations of racism against Officer Martin by many members of the public. Following the Department's investigation, both Pridgen and Keyes recommended to the police chief that Officer Martin be

fired. Instead, the police chief suspended Officer Martin for ten days. Ninety days later, both Pridgen and Keyes were demoted based on the Department's contention that they had disseminated confidential documents regarding the investigation without the Department's authorization.

Pridgen and Keyes brought action against the city under the Act, alleging that they were unlawfully disciplined for making a good faith report regarding Officer Martin's conduct to the police chief. The trial court denied the city's motion for summary judgment, and the court of appeals affirmed, holding that the Act waived the city's immunity.

The Supreme Court reversed, concluding that to "report" under the Act, an employee must convey information, not just conclusions, and that Pridgen and Keyes largely failed to satisfy this requirement. However, the court rejected the city's propositions: (1) to limit the definition of "report" to "a disclosure of information;" and (2) that public employees forfeit the Act's protection if they report as part of their job duties.

Plat Approval: *Schroeder v. Escalera Ranch Owners' Ass'n, Inc*., No. 20-0855, 2022 WL 1815042 (Tex. June 3, 2022). This is an action by a homeowners association against the planning and zoning (P&Z) commissioners of the City of Georgetown, in their official capacity, seeking mandamus relief directing the commissioners to rescind approval of a plat.

Escalera Ranch is a subdivision within Georgetown's extraterritorial jurisdiction, and it and a neighboring subdivision contain some 150 homes and 15 vacant lots, combined. Both subdivisions are accessed via Escalera Parkway, a residential street that traverses Escalera Ranch. A developer applied to the P&Z commission for approval of a preliminary plat for a new 89-home subdivision, Patience Ranch, neighboring Escalera Ranch to the north. As planned, Escalera Parkway would provide the only access to homes in the new subdivision. Several Escalera Ranch residents expressed concerns that: (1) the plat did not conform to the city's Unified Development Code (UDC), thus increasing traffic to an unsafe level; and (2) the plan did not conform to the International Fire Code, which the city had adopted, that there be two separate fire access roads for that area.

The city argued that: (1) Patience Ranch and Escalera Ranch subdivisions were proposed to connect with future development, which would provide another access point and reduce traffic levels on Escalera Parkway; and (2) a connection with future development was also an express exception to the two-fire-access-road requirement. After analysis, P&Z commission staff reported that "[t]he proposed Preliminary Plat meets all of the requirements of the [UDC]" and at a public meeting, the city's assistant fire chief agreed that the new subdivision would meet fire code standards. Accordingly, the P&Z commission concluded that it had a ministerial duty to approve the plat as required by statute.

The Escalera Ranch Owners' Association (Association) sued the commission members asserting that the plat was nonconforming and that their approval of the plat was a clear abuse of discretion. In a plea to the jurisdiction, the commissioners argued that they had a ministerial duty to approve a plat they had determined to be conforming and that the Association lacked standing to sue.

The trial court granted the commissioners' plea. The Association appealed. The appellate court reversed, and the commissioners petitioned for review. The Supreme Court reversed, determining that the commissioners adhered to their duty to interpret the UDC, consider certain listed items, and determine whether a plat conforms to the standards in the UDC. Accordingly, the trial court lacked jurisdiction to compel a contrary determination by mandamus.

Standing: *Jones v. Turner,* No. 21-0358, 2022 WL 1815031 (Tex. June 3, 2022). This is an ultra vires action related to the City of Houston allegedly spending tax revenue in violation of the city charter.

Two city taxpayers sued the mayor and the city councilmembers alleging that they misallocated $50 million tax revenue in fiscal year 2020, in violation of the city charter, when they allegedly directed a certain amount of tax revenue allocated to a fund used exclusively for drainage and street maintenance to other city services. The taxpayers claim that the officials acted ultra vires in spending the tax revenue at issue on anything other than the drainage fund. The officials filed a plea to the jurisdiction asserting governmental immunity, and the trial court denied the plea. The court of appeals held that the taxpayers lacked standing and dismissed the case without reaching the immunity issue.

The Supreme Court found that the taxpayers had met the requirements of the "tax payer exception" to standing by showing that they are taxpayers and public funds are expended on "alleged illegal activity." The court determined that when the law requires that a certain amount of money be directed to a specific service, and the plaintiff alleges that it is being directed and spent elsewhere, the taxpayer has alleged an illegal expenditure sufficient to confer taxpayer standing. Accordingly, the court reversed the appellate court's judgment and remanded to the trial court for further proceedings.

Standing: *Perez v. Turner*, No. 20-0382, 2022 WL 2080868 (Tex. June 10, 2022). This case stems from a challenge to the City of Houston's drainage fee in which the Supreme Court affirmed some claims and remanded one claim.

In 2015, Perez filed a lawsuit against the city's assessment, collection, and expenditure of a drainage fee, alleging that the ordinance authorizing the drainage fee was invalid because the ordinance was premised on a faulty amendment to the city charter. She sought a variety of relief for herself and a class of similarly situated taxpayers, including a declaration of the drainage fee ordinance's invalidity, an injunction against collection of the fee, and reimbursement of already paid drainage fees.

The court of appeals held that Perez's claims based on the charter amendment's invalidity were not ripe and that she lacked standing. She petitioned for review. While her case was on appeal, the city passed a new charter amendment that cured many of the defects Perez alleged in the drainage fee ordinance. In light of this, the Supreme Court construed that Perez had only two remaining claims: (1) reimbursement of the drainage fees she paid prior to 2018; and (2) a narrow prospective injunction against the future expenditure of fees collected prior to 2018.

The Supreme Court concluded that Perez has standing to pursue these claims, but she did not adequately plead those claims so as to overcome the city's governmental immunity. Thus, the court of appeals' judgment of dismissal was affirmed, but that judgment was reversed in part to the extent it denied Perez the opportunity to replead. The case was remanded to the district court to allow Perez to replead in light of intervening events.

Injection Well Permits: *Dyer v. Tex. Comm'n on Envtl. Quality*, No. 19-1104, 2022 WL 2082193 (Tex. June 10, 2022). This case deals with a permit under the Injection Well Act (IWA) where the Railroad Commission (RRC) issued a no-harm letter required by the IWA that the proposed well would not endanger or injure any oil or gas reservoir but later rescinded the letter. Despite the rescission and after a State Office of Administrative Hearings (SOAH) proceeding on the permit, the Texas Commission on Environmental Quality (TCEQ) granted the permit for the injection well while the RRC's order rescinding the letter was pending. Many parties affected by the well challenged the permit seeking declaratory judgment, including the City of Conroe. The trial court denied the claims for declaratory relief and the appellate court affirmed.

Affirming the appellate court, the Supreme Court held: (1) the rescission of the RRC's commission letter after TCEQ granted the permit did not violate the IWA; (2) TCEQ did not act arbitrarily or capriciously when refusing to reopen the record for the permit application in light of the rescission of the RRC's letter; (3) clerical changes to the order did not violate state law; (4) TCEQ had authority to modify the SOAH's findings of fact, including adding additional findings of fact; and (5) TCEQ's findings of fact were supported by substantial evidence.

Elections: *Paxton v. Longoria*, No. 22-0224, 2022 WL 2080867 (Tex. June 10, 2022). In this case, the Texas Supreme Court was asked to certify three questions from the Fifth Circuit in litigation over provisions in SB 1: (1) whether one of the plaintiffs, a volunteer deputy registrar, is a "public official" to whom the anti-solicitation provision applies; (2) whether certain types of speech constitute "solicitation" under that provision; and (3) whether the Attorney General can enforce the civil penalties.

In briefing, the parties agreed that the answer to the first and third questions were no. Because the parties agreed, the Court found: (1) a volunteer deputy registrar was not a "public official" to whom the anti-solicitation provision applies, stating that the response had no effect beyond the case; and (2) the Attorney General had no authority to enforce civil penalties against the parties, stating the response has no effect beyond the case.

As to the second question, the Court concluded: (1) SB 1's definition of "solicits" is not narrowly limited to seeking application of mail-in ballots that would violate state law; (2) solicitation under the statute is not limited to demands for submission of an application to vote by mail; and (3) the statute does not cover telling voters they have the opportunity to apply for mail-in ballots.

Takings; Easements: *City of Friendswood v. Tostado*, No. 01-20-00398-CV, 2022 WL 2070407 (Tex. App.—Houston [1st Dist.] June 9, 2022) (mem. op.). Joseph Tostado sued the City of Friendswood when the city made several improvements, including erecting a locked gate, on the city's easement on his property. The trial court denied the city's plea to the jurisdiction and the city appealed.

The appellate court reversed in part and affirmed in part the order of the trial court, holding that: (1) governmental immunity bars a trespass-to-try-title claim against a city; (2) the Uniform Declaratory Judgment Act does not waive a city's immunity from a suit to determine the existence and ownership of an easement; (3) because the city's actions were substantially certain to restrict Tostado's access to his property, it constituted a taking; and (4) Tostado's claim was not time-barred because the statute of limitations began to run when the city made the complained-of improvements rather than when Tostado originally took title to the land subject to the easement.

Immunity: *Doe v. City of Fort Worth*, No. 02-21-00026-CV, 2022 WL 1496527 (Tex. App.—Fort Worth May 12, 2022). The case stems from a sexual assault of a volunteer by a city employee at a city-owned animal shelter in which the volunteer alleges immunity was waived under the Texas Tort Claims Act (TTCA).

Jane Doe was repeatedly sexually assaulted while working at an animal shelter as a teen volunteer for the city. At the time, the city owned the animal shelter and employed Doe's assailant. Doe sued the city for negligent supervision, premises liability, and other torts. She alleged that the shelter's surveillance cameras, keycards, and animals as the items of personal and real property that triggered the TTCA. She further alleged that the city failed to properly use and monitor its surveillance cameras, that it provided Doe with a keycard that allowed her to access the shelter and to work alone with her assailant without adequate supervision, and that it used animals to lure her to the dangerous work environment. All of this, Doe alleged, was part of the city's failure to adequately supervise and protect her from her assailant—himself a dangerous condition—and all of it caused her sexual assault. Doe also noted that the city partnered with PetSmart for aspects of its volunteer program, and she claimed that this partnership constituted a joint enterprise that waived the city's immunity. The trial court concluded that Doe's claims were barred by sovereign immunity, so it dismissed her case. Doe appealed.

The appellate court affirmed, holding that the city was immune as it was performing a governmental function—animal control—when it engaged in alleged tortious conduct. The court further held that Doe did not plead facts showing that: (1) the city's provision of keycards and maintenance of a keycard system qualified as uses of tangible personal property, or that they caused her injuries; (2) the city's surveillance cameras and rooms qualified as premises defects, or that any such defects were known to the city but not to Doe; and (3) that PetSmart was liable for Doe's injuries at all.

Tort Claims Act: *City of Fort Worth v. Beasley*, No. 02-21-00448-CV, 2022 WL 1573403 (Tex. App. Fort Worth—May 19, 2022) (mem. op.). This case stems from a motor-vehicle accident involving a City of Fort Worth police officer in which city asserts that it is immune from liability.

Officer Towns was in pursuit of a suspected truck thief who had fled another officer's traffic stop when he lost control and crossed the street towards a resident's fence. Beasley was standing near the fence talking to someone who was standing directly next to the fence. Towns's vehicle hit the fence but did not hit any person; Beasley saw the car approaching and jumped out of the way. Beasley subsequently sued the city alleging that he had been injured by the fence. He alleged that the city's immunity had been waived under Section 101.021 of the Texas Tort Claims Act (TTCA)

because his injuries had been caused by Towns's negligent operation or use of a motor-driven vehicle. The city filed a plea to the jurisdiction asserting immunity. The trial court denied the motion, and the city brought this interlocutory appeal.

The appellate court reversed the trial court's decision, finding that Officer Towns had met the good-faith requirement for official-immunity purposes. Accordingly, he was entitled to official immunity and cannot be liable to Beasley, and the TTCA thus does not waive the city's immunity from Beasley's suit.

Tort Claims Act: *City of N. Richland Hills v. Quinonez*, No. 02-21-00432-CV, 2022 WL 1682411 (Tex. App. Fort Worth—May 26, 2022) (mem. op.). This case stems from a vehicle collision involving a City of North Richland Hills police officer in which the appellate court affirmed the trial court's decision.

While leaving the apartment complex parking lot en route to a hit-and-run call, Officer Brown's vehicle hit Quinonez's vehicle. As a result of the collision, Quinonez sustained injuries to her back and neck. Two years later, Quinonez filed suit against the city for negligence, seeking past and future damages for medical care, physical pain and suffering, and mental anguish. The jury awarded Quinonez damages of $34,910.77 for past medical care and $40,000 for past physical pain, and the trial court signed a $74,910.77 judgment on the verdict.

The city appealed the legal sufficiency of the jury verdict, arguing that: (1) the trial court erred in denying its motion for directed verdict because Quinonez failed to plead or offer any proof that Officer Brown acted with conscious indifference or reckless disregard while responding to an emergency call or situation; and (2) the evidence was insufficient to support a jury verdict of $40,000 for physical pain sustained in the past.

The appellate court determined that although the city filed special exceptions in response to Quinonez's lawsuit, the city did not specially except to Quinonez's failure to allege that Officer Brown acted with conscious indifference or reckless disregard while responding to an emergency call or situation. Because the city failed to specially except to this alleged pleading defect with particularity, as required by Rules 90 and 91 of the Texas Rules of Civil Procedure, the city cannot now complain of the pleading defect on appeal. Thus, the court overruled this issue. On the legal sufficiency argument, the appellate court determined in order to preserve error on a factual sufficiency challenge, a party must complain in a motion for new trial that the evidence is factually insufficient to support a jury answer or that the answer is against the great weight and preponderance of the evidence. Because the city did not file a motion for new trial, the court overruled this issue.

Tort Claims Act: *City of Austin v. Powell*, No. 03-21-00146-CV, 2022 WL 1509304 (Tex. App.—Austin May 13, 2022) (mem. op.). Noel Powell sued the City of Austin and Austin Police Department (APD) Officers Brandon Bender and Michael Bullock for negligence after they struck his car while in pursuit of a fleeing suspect in response to a "shots fired" call. The city filed a plea to the jurisdiction claiming governmental immunity under the "emergency exception" to the Texas Tort Claims Act (TTCA). After a hearing on the matter, the district court denied the plea and the city appealed. Although the TTCA waiver of immunity does not apply in

instances when a governmental employee is responding to an emergency, the employee's actions must be in compliance with laws and ordinances applicable to emergency action, or in the absence of such laws or ordinances, the employee's actions must not be made with conscious indifference or reckless disregard for the safety of others. Here, the accident occurred when Officer Bullock collided with Officer Bender's car after failing to maintain a safe distance between his car and Bender's car as required by Transportation Code section 545.062(a), which does not include an exception for drivers of emergency vehicles. The appellate court concluded that because there was enough evidence in the record that indicated Officer Bullock "was inattentive, failed to control his speed, and failed to maintain a safe following distance" which caused the serious collision, Powell raised a sufficient issue of fact that Officer Bullock was reckless. As a result, the appellate court affirmed the district court's denial of the city's plea to the jurisdiction.

Annexation: *Diamond Envtl. Mgmt., L.P. v. City of San Antonio*, No. 04-21-00058-CV, 2022 WL 1559095 (Tex. App.—San Antonio May 18, 2022). In 2013, the city entered into a development agreement with Diamond for Diamond to delay annexation. In 2019, the city: (1) notified Diamond that it had breached the agreement; (2) notified the relevant emergency services districts that also served Diamond's property; and (3) passed an ordinance to annex Diamond's property. One of the emergency services districts sued the city and the city filed a plea to the jurisdiction, which the trial court granted.

In affirming the grant of the plea, the appellate court: (1) found that the city's pre-annexation notice to the emergency services district satisfied the statute's requirements; (2) rejected the emergency services district's argument that the development agreement created a permit; and (3) rejected the emergency services district's argument that the Uniform Declaratory Judgment Act waived the city's immunity.

Immunity: *City of Garland v. Jordan*, No. 05-21-00377-CV, 2022 WL 1498121 (Tex. App.—Dallas May 12, 2022) (mem. op.). Plaintiff sued the City of Garland and Garland Civil Service Commission (commission) after testing for a firefighter promotional exam and later appealing to the commission to regrade his exam because he was not given a fifteen-minute warning, per the exam instructions, which resulted in his inability to transfer answers from his test booklet to a scantron answer sheet before the testing time expired. His claims included: (1) "Denial of Right to Petition and Statutory Grievance Rights;" (2) "Denial of Due Course of Law;" (3) declaratory judgment; (4) injunctive and mandamus relief to compel the Commission to regrade his exam and accept the answers marked solely in his test booklet; and (5) injunctive relief compelling the commission to award him with the promotion and compensation he would have received had the commission adjusted his test grade, or if not possible, damages for "lost wages, loss of employment benefits, pecuniary losses, emotional pain, suffering, mental anguish, inconvenience, damage to his reputation, and other damages." The trial court denied the commission's plea to the jurisdiction, and the commission appealed.

In reversing the trial court and granting the plea, the appellate court: (1) concluded the Uniform Declaratory Judgment Act (DJA) did not apply to plaintiff's claims because the DJA only waives immunity for claims that a statute or ordinance is invalid – not in instances involving claims that governmental actors violated the law; (2) concluded that decisions regarding how promotional

examinations are conducted and graded are not final decisions concerning a promotion, but merely a step in the process of making a final decision, and therefore not appealable; (3) rejected the plaintiff's claims that sections 24.007 and 24.008 of the Government Code and Article V, Section 8, of the Texas Constitution waive the commission's governmental immunity because of a prior, unrelated lawsuit; (4) rejected the plaintiff's claims that section 180.006 of the Local Government Code waives immunity for monetary benefit because he has not been denied any monetary benefit under chapter 141, 142, or 143 of the Local Government Code; and (5) found plaintiff's claims for mandamus and injunctive relief were barred because they were requests for equitable relief that were retrospective in nature – seeking a regrading of his exam and compensation for losing out on the promotion – and his claims were brought against the commission and city, not governmental actors in their official capacity.

Tort Claims Act: *In re Verastique*, No. 05-22-00397-CV, 2022 WL 1514675 (Tex. App.—Dallas May 13, 2022) (mem. op.). Jantzen Verastique was arrested during a protest in Dallas. Following the incident, she filed a petition with the trial court pursuant to Texas Rule of Civil Procedure 202.1 seeking an order allowing her to depose a Dallas Police Department (DPD) representative to investigate potential claims or suits under the Texas Tort Claims Act. The trial court granted her petition, and DPD appealed the order. Verastique filed a motion to dismiss DPD's appeal for want of jurisdiction, asserting that the trial court lacked jurisdiction over the appeal as the trial court's order is interlocutory because DPD is an anticipated defendant. DPD argued that Rule 202.1 does not contemplate a future suit but instead allows the taking of a deposition only in an anticipated suit. However, the appellate court reasoned that Rule 202.1 does contemplate a future suit so that petitioners can investigate the exact nature of the possible claims and learn the identities of potential defendants. Agreeing that it lacked jurisdiction to hear the appeal because the trial court order was not appealable or a final order, the appellate court granted Verastique's motion to dismiss DPD's appeal.

Standing: *Robinson v. Scripps*, No. 05-21-00349-CV, 2022 WL 1577210 (Tex. App.—Dallas May 19, 2022) (mem. op.). Eugene Jalon Robinson sued the City of Dallas and its Director of Cultural Affairs for disassembling and removing a Confederate war monument while working under an expired Certificate of Demolition (CD). After the trial court denied his temporary restraining order, Robinson sought an injunction to enjoin the city from removing the monument. The city filed a plea to the jurisdiction, claiming among other issues, Robinson lacked standing and his claims were moot because the monument had already been removed and placed in storage. Without indicating the legal basis, the trial court granted the city's plea to the jurisdiction and dismissed Robinson's claims. Robinson appealed, claiming the "capable of repetition, yet evading review" exception to the mootness doctrine applied. However, the appellate court found no evidence the city routinely demolished or removed property without a valid CD and considered Robinson's argument that the city could remove other Confederate monuments throughout the city illegally was merely a "theoretical possibility." Because Robinson failed to show he would be subjected to the same action in the future, the appellate court held the exception did not apply and affirmed the trial court.

Tort Claims Act: *City of Cleveland v. Lafrance, et al.*, No. 09-20-00189-CV, 2022 WL 2068858 (Tex. App.—Beaumont June 9, 2022) (mem. op.). Lafrance sued the City of Cleveland for injuries she received when she got an electrical shock plugging her phone charger into an outlet

while volunteering at a concession stand at the city's livestock show. The city filed a plea to the jurisdiction and no-evidence motion for summary judgment, arguing that Lafrance had submitted no evidence to show willful, wanton, or grossly negligent conduct to trigger the TTCA's waiver of governmental immunity or to show that the city controlled the concession stand with the faulty wiring at the time of the incident. The trial court denied the city's motion and plea and the city appealed.

The appellate court upheld the ruling of the trial court, holding that: (1) the recreational use statute, which further limits a city's liability, does not apply to volunteering at a concession stand; and (2) Lafrance had produced more than a scintilla of evidence that the city controlled the concession stand at the time of the incident.

Tort Claims Act: *Wolf v. City of Port Arthur*, No. 09-20-00236-CV, 2022 WL 2068819 (Tex. App.—Beaumont June 9, 2022) (mem. op.). Wolf sued the city of Port Arthur for damages to her property that occurred when the city demolished her building due to substandard conditions. Wolf filed a petition and application for a temporary restraining order, and the city filed a plea to the jurisdiction and motion for summary judgment. The trial court granted the city's motion.

The appellate court upheld the judgment of the trial court, holding that: (1) Wolf's failure to file a direct appeal of the city's administrative determination that the building was in substandard condition barred a collateral attack on that determination; and (2) the claim under the Texas Tort Claims Act failed because the demolition work was not performed by the city itself but by a contractor.

Tort Claims Act: *City of Raymondville v. Elizondo*, No. 13-21-00375-CV, 2022 WL 1669438 (Tex. App.—Corpus Christi–Edinburg May 26, 2022.) (mem. op.). Isabel Elizondo sued the City of Raymondville for burying her deceased husband in the wrong burial plot, claiming that the city was negligent and breached its fiduciary duty. The trial court denied the city's motion for summary judgment and the city appealed.

The appellate court reversed on the basis of governmental immunity, holding that: (1) the use or misuse of information (burial records) does not constitute the use of personal property to trigger a waiver of immunity under the TTCA; and (2) the use or misuse of information does not establish a premises defect claim under the TTCA.

Attorney's Fees: *Jimenez v. City of Rockport*, No. 13-21-00079-CV, 2022 WL 2069212 (Tex. App.—Corpus Christi–Edinburg June 9, 2022) (mem. op.). Jimenez sued the City of Rockport challenging the city's order requiring demolition of buildings on Jimenez's property. The city filed a motion for summary judgment and claimed attorney's fees. The trial court granted the city's motion for summary judgment and granted the city's claim for attorney's fees.

Jimenez challenged the trial court's award of attorney's fees. The appellate court upheld the award, holding that although attorney's fees are not appropriate after the grant of a plea to the jurisdiction, the trial court had reached the merits on one of Jimenez's claims so attorney's fees were appropriate.

Occupational Freedom: *City of South Padre Island v. Surfvive, et al.*, No. 13-20-00536-CV, 2022 WL 2069216 (Tex. App.—Corpus Christi–Edinburg June 9, 2022) (mem. op.). Surfvive, a food truck operator, sued the City of South Padre Island for an injunction against the city's food truck ordinance, which requires that a food truck operator have the signature of an owner of a free-standing restaurant on the island and limits the number of permits to be issued per month. Surfvive argued, among other things, that the ordinance violated its protected economic liberty interest of occupational freedom. The trial court granted Surfvive's motion for summary judgment for declaratory relief, an injunction, and nominal damages. The city appealed.

The appellate court reversed the order of the trial court. Noting that in a case alleging a constitutional violation, governmental immunity is waived only if a plaintiff's constitutional claims are facially valid, The court held that because Surfvive did not present evidence to show that their claims were facially valid, governmental immunity was not waived.

Jurisdiction: *Banes v. City of Houston*, No. 14-20-00382-CV, 2022 WL 1633812 (Tex. App.—Houston [14th Dist.] May 24, 2022) (mem. op.). Neva and Bryant Banes ("Plaintiffs") alleged that a city construction project on their street created a nuisance that gave rise to a constitutional takings claim, so they filed an inverse condemnation claim against the City of Houston ("Houston") in a Harris County district court. Houston filed a plea to the jurisdiction arguing governmental immunity, which the trial court ultimately granted. Plaintiffs appealed. At the appellate court level, all parties agreed that the initial action was incorrectly filed in district court, and that the county court at law is the only court with jurisdiction over the claims. The major disagreement was whether the dismissal should be with or without prejudice. When a trial court lacks subject matter jurisdiction over a case, the case must be dismissed without prejudice; consequently, the appellate court did just that.

May 2022

Note: Included cases are from April 11, 2022 through May 10, 2022.

Tort Claims Act: *City of Houston v. Frazier*, No. 01-21-00318-CV, 2022 WL 1216181 (Tex. App.—Houston [1st Dist.] Apr. 26, 2022) (mem. op.). Geoffrey Frazier sued the City of Houston for injuries he received after Officer Groves of HPD struck his car while responding to a call for assistance from another officer. The city filed a motion for summary judgment, claiming governmental immunity under the Texas Tort Claims Act. The trial court denied the motion, reasoning that the Act waives immunity for claims arising from the operation or use of a motor vehicle. The city appealed, arguing that the waiver of immunity does not apply when a governmental employee is responding to an emergency. The appellate court held that because she was responding to the other officer's urgent request for backup, Officer Groves was reacting to an emergency when the collision occurred, so the Act does not waive the city's immunity.

Tort Claims Act: *City of Austin v. Findley*, No. 03-21-00015-CV, 2022 WL 1177605 (Tex. App.—Austin Apr. 21, 2022) (mem. op.). Erica Findley was killed by a protuberance on a passing train while walking near the train tracks. The Findleys sued the City of Austin, alleging the city was negligent in the operation and maintenance of the lighting near the tracks. The city claimed

governmental immunity, arguing that the Texas Tort Claims Act does not waive immunity for claims arising from negligence in the performance of governmental functions. The trial court agreed and the Findleys appealed, arguing that the operation and maintenance of the train tracks is a proprietary function. The appellate court affirmed, holding that under these facts, the maintenance and operation of the lighting near the train tracks was a governmental function and therefore, immunity is not waived under the Act.

Employment: *City of Celina v. Scott*, No. 05-21-00823-CV, 2022 WL 1101589 (Tex. App.—Dallas Apr. 13, 2022) (mem. op.). Scott, the former assistant chief of police for the city, sued the city, claiming whistleblower protections after the city ultimately terminated him when he reported another employee's potential criminal conduct to the police chief and the county sheriff. The city filed a plea to the jurisdiction on the ground that Scott did not make a report to an appropriate law enforcement agency, which the trial court denied. On appeal, the appellate court affirmed the trial court's denial, finding: (1) internal complaints to an entity authorized to regulate under or enforce the law (the city's police department) can be sufficient for whistleblower protections for a police officer; and (2) Scott's report to the county sheriff was sufficient even if the sheriff initiated the call to Scott.

Governmental Immunity/Contracts: *City of Dallas v. River Ranch Educational Charities*, No. 05-21-00724-CV, 2022 WL 1284168 (Tex. App.—Dallas Apr. 29, 2022) (mem. op.). The city entered into a contract with River Ranch Education Charities (RREC) for RREC to provide equine-related recreational activities at the Texas Horse Park (THP), which is part of an urban renewal plan undertaken by the city. The ordinances provided that a horse park was a private recreation club and the THP was not listed in the city's list of public parks. The city terminated the contract for numerous violations, but RREC refused to vacate, so the city sued RREC to enjoin RREC from occupying the premises and for declaratory judgment; RREC counterclaimed. The city filed a plea to the jurisdiction against the counterclaims on the grounds of governmental immunity, which the trial court denied.

Affirming the denial of the plea, the appellate court found: (1) there was a fact issue under the *Wasson II* factor regarding whether the city was acting primarily for the benefit of its residents; and (2) the city failed to meet the fourth *Wasson II* factor because it did not address whether or how its act of contracting with RREC was "essential" to a governmental action.

Contracts: *San Jacinto River Auth. v. City of Conroe*, No. 09-20-00180-CV, 2022 WL 1177645 (Tex. App.—Beaumont Apr. 21, 2022) (mem. op.). The San Jacinto River Authority (SJRA) sued the cities of Conroe and Magnolia for breach of contract associated with a groundwater reduction plan. The cities filed a plea to the jurisdiction, claiming governmental immunity under the Local Government Contract Claims Act. The trial court granted the motion and the SJRA appealed, arguing that the Act does not waive immunity for breach of performance. The appellate court held that by failing to attend a mediation required under the contract, SJRA had failed to comply with the Act's requirement that contract adjudication procedures be followed before suit. Therefore, the Act did not waive the cities' governmental immunity and the appellate court affirmed the trial court's dismissal of SJRA's claims.

Takings/Immunity: *City of Webster v. Hunnicutt*, No. 14-20-00421-CV, 2022 WL 1111872 (Tex. App.—Houston [14th Dist.] Apr. 14, 2022). Mary Hunnicutt and Clifford Jackson are siblings who co-owned a 23.5-acre tract of land that fronted Interstate Highway 45 in the City of Webster (Webster). After Hunnicutt conveyed her interest in 4.41 acres of the property to the city for development, Hunnicutt and Jackson filed suit against Webster in the county court at law asserting a common-law inverse-condemnation claim and seeking rescission of the deed to Webster. In response, the City of Webster filed a plea to the jurisdiction claiming immunity, which the trial court denied. Webster appealed. Inverse condemnation claims are rooted in the takings clause of the Texas Constitution; therefore, a viable inverse condemnation claim is not barred by governmental and sovereign immunity. To state a viable claim, a litigant must allege (1) an intentional act by the governmental entity under its lawful authority, (2) resulting in a taking or damaging of property, (3) for public use. Because Hunnicutt's allegations included fraud and sounded in tort rather than takings, she failed to plead a viable inverse condemnation claim, and without a viable claim, the trial court did not have subject matter jurisdiction over the case. Additionally, because rescission is an equitable remedy rather than an independent cause of action, the failure of Hunnicutt's pleadings to state a viable right to relief also extinguished her prayer for the remedy of rescission. Ultimately, the appellate court reversed the trial court's order and dismissed Hunnicutt's claims for want of jurisdiction.

[Note, that Hunnicutt and Jackson filed a related case in district court on the same facts making alternative claims. You can ready of summary of that case in the March 2022 edition of Recent Cases of Interest to Cities.]

Tort Claims Act: *Kownslar v. City of Houston*, No. 14-19-00963-CV, 2022 WL 1151128 (Tex. App.—Houston [14th Dist.] Apr. 19, 2022). Jason Kownslar was severely injured in a motorcycle accident in downtown Houston when the front tire of his motorcycle got stuck in a gap between the surface of a street and a light-rail track embedded in the roadway. Kownslar sued Houston for, among other claims, negligence based on an alleged "special defect" in the roadway. Houston filed a plea to the jurisdiction claiming governmental immunity, asserting that Kownslar failed to establish that a special defect existed in the roadway sufficient to waive governmental immunity under the Texas Tort Claims Act (TTCA). After a hearing on the matter, the trial court sustained Houston's plea and dismissed Kownslar's claims, and Kownslar appealed. A city is entitled to immunity from suit under the doctrine of governmental immunity unless governmental immunity has been waived. The TTCA provides a limited waiver of a city's governmental immunity, in certain, narrowly defined circumstances. If Kownslar could show that the premises defect that led to the claim against Houston was a "special defect" under the TTCA, Houston would have had a duty to warn the Kownslar about the defect. While the TTCA does not define "special defect," courts consider characteristics of the defect, such as (1) the size of the condition, (2) whether the condition unexpectedly and physically impairs a vehicle's ability to travel on the road, (3) whether the condition presents some unusual quality apart from the ordinary course of events, and (4) whether the condition presents an unexpected and unusual danger to the ordinary users of the roadway. After reviewing the record, the appellate court determined that the alleged roadway defect was not a "special defect" under the TTCA and affirmed the lower court's dismissal of Kownslar's claims.

<u>April 2022</u>

Note: Included cases are from March 11, 2022 through April 10, 2022.

Elections: *In re Anthony*, No. 22-0193, 2022 WL 817826 (Tex. Mar. 18, 2022). Linda Anthony, a retiree, left the occupation box blank in her candidate application for the office of Mayor of West Lake Hills. The city secretary rejected Anthony's application, concluding that, although she is retired, her failure to list an occupation violates the Election Code. Accordingly, the city secretary excluded Anthony from a place on the ballot as a candidate for mayor. Anthony petitioned the Supreme Court for writ of mandamus seeking to direct the city secretary to accept her application and place her on the ballot as a candidate for mayor.

The Supreme Court held that Anthony's application is not defective in failing to list an occupation when she currently has no paid employment and the city secretary had no discretion in rejecting Anthony's application. Therefore, the court granted mandamus directing the city secretary to accept Anthony's application and place her on the ballot as a candidate for mayor.

Governmental Immunity: *Dohlen v. City of San Antonio*, No. 20-0725, 2022 WL 983764 (Tex. Apr. 1, 2022). Would-be customers of Chick-fil-A brought action against the City of San Antonio for declaratory and injunctive relief, alleging that the city council violated state law when it voted to prohibit the opening of a Chick-fil-A in the San Antonio airport based, at least in part, on alleged legacy in anti-LGBTQ behavior. The city raised two jurisdictional challenges: (1) governmental immunity; and (2) lack of standing. The trial court denied both, but the court of appeals reversed on governmental-immunity grounds and dismissed the case.

The Supreme Court held that: (1) the complaint was insufficient to invoke a waiver of governmental immunity; and (2) plaintiffs were entitled to an opportunity to amend their complaint as the complaint did not affirmatively negate the existence of jurisdiction. Accordingly, the Supreme Court reversed the court of appeals' judgement and remanded to allow plaintiffs an opportunity to replead.

Tort Claims Act: *City of Houston v. Nicolai*, No. 01-20-00327-CV, 2022 WL 960650 (Tex. App. Mar. 31, 2022) (mem. op.). The Nicolais sued the City of Houston after their daughter was killed in a crash while being transported in a police car to a sobering center with her hands handcuffed and no seatbelt on.

The city filed a motion for summary judgment, asserting that it was entitled to governmental immunity because the officer driving the vehicle was entitled to official immunity, and therefore would not be personally liable to the Nicolais, so governmental immunity was not waived by the TTCA. The trial court denied the motion and the city appealed.

The appellate court held that the officer was entitled to official immunity because in driving Caroline Nicolai to the sobering center she was acting within the scope of her authority, performing a discretionary duty, and acting in good faith. Because the officer would have been entitled to official immunity, the TTCA does not waive the city's governmental immunity and the trial court lacked subject matter jurisdiction over the claims. The appellate court reversed and rendered judgment for the city.

Tort Claims Act: *Hung v. Davis*, No. 01-20-00746-CV, 2022 WL 1008805 (Tex. App. Apr. 5, 2022) (mem. op.). Fabiola Davis sued Hung, a city public safety officer, and the City of Houston when she and her two minor children were injured when Hung's city-owned vehicle struck the vehicle Davis was driving.

The city filed a motion to dismiss Hung under the election-of-remedies provision of the Texas Tort Claims Act, relying on Section 101.106(e), which requires mandatory dismissal of an employee if a suit is filed against a governmental unit and any of its employees. Davis nonsuited the city and amended her pleading against only Hung. Hung filed a motion to dismiss, arguing that the court lacked subject matter jurisdiction over the claim because Section 101.106(e) conferred immunity on an employee who is sued with the governmental unit.
The appellate court reasoned that Hung had a statutory right to dismissal under Section 101.106(e) that accrued upon the filing of the city's motion to dismiss, and that Hung's right to dismissal was an irrevocable consequence of Davis's election to sue both the city and Hung. The appellate court reversed and rendered, dismissing Davis's claims against Hung.

Eight Liners: *City of Fort Worth v. Rylie*, No. 02-17-00185-CV, 2022 WL 803842 (Tex. App. Mar. 17, 2022). This case was on remand from the Supreme Court to make a determination on the city's argument that the Texas Penal Code's fuzzy animal exception does not apply to eight liners because eight liners violate the Texas Constitution. The appellate court determined that eight-liner machines award prizes by chance and for consideration; therefore, eight liners are lotteries. Because the Texas Constitution prohibits lotteries, eight liners are unconstitutional regardless of the fuzzy animal exception.

Zoning: *City of Dallas v. Homan*, No. 05-20-01111-CV, 2022 WL 969631 (Tex. App.—Dallas Mar. 31, 2022) (mem. op.). The city received protests from more than 20 percent of the eligible property owners within two hundred feet of a property (Property) seeking a proposed zoning amendment prior to the public hearing. At the hearing, the attorney representing the Property said that one of the protests should be thrown out on a technical issue. Council voted to throw out the protest affidavit, thus reducing the percentage of protestors to below 20 percent so council could pass the zoning amendment by a simple majority instead of three-fourths majority. One of the protestors sued, seeking declaratory relief that the zoning amendment was invalid. The city filed a plea to the jurisdiction and motion for summary judgment, which the trial court denied. The city appealed. The appellate court affirmed the trial court's denial of the plea and motion for summary judgment, finding: (1) the plaintiff had standing to sue for declaratory relief as a property owner within 200 feet of the Property; and (2) the city's argument that it could allow the untimely withdrawal of a protest affidavit and then characterize it as something else to avoid triggering the statutorily imposed requirements for notice and a new hearing was without merit.

Public Information Act: *City of Georgetown v. Putnam*, No. 08-20-00171-CV, 2022 WL 883856 (Tex. App.—El Paso Mar. 25, 2022). Terrell Putnam filed a lawsuit against the City of Georgetown, its mayor, and city manager (collectively, "the city"), to compel the city to provide a specific document to him pursuant to the Texas Public Information Act (PIA). The city had declined to provide the document after receiving an opinion letter from the Texas Attorney General

that it was confidential and exempted under the PIA. During the litigation, however, the city voluntarily released the document to Putnam. The city thereafter filed a plea to the jurisdiction, arguing that the trial court lacked subject matter jurisdiction to hear any of Putnam's claims because the release of the document rendered Putnam's lawsuit moot, and because Putnam never had a valid claim for relief against the city that waived its immunity. Putnam opposed the city's plea to the jurisdiction, arguing that he was entitled to a judgment as a matter of law on his claims for declaratory relief under both the PIA and Uniform Declaratory Judgement Act (UDJA), as well as an award of attorney's fees and costs. The trial court agreed with Putnam.

The appellate court reversed the trial court's order, finding that: (1) release of the records mooted Putnam's claims under both the PIA and UDJA; (2) Putnam is not entitled to attorney's fees under the PIA because he did not substantially prevail in his PIA claim as the city released the records prior to the trial court's order granting his motion for summary judgement; and (3) Putnam is not entitled to attorney's fees under the UDJA as the city's immunity was not waived under the UDJA.

Governmental Immunity: *City of Crawford v. DCDH Dev., LLC*, No. 13-20-00281-CV, 2022 WL 868056 (Tex. App.—Corpus Christi Mar. 24, 2022) (mem. op.). In 2018, DCDH Development, LLC ("Developer") and the City of Crawford purportedly entered into a "City of Crawford Developer Agreement" ("Agreement") which addressed numerous aspects of the development of the Developer's property, including annexation, subdivision, and the provision of water services. By late 2019, it became clear that the city did not have sufficient water to serve the development, which essentially ended the project. Developer sued the city for breach of the Agreement, promissory estoppel, and several torts. The city filed a plea to the jurisdiction arguing that it was immune from suit, which the trial court denied. The city appealed. The appellate court analyzed the Agreement, focusing on the nature of the agreement rather than the nature of the alleged breaches, and found it to be an agreement for waterworks and the provision of water services, which are governmental functions under the Texas Tort Claims Act. Governmental immunity protects cities from suit or liability when they are acting in their governmental capacity, unless there is an express waiver of immunity. Developer argued that the Agreement was an agreement for goods or services; therefore, immunity was waived pursuant to Section 217.152 of the Texas Local Government Code. The appellate court disagreed with Developer's waiver argument and reversed the trial court's dismissal of the city's plea.

Tort Claims Act: *Roades v. Henderson*, No. 13-20-00315-CV, 2022 WL 802983 (Tex. App.—Corpus Christi Mar. 24, 2022). Steven Henderson, Robert Popp, and John Roades were volunteer fire fighters in Wharton County. Returning from a fire in separate vehicles on October 2019, Roades' vehicle struck the vehicle carrying Henderson and Popp, killing Henderson and severely injuring Popp. Popp's and Henderson's estate sued Roades for damages, and Roades filed a motion to dismiss pursuant to the Texas Tort Claims Act ("TTCA"), claiming that: (1) he was an employee of a governmental unit; (2) he was acting in the general scope of employment at the time of the accident; and (3) the claim could have been brought against the fire department. Appellees responded that (1) the fire department was not a governmental unit; (2) Roades was not acting in the scope of employment, because he was on his way home; (3) Roades was a volunteer, not an employee; and (4) the claims could not have been brought against the fire department under the TTCA. After a hearing, the trial court denied Roades' motion to dismiss, and he appealed. The appellate court analyzed whether Roades was a government employee for

purposes of the TTCA. Volunteer firefighters, generally, are not employees under the TTCA, because they are not in the paid service of a governmental entity. However, volunteer firefighters are considered an employee under the TTCA while involved in or providing a response involving fire protection or prevention, rescue, or emergency medical or hazardous material response services. Because Roades was driving home at the time of the collision and not providing emergency response, he could not establish that he was an employee of a governmental unit to invoke dismissal of the case.

Tort Claims Act: *City of Houston v. Cavazos*, No. 14-20-00284-CV, 2022 WL 777327 (Tex. App.—Houston [14th Dist.] Mar. 15, 2022). This case arose from a collision between a vehicle driven by Erika Cavazos ("Cavazos") and a garbage truck driven by City of Houston employee Esteban Espinoza ("Espinoza"). Cavazos sued the city for personal injuries, and the city filed a plea to the jurisdiction, which was denied by the trial court. Unless waived, governmental immunity can protect a city from suit or liability by defeating a trial court's subject matter jurisdiction. The Texas Tort Claims Act ("TTCA") contains a waiver of governmental immunity for personal injury or damages caused by the wrongful act, omission, or negligence of a governmental employee acting within the scope of their employment, if the damage arises from the operation or use of a motor-driven vehicle. At the trial court, the city failed to conclusively prove that Espinoza's operation or use of the garbage truck did not cause Cavazos's alleged injuries, so because there remained a question of fact, the appellate court affirmed the trial court's denial of the city's plea to the jurisdiction.

Zoning: *City of Austin v. Acuna*, No. 14-20-00356-CV, 2022 WL 805953 (Tex. App.—Houston [14th Dist.] Mar. 17, 2022). The City of Austin undertook a comprehensive revision of its zoning ordinances and failed to give individual written notice to landowners as required by state statute. A number of landowners sued the city seeking a declaratory judgment and injunctive relief, which was granted by the trial court, and the city appealed. The city argued that the trial court erred in finding that the city violated Texas Local Government Code §§ 211.006 and 211.007 by failing to provide written notice to all affected property owners of the Planning Commission's public hearing and by failing to recognize property owners' protest rights. Because the city was undertaking a comprehensive revision of its zoning ordinances rather a change affecting only a few properties, the city believed that individual notice was not required. The court disagreed, stating that the zoning statute's notice requirement "must be rigidly performed" and that actions taken without proper notice are invalid. The city further argued that requiring the city to send upwards of 250,000 notices would be an absurd reading of the statutes. The court disagreed with this argument as well and affirmed the trial court's decision.

March 2022

Note: Included cases are from February 11, 2022 through March 10, 2022.

Tort Claims Act: *City of San Antonio v. Riojas*, No. 20-0293, 2022 WL 495473 (Tex. Feb. 18, 2022). This is an immunity from suit case under the Texas Tort Claims Act in which the court is asked to determine whether the need-risk balancing analysis applies in use of law enforcement vehicles in routine traffic management.

Officer Tristan was driving his city patrol car when he turned on his emergency lights to warn approaching motorists of a sudden traffic slowdown that he had observed ahead. Riojas who was riding a motorcycle behind Officer Tristan's vehicle swerved to avoid a collision but lost control and fell to the ground and sustained alleged injuries. Riojas sued the city. The San Antonio court of appeals held that the city was not immune, finding that the city failed to satisfy the good-faith prong of the official-immunity test as it was required to show that before activating his emergency lights, Officer Tristan "balanced the need he perceived [to do so] with the potential risk posed by his chosen course of action."

The Supreme Court reversed the decision of the appellate court holding that that the need-risk balancing analysis applies only in the context of a high-speed chase or other emergency law enforcement response that carries an inherent risk of harm to the public. In a case involving routine traffic management, the court determined that the city need show only that its officer acted in good faith – that is, "a reasonably prudent officer under the same or similar circumstances, could have believed his conduct was justified based on the information he possessed when the conduct occurred."

Tort Claims Act: *City of San Antonio v. Maspero*, No. 19-1144, 2022 WL 495190 (Tex. Feb. 18, 2022). This is a waiver of governmental immunity case under the Texas Tort Claims Act (TTCA) in which the Supreme Court is asked to determine the applicable standard when innocent bystanders suffer harm during a police chase.

The Masperos sustained incapacitating injuries and their two young children died when Rodriguez, a suspect who was being pursued in a high-speech chase by Officer Kory, collided with the Masperos' vehicle. The trial court granted the city's plea to the jurisdiction and dismissed the case, finding that: (1) immunity is not waived under Section 101.021 of the TTCA because no nexus exists "between Officer Kory's police car and the tragic incident;" and (2) Section 101.055 of TTCA applies because "there is no fact issue on 'emergency situation' or conscious indifference/reckless disregard."

The court of appeals reversed holding that: (1) because the evidence demonstrates that Officer Kory continued to pursue Rodriguez up until his collision with the Masperos' vehicle, the Masperos had adequately shown that their injuries "arose from" Officer Kory's use of her patrol car under Section 101.021(1)(A); (2) TTCA's emergency exception is inapplicable because the evidence demonstrates that Officer Kory engaged in an unauthorized chase even when she suspected she could not catch Rodriguez; and (3) Officer Kory's violation of San Antonio Police Department procedure established an independent waiver of immunity from the Masperos' claim for negligent implementation of policy.

The Supreme Court reversed, finding that: (1) the emergency exception to waiver of immunity under the TTCA applied to officer's high-speed chase, and (2) no independent ground for waiver of immunity from suit exists beyond the specific waivers set forth in the TTCA.

Tort Claims Act: *Manley v. Wise*, No. 03-21-00120-CV, 2022 WL 548266 (Tex. App.—Austin Feb. 24, 2022) (mem. op.). Wise sued Chief of Police Brian Manley and six other Austin Police Department officers, alleging that they were responsible for injuries he suffered when he got

overheated and dehydrated during cadet training. The officers filed a motion to dismiss, arguing that by suing Chief Manley in his official capacity, Wise had effectively sued both the city and its employees so that the officers were entitled to dismissal under the election-of-remedies provision of the Texas Tort Claims Act. The trial court denied the motion with respect to the individually named officers and the officers appealed.

On de novo review, the appellate court reversed and rendered judgment dismissing Wise's claims against the officers. The court did not reach the question of whether dismissal under the election-of-remedies provision was required. Instead, determining that Section 101.106(f) of the Texas Tort Claims Act applied to the case, the court held that the officers were entitled under Section 101.106(f) to a dismissal of the claims against them because: (1) conducting cadet training was within the scope of the police officers' employment; and (2) Wise's suit could have been brought against the City of Austin.

Governmental Immunity: *Okere v. Dallas Area Rapid Transit*, No. 05-20-00489-CV, 2022 WL 500026 (Tex. App.—Dallas Feb. 18, 2022) (mem. op.). The plaintiff sued the Dallas Area Rapid Transit (DART) with numerous allegations that DART bus drivers were harassing him with communications by using their vehicles and train bells to communicate. Plaintiff's claims included causes of actions for intentional infliction of emotion distress and public disclosure of private facts. The trial court dismissed the case on DART's motion to dismiss and the plaintiff appealed. The appellate court affirmed, finding that the plaintiff's claims had no basis in law and that the trial court properly granted DART's motion to dismiss.

Defamation: *Johnson v. Cullens*, No. 07-21-00093-CV, 2022 WL 714074 (Tex. App.—Amarillo Mar. 7, 2022) (mem. op.). Johnson sued Cullens for defamation in her official capacity as chief appraiser of the appraisal district. The trial court granted Cullens's plea to the jurisdiction and Johnson appealed. The appellate court affirmed, finding that the retroactive relief Johnson sought for his *ultra vires* claim was unavailable and therefore, Cullens was entitled to governmental immunity.

Employment; Citizens Participation Act: *City of Dallas v. Ahrens, et. al.*, No. 10-19-00137-CV, 2022 WL 554350 (Tex. App.—Waco Feb. 23, 2022) (mem. op.). At the time this case was filed, Katrina Ahrens was a detective with the Dallas Police Department. Her husband had also been a Dallas police officer before he and four other officers were tragically killed on July 7, 2016 by a sniper while on duty. After this incident, members of the public donated money to a non-profit entity operated by the Dallas Police Association for the benefit of the families of the officers who were killed. After not receiving any benefits from the donations, Katarina reported violations of law related to the handling of the donations by her employer to an appropriate law-enforcement authority. Katrina contends that as a result of her reports of misconduct she suffered adverse personnel actions that would not have occurred otherwise. She sued the City of Dallas for retaliation under the Texas Whistleblower Act, and the city responded by filing a motion to dismiss this claim under the Texas Citizens Participation Act ("TCPA"). After a hearing, the trial court denied the city's TCPA motion to dismiss, and the city appealed. The TCPA protects persons who associate, petition, and speak on matters of public concern from legal actions that seek to intimidate or silence them. It establishes a multi-step process for the expedited dismissal of legal actions that are based on or related to a party's exercise of the rights of free speech,

petition, or association. The Whistleblower Act prohibits a government employer from taking an adverse personnel action against a public employee who in good faith reports a violation of law to an appropriate law-enforcement authority. However, the Whistleblower Act does not afford unlimited protection from adverse personnel actions based on legitimate reasons. After reviewing the record, the appellate court concluded that Katrina made a prima-facie showing that the alleged retaliation caused her various employment-related injuries. Additionally, the appellate court determined that it could not say that the city conclusively proved that Katrina's report did not play a role in the decision to take adverse personnel actions against her at the time that it took that action. Accordingly, the appellate court concluded that the trial court did not err when it denied the city's TCPA motion to dismiss and overruled the city's remaining issues.

Governmental Immunity: *Hunnicutt v. City of Webster*, No. 14-20-00222-CV, 2022 WL 481795 (Tex. App.—Houston [14th Dist.] Feb. 17, 2022). Mary Hunnicutt and Clifford Jackson were siblings who co-owned a 23.5-acre tract of land that fronted Interstate Highway 45 in the City of Webster. After Hunnicutt conveyed 4.41 acres of the property to the city for development, Hunnicutt and Jackson filed suit against the city and its Director of Economic Development, Betsy Giusto, seeking declaratory relief voiding Hunnicutt's conveyance of the 4.41 acres, bringing an action for recission, and asserting an ultra-vires claim against Giusto. The pleadings alleged that Giusto came to Hunnicutt's home and made false promises and representations to Hunnicutt to induce Hunnicutt to convey her interest in the property. The city filed a plea to the jurisdiction on all of appellants' claims, which was granted by the trial court. Hunnicutt and Jackson appealed. With regard to Jackson's claims, because he never conveyed his interest in the property, he suffered no damage and therefore had no standing to bring or maintain the claims. Consequently, the appellate court affirmed their dismissal. Because Hunnicutt could articulate alleged damage, she had standing to bring her claims but the court ultimately dismissed them on other grounds. Cities are immune from suit except where the legislature has specifically waived the immunity. Hunnicutt could not articulate a waiver for her claims for declaratory relief to determine title of the 4.41 acres previously conveyed to the city, so the claims were barred by governmental immunity. In addition to claims against the city, Hunnicutt was making claims against Guisto, arguing that she acted without legal authority. On the contrary, Guisto had the legal authority to meet with Hunnicutt regarding development plans for the area and the conveyance of the property, thus negating the ultra vires arguments. The court affirmed the trial court's order dismissing Hunnicutt's and Jackson's claims.

Tort Claims Act: *Rodriguez v. Duvall*, No. 14-20-00402-CV, 2022 WL 619710 (Tex. App.—Houston [14th Dist.] Mar. 3, 2022) (mem. op.). Carlos Rodriguez appealed the trial court's dismissal of his claims for assault, false arrest, and invasion of privacy against City of Houston police officer S.A. Duvall under the Texas Torts Claims Act ("TTCA"). Rodriguez was at a New Year's Eve celebration at a hotel in Houston when he was injured by Duvall, who was providing security for the hotel, when Duvall detained and arrested Rodriguez for suspected narcotics violations. Duvall moved to dismiss Rodriguez's claims against him on the grounds that even though Duvall was working as a security guard, he was discharging his duties as a police officer when he arrested Rodriguez. The TTCA includes an election of remedies provision requiring trial courts to grant a motion to dismiss a lawsuit against a governmental employee sued in an official capacity. Under section 101.106(f) of the TTCA, the governmental unit—not the government employee—must be sued for a governmental employee's work-related tortious

conduct and essentially prevents an employee from being personally sued for work-related torts. Even though Duvall was working for a private employer (the hotel) at the time of the incident, he immediately became an on-duty police officer when he saw Rodriguez attempting to conceal or destroy marijuana. Because Duvall was sued in his official capacity, he was entitled to be dismissed from the lawsuit against him personally. The appellate court affirmed the trial court's dismissal of the lawsuit.

Tort Claims Act: *Harris Cty. Flood Control District v. Halstead*, No. 14-20-00457-CV, 2022 WL 678277 (Tex. App.—Houston [14th Dist.] Mar. 8, 2022). Lance Halstead, a chainsaw operator subcontracted to cut tress for the Harris County Flood Control District ("HCFCD"), was injured when a tree he was cutting in HCFCD's right of way fell and struck him. He sued HCFCD for negligence, and HCFCD filed a plea to the jurisdiction, contending that Halstead had not established a waiver of immunity under the Texas Tort Claims Act ("TTCA"). The trial court denied the jurisdictional plea, and HCFCD appealed the order. The TTCA waives governmental units' immunity from suit in three areas when the statutory requirements are met: (1) use of motor-driven vehicles or motor-driven equipment; (2) injuries arising out of a condition or use of tangible personal property; and (3) premises defects. Halstead alleged a premises defect in that the tree created an unsafe property condition. The court dismissed this argument because Halstead's injuries were not created by a defect in property but rather occurred as the result of activities on the property. Additionally, the TTCA creates a waiver of governmental immunity for torts committed by the use of motor-driven equipment, but the person operating the equipment must be a government employee. Being a sub-contractor, Halstead was not a government employee; therefore, his operation of the chainsaw would not act as a waiver of governmental immunity under the TTCA. The appellate court reversed the trial court's order denying HCFCD's plea to the jurisdiction and rendered judgment dismissing Halstead's claims for lack of subject-matter jurisdiction.

February 2022

Note: Included cases are from January 11, 2022 through February 10, 2022.

Tort Claims Act: *City of Bellaire v. Hennig*, No. 01-21-00077-CV, 2022 WL 210138 (Tex. App.—Houston [1st Dist.] Jan. 25, 2022) (mem. op.). Hennig sued the City of Bellaire, alleging that the city's negligent use of motor-driven equipment caused sewage to back up into her house and damage her property. In the lawsuit, she alleged that the city was negligent in its utilization of a rooter that was too short to reach a blockage, in selecting an inadequate access point to clear the blockage, in failing to adequately clear the line, and in failing to sufficiently inspect the line to determine that it was cleared. She also alleged that the city was negligent in failing to train its personnel on these issues.

Hennig filed a plea to the jurisdiction alleging that its immunity from suit was not waived by the Texas Torts Claims Act (Act), and therefore, the trial court lacked subject matter jurisdiction over her suit. Specifically, the city contended that any allegations concerning the use of motor-driven equipment did not invoke the statutory waiver. It further argued that there was no evidence that the city's operation or use of motor-driven equipment caused Hennig's property damage.

The trial court denied the plea to the jurisdiction. The city appealed and argued that the trial court lacked subject matter jurisdiction over Hennig's suit because governmental immunity was not waived under the Act. The appellate court agreed reversing and rendering judgment dismissing Hennig's suit.

Substandard Structures/Municipal Court: *Jaramillo v. City of Texas City*, No. 01-20-00654-CV, 2022 WL 363271 (Tex. App.—Houston [1st Dist.] Feb. 8, 2022) (mem. op.). Following a physical inspection of the buildings on Jaramillo's property, Texas City notified Jaramillo in writing that the structures were "substandard" as defined in several provisions of Texas City's Code of Ordinances and the International Property Maintenance Code. Texas City then filed a complaint in its municipal court seeking an order requiring Jaramillo to abate the alleged substandard structures on his real property and, if he failed to comply, authorizing Texas City to demolish the structures.

Texas City set the matter for an abatement hearing on July 15, 2020. That same day, Jaramillo and Texas City signed an Agreed Order of Abatement ("Abatement Order"). Jaramillo and the Texas City prosecutor discussed the terms of the Abatement Order on the record. The municipal court judge asked about Jaramillo's agreement to the order and he responded in the affirmative. Two weeks later, Jaramillo filed suit against Texas City alleging an unlawful taking of his property. He alleged that, prior to the abatement hearing, the Texas City prosecutor threatened him with either agreeing to an order authorizing Texas City to demolish the structures on his real property or Texas City would fine him up to $2,000 per day from January 21, 2020 (the date of the initial inspection) to July 15, 2020 (the date of the abatement hearing). According to Jaramillo, he had "no financial choice except to agree to the [Abatement] Order." He alleged that the prosecutor's conduct was illegal and denied him procedural due process in violation of Article 1, Sections 17 and 19 of the Texas Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

Jaramillo requested that the trial court issue a declaratory judgment finding that Texas City's actions were null, void, and of no effect and a writ of certiorari to the municipal court under state law. He also sought a temporary restraining order and a temporary injunction seeking to prevent Texas City from taking certain actions in connection with the structures on his real property. Appellant also requested monetary relief.

The trial court granted Jaramillo's request for a temporary restraining order and set a temporary injunction hearing for September 2, 2020. Following the hearing, the trial court denied Jaramillo's request for a temporary injunction. The next day, he filed his first amended petition adding claims of fraud and civil conspiracy against Texas City. He alleged "the City's course of action is a series of concerted acts of fraud, collusion and misrepresentation by the named participants and others, designed to induce Plaintiff into the Agreed Order, the end consequence of which is the taking of his Property." He claimed Texas City had misrepresented the code violations and corresponding fines to him and had "coerced and induced" him to sign a document that "fraudulently represented his rights in the 'Property.' " He sought monetary relief, a declaration from the trial court that Texas City's actions were null, void, and of no effect, and a writ of certiorari to the municipal court under state law.

Texas City moved to dismiss Jaramillo's lawsuit for want of jurisdiction arguing: (1) Jaramillo could not appeal the Abatement Order, (2) his appeal was untimely and filed in the wrong court, and (3) Texas City is immune from his intentional tort claims. Jaramillo did not respond to the motion. The trial court granted Texas City's motion to dismiss, which Jaramillo appealed. The appellate court affirmed.

Takings: *Webb v. City of Fort Worth*, No. 02-21-00133-CV, 2022 WL 123219 (Tex. App.—Fort Worth Jan. 13, 2022) (mem. op.). This is a constitutional-taking-and-nuisance suit involving governmental immunity as it relates to a city's responsibility for the escape of raw sewage into a home. Webb, a Fort Worth homeowner, sued the City of Fort Worth after his home flooded with raw sewage. He sought damages for a taking under the Texas Constitution, for common law nuisance and statutory nuisance per se, and for negligence, as well as a declaratory judgment. The city filed a plea to the jurisdiction, as well as traditional and no-evidence motions for summary judgment, all of which the trial court granted before dismissing his claims against the city with prejudice.

Webb appealed and argued that the trial court: (1) abused its discretion by refusing to file findings of fact and conclusions of law; (2) abused its discretion by failing to hold an evidentiary hearing on the city's plea to the jurisdiction; (3) erred by granting the city's plea to the jurisdiction and summary-judgment motions, as well as by dismissing his suit with prejudice. Because Webb was not entitled to findings and conclusions or an evidentiary hearing on the plea to the jurisdiction and because the trial court did not err by granting the city's plea to the jurisdiction, the appellate court affirmed the trial court's decision without reaching Webb's two summary-judgment issues.

Tort Claims Act: *Osman v. City of Fort Worth*, No. 02-21-00117-CV, 2022 WL 187984 (Tex. App.—Fort Worth Jan. 20, 2022) (mem. op.). This is an interlocutory appeal from trial court orders granting two pleas to the jurisdiction in favor of the City of Fort Worth and the Dallas/Fort Worth International Airport Board (collectively the "Airport Board"). The underlying lawsuit stems from a lady who was struck by a train in a right-of-way owned by the Airport Board after allegedly crossing adjacent property owned by the Airport Board. Osman alleged that the Texas Tort Claims Act (Act) waived the Airport Board's sovereign immunity. However, the Airport Board argued that they were not given the presuit notice required by the Act, thereby depriving the trial court of subject matter jurisdiction. The Airport Board filed pleas to the jurisdiction on this basis, but Osman moved for continuance to allow additional time for discovery. The trial court denied the continuance and granted the Airport Board's pleas.

Osman argued that the trial court's refusal to allow additional discovery was an abuse of discretion and that the trial court erred by granting the Airport Board's pleas because she raised a genuine issue of material fact regarding the Airport Board's actual, presuit notice. The appellate court found that the Osman failed to explain the nature and materiality of the yet-to-be-discovered information she sought. Furthermore, she had failed to produce evidence that raised a fact issue on each of the three required elements of presuit notice. Instead, Osman disputed the legal standard for such presuit notice. The appellate court affirmed, holding that the trial court did not abuse its discretion by denying the Osman's continuance and did not err by granting the Airport Board's pleas.

Civil Service: *O'Neill v. City of Fort Worth*, No. 02-21-00214-CV, 2022 WL 325386 (Tex. App.—Fort Worth Feb. 3, 2022) (mem. op.). This is a civil service case where the court of appeals affirmed the trial court's ability to order a substituted hearing examiner in an appeal from an indefinite suspension.

O'Neill was a firefighter for the city and was indefinitely suspended after being involved in a physical altercation with a citizen at a TCU football scrimmage. He appealed to a hearing examiner who found for O'Neill. An appeal resulted to the court of appeals, which remanded the issue to decide if the hearing examiner improperly considered outside evidence. On remand, the court held the hearing examiner violated the Civil Service Act (Act) by considering evidence that was not presented in the final hearing. The trial court vacated the examiner's decision and ordered a rehearing. When the city recognized that the same hearing examiner was set to preside over the rehearing, the city objected and filed a plea to the jurisdiction, which the hearing examiner denied. The city then filed suit (that resulted in the present appeal) under the Uniform Declaratory Judgments Act (UDJA) to hold that the same hearing examiner could not preside over the rehearing. The trial court held a trial on the merits under the UDJA claims and found the hearing examiner had exhibited bias, was no longer independent and ruled for the city. O'Neill appealed.

O'Neill argued the city's declaratory-judgment lawsuit was barred by *res judicata* or collateral estoppel. The main issue presented to the trial court was whether the same hearing examiner could preside over the rehearing regarding O'Neill's appeal of his indefinite suspension. The court noted that the Texas Supreme Court has looked to the Texas Arbitration Act (TAA) in prior opinions to fill in the gaps when the Act is silent. Turning to the TAA concerning the issue here, it has a specific section dedicated to rehearings after an arbitration award is vacated. The Act states in multiple locations that a hearing examiner must be independent and therefore neutral. When a hearing examiner is found to have developed bias against one party, they are not independent. To allow a biased hearing examiner to preside over the rehearing merely because the Act is completely silent regarding rehearings is against the purpose of the Act. The trial court, following the Texas Supreme Court's example for crafting remedies when the Act provides none, is permitted to look to the TAA for guidance. As a result, the trial court's order was affirmed.*

Tort Claims Act: *City of Fort Worth v. Alvarez*, No. 02-20-00408-CV, 2022 WL 405897 (Tex. App.—Fort Worth Feb. 10, 2022) (mem. op.). This is a Texas Tort Claims Act ("TTCA") vehicle accident case where the Fort Worth Court of Appeals agreed jurisdiction was not pled nor presented but remanded for an opportunity to cure the pleading.

Romero was traveling in a vehicle with her daughter when floodwaters due to rain swept the vehicle into an alleged rain-filled excavation on property owned by Whiz-Q that was purported to have improper drainage due to a defective excavation. Both occupants drowned. The family sued Whiz-Q, the city, and TxDOT. The city filed a plea to the jurisdiction claiming that its immunity was not waived because it did not own, occupy, or control "the property where this incident occurred" or the access road Romero was on. The plea was denied, and the city appealed.

Plaintiffs argued their pleadings incorporated by implication that the flood waters on the access road constituted a defective condition, but the city asserts the pleadings only mention defective excavation. The court held the pleadings must be read as written, which does not include the flood

waters as a defective condition. The city next argued that it did not have a duty to make the premises safe because it did not create the dangerous condition nor agree to make safe a known, dangerous condition. However, a premises-liability defendant may be held liable for a dangerous condition on real property if it created the condition or it "assum[ed] control over and responsibility for the premises," even if it did not own or physically occupy the property. "The relevant inquiry is whether the defendant assumed sufficient control over the part of the premises that presented the alleged danger so that the defendant had the responsibility to remedy it." While the city has exclusive control over its roadways, it entered into an agreement with TxDOT to maintain the access road. The city's jurisdictional evidence shows that, at the time of the accident, the city did not possess—that is it did not own, occupy, or control—the property or the defective excavation on the property. Whiz-Q owns and operates its business on the property. The court concluded that at the time of the accident, either Whiz-Q or TxDOT owned or maintained the property, not the city. The pleadings are therefore defective. However, the court noted a premise defect (as opposed to a special defect) could still be potentially raised in the pleadings under the agreement with TxDOT. As a result, the suit was remanded to allow the Plaintiffs to replead under a premise defect theory only.*

Zoning: *Farahnak v. City of Southlake Bd. of Adjustment, et al.*, No. 02-21-00202-CV, 2022 WL 405899 (Tex. App.—Fort Worth Feb. 10, 2022) (mem. op.). Farahnak appealed the trial court's determination that the board of adjustment (Board) did not abuse its discretion in allowing a special exception and variance for a property in close proximity to Farahnak. Farahnak also argued that the Board failed to expressly make any of these findings and that even if the findings had been made in Farahnak's favor, the compatible-use finding and the setback criterion would have been supported by no evidence based on Farahnak's assertions at the public hearing.

The evidence showed that the ordinance at issue, while mentioning governing "criteria" and necessary "find[ings]" for a special exception, did not require that the Board make express findings tracking the criteria and findings lists and did not require that any findings be included in the meeting minutes. Therefore, the appellate court found that the Board's failure to do so did not render its ultimate decision illegal. Moreover, the only question that state law allows a reviewing court is the determination of the legality of the Board's decision, which inquires whether the Board clearly abused its discretion. The appellate court affirmed the trial court's order and found that there was no illegality in the Board's determination and that it was appropriately reviewed.

Tort Claims Act: *City of Killeen v. Terry*, No. 03-20-00071-CV, 2022 WL 221240 (Tex. App.—Austin Jan. 26, 2022) (mem. op.). Terry, individually and as next friend to his minor child, sued the City of Killeen for injuries and damages resulting from a Killeen Police Department officer's vehicle colliding with Terry's vehicle. The officer was responding to a 9-1-1 call reporting a stabbing and running "Code III," which allows the officer to run with lights and sirens when responding to a major crime like a felony or when a person's life or safety may be an issue. The officer testified that he understood that emergency vehicles under a Code III may disregard traffic-control devices but must do so in a safe and prudent manner with due care, taking into consideration other vehicles, pedestrians, weather, traffic, and obstacles.

The officer had a red traffic light, but having activated his lights and siren approximately 850 feet before the intersection, sounded his air horn three times, and slowed from 72 miles per hour (mph)

and entered the intersection in the left-most westbound lane at approximately 61 mph. The dashcam video showed that no cars were stopped in front of the officer before the intersection. Terry, who the officer said was in the outside lane and blocked from his view by the stopped cars, had a green light and proceeded into the intersection. The officer's vehicle slowed to 54 mph as it struck Terry's vehicle.

Terry sued, alleging negligence and negligence per se toward him and his child and seeking to impose liability on the city through respondeat superior. Terry asserted that the city was liable under the Texas Tort Claims Act (Act) because Appellant's employee, acting in the course and scope of his employment, injured Appellee and his child through the operation of a motor vehicle; Terry alleged that the officer would have been responsible and the city would be liable if it were a private person. Terry added allegations that the officer acted with conscious indifference or reckless disregard for the safety of others and a claim for gross negligence after the city filed a plea to the jurisdiction. The city in its plea to the jurisdiction asserted that its governmental immunity was preserved because the officer was responding to an emergency and was operating an emergency vehicle in response to a 9-1-1 call, was not reckless, and complied with all applicable statutes and ordinances. The trial court denied the plea, and the appellate court affirmed the trial court's order.

Tort Claims Act: *City of Austin v. Quinlan*, No. 03-21-00067-CV, 2022 WL 261569 (Tex. App.—Austin Jan. 28, 2022) (mem. op.). This is an interlocutory appeal filed by the City of Austin, arguing that Quinlan's claims against it were barred by governmental immunity. The district court denied the city's plea without specifying the basis for the denial.

Quinlan filed suit when she injured herself after falling "more than a foot" from the patio on the outer edge of the premises while she was exiting the restaurant. The restaurant, Guero's, "was in possession and control of the premises and held a permit to occupy the City's Right of Way in order to operate a 'sidewalk café'" on a patio area outside the restaurant. To obtain this permit, Guero's agreed to pay the city an application fee of $100 and an annual fee of $200. Additionally, Guero's was required to maintain the premises in accordance with the terms of a Maintenance Agreement (Agreement) with the city.

Quinlan alleges that the city was liable for her injuries to the extent that the patio and/or surrounding area is owned and/or under the control of the city. She further argued that according to the terms of the Agreement, the city assumed contractual responsibility to both monitor and enforce violations by Guero's with regards to safety of the patio. She also claimed that the city further became obligated to ensure that the patio and the street was level so as not to pose a dangerous condition to her and other patrons. Moreover, Quinlan alleged that the city and Guero's were jointly in control of the subject premises and that both Guero's and the city had a duty to exercise the degree of care that a reasonably careful person would use to avoid harm to others under circumstances similar to those described in the petition. Quinlan further alleged that the city, by virtue of the Agreement with Guero's, was obligated to elevate the street and/or provide appropriate modifications to the patio and surrounding area to make such premises safe for patrons. As an additional basis for liability, Quinlan alleged that the Agreement between the city and Guero's constituted a joint enterprise, thereby making the city vicariously liable for Guero's conduct.

The city filed a plea to the jurisdiction, arguing that Quinlan's claims against it were barred by governmental immunity. The district court denied the city's plea without specifying the basis for the denial. The appellate court affirmed in part and reversed in part the district court's order and rendered judgment dismissing some but not all of Quinlan's claims.

Contracts: ***City of San Antonio By and Through the San Antonio Water Sys. v. Campbellton Rd., Ltd.*****, No. 04-20-00569-CV, 2022 WL 219005 (Tex. App.—San Antonio Jan. 26, 2022).** This is an interlocutory appeal from the trial court's order denying the plea to the jurisdiction and motion to dismiss for lack of jurisdiction filed by the City of San Antonio by and through the San Antonio Water System (SAWS) in a breach of contract case.

In the contract at issue, Campbellton, a private land developer, sought sewer service from SAWS to accommodate its plan to develop two residential subdivisions. The ten-year contract contained provisions regarding Campbellton's installation and conveyance of certain on-site and off-site facilities to SAWS for the purpose of increasing the capacity of the available sewer service so that Campbellton's two developments could obtain sewer services. The contract was subject to Campbellton satisfying conditions enumerated in the contract. Campbellton alleged that SAWS had attempted to avoid liability under the contract "by passing a 'rule'" that stated any wastewater commitments for which SAWS had previously issued but did not specify an "end date" or "termination date" would automatically terminate fifteen years "from the date made." Campbellton sought specific performance, requesting the trial court order SAWS to "specifically perform its obligations and promises under the contract and supply it with the wastewater capacity which it contracted to provide." Campbellton further sought monetary damages pursuant to section 271.153 of the Texas Local Government Code. In addition to its breach of contract claim, Campbellton sought a declaratory judgment that "the purported 'rule' passed by SAWS which attempts to terminate the contractual obligations of SAWS to Campbellton does not apply to the agreement between Campbellton and SAWS." Campbellton further sought costs and attorney's fees.

The appellate court reversed the trial court's order, finding that SAWS's immunity under Chapter 271 of the Local Government Code had not been waived as the contract was not an agreement to provide services to SAWS. Additionally, the court found no waiver of immunity under Chapter 245 of the Local Government Code as it was unclear whether Campbellton had paid all the impact fees required under the contract within ten years from the date of the contract so as to acquire vested rights. The court further remanded to the trial court to determine attorney's fees and costs.

Zoning: ***MVP Raider Park Garage, LLC v. Zoning Bd. of Adjustment of City of Lubbock*****, No. 07-20-00261-CV, 2022 WL 119131 (Tex. App.—Amarillo Jan. 12, 2022) (mem. op.).** The plaintiff sued the city's board of adjustment for denying a conditionally approved signage variance in 2019 when the variance was up for review. The board had granted the variance in 2012 with the condition that it would be up for review after seven years. The trial court granted the board's motion for summary judgment and the plaintiff appealed.

The appellate court affirmed the trial court and found: (1) the board did not abuse its discretion when it issued the variance in 2012 subject to the condition that it be reviewed every seven years and doing so didn't make the variance a temporary variance; (2) the plaintiff's issue with the

review provisions in the variance should have been brought in 2012 after the variance was granted with the conditions; and (3) the testimony at the 2019 hearing was sufficient for the board to revoke the variance.

Disability Discrimination: *Texas Tech Univ. Health Sciences Ctr. v. Niehay*, No. 08-19-00201-CV, 2022 WL 289505 (Tex. App.—El Paso Jan. 31, 2022). This is an interlocutory appeal challenging the trial court's denial of a combined plea to the jurisdiction and motion for summary judgment, seeking dismissal of a lawsuit by Dr. Niehay in which she alleged that she was wrongfully terminated from an emergency medicine residency program because of a perceived impairment, which she identified as morbid obesity.

The appellate court affirmed the trial court's ruling, finding that in a "regarded as" claim, morbid obesity can be considered an impairment under the Texas Commission on Human Rights Act (TCHRA) without evidence of an underlying physiological cause. However, the court limited its holding to morbidly obese workers who can perform their normal job duties without accommodation but are wrongly perceived as being impaired. Dr. Niehay was therefore only required to establish that Texas Tech viewed her as being impaired from her morbid obesity—regardless of the cause—and that Texas Tech terminated her as a result. The court found direct evidence of Texas Tech's discriminatory intent, and concluded that Dr. Niehay met her burden of raising a question of fact on the issue of whether Texas Tech violated the TCHRA in its termination decision.

Civil Service: *City of Beaumont v. Mathews*, No. 09-20-00053-CV, 2022 WL 318586 (Tex. App.—Beaumont Feb. 3, 2022) (mem. op.). This is a civil service/collective bargaining/arbitrator appeal where the Beaumont Court of Appeals reversed the trial court's order and reinstated the arbitrator's award.

Firefighter Mathews was discharged from the City of Beaumont Fire Department after a formal investigation into a rear-end collision involving Mathews. Driver Freeman apparently rear-ended the vehicle driven by Mathews, causing Mathews to exit his vehicle and strike Freeman one or more times. The incident occurred while Mathews was off-duty, but the department's rules and regulations apply certain standards of conduct regardless of duty status. The arbitrator admitted a statement from Freeman asserting such, which was corroborated by other evidence. Mathews appealed the termination to an arbitrator, who ultimately ruled in favor of the city, confirming Mathews's termination. Mathews appealed to the district court, which reversed the arbitrator's award, holding the arbitrator lacked jurisdiction and exceeded his jurisdiction. The city appealed.

Mathews argued the notice of dismissal Chief Huff gave him failed to advise him he had the right under the Civil Service Act (Act) to appeal before either the civil service commission (Commission) or a neutral arbitrator. The question then is whether the lack of that information is jurisdictional when the record shows the firefighter was aware of the options that were available to him under the Act. While Chief Huff's notice does not contain clear and unambiguous language regarding the options it did notify Mathews that he should look to the collective bargaining agreement to decide how to proceed.
The record conclusively proves that Mathews decided after seeking advice from his union that it was in his best interest to demand his appeal be heard by a neutral arbitrator rather than going

before a Commission. As a result, the arbitrator's jurisdiction was properly triggered. Next, Mathews argued the arbitrator improperly considered evidence submitted through the pretrial motion procedure instead of exclusively at the evidentiary hearing. The district court held the arbitrator could not consider pretrial evidence or motions. However, the Act allows the parties to file pretrial motions and expressly states it is not a violation of the Act as long as copies of the filings are served on the opposing party. Thus, the city did nothing wrong by filing a pretrial motion since the certificate of service states the city served the motion on Mathews's legal representative and Mathews never raised a lack of service. In turn, the arbitrator did not violate the Act by conducting a hearing on the city's motion. Next, the court held that the record does not demonstrate the arbitrator considered evidence that was not admitted during the evidentiary hearing. As factfinders, neutral arbitrators are the sole judges of the admissibility of the evidence and the weight and credibility to be given the evidence admitted during a final hearing.

Comparing the arbitrator's findings of fact and conclusions with the evidence presented during the hearing, the court determined the arbitrator relied upon the evidence admitted at the final hearing. The district court conducted a factual and legal sufficiency review of the evidence, but that is not authorized by the Act. District court's appellate review of arbitrator decisions are restricted to jurisdictional grounds and claims the award was procured by fraud, collusion, or through the use of other unlawful means. As a matter of law, the record presented does not allow the district court to reverse the arbitrator's decision. The district court's order and final judgment deprived the city of the statutory benefit of an efficient and speedy resolution through the Act. As a result, the district court's order was reversed and the arbitrator's decision was reinstated.*

Employment Discrimination: *San Benito Consol. ISD v. Leal*, No. 13-20-00569-CV, 2022 WL 243725 (Tex. App.—Corpus Christi Jan. 27, 2022) (mem. op.). Ms. Leal was working as a middle school assistant principal in San Benito Consolidated ISD (the "District") until she was transferred to an instructional facility position at an elementary school. On May 9, 2017, Leal filed a formal charge of discrimination with both the Texas Workforce Commission (TWC) and United States Equal Employment Opportunity Commission (EEOC) and ultimately filed suit against the District on January 30, 2018, alleging, among other things, various forms of discrimination and retaliation under the labor code and violations under the Texas Constitution. The District filed a plea to the jurisdiction, which was denied by the trial court, and the District appealed contending that that Leal failed to exhaust her administrative remedies under the Texas Commission on Human Rights Act (TCHRA) and that she failed to make viable constitutional claims.

The TCHRA prohibits employers from discriminating or retaliating against protected employees who engage in protected activities. An employee engages in a protected activity by, among other things, opposing a discriminatory practice, making a charge of discrimination with the EEOC or TWC, or participating in an investigation by the EEOC or TWC. To exhaust administrative remedies, a person must, among other requirements, file a charge of discrimination with the TWC not later than the 180th day after the date the alleged unlawful employment practice occurred. Each discrete discriminatory act starts a new 180-day clock for filing charges. There is an exception to the 180-day deadline, known as the "continuing violation doctrine," which generally applies to unlawful employment practices that cannot be said to occur on any particular day. Leal failed to establish a continuing violation, so most of her discrimination claims were dismissed as untimely. With regard to her constitutional claims, when public employees make statements pursuant to their

official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. To make a facially valid claim that her right to free speech was violated, Ms. Leal needed to plead and allege facts which show that: (1) she spoke out publicly on a matter of public concern; (3) her interest in speaking on such matters outweighed the District's interest as an employer; (3) she suffered an adverse employment decision; (4) her speech motivated the adverse employment decision. Because she never spoke out publicly, the court concluded that she failed to state a facially valid claim of free speech retaliation. Finally, Ms. Leal alleged the District violated her constitutional rights to due process when they failed to promote her, but because she had no vested property interest in a work promotion—only a mere expectation—the District had not deprived her of property without due process of law. Ultimately the court affirmed the trial court's decision in part, reversed it in part and remanded the case for further proceedings.

Governmental Immunity: *Board of Adjustments for City of San Antonio v. Lopez*, No. 13-20-00199-CV, 2022 WL 242749 (Tex. App.—Corpus Christi Jan. 27, 2022) (mem. op.). The Lopezes own four parcels of real property where they began operating a cement manufacturing facility in 1995. In 1996, the city annexed the property and adopted a new zoning ordinance, and the Lopezes were granted non-conforming use rights allowing them to continue to operate their cement business, which the new zoning rules which would otherwise have prohibited.

Between January and March 2018, the city issued the Lopezes over two hundred citations for various violations of the city's code, and on June 19, 2018, the city revoked the Lopezes' non-conforming use permit and certificate of occupancy. As a result, the city ordered the Lopezes to cease all business operations on the property. The Lopezes reapplied for the same permits, but the city denied their application. Ultimately, the Lopezes appealed the city's administrative decision to revoke their non-conforming use privileges to the city's Board of Adjustments ("BOA") which ruled in favor of the city's decision to terminate the Lopezes' rights, and the Lopezes appealed the BOA's decision to trial court, including additional takings claims and a request for an injunction against the city.

The city responded with a plea to the jurisdiction, which the trial court denied. The city appealed the trial court's judgment, arguing on one hand that the trial court did not have jurisdiction, because the Lopezes failed to exhaust their administrative remedies by not pursuing a rezone of their property. Challenging an action of a BOA requires petitioning a trial court for a writ of certiorari in a specified amount of time and contains no rezoning requirements; therefore, the appellate court dismissed the city's first point of appeal.

The city also argued that the civil trial court had no authority to enjoin enforcement of criminal statutes by the city's municipal court. A civil court has jurisdiction to declare a criminal statute constitutionally invalid and enjoin its enforcement only when: (1) there is evidence that the statute at issue is unconstitutionally applied by a rule, policy, or other noncriminal means subject to a civil court's equity powers and irreparable injury to property or personal rights is threatened; or (2) the enforcement of an unconstitutional statute threatens irreparable injury to property rights. Because evidence showed that the city was actively preventing the Lopezes from remedying the alleged violations they were simultaneously being cited for, the court concluded that the Lopezes' petition adequately challenged the constitutionality of the city's application of its ordinances and thereby

met the first requirement. The Lopezes also presented evidence supporting the allegations that the city's enforcement threatened an irreparable injury to their vested property rights thereby meeting the second requirement as well. The appellate court held the Lopezes had properly invoked the trial court's jurisdiction and affirmed the trial court's judgment dismissing the city's plea to the jurisdiction and enjoining enforcement of the citations against the Lopezes.

Tort Claims Act: *City of Houston v. Green*, No. 14-20-00190-CV, 2022 WL 97334 (Tex. App.—Houston [14th Dist.] Jan. 11, 2022) (mem. op.). Officer Samuel Omesa is a police officer for the City of Houston, and on March 18, 2017, while responding to a call for service, Omesa's vehicle collided with Crystal Green's vehicle. Green filed suit for negligence. The city filed a motion for summary judgment, which was denied by the trial court, and the city appealed arguing that (1) the city retained immunity under the emergency exception of the Texas Torts Claims Act ("TTCA") and (2) Omesa was shielded by official immunity.

Generally, a city is immune from tort liability. The TTCA provides a limited waiver of immunity for tort suits against cities for torts committed by their employees who (1) are acting within their scope of employment arising from the operation or use of motor-driven vehicles (2) if the employee would be personally liable to the claimant according to Texas law. If the employee is protected from liability by official immunity, then the employee is not personally liable to the claimant, and the governmental unit retains its sovereign immunity. Additionally, under the "emergency exception," to the TTCA, a city remains immune from tort liability for a claim arising from the action of an employee who is responding to an emergency call or reacting to an emergency situation if the action is (1) in compliance with the laws and ordinances applicable to emergency action or (2) in the absence of such a law or ordinance, the action is not taken with conscious indifference or reckless disregard for the safety of others.

In this case, the court concluded that Green raised a fact issue as to whether Omesa's conduct was reckless because the evidence supported an inference that Omesa entered the intersection without stopping and without his sirens on, despite knowing that he had a red light, it was dark, that his view of the traffic was partially obstructed, and that a collision with another vehicle that could cause serious injury was possible. Therefore, the court overruled the city's first issue. Additionally, the city cannot be vicariously liable for Omesa's acts if he has immunity from liability. Under the official-immunity defense, a government employee may be immune from a lawsuit that arises from the performance of the employee's discretionary duties performed in good faith, provided the employee was acting within the scope of the employee's authority. Good faith depends on how a reasonably prudent officer could have assessed both the *need* to which an officer responds and the *risks* of the officer's course of action, based on the officer's perception of the facts at the time of the event. Because the evidence did not reflect that Omesa considered alternative actions and because the city's evidence of good faith assumes the truth of disputed facts, the court conclude that the city did not conclusively establish that Omesa acted in good faith. Thus, the trial court did not err by denying the city's motion for summary judgment, and the appellate court affirmed the lower court's order.

Texas Tort Claims Act: *Guzman v. City of Bellville*, No. 14-19-00808-CV, 2022 WL 248132 (Tex. App.—Houston [14th Dist.] Jan. 27, 2022). Rodolfo Guzman was riding his bicycle with members of his cycling club when a storm sewer grate dislodged Guzman from his bicycle, causing

him to hit the ground and sustain personal injuries. In October 2018, Guzman filed suit against only the Texas Department of Transportation ("TxDOT"), and on November 14, 2018, Guzman amended his petition to add defendants Austin County and the City of Bellville (the "city") as defendants as well as the city's Public Works Director, Mr. Munsch. The city and Munsch filed a plea to the jurisdiction and moved for (1) dismissal of all claims against Munsch based on his immunity from suit and (2) summary judgment dismissing all claims against Munsch. The trial court granted the plea and the motion for summary judgment, and Mr. Guzman appealed.

The Texas Tort Claims Act provides that the filing of a suit against a city constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the city regarding the same subject matter, and if a suit is filed under this chapter against both a city and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the city. Since Guzman added the claims against Munsch after filing suit against the city, the court affirmed the trial court's dismissal of all personal claims against Munsch. The court went on to discuss the failures of Guzman's appellate brief, stating that it failed to adequately brief arguments in support of his other points of appeal, and the court ultimately affirmed the trial court's judgment dismissing the case.

Texas Tort Claims Act: *Hulick v. City of Houston*, No. 14-20-00424-CV, 2022 WL 288096 (Tex. App.—Houston [14th Dist.] Feb. 1, 2022) (mem. op.). Nicholas Hulick sued the City for negligence, alleging that Officer De La Guardia, a Houston police officer, struck his motorcycle when the officer attempted to make a left-hand turn, causing Hulick serious injuries. The city filed a plea to the jurisdiction, arguing that the officer retained his official immunity, which the trial court granted. Mr. Hulick appealed.

A city cannot be vicariously liable for an employee's acts unless its governmental immunity has been waived. The Texas Tort Claims Act ("TTCA") provides a waiver of governmental immunity for property damage and personal injury proximately caused by the wrongful act or omission or the negligence of an city employee acting within their scope of employment if (1) the damages arise from the operation or use of a motor-driven vehicle and (2) the employee would be personally liable to the claimant according to Texas law. The dispute in this case was whether the officer "would be personally liable to the claimant under Texas law."

The City argued that Officer De La Guardia would not be liable because he is protected by official immunity. A city employee is entitled to official immunity: (1) for the performance of discretionary duties; (2) within the scope of the employee's authority; and (3) provided the employee acts in good faith. An action is discretionary if it involves personal deliberation, decision, and judgment; on the other hand, an action that requires obedience to orders or the performance of a duty as to which the employee has no choice is "ministerial." In determining whether an act is discretionary, the inquiry focuses on whether an employee was performing a discretionary function. A police officer's operation of a motor vehicle while responding to an emergency is a discretionary function; whereas, operating the vehicle on official, non-emergency business is ministerial. In this case, there was no evidence of an emergency or any urgent circumstance, and the court determined that Officer De La Guardia was performing a ministerial function to which immunity does not attach. Consequently, the court reversed the trial court's order dismissing this case and remanded it back to the trial court for further proceedings.

Civil Service: *City of Houston v. Cortez*, No. 14-20-00565-CV, 2022 WL 364041 (Tex. App.—Houston [14th Dist.] Feb. 8, 2022). The City of Houston's Fire Chief terminated firefighter Pete Cortez after Cortez failed a drug test. Cortez appealed to the Firefighters' and Police Officers' Civil Service Commission for the City of Houston ("the Commission"), and the Commission upheld the termination. Cortez then appealed the Commission's ruling to district court, which: (1) granted a motion for summary judgment filed by Cortez; (2) denied the city's and the Commission's motions for summary judgment; (3) reversed the Commission's decision; and (4) reinstated Mr. Cortez. The city and the Commission appealed.

The dispositive issue before the appellate court was whether the Commission upheld an arbitrary act by the city which "tainted" the Commission's decision "by illegality." An arbitrary act is one that is taken capriciously or at pleasure, and not according to reason or principle. Under the city's civil service executive order, Cortez had a right to retest his hair sample with an independent lab after the positive drug test was returned, and the city had the obligation to inform Cortez of this retest right. The city's effective choice to observe some applicable civil service rules but not others falls squarely within the common understanding of the term "arbitrary," and the court held that the city's failure to fully perform all conditions precedent to removal was either clear abuse by the city or constituted an arbitrary or capricious act. Ultimately, the city's and Commission's decision to terminate Cortez were "tainted by illegality," and the appellate court affirmed the trial court's reversal of the termination.

January 2022

Tort Claims Act: *City of Jersey Vill. v. Killough*, No. 01-20-00823-CV, 2021 WL 5903988 (Tex. App.—Houston [1st Dist.] Dec. 14, 2021) (mem. op.). This is an interlocutory appeal in which the City of Jersey Village challenged the trial court's order denying its plea to the jurisdiction and summary-judgment motion in a premises liability suit.

Killough alleged that he was injured when he collided with a concrete median barrier that had no paint or reflectors, while on his motorcycle, on U.S. Highway 290. Killough argued that the concrete median barrier constituted a special defect because it was an obstruction on the frontage road of U.S. 290 and posed an unexpected and unusual danger to ordinary users of the roadway in such a way that a vehicle's ability to travel on the roadway would be unexpectedly and physically impaired. Killough further argued that the city had control over the concrete median barrier because the city was a home rule city with exclusive control over and under the public highways, streets, and alleys of the city. The city filed a plea and summary judgement motion, contending that the concrete median barrier was an ordinary premises defect rather than a special defect under the Texas Tort Claims Act (TTCA) because it was a longstanding permanent condition and also asserting that the roadway and the concrete median barrier were not constructed, owned, or controlled by the city, but rather by the Texas Department of Transportation. The trial court denied the city's plea to the jurisdiction and summary judgment motion.

The appellate court found that the city's status as a home rule city, standing alone, without a showing of ownership, dominion, or control of the concrete median barrier or roadway at the relevant location, did not create any duty on the part of the city. Therefore, the court held that the

uncontroverted evidence established that the city did not owe Killough a legal duty, and did not waive the city's governmental immunity. The appellate court reversed and rendered a decision.

Takings/Zoning: ***City of Grapevine v. Muns*, No. 02-19-00257-CV, 2021 WL 6068952 (Tex. App.—Fort Worth Dec. 23, 2021).** This matter was first reported last August in the TCAA Monthly Member News, Volume 16, Issue 12 (2021). In this opinion, the appellate court, on a motion for rehearing, reversed, in part, and affirmed, in part, the trial court's order regarding the validity of the city's short-term rental (STRs) ordinance.

The city's initial zoning ordinance was written in a way that prevented STRs, but allowed some "bed and breakfasts." Due to sporadic enforcement, and after an increase in complaints about negative effects from STRs, the city conducted a study. As a result of the study, the city passed an ordinance banning STRs in the entire city, but provided a 45-day grace period before enforcement would begin. Several property owners and commercial real estate services sued to invalidate the ordinance. The city filed a plea to the jurisdiction and motion for summary judgment, which were denied. The city appealed.

The city first contended that the plaintiffs failed to appeal any decisions to the board of adjustment and therefore failed to exhaust their administrative remedies. Generally, administrative bodies do not have the authority to rule on the constitutionality of statutes and ordinances. Although constitutional challenges are not "globally exempted" from the exhaustion requirement, if the administrative body lacked the ability to "render a relief that would moot the claim" then no exhaustion is required. As a result, the board of adjustment lacked the authority to grant the plaintiffs' the right to conduct an STR, so no exhaustion is required.

Next, the city argued that STRs do not fit within the definition of a "single-family detached dwelling" under its zoning code because STRs are not occupied by a single-family but are occupied by groups of people. However, because the city's code defines the word "family" in such a way that it does not require that the people living as a "single housekeeping unit" be related by blood or marriage and also has no duration of occupancy limit, the code does not prohibit STRs as long as the occupancy falls within the common and ordinary meaning of "family."

The city next argued the plaintiffs did not directly challenge the validity of the STR ordinance (only an interpretation of whether it applied to them) so no declaratory relief could be granted. However, the court found the plaintiffs' retroactivity, due-course-of-law, and takings claims turn on whether the existing code allowed STRs. To that extent, the court found they had a valid justiciable controversy. Under the takings analysis, the court held that although a property owner generally has no vested right to use his property in a certain way without restriction, they have a vested right in the real property, which includes the ability to lease. From a constitutional standpoint, that is sufficient to trigger a protected property right interest for jurisdictional purposes. This, along with the fact the court found that STRs were not expressly prohibited by the wording of the ordinance, creates a fact issue as to whether the plaintiffs suffered a taking. The court also noted that, contrary to the city's arguments, lost profits are a relevant factor to consider in assessing the property's value and the severity of the economic impact on a property owner. The plaintiffs pled and submitted evidence to support that STRs "generate higher average rent than long-term

leases, even after expenses" and that the STR Ordinance prevents them from "participating in an active, lucrative market for [STRs]."

The court agreed with the city that the regulation of STRs is not preempted by the Tax Code, as alleged by the plaintiffs. Plaintiffs did not point to any provision in either the Tax Code or the Property Code that implies that the legislature meant to limit or forbid local regulations banning STRs. The court then addressed the retroactive law arguments, holding that a "settled" right is different than a vested right and the plaintiffs asserted the STR ordinance impaired their settled property rights under the common law and under the city's code to lease their properties on a short-term basis. The issue is not about the "property owners' right to use their property in a certain way," but about the owners' "retaining their well-settled right to lease their property."

Next, in the substantive-due-process context, a constitutionally protected right must be a vested right that has some definitive, rather than merely potential existence. Property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made. Thus, although the plaintiffs have a vested right in their properties, they do not have a vested right under the city's zoning ordinance to use them as STRs. However, the court found they do have a fundamental leasing right, which is sufficient to plead, jurisdictionally, a due-course-of-law claim. The court clarified in this *rehearing* opinion, that its holding on this point is limited to the fact a property owner has a fundamental right to lease, but the durational limits may be valid or may be invalid depending on the extent of the regulatory intrusion into that right. The intrusion goes to the merits of the case, which the court declined to address as part of the interlocutory appeal. In short, the plaintiffs properly pled all claims for jurisdictional purposes, except a claim under a preemption theory.*

Condemnation: *Town of Westlake v. City of Southlake*, No. 02-21-00241-CV, 2021 WL 6069104 (Tex. App.—Fort Worth Dec. 23, 2021). This is an interlocutory appeal from the denial of the Town of Westlake's plea to the jurisdiction in a case where the City of Southlake filed condemnation proceedings against the Town of Westlake in order to condemn approximately 1400 feet of land owned by the Town of Westlake.

Westlake claimed that condemnation action brought by Southlake was an attempt by Southlake to use its powers of condemnation to gain access to FM 1938 that a residential development located principally within Southlake, but abutting the boundary with Westlake, had not been able to negotiate. Southlake followed the condemnation procedures outlined in chapter 21 of the Texas Property Code and the commissioners awarded Westlake $22,000 for the condemnation. Westlake filed a motion to dismiss which was denied by the trial court. Then, just before the award was filed with the district court, Westlake filed a plea to the jurisdiction in the district court. The court noted the plea was not a plea, but rather should have been a motion opposing the taking, and denied the plea. Westlake filed this interlocutory appeal in response. Southlake then filed a motion to dismiss.

The appellate court found, with regard to Southlake's motion to dismiss, that the trial court's jurisdiction was triggered once the commissioners' findings were filed, even if Westlake "jumped the gun" as was asserted and filed the plea before the commissioners' filing. As a result, the matter was properly before the appellate court. Regarding Westlake's plea, Westlake first argued no waiver of immunity existed under section 251.001 of the Local Government Code. However, the

appellate court noted that the language allows condemnation regardless of whether the property is already public or private, whether it is inside the city or outside, and possesses safeguards to prevent abuses. Because the statute allows condemnation of public property, it must, therefore include a waiver of immunity for the owning entity. Comparing the language in section 251.001 to similar provisions of the Utility Code, the court held immunity is waived for Westlake. While case law states that when one governmental entity is condemning property owned by another governmental entity, the condemning entity must establish the "paramount importance" standards (i.e., it has a public need greater and will not destroy the public nature). However, the paramount importance doctrine is not jurisdictional. With regards to Westlake's argument that section 311.002 of the Transportation Code, giving cities exclusive control over streets and highways, the record had not been established enough to make the determination of whether the condemnation would interfere with such streets since Westlake owns only the adjoining right of way. The record was also not sufficiently developed to establish whether Southlake could establish a valid public purpose. As a result, the appellate court affirmed the trial court's ruling.*

Tort Claims Act: *City of Killeen Police Dep't v. Fonseca*, No. 03-19-00898-CV, 2021 WL 6105569 (Tex. App.—Austin Dec. 23, 2021). This appeal arises from a collision between a police cruiser driven by Officer Boehmker of the Killeen Police Department (Department) and a vehicle driven by Gloria Fonseca. Fonseca, on behalf of herself and as next friend to Julia Fonseca, along with Alberto Fonseca, acting only as next friend of Julia Fonseca (collectively, the "Fonsecas"), subsequently sued the Department for the officer's alleged negligence and per se negligence. The Department responded with a plea to the jurisdiction, arguing that the suit was barred by governmental immunity and that no exception applied. The Fonsecas amended their suit to include a claim of gross negligence, and the Department amended its plea accordingly. The district court denied the Department's plea, and the Department appealed.

The Department contends the district court erred by overruling the plea to the jurisdiction predicated on governmental immunity from suit. The Fonsecas claim that the Texas Tort Claims Act ("TTCA") provides an exception to sovereign and governmental immunity where injury arises from use of motor vehicle. The appellate court affirmed the trial court's denial concluding that the Fonsecas produced evidence sufficient to create a fact issue as to whether Officer Boehmker's conduct was reckless thereby negating the application of the emergency-response exception to TTCA and, consequently, whether the claim fell within the scope of the TTCA's waiver of immunity.

Tort Claims Act: *City of Austin v. Furtado*, No. 03-21-00083-CV, 2021 WL 6194365 (Tex. App.—Austin Dec. 31, 2021) (mem. op.). This is an appeal arising from an order denying the City of Austin's plea to the jurisdiction in Furtado's trip-and-fall, premises-liability suit. The city argued that governmental immunity barred the claims against the city and that Furtado failed to demonstrate a waiver of that immunity under the Texas Tort Claims Act. The city contends that the trial court erred by denying the plea because: (1) the part of the sidewalk where Furtado fell was an ordinary defect and not a special defect; (2) the city conclusively proved its lack of actual knowledge of the alleged defect; and (3) there was no fact issue about whether the city had constructive knowledge of the alleged defect.

The appellate court concluded that the alleged defect was a special defect and that the undisputed evidence conclusively established that the city did not have actual knowledge of the defect. In addition, the court concluded that Furtado failed to plead facts affirmatively demonstrating constructive knowledge of the alleged defect but that the pleadings did not conclusively negate constructive knowledge. Because there was an issue of pleading sufficiency, the court reversed and remanded to afford Furtado the chance to replead.

ERCOT: *Elec. Reliability Council of Tex., Inc. v. CPS Energy*, No. 04-21-00242-CV, 2021 WL 5879183 (Tex. App.—San Antonio Dec. 13, 2021). This dispute arises from an order of the Public Utility Commission (PUC) to the Electric Reliability Council of Texas (ERCOT) to set the per-megawatt hour price of electricity at its highest permissible rate—$9,000 per mwh—to account for a scarcity in electric supply during Winter Storm Uri. CPS Energy (CPS), a municipally owned utility servicing the San Antonio area that buys and sells electricity, alleges ERCOT improperly kept prices at this rate after any alleged need for scarcity pricing had ended, resulting in billions of dollars in overcharges to market participants, including CPS, and ERCOT owing CPS money.

CPS sued ERCOT for breach of contract, negligence, gross negligence, negligence per se, breach of fiduciary duty, and violations of the Texas Constitution, seeking declaratory and injunctive relief and, alternatively, money damages. It also asserted ultra vires claims against ERCOT's former executives and board, including Magness. ERCOT—but not Magness—filed a plea to the jurisdiction arguing the trial court lacked jurisdiction over CPS's claims for various reasons. ERCOT also filed a motion to transfer venue to Travis County. CPS nonsuited its claims against all the individual defendants except Magness. The trial court denied ERCOT's plea to the jurisdiction and its motion to transfer venue to Travis County. ERCOT and Magness filed a notice of interlocutory appeal from the trial court's order denying ERCOT's plea to the jurisdiction. CPS then filed a motion to dismiss this appeal for lack of appellate jurisdiction.

The appellate court: (1) dismissed CPS's motion to dismiss ERCOT's appeal because it found that ERCOT is a governmental unit as it "operates as part of a larger governmental system" and is therefore an "institution, agency, or organ of government;" (2) granted CPS's motion to dismiss Magness's appeal for want of jurisdiction as Magness lacks standing to appeal the trial court's order granting ERCOT's plea to the jurisdiction; and (3) held that PUC has exclusive jurisdiction over CPS's common-law claims against ERCOT, and CPS must exhaust its administrative remedies in the PUC before seeking judicial review of those claims.

Tort Claims Act: *Pena v. City of Garland*, No. 05-21-00611-CV, 2021 WL 6143710 (Tex. App.—Dallas Dec. 30, 2021) (mem. op.). While Pena was at a city landfill, he was injured when a truck hit him after a city employee signaled to the truck driver to back up. Pena sued on the theories of premises defect, negligence, and the use of a motor vehicle. The trial court granted the city's plea to the jurisdiction and Pena appealed.

The appellate court found: (1) there was no direct evidence to show the city had knowledge of a premises defect due to a high volume of traffic at the landfill; (2) Pena's negligence claim failed to identify any tangible personal property; and (3) a governmental employee directing the truck was not sufficient to meet the use or operation of a motor-vehicle requirement of the Texas Tort

Claims Act. The appellate court affirmed the denial of the plea to the jurisdiction but gave Pena the opportunity to replead.

Purchasing: *City of Waco v. CTWP*, No. 07-21-00280-CV, 2021 WL 6145427 (Tex. App.—Amarillo Dec. 30, 2021) (mem. op.). In this case, a vendor who had an expiring contract with the city sued the city for failing to comply with the procurement statutes when the city: (1) looked at vendors on the BuyBoard purchasing cooperative; (2) contacted some directly; (3) negotiated a different price from the BuyBoard price; and (4) did not provide a copy of the purchase order to BuyBoard. The vendor sued for declaratory judgment and an injunction.

The city filed a plea to the jurisdiction, which the trial court denied it. The city appealed. The appellate court determined that the plea should have been granted as to the declaratory judgment claims because the vendor was not challenging an ordinance. However, the appellate court determined that the evidence presented a conflict regarding the city's governmental immunity from suit on the grounds that it used a purchasing cooperative based on its conduct in selecting a vendor. The appellate court also rejected the city's arguments that the vendor lacked standing and that the vendor's claims were moot because its contract with the city had expired.

Tort Claims Act: *City of Houston v. Gantt*, No. 14-20-00229-CV, 2021 WL 5934955 (Tex. App.—Houston [14th Dist.] Dec. 16, 2021) (subst. mem. op.). Gantt sued the city alleging injuries after being struck by a patrol car driven by a Houston police officer. The city filed a plea to the jurisdiction claiming it was immune from suit due to Gantt's failure to properly notify the city of the claim, which the trial court denied. The city appealed.

The city can be subject to tort liability under the Texas Tort Claims Act ("TTCA"), but the TTCA contains notice requirements which must be followed. Alternatively, if the city had actual notice that (1) an injury had occurred (2) to a particular individual (3) that was at least partially the city's fault, the TTCA's notice requirements would have been satisfied. Additionally, cities may by ordinance or charter put additional notice requirements in place, which the city had done. In this case, police reports and fire department transport records related to the crash were not sufficient to put the city on actual notice of a claim, and Gantt was unable to show that he had otherwise complied with city or TTCA notice requirements. The appellate court reversed the trial court and dismissed the case for want of jurisdiction.

December 2021

Note: Included cases are from November 11, 2021 through December 10, 2021.

Criminal Penalties/Vested Property Rights: *TitleMax of Tex., Inc. v. City of Austin*, No. 01-20-00071-CV, 2021 WL 5364773 (Tex. App.—Houston [1st Dist.] Nov. 18, 2021.). TitleMax sought declaratory and injunctive relief against the City of Austin relating to a city ordinance intended to regulate payday lending practices. The city filed a plea to the jurisdiction, asserting that, because the specific ordinance at issue was penal in nature, the civil district court lacked jurisdiction to declare it unconstitutional or to enjoin a prosecution filed thereunder. The trial court granted the city's plea to the jurisdiction and dismissed TitleMax's case. TitleMax appealed.

The appellate court found that TitleMax showed a threatened irreparable injury to its vested property rights and the "essence" of its claims was not a "criminal law matter" outside a Texas civil court's subject-matter jurisdiction. Therefore, the appellate court reversed the trial court because the trial court erred in granting the city's plea to the jurisdiction dismissing TitleMax's claims.

Tort Claims Act: *City of Houston v. Kim*, No. 01-20-00333-CV, 2021 WL 5774173 (Tex. App.—Houston [1st Dist.] Dec. 7, 2021) (mem. op.). The plaintiff sued a city employee and the City of Houston for a car accident when the city employee, wearing his City of Houston Police Department uniform, collided with plaintiff as he was leaving a high school parking lot and entering the roadway. The city moved to dismiss the employee under the election-of-remedies provision under the Texas Tort Claims Act ("Act"). The city then filed a motion for summary judgment alleging the employee was not acting in the scope of his employment at the time of the accident. The trial court denied the summary judgment and the city appealed. The appellate court held that, by moving to dismiss the plaintiff's claims against the employee under the Act, the city judicially admitted that the employee was acting within the scope of his employment and could not later dispute that admission.

Lease/Breach of Contract: *City of Dallas v. Oxley Leasing N. Loop, LLC*, No. 05-21-00241-CV, 2021 WL 5275828 (Tex. App.—Dallas Nov. 12, 2021) (mem. op.). The city leased a property near the airport to the plaintiff to carry on a banking business. The lease had several renewal options conditioned on the lessee timely providing the city with written notice of its intent to exercise the option. Whether plaintiff properly exercised the renewal option to extend the lease term beyond the initial term is in dispute; however, after the expiration of the initial term, the plaintiff continued to occupy the property and pay rent. Later, the city sent the plaintiff an eviction letter and the plaintiff sued for breach of contract. The city filed a plea to the jurisdiction and the trial court denied it on the grounds that the city was engaged in a proprietary function when leasing the property. The city appealed. Using the *Wasson II* factors, the appellate court determined that the city was engaged in a proprietary function when leasing the property and affirmed the trial court's decision.

Tort Claims Act: *City of Irving v. Muniz*, No. 05-21-00099-CV, 2021 WL 5410410 (Tex. App.—Dallas Nov. 19, 2021, no pet. h.) (mem. op.). Muniz sued the city for injuries from a car accident that happened when he followed detour signs for construction on a city road and his car slid into a large excavation site. The city filed a plea to the jurisdiction on the grounds that the excavation was not a special defect nor a premise defect and the detour/warning signs were a discretionary act. The trial court denied the plea and the city appealed. The appellate court affirmed, finding: (1) the excavation was a special defect as a matter of law; (2) there was a fact question about what warnings were present and whether the warnings were adequate to warn of a special defect; and (3) the city's design of the detour and warning signs were not discretionary.

Face Masks: *Abbott v. Jenkins*, No. 05-21-00733-CV, 2021 WL 5445813 (Tex. App.—Dallas Nov. 22, 2021) (mem. op.). The Dallas County Judge issued a mask mandate in contradiction of Governor Abbott's executive order banning mask mandates (GA-38). A county commissioner sued the county judge for the issuing order and the county judge filed a counterclaim against Abbott in his official capacity over GA-38. The trial court denied Abbott's plea to the jurisdiction

and granted an injunction in favor of the county judge. Abbott appealed. The appellate court found that: (1) the county judge alleged sufficient facts that Abbott's ban constraining the county judge's power to enforce a face-covering requirement within the county, enacted through GA-38, was an *ultra vires* action; (2) the county judge has standing to sue Abbott; (3) the provision of section 22.002 of the Government Code regarding original jurisdiction in the Texas Supreme Court did not apply to the suit against Abbott; and (4) the trial court did not err when it granted the county judge's temporary injunction.

Substandard Buildings: ***Polecat Hill, LLC, et al., v. City of Longview, et al.*****, No. 06-20-00062-CV, 2021 WL 5702184 (Tex. App.—Texarkana Dec. 2, 2021).** The city notified Polecat that its property was in violation of the city's health and safety standards ordinances. Polecat sued the city and the city countersued seeking an injunction to prohibit violations of its ordinances. The trial court ruled in favor of the city and issued a permanent injunction. Polecat appealed. The appellate court rejected Polecat's arguments and found: (1) Polecat failed to preserve its complaints about the affidavits to the motion for summary judgment for appeal; (2) Chapter 54 does not require proof of continuing violations; (3) the city carried its burden on its motion for summary judgment; and (4) Polecat could not defeat the city's no-evidence motion for summary judgment on the inverse condemnation and Equal Protection claims.

Civil Service: ***City of Amarillo v. Nurek*****, No. 07-20-00315-CV, 2021 WL 5395986 (Tex. App.—Amarillo Nov. 18, 2021).** The plaintiff sued the city, city manager, mayor, city council, and members of the city civil service commission seeking: (1) a declaration that the employment positions within the fire marshal's office (FMO) should be classified as civil service positions; and (2) injunctive relief classifying the FMO positions as civil service and affording the plaintiffs the rank they would have been entitled to had the positions been classified as civil service positions. After a bench trial, the trial court: (1) found the plaintiff's position in the FMO was a civil service position; (2) denied the plaintiff relief because it found that the city's firefighters association was the real party in interest; and (3) found the city classified the plaintiff as a non-civil service employee in good faith. Both the city and plaintiff appealed.

The appellate court: (1) overruled the city's challenges to the trial court's findings; (2) found that the trial court erred when it imputed the actions of the city's firefighters association to the plaintiff based on its conclusion that the association is a real party in interest in this case; and (3) found that the trial court did not have sufficient evidence to support its finding that the city acted in good faith in reclassifying the plaintiff's position to non-civil service. The appellate court remanded the case to the trial court to consider the injunctive relief and attorney's fees claims in light of its order.

Governmental Immunity: ***Edinburg Consol. Indep. Sch. Dist. v. Ayala*****, No. 13-20-00570-CV, 2021 WL 5828945 (Tex. App.—Corpus Christi-Edinburgh Dec. 9, 2021) (mem. op.).** Beginning in 2007, Ayala drove a bus for the Edinburg Consolidated Independent School District (ECISD) until he was injured in a collision. After recovering, he returned to work as a dispatcher and was ultimately terminated in September 2015. Three years later, he applied for employment again with the ECISD. When the District failed to respond to his application, he filed suit alleging a claim for failure to hire based on age, disability, national origin and retaliation. The ECISD filed a plea to the jurisdiction arguing that Ayala's filings did not allege facts sufficient to waive ECISD's governmental immunity. The trial court denied the plea, and ECISD appealed.

The Texas Commission on Human Rights Act waives immunity from suit for governmental units for unlawful employment practices. To overcome the government's immunity, (1) the plaintiff must first allege facts sufficient to create a presumption of illegal discrimination; (2) the defendant may then rebut that presumption by producing evidence of legitimate, non-discriminatory reasons for the employment actions; and (3) the plaintiff must then overcome the rebuttal evidence by producing evidence that the defendant's stated reason is a mere pretext. In this case, Ayala's pleadings were sufficient to establish a prima facie case of discrimination, which ECISD's rebuttals could not overcome; therefore, the appellate court affirmed the trial court's order.

Governmental Immunity: *Galveston Cty. v. Leach, et al.*, No. 14-20-00181-CV, 2021 WL 5831123 (Tex. App. - Houston [14th Dist.] Dec. 9, 2021). The plaintiffs in this case were injured after being hit by a motor vehicle driven by an unlicensed driver. They sued Galveston County, because the driver of the vehicle was operating the vehicle at the direction and in the presence of a Galveston County Sheriff's Deputy. The county filed this appeal after its plea to the jurisdiction claiming governmental immunity was denied by the trial court.

The Texas Tort Claims Act ("TTCA") waives governmental immunity where a personal injury is proximately caused by the wrongful act or omission or the negligence of a governmental employee acting within the scope of employment if the personal injury "arises from the operation or use of a motor-driven vehicle" and "the employee would be personally liable to the claimant according to Texas law." In this case, the governmental employee was not operating the motor-driven vehicle which caused the injuries; nevertheless, because the driver was in the act of complying with the directions of a governmental employee who was present when the accident occurred, the TTCA waives governmental immunity. The appellate court affirmed the trial court's order.

November 2021

Note: Included cases are from October 11, 2021 through November 10, 2021.

Tort Claims Act: *Gibbs v. City of Houston*, No. 01-20-00570-CV, 2021 WL 4733790 (Tex. App.—Houston [1st Dist.] Oct. 12, 2021) (mem. op.). This is a Texas Tort Claims Act ("TTCA") case involving a collision between a pickup truck and a city police department vehicle. Brannon was driving a pickup truck when she collided with a city police department SUV, driven by a city employee. Another plaintiff, Gibbs, was one of six passengers riding in the pickup truck. Brannon sued the city, which the other passengers joined, but Gibbs was not named in the amended petition. After the statute of limitations passed, Gibbs was joined in a later petition. The city filed a motion for summary judgment against Gibbs asserting the statute of limitations. The trial court granted the motion and Gibbs appealed.

The party suing a governmental entity has the burden to establish jurisdiction by pleading—and ultimately proving—not only a valid immunity waiver but also a claim that falls within the waiver. The city argued that neither it nor its employee could be liable to Gibbs under Texas law because Gibbs's claims are barred by limitations. Thus, the city argued, Gibbs's claims do not fall within any TTCA waiver. Gibbs asserted the "inadvertent omission" exception which is based on excusable inadvertence or mistake. However, the exception was created when existing parties were

inadvertently dropped from suit, then added back later. In this case, Gibbs joined as a party in the suit for the first time after limitations expired. Ordinarily, an amended pleading adding a new party does not relate back to the original pleading. Since Gibbs was not added until after the limitations expired, it was proper for the court to grant the city's summary judgment.*

Economic Development/Contract Dispute: *Town Park Ctr., LLC v. City of Sealy et al.*, No. 01-19-00768-CV, 2021 WL 4994785 (Tex. App.—Houston [1st Dist.] Oct. 28, 2021). In this contract dispute, Town Park Center and the city executed a Chapter 380 Economic Development Agreement ("EDA") to develop a commercial shopping center on Town Park Center's property. Under the terms of the EDA, Town Park Center agreed to develop and construct the shopping center according to a development plan that the city had approved. The city in turn agreed to pay annual economic development grant payments (based on sales tax collections) as an incentive and sell storm water detention capacity to Town Park Center.

Town Park Center nonsuited two suits prior to this third suit seeking mandamus, declaratory relief, injunctive relief, takings, ultra vires claims and claims under the "vested rights provision" of Local Government Code, Chapter 245. The city filed a plea to the jurisdiction and argued immunity as well as arguments similar to *res judicata*. The trial court granted the plea and Town Park Center appealed.

The court noted that *res judicata* is an affirmative defense and could not be raised in a plea to the jurisdiction. The court held the EDA constituted a contract for goods or services which can trigger a waiver of immunity. The EDA included a provision for Town Park Central to build and dedicate a road to the City as part of the development, which constituted a service. Therefore, the trial court erred in granting the plea as to the breach of contract claim. However, as to the Chapter 245 vested rights claim, Town Park Center did not identify any city order, regulation, ordinance, rule, or other requirement in effect when its rights in the project vested that mandates the sale of the detention capacity at issue. With no change in order or rule, Chapter 245 was inapplicable. As to Town Park's takings claim, the court found it failed to establish the city's refusal to allow the purchase of detention capacity deprived them of the beneficial use of the property. As to the *ultra vires* claims, merely failing to comply with a contract does not give rise to an *ultra vires* claim. While Town Park Central points to a city resolution allowing for detention capacity purchases, it does not mandate the sale of detention capacity. It instead only provides that the city may sell detention capacity, which is discretionary. As a result, the appellate court held that the *ultra vires* claims were properly dismissed. In short, the appellate court reversed the dismissal of the breach of contract claim, ultimately affirmed the dismissal of all other claims, and remanded for trial.*

Tort Claims Act: *City of Arlington v. Ukpong*, No. 02-21-00078-CV, 2021 WL 4783169 (Tex. App.—Fort Worth Oct. 14, 2021) (mem. op.). This is a Texas Tort Claims Act ("TTCA") premise defect case in which the plaintiff sued the city for injuries she incurred when a dead hackberry tree next to a park's trail she frequented fell on her. The city filed a plea to the jurisdiction and asserted a lack of waiver of immunity. The trial court denied the plea and the city appealed.

The TTCA provides that "if a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private

property…" Moreover, when property is open to the public for "recreation," the Recreational Use Statute ("RUS") further limits a governmental unit's duty by classifying recreational users as akin to trespassers. Under the RUS, a landowner has no duty to warn or protect trespassers from obvious defects or conditions. A property owner "may assume that the recreational user needs no warning to appreciate the dangers of natural conditions, such as a sheer cliff, a rushing river, or even a concealed rattlesnake." The city did not owe plaintiff a duty to protect her from obvious defects or conditions and generally did not owe a duty to warn or protect her from the dangers of natural conditions in the park, whether obvious or not. Plaintiff's own pleadings asserted the dead tree was an obvious condition. However, even if the dead tree was not an obvious condition, it was a natural condition, and no duty to warn existed regardless. The appellate court reversed the denial of the city's plea to the jurisdiction and dismissed the plaintiff's claims.*

Face Coverings: *Abbott v. City of San Antonio et al*., No. 04-21-00342-CV, 2021 WL 5217636 (Tex. App. —San Antonio Nov. 10, 2021) (mem. op.). This is an interlocutory appeal in which the court of appeals upheld the trial court's order granting a temporary injunction.

In August 2021, the City of San Antonio and Bexar County filed a declaratory judgment suit against Governor Abbott, in his official capacity, alleging that by adopting certain portions of Executive Order GA-38, he acted *ultra vires* and outside the scope of the Texas Disaster Act (Chapter 418 of the Government Code), and alternatively, the Act violates the Texas Constitution. The suit also included an application for a temporary injunction. The trial court, after an evidentiary hearing, granted the temporary injunction, enjoining enforcement of portions of GA-38 that prohibit local governmental entities from requiring individuals to wear face coverings and setting the case for trial on its merits on December 13, 2021. The Governor filed an interlocutory appeal challenging the temporary injunction.

The court of appeals held that: (1) Section 418.016(a) does not provide the Governor with the authority to suspend statutes that concern local control over public health matters or to prohibit local restrictions on face coverings; and (2) the city and county have alleged sufficient facts that, if taken as true, would confer standing for their claim that the Governor acted *ultra vires.*

Retirement Fund: *Emps.' Ret. Fund of City of Dallas v. City of Dallas*, No. 05-20-00494-CV, 2021 WL 5027759 (Tex. App.—Dallas Oct. 29, 2021). The city adopted an ordinance imposing term limits on the retirement fund's (Fund) board members and the board members filed a lawsuit. Both parties filed cross-motions for summary judgment and the trial court granted the city's motion. The Texas Trust Code governs the Fund and the Fund's trust document requires any amendment, including to the board of directors, to be approved in an ordinance approved by the board, adopted by the city council, and approved by a majority of the voters at a general or special election. Because the city failed to comply with the trust document and imposed new requirements on the Fund board members, the appellate court reversed the trial court's judgment in favor of the city, rendered judgment in favor of the Fund, declared the ordinance establishing term limits void and unenforceable, and remanded the case to the trial court to consider the issue of attorney's fees.

Texas Tort Claims Act: *City of Houston v. Crook*, No. 06-21-00036-CV, 2021 WL 4804453 (Tex. App.—Texarkana Oct. 15, 2021) (mem. op.). Plaintiff sued the city alleging a premises defect and special defect. She alleged she suffered injuries when she was driving on a city street

and a tire of her car got stuck in a partially uncovered manhole causing her car to spin out of control and hit a light pole. The city filed a motion for partial summary judgment, which the trial court denied and the city appealed. The appellate court found there was no support for plaintiff's claims that a partially uncovered manhole or improperly sealed manhole constitutes a special defect. Therefore, the appellate court reversed the trial court's order and remanded for further proceedings.

Face Coverings: *In re Paris Indep. Sch. Dist. et al.*, No. 06-21-00103-CV, 2021 WL 5140152 (Tex. App.—Texarkana Nov. 5, 2021) (mem. op.). Governor Abbott issued Executive Order GA-38, which stated, "[n]o governmental entity, including a county, city, school district, and public health authority, and no governmental official may require any person to wear a face covering . . . ." After the Executive Order was issued, the Paris Independent School District (PISD) issued a mask mandate and the state of Texas sued the school district. The trial court granted the state's temporary restraining order and temporary injunction. PISD filed a writ of mandamus. The appellate court denied the writ of mandamus because PISD could appeal the temporary injunction, which means it had an adequate remedy by appeal and had not established it was entitled to the extraordinary relief of mandamus.

Governmental Immunity: *Freeman v. City of Waxahachie*, No. 10-19-00379-CV, 2021 WL 4898801 (Tex. App.—Waco Oct. 20, 2021). Sheree Freeman was injured when her foot slid into a curb opening and stormwater drainage inlet which were part of a roadway maintained by the city. She sued for damages alleging that the defective design and construction conditions posed an unreasonable danger and risk of serious injury and harm to roadway users and that the city was on notice of the dangerous conditions.

The city filed a plea to the jurisdiction asserting governmental immunity and lack of pre-suit notice, which the trial court granted. The Freemans appealed. While governmental entities are generally immune from suits seeking to impose tort liability, this immunity can be waived by the Texas Tort Claims Act (TTCA) when injuries are caused by a condition or use of tangible personal or real property such that the governmental entity, were it a private entity, would be liable. To perfect the waiver of immunity, a claimant must meet written notice requirements found in the TTCA along with any city-level notice requirements found in the city charter or ordinances. The City of Houston requires written notice of claims to be made within 60 days of the injury, and in this case, the Freemans failed to timely provide this notice. The Freemans argued that the 60-day notice requirement violates the Open Courts Clause of the Texas Constitution and is unconstitutional, and that Mrs. Freeman was so severely incapacitated by her injuries, compliance was impossible. The appellate court was unconvinced, and the appellants' sole issue was overruled.

Charter Amendment: *Hotze v. Turner*, No. 14-19-00959-CV, 2021 WL 4738876 (Tex. App.—Houston [14th Dist.] Oct. 12, 2021). This dispute stems from two amendments to the Houston City Charter which prescribed certain limitations on the city's revenue collection, both of which were approved at an election in 2004. In 2014, Hotze sued the city to enforce one of those amendments and declare the other unconstitutional. The trial court granted summary judgment in favor of the city and Hotze appealed. Hotze was challenging a "primacy clause" in one of the propositions which stated, "[i]f another proposition for a Charter amendment relating to limitations on increases in City revenues is approved at the same election at which this proposition is also approved, and if this proposition receives the higher number of favorable votes, then this

proposition shall prevail and the other shall not become effective," asserting that this clause violated state law and the Texas Constitution. After analyzing the propositions' language and the city's process of adopting the propositions, the court overruled Hotze's statutory and constitutional challenges and affirmed the trial court's summary judgment order.

Governmental Immunity: *City of Houston v. Gantt*, No. 14-20-00229-CV, 2021 WL 4783070 (Tex. App.—Houston [14th Dist.] Oct. 14, 2021) (mem. op.). Gantt sued the city alleging injuries after being struck by a patrol car driven by a Houston police officer. The city filed a plea to the jurisdiction claiming it was immune from suit due to Gantt's failure to properly notify the city of the claim, but the trial court denied the plea. The city appealed.

The city can be subject to tort liability under the Texas Tort Claims Act ("TTCA"), but the TTCA contains notice requirements which must be followed. Alternatively, the TTCA's notice requirements would have been satisfied if the city had actual notice that: (1) an injury had occurred; (2) to a particular individual; and (3) that was at least partially the city's fault. Additionally, cities may by ordinance or charter put additional notice requirements in place, which the city had done. In this case, police reports and fire department transport records related to the crash were not sufficient to put the city on actual notice of a claim, and Gantt was unable to show that he had otherwise complied with the city's or TTCA's notice requirements. The appellate court reversed the trial court and dismissed the case for want of jurisdiction.

October 2021

Note: Included cases are from September 11, 2021 through October 10, 2021.

Eminent Domain: *Ball v. City of Pearland*, No. 01-20-00039-CV, 2021 WL 4202179 (Tex. App.—Houston [1st Dist.] Sept. 16, 2021) (mem. op.). Appellants previously owned a 5.549-acre tract of land in Brazoria County that the City of Pearland acquired through eminent domain for construction and connection of public safety facilities and other related uses. The appellants subsequently sought a declaration that they had a right to repurchase the property. They argued that a statute enacted in 2003, which provides a limited right to repurchase property taken for public use, should apply retroactively to them. Appellants maintained that the failure to apply the later-enacted statute retroactively to their situation deprived them of due process under the United States and Texas Constitutions. The trial court rejected these arguments and granted the city's motion to dismiss the case. Appellants appealed the trial court's order. The court of appeals affirmed the trial court's order, finding that the later-enacted statute did not apply retroactively and the appellants had no remaining interest in the surface estate of the land that was the subject of the initial condemnation case.

Eminent Domain: *Castellanos v. Harris Cty. et al.,* No. 01-20-00414-CV, 2021 WL 4597109 (Tex. App.—Houston [1st Dist.] Oct. 7, 2021) (mem. op.). Harris County and the City of Baytown filed a petition in condemnation seeking to acquire from the appellants various easements over a 1.5-acre tract of land in Baytown to expand a road within the city. The trial court appointed special commissioners, who assessed the total amount of condemnation damages to be $103,912. The appellants objected to the award and appealed, arguing that: (1) the condemnation award was too low because it did not account for damage to the remainder of the property or the livability of

the home after the condemnation, and it was, therefore, legally insufficient to support the judgment; and (2) the trial court erred by refusing their requested jury instruction regarding damage to the remainder. The appellants further claimed error in the court's charge for not defining "damage to the remainder". However, the court of appeals affirmed the trial court's order because the appellants: (1) did not conclusively prove that the cost to cure damage to the remainder was $300,000, which exceeded the total property value as determined by their appraiser; and (2) waived their challenge to the jury charge at trial.

Civil Service: *Arlington Prof'l Fire Fighters et al. v. City of Arlington*, No. 02-19-00156-CV, 2021 WL 4205012 (Tex. App.—Fort Worth Sept. 16, 2021) (mem. op.). This complex appeal stems from appellants filing a petition alleging ten causes of action, including claims for perceived retaliation in cancelling certain types of discretionary pay previously paid to the firefighters and by failing to promote by denying promotions. Appellants claimed the city retaliated against them because they sought and obtained voter approval to implement the civil-service system provided in Chapter 143 of the Texas Local Government Code. The trial court granted each of the city's motions for partial summary judgment and agreed that an association representing the firefighters lacked standing to assert retaliation claims on behalf of the firefighters. Appellants sought clarification of whether the trial court had ruled on their declaratory-judgment claim based on the new vacation-leave policy, and the city responded to this motion by asserting that its motions had addressed this cause of action. The trial court then entered a final judgment stating that appellants had withdrawn their motion for clarification and decreeing that appellants take nothing against the city. Appellants filed a notice of appeal and an amended notice of appeal.

The court of appeals concluded that most of the alleged causes of actions failed and that the trial court committed no error by granting summary judgment in favor of the city. However, the appellate court found that appellants had presented sufficient evidence to survive the city's summary judgment motion for two of their retaliation claims, including claims that: (1) the city cancelled certain types of discretionary pay previously paid to the firefighters; and (2) the city failed to promote by denying promotions. The court of appeals reversed and remanded solely as to these two retaliation claims. With respect to the surviving retaliation claims, the court of appeals further held that the trial court erred when it held that the association representing the firefighters lacked standing to assert those claims.

Employment: *City of Richland Hills v. Childress*, No. 02-20-00334-CV, 2021 WL 4205013 (Tex. App.—Fort Worth Sept. 16, 2021) (mem. op.). Appellee, a former police chief of the City of Richland Hills, sued the city for age discrimination under the Texas Commission on Human Rights Act (TCHRA) after the city terminated her employment. In the accelerated appeal, the city complained that the trial court erred by denying its motion for summary judgment that asserted a plea to the jurisdiction and challenged appellee's damages claim for lost wages. The court of appeals affirmed the trial court's order because: (1) appellee provided sufficient evidence to raise a fact question on her age-discrimination claim; and (2) the city failed to show that evidence of compensable lost wages is a jurisdictional prerequisite to the suit.

Tort Claims Act: *City of Henrietta v. Smithson*, No. 02-20-00380-CV, 2021 WL 4472629 (Tex. App.—Fort Worth Sept. 30, 2021) (mem. op.). Appellee sued the City of Henrietta for property damage caused by sewage backup. Evidence in the record indicated that the sewer main running

outside appellee's house experienced a blockage several days before and again several days after the sewage entered the home. On both occasions, the city used a piece of motor-driven equipment called a jetter to clear the blockages. During this time, the city discovered that it needed to replace the clay pipes making up the main sewer line located under the street outside appellee's home; the city replaced the pipes within days of the second blockage.

The city filed a plea to the jurisdiction asserting immunity from appellee's claims, arguing that the immunity waiver relied on by appellee for property damage caused by the use of motor-driven equipment did not apply. The trial court denied the plea and the city appealed. The city argued that there was no nexus between the use of the jetter and the sewer backup that damaged appellee's home and that the trial court, therefore, did not have jurisdiction. However, the court of appeals affirmed the trial court's determination as the evidence within the record did not negate the existence of jurisdictional facts.

Inverse Condemnation: *Jesus Life Ctr. v. City of Georgetown*, No. 03-21-00236-CV, 2021 WL 4557219 (Tex. App.—Austin Oct. 6, 2021) (mem. op.). Appellant sued Atmos Energy Corporation and the City of Georgetown after appellant was forced to evacuate its premises for several months while Atmos took measures, with the city's assistance, to vent dangerous levels of residual natural gas that had been trapped underground after Atmos's repair of a gas leak. Appellant asserted a claim of inverse condemnation against the city and sought damages for its mortgage default and lost revenue allegedly caused by the forced closure of its facility. The city filed a plea to the jurisdiction, which the trial court granted, and appellant filed an interlocutory appeal of the trial court's order. The court of appeals affirmed the trial court's order. The appellate court agreed that appellant could not reasonably contend that it would not have suffered its alleged damages but for the city's alleged actions of assisting with evacuations because even without the city's actions, appellant would have had been unable to occupy the premises because of the dangerous condition. Appellant's own pleadings negated proof of the element required for a takings claim that the city be a cause in fact of appellant's alleged damages.

Removal: *Wenger v. Flinn*, No. 04-20-00236-CV, 2021 WL 4443705 (Tex. App.—San Antonio Sept. 29, 2021). Six citizens of the City of Castle Hills ("Relators") sought judicial removal of Wenger and Gonzalez ("Appellants") from their elected positions as city aldermen by filing a sworn petition pursuant to subchapter B of Chapter 21 of the Texas Local Government Code. Although Chapter 21 authorizes municipal residents to file a removal action, the action is conducted in the name of the State of Texas, and the district attorney represents the state. The district attorney did not enter an appearance in the removal action until it filed a notice of nonsuit. The Relators objected in writing to the notice of nonsuit, and Appellants responded to the objections by requesting damages and sanctions against Relators. The trial court overruled Relators' objections and granted the district attorney's nonsuit, dismissing the removal action without prejudice. Thereafter, Appellants requested damages pursuant to section 21.028 of the Local Government Code, sanctions, and a motion for a new trial. The trial court held a hearing on the pending motions but did not rule on them before the trial court's plenary power expired, and the motions were denied by operation of law. Appellants appealed, and Relators cross-appealed.

The appellate court found that the trial court did not abuse its discretion by denying Appellants request for sanctions as Relators' petition was filed in compliance with Chapter 21 because their

petition alleged grounds of incompetence and misconduct and alleged specific supporting facts as to each ground in compliance with section 21.026. A dispute about the facts and the district attorney's ultimate decision not to pursue the charges does not mean the petition was groundless when it was filed. Additionally, because the trial court merely granted the district attorney's nonsuit and dismissed the removal action without prejudice, nothing in the court's order and judgment settled or proved Appellants' right to office. Accordingly, Appellants were not entitled to damages under section 21.028. The appellate court affirmed the trial court's judgement and dismissed the cross-appeal.

Tort Claims Act: *City of Dallas v. Ross*, No. 05-21-00001-CV, 2021 WL 4304478 (Tex. App.—Dallas Sept. 22, 2021) (mem. op.). A City of Dallas police officer was responding to a 9-1-1 call about an officer needing assistance in an HOV lane on a freeway. The officer turned on his flashing lights and sirens while responding and got into an accident with the plaintiffs when he was entering the HOV lane. The trial court denied the city's plea to the jurisdiction, which the city filed on the grounds that: (1) emergency response exceptions to the Texas Tort Claims Act applied; and (2) the officer had official immunity. On appeal, the appellate court found that the officer had official immunity because the officer used his discretion within the scope of his authority and in good faith when responding to the call. The appellate court reversed the trial court's denial of the plea on the grounds that the officer had official immunity and didn't reach the issue of the emergency response exceptions put forth by the city.

Tort Claims Act: *Caldwell Cty. v. Genfan*, No. 07-21-00087-CV, 2021 WL 4306215 (Tex. App.—Amarillo Sept. 22, 2021) (mem. op.). The plaintiffs filed a wrongful death lawsuit against the county alleging the county failed to adequately warn against flood waters covering a road that two individuals drove on and subsequently drowned when their vehicle was washed away. The trial court denied the county's plea to the jurisdiction, which was based in part on the emergency response exception to the Texas Tort Claims Act and the actions the county took in closing the road. The appellate court rejected the plaintiffs' arguments that the emergency response exception didn't apply, including arguments that: (1) the county failed to provide evidence it was responding to an emergency; (2) the county had time to prepare for the situation and, therefore, it wasn't an emergency; and (3) the county's signs and barricades closing the roads didn't comply with the Texas Manual on Uniform Traffic Control devices. The appellate court found the pleadings establish that the county was responding to an emergency, reversed the trial court, and granted the plea.

Retaliation: *Flores v. Tex. Dep't of Criminal Justice*, No. 08-20-00050-CV, 2021 WL 4437506 (Tex. App.—El Paso Sept. 28, 2021). This is an employment retaliation suit in which the appellate court affirmed the trial court's judgement.

Flores, a former employee of the Texas Department of Criminal Justice (TDCJ), filed a discrimination and retaliation claim under the Texas Commission on Human Rights Act, alleging that she was terminated on the day she returned to work in 2013 from authorized leave under the Family and Medical Leave Act. TDCJ filed its initial plea to the jurisdiction in 2016 claiming sovereign immunity barred Flores's claims because she was unable to establish a prima facie case of either her discrimination or retaliation claims under the burden-shifting scheme established in *McDonnell Douglas Corp. v. Green*. Following the trial court's denial of TDCJ's first plea to the

jurisdiction, TDCJ sought interlocutory review by the appellate court, which: (1) reversed the trial court's order as to Flores' discrimination claim; (2) rendered judgment dismissing the discrimination claim; and (3) affirmed the trial court's order with respect to the retaliation claim, finding Flores "presented sufficient evidence to raise a fact issue to whether she was constructively discharged."

Upon return to the trial court, TDCJ filed a second plea to the jurisdiction accompanied by a motion for summary judgment approximately one year after the appellate court's first opinion, urging updated case law and newly-discovered information defeats jurisdiction over Flores's retaliation claim. In support of its plea and motion, TDCJ attached an affidavit from a former warden who worked with Flores. Flores claims that the affidavit violates the sham-affidavit rule because it directly contradicts a previous affidavit from the same witness which Flores relied upon in opposing TDCJ's initial plea. Additionally, Flores relied upon the "law of the case" doctrine to support her position that because the appellate court previously determined issues of fact exist regarding her retaliation claim, TDCJ is precluded from re-litigating those same issues to the extent they are merely being rehashed in TDCJ's second plea and motion for summary judgment.

The appellate court disagreed with Flores, and found that she failed to meet her burden of pleading a prima facie case of retaliation under the TCHRA. Accordingly, the appellate court affirmed the judgement of the trial court.

Seized Property: *City of Brady v. Scott*, No. 08-20-00155-CV, 2021 WL 4237150 (Tex. App.—El Paso Sept. 29, 2021). [The court withdrew its opinion and judgement of August 16, 2021, and substitutes it with this opinion.] This is an interlocutory appeal under Chapter 47 of the Code of Criminal Procedure (Code) to determine ownership of seized property in which the court of appeals determined it did not have jurisdiction to hear the appeal.

This case began when police officers seized $11,450 from Scott when searching his home after an investigation for alleged fraud based on complaints that he was operating some form of scam. Several years later, Scott filed suit, specifically under Article 47.01 of the Code, which allows for a specific hearing to determine the person with the superior right to possession of property. In his petition, he complained that although the police opened a case file in the matter and provided him with a receipt stating that it had taken $11,452 in cash from him, the police never returned the cash to him and criminal charges were never filed. The city filed a plea to the jurisdiction, asserting that the funds were not seized as part of a criminal investigation, but to determine their ownership. The city asserted it no longer had the funds as they were disposed of under Article 18.17 of the Code, which allows for disposing of funds when the owner is unknown. Under that article, the police placed an advertisement in the local City of Brady newspaper stating that it had cash in excess of $500 in its possession, and that anyone claiming the money had 90 days to contact them. After no one responded the department obtained an order from a Brady municipal court judge awarding the funds to the city. The city alleged that Scott only had 30 days to appeal or otherwise contest the municipal court's disposition order, and that doing so was a "statutory prerequisite" to filing a Chapter 47 petition. The trial court denied the plea and in the same order it issued a final judgment granting Scott's relief. The city filed an appeal only on the trial court's interlocutory order denying its plea but did not appeal the final judgement.

Because the trial court's interlocutory order denying the city's plea to the jurisdiction was merged into the final judgment, and because the city did not properly perfect an appeal from that final order, the appellate court concluded that it lacked jurisdiction to hear the appeal. Additionally, the court overruled the city's motion for rehearing and denied the city's motion to amend the notice of appeal, finding that permitting an amended notice of appeal would be futile as there is no amendment to the notice of appeal that could meet requisite statutory requirements. Therefore, the city's appeal was dismissed.*

Inverse Condemnation: *City of Robinson v. Leuschner*, No. 10-19-00278-CV, 2021 WL 4595736 (Tex. App.—Waco Oct. 6, 2021). The Leuschners own a home in the City of Robinson. In 2000, the city built a sewer lift station near their home and the Leuschners began complaining to the city of a foul odor coming from the lift station. In 2018, the Leuschners filed suit alleging damages due to the city's creation of a permanent nuisance, constitutional takings, and negligence. The city filed a plea to the jurisdiction, which was denied by the trial court. For the court to have jurisdiction over a constitutional takings claim, there must be evidence of intent on the part of the city. Additionally, to sustain a nuisance or negligence claim, the Leuschners would need to assert waiver of governmental immunity. No evidence of intent was alleged or provided by the Leuschners to support the takings claim and no waiver of immunity was alleged to support the other claims. The court reversed the lower court's action and dismissed the Leuschner's case with prejudice.

Constitutional Takings: *City of Robinson v. Rodriguez*, No. 10-21-00075-CV, 2021 WL 4595743 (Tex. App.—Waco Oct. 6, 2021). The Rodriguezes owned a home in the city that suffered from sewer backups, and in 2019, they sued the city alleging a constitutional taking, seeking money damages and injunctive relief. The city filed a plea to the jurisdiction asserting governmental immunity, which was denied. The city appealed. While governmental immunity is waived for a valid takings claim, to make a valid claim, a claimant must show that the governmental actor took or damaged property for public use intentionally. A governmental entity acts intentionally if it: (1) knows that the specific act is causing identifiable harm; or (2) knows that the specific harm is substantially certain to result from authorized government action. Evidence of a governmental entity's failure to avoid preventable damage may be evidence of negligence, but it is not necessarily evidence of the entity's intent to damage the claimant's property. In this case, the court reversed the trial court's ruling and dismissed the plaintiffs' takings claim, because the plaintiffs provided no evidence of an intentional act on the part of the city.

Governmental Immunity: *Carl Owens, Jr. et al. v. City of Tyler*, No. 12-21-00009-CV, 2021 WL 4617790 (Tex. App.—Tyler Oct. 6, 2021) (mem. op.). The plaintiffs in the underlying case are landholders on Lake Tyler, which is a man-made lake constructed by the city in 1946. The city controls the bottom of the lake, and the city allows lakeside landowners to build piers into the lake itself. After the city approved an application for the plaintiffs' neighbor to construct a boathouse and pier, the plaintiffs sued the city and the other neighbor, requesting an injunction on the project, alleging that the pier and boathouse would devalue the plaintiffs' property. The city filed a plea to the jurisdiction asserting governmental immunity. The trial court denied the plaintiffs' motion for a temporary injunction as well as the city's plea to the jurisdiction. Both parties filed appeals, which resulted in previous appellate court denials of the city's plea and remand to the trial court for further proceedings. Defendants filed a traditional summary judgement motion, which was

ultimately granted. Plaintiffs appealed that judgment, raising ten issues with regard to the evidence, procedures, and the various claims the plaintiffs had alleged. In a lengthy opinion, the appellate court disposed of all of plaintiffs' issues on appeal and sustained the lower court's granting of the motion for summary judgment, except as concerned the issues of cost apportionment for prior appellate litigation.

Tort Claims Act: *City of Corpus Christi v. Martinez*, No. 13-20-00527-CV, 2021 WL 4313109 (Tex. App.—Corpus Christi Sept. 23, 2021) (mem. op.). Mr. Martinez was struck by a city vehicle while walking in a crosswalk and he sued the city for damages. The city filed a plea to the jurisdiction, arguing that governmental immunity was not waived because the city employee driving the vehicle was taking an unpaid lunch at the time of the collision. The trial court denied the city's plea, so the city appealed. The Texas Tort Claims Acts (TTCA) waives governmental immunity for personal injury caused by the negligent acts of governmental employees acting in the scope of their employment if the injury arises from the operation of a motor-driven vehicle. Even though the city's evidence showed that the employee was going home to have lunch when the collision occurred, the court affirmed the trial court's denial of the city's plea because when viewed in the light most favorable to the non-moving party (here, the plaintiff), the evidence supported a waiver of governmental immunity under the TTCA.

<u>September 2021</u>

Note: Included cases are from August 11, 2021 through September 10, 2021.

Mandamus: *In re Abbott*, No. 21-0667, 2021 WL 3641471 (Tex. Aug. 17, 2021). Members of the Texas House of Representatives filed suit against the Governor and Speaker of the House, in their official capacity, seeking an injunction to prevent their arrest for having fled the state in order to prevent the establishment of a quorum on pending legislation. The trial court issued an *ex parte* temporary restraining order (TRO), prohibiting the defendants from compelling members' attendance by arrest or other confinement or restraint for 14 days. Defendants petitioned for writ of mandamus to compel the trial court to withdraw the TRO.

On a matter of first impression, the Supreme Court granted the mandamus, holding that: (1) the arrest of absent members of the House to secure their presence and establish quorum, in accordance with a House rule, was a valid exercise of power granted to the Speaker under the Texas Constitution; (2) the Texas Constitution provision granting state legislators privilege from arrest during a legislative session did not supersede the authority of the Speaker to have members arrested to secure their presence; and (3) the trial court abused its discretion when it granted members' *ex parte* application for TRO to enjoin their arrest.

Ballot Language: *In re Petricek*, No. 21-0693, 2021 WL 3909908 (Tex. Sep. 1, 2021). A group of voters in the City of Austin petitioned the Austin City Council for a proposed ordinance that, according to the petition, would establish minimum standards for the Austin Police Department "to enhance public safety and police oversight, transparency and accountability." Rather than adopt the proposed ordinance, the city council chose to place it before the voters for approval at

the next general election, and rather than use the caption set forth in the petition as the ballot language, the city council prepared and approved its own description of the ordinance to be used on the ballot. Because that language differed materially from the caption in the petition, Petricek, an Austin voter and one of the signers of the petition, brought a mandamus action challenging the city council's chosen ballot language.

The court conditionally granted mandamus relief finding that, although the city charter requires the city to place the petitioned caption on the ballot verbatim if the caption complies with applicable law, including the common-law standard for ballot language, the petitioned caption falls short of that standard because it did not mention the proposed ordinance's cost. Accordingly, the court determined that the city has limited discretion to revise the caption to the extent necessary to bring it into compliance, including adding the cost of the ordinance, but it did not have carte blanche to rewrite the petitioned caption wholesale, and it abused its discretion by doing so.

Tort Claims Act: *City of Houston v. Carrizales*, No. 01-20-00699-CV, 2021 WL 3556216 (Tex. App.—Houston [1st Dist.] Aug. 12, 2021) (mem. op.). This is an interlocutory appeal filed by the City of Houston challenging a trial court's order denying its summary judgment motion in a suit brought against it by appellee, Jose Sabas Carrizales, for negligence.

Carrizales alleged that a city employee failed to control her speed while driving a sewer jet truck owned by the city, causing the employee to strike his car and causing him to suffer personal injuries. The city filed an answer generally denying the allegations in Carrizales' petition and asserting that the trial court lacked jurisdiction over the suit because the city is entitled to governmental immunity and the Texas Tort Claims Act (TTCA) did not waive that immunity. The TTCA waives a governmental unit's immunity for personal injuries proximately caused by the negligence of a governmental unit's employee acting within the scope of her/his employment if the injuries arise from the operation or use of a motor-driven vehicle. The appellate court held that the uncontroverted evidence conclusively proved that the city employee was not acting in the course and scope of her employment with the city when the collision occurred. Therefore, the city's governmental immunity had not been waived and the trial court lacked subject-matter jurisdiction over the Carrizales' suit. Accordingly, the appellate court reversed the trial court's order denying the city's summary judgment motion and rendered judgment dismissing Carrizales' suit for lack of jurisdiction.

Tort Claims Act: *City of Houston v. Kim*, No. 01-20-00333-CV, 2021 WL 3776750 (Tex. App.—Houston [1st Dist.] Aug. 26, 2021) (mem. op.). Appellee, Young Ran Kim, sued the City of Houston and one of its employees under the Texas Tort Claims Act (TTCA) following a motor-vehicle collision. After moving successfully to dismiss its employee from suit, the city moved for summary judgment arguing its employee was not acting in the course and scope of employment, and; thus, the court lacked subject-matter jurisdiction. However, the trial court denied the city's motion for summary judgment.

The city filed an interlocutory appeal contending that the trial court erred in denying its motion for summary judgment because it proved its employee was not acting in the scope of employment when the collision occurred, and that TTCA's limited waiver of immunity did not apply. However, the appellate court found that by moving to dismiss its employee from the suit, the city admitted judicially that the employee was acting in the course and scope of his employment when the accident occurred, and the city agreed vicariously to defend him. Consequently, the city was foreclosed from later arguing in its motion for summary judgment that the employee was not acting in the scope of his employment at the time of the accident. The appellate court affirmed the trial court's denial of the city's motion for summary judgment.

Employment/Whistleblower: *Oakbend Med. Ctr. v. Simons*, No. 01-19-00044-CV, 2021 WL 3919218 (Tex. App.—Houston [1st Dist.] Sept. 2, 2021) (mem. op.). Appellant, OakBend Medical Center, a municipal hospital authority, appealed the judgment rendered on a jury verdict in favor of appellee, Dawn Simons, on her claims brought under the Texas Whistleblower Act (Act). The hospital authority contended that Simons presented insufficient evidence to: (1) satisfy: (a) the objective and subjective prongs of the "good faith" standard for her first complaint, and (b) the objective prong for her second complaint; (2) demonstrate the hospital authority knew about her second complaint to the Occupational Safety and Health Administration (OSHA) before it suspended her and terminated her employment; (3) support the jury's award of emotional distress damages; and (4) support the jury's award of lost wages and benefits.

The appellate court; however, affirmed the trial court's ruling by concluding that: (1) there was sufficient evidence to support the jury's finding that Simons had a good faith belief that the conduct reported in what evidence showed to be a first OSHA complaint was a violation of law and that her belief was objectively reasonable in light of her training and experience; (2) the evidence was legally insufficient to support a finding that the hospital authority knew about Simons' second OSHA complaint before it suspended her or terminated her employment and; thus, her second complaint could not form the basis of a retaliation claim under the Act; (3) the hospital authority waived its appellate review of the jury's compensatory damage award because it failed to address all elements of the award; (4) the evidence was sufficient to support the jury's award of $26,000 in lost wages to appellee; and (5) the hospital authority waived review of its sufficiency challenge to the jury's award of lost benefits.

Tort Claims Act: *City of Austin v. Dawson*, No. 03-21-00023-CV, 2021 WL 3869728 (Tex. App.—Austin Aug. 31, 2021) (mem. op.). Appellee, Carol Dawson, sued the City of Austin for injuries she sustained after tripping on a public sidewalk. Dawson introduced evidence that showed that the sidewalk was designed and constructed by Civilitude, which had received a complaint regarding the sidewalk after one other person had already fallen there.

The city filed a plea to the jurisdiction, asserting that it is protected from suit by governmental immunity and that Dawson had failed to sufficiently plead a premises defect claim within the scope of the Texas Tort Claims Act's (TTCA) waiver of immunity. After the trial court denied the plea, the city filed an interlocutory appeal contending that the trial court erred in denying its plea because

appellee did not establish that the sidewalk's condition was a special defect or that it was an ordinary defect of which the city had actual knowledge. However, the appellate court concluded that Dawson's factual allegations were sufficient to show that the city did indeed have actual knowledge and that, as a result, immunity was waived under the TTCA. Dawson's allegations regarding Civilitude's role in the design and construction of the ramp, its receipt of the complaint, and its employee-employer relationship with the city was found to have sufficiently demonstrated that the city was notified of the complaint and; therefore, that the city was aware that the ramp posed a danger to pedestrians. The appellate court affirmed the trial court's decision.

Board of Adjustment: ***Alpha Sec., LLC v. City of Fredericksburg*, No. 04-20-00447-CV, 2021 WL 3516683 (Tex. App.—San Antonio Aug. 11, 2021).** This is a board of adjustment appeal and declaratory judgment action where the appellate court found that no jurisdiction existed, but remanded the case to provide the plaintiff the opportunity to replead.

Alpha Securities, LLC (Alpha Securities) purchased real property in the City of Fredericksburg's historical district. It sought a variance to expand its doors so the building could be used for commercial uses. The historic district's review board approved the expansion of one door, but not the other. As a result, Alpha Securities was unable to obtain a certificate of occupancy, water, and electrical services. Alpha Securities appealed the determination to the city's board of adjustment (BOA), and the BOA denied relief. Alpha Securities then sued the city, which filed a plea to the jurisdiction. The trial court granted the plea and Alpha Securities appealed.

The court overruled Alpha Security's first argument that the city did not timely seek a ruling on the plea. Subject matter jurisdiction cannot be waived, and courts cannot acquire subject matter jurisdiction by estoppel. The court also denied Alpha Security's attempts to bring ultra vires claims that did not include any specific officials. To the extent Alpha Securities intended to establish that the review board and BOA violated the law, including its constitutional rights, the Uniform Declaratory Judgement Act does not waive the city's governmental immunity. Next, the court analyzed the timeliness of the appeal. The appeal clock does not start to run at the time of the BOA decision; rather, when the BOA's decision "is filed in the board's office." The pleadings did not establish the date when the BOA's decision was filed in the board's office. Because Alpha Securities' pleadings are insufficient to establish jurisdiction but do not affirmatively demonstrate an incurable defect, the trial court should have given Alpha Securities the opportunity to replead. [Comment: this appears to require pleadings to affirmatively list the specific dates for deadline compliance in order to establish jurisdiction]. The city also asserted that Alpha Securities repled three times and should not be allowed to do so again. However, the appellate court determined that was inconsequential in this case, holding that if the trial court determines the plea is meritorious and the pleadings are deficient, the plaintiff must then be given a reasonable opportunity to amend the pleadings to cure the jurisdictional defects. As a result, the case was remanded.*

Emergency Powers: *Abbott v. City of San Antonio*, No. 04-21-00342-CV, 2021 WL 3819514 (Tex. App.—San Antonio Aug. 19, 2021) (per curiam). This case arises from an emergency motion asking the appellate court to exercise its authority under Rule 29.3 of the Texas Rules of

Appellate Procedure to reinstate the trial court's temporary injunction during the pendency of an appeal.

On August 10, 2021, the City of San Antonio and Bexar County filed a declaratory judgment suit challenging Executive Order GA-38. The suit alleges that the governor acted ultra vires and outside the scope of his authority under the Texas Disaster Act of 1975 (the Act) and, alternatively, that the Act violates the Texas Constitution. The city and county's suit also included an application for a temporary injunction. After a hearing on the temporary injunction application on August 16, 2021, the trial court signed an order granting the temporary injunction restraining the governor from enforcing sections of the executive order that prohibit the city and the county from requiring city and county employees or visitors to city-and county-owned facilities to wear masks or face coverings or to prohibit the public health authority from requiring masks in schools in the city and county. The temporary injunction order set the trial on the merits for December 13, 2021. Hours after the trial court signed the temporary injunction order, the governor filed a notice of appeal, which effectively suspended the trial court's temporary injunction. However, the city and county asked the court, in an emergency motion, to preserve their rights by issuing an order reinstating the trial court's temporary injunction.

Based on the temporary injunction order and the evidence attached to the emergency motion, the appellate court determined that the city and county demonstrated that reinstating the trial court's temporary injunction was necessary to prevent irreparable harm. The court concluded that because the Texas Supreme Court has found that an appellate court has "great flexibility in preserving the status quo [when] unique facts and circumstances [are] presented," it will exercise its inherent authority under Rule 29.3 to maintain the status quo and preserve the parties' rights until the disposition of the accelerated appeal. Accordingly, the court granted the emergency motion and reinstated the trial court's temporary injunction pending final disposition of the appeal.

Emergency Powers: *In re Abbott*, No. 05-21-00687-CV, 2021 WL 3610314 (Tex. App.—Dallas Aug. 13, 2021) (mem. op.). The appellate court denied Governor Abbott's petition for writ of mandamus challenging the trial court's temporary restraining order enjoining certain portions of Executive Order GA-38. Applying the plain language of the Texas Disaster Act (the Act), the appellate court concluded that the Dallas County Judge "demonstrated a probable right to relief that the Governor's power to suspend certain laws and rules under section 418.016(a) [of the Government Code] does *not* include the power to suspend the Act's grant of authority to mayors and county judges to declare and manage local disasters under section 418.108."

Land Use: *City of Dallas v. PDT Holdings, Inc.*, No. 05-21-00018-CV, 2021 WL 3733059 (Tex. App.—Dallas Aug. 24, 2021) (mem. op.). The city approved the plaintiff's development plans for a duplex but then issued a stop work order for a violation of the residential proximity slope ordinance. The city's board of adjustment (BOA) denied a variance to the plaintiff and the plaintiff sued for a violation of due course of law, estoppel, laches, and waiver, requesting the court reverse the BOA's decision or award it damages for complying with the ordinance. The city and the BOA filed a plea to the jurisdiction and the trial court denied it. The appellate court determined it could

review the BOA's decision as a court of review but reversed in part and dismissed the plaintiff's claims for damages and for violation of due course of law.

Public Information Act: *In re City of Lubbock*, No. 07-21-00070-CV, 2021 WL 3930727 (Tex. App.—Amarillo Sept. 2, 2021) (mem. op.). This is a Public Information Act (PIA) case where the city appealed the criminal trial court's *ex parte* order that directed the Lubbock Police Department to allow the attorney for a criminal defendant to review certain records that dealt with a minor while prohibiting the city from disclosing the existence of the contents of the order to the State or any other party, including the child victim and outcry witnesses.

The criminal defendant sought the information for use in a criminal prosecution within that criminal case. The city did not receive notice of the *ex parte* motion prior to the trial court's *ex parte* order so the court granted the city's request for rehearing. The State still did not receive notice of the rehearing and the trial court again ordered the city to produce the records, but this time for an *in camera* inspection. The city appealed, seeking mandamus relief. The appellate affirmed the trial court's order, finding that the city it is a non-party in the criminal proceedings and has no adequate appellate remedy and that the trial court did not abuse its discretion.

Seized Property: *City of Brady v. Scott*, No. 08-20-00155-CV, 2021 WL 3615830 (Tex. App.—El Paso Aug. 16, 2021). This is an interlocutory appeal in which the court of appeals determined it did not have jurisdiction to hear an appeal to determine ownership of property under Chapter 47 of the Code of Criminal Procedure (Code).

This case begun when police officers seized $11,450 from Scott when searching his home after an investigation for alleged fraud based on complaints that he was operating some form of scam. Several years later, Scott filed suit, specifically under Article 47.01 of the Code, which allows for a specific hearing to determine the person with the superior right to possession of property. In his petition, he complained that although the police opened a case file in the matter and provided him with a receipt stating that it had taken $11,452 in cash from him, the police never returned the cash to him, and criminal charges were never filed. The city filed a plea to the jurisdiction, asserting that the funds were not seized as part of a criminal investigation, but to determine their ownership. The city asserted it no longer has the funds as they were disposed of under Article 18.17 of the Code, which allows for disposing of funds when the owner is unknown. Under that article, the police placed an advertisement in the local City of Brady newspaper stating that it had cash in excess of $500 in its possession, and that anyone claiming the money had 90 days to contact them. After no one responded the department obtained an order from a Brady municipal court judge awarding the funds to the city. The city alleged that Scott only had 30 days to appeal or otherwise contest the municipal court's disposition order, and that doing so was a "statutory prerequisite" to filing a Chapter 47 petition. The trial court denied the plea and in the same order it issued a final judgment granting Scott's relief. The city filed an interlocutory appeal but did not appeal the final judgement.

The court of appeals held that when a trial court has already entered a final judgment, an appellate court has no jurisdiction to hear a governmental body's interlocutory appeal from an order denying its plea to the jurisdiction, and the governmental body must instead pursue an appeal from the final judgment. Because the city did not timely appeal the final judgment or file an appeal bond for a Chapter 47 appeal, the appellate court has no jurisdiction to hear the city's arguments. Accordingly, the case was dismissed.*

Takings: *City of El Paso v. Ramirez,* No. 08-18-00216-CV, 2021 WL 3827441 (Tex. App.—El Paso Aug. 27, 2021). This case involves an inverse condemnation action in which the court of appeals affirmed the trial court's ruling.

Multiple property owners (appellees) sued the City of El Paso, alleging that the city had committed a compensable taking of their properties under Article I, Section 17 of the Texas Constitution. The appellees claimed that the city's continued operation and maintenance of the Clint Landfill (the Landfill) caused exacerbated flood damage to their properties following a two-day rainfall in July 2006. Appellees alleged that, absent the city's continued operation of the Landfill—including the continued deposit of solid waste and other refuse—the damages would not have occurred. Appellees further alleged the city knew that the Landfill's construction, operation, and maintenance was substantially certain to damage appellees' properties by continuing to flood them during heavy rain events. Following a bifurcated bench trial on the issue of liability, the trial court found appellees had established all required elements of a taking under the Texas Constitution ruling the evidence sufficiently established the city's continued operation and maintenance of the Landfill after 2002—while knowing its history of wash out, runoff and drainage problems—established the city knew that specific property damage was substantially certain to result from such action. The trial court further found the remedial measures taken by the city were inadequate since problems occurred in July 2002, September 2004, and again in July 2006. Along with issuing findings of fact and conclusions of law, the trial court entered an interlocutory judgment on liability for appellees. The city appealed.

On appeal, the city asserted that no evidence supported the trial court's findings as to the required elements of proximate cause and intent. The appellate court overruled the city's assertions, finding that the record contains legally sufficient evidence to support the trial court's ruling, and affirmed the trial court's findings.

Emergency Powers: *In re Abbott*, No. 08-21-00140-CV, 2021 WL 3828464 (Tex. App.—El Paso Aug. 27, 2021) (per curium). This case arises from an emergency motion for temporary relief filed by the governor seeking a stay of the temporary restraining order (TRO) granted by the trial court enjoining the Governor from enforcing, in its entirety, Executive Order GA-38, against any local governmental entity, or employee or official of a local governmental entity in the City and County of El Paso. The TRO was ordered pending a temporary injunction hearing set for August 31, 2021, in the trial court.

Following a vote by the justices that resulted in a plurality with no single rationale commanding a majority vote, the appellate court granted the governor's emergency motion for temporary relief in part and denied it in part. The court held that enforcement of Sections 3(b), 3(g), (4), and 5(a) of Executive Order GA-38 is restrained by the TRO to the extent it applies: (1) against any school district within El Paso County; (2) against the City of El Paso to the extent the city requires all employees to wear a mask or face covering; and (3) against the City of El Paso to the extent the city requires all visitors to the city-owned or managed facilities to wear a mask or face covering, including senior citizen centers, recreational facilities, and city-operated public transportation. The court also held that enforcement of GA-38 is not restrained by the TRO as to all its remaining sections.

Jurisdiction/Bill of Review: *Richter v. City of Waelder*, Nos. 13-20-00494-CV & 13-20-00495-CV, 2021 WL 3555984 (Tex. App.—Corpus Christi Aug. 12, 2021) (mem. op.). The Richters sued the City of Waelder after leaks in a city water pipe caused flooding at the Richter's property. The trial court granted the city's plea to the jurisdiction, dismissing the case. The Richters then filed a bill of review in a separate cause of action, which the trial court granted, thereby vacating the earlier judgment. The trial court then signed a second judgment in the first case granting, again, the city's plea to the jurisdiction. The Richters appealed that action, and the city cross-appealed the granting of the bill of review. A bill of review is an equitable proceeding to set aside a judgment that is not void on its face but is no longer appealable or subject to a motion for a new trial. When a trial court grants a bill of review, a trial on the merits must occur in the bill of review proceedings and not in the underlying case. Because the trial court granted a bill of review and did not hold a trial in those proceedings but instead issued a second judgment in the underlying case, the appellate court did not have jurisdiction over the bill of review appeal. Ultimately the appellate court vacated the trial court judgment granting the city's plea to the jurisdiction and dismissed both appeals. Further action is anticipated in this case.

Tax Rate/Open Meetings Act: *Leftwich v. City of Harlingen*, No. 13-20-00110-CV, 2021 WL 4096148 (Tex. App.—Corpus Christi Sep. 9, 2021) (mem. op.). Robert Leftwich sued the City of Harlingen alleging errors were made when the city adopted its 2019 tax rate as well as related violations of the Texas Open Meetings Act (TOMA). He sought injunctive relief and various declaratory judgments including the voiding of the tax rate ordinances. Harlingen filed a plea to the jurisdiction, which the trial court granted, dismissing Leftwich's petition entirely, and Leftwich appealed.

The appellate court took pains to review the jurisdictional facts at length, including the tax notices, meeting notices and recordings of the meetings, and affirmed the trial court's dismissal of Leftwich's petition, finding the city had not erred in its tax rate setting or violated TOMA. One detail of interest is that Harlingen requires two readings to approve ordinances. The appellate court worked through the hypothetical wherein if the city failed to follow TOMA at the first reading of the tax rate ordinance, that violation would not render the ordinance voidable, because it is at the second reading where the "action" to adopt the ordinance is taken.

Governmental Immunity: *Metro. Transit Auth. of Harris Cty. v. Douglas*, No. 14-19-00714-CV, 2021 WL 3923972 (Tex. App.—Houston [14th Dist.] Sept. 2, 2021). Viola Douglas sued the Metro Police Department of the Metropolitan Transit Authority of Harris County (Department), alleging gender discrimination in the Department's promotion process and retaliation against her for filing a related complaint. In the trial court, the Department filed a motion for summary judgment and a plea to the jurisdiction, which the trial court denied. The Department then filed an interlocutory appeal.

Governmental entities are immune from suit absent an express waiver of governmental immunity. A limited waiver of immunity exists when a governmental entity has discriminated against an employee on the basis of age, sex, or other protected classification or has retaliated against an employee for complaining of such discrimination. In this case, Douglas claimed disparate treatment based on her gender, which can be proved either by direct evidence of discrimination or indirect evidence of discriminatory intent following what is known as the *McDonnell Douglas* framework. Under this framework, if the plaintiff can raise an inference of discrimination, the burden shifts to the defendant to prove a legitimate, non-discriminatory reason for the allegedly discriminatory action. After reviewing the record, the appellate court found that Douglas's assertions related to the Department's alleged discrimination were worthy of credence and raised genuine issues of fact. Additionally, Douglas presented sufficient evidence to support a prima facie case of retaliation. Accordingly, the appellate court affirmed the trial court's denial of the Department's motion for summary judgment and plea to the jurisdiction.

August 2021

Note: Included cases are from July 11, 2021 through August 10, 2021.

Tort Claims Act: *Anderson v. Waller Cty.*, No. 01-20-00097-CV, 2021 WL 3042677 (Tex. App.—Houston [1st Dist.] July 20, 2021) (mem. op.). This is an alleged sexual assault case brought under the Texas Tort Claims Act (TTCA) where the appellate court affirmed the granting of the county's plea to the jurisdiction.

Anderson alleged that while incarcerated at the county jail, she was taken to her cell by an unknown female jailor and given a minor amount of food and water. She took mayonnaise and obstructed the security camera. After eating her food, she claims she blacked out and therefore assumed she had been drugged. She asserts she was sexually assaulted then released. Anderson brought claims against the county, the sheriff, and several jailors for sexual assault, assault, intentional infliction of emotional distress, and negligence. She amended her pleadings indicating the misuse or malfunctioning of security cameras lead to the assaults as well as providing unsafe food. The county filed several pleas to the jurisdiction, which were eventually granted. Anderson appealed.

A plaintiff's failure to provide the statutorily-required notice deprives the trial court of jurisdiction and requires the court to dismiss the plaintiff's case. Knowledge that an injury has occurred, standing alone, is not sufficient to put a governmental unit on actual notice for TTCA

purposes. Further, mere investigation of an incident or injury does not show that a governmental unit had actual notice for purposes of the TTCA. Anderson's written notice was provided four years after her incarceration and nothing in the record indicates the county was aware, for actual notice purposes, that Anderson had reported her claims to the Texas Rangers. Finally, the court held that when a plea is granted and the pleadings consist of only pleading defects which could be cured, the dismissal may be without prejudice, but if the petition could not possibly allege facts demonstrating a waiver of immunity, or if the plaintiff had been given an adequate opportunity to replead and failed, then the dismissal should be with prejudice. Accordingly, the appellate court held that the trial court properly granted the plea with prejudice.*

Tort Claims Act: *Univ. of Tex. MD Anderson Cancer Ctr. v. Simpson*, No. 01-20-00679-CV, 2021 WL 3083104 (Tex. App.—Houston [1st Dist.] July 22, 2021) (mem. op.). This is an interlocutory appeal in a premise defect/Texas Tort Claims Act (TTCA) case where the appellate court reversed the denial of the MD Anderson's plea and dismissed the plaintiff's claims.
Simpson was a visitor to MD Anderson when she slipped and fell "due to a wet slippery floor." Simpson alleged that she did not know that a clear liquid had caused her to fall until she heard someone near the nurse's station point out the liquid and admit they should have cleaned it up. Simpson did not know the identity of any of the persons who were present at the nurse's station. MD Anderson asserted it did not receive any reports of substances or liquids being spilled or present on the floor where Simpson fell and did not receive any reports of falls at that location before Simpson fell. Simpson asserted that anyone who would have admitted to knowing the water was there must be an employee of MD Anderson. The hospital asserted that an unidentified person commenting on the water does not establish a fact issue that the person was an MD Anderson employee. The trial court denied the plea and MD Anderson appealed.

To prove actual knowledge, the plaintiff must show that the governmental unit actually knew of the dangerous condition at the time of the accident. Actual knowledge of an unreasonably dangerous condition can sometimes be proven through circumstantial evidence. However, circumstantial evidence establishes actual knowledge only when it "either directly or by reasonable inference" supports that conclusion. MD Anderson produced evidence that non-employees of MD Anderson can be present at a nurse's station and wear scrubs. The appellate court found that MD Anderson had met its burden, and that Simpson did not dispute MD Anderson's facts or prove actual knowledge through circumstantial evidence. As a result, the plea should have been granted.*

Tort Claims Act: *Garcia v. City of W. Columbia*, No. 01-20-00653-CV, 2021 WL 3159676 (Tex. App.—Houston [1st Dist.] July 27, 2021) (mem. op.). Garcia sued the City of West Columbia for injuries allegedly sustained as a result of work on a municipal water and sewer project. This was the second appeal before the appellate court. In the first appeal, the appellate court addressed the city's plea to the jurisdiction, in which it asserted governmental immunity. The trial court had denied the city's jurisdictional plea, and the appellate court affirmed in part and reversed in part. Now, in this second appeal, the city moved for traditional and no-evidence summary judgment on

several grounds. The trial court granted the city's summary judgment motion without stating a particular basis. Garcia appealed. The appellate court affirmed the trial court's summary judgment as Garcia had failed to submit any evidence that his exposure at the work site caused his injuries.

Takings/Zoning: *City of Grapevine v. Muns*, No. 02-19-00257-CV, 2021 WL 3419675 (Tex. App.—Fort Worth Aug. 5, 2021). This appeal arises from a challenge to the City of Grapevine's municipal ordinance banning short-term rentals (STRs). Plaintiffs own residential properties in Grapevine that they lease to others on a short-term basis. The city passed an ordinance expressly prohibiting STRs in the city. As a result, the plaintiffs sued the city, requesting declarations that the STR Ordinance violates their substantive due-course-of-law rights, is preempted, and is unconstitutionally retroactive. Plaintiffs also asserted a regulatory-takings claim and sought injunctive relief.

The city moved for summary judgment and filed a plea to the jurisdiction arguing that the trial court lacked subject-matter jurisdiction over this case because: (1) the plaintiffs failed to exhaust their administrative remedies; (2) the plaintiffs were seeking an advisory opinion on the STR Ordinance because they have not challenged the city's existing zoning ordinance under which STRs are not a permitted use in the first place; (3) the plaintiffs' regulatory takings claim is invalid; and (4) governmental immunity bars the plaintiffs' claims for declaratory and injunctive relief. The trial court disagreed and denied the city's motion and plea. The city then filed an interlocutory appeal, contending in five issues that the trial court lacked jurisdiction and thus erred by denying the city's jurisdictional plea. The appellate court reversed and rendered in part and affirmed in part.

Given the nature of real property rights, the appellate court concluded that the plaintiffs had a vested right to lease their properties and that this right was sufficient to support a viable due course of law claim. Because the plaintiffs had pleaded valid claims challenging the constitutionality of the STR Ordinance, the city was not immune from the plaintiffs' requests for injunctive relief. However, t**he appellate court did** find that the plaintiffs failed to plead a facially valid preemption claim. Therefore, the court reversed the part of the trial court's order denying the city's amended plea to the jurisdiction as to that claim and rendered judgment dismissing it. The appellate court affirmed the remainder of the trial court's order.

Zoning: *Draper v. City of Arlington*, No. 02-19-00410-CV, 2021 WL 2966139 (Tex. App.—Fort Worth July 15, 2021). This is an appeal arising from a challenge to two City of Arlington municipal ordinances regulating short-term rentals (STRs). Plaintiffs own residential properties in the City of Arlington that they have leased to others on a short-term basis. The city adopted two complementary ordinances: (1) an ordinance amending the city's Unified Development Code to specifically allow STRs as permitted uses only in certain areas of the city; and (2) an ordinance regulating the operation of STRs. As a result, plaintiffs sued the city and its mayor, seeking declarations that both ordinances violate their due-course-of-law and equal protection rights under

the Texas Constitution and that the STR ordinance's prohibition against STR tenants congregating outdoors on the premises during certain hours violates the tenants' assembly and freedom of movement rights under the Texas Constitution.

The plaintiffs applied for a temporary injunction to enjoin the city and the mayor from enforcing the ordinances. The trial court denied the application, and the plaintiffs appealed. The appellate court affirmed the trial court's order holding that the regulations adopted by the city were rationally related to legitimate governmental interests and within the city's police powers. Moreover, the appellate court concluded that the plaintiffs lacked standing to raise a violation of the tenants' assembly and freedom of movement rights.

Takings/Code Enforcement: *Vorwerk v. City of Bartlett*, No. 03-21-00001-CV, 2021 WL 3437889 (Tex. App.—Austin Aug. 6, 2021) (mem. op.). The Bartlett Municipal Court declared a 1986 Toyota mobile home to be a junk vehicle. The municipal court found that defendant Hisle was the owner or person in lawful possession of the mobile home. Hisle was properly notified and appeared in person before the court, and was afforded ample time to remove the mobile home from his property under the city's ordinance. The mobile home was also declared to be a public nuisance. The court ordered that, if the mobile home was not immediately removed from the property, the city would remove it. Vorwerk then filed suit in justice court asserting she owned the vehicle and the city committed a taking by removing the vehicle. The city filed a plea to the jurisdiction which was granted. Vorwerk appealed to the county court at law, and the city filed a plea, which was granted. Vorkwerk appealed.

The appellate court found that the city and the mayor presented undisputed evidence that Vorwerk was not the registered owner of the mobile home. Because Vorwerk did not present any evidence that she was the owner of the mobile home at the time of the municipal court proceeding, the court concluded that she did not raise a fact issue concerning her ownership of the mobile home at the time of the municipal court hearing. Accordingly, the trial court properly dismissed the case for lack of jurisdiction.*

Handgun Notice: *Paxton v. City of Austin*, No. 03-19-00501-CV, 2021 WL 3085845 (Tex. App.—Austin July 22, 2021) (mem. op.). The attorney general (AG) filed suit against the city under former section 411.209 of the Texas Government Code, alleging two types of violations: (1) the display of a permanent etched glass "no guns" sign that "depicts a handgun inside of a circle with a line through it;" and (2) oral warnings prohibiting the carrying of handguns on the premises of city hall. The AG requested civil penalties in the amount of $1,500 per day of violation and attorney's fees. During the trial, a citizen testified that he sent the city notices to remove a pictorial sign prohibiting the carrying of guns and was orally told he could not enter the premises. The trial court dismissed the claims related to the city's prohibition picture of a gun with a circle and line through it, but held the AG met its burden of proof as to other warnings (including oral warnings) on six separate days. The trial court ordered penalties of $9,000 against the city. The city did not

appeal, but the AG did, asserting that the court should not have dismissed the pictorial violation and the city should have been penalized over $5 million due to continuing violations.

The appellate court affirmed the civil penalties imposed by the trial court against the city but denied the AG's request for stronger penalties as a matter of law. Because the AG had not raised any complaint until his appeal regarding the trial court's award of a $1,500 per diem amount rather than the mandatory $10,000 minimum authorized by the statute for subsequent violations, the court could not review that issue as it was not preserved.*

Breach of Contract: *City of Del Rio v. Arredondo*, No. 04-20-00409-CV, 2021 WL 3376948 (Tex. App.—San Antonio Aug. 4, 2021) (mem. op.). This is a breach of contract suit where the appellate court held that because the city's plea only challenged non-jurisdictional facts, so the plea was properly denied.

The city hired Arredondo as its city manager. The parties entered into an employment agreement (Agreement), which provided that Arredondo served "at the pleasure of the City Council." The city council later voted to terminate the Agreement, and Arredondo then sued the city, alleging that the city council did not obtain a majority vote to terminate his employment, which constituted a breach of contract claim. He also pled an alternative breach of employment contract claim. The city filed a plea to the jurisdiction, which was denied.

Section 271.152 of the Texas Local Government Code waives governmental immunity for the adjudication of certain breach of contract claims. The city asserts that the contract did not alter the employment-at-will doctrine and that the city complied with the contract. The crux of this appeal is whether the facts asserted by the city are "jurisdictional facts." Not all facts relating to the merits are necessarily jurisdictional facts. The court determined that the at-will nature and the city's compliance with the contract, in this situation, were not jurisdictional facts, so the plea was properly denied.*

Trespass to Title: *City of San Antonio v. Davila*, No. 04-20-00478-CV, 2021 WL 3376949 (Tex. App.—San Antonio Aug. 4, 2021) (mem. op.). This is a trespass to try title case where the appellate court reversed the denial of the city's plea to the jurisdiction but remanded to allow plaintiffs the ability to replead.

The Davilas sued the city in a trespass to try title action, alleging that, as part of closing and abandoning a street and conveying parcels to adjoining landowners in 1987, the city deeded the subject property to the Davilas' parents. Alternatively, they allege they adversely possessed the property. The city filed a plea to the jurisdiction asserting that the city issued a quit claim deed authorizing the sale of the property to their parents. The quit claim deed contains a metes-and-bounds description of the subject property, reserves a utility easement, and recites that the city passed an ordinance authorizing the sale of the property to their parents. The trial court denied the plea and the city appealed.

The Davilas argue Section 16.005 of the Texas Civil Practice and Remedies Code waives the city's governmental immunity, which relates to road closure ordinances. They did not request relief from the city's ordinance under Chapter 16, which authorized the sale or abandonment of property, but from the quitclaim deed itself. The court determined that the quit claim deed did not waive immunity. Additionally, when a city is sued in a trespass to try title action based on adverse possession, governmental immunity is not waived, and the trial court lacks subject matter jurisdiction. As a result, the appellate court determined that the claims, as alleged, do not waive immunity. However, because the plea attacks the pleadings only and the city did not argue or explain why the pleading defect—suing the city instead of government officials for ultra vires acts—is incurable, the Davilas must be given the opportunity to amend their pleadings.*

Jurisdiction: *Mims v. City of Seguin*, No. 04-20-00355-CV, 2021 WL 3057506 (Tex. App.—San Antonio July 21, 2021) (mem. op.). A group of homeowners whose property was damaged by flooding from a city sewage project sued the city, asserting inverse condemnation and nuisance claims. The trial court granted the city's plea to the jurisdiction.

The appellate court concluded that the city's plea challenged only the sufficiency of the homeowners' pleadings and did not present evidence to negate the existence of the jurisdictional facts alleged by the homeowners. Because the trial court did not allow the homeowners to cure any deficiencies and granted the plea outright, the appellate court held that under these circumstances, the standard of review permits the court to affirm only if the homeowners' pleadings affirmatively and incurably negate the trial court's subject matter jurisdiction. The court determined that the homeowners' pleadings did not affirmatively and incurably negate the trial court's subject matter jurisdiction. As a result, the facts alleged by the homeowners establish the trial court's jurisdiction. The court; therefore, reversed the trial court's judgment and remanded for further proceedings.

Jurisdiction: *City of San Antonio v. San Antonio Park Police Officers Assoc.,* No. 04-20-00213-CV, 2021 WL 2942531 (Tex. App.—San Antonio July 14, 2021) (mem. op.). This is a civil service/collective bargaining suit where the San Antonio Park Police Officers Association (SAPPOA) sought declaratory relief for three distinct issues related to the legal classification of the city's park and airport police officers: (1) that San Antonio's park and airport police officers are "police officers" entitled to collectively bargain with the city and can receive both current and future benefits of the collective bargaining agreements entered into between the city and the San Antonio Police Officers Association (SAPOA) under chapter 174 of the Texas Local Government Code (Chapter 174); (2) that park and airport police officers are "police officers" entitled to collectively bargain with the city and can receive both current and future benefits of the collective bargaining agreements entered into between the city and SAPOA under chapter 143 of the Texas Local Government Code (Chapter 143); and (3) that the city manager is acting ultra vires by denying park and airport police officers the opportunity to collectively bargain. The city and the city manager filed a plea to the jurisdiction. The trial court denied the plea, and the city and city manager filed an interlocutory appeal, asserting that SAPPOA had not established a waiver of immunity through the Uniform Declaratory Judgments Act (UDJA) or Chapters 143 or 174.

The court determined that section 174.023 provides a limited waiver of immunity. Because SAPPOA clearly alleged a violation of their right to collective bargaining under Chapter 174, these factual allegations were sufficient to establish the subject matter jurisdiction of the court. However, SAPPOA did not allege or argue that Chapter 143 provides for a waiver of immunity for their declaratory judgment claim. As a result, the court determined that SAPPOA did not request a declaration concerning the validity of Chapter 143, but instead sought a declaration as to the park and airport police officers' rights under this chapter. Thus, the court held that the UDJA does not waive the city's immunity with respect to their declaratory claim pursuant to Chapter 143. Finally, the court held that SAPPOA alleged sufficient facts that, if taken as true, would confer standing for their ultra vires claims. Accordingly, the appellate court affirmed in part and reversed in part the city's plea to the jurisdiction.*

Due Process/Inverse Condemnation: *City of Dallas v. Reggie*, No. 05-20-00646-CV, 2021 WL 3196963 (Tex. App.—Dallas July 28, 2021) (mem. op.). The city towed two of plaintiff's vehicles for being parked for more than 24 hours in the same spot in violation of a city ordinance. The city sold the vehicles at an auction almost a month after impounding them and after sending two certified letters. The plaintiff filed a lawsuit seeking an injunction before the auction but served the city after the auction. The city appealed the denial of its plea to the jurisdiction. The court reversed the denial and found: (1) there is no waiver of immunity for plaintiff's unlawful seizure claim; (2) plaintiff failed to establish a clam for inverse condemnation because he did not contest the validity or constitutionality of the city ordinances or Texas Transportation Code provisions permitting the impoundment and sale of abandoned or unattended vehicles; (3) plaintiff's due process claims were insufficient to state a claim because he didn't allege any policy or custom existed that deprived him of his due process rights; and (4) plaintiff's injunction claims were moot.

Employment/Whistleblower: *City of Fort Worth v. Birchett*, No. 05-20-00265-CV, 2021 WL 3234349 (Tex. App.—Dallas July 29, 2021) (mem. op.). The plaintiff brought a whistleblower action against the city, claiming that he was terminated less than 90 days after he made good faith reports of the city's violation of law to the appropriate law enforcement authorities. The city argued that the plaintiff: (1) did not make good-faith reports of a violation of law to an appropriate law enforcement authority; (2) was terminated for performance shortcomings, not reporting violations of law; and (3) after his termination, failed to properly initiate the city's whistleblower grievance procedure. The trial court denied the city's plea to the jurisdiction.

In affirming the denial of the plea to the jurisdiction, the appellate court found: (1) there was a question of fact as to whether the plaintiff made a good faith report of the city's violation of law to law enforcement, including that the police chief's memo said the city's violations could result in "serious administrative and criminal sanctions;" (2) the city's argument that the decision maker didn't know about the plaintiff's reports was unpersuasive because the city presented no evidence to support that assertion; and (3) the plaintiff had satisfied the grievance procedure by sending a letter through his counsel.

Employment: *Limas v. City of Dallas*, No. 05-19-01223-CV, 2021 WL 3197334 (Tex. App.—Dallas July 28, 2021) (mem. op.). After the city terminated her for having several conflicts with coworkers in a new department in violation of city personnel rules, the plaintiff sued the city claiming race discrimination, retaliation, hostile work environment, and harassment. The trial court granted the city's plea, dismissing all of the plaintiff's claims. The appellate court affirmed the trial court's judgment and found that: (1) the plaintiff failed to demonstrate a material fact issue regarding disparate treatment because the comparator she put forth was distinguishable; (2) the plaintiff's complaints regarding her conflicts with coworkers were not protected activity under the Texas Commission on Human Rights Act; and (3) the plaintiff failed to demonstrate that she was subject to harassment based on her race.

Texas Tort Claims Act: *Texas A&M Univ. Sys. v. Fraley*, No. 07-20-00116-CV, 2021 WL 3282161 (Tex. App.—Amarillo July 30, 2021) (mem. op.). The plaintiff sued Texas A&M University System (A&M) for his injuries from a one-vehicle accident where he drove on a portion of a road that he claimed A&M removed without installing new traffic control devices. The trial court denied A&M's plea to the jurisdiction and A&M appealed.

The appellate court found that: (1) A&M had complied with its obligations to timely appeal; (2) A&M's decisions to eliminate a roadway and not install a new traffic control or safety devices were discretionary roadway design decisions excluded from liability under the Texas Tort Claims Act; (3) the removal of the portion of road was not a special defect because it was not a threat to the ordinary users of a particular roadway; and (4) the plaintiff's claims did not give rise to a misuse of tangible personal property. Therefore, the appellate court reversed the trial court and dismissed the plaintiff's claims for lack of jurisdiction.

Excessive Force/Section 1983: *Klassen v. Gaines Cty.*, No. 11-19-00266-CV, 2021 WL 2964423 (Tex. App.—Eastland July 15, 2021) (mem. op.). This is an excessive force/Section 1983 case where the Eastland Court of Appeals affirmed the trial court's granting of the county's dispositive motion.

Deputies responded to a disturbance involving possible aggressive actions by Klassen. Klassen was ordered to the ground and, while one of the deputies was attempting to put Klassen into the prone position, Klassen moved his hands and the deputy used his body weight to move Klassen into position. This caused Klassen to strike his chin on the ground, knocking out several teeth and breaking his jaw. Klassen sued. The deputies filed a motion to dismiss under the Texas Tort Claims Act (TTCA), which the trial court granted. They then filed a motion for summary judgment for the remaining federal and state claims. The trial court granted the motion as to the state claims, leaving the federal claims pending. Klassen then filed an amended petition which was almost exactly the same as the previous petition except that he attached an expert's opinion that the force used was excessive. In response, appellees filed another motion to dismiss and a motion for summary judgment in the alternative, which the trial court granted. Klassen appealed the granting of the motion.

The court of appeals specifically noted that the trial court stated in its order that it examined the *entire record* when it dismissed Klassen's claims, indicating that the trial court dismissed the claims under the motion for summary judgment as opposed to the motion to dismiss under the pleadings. When doing so, the standard for determining whether a trial court made an appropriate holding when it considered certain summary judgment evidence is a review for an abuse of discretion. In this case, the court found no such abuse. The court found dismissal of the deputies was proper under the TTCA. Second, the court found there was no excessive force after reviewing the video. Third, the court found that qualified immunity shielded the deputies as Klassen was unable to establish specific actions constituted a violation of clearly established law. The court found Klassen had suffered no "constitutional injury" via the excessive force claim, so the county could not be held liable for any failure to train its deputies.*

Governmental Immunity: *City of Mission v. Gonzalez*, No. 13-20-00138-CV, 2021 WL 3085988 (Tex. App.—Corpus Christi July 22, 2021) (mem. op.). One evening in 2017, Gonzalez injured her knee in a fall while taking out her garbage. Although the fall was on private property, she sued the city, claiming the fall was caused by mud created by water which leaked from a faulty water line repair. The city filed a plea to the jurisdiction claiming immunity from suit, but the trial court denied the plea. The city appealed, arguing that Gonzalez failed to properly notify the city pursuant to the requirements of the Texas Tort Claims Act (TTCA). Alternatively, the city argued that the TTCA's notice requirements would have been satisfied if the city had actual notice that an injury had occurred to a particular individual that was at least partially the city's fault. Gonzalez could not establish that either sufficient notice under the TTCA or actual notice had been given to the city. As a result, the appellate court reversed the trial court and dismissed the case for want of jurisdiction.

Governmental Immunity: *Hidalgo Cty. Det. Center v. Huerta*, No. 13-20-00113-CV, 2021 WL 3085853 (Tex. App.—Corpus Christi July 22, 2021) (mem. op.). Huerta, who was an inmate in the Hidalgo County Detention Center, sued the county for damages after he was injured when a table he was sitting at failed. The county filed a plea to the jurisdiction claiming immunity from suit because the county did not have knowledge of the dangerous condition, while Huerta had knowledge of the table's dangerous nature. The trial court denied the plea, and the county appealed.

Because the table had failed at least three previous times in the same way and injured at least one other inmate before injuring Huerta, the court held that the county did have notice of the dangerous condition. However, because Huerta was an experienced welder who watched the table being repaired and admitted that he knew the repair was inadequate, the county had no duty to make the condition reasonably safe for him. Accordingly, the court reversed the trial court's judgment and dismissed the case for lack of jurisdiction.

Governmental Immunity: *City of Houston v. Gantt*, No. 14-20-00229-CV, 2021 WL 3416990 (Tex. App.—Houston [14th Dist.] Aug. 5, 2021) (mem. op.). Gantt sued the city alleging injuries after being struck by a patrol car driven by a Houston police officer. The city filed a plea to the

jurisdiction claiming it was immune from suit due to Gantt's failure to properly notify the city of the claim, but the trial court denied the plea. The city appealed.

The city can be subject to tort liability under the Texas Tort Claims Act (TTCA), but the TTCA contains notice requirements which must be followed. Alternatively, if the city had actual notice that an injury had occurred to a particular individual that was at least partially the city's fault, the TTCA's notice requirements would have been satisfied. Additionally, cities may by ordinance or charter put additional notice requirements in place, which the city had done. In this case, police reports and fire department transport records related to the crash were not sufficient to put the city on actual notice of a claim, and Gantt was unable to show that he had otherwise complied with the city or TTCA notice requirements. The appellate court reversed the trial court and dismissed the case for want of jurisdiction.

Preemption: *Houston Prof'l Fire Fighters Ass'n v. Houston Police Officers Union*, No. 14-19-00427-CV, 2021 WL 3206056 (Tex. App.—Houston [14th Dist.] July 29, 2021). In 2003, the City of Houston adopted collective bargaining under the Fire and Police Employee Relations Act (FPERA) to govern fire fighter and police officer compensation and other conditions of employment. Fifteen years later, the city charter was amended to provide pay parity between Houston police officers and fire fighters (Pay Parity Amendment). The Houston Police Officers Union (HPOU) filed suit for declaratory judgment on whether the Pay Parity Amendment was preempted by FPERA. Entry of the state into a field of legislation does not automatically preempt city regulation, and for a statute to preempt a home rule charter or ordinance, the preemption must be stated with "unmistakable clarity." Competing state and local regulations will be given as much effect as possible while avoiding inconsistency. After a long and detailed discussion of preemption jurisprudence in Texas, the appellate court held that the Pay Parity Amendment was not preempted by FPERA.

Governmental Immunity: *Foreman v. Lyndon B. Johnson Hosp.*, No. 14-19-00733-CV, 2021 WL 3161440 (Tex. App.—Houston [14th Dist.] July 27, 2021) (mem. op.). Seventeen years after his conviction for sexual assault of a child, Foreman filed suit against several parties, including the City of Houston Police Department, raising complaints related to DNA tests and medical swabs which led to his conviction. Foreman alleged he was injured through the non-use of medical laboratory equipment such as microscopes and specific clamps. The city filed a plea to the jurisdiction, which was granted by the trial court. While the use of certain types of property can waive sovereign immunity under the Texas Tort Claims Act, non-use of property does not. The appellate court affirmed the dismissal.

Governmental Immunity: *Branch v. Fort Bend Cty.*, No. 14-19-00447-CV, 2021 WL 2978639 (Tex. App.—Houston [14th Dist.] July 15, 2021) (mem. op.). Branch was an inmate in the Fort Bend County Jail in 2016 when he injured his spine and head after falling on a concrete floor that was wet from a burst pipe. He sued the county for damages resulting from his injuries. The county filed a plea to the jurisdiction claiming immunity from suit due to Branch's failure to properly

notify the county of the claim under the Texas Tort Claims Act (TTCA), and the trial court dismissed Gantt's suit. He appealed.

A local governmental entity can be subject to tort liability under the TTCA, but the TTCA contains notice requirements which must be followed. Alternatively, if the entity had actual notice that an injury had occurred to a particular individual that was at least partially the city's fault, the TTCA's notice requirements would have been satisfied. In this case, Branch had, in fact, failed to give notice within the six-month time frame required by the TTCA, and the facts that (1) the injury occurred while Branch was under county supervision, (2) in a county facility, and (3) county personnel tended to his injuries were not sufficient to put the county on actual notice of a claim. The appellate court affirmed the trial court's dismissal of the case for want of jurisdiction.

Takings/Jurisdiction: *San Jacinto River Auth. v. Lewis*, No. 14-19-00696-CV, 2021 WL 2931280 (Tex. App.—Houston [14th Dist.] July 13, 2021). Lewis sued the San Jacinto River Authority (SJRA) for a taking related to property damage caused by the SJRA's release of water from Lake Conroe during Hurricane Harvey, alleging constitutional inverse condemnation claims in Harris County district court. SJRA filed a plea to the jurisdiction: (1) challenging the subject matter jurisdiction of the district court over constitutional inverse condemnation claims; and (2) alleging that appellees failed to plead sufficient facts demonstrating a waiver of governmental immunity. The trial court denied SJRA's plea to the jurisdiction, which SJRA appealed.

Section 25.1032 of the Texas Government Code squarely places jurisdiction over eminent domain proceedings brought in Harris County with the county civil court at law rather than the district court. Additionally, in his original petition, Lewis neither made reference to statutory takings causes of action from Chapter 2007 of the Government Code, nor alleged waiver of SJRA's immunity under that chapter. The appellate court held that Lewis failed to make a statutory takings claim, reversed the trial court's order denying SJRA's plea to the jurisdiction, and rendered judgment dismissing appellee's claims for lack of subject matter jurisdiction.

July 2021

Note: Included cases are from June 11, 2021 through July 10, 2021.

Employment Discrimination: *Texas Dep't of Transp. v. Lara*, No. 19-0658, 2021 WL 2603689 (Tex. June 25, 2021). A former employee brought an action against the Texas Department of Transportation (Department) under the Texas Commission on Human Rights Act (TCHRA), alleging that the Department terminated his employment after he exhausted his five months of sick leave while recovering from surgery, that the Department failed to reasonably accommodate his disability by granting him additional leave without pay in accordance with its policy, and that the Department discharged him in retaliation for his request for additional leave. The trial court denied the Department's combined plea to the jurisdiction and motion for summary judgment based on

sovereign immunity. The Austin Court of Appeals affirmed in part and reversed and rendered in part. Both parties petitioned for review.

The Texas Supreme Court affirmed in part, reversed in part, and remanded, holding that: (1) a genuine issue of material fact exists as to whether the former employee requested leave without pay (LWOP) as a reasonable accommodation, which precludes summary judgment on his disability-discrimination claim; (2) a genuine issue of material fact exists as to whether the former employee's request for LWOP was a reasonable accommodation or request for indefinite leave, which precludes summary judgment on his disability-discrimination claim; (3) the former employee failed to show that he engaged in activity protected by TCHRA when he requested LWOP as a reasonable accommodation for his medical issues, and thus failed to establish a prima facie case of retaliation based on the Department's denial of his request and termination of his employment; and (4) the former employee's pleadings gave fair notice of a claim for disability discrimination under the TCHRA.

Copyright Infringement: *Jim Olive Photography d/b/a Photolive, Inc. v. Univ. of Houston Sys.*, No. 19-0605, 2021 WL 2483766 (Tex. June 18, 2021). Photolive, Inc. (Photolive), a professional photographer, brought an action against the University of Houston System (University), a public university, alleging an unlawful taking based on the University's unauthorized use of a copyrighted aerial photograph of the City of Houston on the University's webpage. The district court denied the University's plea to the jurisdiction and the University filed an interlocutory appeal. The Houston Court of Appeals vacated and dismissed, finding that a governmental unit's copyright infringement is not a taking. Photolive petitioned for review, which was granted. The Texas Supreme court affirmed, holding that a violation of a copyright, without more, is not a taking of the copyright.

***Employment: Houston Cmty. Coll. v. Lewis,* No. 01-19-00626-CV, 2021 WL 2654141 (Tex. App.—Houston [1st Dist.] June 29, 2021) (mem. op.).** This appeal stems from a trial court's holding denying the college's plea to the jurisdiction on a racial discrimination claim and a whistleblower retaliation claim. The appellate court reversed the trial court's judgment and dismissed the case finding that the plaintiff provided insufficient evidence of discriminatory intent in her termination and failed to provide causation related to the whistleblower retaliation claim. The court determined that evidence that a subordinate employee had made a derogatory remark was insufficient to show discriminatory intent, the employer established a reasonable basis for the plaintiff's termination, and her replacement was also African-American.

The court also found that the plaintiff failed to provide evidence of causation related to the whistleblower retaliation claim because the individuals responsible for her termination did not have knowledge of her report of alleged illegal activity before her termination. To establish a claim under the Texas Whistleblower Act, an employee must establish that but for a good faith report of illegal activity, the employer would not have taken an adverse employment action against

the employee. The plaintiff failed to produce evidence that the individuals responsible for her termination knew about her report of illegal activity to the veterans organizations at the state and federal level. This failure meant the causation prong of the whistleblower claim was not met.*

Water Rights: *Brazos River Auth. v. City of Houston*, No. 03-20-00076-CV, 2021 WL 2677121 (Tex. App.—Austin June 30, 2021). This is a dispute over the right to construct and operate a reservoir on Allens Creek. The City of Houston and the Brazos River Authority (Authority) have jointly held a water-appropriation permit authorizing them to construct the reservoir and to use some of the water impounded there. In 2019, the legislature, pursuant to H.B. 2846, instructed the city to transfer its entire interest in the proposed reservoir, including its permit rights, to the Authority. On cross-motions for summary judgment, the district court granted declaratory relief, finding that H.B. 2846 is "unconstitutional, void, and unenforceable." The appellate court affirmed the trial court's judgment.

Tort Claims Act: *City of Austin d/b/a Austin Energy v. Lopez*, No. 03-19-00786-CV, 2021 WL 2587718 (Tex. App.—Austin June 24, 2021). Plaintiff, on behalf of her minor son, sued the city for negligence and negligence per se in relation to the decedent's death as a result of an alleged accident that occurred on a construction site. Decedent was working as part of a stucco crew and standing on a metal scaffold that the stucco crew had erected near the city's power line. Decedent was electrocuted when he contacted the power line with a 10-foot roll of metal mesh that he was holding while cutting it with metal wire-cutters.

At trial, the city moved for a directed verdict, contending that the plaintiff's theory alleging that the city's failure to maintain its power lines and poles created the dangerous condition that caused the accident was a premises-liability claim, not a general-negligence claim, and that judgment should be rendered in its favor because plaintiff had not alleged or adduced any evidence as required to recover on a general-negligence claim. Nonetheless, the jury found the city negligent and assigned the city with 26 percent responsibility for the accident. The trial court signed a final judgment: (1) awarding Plaintiff $2,433,600 in damages against the city plus costs, prejudgment interest, and post judgment interest; and (2) ordering the other defendants to indemnify the city for the same amount as required by state law. The city appealed asserting jury charge error and three evidentiary-sufficiency issues.

The appellate court affirmed the trial court's judgment holding that the city, as a public utility, had a duty to exercise ordinary and reasonable care, but the degree of care required must be commensurate with the danger. The "commensurate with the danger" standard does not impose a higher duty of care; rather, it more fully defines what is ordinary care under the facts presented. Here, the city's failure to remedy the leaning pole was a relevant breach of duty because if the pole had been straightened even five degrees and brought back roughly three and a half feet (which would have placed the line nearly 11 feet away from the overhang), the accident would never have happened.

City of Fredericksburg v. E. 290 Owners' Coalition, **No. 04-20-00349-CV, 2021 WL 2445621 (Tex. App.—San Antonio June 16, 2021).** On June 4, 2018, the city sent letters to property owners in the city's extraterritorial jurisdiction (ETJ) informing them that the city was going to begin annexation procedures on an area that included their property. Because the property owners' land was under an agricultural property tax exemption, the city provided the property owners a pre-annexation development agreement in lieu of annexation that informed the property owners that if they did not respond, the city would assume the owners had declined to enter into the agreement and their property might be annexed and public services provided in accordance with a statutory annexation service plan. Under the terms of the proposed pre-annexation development agreement, the city agreed to the continuation of the ETJ status of the owner's property, to immunity of the property from annexation by the city, and to immunity of the property from city property taxes. In return, the property owner would agree not to use the property for any use other than for agriculture, wildlife management, and/or timber land, except for any existing single-family residential use of the property. Unless terminated earlier, the term of the agreement commenced on the date of execution by both parties and terminated on May 1, 2033. Some property owners elected not to enter into the proposed pre-annexation development agreement and, instead, began negotiations with the city over other acceptable terms and conditions. On February 26, 2019, the city sent an email explaining what terms and conditions the city would require as part of a "Voluntary Annexation Agreement" with the owners of properties along East U.S. Highway 290. On March 12, 2019, the owners sent a proposed "Voluntary Annexation Agreement" to the city, which the owners contended tracked the proposed terms and conditions. One month later, on April 12, 2019, the E. 290 Owners' Coalition (Coalition), comprised of unnamed property owners, filed suit against the city, alleging: (1) breach of contract as the February 26, 2019 email constituted an "offer" and the March 12, 2019 responsive email constituted an "acceptance," thereby creating contractual rights and responsibilities between the parties; and (2) violation of the annexation statute. The city filed a plea to the jurisdiction alleging: (1) the Coalition lacked associational standing to sue on behalf of unnamed property owners; (2) the trial court lacked subject-matter jurisdiction over the Coalition's causes of action for breach of contract and its claim for damages because the city had immunity and there is no waiver of its immunity; (3) the lawsuit was not a proper ultra vires suit; (4) the Coalition lacked standing to challenge an annexation proceeding based on alleged procedural defects; (5) enjoining a legislative act violated the separation of powers; and (6) the Coalition's takings claim is not ripe. The trial court denied the plea, and the city filed an appeal. The court of appeals reversed the trial court's order judgment granting the city's plea to the jurisdiction and dismissing without prejudice appellee's claims for breach/anticipatory breach of contract, regulatory takings, and requests for declaratory relief.

Tort Claims Act: ***Town of Highland Park v. McCullers*****, No. 05-19-01431-CV, 2021 WL 2766390 (Tex. App.—Dallas June 29, 2021).** The Town of Highland Park hired a Southern Methodist University police officer to perform extra duty work to guard a private residence under construction. While guarding the residence, a storm flooded the area and the officer died. The officer's estate sued and the town filed a plea to the jurisdiction on the grounds that the plaintiff failed to provide the city notice. The trial court denied the plea. The appellate court reversed the

trial court and granted the plea. It found that: (1) the plaintiffs did not provide notice within six months as required by statute or within 30 days as required by the town's charter; and (2) the town did not have actual or subjective awareness of the incident. The appellate court also rejected the plaintiff's argument that the town was acting in a proprietary capacity when providing private security.

Governmental Immunity: *City of Houston v. Ayala*, No. 14-20-00164-CV, 2021 WL 2472804 (Tex. App.—Houston [14th Dist.] June 17, 2021). Ayala slipped and fell on an orange substance when exiting an escalator in the George Bush International Airport and sued the city for negligent activity and premises liability. The city filed a plea to the jurisdiction arguing governmental immunity, which was denied by the trial court, and the city appealed. A governmental unit is immune from suit unless its immunity is expressly waived. The Texas Tort Claims Act can waive immunity for cases based on premises defects. Because Ayala was merely the holder of a plane ticket and did not specifically pay for entry to the airport, the city owed her the duty of care due to a licensee rather than an invitee, which means the city had to protect her from a dangerous condition of which it actually knew. The court determined that because Ayala failed to establish actual knowledge of the dangerous condition, her claims should have been dismissed. Furthermore, the court held that because Ayala's claims were founded in premises liability, the negligent activity claims should also be dismissed. Accordingly, the appellate court reversed the trial court's order and rendered judgment dismissing the case.

Governmental Immunity: *City of Houston, v. Gonzales*, No. 14-19-00768-CV, 2021 WL 2586242 (Tex. App.—Houston [14th Dist.] June 24, 2021) (mem. op.). Gonzales sued the City of Houston asserting negligence after a city crane operator allegedly swung a crane arm in his direction to scare or strike him. The city filed a Rule 91a motion to dismiss a baseless cause of action, asserting immunity from intentional tort claims, which was denied by the trial court. The city appealed. The Texas Tort Claims Act does not waive governmental immunity for intentional torts; therefore, the trial court lacked jurisdiction over the claim. The appellate court reversed the trial court's order and rendered judgment dismissing the case.

Governmental Immunity: *Chappell Hill Sausage Co., v. Durrenberger*, No. 14-19-00897-CV, 2021 WL 2656585 (Tex. App.—Houston [14th Dist.] June 29, 2021) (mem. op.). Chappell Hill Sausage Company (Landowner) filed suit against seven Washington County officials in their official capacities alleging *ultra vires* failures to maintain a culvert in a county road. The county filed a plea to the jurisdiction based on governmental immunity, which was granted. The Landowner appealed. Even if a governmental entity's immunity has not been waived, a suit may be brought against an official if the official engages in *ultra vires* conduct (i.e. acting without legal authority or failing to perform a purely ministerial act). The Landowner's original petition failed to plead facts establishing jurisdiction, but also did not demonstrate incurable defects in jurisdiction. Construing the Landowner's pleadings liberally in their favor, the appellate court reversed the trial court's order dismissing the case.

<u>June 2021</u>

Note: Included cases are from May 11, 2021 through June 10, 2021.

Zoning: *Powell v. City of Houston*, No. 19-0689, 2021 WL 2273976 (Tex. June 4, 2021). Two homeowners challenged the City of Houston's historic preservation ordinance on the grounds that it was zoning enacted in violation of the city's charter, which only allows zoning to be adopted after public notice and a voter referendum, and it did not comply with certain provisions of Chapter 211 of the Local Government Code. The historic preservation ordinance allows for the creation of historic districts in which properties cannot be modified or demolished without the approval of a historical commission. The court of appeals held that the ordinance is not a zoning regulation because the purposes for which it was created, its function, and its way of regulating property use and development all differ from those of zoning laws.

The Supreme Court affirmed. The court concludes that the ordinary meaning of zoning is the district-based regulation of the uses to which land can be put and of the height, bulk, and placement of buildings on land, with the regulations being uniform within each district and implementing a comprehensive plan. Zoning regulations also tend to be comprehensive geographically by dividing an entire city into districts, though this need not always be the case. In contrast, the court finds that the historical preservation ordinance does not regulate the purposes for which land can be used, lacks geographic comprehensiveness, impacts each site differently in order to preserve and ensure the historic character of building exteriors, and does not adopt the enforcement and penalty provisions characteristic of a zoning ordinance. Accordingly, the ordinance is not zoning and was not enacted in violation of the city charter.

Procedure: *Artuso v. Town of Trophy Club*, No. 02-20-00377-CV, 2021 WL 1919634, (Tex. App.—Fort Worth May 13, 2021) (mem. op.). Plaintiff Artuso sued the Town of Trophy Club for negligence and gross negligence with regard to his home's placement in the town's Public Improvement District No. 1 (PID) and the special assessments imposed in the district. Artuso asserted he timely paid all assessments and even overpaid, claimed that the manner in which the town apportioned the PID costs was arbitrary and capricious, amounting to a violation of his due process rights, and complained that the town had not responded to his assessment-reduction petition. The town filed two pleas to the jurisdiction, which were granted. Artuso appealed arguing that the trial court's oral statements about the grounds for granting the plea were improper as the trial court's signed order listed no grounds.

The appellate court asserted it could not look to the oral statements in the record, only to the wording of the actual written order. By applying this policy, the courts and parties are relieved of the obligation to "parse statements made in letters to the parties, at hearings on motions for summary judgment, on docket notations, and/or in other places in the record." Because Artuso had failed to challenge all of the grounds upon which the town's motion could have been granted, and failed to brief all grounds, the court of appeals affirmed the granting of the dispositive motions.*

Discrimination: ***Goodlett v. NE. Indep. Sch. Dist.*****, No. 04-20-00203-CV, 2021 WL 2117927 (Tex. App.—San Antonio May 26, 2021) (mem. op.).** Goodlett was a custodian at Northeast Independent School District (Northeast). He was autistic and had a limited ability to navigate social situations as a result of his disability, but performed capably in his job. After completing a task, one of his coworkers challenged him and several other employees to a race. While running, Goodlett pushed one of his coworkers from behind, injuring her. During an investigation of the incident, it was discovered that Goodlett had previously made two threatening remarks. He was terminated from his employment and sued Northeast under Chapter 21 of the Texas Labor Code, alleging employment discrimination based on his disability. Northeast filed a plea to the jurisdiction, arguing that Goodlett had failed to present a prima facie case of discrimination. The trial court granted the plea to the jurisdiction.

The court affirmed. In order to establish a prima facie case of discrimination, Goodlett had to show that he was treated less favorably than other similarly situated employees who were not members of the protected class under nearly identical circumstances. This required that Goodlett identify a comparator employee who was not terminated under nearly identical circumstances. Goodlett attempted to do so by alleging that the other employees who participated in the horseplay leading up to the pushing incident had not been disciplined, but the court held that these employees were not similarly situated because they had not pushed a coworker or made threats. As such, Goodlett failed to establish a prima facie case. The court also found that Goodlett had not established a prima facie case for a failure-to-accommodate claim because he had never requested any accommodation.

Takings: ***Martinez v. City of Laredo*****, No. 04-19-00694-CV, 2021 WL 1894905 (Tex. App.—San Antonio May 12, 2021) (mem. op.).** Martinez possessed two taxi permits issued by the City of Laredo. She was arrested for identity fraud and theft, and while these charges were pending, the city temporarily revoked her taxi permits. Martinez sued the city, alleging that this was an unconstitutional taking. The city filed a motion to dismiss for lack of jurisdiction. The city argued that Martinez did not have a vested property right in the permits; thus, the city could not have unconstitutionally taken a property right from Martinez, and that there was no claim for which the city waived governmental immunity. The trial court granted the motion.

On appeal, the court analyzed whether Martinez had a takings claim that would vest the court with jurisdiction. First, Martinez sought a damage remedy, which is unavailable under Texas law for unconstitutional conduct. Second, she had no state constitutional takings claims because she did not allege that the taking was for public use. Third, under Texas law, no person can acquire a vested right to use public streets and highways for commercial business, and therefore Martinez did not have a property right in the taxi permits.

Development Plans: ***London v. Rick Van Park, LLC*****, No. 05-20-00813-CV, 2021 WL 1884650 (Tex. App.—Dallas May 11, 2021) (mem. op.).** The plaintiff sued the city secretary and former chair of the planning and zoning committee for declaratory and injunctive relief, claiming the city officials acted ultra vires for failing to issue a certificate of no action on a preliminary development

plan in the city when the submitted plan was deemed deficient, not properly filed, and substantially incomplete per the Town of St. Paul's ordinances. The trial court denied the city officials' plea to the jurisdiction and the city officials appealed. The appellate court found that the officials the plaintiff sued were not the "municipal authority" responsible for the no action certificate. As such, the court granted the plea, and gave the plaintiff the opportunity to replead.

Coronavirus: *Brown v. Daniels*, No. 05-20-00579-CV, 2021 WL 1997060 (Tex. App.—Dallas May 19, 2021) (mem. op.). Persons detained in the Dallas County jail sued the Dallas County sheriff in her official capacity for her handling of the COVID-19 pandemic within the jail. The sheriff filed a plea to the jurisdiction on the grounds that she was immune from suit: (1) for her actions in managing the COVID-19 crisis at the jail; (2) from plaintiffs' claims that she denied their rights under the Texas Constitution; and (3) from plaintiff's claims under the Texas Tort Claims Act (TTCA). The trial court denied her plea to the jurisdiction and the sheriff appealed. The appellate court reversed the trial court's denial and rendered judgment in favor of the sheriff because the plaintiffs' pleadings affirmatively negated jurisdiction, finding: (1) the plaintiffs' claims under the Texas Constitution were facially invalid and failed as a matter of law; (2) the plaintiffs had not provided a statute to support their claims that the sheriff acted ultra vires; and (3) the TTCA does not provide for injunctive relief.

Payday Lending: *TitleMax of Tex., Inc. v. City of Austin*, No. 07-20-00305-CV, 2021 WL 1899357 (Tex. App.—Amarillo May 11, 2021) (mem. op.). TitleMax sued the city, seeking declaratory and injunctive relief relating to a city ordinance designed to regulate companies' credit-service activities. The trial court granted the city's plea to the jurisdiction on the grounds that the ordinance was a penal law that could not be challenged in civil court. The appellate court reversed, relying on the Texas Supreme Court case *Texas Propane Gas Association v. City of Houston*, which held that a law that contains both civil and criminal aspects can be challenged in civil court if the "essence" of the law is civil.

Jury Selection: *Gomez v. City of Austin*, No. 08-19-00250-CV, 2021 WL 2134335 (Tex. App.—El Paso May 26, 2021). Gomez sued the City of Austin for employment discrimination following his termination. During jury selection, the city used a peremptory strike on a prospective juror who was Hispanic. Gomez made a *Batson* challenge, arguing that the city had struck the juror on racial grounds. The trial court denied the challenge, and Gomez appealed.

Employing the *Batson* framework, the court concluded that Gomez had raised an inference of discrimination and that the city had provided a race-neutral explanation for its use of the strike. The court thus examined whether the totality of the circumstances suggested that the city had purposefully discriminated. It considered five factors: (1) statistical data about the city's use of peremptory strikes; (2) comparative juror analysis; (3) use of the jury shuffle; (4) quantity and quality of questions posed to minority panel members; and (5) the city's history of striking minority jurors. All but one of these considerations weighed in favor of the city. The court upheld the trial court's overruling of the *Batson* challenge.

Public Information: ***City of Odessa v. AIM Media Texas, LLC*****, No. 11-20-00229-CV, 2021 WL 1918968 (Tex. App.—Eastland May 13, 2021) (mem. op.)**. This is a Public Information Act (PIA) case where the Eastland Court of Appeals held the plaintiff is properly under the jurisdiction of the PIA.

AIM Media, a newspaper company, sued the City of Odessa for mandamus under the PIA, asserting that the city failed to timely provide the information requested and improperly redacted information. The city asserted that it provided all requested information and that AIM Media plead conclusory allegations only, with no facts. The city filed special exceptions to the bare pleadings and then filed a plea to the jurisdiction, which was denied. The city appealed.

The court noted that the city challenged the pleadings only, so the pleadings were taken as true for purposes of the plea. The PIA allows a requestor to sue for mandamus. While the court appeared to acknowledge that a lack of factual allegations can be grounds for a plea, the court held that the city failed to obtain a ruling on its special exceptions. As a result, whether the special exceptions properly put AIM Media on notice of any jurisdictional defects was not before the court. Taking the pleadings as true, the court held that AIM Media pled the minimum jurisdictional requirements. The plea was therefore properly denied.*

Jurisdiction: ***Leach v. City of Tyler,*** **No. 12-21-00004-CV, 2021 WL 2371417 (Tex. App.—Tyler June 9, 2021) (mem. op.).** In trial court, Leondra Leach alleged that an improperly secured board flew from a city truck and struck Leach and the truck Leach was driving. Leach's employer, who owned the vehicle Leach was driving, gave timely notice to the city of the $207.19 claim for minor damage to the vehicle, but the notice did not include claims related to personal injuries suffered by Leach individually. The city moved for summary judgment based on Leach's failure to comply with the pre-suit notice requirements found in the Texas Tort Claims Act (TTCA), and the trial court granted the motion. Leach appealed. The appellate court determined that the notice given by Leach's employer was inadequate to convey to the city its "perceived peril" due to Leach's potential claim and was therefore inadequate notice under the TTCA. The appellate court affirmed the trial court's ruling.

Governmental Immunity: ***Hidalgo Cty. Water Improvement Dist. No. 3 v. Hidalgo Cty. Irrigation Dist. No. 1*****, No. 13-20-00355-CV, 2021 WL 2154081 (Tex. App.—Corpus Christi May 27, 2021) (mem. op.).** After the Hidalgo County Water Improvement District No. 3 (Improvement District) condemned a subsurface easement to run a pipe beneath a canal owned by the Hidalgo County Irrigation District No. 1 (Irrigation District), the Irrigation District sued, claiming immunity to a condemnation lawsuit as a governmental entity. The trial agreed with the Irrigation District and dismissed the case on the basis of governmental immunity. Ultimately the appellate court held that, "where a governmental landowner objects to an award on a non-monetary basis . . . the costs of defending the lawsuit would constitute 'unforeseen expenditures'" and that, "[ ] this consideration weighs in favor of applying immunity." The court affirmed the lower court's dismissal.

Governmental Immunity: *San Jacinto River Auth. v. Ray*, No. 14-19-00095-CV, 2021 WL 2154081 (Tex. App.—Houston [14th Dist.] May 27, 2021) (mem. op.). This case arises from flooding produced by the rainfall from Hurricane Harvey in 2017. Appellees (more than 300 property and business owners) asserted that the San Jacinto River Authority (SJRA) released water from Lake Conroe knowing that this action would flood thousands of downstream homes and businesses and alleged constitutional inverse condemnation claims under Article I, Section 17 of the Texas Constitution in Harris County district court. SJRA filed a plea to the jurisdiction: (1) challenging the subject matter jurisdiction of the district court over constitutional inverse condemnation claims; and (2) alleging that appellees failed to plead sufficient facts demonstrating a waiver of governmental immunity. Appellees countered that: (1) fair notice pleading should save their constitutional takings claim; and (2) they also pleaded statutory takings under Government Code Chapter 2007. SJRA replied that if Appellees filed statutory takings claim, only one of the appellees filed their case in time and the others should be time-barred. The trial court denied SJRA's plea to the jurisdiction, which SJRA appealed.

Texas Government Code Section 25.1032 squarely places jurisdiction over eminent domain proceedings brought in Harris County with the county civil court at law rather than the district court. Additionally, in their original petition, appellees made no reference to Chapter 2007 of the Government Code, nor did they allege waiver of SJRA's immunity under that chapter. The appellate court held that appellees failed to make a statutory takings claim, reversed the trial court's order denying SJRA's plea to the jurisdiction, and rendered judgment dismissing appellees' claims for lack of subject matter jurisdiction.

Governmental Immunity: *City of Houston v. Gonzales*, No. 14-20-00165-CV, 2021 WL 2154155 (Tex. App.—Houston [14th Dist.] May 27, 2021) (mem. op.). Appellee slipped and fell at the salad bar of a restaurant located in the George Bush International Airport and sued the city for negligence and gross negligence, invoking the Texas Tort Claims Act's (TTCA's) immunity waiver. United Airlines controlled the area where the incident occurred pursuant to a lease with the city, and based on its lack of control over the area, the city filed a plea to the jurisdiction arguing governmental immunity and seeking dismissal of appellee's claims. The trial court denied the city's plea, and the city appealed. A governmental unit is immune from suit unless the TTCA expressly waives immunity, which it can for premises defects. However, when a landlord, such as the city in this case, does not control the leased premises, they owe no duty to tenants or their invitees for dangerous conditions. The appellate court remanded the case to the trial court with instructions to dismiss the suit against the city.

Jurisdiction: *City of Galveston v. Jolly*, No. 14-19-00599-CV, 2021 WL 2324943 (Tex. App.—Houston [14th Dist.] June 8, 2021) (mem. op.). After the city received an order from the municipal court ordering the demolition of structures on John Jolly's property, Jolly obtained a TRO from the County Court at Law enjoining the demolition. The city filed a plea to the jurisdiction and motion to vacate the TRO. The County Court at Law declined to vacate the TRO,

and the city appealed. The appellate court held that the county court at law has jurisdiction to order the TRO and affirmed the lower court's ruling.

Governmental Immunity: *Rogers v. City of Houston,* No. 14-19-00196-CV, 2021 WL 2325193 (Tex. App.—Houston [14th Dist.] June 8, 2021). Noris Rogers sued defendants, including the City of Houston, for several torts, among other claims, based on events that occurred when employees of a tree trimming service contracting for the power company, accompanied by a City of Houston police officer, came to Rogers' property to trim an oak under a power line. The city filed a plea to the jurisdiction, which was granted by the trial court. Rogers filed a 15-point appeal, most of which will not be discussed here. In his claims against the city, Rogers argued that the off-duty police officer was acting in a proprietary function rather than a governmental function. The appellate court disagreed, holding that even though the officer was off duty and being paid by the power company, the provision of police services is closely related to the governmental function of "police and fire protection and control" for which the city is immune from suit or liability in tort. The appellate court affirmed the trial court's dismissal of all claims against the city.

<u>May 2021</u>

Note: Included cases are from April 11, 2021 through May 10, 2021.

Preemption: *Texas Propane Gas Ass'n. v. City of Houston*, No. 19-0767, 2021 WL 1432221 (Tex. Apr. 16, 2021). The Texas Propane Gas Association (TPGA) sued the city, seeking a declaratory judgment that the city's ordinances regulating liquefied petroleum gas, to include imposing criminal fines for violations, are preempted by state law. The city argued that: (1) civil courts lack subject-matter jurisdiction to adjudicate TPGA's preemption claim because the local regulations it challenges carry criminal penalties; and (2) TPGA lacks standing to challenge the city's regulations without showing injury to a TPGA member for each discrete regulation challenged. The appellate court determined that it had jurisdiction over the claim but that TPGA lacked standing, and consequently remanded the case to the trial court for TPGA to amend its pleadings. The city and TPGA filed petitions for review.

The Texas Supreme Court concludes that TPGA's claim is not a "criminal law matter" that is outside a Texas civil court's subject-matter jurisdiction. Additionally, the court finds that TPGA has demonstrated standing to bring the singular preemption claim it pleaded. Accordingly, the judgement of the appellate court is reversed, and remanded.

Mandamus: *In re City of Galveston*, No. 20-0134, 2021 WL 1822939 (Tex. May 7, 2021). The city entered into a block grant agreement with the State, which required the city to administer federal disaster grant funds. The city hired a private contractor to perform some of this work, and agreed to certify the contractor's application for payment from State funds. A dispute regarding payment and the proper certification procedure for the work arose among the contractor, the city, and the General Land Office (GLO), with the city claiming that the GLO bore ultimate responsibility for paying the contractor. The GLO responded that the city had failed to properly

certify the contractor's work. The private contractor later sued the city for amounts it claimed the city owed it under their agreement. The city settled with the private contractor and sought reimbursement from GLO for the settlement amount that the city paid. As part of the settlement agreement, the city agreed not to sue any GLO employees as defendants in any related proceeding. The city sent the GLO a notice of a claim under Chapter 2260 of the Government Code, which establishes a mediation process for certain disputes between state agencies and their contractors, and allows a contractor to request that the state agency refer the contractor's claim to the State Office of Administrative Hearings (SOAH). After the negotiation period ended, the city requested that the GLO refer the claim to SOAH, but GLO refused to do so. The city filed suit against GLO Commissioner Bush to compel him to refer the claim.
The Texas Supreme Court found that absent legislative authorization, a state agency may not refuse to refer a claim to SOAH based on its unilateral interpretation of Chapter 2260. However, the court denied the petition for a writ of mandamus because the city agreed not to take the commissioner into court in any proceeding related to this dispute.

Takings: *San Jacinto River Auth. v. Medina*, Nos. 19-0400; 19-0401; 19-0402, 2021 WL 1432227 (Tex. Apr. 16, 2021). Downstream property owners brought separate suits for declaratory judgment under eminent domain statutes alleging that the river authority, by precipitously releasing water from a dam at an excessive rate in response to a hurricane, had caused or added to the flooding of their land and thereby caused a "taking." The court of appeals affirmed the trial court's dismissal of the river authority's motions to dismiss. The river authority appealed.

The Texas Supreme Court affirmed, holding that: (1) statutory takings claims under the eminent domain statutes are not limited solely to claims for regulatory takings; and (2) the allegations in the downstream property owners' complaints did not conclusively establish that the river authority's actions met either the "reasonable good faith belief" test of one exception to eminent domain statutes or the "measured and appropriate response" test of another.

Jurisdiction: *Viswanath v. City of Laredo*, No. 04-20-00152-CV, 2021 WL 1393976 (Tex. App.—San Antonio Apr. 14, 2021) (mem. op.). Viswanath is the founder of a government watchdog group known as Our Laredo. After Councilman Martinez defeated Viswanath in a runoff election for a council position, Gomez, a member of Our Laredo, filed an ethics complaint against the co-city managers arguing they were required to "ensure" that Councilman Martinez forfeited his seat due to his alleged conflict of interest. Thereafter, Viswanath filed an additional ethics complaint against the co-city managers arguing they unfairly advanced the private interest of certain developers at the expense of the general population by recommending that city council pass two ordinances that increased the overall utility rate. The co-city managers filed a response and requested sanctions against Viswanath and Gomez, arguing both ethics complaints were frivolous. The City of Laredo's Ethics Commission dismissed both complaints, concluding they did not allege violations of the City of Laredo Ethics Code and therefore did not invoke the commission's jurisdiction. The commission also found both complaints frivolous, and publicly admonished Gomez and ordered Viswanath to pay the maximum civil fine and attorney's fees to the commission's conflicts counsel.

Viswanath filed an appeal of the commission's decision in trial court, seeking a declaration under the Uniform Declaratory Judgments Act (UDJA) that the commission's decision was arbitrary, capricious, unlawful, and unsupported by substantial evidence, and attorney's fees. The city filed a plea to the jurisdiction and a motion for summary judgment. Viswanath also filed his own motion for summary judgment. The trial court denied the city's plea, granted the city's motion for summary judgment, and implicitly denied Viswanath's competing motion for summary judgment. Viswanath appealed.

The appellate court affirmed the portion of the trial court's summary judgment with regard to the commission's finding that Viswanath's complaint was frivolous; reversed the portion of the summary judgment ordering Viswanath to pay attorney's fees as sanctions; and remanded the issue regarding the amount of attorney's fees to the trial court to determine whether substantial evidence was presented to the commission to support its award of attorney's fees.

Tort Claims Act: *City of Dallas v. Estate of Yolanda Jeanne Webber*, No. 05-20-00669-CV, 2021 WL 1573064 (Tex. App.—Dallas Apr. 22, 2021). The plaintiff sued the city in relation to its operation of the 9-1-1 system. When Webber suffered a medical emergency, no one could get through to 9-1-1, and ultimately Webber died. The plaintiff alleged the condition or use of tangible personal property caused Webber's death. The trial court denied the city's plea to the jurisdiction and the city appealed. The appellate court found the law was clear that a mere delay in treatment resulting from a malfunctioning 9-1-1 system is not a proximate cause of the plaintiff's injuries for the purposes of an immunity waiver. As a result, the appellate court reversed the trial court's denial of the plea to the jurisdiction and rendered judgment in favor of the city.

Contracts: *City of Heath v. Williamson d/b/a PCNETSYS*, No. 05-20-00685-CV, 2021 WL 1731796 (Tex. App.—Dallas May 3, 2021). The city appealed the trial court's denial of its plea to the jurisdiction against plaintiff's breach of contract claims for information technology consulting services. The contract provided that the city would pay plaintiff for the services he provided each month and the city argued there was no balance due and owed as required by Texas Local Government Code Chapter 271, Subchapter I. The appellate court vacated the trial court's denial of the plea because the loss of future profits were consequential damages for which there is no waiver.

Tort Claims Act: *Lewis v. Dallas Cty. Sheriff*, No. 05-20-00855-CV, 2021 WL 1783106 (Tex. App.—Dallas May 5, 2021). Plaintiff, an employee at a jail, sued the sheriff who was his supervisor, for the conditions in the county jail during the COVID-19 pandemic, claiming that the sheriff failed to maintain the jail in a clean and sanitary condition. The trial court granted the sheriff's plea to the jurisdiction and the plaintiff appealed. The appellate court affirmed the trial court, finding that: (1) the sheriff's actions were not *ultra vires*; (2) she did not fail to perform a ministerial act; and (3) there is no liability under the Texas Tort Claims Act for failure to perform an act nor for a decision not to perform an act.

Code Enforcement: *City of Dallas v. Stamatina Holdings, LLC*, No. 05-20-00975-CV, 2021 WL 1826931 (Tex. App.—Dallas May 7, 2021). The city determined there were code violations at an apartment complex, including a gas leak. The city required that the apartment complex shut off the gas. The plaintiff sued to turn the gas back on. The trial court granted an injunction requiring that the code violations be remedied but also requiring that the gas be turned on within 24 hours of the order. However, the trial court did not set the matter for trial. The city appealed on the grounds that the trial court violated rules of civil procedure because it did not set the matter for trial and it did not set a bond for the injunction. Because the trial court order did not set the case for a trial on the merits, the appellate court reversed the trial court's order.

Land Use/Contracts: *City of Buda v. N.M. Edificios LLC*, No. 07-20-00284-CV, 2021 WL 1522458 (Tex. App.—Amarillo Apr. 16, 2021). A developer and the city entered into an agreement in which the developer would convey a drainage easement to the city and the city would construct drainage facilities on the easement. The developer then sold the property to another developer. The city refused to construct the drainage facilities and rejected the new developer's plans because of the drainage issues. The new developer sued and the city filed a plea to the jurisdiction, which the trial court denied in part. The appellate court found that: (1) the agreement was a permit under Chapter 245 of the Local Government Code, but the rules were not changed in a manner prohibited by Chapter 245; (2) the plaintiff had sufficient evidence for a regulatory taking claim because of its reasonable investment-backed expectation; (3) the plaintiff should have the opportunity to amend its pleadings for its land use exaction claim; and (4) the plaintiff's claims for attorney's fees against the city should be dismissed.

Takings: *Carrasco v. City of El Paso*, No. 08-20-00062-CV, 2021 WL 1712209 (Tex. App.—El Paso Apr. 30, 2021). Carrasco purchased a lot located at the end of a sloping cul-de-sac, where he constructed a residential home. Because the city's sewage system slopes downward, it is not possible to gravitationally disperse the sewage originating from his premises to the sewer main. Additionally, his connection to the sewer main results in accumulation of sewage from the entire subdivision onto his property. Carrasco installed grinding pumps to discharge his own sewage, but they failed to pump upstream and routinely burned out. As a result, he was forced to cap the sewage line to prevent the accumulation of public sewage on his property and thus, does not have access to the sewage system. Because he was unable to obtain a certificate of occupancy, his home is uninhabitable. After reporting the issue to the city numerous times, Carrasco filed suit, requesting injunctive relief. The city filed a plea, which was granted by the trial court. Carrasco appealed, asserting waiver of governmental immunity and a takings claim.

The appellate court held that there was no waiver of immunity because Carrasco did not provide evidence of a cause of action that falls within the three categories that establish waiver of immunity. Additionally, the court concluded that public work design issues are a protected discretionary function for which governmental immunity applies. The court also determined that Carrasco did not plead a viable takings claim because, pursuant to a conveyance agreement, the city only agreed to operate and maintain the sewer mains installed within the public street, and the

intentional operation of a sewer system is insufficient to support liability for a takings claim. Lastly, the court found that Carrasco did not have a viable negligence claim as cities are immune from liability for negligence in the operation of a sanitary sewer system, which is a governmental function.

Texas Whistleblower Act: *City of Valley Mills v. Chrisman*, No. 10-18-00265-CV, 2021 WL 1807365 (Tex. App.—Waco May 5, 2021) (mem. op.). Chrisman and Troxell, while employees of the City of Valley Mills, placed deer feeders on city-owned property. The city administrator moved the feeders and refused to return them until Chrisman and Troxell signed a release of liability. Chrisman and Troxell were both terminated after refusing to sign the release. Prior to their termination, they reported to the mayor and the Valley Mills Police Department that the city administrator had taken their personal property. Chrisman and Troxell sued for wrongful retaliation under the Texas Whistleblower Act. The city appealed, arguing that the trial court improperly denied the city's plea to the jurisdiction. The city argued Chrisman and Troxell failed to adequately allege and present sufficient jurisdictional facts to bring their claim. The appellate court agreed that the pleadings are insufficient because they do not allege facts that the conduct reported was a violation of the law or that they had a good faith belief they were reporting to an appropriate law-enforcement authority. The appellate court reversed the denial of the city's plea to the jurisdiction and remanded the case to the trial court to allow Chrisman and Troxell the opportunity to amend their pleadings.

Employment: *Sewell v. City of Odessa*, No. 11-19-00121-CV, 2021 WL 1706913 (Tex. App.—Eastland April 30, 2021) (mem. op.). Sewell resigned his job with the City of Odessa animal control division and subsequently filed suit against the city and six employees of the city claiming, among other things, constructive discharge, intentional infliction of emotional distress, Section 1983 claims, and slander. The trial court entered a take nothing judgment and dismissed the claims against the individual city employees under Section 101.106(e) of the Texas Tort Claims Act.

Sewell appeals, challenging the trial court judgment in nine issues. Sewell does not challenge the dismissal of the individual city employees. Sewell's first claim is that the city's summary judgment evidence contained hearsay and was conclusory. The appellate court overruled the objections. His second claim is that the trial court erred by granting the city's motion to strike his summary judgment evidence (an affidavit by Sewell). The appellate court upheld the trial court's rulings as to some portions of the affidavit, but not others. Sewell's third claim is that an inadequate time for discovery had elapsed. The appellate court found the case had been on file for two years; this issue was overruled. His fourth and fifth claims are that the trial court erred in granting the city's motion for summary judgment on his Section 1983 claims. The court overrules both issues concluding, among other things, that Sewell did not have a protected property interest in his job as he did not dispute he was an at-will employee. All of Sewell's remaining claims are subject to the Texas Tort Claims Act. The appellate court finds the city has immunity as to his claims for intentional infliction of emotional distress; negligent hiring,

training, supervision, and retention; and respondeat superior. Moreover, the claims against the individual city employees were dismissed. The judgment of the trial court is affirmed.

Texas Tort Claims Act: *Pryor v. Moore*, No. 12-20-00137-CV, 2021 WL 1582722 (Tex. App. Tyler Apr. 21, 2021) (mem. op.). Pryor was involved in a motor vehicle collision with a City of Tyler garbage truck being driven by a city employee, Moore. Pryor sued the city and Moore for negligence. The city moved for dismissal of Moore and also moved for summary judgment. The trial court dismissed the employee from the case and granted the city's motions for summary judgement, and Pryor appealed. Section 101.106 of the Texas Tort Claims Act provides plaintiffs with the choice of defendants – the governmental entity or the employee acting within the scope of employment – but not both. When a plaintiff sues both a city and the city's employee, the employee must be dismissed from the case if they were acting within the scope of employment. The appellate court analyzed Moore's actions as the driver of the garbage truck, found him to have been acting within the scope of his employment, and affirmed the trial court's dismissal action.

Procurement/TOMA: *City of Brownsville v. Brownsville GMS, Ltd.*, No. 13-19-0031-CV, 2001 WL 1804388 (Tex. App.—Corpus Christi May 6, 2021) (mem. op.). At the time this case was filed in 2019, Brownsville GMS, Ltd. (GMS) had been providing commercial solid waste services to the City of Brownsville. The city's previous contract with GMS had expired in 2016, so in 2017, Brownsville twice issued requests for proposals (RFPs) for solid waste services. Both times, the city rejected all bids, including bids from GMS. GMS continued providing services month-to-month but filed suit in May 2019, alleging violations of the Texas Open Meetings Act (TOMA), violations of Chapter 252 of the Texas Local Government Code, *ultra vires* actions, and requesting injunctive relief.

To obtain injunctive relief, one must assert a cause of action; demonstrate a probable right to relief; and imminent injury in the interim. GMS asserted that by rejecting all of the bids responsive to the RFPs, the city *ultra vires* acts violated the competitive bidding procedures in Chapter 252. To succeed with an *ultra vires* claim, one must prove that a government officer acted without legal authority or failed to perform a purely ministerial act. Because Section 252.043(f) allows a city to reject all bids at a city's discretion, the appellate court rejected GMS's asserted causes of action. GMS was seeking to bar the city from taking any action to interfere with GMS's month-to-month agreement. The only relief available under Chapter 252 is to bar performance of an improperly procured contract, and there being no contract, GMS could not demonstrate a probable right to recovery. The court declined to extend injunction authority to proposed contracts that have not been awarded. GMS also alleged violations of the TOMA, which provides that actions taken by governing bodies in violation of its requirements are voidable. Because the relief granted by the trial court was well beyond what is allowable under TOMA, the appellate court reversed the trial court's orders, dissolved the temporary injunction, and remanded the case back to the lower court for further proceedings.

Employment Discrimination: *Texas State Technical Coll. v. Owen*, No. 13-20-00264-CV, 2021 WL 1567505 (Tex. App.—Corpus Christi Apr. 22, 2021) (mem. op.). While Texas State

Technical College (TSTC) is a public entity, not all aspects of governmental immunity jurisprudence that apply to TSTC are equivalent to those that apply to municipalities. Those diverging immunity rules are not being discussed here. After Owen was terminated by TSTC, he sued TSTC under the Texas Commission on Human Rights Act complaining of discrimination and retaliation. TSTC's plea to the jurisdiction was denied by the trial court, and TSTC filed an accelerated interlocutory appeal of that decision on the grounds that Owen failed to exhaust administrative remedies related to the retaliation claim. Regarding Owen's age discrimination claim, the court observed that while the plea to the jurisdiction requested dismissal of the claim, the plea did not contain arguments challenging the claim and instead asserted that Owen could not meet the elements. A defendant may not advance a "no-evidence" plea to the jurisdiction; consequently, the trial court did not err in denying the plea with respect to the age discrimination claim.

Collective Bargaining: *City of Houston v. Houston Prof'l Fire Fighters' Ass'n*, Nos. 14-18-00976-CV; 14-18-00990-CV, 2021 WL 1807311 (Tex. App.—Houston [14th Dist.] May 6, 2021). The city and the Houston Professional Fire Fighters' Association, Local 341 (Association) attempted to negotiate and mediate a collective bargaining agreement in 2017 but could not come to an agreement. The Association sued the city for violation of Chapter 174 of the Local Government Code. The Association filed a motion for summary judgment on the city's governmental immunity defense, and the city filed a plea to the jurisdiction and its own motion for summary judgment. The trial court denied the city's motion for summary judgment and the city filed this interlocutory appeal, arguing that the Association failed to establish a waiver of governmental immunity by failing to present evidence of good faith collective bargaining for compensation and benefits based on private sector labor standards, and that Chapter 174 violates the Texas Constitution's separation of powers doctrine.

The appellate court affirmed the trial court's denial of the city's plea, finding that, because Chapter 174's governmental immunity waiver language does not require good faith collective bargaining based on private labor standards, the Association had no duty to plead such facts. The appellate court also determined that because the legislature chose sufficiently detailed, yet not-too-confining, language to create reasonable standards for the delegation of authority to the judicial branch within Chapter 174, the statute does not violate the separation of powers doctrine.

Civil Service: *City of Houston v. Reyes*, No. 14-19-00291-CV, 2021 WL 1685230 (Tex. App.—Houston [14th Dist.] Apr. 29, 2021). The City of Houston and the Houston Professional Fire Fighters' Association, Local 341 (Association) entered into a Collective Bargaining Agreement (CBA) in 2011 that governed point calculations for promotional examination test scores. The CBA expired on June 30, 2017. Reyes and Rodriguez took the promotional exam on July 12, 2017, and the exams were scored by the Civil Service Commission (Commission) in accordance with the rules of the then-expired CBA, which cost them each ten additional points on the exam. They appealed the Commission's decision. The Commission reversed itself and rescored the exams pursuant to Chapter 143 of the Texas Local Government Code. Other firefighters appealed this reversal, and Commission reversed itself again, holding that the exams would be scored according

to the CBA. Reyes and Martinez filed suit. The city moved for summary judgement on the grounds that the Commission lacked subject matter jurisdiction to issue the orders they had issued. The trial court denied this motion, and the City filed this interlocutory appeal, arguing that the Commission did not have jurisdiction to issue said orders, because Reyes and Martinez should have followed the CBA's notice filing rules and deadlines rather than Chapter 143.

When deciding whether notice provisions are jurisdictional, the court considers: (1) the plain language of the statute; (2) whether there was a statutory prerequisite for filing a lawsuit or appeal; (3) whether there was a specific consequence for noncompliance; and (4) the consequences flowing from interpretation of the statute. The appellate court affirmed the trial court's dismissal and declined to impose a jurisdictional requirement on the notice of appeal as there was no clear statutory requirement to do so.

Ultra Vires: *Pidgeon v. Turner*, No. 14-19-00214-CV, 2021 WL 1686746 (Tex. App.—Houston [14th Dist.] Apr. 29, 2021). The parties to this appeal have been engaged in related litigation since 2013, when the City of Houston extended benefits to spouses in same-sex marriages on the same terms as spouses in opposite-sex marriages. The plaintiffs sued specifically to: (1) enjoin the mayor's allegedly *ultra vires* expenditures of public funds and claw those funds back; (2) declare the mayor's directive extending the benefits to be in violation of state law; and (3) declare that city officials have no authority to disregard state law merely because it conflicts with their personal beliefs. The city filed a plea to the jurisdiction and motion for summary judgment, which the trial court granted, dismissing all plaintiffs' claims with prejudice. Plaintiffs appealed.

The appellate court found that, in providing same-sex benefits, the mayor and the city had not committed any *ultra vires* impermissible acts in light of the United States Supreme Court's decision upholding same-sex marriage, and that there is no basis to eliminate spousal benefits for all city employees.

April 2021

Note: Included cases are from March 11, 2021 through April 10, 2021.

MOU Electric Rates: *Data Foundry, Inc. v. City of Austin*, No. 19-0475, 2021 WL 1323405 (Tex. 2021). The City of Austin, through its city council, sets the rates that Austin Energy, an electric utility owned by the city, charges to city residents for retail electric services. Data Foundry, Inc., an internet service provider, purchases electricity from Austin Energy for its facilities in the city. Data Foundry filed suit against the city alleging that the rates charged by the city were illegal.

The court of appeals concluded Data Foundry suffered a particularized injury sufficient to confer standing but affirmed the dismissal of Data Foundry's claims in part on other grounds. The Texas Supreme Court concluded that Data Foundry has standing to bring its claims, and remanded the case to the trial court.

Data Foundry satisfied the standing requirement of a particularized injury by alleging it was required to pay a rate for electric services to Austin Energy that was unreasonable, excessive, discriminatory, and confiscatory. But the most interesting discussion in the opinion relates to the city's request that the Texas Supreme Court conclude that, by enacting the Public Utility Regulatory Act (PURA), the legislature intended that city residents such as Data Foundry no longer have any judicial remedy when a municipally owned utility charges a rate that is alleged to be unreasonable or discriminatory. Essentially, the city argued that PURA has preempted the common law and precludes Data Foundry's requested judicial remedy. Before PURA's enactment, the court had recognized that, while the setting of utility rates is strictly a legislative function, courts may review challenges to those rates to determine if they are unreasonable or discriminatory. However, the city argued that: (1) PURA created a pervasive regulatory scheme that preempts the common law on this issue; and (2) with respect to municipally owned utilities, the legislature created a specific procedure for an administrative appeal to the Public Utility Commission by non-city residents, but – because it provided no such procedure for an administrative appeal by city residents – the legislature intended that city residents would have no judicial recourse.

The court declined the city's invitation to address whether the trial court could have properly dismissed Data Foundry's claims based on PURA preemption, and expressed no opinion on this issue. But, the court provided that "our decision does not preclude the city from raising this argument in the trial court on remand."

Governmental Immunity: *White v. City of Houston*, No. 01-20-00415-CV, 2021 WL 1133152 (Tex. App.—Houston [1st Dist.] Mar. 25, 2021). Nathan White sued the city to recover damages for personal injuries that were allegedly sustained when an unsecured firehose from one of the city's firetrucks became entangled in the rear axle of the vehicle he was in, causing the car to be dragged for 30 feet. The trial court granted the city's plea to the jurisdiction. The appellate court affirmed the trial court's judgment holding that, although White's alleged claim was legally sufficient to invoke the Texas Tort Claims Act's waiver of governmental immunity for injuries caused by condition or use of tangible personal property, the emergency exception to waiver of governmental immunity applied in this case.*****

Appellate Procedure: *Franco v. State*, No. 01-20-00633-CR, 2021 WL 922394 (Tex. App.—Houston [1st Dist.] Mar. 11, 2021) (mem. op.). Carmen Franco appealed the county criminal court's dismissal of an untimely filed appeal from a municipal court for the conviction of a moving violation. The appellate court dismissed the appeal for lack of jurisdiction because the county court's record contained no motion for a new trial and the Franco's notice of appeal was not filed with a motion for extension of time in compliance with Rule 10.5(b) of the Texas Rule of Appellate Procedure. The time for filing a notice of appeal may be extended if the notice is filed within 15 days after the deadline and a motion for extension of time complying with Rule 10.5(b) is filed. The Court of Criminal Appeals has interpreted Rule 26.3 similarly to the Texas

Supreme Court in regard to amending a defective notice of appeal, but it has not held that an extension is implied when a notice of appeal is filed within the 15-day period after it is due. Therefore, to extend the time to file a notice of appeal, the appellant must file a motion for extension.

Standing/Takings: *Ellis v. Wildcat Creek Wind Farm LLC*, No. 02-20-00050-CV, 2021 WL 1134416 (Tex. App.—Fort Worth Mar. 25, 2021) (mem. op.). A group of property owners in Cooke County sought to challenge the creation of a reinvestment zone created pursuant to Chapter 312 of the Texas Tax Code. The purpose of the reinvestment zone was to create tax incentives for Wildcat Creek Wind Farm LLC in order to build a wind power plant or "wind farm" in Cooke County. The trial court granted the property owners' dispositive motions for unjust enrichment and regulatory estoppel claims, but denied or dismissed the property owners' pleas to the jurisdiction as to the mandamus and inverse condemnation claims. The appellate court vacated the trial court's judgement and dismissed the case as the property owners did not establish standing and ripeness to bring forth their claims.

Housing Authority Evictions: ***Ledezma v. Laredo Hous. Auth.*, No. 04-19-00563-CV, 2021 WL 1199043 (Tex. App.—San Antonio Mar. 31, 2021) (mem. op.).** For over fifteen years, Miriam Ledezma has lived at the Ana Maria Lozano complex, a federally-subsidized housing project operated by Laredo Housing Authority (LHA). In February 2017, Ledezma received a notice of termination of lease, in which she was accused of "repeatedly threatening the rights of other tenants to the peaceful enjoyment of their community facilities and the social environment of their Housing Project, as called for by Section IX (l) and (m) of the Lease." In October 2017, Ledezma received another notice of termination stating that, because "the reason for the proposed eviction involve[d] a threat to the health, safety and rights of peaceful enjoyment of the premises by [her] neighbors," she was not entitled to a grievance hearing. The notice further stated that LHA would "file proceedings in state court to evict [her] from the premises." In April 2018, Ledezma was sued for forcible entry and detainer. The justice of the peace court ordered her to vacate her housing unit. Ledezma appealed, and the trial court found that Ledezma breached Sections IX(l) and (m) of her lease agreement by threatening the rights of other tenants to the peaceful enjoyment of their community facilities and the social environment of their housing project.

Ledezma argued the trial court lacked subject-matter jurisdiction because the LHA did not comply with federal regulations related to notice in proceeding with the eviction suit. The court of appeals concluded that the notice letter did not comply with the specific notice requirements of 24 C.F.R. § 966.4(l)(3)(v). The court then turned to whether the record showed Ledezma was harmed by the inadequate notice, and ultimately held that she was, resulting in the case being remanded back to the trial court.

Premises Defect: *City of San Antonio v. Realme*, No. 04-20-00119-CV, 2021 WL 1009330 (Tex. App.—San Antonio Mar. 17, 2021) (mem. op.). Nadine Realme paid to participate in a 5K run/walk that took place on the City of San Antonio's streets and sidewalks. The event itself

was sponsored by private entities and Realme's participation fee was directed to the private entities. She followed the pre-designated route and, along that route, between the sidewalk and the street, she tripped on a metal object protruding from the ground, causing bodily injury. She sued the city. The city filed a plea to the jurisdiction and argued that Realme was not an invitee, but rather a licensee, under premise defect standards. The trial court denied the city's plea to the jurisdiction.

The specific Texas Tort Claims Act provision that the court of appeals focused upon states that the city owes to Realme "only the duty that a private person owes to a licensee on private property unless the claimant pays for the use of the premises." After analyzing the plain language of that provision, the court of appeals concluded that the language makes no distinction between who received payment for use of the premises or even whether the payment was for the exclusive use of the premises. In construing Realme's pleadings in her favor and considering the evidence admitted, the court of appeals found there was a material fact issue on the question of immunity, affirmed the denial, and remanded the case to the trial court for further proceedings.*****

Employment: *Herczeg v. City of Dallas*, No. 05-19-01023-CV, 2021 WL 1169396 (Tex. App.—Dallas Mar. 29, 2021) (mem. op.). Herczeg was a police officer who sued the city, alleging gender discrimination, wrongful termination, retaliation, and aiding and abetting retaliation. The city filed a plea to the jurisdiction, attacking the merits of the plaintiff's claims, and asserting that the plaintiff did not timely present them to the Texas Workforce Commission and that she failed to exhaust her administrative remedies. The trial court granted the plea without specifying the grounds and the plaintiff appealed.

The city argued that the appellate court must affirm because the plaintiff did not address all of the city's independent arguments on appeal. The appellate court affirmed because the plaintiff did not address the city's arguments of untimeliness or failure to exhaust grounds, both of which were separate and independent grounds for the trial court to grant the plea.

Contracts: *City of Carrollton v. Weir Bros. Contracting, LLC*, No. 05-20-00714-CV, 2021 WL 1084554 (Tex. App.—Dallas Mar. 22, 2021) (mem. op.). The city appealed the trial court's denial of its plea to the jurisdiction against plaintiff's breach of contract claims for grading work the plaintiff performed for a sports complex on land owned by the city but leased to another entity. On appeal, the city claimed the trial court erred in denying its plea because plaintiff's claims are based on the lease of land for recreational purposes, which is a governmental function. The appellate court concluded the plaintiff's claims for breach of contract for performance of grading were based on a proprietary function because the right to operate, manage, and control the sports complex belonged to the entity leasing the land for the sports complex, not the city.

Ad Valorem Tax: *NMF P'ship v. City of Dallas*, No. 05-19-01578-CV, 2021 WL 1015862 (Tex. App.—Dallas Mar. 17, 2021) (mem. op.). NMF Partnership (NMF) lost a lawsuit for delinquent ad valorem taxes in the 1990s where the trial court ordered the sale of NMF's property as part of the judgment. More than five months later, the same trial court signed an

order to void the sheriff's sale and deed (Post Judgment Order). In 2016, NMF sued and sought to have the court declare the Post Judgment Order void. The trial court denied the relief and NMF appealed. The appellate court determined that the trial court did not have plenary jurisdiction or any jurisdiction to issue the Post Judgment Order. It reversed the trial court's order denying all relief requested by the plaintiff, rendered judgment in favor of the plaintiff declaring as void the Post Judgment Order, and remanded the issue of the award of attorneys' fees to NMF.

Abortion Funding: ***Zimmerman v. City of Austin*, No. 08-20-00039-CV, 2021 WL 1016443 (Tex. App.—El Paso Mar. 17, 2021).** As part of its Fiscal Year 2019-2020 budget, the City of Austin allocated $150,000 for "abortion access logistical support services" and directed the city's health department to disperse the funds to qualified organizations through a competitive bidding process. Don Zimmerman filed a lawsuit against the city and its city manager, in which he sought a declaration that the proposed expenditure violates state law for two distinct reasons: (1) it conflicts with various Texas statutes that make it a crime to aid and abet the procurement of an abortion, which he alleges are still viable even after the Supreme Court of the United States found them unconstitutional; and (2) the expenditure of these funds violates the prohibition in the Texas Constitution against providing "gifts" of public money to private individuals or associations. For different reasons, the trial court granted the city's plea to the jurisdiction, dismissed Zimmerman's first cause of action with prejudice, and dismissed the second cause of action without prejudice. Zimmerman appealed.

The court of appeals concluded that the criminal abortion statutes upon which Zimmerman's first claim is premised are ineffective to impose a duty on the city as it is an attempt to enforce a criminal statute, albeit in a civil context. Additionally, the court of appeals concluded that the highest criminal court in the state had concluded that the statutes were no longer in force and effect, and the court of appeals was unable to find any instance where the Texas abortion statutes have been substantively applied in any criminal case for the almost 47 years since the Supreme Court found them unconstitutional.

With regard to the allegations of an unconstitutional gift, the court of appeals concluded that the claim was not ripe because the city had yet to bid out the contract under which these funds could be expended. Accordingly, unless and until the city enters into a contract obligating it to disperse funds to an abortion-assistance organization, any decision would be an advisory opinion, which would not only violate the Texas Constitution, but would be an unpractical and unwise use of judicial resources.

Public Information: *San Jacinto River Auth. v. Yollick*, No. 09-19-00064-CV, 2021 WL 1031679 (Tex. App.—Beaumont Mar. 18, 2021). Eric Yollick sued the San Jacinto River Authority (SJRA) claiming it failed to handle his request for information in accordance with its duties under the Public Information Act (PIA). The trial court agreed with Yollick and signed a

judgment that requires the SJRA to disclose most of the information in the SJRA's Emergency Action Plan (the Plan). SJRA appealed.

SJRA asserted the evidence shows it received a request seeking the Plan a week before it received Yollick's request from Bradford Laney, who asked the SJRA for access to the Plan. The SJRA referred Laney's request to the Office of Attorney General (OAG) asserting exceptions in the PIA that authorized the SJRA to withhold the Plan when responding to Laney's request. The SJRA argued the trial court misinterpreted the PIA by requiring it to prove the OAG decided the Plan is subject to the PIA's exceptions before October 11, 2017, the day it refused to comply with Yollick's request. The appellate court affirmed the trial court's decision. The SJRA was not excused from referring Yollick's request to the OAG because it did not have a previous determination at the time it refused Yollick's request.

In-Person Court Appearances: *In re Donalson*, No. 12-21-00040-CV, 2021 WL 1054438 (Tex. App.—Tyler Mar. 19, 2021) (mem. op.). The Supreme Court of Texas on March 5, 2021 issued an emergency order allowing in-person hearings, but if a participant could show good cause, they could be permitted to participate remotely. Donalson, because of his concerns related to COVID-19 infection, argued that the lower court abused its discretion by ordering an in-person hearing. The trial court in this case had adopted health protocols requiring temperature screenings, face coverings, social distancing, and courtroom capacity restrictions in line with CDC recommendations. Donalson was unable to establish "good cause" to show that these precautions would be insufficient to protect him from infection or reinfection, and the lower court's requirement of an in-person hearing was upheld over his objections.

Governmental Immunity: *City of Victoria v. Redburn*, No. 13-20-00213-CV, 2021 WL 1217349 (Tex. App.—Corpus Christi Apr. 1, 2021) (mem. op.) The City of Victoria intervened in a lawsuit to seek a declaration that it held a prescriptive drainage easement across the surface of a portion of Redburn's property. Redburn filed, among other things, a counterclaim for injunctive relief against the city, seeking an injunction ordering the city to extend underground drainage pipes under his property rather than using the surface for drainage. The city filed a plea to the jurisdiction in response to the claim for injunctive relief. At trial, the court affirmed the city's easement claims but denied its plea to the jurisdiction. The court analyzed the city's immunity claim through the lens of the abrogation of immunity rule set out in *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006). The purpose of immunity is to protect public funds. Governmental immunity can be abrogated when claims against public funds are offset by governmental claims for monetary relief. The city's claim of an easement and Redburn's claim for an injunction to require construction of subterranean drainage facilities, while logically linked, do not offset, because Redburn's claims involve a significant expenditure of public funds to build the facilities requested. For this reason, Redburn's claim does not fall within the scope of *Reata*, and the city's plea to the jurisdiction was sustained.

Governmental Immunity: *Cameron Appraisal Dist. v. Alfaro*, No. 13-19-00198-CV, 2021 WL 1134315 (Tex. App.—Corpus Christi Mar. 25, 2021) (mem. op.) In a suit to quiet title to real

property filed in 2016, Alfaro claimed that Cameron County and the Rio Hondo Independent School District had wrongfully dispossessed her of real property through a tax foreclosure in 2012. Cameron Appraisal District (CAD) filed a plea to the jurisdiction asserting that the trial court did not have jurisdiction because: (1) Alfaro failed to exhaust administrative remedies related to the tax sale; (2) Alfaro failed to plead a waiver of governmental immunity; and (3) the claim was time barred. The trial court denied CAD's plea on the grounds that CAD may have acted fraudulently in its earlier interactions with Alfaro. CAD filed an interlocutory appeal challenging the court's denial order. The court of appeals found that the record reflected that Alfaro failed to exhaust her administrative remedies and reversed the trial court's judgement. The court of appeals did not consider the questions of pleading waiver or statute of limitations.

Employment: *San Benito Consol. Indep. Sch. Dist. v. Cruz*, No. 13-20-00310-CV, 2021 WL 921793 (Tex. App.—Corpus Christi Mar. 11, 2021) (mem. op.). Maria Cruz filed an employment retaliation and age discrimination case against her former employer, San Benito Consolidated Independent School District (SBCISD), and in response, SBCISD filed a plea to the jurisdiction and motions for summary judgment. The trial court granted summary judgement on the retaliation claim but denied judgement for SBCISD for the discrimination claim. SBCISD appealed. Cruz was able to present a prima facie case of age discrimination, which shifted the burden to SBCISD to prove a legitimate, non-discriminatory reason for Cruz's demotion. The court detailed the history of Cruz's performance with SBCISD as shown through the lower court's evidentiary record, and ultimately found evidence that SBCISD's non-discriminatory reasons for terminating Cruz could be a pretext for discrimination. The court affirmed the lower court's denial of SBCISD's plea to the jurisdiction.

Governmental Immunity: *City of Houston v. Manning,* No. 14-20-00051-CV, 2021 WL 1257295 (Tex. App.—Houston [14th Dist.] Apr. 6, 2021) (mem. op.). A City of Houston fire truck was involved in a collision with appellees. Appellees filed a negligence suit, and the city sought dismissal through summary judgment on immunity grounds, which the trial court denied.

The city brought two points of appeal: (1) that the city is immune, because the fire truck's driver has official immunity; and (2) that the trial court has no jurisdiction over the claims for negligent training, retention, and supervision. The appellate court overruled the city's first issue. Under an official immunity defense, the driver could be immune from suit arising from actions taken in the performance of his employment, if the discretionary duties are done in good faith within the scope of the employee's authority. The evidence establishing the driver's "good faith" is in dispute, so the city is not entitled to a judgment as a matter of law. The court sustained the city's second point of appeal, because negligent hiring, retention, training, and supervision of employees do not involve the operation of a motor vehicle, and thus are not cognizable claims under the Texas Tort Claims Act.

March 2021

Note: Included cases are from February 11, 2021 through March 10, 2021.

Public Camping: ***In re Durnin,*** **No. 21-0170, 2021 WL 791979 (Tex. Mar. 2, 2021).** Petitioners sought an initiative election on an ordinance regarding camping in public places (including sidewalks) and aggressive solicitation for money. The City of Austin called an election for the initiative. When the City approved the ballot language, it stated that the ordinance creates a criminal offense and penalty for anyone sitting or lying down on a public sidewalk or sleeping outdoors. Petitioners sued for mandamus asserting, among other things, that the ballot language inaccurately reflects the ordinance to be voted upon. The court held the wording of the proposed ordinance does not apply to just anyone; rather, the ordinance contains certain exceptions for common uses of the sidewalk. Thus, only a subset of those who engage in the covered behavior—not just anyone—can be penalized under the ordinance. In this regard, the word "anyone" in the City's ballot language threatens to "mislead the voters" by misrepresenting the measure's character and purpose or its chief features. Thus, the court issued a mandamus to strike the word "anyone" in two locations on the ballot.*

Breach of Contract: ***City of Haltom City v. Forrest*****, No. 02-20-00084-CV, 2021 WL 733057 (Tex. App.—Fort Worth Feb. 25, 2021) (mem. op.)**. A terminated police officer filed a religious discrimination complaint with the Texas Workforce Commission. The parties entered into a settlement agreement in which Haltom City agreed to pay the former officer nearly $30,000 and process any employment inquiries through Haltom City police department's human resources department, which was to provide only neutral, non-disparaging information regarding the officer's title, salary, and dates of employment. The former officer filed suit, alleging that Haltom City police department provided a disparaging job reference which he claimed was retaliatory and a breach of the terms of their settlement agreement.

The City filed a plea to the jurisdiction and hybrid traditional and no-evidence motion for summary judgment, both of which the trial court denied. The court of appeals affirmed the trial court's denial of the plea to the jurisdiction and motion for summary judgment.

Texas Tort Claims Act: ***City of Austin v. Credeur,*** **No. 03-19-00358-CV, 2021 WL 501110 (Tex. App.—Austin Feb. 11, 2021)**. This is a premise defect case where Credeur was injured when she fell walking along a city sidewalk in front of private property owned by Riedel. She sued the City, Riedel, and a utility company. The City filed a plea to the jurisdiction, which was denied. The City appealed.

The Court of Appeals reversed the denial of the City's plea to the jurisdiction and dismissed the case as the City produced evidence that showed it had no actual knowledge of the defect, and Credeur failed to raise a fact question as to notice.*

Paid Sick Leave: ***Washington v. Associated Builders & Contractors of S. Texas, Inc.,*** **No. 04-20-00004-CV, 2021 WL 881288 (Tex. App.—San Antonio Mar. 10, 2021).** In this case, the Fourth Court of Appeals considered the legality of the City of San Antonio's paid sick leave (PSL) ordinance. In 2018, various advocacy groups and non-profits initiated a petition to adopt what was labeled the "Paid Sick Leave Ordinance." One of the most critical components of the PSL ordinance was that it would require many San Antonio employers to provide paid leave to their employees for sick days, doctor appointments, and for other enumerated reasons. Under the

ordinance, a business's failure to comply with the provision of the PSL ordinance could result in fines. Instead of putting the ordinance on the ballot for a vote pursuant to the city charter, the city council decided to adopt the PSL ordinance verbatim. In response, multiple businesses and business associations sought and obtained temporary and permanent injunctions to prevent its enforcement.

The court of appeals concluded that the PSL ordinance was unconstitutional because it established a minimum wage that is inconsistent with the Texas Minimum Wage Act (TMWA). The court's decision turned on whether paid sick leave constitutes a "wage" under the TMWA. The court relied on dictionary definitions and the common meaning of words within the ordinance. Ultimately, the court held the PSL ordinance was in fact a "wage" and wage regulations are governed by the TMWA. As a result, the ordinance was preempted by state law.*

Premises Defect: *City of San Antonio v. Anderson*, No. 04-20-00320-CV, 2021 WL 883472 (Tex. App.—San Antonio Mar. 10, 2021) (mem. op.). Anderson was on crutches and exiting a terminal at the San Antonio International Airport. There was deposition testimony that provided that it was raining on that day. Anderson stated that he noticed a rubber mat outside the terminal door, that the ground was wet when he moved his crutches, and that when he moved forward he fell, injuring himself. Anderson alleged both a condition/use of tangible personal property (by failing to use a slip-preventing mat) and, alternatively, a defective condition of the premises (because the city should have known it was raining and needed to have made safe an area where one would not expect to find water). During Anderson's deposition, when asked if he had any reason to believe anyone from the city knew about the water before he fell, he replied: "not that I know of, no, sir." The city filed a plea to the jurisdiction and a no-evidence motion for partial summary judgment. The trial court granted the summary judgment but denied the plea to the jurisdiction. The City then appealed the denial.

The Court of Appeals focused on Anderson's apparent attempt to couch a premises defect claim as a tangible personal property claim. The Texas Tort Claims Act clearly delineates between the two claims such that one claim cannot be both a condition/use of personal property and a premises defect. The former claim was succinctly dismissed because Anderson expressly alleges it is attributed to a failure to use a certain type of mat, which is not a valid claim under the TTCA. As to the latter, none of Anderson's testimony created a fact issue as to whether the City had any knowledge or notice of the water on the ground or mat, which is one required element for bringing forth a premises defect claim. As a result, the denial of the plea to the jurisdiction was reversed and Anderson's claims were dismissed with prejudice.*

Texas Tort Claims Act: *Dallas Cty. Hosp. Dist. v. Bravo*, No. 05-20-00640-CV, 2021 WL 822916 (Tex. App.—Dallas Mar. 4, 2021). This is a Texas Tort Claims Act (TTCA) case where the Dallas Court of Appeals reversed the denial of Parkland's plea to the jurisdiction and dismissed the claims.

Plaintiff Bravo visited a sick family member at a Parkland hospital and as he sat in the main lobby, a large glass pane from a second-story walkway suddenly fell on him from overhead, causing him injuries. Bravo sued Parkland for a premises defect. Parkland filed a plea to the jurisdiction, which was denied. Parkland appealed.

Under a premise defect theory, a limited duty requires the owner of the premises to avoid injuring the plaintiff through willful, wanton, or grossly negligent conduct and to use ordinary care either to warn the plaintiff of, or make reasonably safe, a dangerous condition of which the owner is aware and the plaintiff is not. Parkland submitted evidence the glass pane was installed prior to October of 2015 and Parkland received no notice of any potential problems with the pane prior to Bravo's injury. None of plaintiff's evidence showed Parkland had any prior actual notice of a dangerous condition or provided a basis from which such notice could reasonably be inferred. As a result, Parkland had no actual knowledge of the condition.*

Confederate Monuments: *Carter v. Dallas City Plan Comm'n*, No. 05-20-00190-CV, 2021 WL 777088 (Tex. App.—Dallas Mar. 1, 2021). This is a Confederate monument case where the Dallas Court of Appeals affirmed the granting of the City's plea to the jurisdiction.

After a Confederate monument was originally scheduled for removal from a City cemetery, Plaintiffs brought suit to prevent its destruction, asserting that the City violated its own codes, the Texas Open Meetings Act, the Texas Monument Protection Act, and a few others. The City filed a plea to the jurisdiction, which was granted, except to claims under the Texas Antiquities Act. Plaintiffs appealed after non-suiting the remaining claim.

The City asserted three grounds in its plea to the jurisdiction: standing, governmental immunity, and the political question doctrine. The political question doctrine is not necessarily a component of or necessarily entwined with either of the other two grounds. Plaintiffs challenged standing and immunity, but not the political question doctrine. Because the Plaintiffs did not challenge each independent, standalone ground on which the dismissal of their claims could properly have been based, the court affirmed the granting of the plea.*

Contracts: *City of Dallas v. Asemota*, No. 05-20-00664-CV, 2021 WL 777089 (Tex. App.—Dallas Mar. 1, 2021). The City impounded a vehicle and sold it at auction to Asemota. A finance company repossessed the vehicle, asserting it did not receive notice that the City had impounded the vehicle. Asemota sued the City for breach of contract because the City had not provided notice to the finance company and created a cloud of title. The trial court denied the City's plea, and the City appealed. The appellate court reversed because the contract was not for the provision of goods to the City, as required by Chapter 271 of the Local Government Code for a waiver of immunity.

Texas Tort Claims Act: *City of Dallas v. De Garcia*, No. 05-20-00636-CV, 2021 WL 777087 (Tex. App.—Dallas Mar. 1, 2021). De Garcia sued the City when she tripped over a piece of metal pipe protruding from the sidewalk, which she claimed was owned and controlled by the City. The City filed a plea to the jurisdiction claiming it was immune from suit because it was not responsible for maintaining the sidewalk and was not aware of a defect at the time of De Garcia's injury. The City provided evidence of a contract with TxDOT and claimed TxDOT was responsible for maintaining the sidewalk. The trial court denied the City's plea and the City appealed. The appellate court reversed the trial court and dismissed the claims against the City because the City had presented sufficient evidence that it did not have actual knowledge of the defect and De Garcia failed to rebut the evidence.

Property Taxes: *Collin Cent. Appraisal Dist. v. Garland Hous. Fin. Corp.*, No. 05-19-01417-CV, 2021 WL 711478 (Tex. App.—Dallas Feb. 22, 2021). Garland Housing Finance Corporation (GHFC) and TX Collin Apartments, L.P. (collectively Plaintiffs) challenged the Collin Central Appraisal District's (CCAD) denial of the exemption from property taxes for their housing project. The City of Plano had passed a resolution in support of a four percent housing tax credit for the housing project. The Plaintiffs also got approval for a tax-exempt bond from the attorney general's office and later refinanced the bond. The CCAD canceled the exempt status after the Plaintiffs refinanced the bond. The trial court denied CCAD's motion for summary judgment. On appeal, the Court rejected CCAD's argument that the Chapter 394 exemption was absolute because it was limited by Section 394.005. The Court affirmed the trial court's decision, finding there was no evidence Plano was required to approve the application of Chapter 394 to the Plaintiffs' property for the property to receive the tax exemption.

Concealed Handguns: *Paxton v. Waller Cty.,* No. 07-20-00297-CV, 2021 WL 833978 (Tex. App.—Amarillo Mar. 4, 2021). This is a conceal/carry notice case where the Amarillo Court of Appeals reversed the denial of the Texas Attorney General's plea to the jurisdiction and dismissed the case.

The Waller County Courthouse has a sign noting a person cannot carry any weapons, including knives and guns, in the courthouse. Section 411.209 of the Government Code prohibits a political subdivision from posting notices barring entry to armed concealed-handgun license holders unless entry is barred by statute. Terry Holcomb filed a complaint with the County regarding the sign. The County did not remove the sign and instead sued the Texas Attorney General seeking a declaration that the signs do not violate Section 411.209, which was resolved in a prior case. Separate from the declaratory judgment action, the Texas Attorney General brought a mandamus action against Waller County and various county officials. Waller County filed counterclaims seeking a declaratory judgement. The attorney general filed a plea to the jurisdiction as to the counterclaims, which was denied. The attorney general appealed.

The Uniform Declaratory Judgments Act (UDJA) is not a grant of jurisdiction, but rather is a procedural device for deciding cases already within a court's jurisdiction. The UDJA does not allow "interpretation" claims against a governmental entity or official. The County's counterclaims seek interpretation of Section 411.209, not its invalidation. The UDJA does not waive sovereign immunity for "bare statutory construction" claims. To sue the AG for ultra vires claims, the AG must not be exercising his discretion. Because the AG has discretion to bring or not bring an enforcement claim, no *ultra vires* action is possible. Section 411.209 of the Government Code authorizes the Attorney General to investigate alleged violations of the statute and decide whether further legal action is warranted. When an official is granted discretion to interpret the law, an act is not ultra vires merely because it is erroneous; "[o]nly when these improvident actions are unauthorized does an official shed the cloak of the sovereign and act ultra vires." As a result, the counterclaims should be dismissed.*

Whistleblower: *Raymondville Indep. Sch. Dist. v. Ruiz*, No. 13-19-00597, 2021 WL 822699 (Tex. App.—Corpus Christi-Edinburg Mar. 4, 2021). Ruiz sued his employer, Raymondville Independent School District (Raymondville ISD), under the Texas Whistleblower Act, claiming that Raymondville ISD terminated his employment after he complained to the Raymondville ISD

Chief of Police of conduct by a Raymondville ISD police officer that allegedly constituted official oppression. Raymondville ISD filed a plea to the jurisdiction, asserting sovereign immunity. The trial court denied the plea. Raymondville ISD filed an interlocutory appeal.

The court of appeals affirmed the trial court, finding that there was a good faith belief that Ruiz believed that the officer's treatment of him constituted as "mistreatment" under the official oppression statute, and that the Chief of Police qualified as an "appropriate law enforcement authority" under the Texas Whistleblower statute.

Pregnancy Discrimination: *South Texas Coll. v. Arriola*, No. 12-19-00222-CV, 2021 WL 497237 (Tex. App.—Corpus Christi-Edinburg Feb. 11, 2021). Arriola sued her employer, South Texas College (College), claiming that the College discriminated against her and terminated her employment after she stated that she was trying to become pregnant, and that, after making this statement, she was harassed and discriminated against by her co-workers and supervisors. The College filed a plea to the jurisdiction, asserting that intending to become pregnant is not a protected class and; therefore, Arriola had no case under the Texas Commission on Human Rights Act (TCHRA). The trial court denied the College's plea to the jurisdiction, and the College appealed.

The Court of Appeals affirmed the trial court's holding, concluding that the intent or ability to get pregnant is protected under sex discrimination protections because federal case law related to Title VII has held that being able to become pregnant is a protected class.

Breach of Contract: *City of League City v. Jimmy Changas Inc.* No. 14-19-00776-CV, 2021 WL 629618 (Tex. App.—Houston [14th Dist.] Feb. 18, 2021). The City entered into a "Chapter 380 Economic Development Incentives Grant Agreement" with Jimmy Changas, Inc., (Changas) in which the City offered incentives to Changas to develop a restaurant within the city limits. Changas later sued the City for breach of contract, alleging that it had fully performed the contract, but the City had failed to pay as agreed, and that the City was not immune from suit because the City performed a proprietary function in entering into the Grant Agreement, or alternatively, the Legislature waived the City's immunity under Chapter 271 of the Local Government Code. The City filed a plea, later amending it and combining it with a motion in the alternative for summary judgement on the merits. The trial court denied the City's plea and summary judgement motion. The City filed an interlocutory appeal.

The court of appeals affirmed the trial court finding that the contract was not a governmental function within the scope of the Texas Tort Claims Act, and as the contract was primarily intended to benefit the city and not the general public, the city's action in entering the contract was proprietary. As a result, the city did not have governmental immunity from suit.

February 2021

Note: Included cases are from January 11, 2021 through February 10, 2021.

Nuisance Abatement: *Groba v. City of Taylor,* No. 03-19-00365-CV, 2021 WL 359203 (Tex. App.—Austin Feb. 3, 2021) (mem. op.). The City sought injunctive relief and civil penalties

related to its nuisance determination, including an authorization for the City to demolish Groba's building and charge the costs for doing so to Groba. The trial court issued an injunction order allowing the City to demolish the building, which the City did. The day after the demolition, Groba filed a counterclaim for declaratory judgment and trespass, arguing that he was entitled to a jury trial on the nuisance determination. The City filed a plea to the jurisdiction, which the trial court granted. Groba appealed. The Court of Appeals affirmed the granting of the plea to the jurisdiction as Groba did not timely appeal the municipal court order thereby not complying with the jurisdictional prerequisites for judicial review of the nuisance determination.*

Employment: *City of Fort Worth v. Fitzgerald*, No. 05-20-00112-CV, 2021 WL 486396 (Tex. App.—Dallas Feb. 10, 2021). The City terminated its police chief and he sued for violations of the Texas Whistleblower Act, the Open Meetings Act, the Public Information Act, and the Texas Constitution. The City filed a plea to the jurisdiction against the chief's whistleblower claims on the grounds that he failed to properly follow the internal grievance process under the City's Personnel Rules and Regulations for General Employees (PRRs). The appellate court denied the City's plea, finding that the PRRS specifically exempted police officers from them; therefore, Fitzgerald did not have to follow the grievance procedures set forth in the PRRs.

Contracts: *City of McKinney v. KLA Int'l Sports Mgmt., LLC*, No. 05-20-00659-CV, 2021 WL 389096 (Tex. App.—Dallas Feb. 4, 2021). The City and KLA entered into a non-exclusive revocable license giving KLA recreational use of soccer fields, which included terms for how KLA would construct, rehabilitate, and maintain the fields. The City issued a notice of default and terminated the agreement. KLA sued for breach of contract and the City filed a plea to the jurisdiction, arguing the suit involved a governmental function of parks and recreational facilities. The appellate court found that the City was acting in a governmental function when it entered into the license agreement. However, the Court concluded that the City was not immune from suit for goods and services under Chapter 271. The Court found that improving, rehabilitating, and maintaining the soccer fields as consideration for non-exclusive use of the fields satisfied the requirements of an agreement for providing goods and services to the City.

Dismissal for Want of Prosecution: *Sanchez v. City of Snyder*, No. 11-19-00013-CV, 2021 WL 126429 (Tex. App.—Eastland Jan. 14, 2021) (mem. op.). Sanchez filed an inverse condemnation suit against the city related to the demolition of a vacant mobile home. The city filed a motion to dismiss for want of prosecution (DWOP). Sanchez argued that various personal circumstances and financial issues had caused the delay in trying the case. The trial court granted the city's motion, noting that Sanchez's explanations were no excuse for a total delay of the case. Sanchez appealed, arguing the trial court abused its discretion. The court of appeals held the trial court did not abuse its discretion because: (1) when the trial court granted the DWOP, the suit had remain unresolved for more than four years; (2) five and one-half years had passed since the demolition of the home; and (3) there was no expectation of when Sanchez would be ready to try the case. The judgment of the trial court is affirmed.

Unemployment Benefits: *Van Deelen v. Texas Workforce Comm'n*, No. 14-18-00489-CV, 2021 WL 245483 (Tex. App.—Houston (14th Dist.) Jan. 26, 2021) (mem. op.). Van Deelen was denied unemployment benefits by the Texas Workforce Commission (TWC) upon a finding that he was fired from his employer, Spring Independent School District (Spring ISD) for misconduct. He appealed the decision to the district court. TWC and Spring ISD filed a joint motion for summary judgement, which the trial court granted, finding that there was substantial

evidence to support TWC's decision. Van Deelen appealed. The Court of Appeals concluded that substantial evidence supports TWC's determination that Van Deelen was terminated for misconduct. The decision of the trial court is affirmed.

Discrimination and Retaliation: *Metropolitan Transit Auth. of Harris Cty. v. Carter*, No. 14-19-00422-CV, 2021 WL 126687 (Tex. App.—Houston [14th Dist.] Jan. 14, 2021) (mem. op.). Carter was working as a bus operator when he was administratively terminated for alleged "medical restrictions prohibiting him from performing the essential duties of a bus operator." In its termination letter, Metro did not identify any specific restrictions or essential job functions that Carter could not perform, instead, informing him, that he must be qualified to perform the prospective job requirements and be physically capable of performing the essential functions for an extended period of time. Carter filed suit, alleging disability and age discrimination and retaliation. Metro filed a plea to the jurisdiction, and an amended plea to the jurisdiction arguing that the trial court lacked jurisdiction because Carter had failed to demonstrate Metro's governmental immunity had been waived. At the oral hearing on Metro's plea, Carter non-suited his age discrimination claim. The trial court denied Metro's plea, and Metro filed an interlocutory appeal. The Court of Appeals affirmed the trial court's order and remanded the case for further proceedings, finding that Carter's claims were not time barred, that there was a fact issue as to whether Carter was qualified for the position of bus operator, and that there was at least a fact issue on Carter's retaliation cause.

Notice of Claim: *Metropolitan Transit Auth. of Harris Cty. v. Carr*, No. 14-19-00158-CV, 2021 WL 98076 (Tex. App.—Houston [14th Dist.] Jan. 12, 2021). This is an interlocutory appeal from the denial of a plea to the jurisdiction alleging that Carr failed to provide notice of her claim under the Texas Tort Claims Act when she identified the wrong bus number, thereby, failing to identify the correct "place" where an the incident that resulted in her injuries occurred. The Court of Appeals found that Carr complied with the requirement of reasonably describing the place of the incident giving rise to claim by alleging that it occurred on a bus near a specific intersection. The decision of the trial court is affirmed.

January 2021

Note: Included cases are from December 11, 2020 through January 10, 2021.

Texas Tort Claims Act: *Rivera v. City of Houston*, No. 01-19-00629-CV, 2020 WL 7502054 (Tex. App.—Houston Dec. 22, 2020) (mem. op.). This appeal arises from a car accident and centers on whether a city police officer held official immunity when she drove her police vehicle through an intersection not realizing she had a red light because she was typing on her mobile data terminal. The city argued she held official immunity, and the trial court granted the city's summary-judgment motion, ruling that the city established its affirmative defense. The appellate court reversed the trial court's ruling and remanded for additional proceedings holding that the police officer could not have properly evaluated the risks of her actions against any need to check a priority-two call, thereby taking her actions outside the realm of a good-faith performance of a discretionary act. The court reversed the trial court's decision and remanded for additional proceedings.

Authority of General Law Cities: ***Builder Recovery Servs. LLC v. Town of Westlake,*** **No. 02-20-00051-CV, 2021 WL 62135 (Tex. App.—Fort Worth Jan. 7, 2021) (mem. op.).** This is a declaratory judgment/ordinance invalidation suit brought by a solid waste collector where the Fort Worth Court of Appeals affirmed the Town of Westlake's power to require licenses. The town passed an ordinance allowing third-party haulers to obtain licenses for temporary construction waste services and imposed certain regulations on the license. BRS brought suit asserting, among other things, that the license fee was not tied to actual administrative costs and that the ordinance was preempted by state law, and challenging the town's authority to pass the ordinance. After a bench trial, the trial judge found largely in favor of the town, but invalidated the license fee calculation. BRS appealed. The appellate court rejected BRS' argument that section 361.113 of the Texas Health and Safety Code does not empower the town to issue licenses as a license is an inherent part of the town's regulatory power. The court further determined the license fee issue was moot due to an amended ordinance. However, due to an outstanding issue of attorney's fees, the court remanded to the trial court for disposition.*

Expedited Declaratory Judgment Act: ***City of Magnolia v. Magnolia Bible Church*****, No. 03-19-00631-CV, 2021 WL 7414730 (Tex. App.—Austin Dec. 18, 2020).** This is an interlocutory appeal from an order granting a new trial and denying the city's plea to the jurisdiction in a water rate case in which the appellate court affirmed the granting of a new trial and the denial of the city's plea. The appellate court held that due process does not require personal service in all circumstances, but any use of substituted notice in place of personal notice—e.g., notice by publication—must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." As such, notice by publication is insufficient when the name, address and interest are known.*

Public Information: ***City of Austin v. Doe*****, No. 03-20-00136-CV, 2020 WL 7703126, (Tex. App.—Austin Dec. 29, 2020) (mem. op.).** Jane Doe sued the City of Austin, its police department, and the police chief (collectively, the "city") for declaratory and injunctive relief related to the publication of booking photos (a.k.a. "mug shots") on the city's website. The city appealed the trial court's order denying the city's plea to the jurisdiction. The appellate court affirmed, in part, the trial court's order related to Doe's ultra vires claim against the police chief as to whether the information at issue is "confidential," but reversed the order as to her remaining claims and rendered judgment dismissing those claims.

Texas Tort Claims Act: ***City of Austin v. Anam*****, No. 03-19-00294-CV, 2020 WL 7759980, (Tex. App. —Austin Dec. 30, 2020) (mem. op.) (reh'g en banc granted).** Anam committed suicide by shooting himself in the head while seated in the backseat of a police department patrol car. Anam's estate sued the city under the Texas Tort Claims Act (Act), alleging that the police officer's failure to fasten Anam's seatbelt caused his death. On interlocutory appeal, the court determined that Anams' claims did not fall under the Act's limited waiver of sovereign immunity for death arising from the use of a motor-driven vehicle or caused by a condition or use of tangible personal property because Anam's death was not proximately caused by the unfastened seatbelt, a requirement for waiver under the Act. The court reversed the trial court's order denying the city's plea to the jurisdiction and rendered judgment dismissing Anams' claims against the city.

Emergency Management: *State v. City of Austin*, No. 03-20-00619-CV, 2021 WL 22007 (Tex. App.—Austin Jan. 1, 2021) (per curiam). The Travis County Judge and the Mayor of the City of Austin issued orders that prohibited dine-in food and beverage services from 10:30 p.m. to 6:30 a.m., December 31 through January 3, but allowed takeout, curbside, and delivery. The State of Texas challenged the order in county court, and the trial court upheld the restrictions. The state appealed, and the court of appeals upheld the trial court's decision. The state filed a petition for mandamus with the Supreme Court of Texas, which granted the mandamus, directing the appellate court to issue relief under Texas Rule of Appellate Procedure 29.3, instanter, thereby enjoining enforcement of the orders pending final resolution of the appeal.

Texas Tort Claims Act: *City of Laredo v. Sanchez*, No. 04-20-00402-CV, 2020 WL 7364660 (Tex. App.—San Antonio Dec. 16, 2020). Sanchez sued the city on behalf of her son, alleging that he sustained injuries during a transport in a city-owned ambulance as a result of the ambulance abruptly stopping because of a chain across the driveway to the hospital. The trial court denied the city's plea to the jurisdiction arguing the emergency response exception applied, and the city appealed. The appellate court found that the trial court properly denied the plea to the jurisdiction because, even assuming the city met its burden that the city employee was responding to an emergency call, the son was transported as a precaution, he was not being treated in the ambulance, and the employee did not activate the ambulance lights and sirens.

Breach of Contract: *City of Mason v. Blue Oak Eng'g, LLC*, No. 04-20-00227-CV, 2020 WL 7365452 (Tex. App.—San Antonio Dec. 16, 2020). The plaintiff sued the city for breach of contract to recover an unpaid amount related to a contract for a landfill permit. The city filed a plea to the jurisdiction, arguing it had not waived immunity because the permit the plaintiff worked on was not the same permit as detailed in the contract. The trial court denied the plea. The city appealed. The appellate court rejected the city's claims that the plaintiff sued on a new contract or a contract amendment, and affirmed the denial of the plea finding that the contract falls under Chapter 271 of the Local Government Code and that the city waived immunity for adjudicating a claim for breach of contract.

Takings: *Santander Consumer USA, Inc. v. City of San Antonio*, No. 04-20-00341-CV, 2020 WL 7753730 (Tex. App.—San Antonio Dec. 30, 2020). The plaintiff sued the city for money damages after the city impounded and sold vehicles the plaintiff owned, alleging it amounted to a taking. The plaintiff also challenged the validity of the city's ordinance. The trial court granted the city's plea. The appellate court affirmed on the grounds that the plaintiff did not follow the applicable procedures in the city ordinance to recover the vehicles before it filed its lawsuit, thus depriving the court of jurisdiction. Likewise, the court affirmed the dismissal of the declaratory judgment claims finding that there was no existing conflict because the plaintiff was trying to prevent future takings. The court also rejected the plaintiff's money damages claim because the city was exercising the governmental functions of police protection and regulation of traffic when it impounded the vehicles.

Confederate Monuments: *In re Carter*, No. 05-20-00279-CV, 2020 WL 7693178 (Tex. App.—Dallas Dec. 28, 2020). The plaintiffs sought injunctive and declaratory relief from the city to prevent the city from removing and destroying a confederate monument. The trial court granted the city's plea to the jurisdiction dismissing all claims except for the cause of action

concerning the city's plan to remove and demolish the monument. The court of appeals granted the petition for injunctive relief and ordered the city not to sell, dispose of, or damage the monument until the final disposition of the underlying appeal.

Confederate Monuments: *Return Lee to Lee Park v. Rawlings*, No. 05-19-00456-CV, 2020 WL 7693112 (Tex. App.—Dallas Dec. 28, 2020). The plaintiff sued the councilmembers and the city for injunctive relief and the return of a confederate monument to a city park, alleging violations of the Texas Antiquities Code and criminal mischief. The plaintiff later amended its suit and claimed the city failed to seek competitive bids for the removal of the confederate monument and that the city violated the Texas Open Meetings Act (TOMA) by voting during a "non-voting" meeting. The trial court granted all of the city's various motions, thereby getting rid of the case, and the plaintiffs appealed. The court of appeals found that the plaintiffs lacked standing, the Antiquities Code did not apply because the confederate monument was not a state archeological landmark, the plaintiffs failed to address the city's assertion of governmental immunity, and the city did not violate TOMA.

Purchase of Real Property: *Saum v. City of College Station*, No. 10-17-00408-CV, 2020 WL 7688033 (Tex. App.—Waco Dec. 22, 2020) (mem. op.). The city offered to purchase two tracts of land from Saum. Saum signed and returned the agreement on August 19, 2017. The city council met and approved the contract on September 11, 2017. No one from the city physically notified Saum of the city council's vote. The city manager and the mayor signed the contract on September 12, 2017, and September 14, 2017, respectively. On September 13, 2017, Saum sent a letter to the city revoking her acceptance of the contract as she had received a more favorable offer from another party. The city filed suit to obtain a temporary injunction preventing Saum from disposing of the property until the lawsuit had been resolved. The trial court granted the temporary injunction. Saum appealed. The appellate court held that the trial court did not abuse its discretion in finding that: (1) Saum's revocation was ineffective as it occurred subsequent to the contract being "fully executed" by adoption of the city council; (2) the parties did not agree to require signatures as a condition of mutual consent; and (3) the contract was valid even though a copy was not delivered to Saum before her attempted revocation. The trial court's order granting a temporary injunction is affirmed.

Breach of Contract: *City of Cleburne v. RT General, LLC*, No. 10-20-00037-CV, 2020 WL 7394519 (Tex. App.—Waco Dec. 16, 2020) (mem. op.). The plaintiff sued the city after being evicted from a city airport hangar that it leased from the city. The trial court denied the city's plea to the jurisdiction, and the city appealed, arguing that the lease lacked essential terms to constitute a contract under section 271.151(2) of the Texas Local Government Code. For the purpose of waiving immunity under Chapter 271 of the Texas Local Government Code, a contract must be written and must state "the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity." The court of appeals disagreed, holding that the plaintiff plead sufficient facts to establish a waiver of the city's governmental immunity to suit under Section 271.152. The city next asserted that the trial court erred by denying the plea to the jurisdiction as to the plaintiff's inverse-condemnation, declaratory-judgment, and fraud claims, because they attempted to recast barred breach-of-contract claims to avoid the city's immunity to suit. Because

the court held that the plaintiff had plead sufficient claims to establish a waiver of the city's immunity, each of these claims was overruled. The trial court's judgment is affirmed.

Texas Tort Claims Act: *Garms v. Comanche Cty*., No. 11-19-00015-CV, 2020 WL 7413991 (Tex. App.—Eastland Dec. 18, 2020) (mem. op.). The plaintiff sued the county after he was injured in the county jail. The plaintiff, who was an inmate in the county jail at the time of injury, had informed the jail staff that he felt unwell. His blood pressure was checked, but despite a high blood pressure reading, the duty nurse was not notified and the plaintiff was not monitored. The plaintiff lost consciousness and sustained a serious head injury. The plaintiff was also left unattended with a serious head injury, which caused further issues. The plaintiff sued the county for negligence caused by a faulty motorized camera and failure to monitor and provide medical care to the plaintiff. The appellate court affirmed the trial court's grant of the county's plea to the jurisdiction because injuries allegedly caused by failure to monitor or provide medical care is a nonuse of tangible personal property which does not waive immunity under the Texas Tort Claims Act.*

Texas Tort Claims Act: *Self v. Wet Cedar Creek Mun. Util. Dist*., No. 12-20-00082-CV, 2021 WL 56213 (Tex. Ct. App.—Tyler Jan. 6, 2021) (mem. op.) Self and his wife sued the district for, among other things, negligence and premise defect, alleging that the district's prior repairs to the sewer's vault system resulted in sewage backing up into their home. The district filed a plea to the jurisdiction asserting governmental immunity under the Texas Tort Claims Act. The trial court granted the plea, and Self filed an appeal. The court of appeals affirmed the trial court's decision finding that immunity was not waived as Self did not meet the burden of establishing a fact issue as to whether the flooding of his home "arose" from the use of motor-driven equipment and that the district knew or should have known of a dangerous condition of the premises that created an unreasonable risk of harm to him.

December 2020

Note: Included cases are from November 11, 2020 through December 10, 2020.

Open Meetings Act/Procurement: *Carowest Land, Ltd. v. City of New Braunfels*, No. 18-0678, 2020 WL 6811467 (Tex. Nov. 20, 2020). The plaintiff sued the city for declaratory relief for violations of the Texas Open Meetings Act (TOMA) and the contract-bidding provisions of Local Government Code Chapter 252. Prior to trial, the city appealed the denial of its plea to the jurisdiction against the plaintiff's declaratory relief claims. The appellate court affirmed, permitting the plaintiff's declaratory-judgment claims to proceed. The plaintiff then tried its claims against the city and a developer before a jury and prevailed. Based on the jury's findings, the trial court awarded the plaintiff declaratory relief and attorney's fees. The city again appealed on the grounds that both TOMA and the procurement laws only allow for mandamus and injunctive relief, not declaratory relief. The appellate court agreed. The Texas Supreme Court found that declaratory relief was not available to the plaintiff. It remanded the case to the trial court for further proceedings under TOMA and the procurement laws because existing precedents on which the plaintiff relied at trial had been overruled.

Texas Tort Claims Act: *Ledesma v. City of Houston*, **No. 01-19-00034-CV, 2020 WL 6878404 (Tex. App.—Houston [1st Dist.] Nov. 24, 2020).** The plaintiffs sued a city employee and the City of Houston for a car accident when the city employee, wearing her City of Houston Police Department uniform, rear-ended the plaintiffs. The city moved to dismiss the employee under the election-of-remedies provision under Section 101.106(e). The plaintiffs then non-suited the employee. The city filed a motion for summary judgment alleging the employee was not acting in the scope of her employment at the time of the accident. The trial court granted summary judgment and the plaintiffs appealed. The appellate court held that, by moving to dismiss the plaintiffs' claims against the employee under Section 101.106(e), the city judicially admitted the employee was acting within the scope of her employment and could not later dispute that admission.

Texas Tort Claims Act: *City of Houston v. Hussein*, **No. 01-18-00683-CV, 2020 WL 6788079 (Tex. App.—Houston [1st Dist.] Nov. 19, 2020) (mem. op.).** The plaintiffs sued the city for negligent operation of a motor vehicle for injuries from when a city-owned ambulance struck a concrete barrier during their transport in the ambulance. The city filed: (1) a motion for summary judgment because it alleged the emergency response exception to the Texas Tort Claims Act (TTCA) applied; and (2) a motion to dismiss on the basis that the claims were healthcare liability claims for which the plaintiffs failed to serve the statutorily-required expert report. The trial court denied the city's motions and the city appealed. The appellate court concluded there was a fact issue regarding whether the emergency response exception applied based on the facts presented, including that the ambulance did not turn on its lights and sirens for the transport. The court also concluded that one of the plaintiffs' claims was a health care liability claim, and therefore the trial court erred in denying the motion to dismiss. The other plaintiff's claim was not a health care liability claim and therefore the trial court correctly denied the motion to dismiss.

Texas Tort Claims Act: *City of San Antonio v. Smith*, **No. 04-20-00077-CV, 2020 WL 6928400 (Tex. App.—San Antonio Nov. 25, 2020) (mem. op.).** The plaintiff sued for injuries she sustained when a stolen, city-owned ambulance collided with her car. The city filed a plea to the jurisdiction alleging, among other things, that "operation or use" of a motor vehicle does not apply because a city employee was not using the vehicle – the thief was. The plaintiff countered that her claim also arose out of the "use or condition of tangible personal property" and that the city should have installed an anti-theft device. The appellate court found that the operation or use of a motor vehicle did not apply because a city employee was not operating or using the stolen vehicle at the time of the crash. The court also concluded the claim did not arise out of the use or condition of tangible personal property because the plaintiff's claim was "no more than a failure to use [a particular anti-theft device], which does not fall within the waiver." The court granted the city's plea to the jurisdiction and rendered judgment in favor of the city.

Quo Warranto: *City of Leon Valley v. Martinez*, **No. 04-19-00879-CV, 2020 WL 6748723 (Tex. App.—San Antonio Nov. 18, 2020).** After the city council removed Martinez from his elected office as council member and appointed his replacement, Martinez sued the city seeking reinstatement. Martinez's original term of office was set to expire after the May 2, 2020 election, which was then continued to the November 2020 election date due to the pandemic. The appellate court held that the proper proceeding was a quo warranto proceeding. Martinez filed a

motion for rehearing. The court withdrew its previous decision and substituted a new decision on rehearing because Martinez's claims were now moot. His term would have expired on November 3, 2020. Therefore, he could no longer be reinstated.

Texas Tort Claims Act/Takings: *City of Blue Ridge v. Rappold*, ***No. 05-19-00961-CV, 2020 WL 7065830 (Tex. App.—Dallas Dec. 3, 2020) (mem. op.)***. *The Rappolds brought negligence-related claims under the Texas Tort Claims Act (TTCA) and takings claims against the City of Blue Ridge. They alleged the city's wastewater treatment facility failed, resulting in a combination of raw sewage and storm water covering portions of their property. The city filed a plea to the jurisdiction. At this stage in the litigation (pre discovery), the court holds that the Rappolds have sufficiently alleged misuse and operation of motor-driven pumps, as well as the condition or use of the city's tangible personal property, caused their damages. In addition, the court overrules the city to the extent it complains that the TTCA specifically precludes an award of exemplary damages. Finally, the court holds that, at this point in the proceedings, the Rappolds pleadings state a viable takings claim. The trial court's order denying the city's plea to the jurisdiction is affirmed.*

Texas Tort Claims Act: *City of Dallas v. Mazzaro*, ***No. 05-20-00103-CV, 2020 WL 6866570 (Tex. App.—Dallas Nov. 23, 2020) (mem. op.)***. *Mazzaro sued the city to recover damages for injuries suffered when she fell while walking on city-owned property. The city filed a plea to the jurisdiction. The court concludes that the evidence establishes Mazzaro did not meet the Texas Tort Claims Act's form notice requirement because, although it was sent, written notice of her claim was not actually received by the city within the required timeframe. The court also holds that, although the city EMS responded to the scene of the accident, the city had no subjective awareness of its alleged fault in causing or contributing to Mazzaro's injuries. Thus, the city had no actual notice of Mazzaro's claims. The trial court's order denying the city's plea to the jurisdiction is reversed.*

Emergency Management: *State v. El Paso Cty.*, **No. 08-20-00226-CV, 2020 WL 6737510 (Tex. App.—El Paso Nov. 13, 2020)**. Governor Abbott's Executive Order GA-32 allows bars to open with reduced capacity. After El Paso County had a surge in COVID-19 cases, County Judge Ricardo Samaniego issued a stay-at-home order and prohibited social gatherings not confined to a single household. The State of Texas and a collection of restaurants sued the county and the judge asserting the order was contrary to the governor's order. The governor's order contains a preemption clause countermanding any conflicting local government actions, but the county order states any conflict requires the stricter order to apply. County judges are deemed to be the "emergency management director[s]" for their counties. The Texas Disaster Act (Act) contemplates that a county judge or mayor may have to issue a local disaster declaration and has similar express powers to those issued to the governor. However, a county judge is expressly referred to as the "agent" of the governor, not as a separate principle. Further, even if the county judge had separate authorization, the legislature has declared the governor's executive order has the force of law. State law will eclipse inconsistent local law. Additionally, the Act allows the governor to suspend the provisions of any regulatory statute within an executive order, which would include the county order. The court concluded by stating how essential the role of a county judge is when managing disasters and emergencies, and that their opinion should not be misunderstood. The governor's order only controls over conflicts, and any provision of the

county order that can be read in harmony remains enforceable. The court appeals held the trial court erred in denying the injunction sought by the State of Texas, and reversed the denial.*

Whistleblower/First Amendment: *Shobassy v. City of Port Arthur*, **No. 09-18-00363-CV, 2020 WL 6787522 (Tex. App.—Beaumont Nov. 19, 2020) (mem. op.).** In this appeal from a trial court's judgment dismissing the plaintiff's retaliation-in-employment case the Beaumont Court of Appeals affirms the trial court's summary judgment.

The plaintiff worked as an assistant city attorney for the city for five years and the city attorney was the plaintiff's supervisor. During the plaintiff's employment, he discussed the city's compliance with purchasing law in the context of his employment as an assistant city attorney. He was terminated by the city attorney and given a termination notice that indicated that he was terminated because, among other things, he failed to follow-up on tasks and communicate with the city attorney and failed to complete the tasks assigned to him. Plaintiff sued the city in district court alleging a Whistleblower Act claim and that his termination violated his First Amendment rights. The city filed a plea to the jurisdiction and no evidence motion for summary judgment, which the trial court granted.

To establish a claim for retaliation under the Whistleblower Act, the plaintiff has to show that the employer's termination would not have occurred had the plaintiff not made a good faith allegation of violation of law to an appropriate law enforcement authority. The report has to be a "but-for" cause of the termination. The plaintiff was unable to make the causal connection. To establish a claim for a free-speech retaliation claim, the plaintiff must show the plaintiff was terminated for engaging in constitutionally protected speech. The speech in question is not protected if it is spoken within the context of the employee's official duties. The Whistleblower claim was dismissed because the claims of illegal conduct by the city were not made until after the termination. The free speech claim was invalid because his speech was performed and related to his employment position. The dismissal of both was proper.*

Texas Tort Claims Act: *Texas Dep't of Pub. Safety v. Kendziora*, **No. 09-19-00432-CV, 2020 WL 6494210 (Tex. App.—Beaumont Nov. 5, 2020) (mem. op.)**. This is an interlocutory appeal from the denial of Texas Department of Public Safety's plea to the jurisdiction in a case involving a car accident while a DPS trooper (Chapman) was responding to an emergency. The Beaumont Court of Appeals reversed the denial.

Chapman was responding to a call reporting one hundred people fighting at a sports complex. En route, he approached a red light with his lights and siren activated, activated his air horn, and slowed to a near stop while clearing the intersection. He looked both ways while crossing the intersection and cleared multiple lanes before being struck by Kendziora. Kendziora filed suit under the Texas Tort Claims Act (TTCA) for personal injuries sustained from that collision. DPS put forth the emergency exception defense under TTCA, which preserves immunity if the employee was in compliance with applicable law or was not acting recklessly. Chapman testified that he considered the nature of the emergency in deciding to respond immediately and urgently, while still ensuring vehicles at the intersection were stopped before proceeding. Kendziora testified that she did not hear any sirens or see any police lights prior to the collision. The court of appeals held that Kendziora failed to raise a fact issue as to whether Chapman acted recklessly

when he entered the intersection. She did not present any evidence showing Chapman failed to slow as necessary before entering the intersection or that he acted recklessly. Kendziora argued that the dashcam video is evidence of the reckless actions, but the video was not tendered or admitted into evidence in the lower court and was not part of the appellate record.*

Vested Rights/Takings: *Bauer v. City of Waco*, No. 10-19-00020-CV, 2020 WL 7253430 (Tex. App.—Waco Dec. 9, 2020) (mem. op.). Developers sued the city arguing they had a vested right under Chapter 245, Local Government Code, to build a lake on a property. The developers also raised dedicatory exaction and takings claims and a declaratory judgment claim regarding an 8-inch water line on the property. The city filed a motion for summary judgment. The developers failed to challenge the summary judgment on all the grounds asserted by the city as to the vested rights and exaction claims. The city's summary judgment evidence established that the prior owner of the property requested the installation of the water line complained about by the developers. As for their declaratory judgment claims, the developers did not challenge the validity of a statute or ordinance. The trial court's summary judgment is affirmed.

November 2020

Note: Included cases are from October 11, 2020 through November 10, 2020.

Elections: *Abbott v. Anti-Defamation League Austin*, No. 20-0846, 2020 WL 6295076 (Tex. Oct. 27, 2020). In July, Governor Abbott expanded the time to deliver mail-in ballots to a polling location for early voting as well as election day, but then limited the locations for delivery to just one location per county in October. Plaintiffs claimed the October proclamation: (1) was an *ultra vires* act because it exceeds the governor's authority under the Texas Disaster Act; (2) infringes on the right to vote, in violation of Article I, section 3 of the Texas Constitution; and (3) violates Article I, section 3 by disparately burdening voters in large counties. The Texas Supreme Court overturned the appellate court and dissolved the trial court's temporary injunction because it found: (1) the July and October Proclamations expand the options otherwise available to voters and that Governor Abbott could amend his proclamations; (2) the burden of waiting in line on voting was *de minimis*, and thus, not unconstitutional; and (3) the state's county-based elections system did not disparately impact voters in larger counties.

Tort Claims Act: *City of Fort Worth v. Rust*, No. 02-20-00130-CV, 2020 WL 6165297 (Tex. App.—Fort Worth Oct. 22, 2020) (mem. op.). Rust sued the City of Fort Worth for an injury when he fell out of a city-owned golf cart at a municipal golf course alleging the city negligently maintained the golf cart, should have removed the cart, and failed to warn him of the dangerous condition. The city filed a plea to the jurisdiction on the grounds that the Recreational Use Statute applied to the case, thus lowering the city's duty of care to gross negligence, malicious intent, or bad faith. The appellate court held that the Recreational Use Statute applied to Rust's claims, even though they were for the condition or use of tangible personal property. The court found that the plea should have been granted, but that Rust should have the opportunity to amend his petition.

Promotional Exams: *Perrin v. City of Temple*, No. 03-18-00736, 2020 WL 6533659 (Tex. App.—Austin Nov. 6, 2020) (memo. op.). Perrin and Powell, both serving as police officers for

the City of Temple, participated in a promotional test that includes a written examination and an assessment for promotional eligibility to the rank of corporal. Five officers, including Perrin and Powell, passed the written examination, and after adding seniority points, the publicly posted results showed Powell in third position and Perrin in fifth. After completing the assessment, the final promotional eligibility list showed that Perrin moved up the list to third, and Powell moved down to fourth. Before the eligibility list expired, the city eliminated four corporal positions and created two new lieutenant and two new sergeant classifications. In response, the police chief determined that this sequence of events should have resulted in the promotion of officers Mueller, Perrin, Powell, and Hickman to corporal, then their immediate demotion back to the rank of police officer, and subsequently placement on a re-instatement list for a period of one year in the order of seniority in the department. When the re-instatement list was published, Perrin was ranked last. Perrin sued the city and additional defendants (city defendants) for an ultra vires claim and seeking declaratory, injunctive, and mandamus relief, asserting that the re-instatement list should be based on seniority in the position and not seniority in the department. The city defendants counterclaimed, seeking declaratory relief that Powell was entitled to the promotion, and thereafter Powell intervened. The trial court issued an order denying Perrin's plea to the jurisdiction and motion for summary judgment and granting the city defendants' and Powell's motions for summary judgment. Perrin appealed. The court of appeals determined that under the redundant remedies doctrine, the trial court did not have jurisdiction over Powell's claim challenging the order of the promotional eligibility list under the UDJA because Section 143.034(a) of the Local Government Code provides a redundant remedy. Similarly, the court found that the trial court had erred in granting summary judgement on Powell's ultra vires claim and the city defendants' UDJA claim because the court did not have jurisdiction over an eligibility list that had expired and that the civil service commission had no authority to make changes. The court also found that "seniority" under Section 143.085(a) refers to seniority in the corporal position, and not seniority in the department. Accordingly, the court reversed the trial court's finding, granting Perrin's motion for summary judgement and denying Powell's and the city defendants' motion for summary judgement.

Elections: *Hughs v. Move Texas Action Fund*, **No. 03-20-00497, 2020 WL 6265520 (Tex. App.—Austin Oct. 23, 2020) (per curiam.).** Move Texas Action Fund (MOVE) sought an injunction ordering Hughs, the Texas Secretary of State, to refrain from enforcing an Election Code provision that requires a physician certification be provided when an applicant requests a late mail-in ballot because the applicant has a disability that originates on or after the deadline for requesting a mail-in ballot. MOVE alleged that the physician certification requirement is satisfied by the existing public health orders regarding quarantine as to any voter who is diagnosed positive for COVID-19 after the 11-day cutoff or that the Election Code provision is unconstitutional. The district court granted a temporary injunction ordering Hughs to refrain from enforcing the physician's certificate requirement and from advising election officials to enforce the requirement. Hughs appealed, which automatically superseded the temporary injunction. MOVE filed an emergency motion seeking to reinstate the injunction. The court of appeals denied the request finding that granting the injunction at that time would change the longstanding requirements governing late mail-in ballots and risk voter confusion.

Petition Signatures: *In Re Martinez*, **No. 04-20-00424-CV, 2020 WL 6048768 (Tex. App.—San Antonio Oct. 14, 2020) (memo. op.).** Martinez, a candidate for Val Verde County

Attorney, sought, by a writ of mandamus, to decertify and remove his opponent, Smith, from the ballot, asserting that Smith's ballot petition signatures were invalid because two of her circulator's affidavits did not contain dates, which would have resulted in the total number of valid signatures falling below the requisite number. The court denied the writ of mandamus. It considered the affidavits in the context of their purpose, which is to ensure that a candidate has submitted a sufficient number of valid ballot petition signatures, and determined that invalidating the signatures due to the missing dates would not be a just and reasonable result.

Property Tax Exemption: *Dallas Cent. Appraisal Dist. v. City of Dallas*, **No. 05-19-00875-CV, 2020 WL 6334805 (Tex. App.—Dallas Oct. 29, 2020) (memo. op.).** The City of Dallas leases property from a private party and uses such property exclusively for public purposes. The city's lease with the property owner provides that the city is responsible for paying taxes on the property. Upon receipt of notice of property taxes due on the property, the city filed a protest with the Dallas Central Appraisal District Review Board (DCAD), asserting that it is entitled to a tax exemption because a leasehold held by a public entity and used for a public purpose constitutes public property. DCAD denied the city's request, and the city filed a petition for judicial review. The trial court ruled that the city was entitled to a public property exemption from paying property taxes on its leasehold interest in the property. DCAD appealed, arguing that the property is not exempt because it is not owned by the city. The court of appeals reversed the trial courts order finding that the city is not entitled to a tax exemption because it does not hold legal or equitable title to the property.

Tort Claims Act: *Gonzales v. City of Farmers Branch*, ***No. 06-20-00054-CV, 2020 WL 6494922 (Tex. App.—Texarkana Nov. 5, 2020) (mem. op.)****. Gonzales sought damages for alleged injuries he suffered when a city police officer fired rounds into a vehicle in which Gonzales was a passenger. Because there was only a summary judgment hearing (not a trial) held in this case, Gonzales' claim that he should have been present for the "non-jury trial" is overruled. And because his third amended petition was filed after the hearing, and without leave of court, the court was not required to consider it. The trial court's summary judgment in favor of the city is affirmed.*

Excessive Fine: *Duisberg v. City of Austin*, ***No. 07-20-00171-CV, 2020 WL 6122951 (Tex. App.—Amarillo Oct. 16, 2020) (mem. op.)****. Duisberg seeks to nullify civil penalties which accrued after he allowed his house to deteriorate to the level of becoming a "public nuisance." He argues the penalties imposed by the city are excessive and violate the Eighth Amendment of the United States Constitution. Noting it was Duisberg's own delay in bringing his house into compliance over the course of many years that created the $33,000+ in penalties, the court of appeals affirms the trial court's order granting the city's summary judgment motion.*

Removal from Office: *Brown v. State*, **No. 08-19-00110-CV (Tex. App.—El Paso Oct. 12, 2020)**. In this case, an elected official, appearing as a *pro se* litigant, appeals her removal from office for misconduct and incompetence. After giving her multiple chances to cure, the court of appeals holds that the elected official's failure to clearly state her issues and provide a reporter's record requires the court to affirm the trial court's order of removal.

Zoning: *Donalson v. City of Canton*, **No. 12-20-00164-CV, 2020 WL 6164470 (Tex. App.—Tyler Oct. 21, 2020) (mem. op.).** The City of Canton sued a church and its owner, and later added additional defendants, because the church violated the city's zoning ordinance by using a former nursing home property as a residential complex. The city nonsuited some of the defendants without prejudice and the trial court entered a stipulated permanent injunction and final judgment against the remaining defendants. One of the dismissed defendants filed the appeal. The court dismissed the appeal as moot because there was no longer a justiciable controversy between the city and the dismissed defendant.

Tort Claims Act: *City of Brownsville v. Rattray*, **No. 13-19-00556-CV, 2020 WL 6118473 (Tex. App.—Corpus Christi Oct. 15, 2020) (mem. op.).** Rattray's and other homeowners' homes were flooded as a result of storm water accumulation. They sued the City of Brownsville claiming the city and its employees negligently operated motor-driven equipment by untimely activating such equipment. The city filed a plea to the jurisdiction, which was denied by the trial court. The city then filed an interlocutory appeal, asserting that its immunity from suit was not waived. The court of appeals reversed the trial court's decision, finding that the city's actions constituted nonuse of property that does not invoke the Texas Tort Claims Act's waiver of immunity.

Zoning: *City of Dickinson v. Stefan*, **No. 14-18-00778-CV, 2020 WL 6280945 (Tex. App.—Houston [14th Dist.] Oct. 27, 2020).** Stefan asked the trial court for a declaratory judgment, declaring his property a legal nonconforming use as a special event venue. He also asserted an inverse-condemnation claim under article I, section 17 of the Texas Constitution because the city refused to issue him a special use permit to operate a special event center. On appeal, Stefan argues that he pleaded an independent claim for declaratory relief under Local Government Code chapter 245. The court of appeals holds that Stefan did not plead a claim under chapter 245 and did not seek judicial review of the board of adjustment's (BOA) decision under Local Government Code section 211.011. And because Stefan failed to exhaust his administrative remedies by seeking review of the BOA decision, the trial court lacked subject-matter jurisdiction over Stefan's declaratory-judgment claim and his takings claims is barred. The trial court's order is reversed and the court of appeals renders judgment dismissing Stefan's claims for lack of subject-matter jurisdiction.

Premises Liability: *Harris Cty. Hosp. Dist. v. Peavy*, **No. 14-19-00953-CV, 2020 WL 6142887 (Tex. App.—Houston [14th Dist.] Oct. 20, 2020) (mem. op.).** Peavy was injured when she tripped and fell on the lip of a door brace on the premises of Lyndon B. Johnson Hospital, which is a part of the Harris County Hospital District (HCHD). Peavy failed to raise a genuine issue of material fact showing that HCHD actually knew of the alleged defect/dangerous condition. Thus, Peavy's claim is barred by immunity and her suit is dismissed.

Employment: *Fields v. Houston Indep. Sch. Dist.*, **No. 14-19-00010-CV, 2020 WL 6073758 (Tex. App.—Houston [14th Dist.] Oct. 15, 2020)**. Fields was dismissed from the Houston Independent School District (HISD) alternative-certification program for teachers. After receiving a right to sue letter, Fields sued for discrimination and later retaliation. The court of appeals first holds that Fields' retaliation charge was factually related to her discrimination charge. Next, the court finds HISD presented evidence of legitimate, non-discriminatory reasons

for the discharge, which Fields was unable to rebut to establish pretext under her discrimination charge. When an employer presents jurisdictional evidence rebutting the prima facie case, the presumption of retaliation disappears. The employee must present sufficient evidence of pretext to survive a plea to the jurisdiction. All elements of a circumstantial-evidence retaliation claim are jurisdictional. Because Fields failed to present any evidence of pretext on the part of HISD, she failed to establish a waiver of immunity. As a result, HISD's plea to the jurisdiction was properly granted by the trial court.

October 2020

Note: Included cases are from September 11, 2020 through October 10, 2020.

Elections: *In re Hotze*, **No. 20-0739, 2020 WL 5919726 (Tex. Oct. 7, 2020).** The relators filed a mandamus petition in the Texas Supreme Court at the end of September to prevent expanded early voting and the time to drop off mail-in ballots on the grounds that the Governor's proclamation violated their due process rights and the Governor's actions were unconstitutional. The Texas Supreme Court denied the petition because the relators were dilatory in pursuing their rights; they waited 10 weeks after the proclamation was issued to file their lawsuit. Additionally, at the time of the decision, the election had already started, and the United States Supreme Court has repeatedly warned against judicial interference in an election that is imminent or ongoing.

Elections: *State v. Hollins*, **No. 20-0729, 2020 WL 5919729 (Tex. Oct. 7, 2020).** The State of Texas sued the Harris County Clerk to prevent the Clerk from mailing out mail-in ballot applications to all registered voters in Harris County. The trial court and appellate court ruled in favor of the Clerk on the State's preliminary injunction because those courts found the State would not be harmed. The Texas Supreme Court reversed and found that the State would be harmed because the Election Code does not allow for sending all voters mail-in ballot applications (meaning the Clerk would be acting *ultra vires*) and the State has an interest in maintaining the uniformity of its elections.

Takings Impact Assessments: *Lamar Advantage Outdoor Co., L.P. v. Texas Dep't of Transp.*, **No. 02-19-00368-CV, 2020 WL 5666554 (Tex. App.—Fort Worth Sept. 24, 2020).** The owner of a billboard filed suit seeking a declaratory judgment against Texas Department of Transportation (TxDOT) to void a highway construction project because TxDOT failed to prepare a Takings Impact Assessment pursuant to the Private Real Property Rights Preservation Act. The billboard owner claimed the project reduced its revenue because the project reduced the billboard's visibility. The Second Court of Appeals affirmed the trial court's grant of the plea to the jurisdiction. The court held the billboard owner lacked standing because it holds only a leasehold interest in a billboard located on real property where TxDOT's project took neither the land on which the billboard sits nor the billboard itself.

Premises Liability: *City of Dallas v. West*, **No. 05-19-01540-CV, 2020 WL 5834299 (Tex. App.—Dallas Oct. 1, 2020) (mem. op**.). West was injured after she tripped over a protruding metal bolt on the sidewalk. She sued the City of Dallas for premises liability. The city filed a plea to the jurisdiction asserting that the protrusion was not a special defect, that West was a licensee, and that the city did not have actual, prior knowledge of the condition. The trial court

denied the plea. On appeal, the court reversed the trial court's order finding that the protrusion was not a special defect and the duty the city owed to West was that of a licensee.

Employment Discrimination: *City of Dallas v. Siaw-Afriyie*, **No. 05-19-00244-CV, 2020 WL 5834335 (Tex. App.—Dallas Oct. 1, 2020) (mem. op.)** Siaw-Afriyie sued the City of Dallas alleging race discrimination, national origin discrimination, and retaliation after he was not selected for a senior manager position and his position was subsequently eliminated. The city filed a plea to the jurisdiction asserting that the city had a legitimate, non-discriminatory reason for not selecting Siaw-Afriyie for the position, and a non-discriminatory and non-retaliatory reason for eliminating his position, and that he had presented no evidence of pretext. The trial court denied the plea. On appeal, the court affirmed the trial court's denial finding that Siaw-Afriyie had provided evidence that the city's decision not hire him for the position and to subsequently eliminate his position was a pretext for discrimination and retaliation.

Employment Discrimination: *Univ. of Texas Sw. Med. Ctr. v. Vitetta*, **No. 05-19-00105-CV, 2020 WL 5757393 (Tex. App.—Dallas Sept. 28, 2020) (mem. op.).** After the University of Texas Southwestern Medical Center cut her salary, lab space, and staff, and allegedly sabotaged her role as president of the faculty senate, Dr. Vitetta sued the university for age and sex discrimination and retaliation. The university filed a plea to the jurisdiction, which was denied by the trial court. On appeal, the court affirmed the trial court's order denying the plea on Dr. Vitetta's age discrimination and sex discrimination claims related to cuts to her salary and lab, and reversed the trial court's decision related to retaliation.

Whistleblower: *Hennsley v. Stevens*, **No. 07-18-00346-CV, 2020 WL 5949242 (Tex. App.—Amarillo Oct. 7, 2020)**. Chris Hennsley, a former police officer with the City of Lubbock, sued the city under the Texas Whistleblower Act. With regard to Hennsley's claim that he was terminated from employment for reporting Police Chief Stevens's alleged tampering with witnesses in a pending criminal trial, the court of appeals holds that Hennsley sufficiently alleges the first part of showing a waiver of immunity under the Whistleblower Act. However, Hennsley's pleadings do not affirmatively show or negate his compliance with the prerequisites for suing (Government Code Sections 554.005 and 554.006 set out the timeframe within which an employee "must sue" the governmental entity; it depends on the timing of when the grievance/appeal process was initiated). Thus, the court of appeals vacates the district court's judgment of dismissal, and remands this matter solely for the district court to determine whether Hennsley complied with Government Code Sections 554.005 and 554.006.

Annexation: *Hill v. City of Fair Oaks Ranch*, **No. 07-19-00037-CV, 2020 WL 5552887 (Tex. App.—Amarillo Sept. 16, 2020) (mem. op)**. In this case, landowners challenge five involuntary annexations. The issue is whether the landowners have standing. While the landowners did not properly brief some arguments, they did properly allege the annexations exceeded the area allowed within a given year under Local Government Code Section 43.055. If proven, those allegations establish the city's annexation ordinances are void, not merely voidable. As a result, the court of appeals reversed the grant of the city's plea to the jurisdiction and remanded the case for trial.

Attorney's Fees: *Kirk v. City of Lubbock*, **No. 07-19-00069-CV, 2020 WL 5581352 (Tex. App.—Amarillo Sept. 17, 2020) (mem. op.)**. The Kirks, along with other plaintiffs, filed suit to enjoin the city from annexing their property. Initially, the district court granted a temporary restraining order (TRO) against the city, conditioned on plaintiffs posting an injunction bond. Six days after the bond was posted, the district court dissolved the TRO on the city's motion. Thereafter, the city filed a motion for forfeiture of the bond and an award of attorney's fees. Plaintiffs failed to appear or answer the motion. The district court ordered the bond to be forfeited and awarded attorney's fees to the city. The Kirks raised five issues on appeal regarding the bond forfeiture hearing and award of attorney's fee. The court of appeals overruled all five issues, and affirmed the judgment of the district court.

Tort Claim: *City of El Paso v. Aguilar*, **No. 08-19-00262-CV, 2020 WL 5987623 (Tex. App.—El Paso Oct. 9, 2020)**. Aguilar was helping with a float in the December 2016 City of Lights Parade when she was hit by a vehicle/float. Aguilar filed suit alleging the city was negligent in failing to oversee and control parade traffic, and in instructing the driver of the float (Ortega) to move forward when it was unsafe to do so. She alleged that her injury arose from the operation or use of a motor vehicle and the use of tangible personal property. Aguilar also alleged that the city was liable for the conduct of the person who instructed Ortega to move forward, either by vicarious liability or respondeat superior, and that it was also directly liable for negligently training and supervising that person. The court of appeals affirms the order of the trial court insofar as it denies the city's plea to the jurisdiction challenging Aguilar's claim for negligence in instructing Ortega to move his vehicle when it was not safe to do so based on respondeat superior liability. The order is reversed insofar as it denies the city's plea to the jurisdiction challenging Aguilar's remaining claims. On remand, Aguilar is to be given an opportunity to replead those claims to allege sufficient jurisdictional facts, if such facts exist, in support of those claims.

Breach of Contract: *Dowtech Specialty Contractors, Inc. v. City of Weinert*, **No. 11-18-00246-CV, 2020 WL 5740865 (Tex. App.—Eastland Sept. 25, 2020) (mem. op.)**. In this case, Dowtech sued the city for breach of contract and sought to recover both the contract balance and charges for additional work to the city's water system. The trial court awarded Dowtech $2,052.50 for certain work, but held Dowtech did not complete all work required by the contract so was not entitled to the contract price. It also denied the request for attorney's fees and interest. The court of appeals affirmed the trial court judgment holding, in part, that attorney's fees for breach of contract under Local Government Code Section 271.153 are valid only if equitable and just.

Subdivision Platting: *City of San Benito v. Cameron Cty. Drainage Dist. No. 3*, **No. 13-19-00194-CV (Tex. App.—Corpus Christi Sept. 24, 2020).** In this case, plaintiffs sought to require the city to re-instate a process by which the city would approve a plat only if it has received prior approval from overlapping drainage and irrigation districts (each of which have their own platting rules). The city filed a plea to the jurisdiction in the trial court, which rejected the plea. The court of appeals reversed the trial court's denial, but remanded for further consideration. The underlying issue is whether the city may "negate and require non-compliance with the rules and regulations" of the districts, and that the city's actions have placed subdividers in the position of either

bypassing/failing to follow the districts' rules regarding plats, or having the city refuse to approve a proposed plat.

Elections: *State v. Hollins*, **No. 14-20-00627-CV, 2020 WL 5584127 (Tex. App.—Houston [14th Dist.] Sept. 18, 2020).** In this case, the Harris County Clerk proposed sending an application for a mail-in ballot to every registered voter in the county. The attorney general challenged the proposal, and both the trial court and court of appeals denied his request for an injunction. [Note: The attorney general immediately appealed the decision to the Texas Supreme Court, **which issued a temporary injunction on October 7**. The Supreme Court concluded that "the Election Code does not authorize an early-voting clerk to send an application to vote by mail to a voter who has not requested one and that a clerk's doing so results in irreparable injury to the State. We grant the State's petition for review, reverse the court of appeals' judgment, and remand the case to the trial court for entry of a temporary injunction prohibiting the Harris County Clerk from mass-mailing unsolicited ballot applications to voters."]

September 2021

Note: Included cases are primarily from August 11, 2020 through September 10, 2020.

Healthcare Liability: *City of Houston v. Houston*, **No. 01-19-00255-CV, 2020 WL 4982675 (Tex. App.—Houston [1st Dist.] Aug. 25, 2020)**. The plaintiff sued the City of Houston for her injury during her ambulance transport. The city filed a motion to dismiss because the city claimed it was a medical negligence claim requiring an expert report. The court of appeals held that emergency medical services for the city is a "health care provider" based on the definition of "health care institution" and that the claim involves a nexus between the injuries and the provision of medical care. The court held that the case should have been dismissed because the plaintiff failed to file an expert report.

Employment: *City of Houston v. Trimmer-Davis*, **No. 01-19-00088-CV, 2020 WL 4983253 (Tex. App.—Houston [1st Dist.] Aug. 25, 2020) (mem. op.)**. Trimmer-Davis sued the City of Houston for retaliation and to remove a determination from her file that she filed a false complaint of discrimination. After she filed her lawsuit, the city terminated her for failure to follow drug test procedures, which she added to her suit. The trial court granted the city's plea to the jurisdiction as to the recordkeeping claim but denied the plea for the one-day suspension and the termination. Both parties appealed. The court of appeals found there was sufficient evidence that the city had non-retaliatory reasons for the termination, but not for the suspension or the untruthfulness finding in her file. The court of appeals sent the case back to the trial court on the recordkeeping and suspension retaliation claims.

Elections/Candidate Eligibility: *Jefferson-Smith v. City of Houston*, **No. 01-20-00136-CV, 2020 WL 4589745 (Tex. App.—Houston [1st Dist.] Aug. 11, 2020)**. Jefferson-Smith sued the City of Houston to prevent her opponent from appearing on a ballot in a runoff election because she claimed the opponent had been convicted of a felony for which she had not been pardoned or relieved of the disability. The trial court dismissed her claims for failing to provide sufficient

evidence to the administrative authority of whether the opponent had been pardoned or relieved of the disability. The appellate court upheld the trial court's finding on appeal because the documents that Jefferson-Smith presented to the administrative authority regarding her opponent's eligibility present a fact question.

Employment: *University of North Tex. Sys. v. Barringer*, **No. 02-19-00378-CV, 2020 WL 5414973 (Tex. App.—Fort Worth Sept. 10, 2020) (mem. op.)**. Barringer sued the University of North Texas (UNT) for age discrimination and retaliation when she resigned her position before UNT could conduct an investigation into her alleged misconduct. The trial court denied UNT's plea to the jurisdiction and UNT appealed. The appellate court reversed the trial court and dismissed the case for want of jurisdiction because Barringer failed to rebut UNT's evidence that UNT did not constructively discharge her.

Non-Disclosure Agreement: *Fitzsimmons v. Killeen Indep. Sch. Dist.*, **No. 03-19-00535-CV, 2020 WL 4726697 (Tex. App.—Austin Aug. 14, 2020) (mem. op.)**. Fitzsimmons, a former teacher at Killeen Independent School District (district), sued the district alleging that it violated a non-disclosure clause in a settlement agreement when a district employee disclosed to another school district the reason for Fitzsimmons's termination from the district. The district filed a plea asserting governmental immunity. The trial court sustained the plea without specifying its reasons. The court of appeals affirmed, finding that because Fitzsimmons failed to address damages that he may be entitled to under Chapter 271 of the Local Government Code, immunity from suit was not waived.

Employment: *Webb Cty. v. Romo*, **No. 04-19-00849-CV, 2020 WL 5027389 (Tex. App.—San Antonio Aug. 26, 2020)**. Romo, who was running for office of county constable, sued Webb County after he was terminated from his position as chief investigator for the county attorney's office, claiming, among other things, violation of the Texas Constitution's first amendment rights to free speech, freedom of association, and free and due process speech claims, and breach of contract. The county argued that it was immune from Romo's claims. The trial court denied the county's plea to the jurisdiction. The court of appeals held that Romo's request for money damages for the alleged violations of his free speech and association rights are barred by sovereign immunity, but the remedy of reinstatement was valid. The court also found that the county was immune from the contract claim.

Governmental Immunity: *City of San Antonio v. Von Dohlen*, **No. 04-20-00071-CV, 2020 WL 4808722 (Tex. App.—San Antonio Aug. 19, 2020)**. The city council voted to approve a concession agreement that would exclude a subcontractor from operating a Chick-Fil-A restaurant at the city's airport. Subsequently, the Texas Legislature passed legislation prohibiting governmental entities from discriminating against any person on the basis of its membership in, affiliation with or support provided to a religious organization. Shortly thereafter, the appellees sued the city for declaratory and injunctive relief, arguing that the city was violating state law by continuing to exclude Chick-Fil-A from operating at the airport. The city filed a plea based on governmental immunity and a Rule 91 motion to dismiss. The trial court denied the plea and the motion. The court of appeals only addressed the plea as it was dispositive, finding that a claim to

effectively nullify the concession agreement, which was made prior to the enactment of the new legislation, was barred by governmental immunity.

Quo Warranto: *City of Leon Valley v. Martinez*, **No. 04-19-00879-CV, 2020 WL 4808711 (Tex. App.—San Antonio Aug. 19, 2020)**. After the city council removed Martinez from his elected office as council member and appointed his replacement, Martinez sued the city seeking reinstatement. The city filed a plea, arguing that a quo warranto proceeding was Martinez's exclusive remedy. The trial court denied the appeal. The court of appeals held the remedy to seek reinstatement was a quo warranto action.

Elections: *City of Floresville v. Gonzalez-Dippel*, **No. 04-20-00070-CV, 2020 WL 4606902 (Tex. App.—San Antonio Aug. 12, 2020) (mem. op.)**. The city's charter requires municipal elections be held on the May uniform election date, but, in 2011, the city council, adopted a resolution changing the date of its May election to November. In 2019, the city council repealed the 2011 resolution, changing the date for all future municipal elections back to May. Candidates for places 3, 4, and 5 who had filed for a place on the ballot for the November 2019 election before the 2019 resolution was passed, and the city's mayor, Gonzalez-Dippel, in her official capacity, sued the city and each of the other city council members and the city secretary in their official capacities, seeking declaratory and injunctive relief for the 2019 resolution was allegedly passed in violation of the Election Code and the Texas Open Meetings Act (TOMA). The city filed a general denial and a plea. The trial court denied the city's plea and granted a temporary injunction declaring the 2019 resolution void, places 3, 4, and 5 vacant, and ordering the city to hold a special election in May 2020. The court of appeals reversed in part the trial court's order denying the plea, holding that the mayor had no standing to sue in her official capacity and the claims for declaratory and injunctive relief were improper attempts to pursue a quo warranto claim. The court remanded to the trial court the city's mootness challenge to the TOMA claims, and affirmed the trial court's order as to the claim that the 2019 resolution violated the Election Code.

Annexation: *City of Terrell v. Edmonds*, **No. 05-19-01248-CV, 2020 WL 5361978 (Tex. App.—Dallas Sept. 8, 2020) (mem. op.)**. In response to the city's efforts to annex 1000-foot wide strips along specific state highways, property owners residing outside the city limits sued the city alleging that the proposed annexation violated the city charter and state law, and that the notice of the proposed annexation was insufficient under the Texas Open Meetings Act (TOMA). The city argued, among other things, that the suit was not ripe as city council had yet to vote on the annexation and that an injunction to stop council from voting on the annexation ordinance based on alleged violations of TOMA may only be asserted in a quo warranto proceeding. The trial court denied the plea. The court of appeals held that appellants' allegations were not ripe and that a quo warranto proceeding is the only proper method of attacking the validity of a city's proposed annexation based on TOMA violations.

Whistleblower: *Herrera v. Dallas Indep. Sch. Dist.*, **No. 05-19-01290-CV, 2020 WL 5054798 (Tex. App.—Dallas Aug. 27, 2020)**. Herrera sued the Dallas Independent School District (district) after he was terminated at the end of his probationary period, claiming whistleblower

retaliation for making complaints to Child Protective Services regarding suspected child abuse by other district teachers. The district filed a plea to the jurisdiction asserting that Herrera failed to follow the district's grievance process before filing suit. The trial court granted the district's plea. The court of appeals reversed and remanded, finding that a fact issue exists regarding whether Herrera complied with the jurisdictional prerequisites for a whistleblower suit.

Governmental Immunity: *City of Saginaw v. Cruz*, **No. 05-19-01141-CV, 2020 WL 5054802 (Tex. App.—Dallas Aug. 27, 2020) (mem. op.)**. Cruz was allegedly injured when a manhole cover flipped open in front of the vehicle he was driving causing the vehicle to flip over and skid down the road on its roof. He sued the city for negligence and premise liability. The city filed a plea to the jurisdiction alleging governmental immunity and abuse of discretion in denying its motion to amend its admissions. The trial court denied the city's plea. The court upheld the trial court's order, finding that there was sufficient evidence to raise a fact question as to whether the city had constructive knowledge that the manhole did not conform to contract requirements before it was put to use, and that the trial court did not abuse its discretion in denying the motion.

Platting: *Escalera Ranch Owners' Ass'n, Inc. v. Schroeder*, **No. 07-19-00210-CV, 2020 WL 4772973 (Tex. App.—Amarillo Aug. 17, 2020)**. The Homeowner's Association of Escalera Ranch (HOA) sued the City of Georgetown Planning and Zoning Commission (commission) seeking a temporary injunction to halt a new development and mandamus relief to invalidate the associated plat. The plat provided access to a new subdivision via a residential street that provides access to and through the Escalera Ranch neighborhood. The court of appeals held: (1) the HOA has standing to sue the commission; and (2) if the plat doesn't comply with the applicable regulations, the commission's actions could constitute an abuse of discretion, subject to mandamus relief.

Tort Claims Act: *City of El Paso v. Cangialosi*, **No. 08-19-00163-CV, 2020 WL 5105217 (Tex. App.—El Paso Aug. 31, 2020)**. The plaintiff alleges that the manner in which police officers conducted a pursuit proximately caused an automobile collision in which plaintiff was involved. The court of appeals held the city's plea to the jurisdiction was properly denied by the trial court because there was some evidence the officers were in pursuit at the time of the crash and that the officers had violated city policy.

Tort Claims Act: *Jefferson Cty. v. Reyes*, **No. 09-18-00236-CV, 2020 WL 5414985 (Tex. App.—Beaumont Sept. 10, 2020) (mem. op.)**. Reyes sued Jefferson County and a county employee, Lawrence Flanagan, under the Texas Tort Claims Act (TTCA) for injuries and property damage resulting from an automobile collision between Reyes and Flanagan. The county filed a plea to the jurisdiction arguing that Reyes failed to comply with the presentment requirement in Local Government Code Section 89.004 which was a statutory prerequisite to suit. On remand from the Texas Supreme Court, the court of appeals holds that Section 89.004 is not a statutory prerequisite to suit contemplated by Section 311.034 of the Code Construction Act, and therefore, any failure to comply with this presentment provision did not operate as a jurisdictional bar to Reyes's TTCA lawsuit against the county.

Premise Defect: *City of Beaumont v. Isern*, **No. 09-19-00451-CV, 2020 WL 4680200 (Tex. App.—Beaumont Aug. 13, 2020) (mem. op.)**. Isern alleged he was injured when he struck a

water valve street cover on a city roadway while riding his bicycle. He asserted claims for the negligent use of tangible personal property, special defect, and premise defect. The court of appeals held: (1) Isern's pleadings fail to allege facts that affirmatively demonstrate that his injuries arose from the city's use of tangible personal property; and (2) the valve cover is not a special defect. As to the premise defect claim, the court of appeals found the city's plea to the jurisdiction should not have been granted because Isern's pleadings are sufficient to meet his burden of showing a waiver of immunity.

Code Enforcement: *Wolf v. City of Port Arthur*, **No. 09-19-00047-CV, 2020 WL 4516857 (Tex. App.—Beaumont Aug. 6, 2020) (mem. op.)**. Pro se Plaintiff Wolf sued the city seeking a temporary restraining order (which was granted by the trial court) and temporary injunctive relief to prevent the city from demolishing a building. The court of appeals held that the trial court did not abuse its discretion in denying the injunctive relief.

Immunity: *Mclennan Cty. Water Control & Improvement Dist. v. Geer*, **No. 10-17-00399-CV, 2020 WL 4218085 (Tex. App.—Waco July 22, 2020) (mem. op.).** The water district turned off the plaintiffs' water after it was discovered that the plaintiffs had two buildings hooked up to the same meter. The plaintiffs' sued for breach of contract for turning off their water and for trespass under the Tort Claims Act for entering their property without permission. The court of appeals dismissed the case against the water district because the plaintiff failed to allege a cause of action that waives governmental immunity for breach of contract (Chapter 271 of the Local Government Code) or for negligence (Texas Tort Claims Act) for actions surrounding the disconnection of plaintiffs' water by the district.

Code Enforcement: *House of Praise Ministries, Inc. v. City of Red Oak*, **No. 10-19-00195-CV (Tex. App.—Waco Aug. 6, 2020) (mem. op.)**. The plaintiff owns a piece of property in the City of Red Oak that was the subject of code enforcement actions, including a substandard building declaration in municipal court. The plaintiff initially brought claims for a regulatory taking, a procedural due process violation, and a substantive due process violation based on the municipal court case determining that the buildings on the property were substandard. In a previous ruling, the regulatory taking and procedural due process claims were dismissed, but the plaintiff was given the opportunity to replead the substantive due process claim. The plaintiff repled the substantive due process claim, including allegations that the city violated plaintiff's substantive due process rights by offering an amortization agreement, engaging in overzealous code enforcement actions, and filing a *lis pendens* prematurely. The court of appeals affirmed the trial court's grant of a plea to the jurisdiction because none of plaintiff's allegations rise to the level of a substantive due process violation.

Accident Reconstruction Expert: *Flores v. Verastegui*, **No. 11-18-00166-CV, 2020 WL 5057375 (Tex. App.—Eastland Aug. 27, 2020) (mem. op.)**. Plaintiff was injured as a result of an accident involving a City of Abilene roll-off style garbage truck. A jury determined that no negligence on the part of the city's employee was a proximate cause of the accident, and the trial court entered judgment against another defendant (Verastegui). Plaintiff challenges the judgment asserting: (1) that the trial court abused its discretion by admitting certain expert testimony, reports, and an animation prepared by the city's expert; and (2) that the evidence was factually

insufficient to support the jury's finding as to the city. The appellate court affirms the judgment of the trial court.

Breach of Construction Contract: *City of Palestine v. LS Equip. Co., Inc.*, **No. 12-19-00264-CV, 2020 WL 5047905 (Tex. App.—Tyler Aug. 26, 2020) (mem. op.)**. This appeal results from a breach of contract dispute between the City of Palestine and Lone Star Equipment (a paving company) regarding a road construction project. After numerous disputes involving the location of the road, materials, and construction methods, Lone Star sued the city for breach of contract and prevailed. The court of appeals affirmed the trial court's decision based on procedural grounds, specifically sufficiency of the evidence and jury charges.

Constitutional Gift Prohibition: *Concerned Citizens of Palm Valley, Inc. v. City of Palm Valley*, **No. 13-20-00006-CV, 2020 WL 4812641 (Tex. App.—Corpus Christi Aug. 13, 2020) (mem. op.)**. In this unreported opinion, concerned citizens sought a temporary injunction against the spending of public funds to improve a private golf course, alleging a violation of the Texas Constitution's "gift prohibition." The court of appeals refused to issue the injunction by concluding that the plaintiffs lacked standing because they did not allege in their petition or provide any evidence that the group or any of its members suffered or would likely suffer any particularized injury as a result of the city's work on the golf course.

Employment Discrimination: *Donna Indep. Sch. Dist. v. Castillo*, **No. 13-19-00395-CV, 2020 WL 4812638 (Tex. App.—Corpus Christi Aug. 13, 2020) (mem. op.)**. In this case, a school district police officer claimed discrimination (based on age and sex). The school district argued that she failed to exhaust her administrative remedies and, therefore, the trial court lacked jurisdiction over her claims. The court of appeals concluded that the trial court: (1) has jurisdiction over her age discrimination claims based on her transfer and her retaliation claims based on adverse actions taken in response to her administrative complaints; but (2) does not have jurisdiction over her claim for sexual harassment, hostile work environment caused by sex discrimination, and any other sex discrimination alleged in her petition that occurred after her charge was filed with the Texas Workforce Commission.

Tort Claims Act – Notice of Claim: *Metro. Transit Auth. of Harris Cty. v. Hunter*, **No. 14-18-00822-CV, 2020 WL 4760206 (Tex. App.—Houston [14th Dist.] Aug. 18, 2020) (mem. op.)**. The trial court denied the transit authority's plea to the jurisdiction in a personal injury lawsuit. On appeal, the court held that the plaintiff's claim is not jurisdictionally barred because her pleadings provided proper notice of suit as required by the Texas Tort Claims Act.

August 2020

Note: Included cases are from July 11, 2020 through August 10, 2020.

Breach of Contract: ***In re Republican Party of Tex.*****, No. 20-0525, 2020 WL 4001050 (Tex. July 13, 2020).** In this case, the Texas Supreme Court denied the Republican Party of Texas's petition for writ of mandamus in response to the City of Houston cancelling the agreement for the Party to use its convention center for its 2020 State Convention.

The termination letter invoked a force majeure clause in the Agreement and cited "the unprecedented scope and severity of the COVID-19 epidemic in Houston." The next day, the Party sued for a declaration that the city had breached the agreement, an injunction prohibiting termination, and specific performance. The trial court denied the Party's temporary restraining order. The Party appealed directly to the Texas Supreme Court for mandamus under Section 273.061 of the Election Code to order the city to perform under the contract.

Section 273.061 gives the Texas Supreme Court jurisdiction to "issue a writ of mandamus to compel the performance of any *duty imposed by law* in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer." Section 1.005(10) defines "law" in the Election Code to mean "a constitution, statute, city charter, or city ordinance." *Id.* § 1.005(10). Thus, "duty imposed by law" in Section 273.061 is limited to a duty imposed by a constitution, statute, city charter, or city ordinance. The agreement was not a law. Therefore, the Texas Supreme Court lacked jurisdiction and dismissed the petition.

Whistleblower Claims/Employment Law: *OakBend Med. Ctr. v. Simons*, No. 01-19-00044-CV, 2020 WL 4457972 (Tex. App.—Houston [1st Dist.] Aug. 4, 2020) (mem. op.). In this case, the First Court of Appeals overturned the jury verdict in favor of Simons for her whistleblower claims.

Simons was a staff nurse with OakBend Medical Center (the hospital). Simons made complaints to OSHA for violations because she contended the hospital: (1) did not have adequate security or security guards, which made the workplace unsafe; and (2) retaliated against her for her first complaint by refusing to pay for tuition for her to become a nurse practitioner. After an investigation, OSHA and the Department of Labor determined there was not enough evidence to substantiate either complaint.

Separately, Department of State Health Services investigated a complaint against Simons that she kicked a patient in the foot. The DSHS investigation determined that the hospital had an "immediate jeopardy" situation and instructed the hospital to submit a plan to address how it intended to remove the threat. The hospital suspended Simons on the same day and later terminated her employment.

Simons filed a whistleblower lawsuit claiming the hospital retaliated against her for filing OSHA complaints. At trial, the jury found in favor of Simons. The jury determined that she had made her complaints in good faith and suffered damages because of the retaliation. The hospital appealed the jury verdict.

The hospital argued on appeal that the Texas Whistleblower Act does not protect Simons because she failed to present any evidence that she acted in good faith in filing either of her complaints with OSHA. To prove a claim under the Whistleblower Act, a public employee must demonstrate that she reported a violation of law in good faith and that the adverse employment action by the employer would not have occurred had the report not been made. *City of Houston v. Levingston*, 221 S.W.3d 204, 226 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also* TEX. GOV'T CODE §§ 554.002, 554.004.

Regarding the first complaint, the hospital argued that Simons did not file her first complaint to OSHA regarding the hospital's alleged lack of security in good faith because she did not subjectively believe the hospital had violated a law. The First Court of Appeals agreed. Although Simons felt that the security was inadequate, she cited to no law that the hospital violated.

Next, the hospital contended that Simons's second complaint to OSHA for the denial of her tuition reimbursement cannot form the basis of a retaliation cause of action because she failed to present evidence that the hospital knew about her second complaint before it suspended her and terminated her employment. The appellate court agreed.

Having ruled in favor of the hospital on both issues, the First Court of Appeals reversed the trial court's judgment and rendered judgment that Simons take nothing on her claims.

Land Rights: *City of Mansfield v. Savering*, No. 02-19-00174-CV, 2020 WL 4006674 (Tex. App.—Fort Worth July 16, 2020) (mem. op.). In this lengthy opinion, the Fort Worth Court of Appeals holds certain private property owners did not establish a right to declaratory relief regarding fee-simple ownership of lots over which the City of Mansfield exercised some regulatory control, asserting they were public paths.

A developer filed a final plat in Tarrant County, creating a planned housing development called The Arbors of Creekwood – Gated Community (the Development). The Development was in the city and had two Homeowners Associations (HOA). An amended plat divided the lots into R1 and R2 lots. All R2 lots were in the floodplain, which was governed by city ordinance. The developer created a lake and connected jogging paths ending at the lake. The developer testified the paths were for public use. The boundary line for the R2 lots abutting the lake was to the north of the lake; thus, the lake was not included within the boundaries of these R2 lots. The developer executed a declaration of covenants, conditions, and restrictions (the Declaration) for the Development and filed them in Tarrant County. The Declaration stated the HOAs owned fee-simple title to private streets in the Development and "common properties" which had a complicated definition. In 1997, the Arbors HOA forfeited its right to do business and became a terminated entity. The surviving HOA asserted the Arbors HOA property lots (R2) automatically transferred to it.

In January 2012, the city began planning for a "possible future trail connection" to the jogging path. Construction on the bridge began in 2013 and opened on January 25, 2014. Some owners of R1 lots noticed an increase in people using the jogging path and trespassing on the R1 lots. The R1 owners sued seeking a declaration they owned the R2 lots as common properties, and seeking to quiet title. The court of appeals issued an interlocutory opinion in review of a temporary injunction noting the R2 lots were included in the definition of "common properties." The R1 Owners also raised claims against the city defendants for trespass and inverse condemnation. The city defendants filed a traditional and no-evidence motion for summary judgment, including arguments that the facts and law had substantially changed since the interlocutory order. They argued the R1 owners did not have a right to possess the R2 lots (which were originally owned by the defunct HOA) and that they did not have a private right to enforce

a city ordinance on floodplain development. The trial court denied the city defendants' motions and granted the partial summary judgment of the R1 owners. The city defendants appealed.

The court first went through a detailed analysis of the evidence submitted, objections to the evidence, and what constituted judicial admissions. The court held the law-of-the-case doctrine only applied to claims fully litigated and determined in a prior interlocutory appeal; it did not apply to claims that have not been fully litigated. The law-of-the-case doctrine is flexible and directs the exercise of court discretion in the interest of consistency but does not limit its power. The interlocutory opinion (which was a complicating obstacle) did not address the R1 Owners' UDJA claim regarding title to the R2 lots, only a probable right of relief for trespass claims based on an undeveloped record. The court noted they were substantially different arguments, issues, law, and review standards. The city argued the R2 lots owned by the defunct HOA could be distributed only under the terms of the articles of incorporation and could not pass to the live HOA automatically. The court agreed with the city that the R1 owners did not establish a proper conveyance under the articles.

Next, the court turned to the floodplain ordinance, where the R1 owners asserted the city failed to follow its own ordinance by obtaining studies before constructing structures in the floodplain connecting the jogging paths. The city defendants' argument that no private cause of action to enforce the ordinance exists is one of standing. The R1 Owners did not challenge the validity of the ordinance, but rather asserted that they wanted a construction of the ordinance and enforcement of it against the city defendants. The R1 Owners did not have a right to enforce the ordinance through a UDJA claim, which only waives immunity for ordinance invalidation. Alternatively, under the record, the R1 owners did not establish the city violated the ordinance. The city defendants proffered summary-judgment evidence raising a fact issue on their substantial compliance. Finally, since the court held the R1 owners could not bring a UDJA claim, the attorney's fee award was reversed.*

Texas Tort Claims Act: *City of Austin v. Anam*, No. 03-19-00294-CV (Tex. App.—Austin July 30, 2020) (mem. op.). In this Texas Tort Claims Act case, the court of appeals upheld the trial court's denial of the city's plea to the jurisdiction for a detainee's death by suicide while in a patrol vehicle.

Anam was arrested for allegedly shoplifting. The arresting officer performed an inadequate search of Anam and failed to detect a handgun that was attached to the front of Anam's waistband. The officer handcuffed Anam's hands behind his back, placed him in a patrol car, and fastened his seatbelt. During the ride, the lap belt portion of Anam's seatbelt unfastened, and after he revealed to the officer that he was suicidal, he told the officer that he had a loaded firearm pointed at his own head. The officer stopped and exited the vehicle. Anam then shot himself and died. His family sued the city under the Tort Claims Act alleging waiver of the Act applies for death caused by use of a motor-driven vehicle or, alternatively, for death caused by a condition or use of tangible personal property. The city filed a plea to the jurisdiction. The trial court denied the plea, and the city appealed.

The court of appeals concluded that the improper use or failure to use a vehicle's safety equipment can constitute use of a motor vehicle, and that the officer's failure to secure Anam's

seatbelt constituted use or operation of a motor vehicle. Additionally, the court found that given the officer's testimony regarding the suicidal tendencies of detainees, his awareness that Anam was despondent, his general awareness that detainees are often in possession of weapons, and the video showing that for most of the drive, Anam was not property restrained by the seatbelt and was in possession of a weapon, the family had met their burden of raising a fact issue regarding foreseeability. Accordingly, the court affirmed the trial court's order. The appellate court did not address the issue of whether Anam's death was caused by a condition or use of tangible personal property.

Texas Tort Claims Act: *Webb Cty. v. Lino*, No. 04-19-00891-CV, 2020 WL 4218714 (Tex. App.—San Antonio July 22, 2020) (mem. op.). This is a motor vehicle accident case under the Texas Tort Claims Act (TTCA) where the San Antonio Court of Appeals affirmed the denial of the county's plea to the jurisdiction.

Webb County Sheriff's Deputy Mauro Lopez witnessed Saldivar pass a vehicle from a no-passing lane on a three-lane highway. Deputy Lopez applied his brakes to make a U-turn prior to initiating his lights and siren. The video from Deputy Lopez's dash camera shows he slowed down from 70 miles per hour to 16 miles per hour in seven seconds. During this time, he began moving into the center turn lane, effectively blocking all traffic behind him. This caused drivers behind Lopez to brake suddenly, and an 18-wheeler truck to jackknife and skid into the westbound lane, directly into Saldivar's path. Saldivar's truck and the 18-wheeler collided, resulting in the death of killing Saldivar and all passengers. The families sued, and the county filed a plea to the jurisdiction. The plea was denied and the county appealed.

The county asserted Deputy Lopez did not control the 18-wheeler which caused the accident, so no waiver of immunity exists. The TTCA waives immunity if the injury "arises from the operation or use of a motor-driven vehicle." The TTCA does not define the term "arises from" but case law states it requires a nexus between the operation or use of the motor-driven vehicle or equipment and cause of the plaintiff's injuries. The Texas Supreme Court has "described the threshold as something more than actual cause but less than proximate cause." The necessary causal nexus requires a showing that the use of the vehicle actually caused the injury. Deputy Lopez testified that a vehicle going far below the speed limit poses a hazard to vehicles traveling behind it. The police crash report notes witnesses stated it was Deputy Lopez's drastic reduction in speed which caused following traffic to have to take evasive measures. Taking the pleadings in a light most favorable to the non-movants, the court held the evidence in this case raises a fact question about whether Deputy Lopez's operation or use of his vehicle was "directly, causally linked to the accident and the damages sustained."

The court next considered whether Deputy Lopez possessed official immunity. Such immunity is governed by the needs/risk analysis. The court agreed Deputy Lopez was performing a discretionary duty in choosing to pursue the perceived traffic violation. However, Webb County did not conclusively establish that a reasonably prudent officer could have determined Deputy Lopez's actions were justified under these circumstances. There was no detailed analysis of the need for immediate apprehension versus the risks related to the U-turn at that point and in that manner. Finally, as to the county's assertion under the emergency responder exception, routine traffic stops were not listed as emergency calls in the department manual, Deputy Lopez did not

activate his lights or siren, he did not call dispatch to notify the situation was an emergency, and nothing indicates there was an immediate need to pull in front of oncoming traffic as opposed to waiting for traffic to be more cleared or by activating lights/sirens. As such, the plea was properly denied.

Uniform Declaratory Judgment Act: *Kehoe v. Kendall Cty.*, No. 04-19-00825-CV, 2020 WL 4045991 (Tex. App. —San Antonio July 15, 2020) (mem. op.). This is a declaratory judgment case involving a private property easement where the San Antonio Court of Appeals affirmed the city's plea to the jurisdiction and awarded sanctions against the plaintiff.

Kehoe asserts Kendall County improperly accepted a 40-foot easement across her property and sought a declaration no easement exists. She brought suit under the Uniform Declaratory Judgment Act (UDJA) and the Texas Private Real Property Rights Preservation Act (PRPRPA). The county filed a plea to the jurisdiction, which was granted, and sought sanctions asserting that Kehoe previously sued over the easement and lost. The trial court granted sanctions and Kehoe appealed.

The court first held that Kehoe's arguments in her brief, even broadly construed, do not address the trial court's jurisdictional dismissal. The briefings consist solely of bare assertions of error, without citations to applicable authority or the record. Since nothing was properly briefed for review, the plea to the jurisdiction remains properly granted. Likewise, Kehoe does not address the standards for sanctions and so they are likewise affirmed.*

Texas Tort Claims Act: *Shaw v. City of Dallas*, No. 05-19-01233-CV, 2020 WL 4281789 (Tex. App.—Dallas July 27, 2020) (mem. op.). In this Texas Tort Claims Act case, the court of appeals upholds the trial court's dismissal of the pro se plaintiff's action against the city.

The plaintiff called an ambulance after suffering severe stomach pain. He alleges that the driver of the ambulance hit potholes on the way to the hospital exacerbating his injuries. The plaintiff had surgery to fix the stomach issue. The plaintiff sued the city under the Tort Claims Act arguing that the bumpy ambulance ride exacerbated his stomach injury. The city argued that there was no evidence that the ambulance ride caused the stomach injury because the injury was a pre-existing condition. The trial court dismissed the plaintiff's claims for lack of sufficient evidence.

In order to waive the government's immunity through the Tort Claims Act, the plaintiff has to allege that the government employee caused an injury. Despite the court's liberal construction of the pro se plaintiff's petitions and evidence, the only evidence presented that alleged wrongdoing by the city occurred was the statement by the nurse practitioner that the bumpy ride might have "add[ed] more pain to the abdomen area." The court of appeals agreed with the trial court that this statement alone was insufficient to waive immunity. The court also noted that it does liberally construe pro se plaintiff pleadings but has to hold a pro se plaintiff to the same procedural standard as a plaintiff with counsel in order to avoid giving a pro se applicant an unfair advantage.*

Referendum Petition: *Carruth v. Henderson*, No. 05-19-01195-CV, 2020 WL 4199065 (Tex. App.—Dallas July 22, 2020). This is a mandamus action (and second interlocutory opinion) where the Dallas Court of Appeals issued a mandamus against the city secretary of the City of Plano regarding a citizen's referendum petition and granted summary judgment for the plaintiff citizens.

The City of Plano, a home-rule municipality, has a comprehensive plan for land and use development under Chapter 213 of the Texas Local Government Code. The City of Plano's charter permits qualified voters to submit a referendum petition seeking reconsideration of and a public vote on any ordinance, other than taxation ordinances. After the city passed an ordinance amending and adopting a new comprehensive plan, several citizens submitted a petition to the city secretary for a referendum to repeal the new plan. The city council held an executive session and was advised by outside legal counsel that the petition was not subject to a referendum vote. When no action was taken on the petition, the citizens filed suit to compel formal submission to the city council and to have the city council either take action or submit the issue to a popular vote. The city secretary filed a motion for summary judgment, which was granted. The citizens appealed.

The legislature may preempt municipal charters and ordinances. However, when preempting a home-rule charter, the language must be clear and compelling. The Plano City Charter itself excepts only ordinances and resolutions levying taxes from the referendum process. And while Chapter 213 of the Texas Local Government Code regulates the adoption of comprehensive plans, the mere fact that the legislature has enacted a law addressing comprehensive plans does not mean the subject matter is completely preempted (which would have foreclosed a referendum application). The city secretary claims Section 213.003 impliedly withdraws comprehensive development plans from the field of initiative and referendum by mandating procedural requirements, including a public hearing and review by the planning commission before cities can act on such plans. This argument ignores that the Section 213.003(b) also allows a city to bypass the procedures set forth in subsection (a) and adopt other procedures in its charter or by ordinance. Thus, the legislature did not limit the power of home-rule cities to adopt comprehensive plans. Further, comprehensive plans, while linked to, are to be treated differently than zoning regulations. So, the cases cited by the city secretary related to zoning referendums are not applicable. The order granting the city secretary's motion for summary judgment is reversed.

Because the original interlocutory opinion held the city secretary has a ministerial duty to present the petition to the city council, the law-of-the-case doctrine prevents the panel from holding otherwise. As a result, the appellate court must grant the citizen's motion for summary judgment.*

Attorney Fees: *Rickert v. Meade*, No. 06-20-00002-CV, 2020 WL 4354946 (Tex. App.—Texarkana July 30, 2020) (mem. op.). In this Section 1983 case on an attorney fees award, the appellate court upheld the trial court's grant of attorney fees in favor of the defendant, City of Bonham, because the plaintiff did not establish even a prima facie case.

The plaintiff was terminated from his city employment after a co-worker filed a sexual harassment claim against him based on an allegedly consensual relationship. The Texas Workforce Commission determined that the sexual harassment claim against the plaintiff was baseless. The plaintiff sued the city under Section 1983 asserting entitlement to a name-clearing hearing. The trial court dismissed the claim for lack of evidence and awarded attorney's fees to the city. The plaintiff appealed the attorney fee award.

In order for an attorney fee award to be upheld against a plaintiff in favor of a defendant, it has to be shown that "the plaintiff's action was frivolous, unreasonable, or without foundation even though not brought in subjective bad faith." *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (per curiam) (quoting Christiansburg, 434 U.S. at 421). The plaintiff's action was based on the lack of a name-clearing hearing after his termination. A terminated individual has the right to a name-clearing hearing where the employee's "good name, reputation, honor, or integrity" is questioned during a termination. *Bledsoe v. City of Horn Lake, Miss*., 449 F.3d 650, 653 (5th Cir. 2006). In this case, the plaintiff provided no evidence that he was denied a name-clearing hearing, or that he even requested one. Evidence was presented that he was provided a chance to be heard at a hearing prior to termination. The court of appeals held this lack of evidence was sufficient to show that the trial court did not abuse its discretion.*

Texas Tort Claims Act: *City of Houston v. Mejia*, No. 14-19-00559-CV, 2020 WL 4092253 (Tex. App.—Houston [14th Dist.] July 21, 2020). This is a Texas Tort Claims Act (TTCA) case involving a motor vehicle accident in which the 14th Court of Appeals affirmed an order denying the city's jurisdictional challenge on interlocutory appeal.

Isabel Mejia was driving her vehicle when Sergeant Michelle Gallagher (Gallagher) of the Houston Police Department failed to yield the right of way at an intersection and hit Mejia's vehicle. The Mejias sued Gallagher and the city for personal injuries. The Mejias' claims against Gallagher were dismissed pursuant to the city's motion under Texas Civil Practice and Remedies Code Section 101.106(e). The city originally admitted Gallagher was in the course and scope of her employment at the time, then later amended responses to Mejia's request for admissions and denied she was within the course and scope. The city then filed a motion for summary judgment asserting Gallagher was not within her course and scope of employment at the time of the accident. Essentially, the city found out that Gallagher's husband (a police lieutenant) asked her to drive his "take home" police vehicle from the mechanic's garage and was delivering it to their home when she was involved in the accident. Gallagher testified that at the time of the accident she was driving home, had no official duties, was not being paid, was not responding to a call for service, criminal activity, or an emergency situation. The motion was denied and the city appealed.

Under the TTCA, "scope of employment" means the performance of "the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority." Whether she was on duty, off duty, or using a police vehicle or not, is not dispositive. The focus is on the capacity in which the officer was acting at the time of the accident (i.e. what the officer was doing and why she was doing it.) Gallagher's affidavit reflects that her husband (a superior officer employed by Gallagher's employer) asked her to pick up his city-issued vehicle from the city garage so her superior officer

would have the vehicle available at the beginning of his shift (a benefit to Gallagher's employer). Gallagher was not merely commuting to work, but running an errand for the city. As a result, the city did not conclusively negate Gallagher's course and scope.

Chief Justice Frost's dissent asserts the majority used the wrong legal standard. Nothing in the record shows that in picking up her husband's work vehicle and driving it to their home, Sergeant Gallagher was acting on the instructions of a supervisor or other superior *in her chain of command*. The mere conferring of an employer benefit is not the proper legal test.*

Sales Tax Delinquency: *State v. Hunter*, No. 14-18-00678-CV, 2020 WL 4211241 (Tex. App.—Houston [14th Dist.] July 23, 2020) (mem. op.). The Texas Comptroller of Public Accounts audited Hunter Agri Construction, Inc., and determined that the company had underreported sales taxes. Hunter Agri Construction and the comptroller entered into an "Agreement on Insolvency Relief," which included a term designated Jerry Hunter (Hunter) as the co-guarantor. Hunter signed the agreement with the designation "President" underneath his signature. Hunter also signed a separate "Payment Agreement" with the comptroller, which he signed with the designation "Taxpayer Title: Pres" underneath his signature. The Payment Agreement included a signature line for "co-guarantor" that was left blank. After Hunter missed two required payments, the state and multiple cities and counties (state) sued Hunter for breach of contract, alleging he was individually liable for Hunter Agri Construction's tax liability under the payment agreement as a "co-guarantor of payment." Both the state and Hunter filed motions for summary judgment. Ultimately the trial court denied the state's motion, granted Hunter's motion, and rendered a take-nothing judgment against the state. The state appealed.

The first issue on appeal was whether the state conclusively showed that a breach of contract occurred. The court of appeals held that the contract at issue expressly stated that Hunter is the co-guarantor, and states that upon default the comptroller could collect the amounts due from either the taxpayer, Hunter Agri Construction, or the co-guarantor, Hunter. According to the court, to conclude that Hunter signed the payment agreement only in his personal capacity would render the guaranty language meaningless.

The state also contended that it conclusively established the delinquency and amount of sales taxes owed by presenting the comptroller's certificate of delinquency in support of the state's motion for summary judgment. The certificate showed a total liability of $84,642.20. Hunter had the burden to present conclusive evidence to overcome the presumption of correctness in the certificate of delinquency. But Hunter only provided an affidavit reflecting payments totaling $29,000. The court held that Hunter did not offer proof that would overcome the presumption of correctness in the certificate of delinquency.

The court concluded that the trial court erred in granting summary judgment in favor of Hunter and against the state on its breach of contract claim. The court reversed the trial court's judgment, rendered judgment in favor of the state, and remanded for a determination of attorney's fees.

Drainage Fees: *Beck Steel, Inc. v. City of Lubbock*, No. 14-19-00060-CV, 2020 WL 4461277 (Tex. App.—Houston [14th Dist.] Aug. 4, 2020) (mem. op.). Beck Steel and John Beck sued

the City of Lubbock claiming that the city improperly levied certain assessments against the Storm Water Utility Fund. More specifically, Beck asserted claims for reimbursement, money had and received, unconstitutional taking, and injunctive relief relating to payments from drainage fee revenue in the form of payments in lieu of taxes, payments in lieu of franchise fees, and pledges towards general obligation debt. The trial court denied Beck's motion for summary judgment and granted the city's motion. Beck appealed.

On appeal, Beck argued that the city couldn't collect payments in lieu of taxes and franchise fees from the drainage fee fund, because those assessments represent "fictional amounts," and "[o]nly actual costs can be included" in the city's drainage fee assessments. Beck also asserted that the city improperly used drainage-fee revenue to repay general-obligation debt. However, the court agreed with the city's contention that the challenged assessments could be properly levied against the Fund's drainage-fee revenue under Section 552.054, which states that the subchapter "does not: ...preclude a municipality from imposing impact fees or *other charges for drainage authorized by law*." (emphasis added.) The court held that the plain language of this provision — read in light of the deference afforded city ordinances — supports the conclusion that the payments in lieu of taxes, payments in lieu of franchise fees, and repayment of general-obligation debt fall within the phrase "other charges for drainage authorized by law." The court affirmed the trial court's judgment.

July 2020

Note: Included cases are from June 11, 2020 through July 10, 2020.

Texas Tort Claims Act: *VIA Metropolitan Transit v. Curtis Meck*, No. 18-0458, 2020 WL 3479509 (Tex. June 26, 2020). This is a Texas Tort Claims Act (TTCA) case involving a VIA bus accident where the Texas Supreme Court affirmed a jury award against VIA.

VIA Metropolitan Transit is a governmental entity that operates public transportation services in San Antonio and Bexar County. Curtis Meck boarded a VIA bus operated by Frank Robertson, who was new to the job and still in training. Robertson began to pull away from the stop when another passenger shouted, "Back door!" apparently to notify Robertson that a passenger was still trying to exit. Traveling just under five miles per hour, Robertson made an abrupt stop, causing Meck to fall forward into the partition behind Robertson's seat. Meck asserts this caused a herniated disc in his neck. Meck sued VIA asserting negligence and that VIA was a "common carrier" with a high degree of care imposed for the benefit of the passengers. After a trial on the merits, the jury found for Meck. VIA appealed. VIA did not object to the designation as a common carrier and did not object during jury selection when Meck's attorneys told the jury of the higher duty imposed on VIA. VIA moved for a directed verdict asserting it was not a common carrier and the jury instruction was incorrect. The motion was denied.

Under the Texas Transportation Code, the duties and liabilities of a common carrier are the same as provided for under common law. TEX. TRANSP. CODE §5.001(a)(1). A common carrier owes a duty to its passengers to act as "a very cautious and prudent person" would act under the same or similar circumstances. To qualify as a common carrier (in contrast to a private carrier), the entity must provide transportation services to the general public, as opposed to providing such services

only for particular individuals or groups and as its primary function. VIA argued it is not a common carrier because: (1) it is not "in the business" of providing such services, (2) providing such services is not its "primary function," and, (3) in any event, it cannot be a common carrier because it is a governmental body that performs only governmental functions. While the Court agreed that VIA is statutorily prohibited from generating revenue greater than an amount "sufficient to meet [its] obligations," it disagreed that profit is necessary to qualify for the "in business" designation. The Court held VIA was indisputably in "the business of transporting people" and therefore met the first prong. And while VIA argued it performs numerous governmental functions that include constructing roads, issuing bonds, collecting taxes, and promoting economic development, for the purpose of "implementing the State's transportation policy," the Court held it must only do so to fulfill its obligation to operate as a "rapid transit authority." As a result, transporting people is its primary function. The Court agreed that VIA is a governmental entity and that it was performing governmental functions that provided, by default, governmental immunity. However, that status does not prevent it from being a common carrier with a higher degree of care to its passengers. The Court further declined to change the law by requiring a lower, ordinary standard of care. The Court then held the TTCA does not define what type of negligence is subject to the waiver of immunity. However, the common law has long used the term "negligence" to refer to "three degrees or grades of negligence," including gross negligence, ordinary negligence, and slight negligence (which applies to common carriers). As a result, all three types are subject to the waiver in the TTCA. Finally, the Court held the evidence was legally sufficient to uphold the jury award.

Chief Justice Hecht wrote a concurring opinion noting the "slight negligence" or "high degree of care" standards are misleading, unnecessary and should be abandoned. They suggest that common carriers are to "exercise all the care, skill, and diligence of which the human mind can conceive," which invites the jury "to scrutinize the carrier's conduct in an endeavor to find it defective." However, he notes that given the evidence, an instruction on a "reasonable care" standard would not have changed the outcome.*

Contractual Immunity: *Nettles v. GTECH Corp.*, No. 17-1010, 2020 WL 3116609 (Tex. June 12, 2020). In this case, the Texas Supreme Court held a contractor providing certain functions of the Texas Lottery Commission was not entitled to derivative sovereign immunity.

GTECH Corporation (GTECH) provided instant ticket manufacturing and services to the Texas Lottery Commission (TLC). GTECH was sued by multiple plaintiffs (in multiple suits after consolidated on appeal) alleging that the instructions on a scratch-off lottery ticket were misleading, causing them to believe they had winning tickets when they did not. GTECH created draft tickets, which the TLC commented on and made changes to, but ultimately approved after the back-and-forth concluded. After several complaints, the TLC shut down the game within 60 days of its release. The plaintiffs asserted claims for fraud, fraud by nondisclosure, aiding and abetting fraud, and conspiracy. GTECH filed pleas to the jurisdiction, asserting it was entitled to the same immunity held by the TLC. Due to the multitude of suits, some pleas were granted, some denied, but all ended up on appeal.

The Court first noted it had not yet had the opportunity to address whether a Texas government agency's immunity from suit might extend to its private contractors and, if so, under what

circumstances. In the instances of derivative immunity, it only applies to a private company operating "solely upon the direction" of a government, and exercising "no discretion in its activities." It applies when the private company was "not distinguishable" from the governmental entity such that "a lawsuit against one [was] a lawsuit against the other."

Here, the contract required GTECH to provide suggested game designs. After receiving approval from the TLC, GTECH provided drafts and received comments. GTECH's role also included crafting, designing, and choosing wording. TLC's instant product coordinator testified he would expect GTECH to notify them if it saw concerns with a game, including misleading instructions. Based on the contract and other evidence in the record, the Court held GTECH had some discretion with regard to the conduct at issue. The Court held that close supervision and final approval of work over which a contractor has discretion are not the same as the government specifying the manner in which a task is to be performed.

Importantly, the Court stated "[t]hus, even if we recognized derivative sovereign immunity for contractors, GTECH would not be entitled to immunity from suit on the fraud claims under the control standard." This seems to indicate the issue of derivative immunity for contracts with state agencies remains an open question. The Court also stated "[a] challenge to an element of a plaintiff's claim by a defendant who lacks immunity from suit does not implicate the jurisdiction of the court; it should be raised in a motion for summary judgment rather than a plea to the jurisdiction." Finally, the majority held that extending immunity to contractors for fraud could not further the purpose of immunity.

However, the Court did say that GTECH was entitled to derivative immunity from the allegation of conspiracy and aiding and abetting because such claims require a finding of the underlying fraud claim being viable against the TLC. Since the TLC has immunity from fraud claims, the conspiracy claims, and aiding and abetting claims cannot be sustained against GTECH.

Chief Justice Hecht's opinion, concurring in part and dissenting in part, notes that he believes since the ultimate decision and approval of the final ticket form rested with the TLC that GTECH should have been provided immunity as to the fraud claims. He stated "Today's lesson is that if the government acts only through its own employees, it is immune from suit, but if it consults experts before it acts, it is still immune from suit but the experts are not, except that the experts are immune from suit for helping the government defraud but not for giving the government advice that it uses to defraud. And there you have it." He agreed GTECH was immune from the conspiracy and aiding and abetting claims.

Justice Boyd's opinion essentially stated his opinion is that "the simple and logical conclusion" is that sovereign immunity only protects the sovereign, no one else. He clarified that this does not affect his opinion on official or qualified immunity, which applies to individuals.*

Public Information: ***Genuine Parts Co., Inc. v. Paxton*****, No. 03-19-00441-CV, 2020 WL 3887973 (Tex. App.—Austin July 10, 2020) (mem. Op.)**. This a Texas Public Information Act (PIA) case in which the court of appeals affirms the trial court's finding that a settlement agreement was not excepted from disclosure.

Genuine Parts Company, Inc. (Genuine Parts) and the City of Houston entered into a settlement agreement that resolved litigation between the parties related to Genuine Part's provision of automotive parts and services to the city's fleet vehicles. A request was made for a copy of the settlement agreement. The city informed Genuine Parts of the request, and Genuine Parts requested a ruling from the attorney general asserting that settlement agreement was excepted from disclosure under Sections 551.104 and 551.110. Genuine Parts argued that the settlement agreement contained information that if disclosed would give advantage to a competitor or bidder, and that it contained commercial or financial information that if disclosed would cause substantial competitive harm to Genuine Parts. The attorney general issued a ruling finding that the settlement agreement was not excepted from disclosure. Genuine Parts filed suit against the attorney general. The attorney general filed a motion for summary judgement arguing that, as a matter of law, the settlement agreement did not fall within an exception to disclosure under the PIA. The trial court granted the summary judgement motion declaring that the settlement agreement was public information. Genuine Parts appealed.

Genuine Parts bears the burden of establishing that this exception to public disclosure applies to the settlement agreement. The proper test is whether disclosure of the information would provide a competitor or bidder with an advantage, albeit not necessarily a decisive one. Genuine Parts provided examples of how competitors, in the past, had used the PIA to gain advantages in bids to which Genuine Parts was also applying. While that could potentially be true, the key issue is whether the settlement agreement actually contains such harmful information. The settlement agreement identifies the parties and generally describes their dispute, the details of which are contained in publicly available federal court filings. The settlement agreement sets forth the total amount of a payment to be made by one party to the other along with the manner and timing of the payment. The settlement agreement references a lump sum amount relating to inventory, but provides no description of the nature of the inventory or its pricing, and there is nothing that could be construed to constitute "performance figures." Genuine also failed to explain how the contents of the settlement agreement might give a competitive advantage. As a result, the evidence in the record fails to demonstrate that the settlement agreement contains information that "if released would give advantage to a competitor or bidder." As such, the court concluded that summary judgment was properly granted.*****

Exactions: *Selinger v. City of McKinney*, No. 05-19-00545-CV, 2020 WL 3566722 (Tex. App.—Dallas July 1, 2020) (mem. op.). This is an exactions case in which the court of appeals reverses the trial court's order granting the City of McKinney's plea to the jurisdiction.

Nancy Dail owns a tract of land in the City of McKinney's extraterritorial jurisdiction (ETJ). Selinger, a developer, was under contract to purchase the land, and submitted his plans to the city to subdivide the land into approximately 331 lots. The plans included construction of necessary sewer infrastructure because the tract of land was not served by the city's water and sewer services, and the city had no plans to extend those services to it. Selinger reached an agreement with the North Collin Special Utility District to supply water to the subdivision. The city denied Selinger's plat application when Selinger refused to agree to pay the city approximately $482,000 if and when the city's water and sewer transmission lines were extended to the development. Ten days later, Dail and Selinger sued the city alleging, among other things, a takings claim. The city filed a plea to the jurisdiction, asserting lack of ripeness and lack of

standing as to Selinger. The trial court granted the city's plea and dismissed the lawsuit with prejudice for lack of subject matter jurisdiction. Dail and Selinger appealed. Subsequently, a new subdivision plat was filed by Norhill Energy, LLC that was substantially the same as the initial plat except that it did not request any variances.

The court first addressed whether the case was ripe. The court found that the takings claim was ripe because the city's demand for Selinger's commitment to pay $482,000 as a condition of plat approval constituted an exaction and sufficient injury for ripeness purposes even though the demanded payment was contingent rather than definite. The court then addressed standing. It concluded that, even though Selinger was only under an option contract to purchase the land and had no property rights in the land itself, he had standing because the city had injured his rights in his plat application and the money he spent to prepare and submit the application. The court then looked at the applicability of the Private Real Property Rights Preservation Act (Chapter 2007 of the Government Code), which waives sovereign immunity to suit and liability in instances where a city enacts or enforces an ordinance, rule, regulation, or plan that does not impose identical requirements or restrictions in the entire ETJ of the city. The court determined that Chapter 2007 was applicable because there was evidence that there was other property in the city's ETJ that did not have the same requirements imposed on it. The court then turned to whether the court had jurisdiction over Selinger's claims under Section 212.904 of the Local Government Code, which establishes rules and procedures regarding apportionment of municipal infrastructure improvement costs. The court determined that Selinger had sufficiently pled a declaratory judgement claim challenging the city's subdivision ordinance, and as a result the trial court had jurisdiction over Selinger's claims for attorney's fees. Additionally, the court found that Section 212.904 does not specify a particular procedure for an appeal to the city's governing body, and that Selinger had exhausted his administrative remedies once city council denied his plat application. The court also found that the trial court had jurisdiction over the Selinger's state due process claims. Finally, the court ruled that, even though the city had received a new plat application, the case was not moot because the city's treatment of the new plat application will not affect the present controversy.

Government Immunity: *City of Dallas v. Kennedy*, No. 05-19-01299, 2020 WL 3286515 (Tex. App.—Dallas June 18, 2020) (mem. op.). This is a personal injury case in which the court of appeals reversed the trial court's order denying the City of Dallas' plea to the jurisdiction.

Kennedy purchased a train ticket in Longview and travelled from Kilgore via train to Dallas, arriving at Union Station, a train station that is owned and operated by the City of Dallas. She did not pay the city any fee to enter and exit Union Station. As she was leaving the train station, she fell through a broken area of tile and sustained injuries that required medical care. Kennedy sued the city for negligence, asserting that the city had failed to repair the floor and failed to warn her of the dangerous condition. The city filed a plea to the jurisdiction. Kennedy amended her petition, dropping another defendant but continuing to assert the same claims against the city. The city filed a supplemental plea to the jurisdiction with evidence attached. Kennedy filed her own evidence, which the city objected to. The trial court denied the city's supplemental plea and overruled the city's evidentiary objections. The city appealed.

The court held that the city owed to Kennedy the duty it owes to a licensee, finding that Kennedy's purchase of a train ticket in Longview did not constitute paying for the use of Union Station that would trigger invitee status. The court then looked at whether the city had actual knowledge of defects in the flooring area that Kennedy fell through. The court determined that the city's evidence, which showed that no reports of defects in the flooring had been made in the two years prior to Kennedy's accident, conclusively showed that the city lacked actual knowledge of the alleged dangerous condition. Additionally, the court refused to infer actual knowledge based on the apparent age of the defect.

Whistleblower: *City of Fort Worth v. Pridgen*, No. 05-19-00652-CV, 2020 WL 3286753 (Tex. App.—Dallas June 18, 2020) (mem. op.). This is a whistleblower case in which the court of appeals affirms the trial court's order denying the City of Fort Worth's motion for summary judgement.

Before they were demoted, Pridgen and Keyes were serving as assistant police chief and deputy chief, respectively, in the Fort Worth Police Department (department), where they both supervised the Internal Affairs (IA) and Special Investigations Unit (SIU) divisions. Pridgen and Keyes participated in the internal department investigation of an arrest conducted by Officer Martin. Officer Martin had been dispatched on a disturbance call to Jacqueline Craig's residence following a 9-1-1 call by Craig to report that her seven-year old son had been choked by an adult neighbor. Officer Martin arrived at the scene to investigate, but soon thereafter engaged in an argument with Craig, which subsequently resulted in his pushing Craig to the ground; removing his Taser from his gun belt and placing it on Craig's back; pointing the Taser at Craig's 15-year old daughter and ordering her to the ground; and then placing Craig under arrest. In addition to being recorded on Officer Martin's body worn camera, the incident was shown on Facebook livestream and gained national attention and media coverage leading to allegations of racism against Officer Martin by many members of the public. Following the department's investigation, both Pridgen and Keyes recommended that Officer Martin be fired. Instead, the police chief suspended him for ten days. Ninety days later, both Pridgen and Keyes were demoted based on the department's contention that they had disseminated confidential documents regarding the investigation without the department's authorization.

Pridgen and Keyes sued the city alleging violations of the Texas Whistleblower Act. The city filed a motion for summary judgement arguing that Pridgen and Keyes were not whistleblowers because they did not make a good faith report of a violation of law to the police chief and there was no causation between the report and the adverse employment action. The trial court denied the city's motion, and the city appealed.

The court first looked at whether the reports made to the police chief by Pridgen and Keyes regarding Officer Martin's conduct were reports of a violation of law protected by the Whistleblower Act or opinions about the discipline and consequences of Officer Martin's conduct. The court found that Pridgen and Keyes presented evidence that they had reported conduct that constituted violations of law to the police chief, including assault, official oppression, and perjury based on their viewing of Officer Martin's body camera video and arrest affidavits and on what Officer Martin did and said. The court then looked at whether Pridgen and Keyes' reports of Martin's violations of law were objectively made in good faith. The court

concluded that Pridgen and Keyes had raised a fact issue as to their objective good faith in reporting Martin's violations of law. Finally, the court looked at whether Pridgen and Keyes raised a fact issue on causation. The court determined that they had offered evidence from which a jury could conclude that their engaging in protected activity at least partially motivated the police chief to demote them, and that the police chief would have reached a different decision in the absence of their protected activity. Accordingly, the court upheld the trial court's decision to deny the city's motion for summary judgement.

Breach of Contract: *Hernandez v. County of Zapata*, No. 04-19-00507-CV, 2020 WL 3815932 (Tex. App.—San Antonio July 8, 2020) (mem. op.). [Comment: this opinion is helpful mainly to litigators who deal with standards for admission of evidence]. This is a breach of contract/garbage collection case where the court of appeals upheld an order granting the County of Zapata's summary judgment against Hernandez.

Hernandez and the County of Zapata entered into a one-year written contract, granting Hernandez an exclusive franchise to provide garbage collection services to county residents. Hernandez agreed to pay the county a percentage of the sums he collected from the residents for his garbage collection services. When a dispute arose, the county sued Hernandez for breach of contract. The county filed a traditional motion for summary judgment, which was granted. Hernandez appealed.

A party opposing a motion for summary judgment may file a response "not later than seven days prior to the day of" the summary judgment hearing. Hernandez failed to timely file a response and failed to establish the trial court abused its discretion in denying his motion to file a late response. Hernandez's motion was unsupported by any probative evidence establishing good cause for the failure. The lack of factual support and explanation regarding counsel's alleged mistakes, "leav[es] the trial court without any means of determining whether an excusable accident or mistake had in fact occurred."

In comparison, the county's affidavits in support of its summary judgment were properly supported and included the underlying facts to justify the conclusions asserted in the affidavits. For example, the affidavit of the county auditor provided support by stating: (1) his primary duties are to oversee financial record-keeping for the county and to assure that all expenditures comply with the county budget; (2) he has continuous access to all county books and financial records and conducts a detailed review of all county financial operations; (3) he has general oversight of all books and records of all county officials and is charged with strictly enforcing laws governing county finance; and (4) after reviewing bank statements from Hernandez's business and comparing them with county records and cross-checking corresponding franchise fee percentage owed by Hernandez pursuant to the contract, that the amount Hernandez owed the County was $361,439.07. As such, the trial court did not abuse its discretion in denying Hernandez's objections to the county's affidavits.

The court also found that the trial court did not abuse its discretion in overruling the objection to bank statements based on hearsay. Under the Texas Rules of Evidence, a statement by an opposing party is not hearsay if the statement is offered against the opposing party and "is one the party manifested that it adopted or believed to be true." Hernandez admitted that he produced

the bank statements in discovery. By producing the bank statements and by adopting the bank statements as his own, Hernandez manifested an adoption or belief in their truth. The evidence is sufficient to conclusively establish the existence of a valid contract, that the county performed under the contract, and that Hernandez breached the agreement. Aside from the first-year payment, it is undisputed Hernandez did not pay the county the contracted percentages of the total gross receipts for the years 2011 to 2016. As a result, the trial court was within its discretion to grant the summary judgment. Finally, the court concluded that the record supports an award of attorney's fees.*

Contractual Immunity: *City of Port Isabel v. Meza*, No. 13-19-0070-CV, 2020 WL 3786249 (Tex. App.—Corpus Christi July 2, 2020) (mem. op.). On May 15, 2015, the City of Port Isabel terminated the city manager, Edward Meza. Additionally, the city council rescinded the severance policy adopted by the city council in 2010, in spite of the fact that a document titled "City Manager Severance Agreement" was signed by the mayor and Meza on July 6, 2010. Meza filed suit for breach of contract, and the city filed a plea to the jurisdiction, arguing that it was immune from suit under Chapter 271 of the Local Government Code. The trial court denied the city's plea, and the city appealed.

On appeal, the city argues that Meza's severance agreement was not properly executed because it was not brought before the city council for final approval, or in the alternative, it was rescinded during the May 2015 meeting and Meza did not have standing to bring the lawsuit. As a result, the city contended that immunity was not waived under Local Government Code Section 271.152. The minutes from July 2010 showed that the city council discussed a severance package for Meza, and the severance agreement introduced as evidence contained the mayor and Meza's signatures. According to the court, there was more than a scintilla of evidence to show that Meza's severance agreement was properly executed. Accordingly, the court concluded that the trial court correctly denied the city's plea to the jurisdiction.

Breach of Contract: *City of Corpus Christi v. Graham Constr. Servs., Inc.*, No. 13-19-00367-CV, 2020 WL 3478661 (Tex. App.—Corpus Christi June 25, 2020) (mem. op.). This is a breach of contract claim under Chapter 271 of the Local Government Code involving a wastewater plant replacement project where the Court of Appeals affirmed the trial court's denial of the city's plea to the jurisdiction.

The City of Corpus Christi entered into a contract with Graham Construction Services (Graham) for the replacement of a wastewater plant. In the agreement, the city hired Carollo to provide engineering and contract administration services and Carollo was considered the owner's representative. The agreement had strict deadlines for the completion of the project in two different phases. The agreement also had strict notice of claim requirements (i.e. less than 90 days after claim event). Graham submitted over a dozen delay claims, arguing that it faced delays due to "unclear or conflicting specifications in the contract, unnecessarily burdensome testing requirements, and an uncooperative and obstructionist attitude on the part of Carollo", but not within the time frames required by the agreement. At some point, the city replaced Carollo with Freese & Nichols (Freese), but Carollo was still involved in the project. Graham also submitted reports requesting an increase in price and extensions of the schedule. The city reviewed the reports and met with Graham regarding these reports. The city refused to issue a

certificate of substantial completion, and Graham left the job site. Graham sued the city for breach of contract. The city filed a counterclaim which included a third-party petition against Carollo. Three years after the suit filing, the city filed a plea to the jurisdiction. The trial court denied the plea as to the breach of contract and attorney fee claims and the city appealed.

Under Chapter 271 of the Texas Local Government Code's waiver of immunity for goods/services contracts, contract damages are limited to: (a) balance due including increased costs from owner caused delays; (b) change orders; (c) attorney's fees; and (d) interest. TEX. LOC. GOV'T CODE § 271.153. The chapter does not waive a contractor's defense, but does require a contractor to comply with the adjudication methods found in the contract. *Id.* §§ 271.154-.155. The city argued that it was not responsible for owner-caused delays because the delays were allegedly caused by Carollo, an independent contractor. The court held a fact issue exists because Carollo was listed as an "Owner Representative" in the agreement. The court also held (1) the city's thirty and sixty-day notice of claim requirements are prohibited by Section 16.071 of the Texas Civil Practice and Remedies Code; and (2) the city did not tell Graham it missed the notice of claim deadline but instead worked through the claim dispute. These are permissible under Section 271.155. The court compared this case to a recent contract case where the city did notify a contractor of the lateness of their claims. *See Mission Consol. Indep. Sch. Dist. v. ERO Int'l, LLP*, 579 S.W.3d 123, 129 (Tex. App.—Corpus Christi 2019, no pet.). Finally, the court held that the contractor's request for attorney's fees was allowed because Section 271.153 states that fair and equitable attorney's fees are recoverable. The plea was properly denied.*

June 2020

Note: Included cases are from May 11, 2020 through June 10, 2020.

Elections: *In re State*, No. 20-0394, 2020 WL 2759629 (Tex. May 27, 2020). In this case, the attorney general filed a lawsuit directly with the Supreme Court, claiming that the fear of contracting COVID-19 is not a "disability" that would allow a voter to quality for a mail-in ballot. The attorney general asked that the court issue a writ of mandamus to five county clerks and election administrators to stop them from "misinforming the public to the contrary and improperly approving applications for mail-in ballots."

Texas voters can ask for mail-in ballots only if they are 65 years or older, have a disability or illness, will be out of the county during the election period, or are confined in jail. Texas election law defines disability as a "sickness or physical condition" that prevents a voter from appearing in person without the risk of "injuring the voter's health."

The court agreed with the attorney general that fear of contracting the virus, by itself, isn't enough for a voter to request a mail-in ballot. However, it declined to issue the writ of mandamus the attorney general requested.

In issuing its opinion, the court stated: "We agree with the State that a voter's lack of immunity to COVID-19, without more, is not a 'disability' as defined by the Election Code. But the State

acknowledges that election officials have no responsibility to question or investigate a ballot application that is valid on its face. The decision to apply to vote by mail based on a disability is the voter's, subject to a correct understanding of the statutory definition of 'disability.' Because we are confident that the Clerks and all election officials will comply with the law in good faith, we deny the State's petition for writ of mandamus."

Vested Rights: *River City Partners, Ltd. V. City of Austin*, No. 03-19-00253-CV, 2020 WL 3164404 (Tex. App.—Austin June 4, 2020) (mem. op.). This appeal arises from a dispute over a City of Austin ordinance that limits the size of retail development in the Barton Springs Zone of Austin.

The property in question was annexed by the City of Austin in 1985. At the time of annexation, the property did not have a permanent zoning classification in place. On the recommendation of the city's land-development office, the city council made permanent zoning classification for several properties, including the property in question, contingent on meeting floor area ratio (FAR) standards more stringent than required by the city's general zoning ordinance.

In 1987, River City's predecessor in title applied to rezone the property to the "community commercial" classification. At the time, the city's zoning regulations for that classification set a 1:1 FAR. The city conditioned its approval on the owner impressing the land with a restrictive covenant that, among other things, limited development to no more than 0.2:1 FAR. The owner executed and recorded the requested covenant (1986 Covenant) and the city reclassified the property to community commercial. In April 2003, the property owner applied to the city for approval to create an eight-lot commercial subdivision. While the application was pending, the city council enacted the Barton Springs Zone ordinance (BSZ Ordinance), which designates twenty-two activities as retail uses and provides that a principal use and its accessory uses may not exceed 50,000 square feet of gross floor area. In 2004, the city approved the plat application and issued a final subdivision plat (2004 Subdivision Plan) with plat notes that provided that the development on the lots will be limited to 65 percent impervious cover with a maximum FAR not to exceed 0.2:1 pursuant to the 1986 restrictive covenant.

River City subsequently purchased six of the lots and in 2017 applied for permission to construct a 72,272 square foot automobile dealership and 14,866 square foot service center that exceeded the BSZ Ordinance limits on use size. River City sought an exemption on the ground that the BSZ Ordinance conflicted with the 1986 Covenant. The city initially agreed and provided that the project was entitled to rights granted in the 1986 Covenant and would not be subject to the requirements of the BSZ Ordinance. Seven months later the city reconsidered, finding that the 1986 Restrictive Covenant was not applicable. River City sued to enjoin the city from enforcing the ordinance and sought relief under the Uniform Declaratory Judgement Act (UDJA). The city filed a plea to the jurisdiction. The trial court sustained the plea and dismissed River City's claims. River City appealed, seeking a declaration that: (1) Chapter 245 of the Local Government Code prohibits the city from enforcing the BSZ Ordinance; (2) River City's application fits into one of the ordinance's exemptions; or (3) the city should be estopped from applying the BSZ Ordinance.

The court first considered whether the 1986 Covenant or the 2004 Subdivision Plat constitutes a permit application sufficient enough to invoke Chapter 245's protections. The court found that

the 2004 Subdivision Plat constitutes a permit under Chapter 245, and because the subdivision plat application was filed before the BSZ Ordinance's effective date, vested rights attached to the project on the filing of the application.

The court then considered whether the BSZ Ordinance was exempt from Subsection 245.004(2), which excludes from the requirements of Chapter 245, preexisting municipal zoning regulations that do not affect, among other things, lot size, lot dimensions, lot coverage, or building size or that do not change development permitted by a restrictive covenant required by a municipality. Construing the BSZ Ordinance in the context of the city's entire land development code, the court determined that River City failed to show that the BSZ Ordinance affects building size.

Additionally, the court concluded that because the 1986 Covenant does not authorize River City to use the land as a car dealership and service center without size restrictions, River City failed to show that the BSZ Ordinance changes development permitted by the covenant. Accordingly, the court found that the trial court did not have jurisdiction under Chapter 245. Finally, the court declined to remand the case back to district court to allow River City an opportunity to amend its pleadings so as to cure jurisdictional effect. The court found that River City had received a reasonable opportunity to amend its pleadings after the city filed its plea to the jurisdiction, and that the amended pleading still did not allege facts that would constitute a waiver of immunity.

F-5 Employment Termination Reports: *McCall v. Hays Cty. Constable Precinct Three*, No. 03-18-00355-CV, 2020 WL 2739868 (Tex. App.—Austin May 21, 2020) (mem. op.). In this appeal, the court affirms the trial court's order finding that a law enforcement officer's termination was correctly categorized as a "general discharge."

Brian McCall was a volunteer reserve officer for Hays County Constable Precinct Three (Constable). His employment with the Constable was terminated after an investigation revealed that he had provided and failed to prevent others from providing his 18-year old girlfriend, Vivian Sanchez, with alcohol, and that he had failed to return his equipment when requested to do so. The Constable filed an employment termination report (F-5 Report) with the Texas Commission on Law Enforcement (TCOLE) stating that McCall was terminated with a "general discharge." McCall filed an administrative appeal seeking to correct the "general discharge" to an "honorable discharge." The administrative law judge (ALJ) concluded that the Constable had established by a preponderance of evidence that McCall's termination was appropriately categorized as a "general discharge" and should not be changed to "honorable discharge." McCall appealed the ALJ's order in district court. The district court affirmed the ALJ's order. McCall appealed.

The court determined that McCall's explanation for never objecting to allowing others to provide alcohol to his girlfriend failed because the doctrine of in loco parentis did not permit McCall's mother to authorize Sanchez's drinking. The court also determined that the ALJ was not authorized or required to determine whether the Constable met the requirements of Chapter 614 of the Government Code in the F-5 hearing as an F-5 hearing is a proceeding to contest information in an employment termination report and not a proceeding to challenge disciplinary action. Accordingly, the court affirmed the order denying McCall's petition to correct the "general discharge" in his F-5 Report to an "honorable discharge."

Tort Claims Act: *City of San Antonio v. Hurón*, No. 04-19-00570-CV, 2020 WL 3065426 (Tex. App.—San Antonio June 10, 2020) (mem. op.). In this appeal, the court determines that although the city received no formal notice of a claim, the city had actual notice of the claim under Section 101.101(c) of the Texas Tort Claims Act.

David Arredondo was riding his bicycle westbound on Sioux Street shortly before midnight when he failed to stop at a stop sign, and rode across the unlit intersection. Police Officer Botello, driving southwest on another road, struck Arredondo with his vehicle, and Arredondo died at the scene. City investigators and a supervisor were dispatched to scene where they took a statement from Officer Botello regarding the accident and photographed and took videos of the scene. Thereafter, they filed their reports. Thirteen months after the accident, Arredondo's sisters, Hurón and Rico, sued the city for wrongful death asserting that the officer was negligent and grossly negligent. The city, in its plea to the jurisdiction, argued that immunity was waived because it did not receive formal notice of the sisters' claims within the ninety-day notice period required under the city's charter and it had no actual notice of its alleged fault within the notice deadline. The sisters did not present evidence of formal notice, but presented evidence of actual notice in the form of the city-generated reports. The trial court denied the city's plea, and the city filed an interlocutory appeal.

Under the Texas Tort Claims Act, actual notice exists only when a governmental unit has subjective awareness that its fault, as ultimately alleged by the claimant, produced or contributed to the claimant's injuries. To determine if there was legally sufficient evidence to support a finding that Officer Botello was not maintaining proper lookout at the intersection at the time of the accident in violation of his duty, the court reviewed the city-generated reports submitted into evidence. The court concluded that the vehicle accident report or loss notice completed by Officer Botello was legally sufficient to support such a finding. As a result, the court found that the city had timely notice of its fault in producing or contributing to Arredondo's death.

City Charter: *Suarez v. Silvas*, No. 04-19-00836, 2020 WL 2543311 (Tex. App.—San Antonio May 20, 2020). This appeal arises from a decision by councilmembers of the City of Converse to declare that Silvas, a councilmember elected to Place 4 in the city, had forfeited her position on council for violating a provision of the city charter.

The Converse City Charter provides that except for inquiries and investigations into the official conduct of a city department, agency, office, officer or employee, the mayor and all councilmembers shall deal with city officers and employees who are subject to the direction of the city manager solely through the city manager. The charter further provides that a councilmember or the mayor shall forfeit his office if he or she violates any provision of the charter. In preparation for an October 15, 2019, city council meeting, John Quintanilla, the city's director of development services, submitted to council a report of total permits and inspections completed for a specific time period. Silvas contacted the city manager and asked that Quintanilla contact her regarding the report. Silva asked Quintanilla if the report included data on commercial reports. What transpired after is disputed. In an email to the city manager, Quintanilla stated that Silvas requested that he run a report for the last five fiscal years and conduct an analysis for discussion at the upcoming council meeting. Silvas testified that

Quintanilla voluntarily offered to run the five-year report and denied asking him to perform an analysis or that she even requested such an analysis. On October 22, 2019, the mayor called a special meeting of council with the sole item on the agenda being a closed meeting under the personnel exception "to hear a complaint or charge against . . . Silvas." At the end of the meeting, one of the councilmembers moved that council forfeit Silva's position on the council for violating the city charter provision because Silvas gave a directive to a city employee subject to the city manager. The decision was solely based on the "directive" referenced in Quintanilla's email.

Silvas filed suit seeking declaratory judgment or injunctive relief to compel a governmental official to cease ultra vires activity and comply with statutory or constitutional provisions. She also sought a temporary restraining order and temporary injunction to stop the city manager and city secretary from listing Place 4 on the council as vacant and a notice that council was accepting applications for Place 4. The trial court granted a temporary restraining order. Before the trial court's hearing on the temporary injunction, council held another special meeting to reconsider its declaration that Silvas forfeited her position on city council. At the conclusion of the temporary injunction hearing, the trial court enjoined the city, the mayor, the remaining councilmembers, the city manager, and the city secretary (collectively, appellants) from taking any action to obstruct, hinder, or remove Silvas from her duly elected office or blocking her access to city-issued electronic accounts and key cards. Eventually, the trial court denied the city's plea. The appellants appealed.

The court first looked at whether a city charter is an ordinance or statute for purposes of determining whether the charter's forfeiture provision was lawful under the Uniform Declaratory Judgment Act. The court determined that the trial court had erred in denying the plea to the jurisdiction as to Silvas's claims seeking declarations involving the construction or validity of the charter because a city charter is a city's constitution and not a statute or ordinance. Thus, injunctive relief was precluded. The court then looked at whether Silvas had alleged a proper ultra vires claims. The court found that she had alleged a proper ultra vires claim and was entitled to prospective injunctive relief against all the appellants, other than the city. The court also found that the appellants' actions were not protected by legislative immunity as the actions taken to enforce the city charter forfeiture provision were non-legislative acts. Finally, the court rejected the Silva's challenge to the constitutionality of the city charter under the Open Meetings Act, finding that injunctive relief was not available in this instant case. Accordingly, the court remanded the case to trial court for further proceedings.

Nonconforming Use: *Tejas Motel, L.L.C. v. City of Mesquite*, No. 05-19-00667-CV, 2020 WL 2988566 (Tex. App.—Dallas June 4, 2020) (mem. op.). In this appeal, the court affirms the trial court's order granting the city's plea to the jurisdiction in a case involving the amortization of a nonconforming use.

In 2006, Tejas acquired the property on which Tejas Motel is located and has been in operation since 1970. The use of the property as a motel was initially authorized under the city's 1973 Comprehensive Zoning Ordinance, but the continued use of the property as a motel became a nonconforming use when the zoning ordinance was amended in 1997. The city did not specifically address nonconformance until April 2018, when it passed an ordinance changing the

manner in which the city's board of adjustment (BOA) could amortize nonconforming properties. The BOA scheduled and held a public hearing in June 2018, where it determined that Tejas Motel's continued operation as a nonconforming use would adversely affect other nearby properties. At the hearing, Tejas agreed to the amortization of the property provided that it could cease operations or bring the motel into compliance by May 1, 2019. After the hearing, Tejas's attorney reviewed and edited a draft of the BOA's decision and electronically signed that draft before Tejas and the city jointly submitted it to the BOA on July 30, 2018. The BOA executed the decision on July 31, and the city emailed the decision to Tejas's attorney the following day.

In November, three months after the BOA's decision, Tejas appealed the decision asserting the following causes of action: (1) the decision was void based on a Texas Open Meetings Act violation; (2) declaratory judgement that the city's ordinances are unconstitutional as applied to Tejas and otherwise invalid; (3) a claim for monetary judgement based on the allegation that the city's ordinances were unconstitutional as applied to Tejas; and (4) a claim for declaratory relief based on ultra vires actions taken by the BOA. The city filed a plea to the jurisdiction and a conditional summary judgement motion as to the Open Meetings Act claim. Tejas responded to the motion for summary judgement, but two days prior to the hearing on the motions, Tejas amended its petition adding new claims against the BOA members in their official capacities, and a petition in intervention on behalf of a frequent guest of the motel seeking relief for the city's alleged violation of the Open Meetings Act. The day before the hearing, Tejas filed a supplement to its amended petition and a response to the city's plea, and within its response, requested a continuance to allow it to conduct additional discovery related to when the BOA filed its minutes on its hearing. The city objected to the amended petition and supplement as untimely. A hearing was held, but no record was made. Shortly thereafter, the trial court granted the city's plea in its entirety, dismissed Tejas's claims for lack of jurisdiction, and denied the city conditional summary judgement motion as moot. Tejas appealed.

The court first considered the timeliness of the Tejas appeal challenging the BOA's decision. The court determined that because Tejas did not timely appeal the BOA decision within the statutorily-required 10 days after the decision is filed with the BOA, the trial court lacked jurisdiction over Tejas's state-law claims, including the Open Meetings Act claim and the as-applied constitutional challenges. The court next examined whether Tejas had any viable federal takings claim. The court determined that Tejas did not have a vested property interest in maintaining a nonconforming use as Tejas purchased the property long after it became a nonconforming use and it had no reasonable investment-backed expectations in continuing that use. Finally, the appellate court determined that the trial court did not abuse its discretion by denying Tejas's request for a continuation in order to conduct discovery as Tejas failed to specify what discovery it sought and provided no information about the steps it had taken to pursue discovery. Accordingly, the trial court's order granting the city's plea and dismissing Tejas's claims is affirmed.

Immunity: *Texas Dep't of Transp. v. Ives*, No. 05-18-01527-CV, 2020 WL 2715367 (Tex. App.—Dallas May 26, 2020) (mem. op.). [Note: On the court's own motion, the court withdrew its original opinion and judgement from April 20, 2020, and substituted this new opinion and corresponding judgement in its place. The court reverses the trial court's order, grants the city's

plea to the jurisdiction, dismisses Rodriguez's claims for want of subject matter jurisdiction, and remands the case to the trial court for further proceedings consistent with this opinion.]
In this appeal, the court found that the Texas Department of Transportation's (TxDOT) immunity was not waived under the Texas Tort Claims Act (TTCA) in a personal injury case.

Ives was driving his car in Collin County when he ran out of gas. He left his car on the shoulder of the road, and as he walked in the grass along the road toward a gas station, he fell into a drop inlet grate and badly injured his leg. TxDOT owned the drop inlet grate. An engineer for TxDOT testified that the area where Ives walked was intended to facilitate water drainage and was not intended for pedestrian traffic.

After a jury trial, TxDOT filed a motion for judgment notwithstanding the verdict, arguing it retained its sovereign immunity. The trial court denied the motion. TxDOT appealed, arguing that it retained its sovereign immunity because there was no evidence that it had the requisite actual knowledge of the alleged danger posed by the drop inlet grate.

The court first addressed whether there was evidence that TxDOT had actual knowledge of the alleged danger posed by the grate. To show that TxDOT had actual knowledge that the drop inlet grate was unreasonably dangerous, Ives relied on google images showing three orange traffic control panels on the side of the road near a drop inlet grate to show that TxDOT attempted to warn of the dangerous condition, make it safe, or maintain it in a reasonably safe manner by placing the panels on either side of the grate where he fell. However, Ives did not identify the location of the panels, and did not know why they were placed where they were when the image was taken. Further, a TxDOT engineer opined that the panels were used by maintenance crews to divert traffic to another lane in the event of a flood, not to warn pedestrians of the grate. He also opined that once the excess water cleared, someone saw the panels on the road and tossed them to the side. The appeals court agreed with TxDOT finding that there was no evidence that TxDOT had actual knowledge of the alleged danger posed by the drop inlet grate.

The court then addressed whether the grate constituted a special defect which only requires proof that the governmental unit should have known of the dangerous condition. The court determined that because the grate was located in the grass a couple of feet off the roadway, it did not pose a threat to an ordinary user travelling on the road in the normal course of travel. Ives walking beside the road in the grass was not an ordinary user on the road. The court, therefore, concluded that the grate was not a special defect, in the same class as an excavation or obstruction on the roadway.

Because the court found that there was no evidence showing TxDOT had the actual knowledge required to waive its immunity under the TTCA and that the grate was not a special defect, the court did not consider whether TxDOT is immune from suit because its conduct fell within the discretionary function exception to the TTCA's waiver of immunity. As such, the court reversed the trial court's judgment, and dismissed the case.

Subdivision Regulations: ***Korr, L.L.C. v. County of Gaines*****, No. 11-18-00130-CV, 2020 WL 2836491 (Tex. App.—Eastland May 29, 2020) (mem. op.)**. This case involves a claim under the Uniform Declaratory Judgment Act (UDJA) regarding an interpretation of a county regulation dealing with plats. The court of appeals held that the UDJA cannot be used if there is no ripe injury.

Korr, a land developer in the county, filed suit against the county under the UDJA based on a county regulation that requires a bond to cover the cost of electrical infrastructure prior to a plat being reviewed. Korr argued that the provision was preempted by the Public Utility Commission's authority. Korr presented a plat that had already been approved and indicated but did not state Korr had an interest in this and other properties in the county. The county filed a plea to the jurisdiction, which was granted. Korr appealed.

Korr presented no proof of Korr's ownership of land in the county or active plat applications before the county. In addition, the listed plat had not required the type of bond at issue in the claim. Korr argued that despite not having a ripe injury, the UDJA should still allow the suit, because Korr wished to develop property in the future. The court of appeals reviewed the requirements for standing in a UDJA claim, including the ripeness of a controversy. The court held that a ripe controversy is still required and noted Korr's arguments in the trial court were all based on "hypothetical" situations. The court held that it could not issue an advisory decision and affirmed the trial court's dismissal.*

Contractual Immunity: ***City of Pharr v. Cabrera*****, No. 13-18-00559-CV, 2020 WL 2988641 (Tex. App.—Corpus Christi June 4, 2020) (mem. op.)**. Gabriel Cabrera, an employee with the City of Pharr, was terminated by the city and the city refused to pay Cabrera accrued sick leave. Cabrera alleged that he was entitled to be paid for his accrued sick leave based upon the city's personnel policy, which provided for payment of accrued sick leave for certain qualified retirees. Cabrera sued the city, arguing that the city's personnel policy constituted a contract between him and the city for the payment of benefits. The city filed a plea to the jurisdiction on the grounds of sovereign immunity, which was denied by the trial court. The city appealed.

On appeal, the first issue considered by the court was whether the city entered into a unilateral contract with Cabrera by passing the ordinance adopting the personnel policy. The city's personnel policy contained a disclaimer, which Cabrera signed, indicating that the manual was not a contract. The court pointed out that Texas law disfavors employee manuals forming contractual obligations, particularly when there is a specific disclaimer. Due to the disclaimer language, and because the city's policy did not specify compensation for Cabrera's classification or specify hours of service, the court held that the city did not waive sovereign immunity under Local Government Code Section 271.152, and therefore, the trial court erred by denying the city's plea to the jurisdiction. The trial court's judgment was reversed, and the court dismissed all claims against the city for want of jurisdiction.

Texas Tort Claims Act: ***City of Kingsville v. Dominguez*****, No. 13-19-00236-CV, 2020 WL 2776543 (Tex. App.—Corpus Christi May 28, 2020) (mem. op.)**. This is a motor vehicle accident case under the Texas Tort Claims Act (TTCA) where the Corpus Christi Court of Appeals reversed the denial of a plea to the jurisdiction and dismissed the plaintiff's claims.

Dominguez alleged that Oscar Mendiola, while operating a city fire truck, failed to yield the right of way at a signal light which resulted in a collision with Dominguez's vehicle. The record demonstrated the fire truck was traveling behind an ambulance and the truck's siren and emergency lights were both activated. Mendiola slowed as he approached, visually confirmed traffic had stopped, then proceeded. According to the official accident report, the investigating officer concluded that the fire truck driver was facing a red light and failed to yield the right of way to Dominguez. The officer also concluded that Dominguez "disregarded an Emergency Vehicle while operating emergency lights." The officer did not issue a citation to either driver. The city filed a plea to the jurisdiction based on the emergency responder exception of the TTCA. The plea was denied and the city appealed.

Part of the policy behind the emergency responder exception is because imposing "liability for a mere failure in judgment could deter emergency personnel from acting decisively and from taking calculated risks" and would "allow for judicial second-guessing of the split-second and time-pressured decisions emergency personnel are forced to make." However, compliance with the requirements of Chapter 546 of the Texas Transportation Code does not relieve the driver of liability if they act recklessly (i.e. he understood the risks but did not care about the result). The city argued Mendiola acted to minimize the risk to others as he entered the intersection, thereby demonstrating that Mendiola "clearly did care about the result" of his actions.

Dominguez responds that Mendiola's actions of entering the intersection against a red light without stopping were evidence of recklessness. The court held the fire truck driver slowed below the speed limit, visually confirmed stopped vehicles, had the lights and sirens on, and therefore, did not act recklessly. As a result, the plea should have been granted.**

<u>May 2020</u>

Note: Included cases are from April 11, 2020 through May 10, 2020.

Eight Liners: *City of Fort Worth v. Rylie*, No. 18-1231, 2020 WL 2311941 (Tex. May 8, 2020). In this case, the Texas Supreme Court determined the issue of constitutionality of eight-liners must be addressed in deciding the case. The court remanded the case to the Second Court of Appeals to address the issue.

In Texas, lotteries are unconstitutional with limited exceptions. Lotteries include activities that involve, at a minimum, (1) the payment of consideration (2) for a chance (3) to win a prize. There is a "fuzzy animal exception" to the prohibition on lotteries. A machine that would otherwise constitute a "gambling device" is excluded from the definition if (1) it is used "solely for bona fide amusement purposes," (2) it rewards only "noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items," and (3) the reward for "a single play of the game or device" is worth no more than the lesser of $5 or ten times the cost of the single play. Tex. Penal Code § 47.01(4)(B).

Soon after the legislature adopted the fuzzy-animal exception, owners of machines known as "eight liners" began taking the position that their machines fall within the exclusion's protection.

Eight liners generally operate like a video slot machine and award coupons based on play. The player can then exchange the coupon for a "prize" or for a "right of replay," meaning credits to use on a different machine.

The eight liner operators admit that their eight liners qualify as "gambling devices," but they contend that they operate their machines in a way that brings them within the fuzzy-animal exception. The city argued eight liners are unconstitutional lotteries and therefore not governed by Chapter 2153 because it does not apply to unconstitutional devices. The city did not contest that the operators' eight liners qualify as coin-operated machines, but instead contended that Chapter 2153 does not apply to them at all if they are unconstitutional or illegal.

The Texas Supreme Court agreed the issue needed to be decided. The court determined the issues were: (1) whether the eight liners constitutionality and legality affect Chapter 2153's applicability, and if so, (2) whether eight liners are constitutional and legal. On the first point, the court concluded that constitutionality and legality matter because Chapter 2153 does not apply to or regulate unconstitutional or illegal machines. The operators argued that Section 2153.003 merely clarifies that, although Chapter 2153 applies to and regulates unconstitutional and illegal machines, it does not thereby make them constitutional or legal. Tex. Occ. Code § 2153.003. As they construed it, although the state may license and tax machines, the Chapter does not provide a shield of legality to someone charged with operating an illegal machine. They argued their machines are not illegal because the state licenses their machines under Chapter 2153.

The city contended the eight liners are unconstitutional or illegal, therefore, the fact that the state has licensed and taxed them would not change the meaning of Section 2153.003 any more than it could change the meaning of the constitution's requirement that the legislature prohibit lotteries. The court found that this issue needed to be addressed. If the legislature exercises power the constitution says it doesn't have—that is, if it permits lotteries when it only has the power to prohibit them—the court takes the constitution's word over that of the legislature. It concluded Chapter 2153 does not apply to unconstitutional or illegal machines.

The Court did not address the second issue of whether or not eight liners are unconstitutional. Instead, it remanded the issue to the Second Court of Appeals to decide in the first instance.

Contractual Immunity: *San Antonio River Auth. v. Austin Bridge & Road, L.P.*, No. 17-0905, 2020 WL 2097347 (Tex. May 1, 2020). In this construction contract dispute, the Texas Supreme Court held Chapter 271 of the Texas Local Government Code waives immunity for arbitration clauses.

The San Antonio River Authority (Authority) hired Austin Bridge and Road L.P. (ABR) to perform repairs of the Medina Lake Dam. Disagreements about the scope of work and payment arose. ABR triggered the arbitration provision in the contract. When the arbitrator denied the Authority's assertion it was immune, it sued ABR in district court seeking a declaration the Authority lacked the ability to waive immunity for arbitration. The trial court denied the Authority's summary judgment. The court of appeals reversed in part, holding that while the arbitration provision was enforceable, only a court could determine immunity was waived. The Authority appealed.

Until the waiver in Chapter 271 existed, governmental immunity shielded a local government from enforcement of its contract obligations. Currently, Section 271.154 expressly provides that arbitration agreements are enforceable. The term "Adjudication" in Chapter 271 means "the bringing of a civil suit and prosecution to final judgment . . . and includes the bringing of an authorized arbitration proceeding…." Further, an arbitration is an "adjudication procedure" under the plain meaning of the statute. However, immunity is waived only to the extent authorized by Chapter 271. As a result, the Authority was authorized to agree to arbitrate disputes arising from its contract with Austin Bridge, within Chapter 271's expressed limits. However, the Texas Supreme Court agreed with the court of appeals and held the judiciary has a non-delegable duty to determine whether immunity has been waived. Because immunity bears on the trial court's jurisdiction to stay or compel arbitration, and to enforce an arbitration award in a judgment against a local government, a court must decide whether governmental immunity is waived. An agreement to arbitrate is unenforceable against a local government to the extent it purports to submit immunity questions to an arbitrator.

The court then analyzed the contract and determined that while the contract was for the benefit of a river district, it also provided a benefit to the Authority and the Authority is the entity that entered into the contract. As a result, in this situation, the Authority's immunity is waived. The court held the decision of whether ABR is seeking actual damage or consequential damages is not factually developed, although, ABR at least pled some possibility the damages sought are actual damages.*

Whistleblower Act: *City of Madisonville v. Sims*, No. 18-1047, 2020 WL 1898540 (Tex. April 17, 2020). This is a Texas Whistleblower Act case where the Texas Supreme Court held the 90-day deadline for filing suit is jurisdictional.

David Sims was a police officer in the Madisonville Police Department. Sims received information that his boss, Sergeant Jeffrey Covington, planned to plant drugs in Covington's ex-wife's car to assist in his ongoing child-custody dispute. Sims and Covington had a bad history, both before and during Covington's time at Madisonville PD. Sims told the Chief of Police, Charles May, but Chief May dismissed the information. Sims later discovered, by using an administrator access login, that Covington was compiling an "investigative file" on Sims presumably to have him fired. Sims was "dishonorably discharged" shortly afterwards for violating the department's computer-use policy. The dishonorable designation was later changed to honorable by a State Office of Administrative Hearings (SOAH) administrative law judge. Sims sued under the Texas Whistleblower Act after the SOAH determination (which was past the 90-day deadline to file suit). The city filed a plea to the jurisdiction, which was granted. The court of appeals reversed, holding the deadline was not jurisdictional. The city appealed.

Texas Government Code Section 311.034 of the Code Construction Act makes statutory prerequisites to suit jurisdictional as to claims against governmental entities. The Texas Supreme Court has held "the term 'statutory prerequisite' refers to statutory provisions that are mandatory and must be accomplished prior to filing suit." When a statutory prerequisite to suit is not met, "whether administrative (such as filing a charge of discrimination) or procedural (such as timely filing a lawsuit)," the suit may be properly dismissed for lack of jurisdiction.

The Whistleblower Act clearly and unambiguously waives sovereign immunity to allow plaintiffs to obtain relief, but an employee with a Whistleblower Act claim must strictly abide by the procedural limitations set out in the Act to obtain relief, including the statute of limitations. The Act states the employee "must sue" within ninety days. The ninety-day filing deadline is thus a jurisdictional statutory prerequisite to suit. The plea should have been granted.*

Texas Tort Claims Act: *Reyes v. Jefferson Cty.*, No. 18-1221, 2020 WL 1898542 (Tex. Apr. 17, 2020). This is a case about notice under the Texas Tort Claims Act (TTCA).

Reyes sued Jefferson County under the TTCA for injuries he allegedly sustained in an automobile accident with a county law enforcement officer. Within six weeks of the accident, Reyes's attorney contacted the county to file a claim. The county instructed Reyes's attorney to direct all claims to the county's authorized third-party administrator. Reyes's letter to the third-party administrator: (1) notified the county of Reyes's negligence claim; (2) identified the date of the accident, described it as a "crash," and named the county employee involved; (3) requested the crash reports and copies of statements Reyes had made; and (4) expressed interest in "a quick and amicable resolution of this claim."

The appellate court held Reyes did not comply with the formal-notice requirement in Section 101.101(a) of the Civil Practice and Remedies Code because his letter to the third-party administrator "failed to provide a place of the incident and failed to 'reasonably describe' the incident." The appellate court also concluded the county lacked actual notice within the meaning of Section 101.101(c) because the county's investigation failed to uncover any negligent conduct, so it had no knowledge "that it might have been at fault."

Section 101.101 requires "notice of a claim" to include specific information, unless the governmental unit has "actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged."

The court declined to consider if Reyes's letter to the third-party administrator was sufficient to constitute formal notice because the actual-notice exception was satisfied as a matter of law. Actual notice exists only when the governmental unit has knowledge of: (1) a death, injury, or property damage; (2) the governmental unit's alleged fault producing or contributing to the death, injury, or property damage; and (3) the identity of the parties involved. Actual notice means the governmental unit is subjectively aware that it may be responsible for death, injury, or property damage in the manner ultimately alleged by the claimant.

In this case, the county and its authorized claims administrator knew about Reyes's allegations that a specifically-identified county employee had injured him in an automobile accident. Reyes's communications with the third-party administrator coupled with its acknowledgment, investigation, and denial of his claim establish the county's subjective awareness that Reyes was claiming the county was at fault in the manner ultimately alleged in this lawsuit. The actual-notice standard does not require proof that the county believed it was liable. Because of that, the Texas Supreme Court reversed the appellate court's ruling.

Red Light Cameras: *Van Der Grinten v. City of Sugarland*, No. 01-17-00626-CV, 2020 WL 2201100 (Tex. App.—Houston [1st Dist.] May 7, 2020) (mem. op.). In this constitutional challenge to red-light camera case, the First Court of Appeals held the plaintiffs were required to exhaust administrative remedies before bringing their constitutional-takings claim.

The plaintiffs sued the City of Sugarland. Two of the plaintiffs had paid a civil penalty for violating a city ordinance for red-light infractions caught on camera. They claimed they paid under "duress." One of the plaintiffs did not pay the penalty, but claimed the city would put a hold on his registration for failure to pay. The plaintiffs sought declaratory judgment, injunctive relief, and reimbursement for penalties. The city filed a plea to the jurisdiction, which the trial court granted. The plaintiffs appealed.

The court found the two plaintiffs who paid the penalty paid it voluntarily. Their claims could not proceed against the city because the plaintiffs did not exhaust their administrative remedies. Therefore, the government retained immunity from suit for their claims for reimbursement.

Additionally, they could not bring a takings claim because a litigant must use his administrative remedies rather than filing a claim in district court. The district court did not have subject-matter jurisdiction because the plaintiffs failed to exhaust their administrative remedies.

The third plaintiff who did not pay the penalty could not assert a takings claim, either, because he did not pay the penalty. He presented no evidence that the city would put a hold on his registration for failure to pay. He did not properly plead a takings claim.

The court affirmed the trial court's grant of the city's plea to the jurisdiction.

Texas Tort Claims Act: *In re City of Houston*, No. 01-19-00805-CV, 2020 WL 2026978 (Tex. App.—Houston [1st Dist.] Apr. 28, 2020) (mem. op.). The plaintiff in the case sued a City of Houston police officer for injuries arising from an automobile accident. The police officer (who was represented by the City of Houston's legal department) filed a motion to dismiss pursuant to Section 101.106(f) of the Texas Civil Practice and Remedies Code, asserting that he was acting in his capacity as an employee of the city and therefore the suit must be filed against the city. The officer attached a proposed final judgment dismissing the case. The draft judgment was entitled a final judgment, granted the motion to dismiss, and declared that it disposed of all parties and claims. On the same day, the plaintiff amended his petition to remove the officer and add the city as the defendant.

On June 3, 2019, the trial court signed the police officer's proposed final judgment, which provided that it "disposes of all parties and claims and is final and appealable." The judgment does not mention the city.

When the plaintiff tried to schedule depositions with the city, the city refused, citing the final judgment. The trial court amended the final judgment more than 30 days after it entered the judgment. The city filed a writ of mandamus with the First Court of Appeals on the grounds that the judge lacked plenary power to amend the final judgment because more than 30 days had passed after entry of the final judgment.

The appellate court agreed the trial court lacked authority to modify the judgment. First, the judgment was final. The judgment satisfies the first test for finality because it includes finality language stating "This order disposes of all parties and claims and is final and appealable." The plaintiff did not file any motions that would have extended the court's plenary power beyond 30 days. Therefore, the trial court could not amend the final judgment more than 30 days after its final judgment. The appellate court concluded that the trial court abused its discretion by modifying its final order when it had lost its plenary power.

Texas Tort Claims Act: *City of Sugar Land v. Gaytan*, No. 01-18-01083-CV, 2020 WL 2026374 (Tex. App.—Houston [1st Dist.] Apr. 28, 2020) (mem. op.). This is a Texas Tort Claims Act (TTCA) case where the plaintiff claimed the city was liable for his injuries when a police officer was directing traffic during a triathlon. The plaintiff was biking during the triathlon when a car hit him at an intersection. A city police officer was directing traffic at the intersection and at least one of them directed the car that hit the plaintiff to proceed through the intersection. The car proceeded and then paused in the lane of traffic, disregarding the officer's instruction, which then caused the plaintiff to collide with the car. Plaintiff alleged the city, in controlling traffic, was operating or using the motor vehicle for the purposes of the TTCA. The city filed a plea to the jurisdiction, which the trial court denied.

The city argued that the plaintiff's allegations did not contain an allegation that a city employee was operating a motor vehicle. The court analyzed cases out of other Texas appellate courts, which found that controlling traffic did not arise from the operation or use of a motor vehicle. The court found that the plaintiff's claims did not arise out of the operation or use of a motor vehicle. However, in doing so, the court noted it was not establishing a bright-line rule that a governmental employee must always be personally driving the motor vehicle to qualify for the waiver of immunity under the TTCA. Even assuming there is no bright-line rule, the plaintiff's claims did not allege that it was the officer who caused his injuries. The officer directed the car through; it was the car's failure to follow the officer's instruction and its pause that injured the plaintiff. The court overruled the trial court and granted the city's plea.

Annexation: *Comanche Peak Ranch, LLC v. City of Granbury,* No. 02-19-00412-CV, 2020 WL 1949628 (Tex. App.—Fort Worth Apr. 23, 2020) (mem. op.). In this annexation case the appellate court affirmed that the proper vehicle for challenging the city's annexation was a quo warranto proceeding because it is the proper way to challenge procedural faults with annexation.

The city initiated the process to annex the plaintiff's property prior to the effective date in H.B. 347, passed during the 2019 legislative session. The city sent the property owners proposals for "development agreements" for their agriculture-exempt properties that would postpone annexation if the property owners signed the agreements. The property owners dispute that the proposals met the requirements of the annexation statutes and that the failure to meet those standards render the annexation void.

The property owners filed suit challenging the annexation. The city filed a plea to the jurisdiction, which the trial court granted. The appellate court only addressed whether a quo

warranto proceeding was the proper vehicle to challenge the annexation because that disposes of all issues.

Generally, the only appropriate mechanism for challenging the validity of an annexation is a quo warranto proceeding, in which the State of Texas acts to protect itself and the good of the public generally, through the duly chosen agents of the state who have full control of the proceeding. The purpose of a quo warranto proceeding is to question the right of a person or corporation, including a municipality, to exercise a public franchise or office. The attorney general or a district or county attorney brings quo warranto proceedings in the name of the State of Texas. They serve the purpose of avoiding numerous successive suits by private parties attacking the validity of annexations, which could lead to different results

A quo warranto proceeding is the proper way to challenge procedural faults such as the adequacy of a service plan, lack of notice, lack of a quorum for hearing, and other deficiencies in the procedure of adopting the annexation ordinance. The determination of whether an individual landowner, as opposed to the state in a quo warranto proceeding, has standing to challenge annexation turns on whether the challenge attacks a city's authority to annex the area or merely complains of a violation of statutory procedure. The issue is whether the property owners' claims are based on a procedural defect in the annexation, or the city's exceeding its annexation authority as delegated by the legislature.

The property owners specifically complain that the development agreement did not: (1) guarantee the continuation of ETJ status and exemption from annexation; and (2) contain a property description. Regarding the continuation of ETJ status, the property owners complain the development agreement did not meet the requirement of Local Government Code Section 43.016(b) that has the language "may not annex . . . unless." However, the property owners confused being offered a development agreement with acceptance of the agreement. The property owners and the city did not reach an agreement; therefore, the adequacy of the development agreement is a defect in the procedure and must be brought in a quo warranto proceeding.

Likewise, the property owners' complaint regarding the insufficient property description is a defect in procedure. The law only requires an adequate legal description. The description the city used is the one it received from the properties' taxing entity, which meets that requirement.

Because the property owners did not accept the proposal and the parties never entered into a final agreement, all of the property owners' complaints are just about the procedure. Complaints about procedure must be brought in a quo warranto proceeding. Therefore, the appellate court affirmed the dismissal but modified the judgment to reflect that the dismissal is without prejudice to allow the claims to be brought in a quo warranto proceeding.

Short Term Rentals: *Anding v. City of Austin*, No. 03-18-00307-CV, 2020 WL 2048255 (Tex. App.—Austin Apr. 29, 2020) (mem. op.). This is a case challenging the constitutionality of the City of Austin's short-term rental (STR) regulations where the court of appeals affirmed summary judgement in favor of the city and reversed the plea to the jurisdiction as it applied to the municipal court judge.

Robert and Roberta Anding own a vacation house in the City of Austin that they rent out to others when they are not using the property. In an effort to avoid the city's STR ordinance, which applies to short-term rentals of periods of less than 30 consecutive days, the Andings entered into 30-day leases with multiple, unrelated lessees, who in turn entered into co-tenant agreements amongst themselves to grant to each other, in return for a reduction in the total lease cost, the right to exclusively occupy or use the house for portions of the 30-day term. The co-tenant agreement specified that the Andings were not parties to the co-tenant agreement.

In response to a complaint by a nearby homeowner, the city's code enforcement interviewed the occupants of the Andings' house, and, based on that information, issued the Andings with four administrative citations for operating without an STR license and violating the STR ordinance. The Andings paid the fines but challenged their validity in an administrative hearing process. The hearings officer upheld the fines, and the Andings appealed to city's municipal court. Judge Clervi affirmed the hearing officer's decision and denied the Andings' motion for a new trial. The Andings filed suit against the city seeking declaratory and injunctive relief related to the city's citations, asserting that the STR ordinance was unconstitutionally vague as it did not give fair notice that a lease violates the ordinance if some, any, or all of the tenants do not actually stay at the home for a continuous 30 days or if the tenants share the rent and periods of possession. They also sought mandamus relief to compel Judge Clervi to apply the law correctly. The Andings and the city filed cross motions for summary judgment on the Andings' constitutional claim, and Judge Clervi filed a plea to the jurisdiction challenging the request for mandamus relief. The district court denied the Andings' motion for summary judgement, granted the city's motion for summary judgement, and sustained Judge Clervi's plea to the jurisdiction. The Andings' appealed.

On appeal, the court found that the trial court had jurisdiction over the Andings' constitutional claim because the UDJA waives immunity for claims alleging that an ordinance is unconstitutional. However, the court determined that the STR ordinance gave fair notice of what conduct was subject to the ordinance. Applying the common and ordinary meaning of "rent" and "rental" and incorporating the city's code definition of "short-term rental use," the court concluded that the city's STR ordinance applied to the paid-for grant of occupancy or use of a residential dwelling for less than 30 consecutive days. Additionally, the court held that the city is not required to expressly list every fact pattern that would not be subject to the STR ordinance, and not doing so does not make the ordinance vague and does not invite the city to expand the scope of the ordinance beyond its plain language. Accordingly, the court denied the Andings' motion for summary judgement and upheld the city's motion for summary.

With respect to the mandamus claim, the court found that the trial court erred in sustaining Judge Clervi's plea to the jurisdiction because the court had jurisdiction over the request for mandamus relief. The court remanded the claim to the trial court for further proceedings on whether the Judge's actions were ministerial.

Contractual Immunity: *Elizabeth Benavides Elite Aviation, Inc. v. City of Laredo,* No. 05-18-01527-CV, 2020 WL 2044678 (Tex. App.—San Antonio Apr. 20, 2020) (mem. op.). This is a case involving a breach of contract claim where the court of appeals found that the City of

Laredo engaged in a governmental activity when it entered into a lease agreement with Elizabeth Benavides Elite Aviation, Inc. (Elite).

In 2006, Elite entered into a lease agreement with the city for the use of a tract of land at the Laredo International Airport solely for the purpose of storage and dispensing of aviation fuels for fueling aircraft. Elite was also required to construct a concrete fuel containment pad for the installation of aboveground fuel storage tanks. In 2019, Elite filed a breach of contract claim against the city. Elite's pleading alleged that the city was acting in a proprietary capacity when it entered into the lease with Elite, thereby waiving its immunity. In its plea, the city argued it was protected by governmental immunity. The trial court granted the city's plea and dismissed Elite's claim against the city. Elite appealed.

The court of appeals began its analysis with a discussion of the law surrounding the governmental/proprietary dichotomy under the Texas Tort Claims Act (TTCA), which expressly categorizes certain municipal activity as governmental or proprietary. Where it does not, the Supreme Court of Texas has articulated four factors to consider in determining whether an act is proprietary or governmental: (1) whether the city's act is mandatory or discretionary; (2) whether the act is intended to benefit the general public or the city's residents; (3) whether the city is acting on the state's behalf or its own behalf in undertaking the activity; and (4) whether the city's act is so related to a governmental function to render the act governmental even if it would otherwise be proprietary.

Although Elite's brief focused on the above four factors in arguing that entering into the contract was a proprietary activity, the court of appeals noted that it did not need to resort to those factors because the TTCA expressly lists "airports" as a governmental function in Section 101.0215(a)(10) of the TTCA. Further, the Supreme Court of Texas has explained that when determining whether governmental immunity applies to a breach-of-contract claim against a municipality, the nature of the contract governs the activity. Because the nature of the contract involved airports, a subject specifically defined as governmental, the court found that the activity was governmental. As such, the court concluded that the city engaged in a governmental activity when it entered into lease with Elite. Accordingly, the court held that the city was immune from suit and affirmed the trial court's order dismissing Elite's claim.

Immunity: *Texas Dep't of Transp. v. Ives*, No. 05-18-01527-CV, 2020 WL 1909999 (Tex. App.—Dallas Apr. 20, 2020) (mem. op.). This is a personal injury case in which the court of appeals ruled that the Texas Department of Transportation's (TxDOT's) immunity was not waived under the Texas Tort Claims Act (TTCA).

Ives was driving his car in Collin County when he ran out of gas. He left his car on the shoulder of the road and walked in the grass along the road toward a gas station. He fell into a drop inlet grate and badly injured his leg. TxDOT owned the drop inlet grate. An engineer for TxDOT testified that the area where Ives walked was intended to facilitate water drainage and was not intended for pedestrian traffic.

After a jury trial, TxDOT filed a motion for judgment notwithstanding the verdict, arguing it retained its sovereign immunity. The trial court denied the motion. TxDOT appealed, arguing

dismissal was warranted for two reasons: (1) the discretionary exception of the TTCA prevented waiver of sovereign immunity; and (2) there was no evidence TxDOT had the requisite actual knowledge of the alleged danger posed by the drop inlet grate.

The court of appeals first addressed TxDOT's second argument. Ives relied on a photograph showing three orange traffic control panels on the side of the road near a drop inlet grate to show that TxDOT attempted to warn of the dangerous condition or make it safe. In response, a TxDOT engineer opined that the panels were used by maintenance crews to divert traffic to another lane in the event of a flood, not to warn pedestrians of the grate.

The appeals court agreed with TxDOT finding that there was no evidence that TxDOT had actual knowledge of the alleged danger posed by the drop inlet grate; the devices were placed in that location to warn about the grate or make it safe; and TxDOT never received reports of prior injuries or the alleged dangerous condition. Because the court held that there was no evidence showing TxDOT had the actual knowledge required to waive its immunity under the TTCA, the court did not consider TxDOT's first issue. As such, the court concluded that the trial court lacked subject matter jurisdiction, reversed the trial court's judgment, and dismissed the case.

April 2020

Note: Included cases are from March 11, 2020 through April 10, 2020.

Insurance: *Farmers Tex. Cty. Mut. Ins. Co. v. Beasley*, No. 18-0469, 2020 WL 1492412 (Tex. Mar. 27, 2020). While not a governmental entity case, this case involves standing to sue under a personal injury protection policy (PIP) and the distinction made with incurred rates vs. list rates of the medical providers. This can affect not only litigation, but also those entities that are self-insured.

Beasley was injured in a car accident and his treatment displayed in the medical provider's invoices totaled $2,662.54. Beasley had health coverage with BlueCross BlueShield (BCBS) which negotiated a provider rate of $1,068.90. The medical providers did not attempt to recover or hold him liable for the difference. Beasley also had a PIP policy through Farmers Texas County Mutual Insurance Company (Farmers). The policy stated it would pay benefits because of bodily injury, including reasonable medical expenses. Beasley made a claim but sought the list/invoiced rates. Farmers paid Beasley $1,068.90. He sued for the difference alleging breach of contract and asserting the policy covers reasonable medical costs, regardless of any reductions the providers agreed to accept later. Farmers asserted the policy was for medical expenses *incurred*. The trial court granted Farmers' plea to the jurisdiction but the court of appeals reversed holding the breach of contract claim was sufficient to confer jurisdiction. Farmers appealed.

Standing is a requirement of jurisdiction and Beasley must establish an injury. Beasley was not harmed as the medical providers did not attempt to charge him for the difference. He was not able to claim any unreimbursed, out-of-pocket medical expenses. Nor does Beasley assert that any of his medical providers withheld treatment as a result of the adjusted bills. The fact Beasley felt personally aggrieved by the lack of payment does not mean he suffered an injury. [Comment:

yes, he actually made that argument.] Beasley also asserts Farmers impermissibly considered a collateral source in determining how much to reimburse BCBS's payments to Beasley's medical providers. But a health insurer's negotiated discounts do not constitute a collateral source of benefits to the insured in this context. Adjustments in the amount of charges to arrive at the amount owed is a benefit to the insurer (one it obtains from the provider for itself), not for the insured. As a result, the collateral source rule is inapplicable in Beasley's case. Beasley, therefore, was not able to establish standing to bring suit.*

Bond Requirements: *City of Conroe v. San Jacinto River Auth.*, No. 18-0989, 2020 WL 1492411 (Tex. Mar. 27, 2020). This is a case brought under the Expedited Declaratory Judgment Act (EDJA) involving proper compliance with bond requirements by the local government. The EDJA provides an "issuer" of "public securities" an expedited declaratory procedure to establish the "legality and validity" of public securities and "public security authorizations." Tex. Gov't Code § 1205.021.

The Lone Star Groundwater Conservation District was created to address concerns about inhabitants of an area and their reliance on groundwater drawn from the Gulf Coast Aquifer. In 2008, the conservation district required all large-volume groundwater users—including the cities—to develop and implement plans for reducing their usage substantially. Mandatory groundwater usage cutbacks took effect in January 2016. Respondent San Jacinto River Authority (SJRA), a legislatively-created conservation and reclamation district, developed a groundwater reduction plan (GRP) to draw surface water from Lake Conroe, treat the water, and sell it to large-volume users. SJRA issued seven series of bonds between 2009 and 2016 that had an outstanding principal balance of approximately $520 million. SJRA entered into bilateral GRP contracts with about 80 water-system operators. The GRP rates are governed entirely by contract. Several cities sued the conservation district and the suit expanded to include SJRA. Several cities asserted they would not pay. SJRA filed suit under the EDJA seeking a declaration regarding the contracts and rates. The cities opted into the suit, but then filed pleas to the jurisdiction alleging SJRA did not seek a declaration as to "the legality and validity" of a "public security authorization," but instead sought to litigate what are substantively suits on contracts that properly lie outside the statute. The trial court denied the pleas and the cities appealed. The intermediary court of appeals held primarily for SJRA and the cities appealed to the Texas Supreme Court.

The EDJA was enacted to "stop 'the age old practice allowing one disgruntled taxpayer to stop the entire bond issue simply by filing suit.'" The court went through an analysis of the EDJA and its purpose in considering jurisdiction and definitions. SJRA and the attorney general contend the GRP contracts, rate order, and rates themselves are public security authorizations because they are all connected to the bonds SJRA issued to finance the GRP project. The court first held the authority declaration concerns the legality and validity of SJRA's contracts with GRP participants, as GRP rate orders and rates are creatures of the contracts. As a result, the EDJA permits the trial court to exercise jurisdiction over this declaration. However, the court held the rate orders and rates lacked a proper connection with the bonds. Even though the rate order and rates may affect the amount SJRA is paid under the contracts, neither has an authorizing connection with the public securities. The EDJA treats execution of a contract to be connected but does not treat compliance with a contract as a public security authorization. As a result,

SJRA can seek a declaration the contract was validly executed, but not whether it complied with the contract. As a result, the EDJA confers jurisdiction to declare whether the GRP contracts (as public security authorizations) are legal and valid, but it does not extend to declaring whether a specific rate amount set in a particular rate order is valid as it is controlled by the contract. SJRA may not obtain EDJA declarations concerning the cities' *in personam* rights and liabilities. The EDJA permits only *in rem* declarations concerning property rights.*****

Workers' Compensation: *Orozco v. County of El Paso*, No. 17-0381, 2020 WL 1321473 (Tex. Mar. 20, 2020). This is a workers' compensation case, but the key issue is whether the deputy who died in a vehicular accident while driving his assigned patrol car was in the course and scope of his employment. The Texas Supreme Court held he was within the course and scope.

Orozco was killed instantly when a wheel from another vehicle came loose and crashed through his patrol car's windshield on the expressway. At the time of his death, Orozco was a sergeant with the El Paso County Sheriff's Department. However, Sergeant Orozco was not scheduled to work for the department that night. He instead worked an extra-duty assignment at a University of Texas El Paso (UTEP) football game. Because the work at UTEP was extra-duty employment (and not considered off-duty) and might entail the use of an officer's law-enforcement powers under the policy manual, Sergeant Orozco wore his uniform, badge, and gun to the football game. He also drove there in his assigned patrol car. After completing his work at the UTEP football game, Sergeant Orozco also used the patrol car for his return trip home, which is when the accident occurred. His surviving spouse filed a claim under the Worker's Compensation Act. The county asserts the claim should be denied. All procedural administrative steps were taken and suit was filed. The court of appeals ruled in favor of the county and the widow appealed.

The Texas Supreme Court recently held the question of whether an officer is on or off duty does not determine whether the officer's conduct falls within the scope of his employment. "Peace officers are . . . relatively unique among governmental employees as they may be required to spring into action at a moment's notice, even while off duty." Because a peace officer is always a peace officer, even during off-duty hours, the capacity in which an officer is acting can be nebulous. While the parties made arguments regarding his status at the football game, the court held that was not the focus. It is Sergeant Orozco's use of his patrol car for travel from that approved employment to his home that is at issue.

As a general rule, travel to and from work does not originate in the employer's business and, in some instances, is expressly excluded from the course and scope of employment by statute. While exceptions may have previously existed for travel that is an integral or required part of the employee's work, the legislature has since codified its definition of course-and-scope which controls. The court analyzed a lot of the record and testimony and determined that Orozco's "use" of the vehicle was authorized and not purely for personal use. Further, the statutory test asks whether the activity producing injury relates to, originates in, and furthers the employer's business affairs. The operation of a marked patrol car on the public streets is an activity that clearly relates to and originates in the work or profession of the El Paso County Sheriff's Department. Patrolling El Paso's roads is a significant part of the department's work. Moreover,

having uniformed deputies in marked patrol cars on El Paso streets furthers the work of the sheriff in preserving the peace.

The statutory definition of the term "course and scope of employment" excludes two types of travel—the coming-and-going rule and the dual-purpose rule. Travel to and from work is governed solely by the coming-and-going rule, while all other travel is subject to the dual-purpose rule. Here, it appears undisputed that Orozco "contacted the Sheriff's dispatch as he left the extra-duty assignment that he was in route to his home and available for calls." After analyzing numerous parts of the record which made clear he was subject to call while driving home and was required to respond to emergencies if observed, the court concluded that the authorized operation of Orozco's patrol car to and from the approved extra-duty assignment was a law enforcement activity similar to his on-duty work for the county. As a result, his death occurred during the course and scope of his employment.*

Litigation/Discovery Issues: *In re Mobile Mini, Inc.*, No. 18-1200, 2020 WL 1224169 (Tex. Mar. 13, 2020). This is a mandamus case that will be of interest mainly to litigators. The Texas Supreme Court granted mandamus and ordered the trial court to allow the designation of a responsible third party even though the statute of limitations had expired.

Covarrubias's pinky finger was injured when a wind gust blew the door of a construction trailer closed on his hand. Mobile Mini owned the trailer, but had leased it to Nolana Self Storage, LLC, the owner of the construction site. Covarrubias sued Mobile Mini just before the statute of limitations expired, but did not sue Nolana. Mobile Mini's discovery responses identified Nolana as a potentially responsible third party. Mobile Mini filed a motion to designate Nolana as a responsible third party, but no hearing was set immediately. Meanwhile, Nolana (who had been brought in) obtained a summary judgment that claims against it were time-barred and it was dismissed. Covarrubias later objected to Mobile Mini's attempt to designate Nolana as a responsible third-party given the time bar. The trial court refused to allow Mobile Mini to designate Nolana. The court of appeals denied Mobile Mini's mandamus petition without substantive comment. Mobile Mini brought this mandamus action in the Texas Supreme Court.

The court went through a lengthy analysis of Chapter 33 of the Texas Civil Practice and Remedies Code. The court held Mobile Mini's disclosure was timely because under the Texas Rules of Civil Procedure, it was not obligated to disclose potentially responsible third parties until its discovery responses were due. Because Covarrubias waited almost two years to sue Mobile Mini, the response deadline for the disclosures fell after limitations expired. Mobile Mini did not engage in any dilatory or stall tactics to game the system, but instead filed the discovery response when it was due. Such is deemed a timely designation. Placing the onus on a defendant to respond before the Rules of Civil Procedure obligate it to do so not only contravenes Section 33.004(d)'s express language but would also be unfairly prejudicial to defendants. Covarrubias's second argument that Nolana was "substantively" dismissed was rejected as missing a statute of limitations in this case was procedural in nature. Under the proportionate-responsibility statute, "responsibility" is not equated with "liability." Finally, an adequate appellate remedy is ordinarily lacking because allowing a case to proceed to trial without a properly requested responsible-third-party designation "would skew the proceedings, potentially affect the outcome of the litigation, and compromise the presentation of the relator's defense in ways unlikely to be

apparent in the appellate record." As a result, the trial court had a required duty to allow the designation. The court granted the writ of mandamus ordering Nolana be designated as a responsible third-party.*

Premises Liability: *Hillis v. McCall*, No. 18-1065, 2020 WL 1233348 (Tex. Mar. 13, 2020). This is a premises-liability case where the Texas Supreme Court ruled the property owner negated as a matter of law the duty to warn of the brown-recluse spider danger. While not a governmental liability case, the analysis of knowledge would be similar.

Hillis owns a bed and breakfast (B&B) and a neighboring cabin, which he rents out. Hillis hired a housekeeper to prepare and clean the B&B before guests arrived. That process included utilizing "bug bombs" in the event the housekeeper noticed any pest problems, on an "as needed" basis. Hillis leased the neighboring cabin on the property to Henry McCall, and utilized him as a handyman. Hillis typically called McCall several days before guests arrived and asked him to perform various tasks associated with B&B services. While checking under the sink for a leak in response to a Hillis call, McCall was bitten by a brown recluse spider. Before he was bitten, McCall had observed spiders in both the cabin and the B&B on several occasions and had notified Hillis about the general presence of spiders. Hillis asserted he would pass along the information to the housekeeper to take care of. McCall sued Hillis for negligence under a premises-liability theory, alleging that the presence of brown recluse spiders on Hillis's property constituted an unreasonably dangerous condition. Hillis filed a motion for summary judgment, arguing that, under the longstanding doctrine of *ferae naturae*, he owed no duty to McCall with respect to indigenous wild animals that Hillis had neither introduced to nor harbored on the property. The trial court granted the motion for summary judgment and McCall appealed.

The Texas Supreme Court held the duties owed by a landowner in a premises-liability case "depend upon the role of the person injured on his premises." When the injured person qualifies as an invitee, as McCall did by admission of the parties, then as a general rule the landowner owes a "duty to make safe or warn against any concealed, unreasonably dangerous conditions of which the landowner is or reasonably should be, aware but the invitee is not." The duty does not extend to warning the invitee of hazards that are open and obvious. The court also recognized that with certain exceptions, a premises owner generally owes no duty to protect invitees from wild animals on the owner's property.

Wild animals "exist throughout nature" and are "generally not predictable or controllable." The exception to this doctrine is when wild animals are found in artificial structures or places where they are not normally found, the landowner knows or should know of the unreasonable risk of injury and patrons would not be expected to recognize the danger. Under this exception, the landowner owes the general duty owed to an invitee to warn or make safe unreasonably dangerous conditions they know or should know about. However, many insects and spiders are commonly found indoors. The ever-present possibility that an insect or spider bite may occur indoors does not amount to an unreasonable risk of harm.

The court analyzed the record and listed pertinent facts. The court found knowledge of the general intermittent presence of spiders does not necessarily amount to knowledge of an unreasonable risk of harm, and Hillis had no particular reason to know that brown recluses, or

other venomous spiders, were inside the B&B. Further, McCall and Hillis had identical actual knowledge of the presence of spiders on the property. According to McCall, Hillis should have warned him that the spiders McCall himself had seen and reported to Hillis were dangerous. The court expressly stated "[w]e will not impose a duty on a landowner to warn an invitee about something he already knows." As a result, Hillis negated a duty to McCall as a matter of law.*

Open Meetings: *Chisholm Trail SUD Stakeholders Group v. The Chisholm Trail Special Util. Dist.*, No. 03-18-00566-CV, 2020 WL 1281254 (Tex. App.—Austin Mar. 18, 2020) (mem. op.). This is an appeal in an asset transfer and utility system consolidation case in which the court of appeals granted the appellees motion to dismiss this appeal as moot, set aside the trail court's order of final summary judgement, and dismissed the case for lack of jurisdiction.

Chisholm Trail SUD Stakeholders Group (Stakeholders Group) filed suit complaining that the Chisholm Trail Special Utility District (District) and its directors violated the Open Meetings Act (TOMA) rendering an asset transfer and utility system consolidation agreement between the District and the City of Georgetown void. The Stakeholders Group sought a declaratory judgement and injunction to enjoin and prevent the District and its directors from continuing to violate the TOMA. The trial court granted a final summary judgement dismissing, with prejudice, the Stakeholders Group's claims against the District, its directors, and the city (Appellees). The Stakeholders Group appealed. The Appellees filed a motion to dismiss the appeal as moot.

The court of appeals concluded that it did not have standing because the Stakeholders Group's claims were moot. The court determined that the District had been dissolved pursuant to state law, which authorized the District, regardless of pending litigation, to vote to dissolve; the Public Utility Commission had entered a final order to transfer the District's certified water-service area to the city, and such order was not appealable; and the requested relief to enjoin the Appellees from future TOMA violations would have no effect because the District had been dissolved and has no directors. Accordingly, the court lacked jurisdiction over the appeal.

Contractual Immunity: *Dallas Area Rapid Transit Auth. v. GLF Construction Co*., No. 05-19-00930-CV, 2020 WL 1650060 (Tex. App.—Dallas Apr. 3, 2020) (mem. op.). This is an interlocutory appeal in a contractual immunity case in which the court of appeals affirmed the trial court's order denying the Dallas Area Rapid Transit Authority's (DART's) plea to the jurisdiction.

GLF Construction Company (GLF) and DART entered into a contract for GLF to build part of a DART light rail extension. In the contract, the parties agreed to an administrative dispute resolution process. According to GLF, DART's inadequate project administration drove GLF's costs up far beyond the contract price. GLF submitted a request for equitable adjustment, which was denied by a DART contracting officer. GLF administratively appealed the contracting officer's decision to an administrative judge, but the judge's decision, while finding liability and damages, did not provide which party owed any money. In January 2019, GLF sued DART for breach of contract and for a finding to hold the dispute resolution process unconstitutional. DART filed a plea to the jurisdiction, which was denied. DART appealed.

DART asserts that its immunity was not waived because: (1) the contract in question was executed in 1999 before Chapter 271 of the Local Government was in effect; and (2) GLF failed to exhaust its remedies under the dispute resolution process. The court declined to decide whether Chapter 271 applies retroactively, but found that DART did not establish that GLF failed to exhaust the contract's adjudication process. The court of appeals found DART's position – that GLF's failure to formally list its suit as an appeal or identify any legal errors in the administrative judge's ruling that the lawsuit was not an appeal of that decision – lacking. The court noted that GLF requested a trial de novo from the administrative law judge's decision and sought damages. As a result, GLF's petition challenges the administrative judge's decision within the plain meaning of the regulations and contract, and the plea was properly denied.**

Immunity: *City of Dallas v. Rodriguez*, No. 05-19-00045-CV, 2020 WL 1486831 (Tex. App.—Dallas Mar. 27, 2020) (mem. op.). On the court's own motion, the court withdrew its opinion and judgement from August 7, 2019, and substitutes this new opinion and corresponding judgement in its place. In the new opinion, the court reverses the trial court's order, grants the city's plea to the jurisdiction, dismisses Rodriguez's claims for want of subject matter jurisdiction, and remands the case to the trial court for further proceedings consistent with this opinion.

This is an appeal of a trial court's order denying the City of Dallas' plea to the jurisdiction in a case involving an accident with a marked police vehicle in which the court reverses the trial court's order, dismisses Rodriguez's claims, and remands the case to the trial court.

Rodriguez alleged that she was injured after a City of Dallas police officer disregarded a red light and caused her vehicle to strike the officer's marked vehicle. Rodriguez sued the city alleging negligence, gross negligence, respondeat superior, and negligence per se. The city filed a plea to the jurisdiction arguing that the police officer was entitled to official immunity and the city was shielded from liability by governmental immunity because the officer was performing a discretionary function within the scope of her employment and acting in good faith. The city's plea was supported by the officer's affidavit describing the circumstances of the accident and her actions and perceptions of the urgency of the situation and risks involved. Rodriguez objected to the police officer's affidavit arguing that it was hearsay and that five paragraphs of the affidavit should be excluded. The trial court denied the city's plea and sustained Rodriguez's objections to the affidavit except for one statement. The city appealed.

The court of appeals first looked at whether the trial court abused its discretion in sustaining Rodriguez's objections to the affidavit offered in support of the city's plea to the jurisdiction. The court concluded that Rodriguez's objections were not sufficiently stated as she did not state the specific grounds on which each identified section of the affidavit was objectionable.

The court next addressed whether the officer in the performance of discretionary duties acted in good faith so as to sustain the defense of official immunity. The court concluded that Rodriguez failed to raise a factual dispute as to whether the officer acted recklessly or in violation of the law. The court also determined that the following evidence conclusively established that the officer was acting in good faith: (1) the officer was responding to a potentially life threatening emergency involving several unknown people beating on a woman's door and threatening her

with a gun; (2) the officer stopped at the intersection and believed, in good faith, that the need to get to the scene of the emergency call outweighed the perceived minimal risk of an accident; (3) the road was dry, traffic appeared to be yielding to the officer, and her emergency lights, siren, and air horn were activated; and (4) she did not perceive that proceeding through the intersection would cause any danger to any other driver near her location. Accordingly, the court reversed the trial court's order, granted the city's plea to the jurisdiction, dismissed Rodriguez's claims for want of subject matter jurisdiction, and remanded the case to the trial court for further proceedings consistent with this opinion.

Contractual Immunity: *Amador v. City of Irving*, No. 05-19-00278-CV, 2020 WL 1316921 (Tex. App.—Dallas Mar. 20, 2020) (mem. op.). This is an appeal involving a breach of contract claim in which the court of appeals reversed the trial court's order granting the City of Irving's plea to the jurisdiction.

Amador enrolled in a program offered by the city, and funded by HUD, to provide low-income homeowners loans to refurbish their homes using city-approved contractors under the city's supervision. Under the program, a homeowner is required to sign a loan document in which a portion of the loan is non-deferred and interest bearing, while the remainder is deferred at a rate of 1/15th per year, but is due in full should the homeowner move out of the home or choose to sell it. The program uses a list of preferred contractors who have been vetted by the city and have agreed to the city's terms, practices, and construction standards. All preferred contractors are invited to bid on a project, and upon receipt and review of the bids, the city presents all eligible bids to the homeowner who may then choose a contractor from any of the eligible bids. Upon enrollment, Amador signed a copy of the city's policies and procedures and loan documents. She also entered into a mechanic's lien contract with Javier Villagomez, a city-approved contractor that she selected to restore her home. Villagomez immediately transferred the lien to the city. Amador was not satisfied with the contractor's work, claiming that he performed substandard work that resulted in damage to her home. Amador alleges that the city was aware that the contractor was not competent, licensed, bonded or insured, and that when she informed the city of the problems with his work, the city repeatedly told her that the work would be completed, yet the city paid the contractor in full and did nothing to help fix her home. Amador sued the city and the contractor asserting against both defendants claims for breach of contract and negligence, and against the city claims for fraudulent inducement and violations of the Deceptive Trade Practices Act. She sought a declaratory judgement that the subject agreements be declared void or voidable at her election, and to recover attorney's fees. The city filed a plea to the jurisdiction asserting governmental immunity. Following a hearing, the court granted the plea and dismissed the city from the suit. Thereafter, Amador settled her claims with the contractor. Amador appealed the plea as it relates to the city.

The court first looked at whether the contract was an agreement for providing goods or services to the city such that governmental immunity was waived under Chapter 271 of the Local Government Code. The court concluded that Villagomez's service of repairing Amador's home was a service to the city by virtue of the city's property interest in the home, which was acquired by lien assignment, and that Amador's payment of interest to the city under the loan agreement provided the city with a direct benefit. The court then looked at whether waiver of immunity from suit extends to claims for damages where there is no "balance due and owed." The court

concluded that Amador had alleged damages recoverable under Chapter 271 as the damages to remedy the improper work done by Villagomez directly and necessarily resulted from the city's breach of the contract. As such, the court reversed the trial court's grant of the city's plea to the jurisdiction on the breach of contract claims. However, the court affirmed the trial court's order granting the city's plea with respect to the non-contract claims, finding that Chapter 271 does not waive immunity for negligent or intentional torts. Finally, the court affirmed the trial court's order granting the city's plea to the jurisdiction regarding the Uniform Declaratory Judgment Act (UDJA), finding that Amador did not allege a UDJA claim for which governmental immunity was waived.

Civil Forfeiture: *1812 Franklin St. v. State of Texas*, No. 06-19-00065-CV, 2020 WL 1482584 (Tex. App.—Texarkana Mar. 27, 2020). Richard Lynn Clark (Clark), with his wife, Ester, owned the house at 1812 Franklin Street in Bonham, Texas, which they bought in February, 2015. In August 2015, Clark was stopped by an officer of the Bonham Police Department (BPD) on his motorcycle and was found in possession of 5.14 grams of methamphetamine. Clark told the officer that he was on his way home and admitted that he did intend to keep the drug at his home. Clark plead guilty to the second degree felony of possessing more than four, but less than 200, grams of methamphetamine and pursuant to a plea agreement was sentenced to eight years imprisonment and ordered to pay a $1,500 fine.

While Clark was incarcerated, Ester sold drugs from the house and allowed various other illegal activities to take place there. Over many months of surveillance of the house, stopping people that left the house and finding them in possession of drugs, and seeing the presence of "wanted people", the Bonham Police Department raided the house in July 2018 after a controlled buy was made at the house. Through communications with his sister, Clark was aware of the activities going on at his house while he was incarcerated.

The State of Texas filed a civil forfeiture case to declare Clark's house contraband under Article 59 of the Texas Code of Criminal Procedure. The trial court found the house was contraband because it was used in the commission of several drug-related offenses and ordered its forfeiture. Clark filed an appeal and argued that the State failed to meet its burden of proof to show that the house was contraband, that he proved the innocent-owner defense because he was in prison while Ester was using the property to commit the drug-related offenses without his knowledge, and that the forfeiture violated the Excessive Fines Clause of the Eight Amendment of the United States Constitution.

The Sixth Court of Appeals did not agree. The court took up each argument separately. First, the Court found that the State did have legally and factually sufficient evidence to support the finding that the house was contraband since the state did meet its burden of proof by a preponderance of the evidence. The state showed that for a period of several months, drugs and paraphernalia were found in the house, on the persons of people in the house, and during traffic stops of vehicles leaving the house which showed a substantial connection between the property and the illegal activity. Also, the court noted that community property is not exempt from forfeiture where the property is being used by a spouse in a manner that violates the Texas Controlled Substance Act, even though the property is used by one spouse without the

knowledge or consent of the other spouse. Therefore, the state did not have to show that the owner had knowledge of the illegal activity in order to prove that the property is contraband.

Second, the court found that there was legally and factually sufficient evidence that supported the trial court's rejection of Clark's innocent-owner affirmative defense. For a person to prevail under this defense, once the state has met its burden, the burden shifts to parties claiming this defense to prove that the owner or interest holder was not a party to the offense giving rise to the forfeiture, and that the contraband was used or intended to be used without the effective consent of the owner or interest holder in the commission of the offense giving rise to the forfeiture. Though Clark established the first requirement (not a party to the offenses that gave rise to the forfeiture), he could not prove that he did not give effective consent. Clark admitted that he used methamphetamine at his house for a few years before he was incarcerated. Also, while incarcerated, Clark received information from his sister about Ester's illegal activities going on in the house and he continued to support Ester and authorized the paying of bills by his sister. Clark impliedly consented to the drug-related activity happening in his house.

Third, the Court found the forfeiture did not violate the Excessive Fines Clause. For there to be a violation of the Excessive Fines Clause, the following factors have to be considered: (1) the nature of the offense; (2) the relationship or the offense to other illegal activities, (3) whether the defendant was in the class of persons addressed by the forfeiture statute; (4) the maximum fines and sentences for the offense committed and the level of culpability reflected by the penalties; and (5) the harm that the defendant caused. *United States v. Bajakajian*, 524 U.S. 321, 337-39 (1998). After reviewing all the factors from the *Bajakajian* proportionality test, the court did not find that the house's forfeiture was grossly disproportionate to the offenses giving rise to the forfeiture. The forfeiture did not result from Clark's arrest, it resulted from the raid of the house which revealed that Ester was running a drug haven in the house, as well as other illegal activities being observed and people being arrested for the drug activity happening in the house. Ester was definitely the class of person that the forfeiture statute was addressing, i.e. drug traffickers. Ester's state jail felony carried a maximum fine of $10,000 and maximum of two years imprisonment. Additionally, four other people were arrested during the raid for possession of methamphetamine, which they presumably purchased at the house with Ester's approval. The maximum fines for the offenses of each of the additional people arrested would exceed the purchase price of the house ($45,000). Finally, there are many studies that clearly demonstrate the direct nexus between illegal drugs and crimes of violence and that our society is negatively affected by criminal drug activities. This illegal activity is exactly what the civil forfeiture statute was designed to permit the state to prevent.

Last, the court found that Clark failed to preserve his remaining points of error since Clark did not properly raise complaints concerning double jeopardy and collateral estoppel barring the trial court's consideration of his 2015 conviction, forfeiture of his house being barred by double jeopardy, trial court error in taking judicial notice of unobjected-to testimony from another case, and officers offered allegedly perjured testimony. Therefore, the court affirmed the trial court's judgment.

Civil Forfeiture: *State of Texas v. Ten Thousand Two Hundred Fourteen Dollars*, No. 07-18-00306-CV, 2020 WL 1597849 (Tex. App.—Amarillo Apr. 1, 2020) (mem. op.). In May 2017,

Andre Dyer Faina (Faina) was pulled over by Sherman County deputy sheriffs for failing to signal a right turn within 100 feet of an intersection. During the stop, a City of Stratford canine officer arrived and allowed his dog to perform a free air sniff of Faina's car. The dog indicated a positive alert for the presence of illegal odor of narcotics emitting from Faina's car. Deputies searched Faina's car and found approximately $10,214 under the driver's seat. When asked where he was going, Faina stated he was going to visit his mother in Oklahoma. When told he was headed in the wrong direction, Faina said he made an exit in Dallas that brought him to Stratford, as well as, that his sister was graduating. When asked about the money, Faina stated that he was taking it to his mother to repay a debt and intended to give a portion to his sister. Faina stated he had previously been in trouble in Houston for a "little amount" of marijuana.

Faina was arrested for an outstanding New Mexico warrant for possession of marijuana that happened in August of 2016 for transporting six pounds of marijuana from Colorado. Faina's arrest record showed an arrest in Houston for two pounds of marijuana, but there was no evidence that Faina was ever convicted of these alleged crimes. While in custody, Faina voluntarily spoke with the deputies and consented to a search of his cellphone. Deputies found a highlighted route from Wichita Falls to the Denver, Colorado area. When deputies asked about the map and no address in Oklahoma, Faina said his sister graduated the previous weekend.

The State of Texas filed a civil forfeiture lawsuit of the seized money discovered in Faina's car, alleging the money was contraband as defined by Article 59.01(2) of the Texas Code of Criminal Procedure. Faina answered and filed a no-evidence motion for summary judgement, asserting that the state had no evidence the seized money was contraband under the statute. The state responded with a deputy's affidavit. The trial court granted Faina's motion and rendered a judgement directing the state to restore the seized money to Faina. The State of Texas appealed.

The state argued that the trial court erred on rendering summary judgment for Faina because it presented more than a scintilla of evidence that the money was contraband. Specifically, the state argued the summary judgement evidence, including all inferences to be drawn therefrom, raised a genuine issue of material facts that Faina was going to use the money to drive to Colorado and buy large amounts of marijuana.

The Seventh Court of Appeals did not agree. The state had the burden of proving that Faina intended to drive to Colorado to buy a large amount of marijuana with the money found in his car. Based on the summary judgment evidence in the light most favorable to the non-moving party, the court held that the state failed to present more than a scintilla of evidence that the seized money constituted contraband. All the evidence and inferences supported a finding that Faina was driving to Colorado when he was stopped in a routine traffic stop, he had prior arrest for drug-related offenses, and the money had been around illegal narcotics. But, that the money was going to be used to purchase a large amount of marijuana would require the court to impermissibly stack inference upon inference. The state did not meet its no-evidence summary judgement burden of presenting more than a scintilla of evidence to establish a substantial connection between the money it seized and its alleged use to buy marijuana, and therefore that the seized money was contraband. The court overruled the state's issue and affirmed the judgement of the trial court.

Civil Forfeiture: ***Approximately $23,606.00 United States Currency v. State of Texas*****, No. 07-19-00297-CV, 2020 WL 1500073 (Tex. App.—Amarillo Mar. 27, 2020) (mem. op.)**. On June 6, 2016, the State of Texas filed a notice of seizure and intended forfeiture of approximately $23,606.00 seized from Guinapauline Santos (Santos) under Article 59 of the Texas Code of Criminal Procedure. Various procedural matters delayed the trial court granting the state's motion of summary judgment and denial of Santos's motion to dismiss on August 12, 2019. Some of these delays included Santos not filing a response to the state's discovery requests, an informal tacit abatement agreement to wait for the Texas Supreme Court to opine on a case similar to the present case, and Santos filing her notice of intent to challenge the constitutionality of the forfeiture statute. Santos appealed the trial court's judgment contending the trial court erred by denying her motion to dismiss for want of prosecution and that the statutory forfeiture scheme violates constitutional protections.

The Seventh Court of Appeals disagreed with Santos. Rule 6.1 of the Texas Rules of Civil Procedure provides time standards in which trials should be brought to trial or final disposition. Generally, civil nonjury cases should be tried or brought to final disposition within twelve months from the appearance date. However, the application of Rule 6 is discretionary and nonbinding and may not be possible to adhere to if the case is especially complex or has special circumstances. In this case, the court stated that many of the delays in this case were caused by Santos. Thus, the trial court did not abuse its discretion in denying Santos' motion of dismissal.

Also, the Court stated that a constitutional challenge of a state statute is a serious matter and requires adequate briefing, including the citing of legal authority and substantive analysis to support the issues in order for the complaint to not be waived. The court held Santos presented none of this, but that her writing appeared to suggest little more than a personal viewpoint on the supposed inequities of historic and current forfeitures. Therefore, Santos waived her constitutional attack of the civil forfeiture statute. The trial court's judgment is affirmed.

Whistleblower Act: ***Reding v. Lubbock Cty. Hosp. Dist.,*** **No. 07-18-00313-CV, 2020 WL 1294912 (Tex. App.—Amarillo Mar. 18, 2020) (mem. op.)**. This is a Texas Whistleblower Act case where the Amarillo Court of Appeals affirmed the granting of the hospital district's plea to the jurisdiction.

Reding is a registered nurse working for the Lubbock County Hospital District d/b/a University Medical Center (UMC). UMC announced plans for a new policy that required nurses to sign up for two mandatory "on call" shifts per month and disciplined those who did not comply. Reding believed the proposed compulsory shifts violated Section 258.003 of the Texas Health & Safety Code, prohibiting a hospital from requiring a nurse to work mandatory overtime. She filed a complaint with the human resources and legal departments. Reding was later terminated. Reding asserted the termination was retaliatory and brought suit under the Texas Whistleblower Act. UMC filed a plea to the jurisdiction which was granted. Reding appealed.

Reding alleged that she "reasonably and in good faith believed that [UMC's] legal department was the appropriate authority to whom she should report the violation." However, the Texas Supreme Court has consistently held that "reports up the chain of command are insufficient to trigger the Act's protections." To qualify, the internal department must also have outward-

looking powers, as an "authority to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself, or it must have authority to promulgate regulations governing the conduct of such third parties." While the legal department at UMC may oversee internal compliance with the law governing nurses' work hours, that is not the same as having the authority to enforce laws against third parties. The plea was properly granted.*

Insurance Claims: ***City of Spearman v. Texas Mun. League Intergovernmental Risk Pool*****, No. 07-18-00402-CV, 2020 WL 1174183 (Tex. App.—Amarillo Mar. 11, 2020)**. The City of Spearman submitted a claim with the Texas Municipal League Intergovernmental Risk Pool (TMLIRP), a governmental self-insurance fund, for hail damage to buildings caused by a hailstorm that occurred on May 16, 2016. TMLIRP sent an adjuster to inspect five buildings for hail damage and estimated the replacement-cost value of the covered loss to be $5,437.66. TMLIRP sent the city a sworn statement in proof of loss for the city to sign that reflected the adjuster's estimate of the loss. The city neither returned the proof of loss nor filed any other sworn proof of loss. The city hired a roofing contractor to inspect some of the buildings and submitted an estimate of the required repairs to TMLIRP. TMLIRP sent an engineering firm to conduct a second inspection and the firm determined that there was no additional covered loss beyond that identified by the initial inspection. TMLIRP informed the city of the results of the latest inspection.

In May 2017, the city filed suit against TMLIRP for breach of contract, claiming TMLIRP had improperly denied coverage and underpaid the claim. TMLIRP answered the suit and filed a traditional and no-evidence motion for summary judgment. In its motions, TMLIRP claimed five reasons why there was no breach of contract including that the city failed to submit a sworn proof of loss. The trial court granted TMLIRP's motion for summary judgment without specifying the grounds for its ruling and dismissed the city's breach of contract claim with prejudice. The city appealed.

The city challenged all five grounds presented in the TMLIRP's motion for summary judgment. However, the Sixth Court of Appeals only addressed the sworn proof-of-loss issue as it was dispositive. The court affirmed the trial courts granting of TMLIRP's motion for summary judgment because a proof of loss is a "condition precedent to recovery on the policy" according to the Texas Supreme Court. *Am. Teachers Life Ins. Co. v. Brugette*, 728 S.W.2d 763, 764 (Tex. 1987). The city failed to submit the proof of loss as required by the policy, as well as, failed to satisfy a condition to recovery in the policy. Therefore, under the circumstance presented to the court, the trial court had one ground supporting its decision.

Gender Discrimination/Hostile Work Environment: *County of El Paso v. Aguilar*, No. 08-19-00082-CV, 2020 WL 1303556 (Tex. App.—El Paso Mar. 18, 2020). This is a gender discrimination/hostile work environment case where the El Paso Court of Appeals reversed-in-part and affirmed-in-part the denial of the county's plea to the jurisdiction. The 42-page opinion presents a detailed analysis under employment law, including prima facie element analysis and burden shifting.

Aguilar worked for the county in various positions for nearly twenty-four years. She was holding the position of facilities manager when she complained to her supervisors and the human

relations department that she was paid substantially less than not only the male who previously held the equivalent position but also less than other similarly situated male coworkers. She also raised the issue of pay disparity with the county commissioner's court. She also complained she was harassed by a male co-worker. The supervisor put restrictions on the co-worker in 2014, limiting contact with Aguilar and her staff. That restriction was lifted five months later, but according to Aguilar, the co-worker, Lucero, resumed his harassing behavior. When Aguilar obtained an email the supervisor wanted to discuss Lucero with her and her behavior in a meeting where he was present, she experienced an anxiety attack and eventually resigned. Aguilar brought suit under the Texas Commission on Human Rights Act (TCHRA) under a constructive discharge theory. The county filed a plea to the jurisdiction, which was denied.

The court first went through numerous pages regarding the affidavits and determined the trial court did not abuse its discretion in considering Aguilar's affidavit. Next, the court determined Aguilar was required to establish she was "treated less favorably than similarly situated members of the opposing class[.]" The county presented evidence that Aguilar did not hold the same job position, duties and responsibilities, or requirements for education as the comparators she listed. The applicable test is not whether the positions are comparable in some respects; the test is whether the positions are "comparable in all material respects." While Aguilar's burden at the prima facie stage was not onerous, it did require, at a minimum, that she present evidence raising a fact issue on whether she was similarly situated to members outside her protected group who were treated differently. She did not present contradicting evidence as to two other managers, but did as to a third, Cruz. As a result, the plea should have been granted as to disparate regarding the first two managers, but was properly denied as to Cruz.
As far as the harassment claim goes, the county argues that Lucero's comments did not create a hostile work environment because many of them were made to persons other than Aguilar. But those comments were made about Aguilar and were humiliating to her. In addition, because many of the comments were made to her staff and to contractors with whom she worked, they interfered with her ability to perform her job duties. Aguilar demonstrated that a disputed material fact existed concerning whether her work environment was objectively hostile or abusive. While the restrictions on Lucero were put in place, they were lifted five months later and he returned to his prior behavior. While the county asserts it did not have time to respond to the return, Aguilar's hostile work environment claim is not based solely on the final week of her employment, divorced from the years of harassing conduct that preceded that week. A reasonable person could conclude that this failure effectively communicated to Aguilar that Lucero would be permitted to once again humiliate Aguilar and interfere with her job performance.

As to Aguilar's retaliation charge, she asserted after complaining about Lucero, her supervisor sent her an email accusing her of inappropriate behavior in a meeting. When her supervisor emailed her to discuss "next steps" she took that to mean discipline of her, so she resigned. The totality of the circumstances surrounding Aguilar's hostile work environment claim created a fact issue as to whether retaliation was committed by the county for reporting harassment. However, no fact issue exists regarding Aguilar's retaliation charge for reporting disparate pay. In sum, the plea was properly denied as to some claims, but should have been granted as to others.*

Recreational Use Statute: *Johnson v. Woodlands Township*, No. 09-18-00247-CV, 2020 WL 1479715 (Tex. App.—Beaumont Mar. 26, 2020) (mem. op.). In July 2016, Johnson injured his knee when he slipped from a diving board at one of The Township's community pools. Johnson sued The Township (a governmental entity) alleging negligence and gross negligence caused his fall. The Township filed a combined plea to the jurisdiction and no-evidence motion, which was granted by the trial court.

Johnson appealed, arguing the trial court erred by: (1) granting The Township's plea to the jurisdiction; (2) granting The Township's motion for summary judgment; and (3) considering unreliable evidence when it granted the combined plea.

The appellate court concluded that the Recreational Use Statute applied to Johnson's claims. As a result, in response to The Township's combined plea, Johnson needed to produce evidence to demonstrate a genuine issue of material fact existed on his gross-negligence claim. Johnson's evidence showed only that The Township was unaware of the procedures the manufacturer recommended about using and maintaining the diving board. The Township did inspect and maintain its pools, and its inspection procedures included inspecting the pool's diving boards. An entity's failure to follow a manufacturer's recommended practice, without more, fails to show the entity knew of the risk created by not following inspection procedures and did not care.

Johnson failed to establish any of the Tort Claims Act's waivers apply to his claims. The trial court's judgment was affirmed.

Employment: *City of Coldspring v. Boudreaux*, No. 09-19-00251-CV, 2020 WL 1465977 (Tex. App.—Beaumont Mar. 26, 2020) (mem. op.). Suzann Boudreaux sued her employer, the City of Coldspring, alleging that the city, by and through the actions of its Alderman, Greg Vore, engaged in sex discrimination and workplace harassment in violation of the Texas Commission of Human Rights Act (TCHRA). Specifically, Boudreaux alleged that:

- during a city council meeting on November 5, 2018, Vore stood up during open session and slapped on the table in a threatening manner and untruthfully shouted that Boudreaux was a liar.
- during a November 5, 2018, city council meeting, Vore yelled at Mayor Pat Eversole, stating "I don't like you and I can't stand to look at you." Immediately following the meeting, Alderman Charles Altman told Eversole that she should fix her hair and nails so that it would not be so difficult for Vore to look at her.
- Aldermen openly discussed and questioned why a female citizen of African American heritage would want to serve on city council.
- On numerous occasions, Altman entered city council announcing that "his balls are on the table," and Vore stated that "he was looking for a set of pink balls for the Mayor so she could have some[.]"
- While discussing a ticket that a Texas Department of Public Safety Trooper had issued to a citizen, Vore used a racial epithet. Boudreaux and Eversole were present when Vore made the statement, and Boudreaux alleged that Vore intended his statement not only as a racial slur, but also as a bullying and demeaning statement because Vore knew that Mayor Eversole was in a relationship with an African American.

- Vore frequently patted his hips and warned, in an intimidating fashion, that he had a firearm.
- Vore openly commented about the difficulties of a female citizen who was riding a bike, stating that she was so "fat you couldn't see the bike seat and she was barely moving."

The city filed a plea to the jurisdiction which was denied by the trial court. The city appealed and argued that the trial court erred in denying its plea to the jurisdiction because Boudreaux failed to plead a prima facie gender-based hostile work environment claim under Section 21.051 of the Labor Code. The city argued that it was immune from suit under the TCHRA because Boudreaux failed to plausibly plead or raise a fact issue on any of the essential elements of her claim.

The appellate court found that, although Boudreaux's evidence showed that she was subjected to repeated and ill-mannered behavior, the instances that she alleges do not amount to the quality or severity of misbehavior sufficient to subject Boudreaux to hostile or abusive conditions which materially alter her conditions of employment. Additionally, Boudreaux did not show that Vore calling her a liar was based on her gender or was part of a pattern of gender-based harassment. And the mere utterance of an epithet that engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to create a hostile work environment. The court concluded that all of Boudreaux's evidence, taken together, failed to demonstrate that her working conditions were so severely degraded and fraught with discriminatory hostility or abuse as to warrant invocation of the TCHRA's protections. Thus, the city's immunity was not waived and the trial court's denial of the city's plea to the jurisdiction was reversed.

Boudreaux also sued Alderman Vore, individually, for defamation, defamation per se, slander, and intentional infliction of emotional distress. The trial court denied Vore's motion to dismiss. Vore appealed. On appeal, he argued: (1) he had official and legislative immunity; (2) Boudreaux failed to state a prima facie case for her defamation and defamation *per se* claims; and (3) Boudreaux failed to state a prima facie case for her claim of intentional infliction of emotional distress, and that the tort is barred as a "gap-filler" tort. Vore also complained that the trial court improperly awarded attorney's fees to Boudreaux.

The appellate court concluded that because Vore established by a preponderance of the evidence that Boudreaux's claims are based on, relate to, or are in response to his exercise of free speech, and because Boudreaux failed to establish a prima facie case for each essential element of her claims, the trial court erred by denying Vore's motion to dismiss under the Texas Citizens Participation Act (TCPA). The trial court's ruling was reversed and remanded to the trial court with instructions to enter judgment dismissing all of Boudreaux's claims against Vore and, after notice and a hearing, to award Vore his damages and costs as provided by the TCPA.

Takings: *City of Albany v. Blue*, No. 11-18-00051-CV, 2020 WL 1623719 (Tex. App.—Eastland Apr. 2, 2020) (mem. op.). This is an interlocutory appeal in a nuisance and inverse condemnation case where the Eastland Court of Appeals reversed the denial of the city's plea to the jurisdiction. It then remanded to allow the plaintiffs the ability to replead.

The City of Albany began construction of a drainage and improvement project for the city-owned golf course next to property owned by the plaintiffs. The plaintiffs assert the construction

altered surface water flow and drainage resulting in the flooding of their property. They sued and the city filed a plea to the jurisdiction, which was denied. The city appealed.

The city only challenged the sufficiency of the plaintiffs' pleadings and did not submit any evidence contrary to the alleged facts. The city asserts that plaintiffs failed to allege facts that show an intentional act of the city. However, if the city knows that specific damage is substantially certain to result from its conduct, then takings liability may arise even when the government did not particularly desire the property to be damaged. The plaintiffs merely allege that the city "knew that its actions would cause identifiable harm, or that specific property damage was and is substantially certain to occur." However, conclusory statements in a pleading are insufficient to establish jurisdiction. As a result, the plaintiffs did not sufficiently plead an inverse condemnation claim. Likewise, they failed to allege the required intent needed to establish a nuisance claim against the city under the Texas Constitution. Again, they provide mere conclusory statements. However, the plaintiffs were not put on notice their pleadings were defective. The pleading defects in this case are not the type that can never be cured. As a result, the case is remanded to give the plaintiffs the opportunity to cure the defects.*

Public Information Act: *Horton v. Welch*, No. 12-19-00381-CV, 2020 WL 1697439 (Tex. App.—Tyler Apr. 8, 2020) (mem. op.). James Horton made two Public Information Act (TPIA) requests of Ron Welch, the mayor of Caney City, requesting, among other items, copies of all text messages and emails of all city council members from November 2015 to January 2019. Welch responded to the request after Horton paid the resulting fees. However, Welch did not ask any councilmembers whether they had text messages or emails responsive to the request. Horton filed a suit under the TPIA, asserting that Welch did not fully comply with his request, and asked the trial court to issue a writ of mandamus directing the city to fully comply. The trial court granted Welch's motion for summary judgment, and Horton appealed.

Horton's sole issue on appeal is that the trial court erred in granting summary judgment in favor of Welch because Welch admitted in his deposition testimony that he made no inquiry of councilmembers regarding text messages and emails, which raises a fact question regarding whether Welch and the city complied with his requests. The court held that Welch "labored under a basic misconception of the law." In this case, the city could not fulfill the requirements of the TPIA by producing only documents in its possession when its officials possess documents that are subject to disclosure. Because the city did not seek to obtain texts and personal emails from councilmembers that the city did not keep in the regular course of business, there was a genuine issue of material fact as to whether Welch fully complied with Horton's requests by providing all texts and emails written by councilmembers in connection with the transaction of official business of the city. The court reversed the trial court's judgment and remanded the cause to the trial court for further proceedings.

Workers' Compensation: *City of Dallas v. Thompson*, No. 12-19-00036-CV, 2020 WL 1443567 (Tex. App.—Tyler Mar. 25, 2020). Greg Thompson was employed by Dallas as a firefighter. After he was diagnosed with testicular cancer in August 2010, Thompson reported the cause of his injury as exposure to carcinogens during his career as a firefighter. The city denied compensability and liability, and ultimately administrative review of the case by the Division of Workers' Compensation of the Texas Department of Insurance (DWC) proceeded

pursuant to the requirements of the Texas Workers' Compensation Act. An administrative law judge determined that Thompson suffered compensable injury, and importantly, that the city waived its defense that Thompson didn't file a claim for compensation within one year of the injury because the city did not raise it within a reasonable time period after it became available. After review by a DWC appeals panel, the administrative law judge's ruling became final. The city sought judicial review, where the trial court rendered partial summary judgment determining that the city was not relieved from liability for Thompson's workers' compensation claim. The city appealed.

On appeal, the city contended that the trial court erred because the city did not waive its one-year defense. First, the city argued that the administrative law judge erroneously added the waiver issue at the contested case hearing. On this point, the court determined that the city did not meet its burden to show, as a matter of law, that the administrative law judge erroneously added the waiver issue, since the city's motion for summary judgment makes no mention of the contested case hearing exhibits and the court must presume that the omitted evidence supports the trial court's judgment.

The city next argues that the administrative law judge's determination that the city waived its defense that Thompson failed to timely file his claim because the city didn't raise it within a reasonable period of time after it became available had no basis in law. The court states that workers' compensation appeals panels have for years determined that the defense of the claimant's failure to file within one year must be raised in a reasonable period of time. In this case, there was a five-year delay between the time that the defense became available and when it was asserted. The court held that inaction for a long period can prove waiver, and affirmed the trial court's partial summary judgment.

Contractual Immunity: *City of Elsa v. Diaz*, No. 13-19-00109-CV, 2020 WL 1615659 (Tex. App—Corpus Christi–Edinburg Apr. 2, 2020) (mem. op.). This is an interlocutory appeal (second for the case) in a contractual immunity case where the Thirteenth Court of Appeals held the city's summary judgment was merely a motion to reconsider the already denied plea to the jurisdiction, so the appellate court lacked interlocutory jurisdiction.

Diaz was appointed as interim police chief but emails stated if not selected for the permanent position, he would resume his role as the warrants officer. Later, a new city manager removed Diaz from the chief position but terminated his employment. Diaz sued for breach of contract. The city first filed a plea to the jurisdiction which was granted. However, the Thirteenth Court of Appeals reversed and remanded. On remand, the city filed separate no-evidence and traditional motions for summary judgment, each reasserting that the trial court lacks subject matter jurisdiction because the city council did not formally approve the contract. The motions were denied and the city took this interlocutory appeal.

Although Section 54.014(a) does not expressly limit a party to one interlocutory appeal, the right to successive interlocutory appeals is not without limits. When a second motion/plea constitutes nothing more than a motion to reconsider, without any new or distinct evidence or arguments, the appellate court lacks interlocutory jurisdiction. In making this determination, courts of appeals should compare both the substance and procedural nature of the two challenges. The

court held, in this case, the original plea and the motions for summary judgment were substantively and procedurally identical. The only change is the city added an affidavit which implicitly refutes evidence considered in *Diaz I* regarding the authority to enter into the contract by the city manager. Since the second set of motions does not contain "new and distinct" challenges to the trial court's jurisdiction, they are mere reconsiderations. The court of appeals, therefore, dismissed the appeal for lack of interlocutory jurisdiction.*****

Collective Bargaining: *City of Houston v. Houston Prof. Fire Fighters' Assoc.*, No. 14-18-00418-CV, 2020 WL 1528078 (Tex. App.—Houston [14th Dist.] Mar. 31, 2020) (mem. op.). The City of Houston and the Houston Professional Fire Fighters' Association, Local 341, entered into a collective bargaining agreement (CBA) that included an agreement to arbitrate certain disputes. After the Houston Fire Department terminated the employment of several firefighters for failure to achieve paramedic certification, a grievance was filed by the association, resulting in arbitration. After arbitration, a trial court rendered summary judgment confirming the arbitration award in favor of the association. The city appealed, contending that the trial court erred in granting the association's summary judgment because the arbitrator: (1) lacked jurisdiction when the association's grievance was untimely; (2) exceeded her jurisdiction by deciding a question that was not before her; (3) modified the law and terms of the CBA at issue; and (4) exceeded her jurisdiction by ordering reinstatement of three firefighters.

Regarding the city's first issue on appeal that the association's grievance was untimely, the grievance procedure outlined in the CBA provided that the association was required to file a grievance within thirty days of the date upon which the association knew or should have known the facts or events giving rise to the grievance. The court held that because the CBA specifically authorized the arbitrator to handle the interpretation and application of the terms of the CBA, this encompassed determining when a grievance must be filed under the CBA. The arbitrator had express authority to determine the fact question relating to whether the grievance was timely, so the court held that the arbitrator did not exceed her authority by deciding the timeliness issue.

The city next argued that the arbitrator exceeded her jurisdiction by determining that the terminated firefighters had a right to an administrative appeal, which was not an issue that was before the arbitrator. The court held that the inability to appeal, or have a hearing concerning termination, was one of the changed consequences not permitted under the CBA. According to the court, the arbitrator maintained the authority to analyze the terms of the agreement as they related to the firefighters' right to appeal.

In its third issue, the city argued that because Local Government Code Chapter 143 generally controls over a CBA, the arbitrator exceeded her jurisdiction by determining that the terminated firefighters should have a post-termination hearing because Chapter 143 does not provide a right of administrative appeal to a firefighter who is terminated for failing to meet conditions of employment. The court held that the city's argument "boils down to a contention that the arbitrator got the law wrong" which is beyond the scope of the court's review. The arbitrator's analysis of the terms of the CBA was within the scope of the arbitrator's authority, so the court overruled the city's third issue.

Finally, the city asserted the arbitrator had no jurisdiction to order reinstatement since the CBA didn't grant the arbitrator the authority to reinstate. The court relied upon common law to conclude that an arbitrator has broad discretion in fashioning an appropriate remedy, so the arbitrator did not exceed her authority by reinstating the terminated employees.

The court affirmed the trial court's judgment.

March 2020

Note: Included cases are primarily from February 11, 2020 through March 10, 2020.

Texas Tort Claims Act: *Jones v. Board of Trustees of Galveston Wharves*, No. 01-19-00671-CV, 2020 WL 937016 (Tex. App.—Houston [1st Dist.] Feb. 27, 2020). This is a Texas Tort Claims Act case where the appellate court determined that the Port of Galveston did not have actual notice of the plaintiff's claims because she claimed no injury when the port's employee contacted her after the incident.

Jones did not provide notice of her claim to the port within the required six months. Instead, she claimed the port had actual notice of her claim. To have actual notice, the port must have had subjective awareness of her claim. The port knew Jones slipped and fell because of water. A security guard informed a port employee investigating the claim that Jones's right knee and foot were red afterward. However, Jones herself told the port employee that she was ambulatory, was not injured, and did not need medical assistance. Based on the record, the port did not have actual notice and the trial court properly granted the plea to the jurisdiction.

Texas Tort Claims Act: *City of Houston v. Lal*, No. 01-19-00625-CV, 2020 WL 937026 (Tex. App.—Houston [1st Dist.] Feb. 27, 2020). This is a Texas Tort Claims Act motor-vehicle accident case. The First Court of Appeals affirmed the denial of the city's plea to the jurisdiction.

An off-duty police officer in his city-issued vehicle collided with the plaintiff when the officer looked at his city-issued cell phone and veered into oncoming traffic. The plaintiff sued and said the officer was in the course and scope of his employment at the time of the accident. The city filed a plea to the jurisdiction on the grounds that the officer was not in the course and scope of his employment with the city, which was denied. The city appealed.

The appellate court noted that "[w]hether a peace officer was on duty or off is not dispositive as to whether he was acting within his employment's scope." *Garza v. Harrison*, 574 S.W.3d 389, 405 (Tex. 2019). Instead, the inquiry focuses on what the officer was doing and why he was doing it. Just the fact that the officer was on call at the time of the accident does not mean he was within the course and scope of his employment.

The appellate court determined that a reasonable factfinder could infer that the officer was acting in the course and scope of his employment when checking his city-issued phone to see if he needed to return to duty. Since the officer was on call, he had to monitor his city-issued phone for incoming work-related calls. The important inquiry is whether there is a connection between

the officer's job duties and the tortious conduct. The appellate court found that there was. Therefore, the trial court properly denied the city's plea and the appellate court affirmed.

Governmental Immunity/Easement Rights: *Harris Cty. v. Park at Westcreek, LP*, No. 01-18-00343-CV, 2020 WL 826725 (Tex. App.—Houston [1st Dist.] Feb. 20, 2020). This case is about a dispute over the ownership of an easement. The First Court of Appeals affirmed the trial court's denial of the county's plea to the jurisdiction.

The county, Park at Westcreek, L.P. (Westcreek), and several public storage companies all owned part of the same tract of land. The original owners dedicated a 40-feet-wide easement of land that crossed from the main frontage road westward across the tract. The easement was dedicated for road purposes that should be privately owned and maintained but would be dedicated to the public. Furthermore, the dedication stated that if the public ceased to use the right-of-way, then the easement terminated. The county and the public storage companies purchased portions of the tract along the frontage road. Westcreek purchased a portion of the tract to the west of the county's property. Westcreek was assigned a nonexclusive right to the use of the easement on the southern 20 feet of the county's property and northern 20 feet of the public storage companies' property.

Westcreek has access to its apartments from two other nearby roads. It sought permission from the county to construct an entrance on the easement to increase accessibility. The county denied Westcreek's request.

Westcreek sought a declaration of its legal rights to an easement on land owned by the county. The county filed a cross-action against three public storage companies and Westcreek, asserting the county had adversely possessed the property. Westcreek then amended its pleadings to include a takings claim and that the easement dispute was a boundary dispute. The county settled with the public storage companies. The county then filed a plea to the jurisdiction on the grounds that it was immune from Westcreek's claims.

The parties all filed various iterations of their pleadings and the county filed a plea to the jurisdiction on the grounds that Westcreek did not plead the necessary legislative waiver and that the county had not waived its governmental immunity from suit. Westcreek responded that the county had waived its immunity by seeking affirmative relief, citing *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006). The trial court denied the county's plea, but did not state the reason why.

The appellate court first addressed the county's arguments that it had governmental immunity and that it did not waive governmental immunity by filing its cross-action. The county asserted it was generally immune from suit for land. However, the court determined *Reata* applied and the county waived its immunity by asserting affirmative claims. When asserting its adverse possession claim to ownership of the easement, the county left the "sphere of immunity from suit for claims against it which are germane to, connected with, and properly defensive to claims" the county asserted. In analyzing this argument, the court determined that the county had filed cross-claims against the public storage companies and Westcreek. Although the county nonsuited its claims against the property storage companies, it did not nonsuit its claims against Westcreek.

Additionally, nonsuiting of affirmative claims does not impact the *Reata* analysis. The court also rejected the county's argument that it must plead a claim for monetary damages for the trial court to acquire jurisdiction under *Reata*. Thus, the appellate court concluded the trial court properly denied the county's plea to the jurisdiction.

Next, the appellate court considered the county's third argument that it was immune from Westcreek's constitutional taking or inverse condemnation claim because Westcreek failed to allege an actionable takings claim. The appellate court noted that the county had acknowledged the nature of Westcreek's property interest necessarily depended on the status of the easement. The county's argument implicated the underlying merits of the case, which the appellate court determined is inappropriate to consider on a plea to the jurisdiction. Therefore, it overruled the county's third issue.

Charter Amendment: ***Kilgore v. City of Lakeway***, No. 03-18-00598-CV, 2020 WL 913051 (Tex. App.—Austin Feb. 26, 2020) (mem. op.). This is an appeal of the granting of a plea to the jurisdiction in a case involving a charter amendment in which the court of appeals affirms the trial court's order.

In 2014, voters approved amending the city charter to extend the mayoral and city council terms of office from two to three years. After the change was adopted, the city realized that the charter still contained a provision that required members of council to be elected at large by plurality vote in violation of the Texas Constitution, which requires a home-rule city that has council terms that exceed two years to elect its members of council by a majority vote. In response, the city contacted the Texas Secretary of State (SOS) for advice. The SOS recommended that the city pass an ordinance postponing implementation of the three-year terms until the at-large system could be replaced with a place system, necessary to facilitate a majority-vote system, and from the 2018 election and forward, the city pass an ordinance to assign place numbers to the council members. Once this was done, the charter amendment could be implemented and the councilmembers could be elected by majority vote for three year terms.

In April 2018, the city passed an ordinance suspending the charter amendment until the city either established a place system or amended the charter, and provided that the May 2018 election would be conducted under the plurality system. The city never implemented a place system for its council as recommended by the SOS. Instead, in May 2018, the city passed another ordinance providing that it had just conducted an election for the city's mayor and two council seats for the purpose of realigning the terms of the mayoral and council seats. The mayor was declared to be serving as a holdover since 2017, two councilmembers would serve as holdovers until their seats were filled by a special election in November 2018, two councilmembers were realigned from three-to-two year terms ending in 2019, and two terms did not need realignment. The ordinance also provided that the two council candidates receiving the highest number of votes in the November 2018 special election would serve two-year terms and an election in May 2019 would elect the mayor and three councilmembers for two-year terms. In July 2018, the city passed an ordinance ordering a special election in November 2018 to elect two councilmembers.

Kilgore sued the city and its elected officials in their official capacities seeking to enjoin the November 2018 special election. The city filed a plea to the jurisdiction asserting that Kilgore lacked standing to bring suit. The trial court granted the plea to the jurisdiction. Kilgore appealed. The court of appeals determined that Kilgore's complaints about the postponement of the charter amendment were not moot because the at-large plurality voting of councilmembers for two-year terms was still ongoing and would continue with each subsequent city council election. However, because the charter amendment was void and of no legal effect as it conflicted with the Texas Constitution, it could not be implemented. Additionally, the court found that Kilgore did not have standing to bring the lawsuit as he did not allege some injury distinct from that sustained by the public at large. Accordingly, the court affirmed the trial court's order.

Contract Immunity: *Harlandale Indep. Sch. Dist. v. Jasmine Engineering, Inc.,* No. 04-19-00638-CV, 2020 WL 1159056 (Tex. App.—San Antonio March 11, 2020) (mem. op.). This is an appeal of the denial of a plea to the jurisdiction in a case involving a breach of contract in which the court of appeals affirms the trial court's order.

In 2012, Harlandale Independent School District (district) and Jasmine Engineering, Inc. (Jasmine) entered into a professional services agreement (PSA), which was subsequently amended six times. In January 2018, the district informed Jasmine that the PSA was terminated without cause. Jasmine then sued the district for breach of contract, alleging that the PSA required a finding of cause to terminate. The district filed a plea to the jurisdiction and attached a final investigative report by the Texas Education Agency (TEA), which made findings and conclusions that the district and its representatives violated state law when the district entered into and later amended the PSA. The district argued that Jasmine could not demonstrate a valid waiver of the district's governmental immunity because, according to the TEA, the PSA was unauthorized by law and improperly executed, and a contract made in violation of the law does not waive governmental immunity. The trial court denied the plea and the district appealed.

The court of appeals upheld the trial court's judgement finding that while the TEA has statutory authority to initiate investigations into contracting matters, make findings, and impose sanctions pursuant to its findings, it's findings do not bind a court or the parties in a contract dispute, so as to deprive a trial court of jurisdiction. Because the district did not ask the trial court to determine whether the PSA was entered or amended in violation of state law, the district did not meet its burden to establish the trial court lacked subject matter jurisdiction.

Immunity: *City of San Antonio v. Riojas*, No. 04-19-00220-CV, 2020 WL 907573 (Tex. App.—San Antonio Feb. 26, 2020). This is an interlocutory appeal of the denial of a plea to the jurisdiction in a case involving a motor vehicle accident in which the court affirms the trial court's order.

Officer Tristan was driving his patrol vehicle on the freeway. He activated his emergency lights after he moved to an exit lane and traffic began to slow down for no obvious reason. This in turn caused his vehicle's dash cam to begin recording and his microphone to be activated shortly thereafter. In his affidavit, Officer Tristan stated that, around the time he turned his lights on, he saw a white vehicle driven by Olvedo crossing several lanes of traffic in an attempt to exit the

freeway. However, the dash cam video showed Olvedo, who was driving a white car, moving into the far-right main lane and breaking for unknown reasons. The video also showed another white car next to Olvedo merging into Olvedo's lane, cutting her off, and briefly stopping before driving away. Olvedo then suddenly crossed two sold white lanes separating the exit lane from the three main lanes and exiting the highway. Officer Tristan concluded that Olvedo had made an improper lane change and impeded traffic behind her. After Olvedo exited, Officer Tristan radioed a nearby police officer to pull her over and ticket her.

While Officer Tristan was watching Olvedo in the right lane, Riojas was driving his motorcycle in the far-left lane directly behind a car driven by Vela. Riojas and Vela were behind Officer Tristan. Riojas saw Vela braking, and took an evasive action to avoid hitting her. He then lost control of his motorcycle, fell off, and came to rest near a concrete barrier. His motorcycle slid and hit the back of Vela's car. As Officer Tristan maneuvered his vehicle to the location where Riojas was located, he remarked that a white vehicle, presumably Olvedo's car or the other car, had caused the accident. Three other people – Vela and two unidentified men – stopped to help Riojas. The unidentified men approached Officer Tristan and told him that they believed the wreck was his fault and that by activating his emergency lights, he scared everybody on the street. Vela stated that he slowed down because the car in front of her slowed down. Officer Tristan stated that he turned on his lights after he saw Rioja's motorcycle sliding, but his police report provides that he saw the motorcycle after he turned on his lights.
Riojas sued the city for his injuries, and later amended his petition to include Olvedo and the owner of the car she was driving as defendants. The city filed a plea to the jurisdiction arguing that the city was immune because: (1) the accident was not caused by Officer Tristan's activation of his emergency lights and therefore did not arise from the operation or use of a motor-driven vehicle; and (2) officer Tristan performed a discretionary duty in good faith and was entitled to official immunity. The trial court denied the plea, and the interlocutory appeal followed.

First, the court first looked at whether liability was waived under the Texas Tort Claims Act's provision for personal injury "arising" from the operation or use of a motor-driven vehicle. The court initially reviewed the city's argument that the eyewitnesses' statements were speculative and conclusory such that they did not raise a fact issue that anything Officer Tristan did caused Vela or the motorist in front of her to brake. The court concluded that the eyewitnesses' statements were not speculative or conclusory because the eyewitnesses were physically present in the moments leading up to the accident and immediately afterward, and that their opinions were based on their perceptions that there was no reason for Officer Tristan to activate his lights, and that he scared everybody on the street by doing so. As such, the eyewitnesses' opinions presented more than a scintilla of evidence that the accident would not have occurred but for Officer Tristan unexpectedly and inexplicably activating his emergency lights.

The court then looked at the city's argument that Officer Tristan's use of his vehicle was merely a condition that made the accident possible. In finding that Officer Tristan's operation or use of his vehicle did not merely furnish a condition that made the accident possible, the court distinguished this case from Texas Supreme Court precedent. The court found that there was evidence that Rioja's wreck occurred contemporaneously or nearly contemporaneously with Officer Tristan's activation of his lights under circumstances that made two eyewitnesses conclude that Officer Tristan's operation or use of his vehicle triggered the wreck.

The court also addressed the city's argument that Officer Tristan's conduct was too attenuated from the wreck to have caused it because Rioja's wreck occurred "three lanes away" from Officer Tristan's patrol vehicle, Rioja's motorcycle did not strike Officer Tristan's vehicle, and the wreck was too geographically and temporarily removed from Officer Tristan's activation of his emergency lights to have arisen from that action. The court determined that because the Transportation Code requires drivers to stop and remain standing until a police vehicle displaying its emergency lights drives away, the city is unable to show as a matter of law that no vehicle in the far-left lane was required to brake in response to anything Officer Tristan did in the far-right exit lane.

Second, the court addressed the city's claim that it is immune from Rioja's claims because Officer Tristan is entitled to official immunity. The court applied the "need to take action" versus the "risk of harm the action posed to the public" analysis to determine if Officer Tristan acted in good faith so as to qualify for official immunity. The court concluded that Officer Tristan's affidavit was nothing more than a "simple subjective pronouncement of good faith" that was not supported by a showing that he needed to balance the need he perceived with the potential risk posed by his chosen course of action. As such, he was not entitled to official immunity.

Finally, the court concluded that Rioja's allegations against a newly added defendant did not constitute clear, deliberate, and unequivocal admissions that essentially amounted to an abandonment of his original claims against the city.

Municipal Court: *Chapa v. State*, No. 05-19-00609-CR, 2020 WL 1129980 (Tex. App.—Dallas March 9, 2020) (mem. op.). This is an appeal of a municipal court conviction in which the court of appeals affirmed the trial court's order.

Chapa was cited by City of Carrolton Police for operating a motor vehicle with an expired registration. Chapa pled not guilty, and, following a jury trial in the city's municipal court of record, was found guilty and assessed a fine. Chapa timely appealed to the county court of criminal appeals arguing that the municipal court's judgement should be reversed because he was prevented from registering his vehicle by the Texas "scofflaw" statute, Section 502.010 of the Texas Transportation Code, which allows a county assessor to deny vehicle registration to individuals with outstanding fines or warrants. The county court of criminal appeals found that Chapa failed to preserve error for appeal by not filing a reporter's record and affirmed the municipal court's judgement. Chapa appealed.

In the county court, Chapa presented ten issues broadly contending that his conviction for operating a motor vehicle with an unexpired registration was improper because he was prevented from renewing his registration. However, in his motion for a new trial to the court of appeals he only raised four issues and failed to raise the issues regarding his inability to register his vehicle due to state law. Because he failed to raise these issues, the court found that he forfeited these issues. For the issues he did raise, the court found that Chapa failed to provide an argument or legal authority to support his position and failed to provide a court reporter's record that would allow the court to assess his claims. Accordingly, the court affirmed the judgement of the county court of criminal appeals.

Abuse of Official Capacity: *Becker-Ross v. State*, No. 06-19-00108-CR, 2020 WL 130588 (Tex. App.—Texarkana Jan. 13, 2020). Rosena Becker-Ross, city administrator for the City of Mount Enterprise was found guilty by a jury of three counts of abuse of official capacity for pressuring the city marshal, Parker Sweeney, to write a certain number of traffic tickets within a specified period even though traffic-offense quotas are illegal under Section 720.002 of the Texas Transportation Code. On several occasions, using texts and emails, the city administrator demanded the marshal write more traffic citations because it affected the city's budget, her salary, his salary, and his job. This continued even after the marshal informed the city administrator and the city council of Section 720.002 of the Transportation Code. Eventually, the marshal was fired.

The city administrator appealed her convictions stating that there was not legally sufficient evidence to support the jury's verdict, the trial court erred in not granting her motion to quash because there was inadequate notice of the offense she was charged with, and there was an error in the jury charge. The court of appeals overruled all the city administrator's arguments and affirmed the trial court.

The court stated that the evidence presented to the jury was not legally insufficient because there was plenty of evidence to show the city administrator was subject to Section 720.002 of the Texas Transportation Code. Her argument that she did not have authority over the marshal was not applicable because Section 720.002 did not impose such a requirement. Also, her argument that she did not have the required mens rea to receive a benefit from Section 720.002 was insufficient because the evidence showed that she was the highest paid city official, her salary was paid from the city's budget, and a large part of the budget was based on traffic ticket fines. This showed that she intended to obtain a benefit of maintaining her higher salary by violating Section 720.002.

The court also found that the trial court did not err in not granting the motion to quash since there was adequate notice to the city administrator in the information concerning her intended benefit for the imposition of a traffic-offense quota. The State of Texas was not required to be detailed on how the city administrator benefited since "benefit" is defined in the Texas Penal Code and it is presumed the defendant is on notice of statutory definitions. Also, the State's information tracked the statutory language and set forth each and every element the State was required to prove at trial.

Lastly, the court determined there was no error in the jury charge when the trial court included the laws of parties to the jury charge since the court already determined that there was sufficient evidence showing the city administrator's guilt as a primary party to the offenses and the city administrator, herself, stated that she would not be the only one going down.

Texas Torts Claim Act: *Crockett Cty. v. Damian*, No. 08-19-00145-CV, 2020 WL 814013 (Tex. App.—El Paso Feb. 19, 2020). On March 2, 2017, Miguel Damian died from injuries he sustained at work after he was run over by a road maintainer operated by Adam De La Garza (De La Garza), a Crockett County employee.

Appellees filed their original petition to bring suit against De La Garza, Crockett County, and the Crockett County Road Department for the wrongful death of Damian. The original petition raised only state-law torts claims under the Texas Tort Claims Act (TTCA). The county's original answer raised the affirmative defense of governmental immunity and argued any claims against De La Garza are barred by Section 101.106(e) of the TTCA. The county filed a motion to dismiss pursuant to Section 101.106(e), admitting that De La Garza was a county employee and that the county was entitled to dismissal of all claims against De La Garza because the Appellees failed to elect between suing the county and its employees before filing suit. Appellees did file an amended petition which added a state common-law negligence claim against De La Garza in his individual capacity for acts committed outside the course and scope of his county employment, drinking excessively and staying up late the night before he was required to report to work early the following day. The Appellees conceded the tort claim brought against De La Garza in his official capacity in the original petition required dismissal because it was brought under the TTCA, however, their subsequent state common-law negligence claims against De La Garza in his individual capacity was not subject to the TTCA and should not be dismissed. The trial court agreed with the Appellees and dismissed the tort claims based on acts committed within De La Garza's employment, but denied the motion as to tort claims based on acts committed outside of the scope of his county employment.

In this interlocutory appeal, the court of appeals reversed the trial court's order denying in part the county's motion to dismiss and render judgment dismissing all of the Appellees' state-law-tort claims against De La Garza. The court found that the trial court should have also dismissed the tort claims based on acts committed outside of the scope of De La Garza's county employment because Section 101.106(e) of the TTCA requires plaintiffs to choose, before filing suit, between suing a governmental entity or suing an employee in his individual capacity. If the plaintiffs do not make the choice before filing suit, the governmental unit may file a motion to dismiss all state-law-tort claims against its employee by effectively confirming the employee was acting within the scope of employment and that the government, not the employee, is the proper party. The county did this when it filed its motion to dismiss. Because the Appellees filed against both, instead of filing only against De La Garza in his individual capacity, the Appellees forfeited all state-law negligence claims and are barred from bringing any state-law-tort claim against De La Garza regarding the same subject. The court also distinguished this case from *Texas Dep't of Aging & Disability Svs. v. Cannon*, 435 S.W.3d 411(Tex. 2015) because *Cannon* added a claim under 42 U.S.C. §1983, a federal claim, which is a non-state-law-tort claim, and therefore was not subject to the dismissal of the state-law-torts claim under the TTCA.

Junked Vehicles: *Tucker v. City of Corpus Christi*, No 13-18-00328-CV, 2020 WL 948364 (Tex. App.—Corpus Christi Feb. 27, 2020). On August 5, 2013, a municipal court judge ordered the seizure of four vehicles located on property owned by Danis and Beverly Tucker. The Tuckers contended that the vehicles were antique cars that were not subject to seizure under the city's junked vehicle ordinance. Their initial suit against the city was dismissed on August 5, 2015, for want of prosecution. The Tuckers filed another lawsuit on August 4, 2017, alleging conversion, trespassing, invasion of privacy, due process violations, fraudulent misrepresentation of the city's code of ordinances, and the taking of personal property without just compensation. The city filed a plea to the jurisdiction contending that the Tuckers' claims were barred by the

two-year statute of limitations in Civil Practice and Remedies Code Section 16.003. The trial court granted the city's plea to the jurisdiction and the Tuckers appealed.

In their sole issue on appeal, the Tuckers argued that the trial court erred in dismissing their takings claim because their suit was filed within the applicable limitations period. The court of appeals first, in reliance on the Texas Supreme Court's decision in *Prairie View A&M v. Chatha*, 381 S.W.3d 500 (Tex. 2012), concluded that the statute of limitations is a jurisdictional requirement in suits brought against a governmental defendant. The Tuckers argued that their takings claim is governed by a ten-year statute of limitations, instead of two years. The court noted that the ten-year statute of limitations cited by the Tuckers applies to a governmental entity's taking of real property, not personal property like the automobiles at issue. Under Civil Practice and Remedies Code Section 16.003, the applicable statute of limitations was two years. Further, the court held that the Tuckers' initial lawsuit, which was dismissed for want of prosecution, did not toll the limitations period.

Because the Tuckers' lawsuit was filed on August 4, 2017, almost four years after the alleged taking and well beyond the two-year statute of limitations, the court concluded that the Tuckers failed to comply with a statutory prerequisite to suit, thus negating jurisdiction. The court of appeals affirmed the trial court's granting of the city's plea to the jurisdiction.

Wrongful Death: *Harris Cty. v. Coats*, No. 14-17-00732-CV, 2020 WL 581184 (Tex. App.—Houston [14th Dist.] Feb. 6, 2020). This is a Section 1983/wrongful death case where the Fourteenth Court of Appeals reversed, in part, a jury award against the county and its deputy.

Jamail and his girlfriend were using cocaine when Jamail felt ill. Jamail exited through a window and called 9-1-1 from a public phone. However, when the emergency medical technicians (EMTs) arrived, Jamail ran from the area to a nearby Burger King. Deputy Saintes arrived after a disturbance call, handcuffed Jamail and walked him to the ambulance. When they neared the ambulance, Jamail became combative and attempted to run. Multiple deputies arrived and assisted Deputy Saintes to subdue Jamail. EMTs gave Jamail an injection of a sedative. Jamail was seen breathing normally. The parties dispute whether Deputy Vailes' boot was on Jamail's nose and mouth at the time. However, after a short while, he could not be roused. He was transported to a nearby hospital where he died. The family sued. Multiple individuals and parties settled out or were dismissed based on immunity. A jury trial was held against the county and Deputy Vailes. The jury found for Jamail's family. The county and Deputy Vailes appealed.

The court first determined no county policy, custom, or practice existed to establish Section 1983 liability as to the entity. Normally, single incidents cannot create a policy, custom, or practice. As far as constables go, the fact that a constable's jurisdictional reach is throughout the county does not support the trial court's conclusion that the Precinct Four Constable is a law enforcement final policymaker for Harris County. Jamail's burden was to identify a final policymaker who speaks on law enforcement matters for the local government unit at issue—Harris County, not simply a precinct.

As to Deputy Vailes, the court held some evidence existed that Deputy Vailes placed his boot on Jamail's face when he was already handcuffed. The law was sufficiently clear that every

reasonable official would understand (as did those who testified) that stepping on the nose and mouth of someone who is lying on the ground, likely sedated, handcuffed, and unresponsive, with enough force that the person's neck touches the ground, would constitute an excessive force violation. Therefore, Vailes was not entitled to qualified immunity on that claim. However, the evidence was insufficient that Vailes' actions caused Jamail's death. Deputy Vailes argues that Jamail died because of acute cocaine toxicity, as the medical examiner concluded following Jamail's autopsy. In cases alleging medical injury or death, expert testimony regarding causation is generally the norm and Jamail's family did not produce any regarding the cause of death. The fact that Vailes' boot was placed on Jamail, when he was already non-responsive is insufficient to justify the jury award against Vailes as to Jamail's death. Because of the alterations to the judgment, the court remanded for a reconsideration of the attorney fee award.**

February 2020

Note: Included cases are from January 11, 2020 through February 10, 2020.

Texas Tort Claims Act: *Texas Dep't of Criminal Justice v. Rangel*, No. 18-0721, 2020 WL 596876 (Tex. Feb. 7, 2020). This is a Texas Tort Claims Act (TTCA) case where the Texas Supreme Court held the Texas Department of Criminal Justice (TDCJ) retained immunity for hitting an inmate with a tear-gas shell because the riot exception to the TTCA applied.

Two groups of inmates were threatening each other in the Pam Lychner State Jail. The groups totaled twenty-six inmates. After giving orders to cease hostilities for almost an hour, which the inmates ignored, a TDCJ warden authorized a lieutenant to use a rifle as a show of force. The armory employee gave the lieutenant the rifle and two shells, including a skat shell. A "skat shell" launches five pyrotechnic submunitions that are designed to deliver chemical agents at a range of up to eighty meters. The lieutenant accidentally loaded the skat shell. After giving a final order to rack up, which the inmates refused, the lieutenant fired the skat shell at the group of inmates who refused to comply with orders. The skat shell hit Rangel, injuring him. Rangel sued. TDCJ conducted an internal use-of-force review that "revealed several mistakes" as to how the incident was handled, noting that the skat shell was "designed for outdoor areas" only and "that chemical agents should have been administered through the door rather than in the middle of the housing area." The lieutenant who fired the skat shell was disciplined. TDCJ filed a plea to the jurisdiction, which was denied.

The Texas Supreme Court held the supervisor's order to use the tear-gas gun was a "use of tangible personal property" under the TTCA. It was not the use by the individual guard following orders, but was a "use" by the supervisor who authorized an order the gun be put into play. The distinguishing factor is the order by the supervisor specifically to use the weapon, and not merely making the weapon available to the guard with no direction. [Comment: the court spent multiple pages in the opinion on this distinction.] The court did not address TDCJ's argument regarding the intentional tort exception to the TTCA. However, the immunity waiver does not apply to a claim "based on an injury or death connected with any act or omission arising out of civil disobedience, riot, insurrection, or rebellion." Tex. Civ. Prac. & Rem. Code § 101.057(1). Rangel argued that the circumstances did not constitute a riot or there was a fact issue as to

whether a riot existed. The court concluded the plain and ordinary meaning of the term "riot" also includes how the term is used in other statutes, including the Penal Code. The Penal Code defines "riot" in part as "the assemblage of seven or more persons resulting in conduct" that "creates an immediate danger of damage to property or injury to persons." Tex. Penal Code § 42.02(a). While not identical, that definition is in line with the ordinary meaning of "riot," emphasizing not only the size of assemblage and nature of the events but also the immediate danger. As a result, the undisputed facts of the case constitute a riot as a matter of law. As a result, no waiver of immunity exists and the plea should have been granted. The court reversed the First Court of Appeals and rendered judgment in favor of TDCJ.*

Texas Tort Claims Act: *City of Houston v. Terry*, No. 01-19-00197-CV, 2020 WL 370556 (Tex. App.—Houston [1st Dist.] Jan. 23, 2020) (mem. op.). This is a Texas Tort Claim Act (TTCA) case where the First District Court of Appeals reversed the denial of the city's plea to the jurisdiction and dismissed the case.

Terry was electrocuted while performing maintenance on a communication tower leased by the city. Terry was employed by a contractor at the time, but he was accompanied by a city employee (Hunter) at the site. Before having Terry climb the tower to replace a lightbulb, Hunter was to remove the control box faceplate, which theoretically should cut the power. However, when Terry touched the lightbulb that needed replacing 300 feet up the tower, he was electrocuted. Hunter testified that he did not know the source of the electricity. Hunter maintained that the power was off because: (1) power immediately stops running to the tower when the control box's faceplate is removed, and (2) Terry's injuries would have been far more severe had the power been on. However, evidence showed several capacitors were near the control box and could have retained a charge for a short while. Terry brought claims under the TTCA for injuries resulting from both the use of tangible personal property and for premises defects. The city filed a plea to the jurisdiction. The trial court granted the plea as to the negligent use of personal property but denied it as to the premises defect.
The court held a claim for premises liability is distinct from a claim for general negligence. The TTCA's premises liability provision imposes heightened requirements for liability, and they cannot be avoided by recasting a premises defect claim as one for general negligence. Under a premises defect theory, the city only owed a duty to warn of dangers it had actual knowledge existed. Failing to turn off the electricity does not fall under a premises defect theory, but is a general negligence theory. Premises liability instead concerns nonfeasance theories of liability based on the failure to take measures to make the property safe. Any fact issue relating to Hunter's alleged failure to turn off the electricity to the tower is immaterial to the premises defect analysis. Under a premises defect theory, Terry did not establish a waiver. It is undisputed that any residual electricity stored in the capacitors should have dissipated about a minute or two after the power was turned off. Given that it took Terry at least 30 minutes to climb the tower and reach the lightbulb where he was electrocuted, Hunter's awareness that these capacitors carried a short-term charge does not rise to the level of actual knowledge of a dangerous condition. At most, Hunter's testimony about the tower's capacitors raises an inference that he may have been aware of a hypothetical hazard. That is not enough. Assuming that the tower's capacitors were the source of the electricity that injured Terry, any power they stored was present because that is how the capacitors operate. Hunter, however, did not know they posed a danger. As a result, the plea should have been granted.*

Employment/Civil Service: *City of Fort Worth v. O'Neill*, No. 02-18-00131-CV, 2020 WL 370571 (Tex. App.—Fort Worth Jan. 23, 2020) (mem. op.). The Fort Worth Court of Appeals reversed-in-part and affirmed-in-part a trial court order regarding whether the court had jurisdiction over an appeal from a hearing examiner's decision under the Civil Service Act.

Shea O'Neill was indefinitely suspended as a firefighter with the city. O'Neill, while on work-related leave, struck a 70-year-old parent at a football scrimmage with his left hand. The parent alleged he sustained facial injuries, several cracked and broken teeth, and a bloody nose. The fire chief found that O'Neill had violated several fire-department rules and regulations and imposed the suspension. O'Neill appealed and a hearing examiner reversed the suspension. The city appealed to the district court, which granted O'Neill's plea to the jurisdiction holding it had no jurisdiction over the hearing examiner's decision. The city appealed.

The city asserts the district court had jurisdiction to consider the appeal for two reasons: (1) the hearing examiner's decision was procured by unlawful means because she considered evidence not admitted at the hearing, and (2) the hearing examiner exceeded her jurisdiction because she concluded that the fire department's due-process violations compelled her to reinstate O'Neill. The Civil Service Act mandates that a decision be made on evidence submitted at the hearing. A hearing examiner's decision is "final and binding on all parties." An appeal is permitted only if the hearing examiner was without jurisdiction or exceeded his/her jurisdiction or that the order was procured by fraud, collusion, or other unlawful means. It is undisputed the hearing examiner conducted her own independent Internet research on the side effects of certain drugs. O'Neill counters the search results were not "procured" through unlawful means. In ordinary usage, "procure" means to "to cause to happen or be done" and to "bring about." The hearing examiner found the "slap" was defensive in nature and unlikely to have caused the broken teeth or bones and dismissed the nosebleed as being caused by the slap.

The court held a fact issue exists regarding the side-effects evidence and whether it led the hearing examiner to decide that the evidence overall did not support the fire chief's findings and conclusions. Such was improper and was procured through an unlawful means as the medication issue was not submitted during the hearing as evidence. As a result, the "procured through unlawful means" ground entitled the city to reversal of the order granting the plea and a remand for further proceedings. However, the hearing examiner also determined that the department did not fully investigate the facts and allegations and did not give O'Neill an adequate opportunity to respond to the allegations. Such is within her discretion. Nothing in the Civil Service Act prohibits hearing examiners from reinstating a firefighter based on a finding that the department did not give due process during the disciplinary process. That ground was overruled by the court, even though it still remanded the case.*

Texas Tort Claims Act: *City of Fort Worth v. Posey*, No. 02-19-00351-CV, 2020 WL 241425 (Tex. App.—Fort Worth Jan. 16, 2020). This is a premises liability/Texas Tort Claims Act (TTCA) case where the Fort Worth Court of Appeals held a fact question exists as to Posey's payment for use of the premises so the plea to the jurisdiction was properly denied.

Posey attended a Christmas gift market put on by the Junior League of Fort Worth at the Will Rogers Memorial Center (WRMC). Posey asserts she paid for entry to the coliseum. The city

asserts Posey purchased the entry ticket to enter the gift market from the Junior League and not the city. After the market event, Posey walked down the public sidewalk to return to her car and tripped over an unknown metal object located in the concrete sidewalk. Posey fell and suffered injuries. Under the TTCA, the city owes Posey a duty "that a private person owes to a licensee on private property, unless the claimant pays for use of the premises." Tex. Civ. Prac. & Rem. Code § 101.022(a). If Posey paid for the use of the premises, she is an invitee; if not, she is a mere licensee. The city filed a plea to the jurisdiction based on lack of actual knowledge required of a licensee. The plea was denied and the city appealed.

If Posey was a licensee, she must show that the city had actual knowledge of the unreasonable risk of harm created by the obstruction. If she was an invitee, she need only show that the city should have known of the risk—i.e., constructive knowledge. Posey asserts she paid a fee to park at the coliseum, and it is undisputed that the parking fee went directly to the city. Second, Posey offered evidence that she paid a $12 fee to enter Junior League's gift fair, and Junior League, in turn, paid the city to rent the premises. However, the city asserts Posey fell on a public sidewalk for which she did not have to make any payment. One line of cases would agree with the city that the standard should be "but for" the payment, the claimant would not have access to the area. However, because of the text of the TTCA, the court held Posey "paid for the use of the premises" and the fact others could access the same area without paying is immaterial for statutory construction principles. Further, the statute does not say that the claimant must pay for exclusive or nonpublic use of the premises. Posey introduced multiple forms of evidence—including a contract and testimony from the city's own representative—showing that the payments also endowed her with the express right to use the walkway to travel between the parking lot and the gift fair. As a result, a fact question exists as to whether Posey is considered an invitee or licensee. The plea was properly denied.*****

Competitive Bidding: *Tarrant Cty. v. Lerner*, No. 02-19-00330-CV, 2020 WL 98143 (Tex. App.—Fort Worth, Jan. 9, 2020) (mem. op.). This is a declaratory judgment/immunity case where the Fort Worth Court of Appeals held the county retained immunity for declaratory claims alleging violations of the competitive bidding statute.

The county had a contract with Dispute Resolution Services of North Texas (DRS) to manage the county's alternative dispute-resolution services and was valued at over $400,000 per year. When renewing the contract, Tarrant County did not seek competitive bids for the contract. A competitor, Lerner, sued asserting after the last renewal the contract was invalid due to the lack of bidding. The county filed a plea to the jurisdiction, which was denied.

The immunity waiver contained in the competitive bidding statute is specific and narrowly drawn: "Any property tax paying citizen of the county may enjoin performance under a contract made by a county in violation of [the Act]." Tex. Loc. Gov't Code § 262.033. The court held the Legislature intended to waive immunity for injunctive-relief claims arising from violations of the statute. However, that does not waive immunity for attorney's fees or any other form of relief. As a result, the court found the county retained immunity for Lerner's declaratory judgment claims. The plea should have been granted.*****

Age Discrimination: *City of San Antonio v. Arciniega*, No. 04-19-00467, 2020 WL 214759 (Tex. App.—San Antonio Jan. 15, 2020) (mem. op.). This is an appeal of the trial court's order denying the City of San Antonio's plea to the jurisdiction in a claim for age discrimination.

After Arciniega's employment with the city was terminated, he sued the city alleging age discrimination. The city filed a plea to the jurisdiction asserting that Arciniega's lawsuit was barred because he failed to file his administrative complaint with the Texas Workforce Commission within the required 180 days after the date he was terminated. The trial court conducted an evidentiary hearing, at which the city's witness testified that she contacted Arciniega by telephone on August 2, 2013, and informed him that he was being terminated effective that day, and that written notice would be mailed to him. Arciniega testified that he received a voicemail from the city stating that documentation was being forwarded to him and that he signed a "green card" acknowledging receipt of the notice of termination on August 10, 2013. Based on this hearing, the trial court denied the city's plea. The city appealed.

The court of appeals concluded that when a defendant asserts and supports with evidence that the trial court lacks subject matter jurisdiction, and the facts underlying the merits and subject matter jurisdiction are intertwined, a plaintiff is only required to show that there is a disputed material fact regarding the jurisdictional issue. Thus, the trial court was required to resolve the jurisdictional issue on the basis of facts that it found during the evidentiary hearing. Additionally, the court found that the trial court was not required to enter findings of facts and conclusions of law. Accordingly, the court affirmed the trial court's ruling.

Court Fees: *Ovalle v. State*, No. 05-19-00136-CR, 2020 WL 364140 (Tex. App. – Dallas Jan. 22, 2020). This is a constitutional challenge to certain allocations of court fees imposed under Section 133.103 of the Local Government Code.

Ovalle challenged the allocation of the $25 fee imposed under Section 133.103 whereby 50 percent of the fee is sent to the comptroller for deposit in the general revenue fund and 40 percent is deposited in the general revenue account of the county or municipality. The State asserted that Ovalle had waived the issue by failing to object in trial court. The court of appeals found that the allocations were unconstitutional as violating the separation-of-powers provision of the Texas Constitution. Additionally, the court found that Ovalle did not have the opportunity to challenge the fee in trial court as the court costs was not imposed in court or itemized in the initial judgement, rather, the itemized bill of costs did not show the fee until one month after the judgement was signed.

Tort Claims Act: *Zapata v. City of Gonzales*, No. 13-18-00065-CV, 2020 WL 486489 (Tex. App.—Corpus Christi Jan. 30, 2020) (mem. op.). A city police officer was responding to an emergency when his patrol car collided with a vehicle in an intersection containing Alejandra Zapata, Yarely Zapata, Antonio Morales, Jr., and Miguel Morales. The officer, along with several bystanders, maintained that the officer had a green light when he entered the intersection and collided with the other vehicle. However, in their statements, Alejandra and Yarely Zapata both maintained that they had a green light. After being sued, the city filed a plea to the jurisdiction arguing that its immunity from suit was not waived by the Texas Tort Claims Act and the "emergency response exception" to the statutory waiver of immunity applied in this case.

The trial court granted the city's plea to the jurisdiction and dismissed appellants' claims with prejudice.

On appeal, appellants argue that the trial court erred in granting the city's plea because a genuine issue of material fact existed as to whether the dispatch call was considered an emergency call and whether the officer's conduct was reckless. On the first question of whether the officer was responding to a minor car accident or an emergency, the court of appeals determined that the appellants did not raise a fact question as to whether the officer was responding to an emergency. The officer was dispatched to an accident at a highway intersection and it was unknown whether the occupants were injured. Further, the officer was authorized to run a "Code 3" with his emergency lights and sirens activated.

On the second issue, appellants argued that a genuine issue of material fact existed as to whether the officer's conduct was reckless. More specifically, the appellants argue that the officer acted in a reckless manner by speeding through the intersection, failing to see the vehicle passing in front of him, and failing to slow down to an appropriate speed to avoid the accident. Viewing the evidence in the light most favorable to the appellants, the court of appeals noted that Alejandra and Yarely Zapata contended that they had the green light as they travelled through the intersection. This would mean that the officer drove through the intersection on a red light without slowing his vehicle or waiting for the cross traffic to yield. This evidence created a fact issue as to whether the officer's conduct was reckless. For this reason, the court sustained the appellants' issue, reversed the trial court's order granting the city's plea to the jurisdiction, and remanded the case for further proceedings.

Public Information: *Roane v. Paxton*, No. 14-18-00264-CV, 2020 WL 428861 (Tex. App.—Houston [14th Dist.] Jan. 28, 2020) (mem. op.).

This is a Public Information Act (PIA) lawsuit where the Fourteenth Court of Appeals agreed with the attorney general that certain records must be released.

Roane served as superintendent of the Seguin Independent School District (District) who had a sexual harassment charge filed against him. After he had left the District, the District received several PIA requests which included information on the complaint. Roane was notified he could file a third-party objection, which he did asserting common law privacy to withhold the information. While the attorney general (AG) allowed the District to withhold other responsive information, it opined the complaint information was subject to release. Roane filed suit to prevent the release and filed a motion for summary judgment. The AG also filed a motion for summary judgment. The trial court granted the AG's motion and denied Roane's motion. Roane appealed.

The common-law right to privacy protects information from disclosure when "(1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public." However, the highly intimate or embarrassing facts must be "about a person's private affairs." The summary judgment record failed to demonstrate that the information involved matters relating to Roane's "private affairs." Matters of workplace harassment,

discrimination, and policy violations in a governmental body, by their very nature, generally do not qualify. The court noted the complainant's name and other individuals' names have been redacted from the information ordered to be disclosed by the AG's opinion. As a result, all that remains are public matters. Therefore, the trial court ruled properly regarding the competing motions.*

January 2020

Note: Included cases are from December 11, 2019 through January 10, 2020.

Employment: *Town of Shady Shores v. Swanson*, No. 18-0413, 2019 WL 6794327 (Tex. Dec. 13, 2019). This is an employment case, but the focus on the opinion is a procedural one. Importantly, the Texas Supreme Court held: (1) a no-evidence motion for summary judgment was proper to raise a jurisdictional challenge, and (2) the Texas Open Meetings Act (TOMA) did not waive immunity for declaratory relief, only mandamus and injunctive relief.

Swanson was the former Town Secretary for Shady Shores. She brought claims asserting she was wrongfully discharged. The town filed a plea to the jurisdiction, which was granted as to the *Sabine Pilot* and Whistleblower claims. The town later filed traditional and no-evidence summary judgment motions (on immunity grounds) as to the TOMA declaratory judgment claims, which the trial court denied. The town took an interlocutory appeal, but Swanson kept filing motions. The trial court granted Swanson leave to file a motion for a permissive interlocutory appeal as Swanson asserted she filed her notice of appeal (for the plea to the jurisdiction) within 14 days of the town's notice of appeal for the summary judgments. When Swanson attempted to hold further proceedings and obtain an order on the permissive appeal, the town filed a separate mandamus action (which was consolidated for purposes of appeal). The court of appeals declined to issue the mandamus noting the trial court did not actually sign any orders, noting Swanson did not timely file an appeal, and was not granted a permissive appeal.

The court of appeals held allowing a jurisdictional challenge on immunity grounds via a no-evidence motion would improperly shift a plaintiff's initial burden by requiring a plaintiff to "marshal evidence showing jurisdiction" before the governmental entity has produced evidence negating it. It also held the entity must negate the existence of jurisdictional facts. After recognizing a split in the appellate courts, the Texas Supreme Court rejected the reasoning noting in both traditional and no-evidence motions, the court views the evidence in the light most favorable to the nonmovant. Because the plaintiff must establish jurisdiction, the court could "see no reason to allow jurisdictional challenges via traditional motions for summary judgment but to foreclose such challenges via no-evidence motions." Thus, when a challenge to jurisdiction that implicates the merits is properly made and supported—whether by a plea to the jurisdiction or by a traditional or no-evidence motion for summary judgment—the plaintiff will be required to present sufficient evidence on the merits of her claims to create a genuine issue of material fact. Such a challenge is proper using a no-evidence summary judgment motion.

Next, the Court held the Uniform Declaratory Judgment Act (UDJA) does not contain a general waiver of immunity, providing only a limited waiver for challenges to the validity of an

ordinance or statute. UDJA claims requesting other types of declaratory relief are barred absent a legislative waiver of immunity with respect to the underlying action. Under TOMA, immunity is waived only "to the express relief provided" therein—injunctive and mandamus relief—and the scope does not extend to the declaratory relief sought. Thus, TOMA's clear and unambiguous waiver of immunity does not extend to suits for declaratory relief against the entity. However, Swanson did seek mandamus and injunctive relief as well, which were not addressed by the court of appeals, even though argued by the town. As a result, the Supreme Court remanded these claims to the court of appeals to address.*

Declaratory Judgment: *City of Houston v. Hope for Families, Inc.*, No. 01-18-00795-CV, 2020 WL 97176 (Tex. App.—Houston [1st Dist.] Jan. 9, 2020) (mem. op.). This is a declaratory judgment case where Hope for Families (HFF) sought to declare a deed from HFF to the city void.

The city selected HFF to receive funding to purchase, demolish, and rehabilitate a foreclosed, dilapidated apartment complex as part of its community development program. HFF learned that the property was encumbered with delinquent property taxes. Before it could reach a resolution of the tax delinquency, Wade, a city employee, negotiated an agreement with one of HFF's board members to convey title to the city. HFF sued to have the conveyance of title declared void. The trial court denied the city's and Wade's plea to the jurisdiction.

First, the court of appeals determined that the Uniform Declaratory Judgment Act does not have a general waiver of governmental immunity. These types of lawsuits against a governmental entity are suits against the state for which the plaintiff needs a waiver of governmental immunity to proceed. There is no such waiver.

HFF also sued under the theory that the Texas Business Organizations Code provides a remedy to declare the conveyance invalid. However, the court of appeals determined that there is no authority for HFF to bring the lawsuit; only the attorney general has standing to undo the deed between HFF and the city. HFF could sue only its board member under the Texas Business Organizations Code.

Even when attempting to treat HFF's claim as a trespass to title, the city still retained its immunity because there is no waiver of governmental immunity for that claim. However, Wade as an individual could be sued for acting *ultra vires*. In order to fall under the *ultra vires* exception, "a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial duty." The court concluded that HFF's petition had alleged sufficient facts that Wade acted improperly in filing the deed. Thus, those claims against him in his official capacity could proceed.

The court reversed the trial court when it came to the city and granted the plea to the jurisdiction. The court dismissed the claims against the city for lack of subject-matter jurisdiction. The court reversed the portion of the trial court's order denying Wade's plea to the jurisdiction regarding the title dispute claim and remanded the issue for further proceedings. It affirmed the remainder of the order.

Texas Tort Claims Act: *City of Houston v. Miller*, No. 01-19-00450-CV, 2019 WL 7341666 (Tex. App.—Houston [1st Dist.] Dec. 31, 2019) (mem. op.). This is a Texas Tort Claims Act case that focuses on the notice provisions of the statute. The trial court denied the city's plea to the jurisdiction on the grounds that it did not have timely notice of Miller's claims.

The city's charter requires notice within 90 days of the date of the incident. Miller was thrown from his motorcycle after riding over a pothole. He sent a letter to the city outside of the city's 90-day notice period. Miller argued the city had actual notice despite the fact he did not provide formal notice within the deadline. He claimed the city had to be aware of the defective condition because it should have known about it. The First Court of Appeals rejected that argument because Miller failed to present evidence that the city had "subjective awareness" of its "alleged fault producing or contributing to the injury." The court reversed the trial court's denial of the city's plea to the jurisdiction and rendered judgment dismissing Miller's claim with prejudice.

Texas Tort Claims Act: *Deleon v. Villareal*, No. 02-19-00133-CV, 2020 WL 98142 (Tex. App.—Fort Worth Jan. 9, 2020) (mem. op.). This is a Texas Tort Claims Act case that focuses on whether police officers were in the scope of their employment when arresting Deleon and testifying against him. The Second Court of Appeals affirmed the trial court's grant of the officers' motion to dismiss.

The officers arrested Deleon and then testified against him. After a jury acquitted him, Deleon sued the officers for negligence per se and intentional infliction of emotional distress. The officers filed a 91a motion to dismiss on the grounds that the lawsuit could have been brought against the City of Saginaw under Texas Civil Practice and Remedies Code Section 101.106(f). Deleon refused to amend his petition to dismiss the officers and sue the city.

Section 101.106(f) requires mandatory dismissal of the individuals if the suit could have been brought against the city. Section 101.106(f) "provides the appropriate avenue for dismissal of an employee [of a governmental unit] who is considered to have been sued in his official capacity," that is, when suit "is brought against a government employee for conduct within the general scope of his employment and, when suit could have been brought under the [Texas Tort Claims Act] against the government."

The court concluded the dismissal was proper. Because Deleon's suit against the officers was based on conduct within the general scope of their employment and could have been brought under the TTCA against the city, Deleon's suit was against the officers in their official capacities only. Thus, the officers were entitled to dismissal.

Zoning: *Oak Point Bd. of Adjustment v. Houle*, No. 02-19-00068-CV, 2019 WL 6767801 (Tex. App.—Fort Worth Dec. 12, 2019) (mem. op.). This is a board of adjustment appeal where the Fort Worth Court of Appeals reversed the denial of the board's plea to the jurisdiction and dismissed the case.

The City of Oak Point has a zoning ordinance establishing a 50-foot front-yard setback in residential neighborhoods. Houle, a resident, complained about the variance to the set-back

granted to his neighbor, Bobby Pope. Pope received a permit and built a shed, but due to a miscalculation, it was built in the setback. The board of adjustment (BOA) granted the variance. Houle attempted to challenge it by suit in the county court at law. The BOA filed a plea to the jurisdiction which was denied. It appealed.

The BOA advised Pope had since moved the shed out of the setback. By variance, the BOA effectively excepted Pope's shed from the front-yard setback requirement. Houle's petition seeks to undo that exception. However, the variance expressly stated that should the shed ever be moved, the variance would be nullified, which is exactly the relief requested by Houle. The shed's relocation means that Houle has obtained the relief he sought by his claims, and a judicial determination cannot have any practical legal effect on an existing controversy, rendering his lawsuit moot. None of Houle's arguments asserting why the suit remains live applied. As a result, the plea should have been granted.*

Governmental Immunity: *City of Helotes v. Page*, No. 04-19-00437-CV, 2019 WL 6887719 (Tex. App.—San Antonio Dec. 18, 2019) (mem. op.). This is an interlocutory appeal from the denial of the City of Helotes' plea to the jurisdiction in which the court of appeals held that the plaintiff's injuries occurred during the performance of a proprietary function.

A city employee dropped a table while removing it from a parked golf cart. The table allegedly struck the cart's accelerator causing the cart to propel forward and strike the plaintiff, Jean Marie Page. This accident occurred while the employee was setting up for an event referred to as the "MarketPlace at Old Town Helotes," which is a vendor fair sponsored, supervised, regulated, operated, and managed by the city. The MarketPlace is held on public streets which are closed to traffic, and the city rents booths to vendors who sell crafts, merchandise, and food, and advertise and display the services they offer. The city also has a booth from which it sells beer. Page sued the city for negligence. The city filed a plea to the jurisdiction alleging the MarketPlace is a governmental function because it was an economic development tool to bring people into Old Town Helotes so as to improve the existing businesses' finances and generate community involvement. The trial court denied the plea.

The court applied the following four prong test delineated in *Wasson Interests, Ltd. v. City of Jacksonville* to determine whether the MarketPlace was a proprietary or governmental activity: (1) whether the city's act was mandatory or discretionary; (2) whether the activity was intended to benefit the general public or the city's residents; (3) whether the city was acting on the state's behalf or on its own behalf in performing the activity; and (4) whether the city's act was sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary.

The city conceded that its decision to own, support, and operate the MarketPlace was discretionary indicating that the MarketPlace was likely proprietary. The court also determined that although non-residents participated in and benefited from the MarketPlace, its primary objective was to assist local businesses by generating community involvement in the Old Town Helotes area which raised funds for the city's general budget. Additionally, the court found that the city administrator's testimony regarding the collection of sales taxes, the recording of revenues in the MarketPlace's budget, and the use of the profits for the MarketPlace or other city

departments provided some evidence that the city was acting on its own behalf. Finally, the court concluded that there was no evidence that the operation of the MarketPlace is "essential" to the city's governmental actions. Accordingly, the court affirmed the trial court's order.

Tort Claims Act: *City of El Paso v. Lopez*, No. 08-19-00056-CV, 2019 WL 6838005, (Tex. App.—El Paso Dec. 16, 2019). This is a Texas Tort Claims Act (TTCA) case where the El Paso Court of Appeals affirmed the denial of the city's plea to the jurisdiction.

Lopez was traveling on his motorcycle at night when the roadway ended with a concrete barrier and canal. There were neither road signs nor any other type of warnings or lighting. Lopez struck the barrier and was killed. The police investigation report noted "the driver . . . failed to stop for the end of the street or roadway and crashed his bike into the canal." A nearby resident also gave a statement that "there are a lot of cars that crash into the canal" because "[t]here are no warning signs to let you know that the street ends so when people come out of the bars they wind up crashing at the canal." The investigation listed "lack of signs and illumination" as factors in causing the accident. Lopez's family brought a wrongful death claim against the city. The city filed a plea to the jurisdiction, which was denied.

The plaintiffs failed to provide statutory notice of the accident but asserted the city had actual notice of its fault. Citing to the recent Texas Supreme Court case in *Worsdale v. City of Killeen,* 578 S.W.3d 57 (Tex. 2019), the court held the "critical inquiry is the governmental unit's actual *anticipation* of an alleged claim rather than subjective confirmation of its actual liability." After reviewing the record, the court held the city had actual notice of the claim under the TTCA. Next, the court analyzed whether the concrete barrier was a special defect. Both the canal and the concrete barrier were located on the roadway's path, neither of which was visible in the dark to ordinary motorists. As a result, the court determined it was a special defect and the plea was properly denied.*

Breach of Contract: *Wasson Interests, Ltd. v. City of Jacksonville*, No. 12-13-00262-CV, 2019 WL 7373851 (Tex. App.—Tyler Dec. 31, 2019) (mem. op.). [Note: Wasson filed a motion for rehearing after the court's August 30, 2019 opinion. The court overruled the motion for rehearing, withdrew its opinion and judgment from August 30, 2019, and substitutes this new opinion and corresponding judgment in its place. In the new opinion, the court rejected Wasson's arguments on rehearing as untimely and not proper grounds upon which to reverse the trial court's summary judgment.]

After the Texas Supreme Court held in 2016 that the proprietary-governmental dichotomy applied to breach of contract cases, it remanded this case back to the Tyler Court of Appeals to address the merits of the city's initial no-evidence motion for summary judgment.

The basic fact pattern is as follows. Wasson Interests, Ltd. (Wasson) was the successor in interest of a 99-year lease of city property specified for residential use for two separate lots – lot 43 and lot 46. Wasson began leasing the property for one week at a time. The city sent an eviction notice holding the short-term rentals constituted a commercial use of the property in violation of the lease. The city agreed to excuse past violations and cancel the eviction in exchange for Wasson entering into a reinstatement agreement under which the city imposed more specific conditions

concerning the property's acceptable uses and occupancy limitations. Later, the city discovered an advertisement to rent the home on lot 43. The city sent notice to Wasson that the advertisement and rental terms violated the reinstatement agreement and that the city would terminate the leases if Wasson failed to cease all commercial activity within ten days. The city ultimately sent an eviction notice and Wasson sued the city for breach of contract. The city filed a traditional and no-evidence summary judgment which the trial court granted and Wasson appealed.

After remand from the Texas Supreme Court, the court of appeals considered Wasson's argument that the trial court erred when it granted summary judgment in favor of the city due to a fact issue on Wasson's breach of contract and wrongful eviction claims. The city alleged that Wasson breached the reinstatement agreement in three ways: (1) Wasson advertised the properties online for use as a vacation rental; (2) Wasson's rental scheme obligated a renter to stay a minimum of only one week (instead of 30 days); and (3) Wasson allowed its employees to stay at the properties in consideration for their labor. The court addresses whether Wasson carried its burden to create a fact issue by producing more than a scintilla of evidence that it did not materially breach the reinstatement agreement.

The reinstatement agreement expressly prohibited the advertisement. Nevertheless, Wasson advertised the house on lot 43 on VRBO.com. The court held that the advertisement constituted not only a breach of the agreement, but also authorized the city to terminate the leases and evict Wasson on lot 43. (Note: although Wasson didn't carry its burden to show a fact issue regarding the advertisement for the lot 43 property, no advertisement for lot 46 was in the record, so Wasson presented more than a scintilla of evidence that complied with the reinstatement agreement's advertisement provision as to the lot 46 property.)

The court also sided with the city's contention that the rental scheme's obligation that a renter stay a minimum of only one week violated the reinstatement agreement. In doing so, the court again referenced the online advertisement for the property on lot 43. The agreement required any rentals to have a term that exceeded 30 consecutive days. Wasson did not offer sufficient evidence showing that it did not breach the 30 consecutive day requirement in the agreement in relation to the property on lot 43. Again, without any advertisement pertaining to the property on lot 46 in the record, Wasson raised a fact issue as to whether the city's termination of the lease for lot 46 and eviction was improper.

The reinstatement agreement also prohibited Wasson from renting the property as a vacation home "whether rent is paid in money, goods, labor, or otherwise." The city claimed that Wasson violated the agreement for both lots when it allowed employees to stay at both properties in consideration for their labor. But the court found no evidence in the record that Wasson allowed employees to stay at the property in consideration for their labor. The only evidence in the record showed that Wasson allowed employees to stay at the property gratuitously at times. The city therefore was without cause to terminate either lease and evict on this ground.

For the reasons stated above, the court held the city was authorized to terminate the lease and evict Wasson on lot 43, but Wasson raised a fact issue concerning the city's termination of the

lease and eviction on lot 46. The court affirmed the trial court's order in relation to lot 43, but reversed the trial court's order and remanded as to lot 46.

Finally, Wasson argued that it should retain the equity for the improvements made to the city's land even if it violated the reinstatement agreement. Although Wasson was lawfully evicted from the property on lot 43, the court held that it would be inequitable for the city to retain the full value of the improvements made by Wasson to lot 43. According to the court this case represents an "unusual scenario" in which the city provided only the land and the leases authorized the tenant to construct permanent homes and other improvements. The city would be unjustly enriched to retain the full value of the extensive improvements without providing any compensation to Wasson. The court remanded the issue to the trial court to determine the amount of equitable reimbursement due to Wasson for the improvements to lot 43.

December 2019

Note: Included cases are from November 11 through December 10, 2019.

Charter Amendments: *Johnson v. Williams*, No. 02-19-00089-CV, 2019 WL 6334689 (Tex. App.—Fort Worth Nov. 27, 2019) (mem. op.). The Fort Worth Court of Appeals affirmed a plea to the jurisdiction in a case where a resident sued to invalidate a charter amendment.

Arlington residents initiated a petition drive for an amendment to the city charter that would impose term limits on the mayor and the city council (Proposition E), which the voters passed. Arlington resident Johnson asserted that because the petition summary misled petition signers, the petition's circulators had committed fraud, and the resulting amendment should be struck down. He filed suit to invalidate the provision. The city defendants filed a plea to the jurisdiction and motion for summary judgment, which the trial court granted. Johnson appealed.

Elections are political matters, and the courts have jurisdiction of political matters only if the law has specifically granted such authority. The Texas Election Code allows an election contest for election fraud only if an election officer or other person officially involved in the administration of the election commits the alleged fraudulent act. The petition circulators do not formally qualify as election officers. After performing a statutory construction analysis, the court determined the circulators also do not qualify as a person "officially involved in the administration of the election." As a result, the trial court properly granted the plea. The court declined to allow Johnson the ability to replead. However, the court noted that since the trial court lacked jurisdiction, it lacked the authority to enter an order on the summary judgment.*

Employment: *Toldson v. Denton Indep. Sch. Dist.*, No. 02-18-00394-CV, 2019 WL 6205245 (Tex. App.—Fort Worth Nov. 21, 2019) (mem. op.). This is a sexual harassment/retaliation claim where the Fort Worth Court of Appeals affirmed the employer's motion for summary judgment.

Toldson worked for Denton Independent School District (DISD) as a paraprofessional teacher's aide off and on from 2009 until he was terminated in February 2015. In 2014, Toldson served as an aide in the special education department at Ryan High School (RHS). Toldson complained to

the assistant principal several times that the teacher (Ms. Winrow) was overly demanding and that Toldson did not know what was expected of him in the classroom. Toldson made no allegations during these meetings that Winrow had sexually harassed him. Toldson continued these complaints for several months until he eventually mentioned what he felt was inappropriate sexual comments. DISD offered to move Toldson to a different classroom while investigating his complaints. The principal interviewed five witnesses and did not find any who corroborated Toldson's allegations of sexual harassment. The principal concluded the investigation and offered to move Toldson to another teacher, to which Toldson objected. Toldson complained to the DISD human relations department and asserted his immediate supervisors began retaliating against him by requiring him to be at department meetings where Winrow would be present. Toldson followed the grievance procedures, but with no resolution he would accept. During this entire time, Toldson's job performance at RHS was an issue, including often arriving late for work, leaving early, and numerous absences, all without providing proper notification to his superiors. He also took longer breaks than allowed, as well as unauthorized breaks that left students unsupervised. Toldson was reassigned to a different campus. While there, the record reflects Toldson sexually harassed a female teacher. Upon learning of the incidents, DISD terminated Toldson. Toldson sued for sexual harassment and retaliation. The DISD filed a motion for summary judgment, which was granted. Toldson appealed.

Regarding his retaliation claim, the court noted Toldson identified no evidence establishing causation. While Toldson asserts an email present somewhere in the record constitutes direct evidence of causation, Toldson failed to identify, cite, or adequately brief the email for the court. Toldson bore the burden of supporting his contentions with appropriate citations to the record. Toldson failed to meet those burdens. Further, the court agreed DISD presented evidence of a legitimate, non-retaliatory reason for terminating Toldson's employment. Toldson failed to demonstrate a fact issue exists regarding pretext. The court likewise had difficulty finding Toldson had properly briefed and identified arguments and issues regarding the sexual harassment claim. The court noted the summary judgment record in this case exceeds 2,000 pages. Of the nineteen sentences of alleged facts Toldson relies upon to show a fact issue the sexual harassment charge, eight contain no citation to the record whatsoever and the rest do not explain how they relate to any form of harassment. Toldson provided no reference to a specific place in the record where any exhibits exist, so he failed to brief his issues. The court affirmed summary judgment.*****

Procedure: *Wilson v. City of Austin*, No. 03-18-00806-CV, 2019 WL 6336187 (Tex. App.—Austin Nov. 27, 2019) (mem. op). This appeal stems from the county court's order granting the City of Austin's motion to strike, special exception, and motion to dismiss in a case related to an automobile accident.

In July 2015, Wilson sued Phillips alleging that Phillip's negligence caused an automobile collision in August 2013 that resulted in Wilson's injuries. Phillips excepted to the petition and moved to dismiss the suit, arguing that Wilson should have sued the city because Phillips was driving within the scope of his employment with the city when the alleged accident occurred. The court granted the motion and dismissed the suit against Phillips with prejudice. In December 2015, Wilson filed a petition for bill of review claiming that her due process rights were violated because she was not served with Phillips answer or notice of hearing on his motion to dismiss,

and never received notice of the order dismissing the suit. The county court reinstated the case, and Wilson filed her first amended original petition in June 2016, and listed the city as a defendant and alleged two counts of negligence, one against Phillips and the other against the city. A week later, Wilson filed a second amended petition and a notice of nonsuit with prejudice as to all her claims against Phillips. In October 2016, the court signed an order granting the notice of nonsuit and dismissing the claims against Phillips with prejudice.

Two years later, Wilson filed her third amended petition (although titled a first amended petition) that named Phillips as the sole defendant and did not mention or discuss the city. Phillips excepted to the petition naming Phillips as the sole defendant as he had been nonsuited with prejudice. Phillips also moved to dismiss the cause because Wilson should not be given leave to amend the petition to name the city as the defendant given that the claims would now be time barred, and alternatively, for the cause to be dismissed for want of prosecution. A few days later, Wilson filed her fourth amended petition listing the city as the defendant and specifically stating the she did not intend at the time of filing the third amended petition to dismiss the city as a party, and that it was a clerical mistake. The city filed a motion to strike, a motion to dismiss, and a special exception, and noted that Wilson did not request leave to file her fourth amended petition against the city. Wilson responded, arguing that the relation back doctrine applies under the misnomer or misidentification theories to make her claims against the city timely. The court dismissed, with prejudice, Wilson's claims against Phillips. The court also sustained the city's exception, disallowing Wilson from repleading as the claims against the city were time barred, thereby dismissing Wilson's claims against the city with prejudice. Wilson appealed the order related to the city arguing that the county court abused its discretion in granting the city's special exception and dismissing her claims.

The court of appeals affirmed the county court's decision. The court determined that by Wilson filing her third amended petition in which she omitted the city as a defendant, she effectively nonsuited or voluntarily dismissed her claims against the city. Additionally, the court found that Wilson's claims against the city raised in her fourth amended petition that added the city as a defendant were untimely because the statute of limitations had run at the time of the third amended petition. The court also found that the misnomer and misidentification theories in the context of the relation back doctrine are inapplicable because Wilson did not misname the city as a defendant; rather she omitted the city as a defendant, and omitted all discussion and reference to the city.

Short-term Rentals: *Zaatari v. City of Austin*, No. 03-17-00812-CV, 2019 WL 6336186 (Tex. App.—Austin Nov. 27, 2019). This is an appeal arising from a challenge to the City of Austin's ordinance regulating short-term rental properties (STRs).

A number of property owners challenged certain provisions of the city's ordinance as unconstitutional. Specifically, they challenged a provision that suspended the licensing of any new use of non-owner occupied single-family residences as short term rental properties (type-2 STRs) and terminated all type-2 STRs by 2022. They also challenged an ordinance provision that controls the conduct and types of assembly at short-term rental properties, including prohibiting any assemblies between the hours of 10:00 p.m. and 7:00 a.m., prohibiting outdoor assemblies of more than six adults between 7:00 a.m. and 10:00 p.m., and prohibiting more than six unrelated

adults or ten related adults from being present on the property at any time. The State of Texas intervened in the property owners' suit asserting that the ordinances' ban on short-term rentals of non-homestead properties is unconstitutional as a retroactive law and as an uncompensated taking of private property. The trial court granted the city's no-evidence motion for summary judgement, denied the property owners' and the State's traditional motions for summary judgement, excluded certain evidence from the summary-judgement record, and overruled the city's plea to the jurisdiction. The property owners and the State appealed, and the city cross-appealed.

In striking down the city's ban of type-2 STRs, the court held that the provision is unconstitutionally retroactive because it would significantly impact property owners' well-settled right to lease their property while serving minimal, if any, public interest. The court relied on a 2018 Texas Supreme Court opinion relating to homeowners associations' limits on STRs to hold that short-term rentals are residential, rather than commercial, in nature. The court also concluded that the ordinance provision restricting assembly infringes on Texans' fundamental right to assemble because it limits peaceable assembly on private property. The court determined that this provision is not narrowly tailored to serve a compelling state interest, thus, it violates the Texas Constitutions' guarantee to due process.

TPDES Permit: *Texas Comm'n on Envtl. Quality v. Maverick Cty.*, No. 03-17-00785-CV, 2019 WL 6042276 (Tex. App.—Austin Nov. 15, 2019) (mem. op.). This appeal stems from a district court's reversal of the Texas Commission on Environmental Quality's (TCEQ) final order granting an industrial wastewater discharge permit application for the Eagle Pass Mine (Mine) that is owned by Dos Repúblicas Coal Partnership (DRCP).

DRCP's predecessor in interest acquired a surface coal mining permit for the Mine in 2000, which was transferred to DRCP in 2009 when DRCP acquired the Mine. In 2009, DRCP entered into a contract mining agreement with Camino Real Fuels, LLC (CRF) to "develop, construct, operate and perform on-going reclamation at the Mine and to remove and deliver coal from the Mine" to DRCP. In 2013, the Texas Railroad Commission renewed and issued to DRCP a surface coal mining permit and approved CRF as the operator of the Mine. DRCP's predecessor in interest had also acquired a wastewater discharge permit (a TPDES permit) for the Mine in 1994, which it renewed in subsequent years, with the most recent permit expiring in 2015. After DCRF acquired the Mine, and prior to the expiration date of the most recent TPDES permit, DRCP applied to the TCEQ to amend and renew the permit.

The TCEQ executive director declared the application complete, and on DRCP's request referred the application to the State Office of Administrative Hearings (SOAH) to be heard by two administrative law judges (ALJs). The City of Eagle Pass, Maverick County, and other downstream landowners (Permit Contestants) were admitted as parties. Following a contested hearing, the ALJs issued a proposal for decision (PDF) recommending that the draft permit be granted with a few changes, including addition of a boron limit and a requirement that aluminum be monitored. After considering the PDF, TCEQ issued a final order granting DRCP's application, but excluded the ALJ's recommended findings relating to the boron limit and aluminum monitoring requirement, and instead imposed a sampling regime that would occur periodically over the life of the permit. The Permit Contestants appealed the decision to district

court, alleging, among other things, that DRCP's contractor, CRF, should have applied as the permit operator, and that TCEQ improperly modified the PDF by deleting the boron limit and aluminum monitoring requirement.

The district court reversed TCEQ's final order and remanded because the agency's determination regarding the proper entity to be identified as the operator of the Mine was made in violation of statutory and regulatory provisions, but upheld the other issues on appeal. DRCP and TCEQ appealed the district court's order reversing and remanding the operator issue. On cross appeal, the Permit Contestants challenge the district court's judgement affirming TCEQ's order as to the other issues raised.

In affirming the district court's order with respect to the operator issue, the court of appeals concluded that the TPDES permit application was incomplete because DCRP was not the operator of the Mine. The court looked to the plain language meaning of the regulatory definition for "operator," and determined that although DCRP has overall financial responsibility over the operations of the Mine, overall financial responsibility alone is not sufficient to support a conclusion that DRCP is the operator of the Mine. The court; however, vacated the portion of the district court's final judgement affirming the other issues on appeal concerning the specific TPDES permit granted by TCEQ because issuing a judgement on those issues would be issuing an impermissible advisory opinion.

Immunity: *Brown v. City of Ingram*, No. 04-19-00508-CV, 2019 WL 6138231 (Tex. App.—San Antonio Nov. 20, 2019) (mem. op.). This is an accelerated appeal by Brown that stems from the trial court's order granting the City of Ingram's plea to the jurisdiction and the court's judgment dismissing Brown's counterclaim.

The City of Ingram sued Brown and eight other defendants seeking declaratory relief that its ordinance related to the city's wastewater system was a valid and reasonable exercise of the city's police powers. Brown asserted a counterclaim against the city arguing that the city had breached its contract for wastewater services by knowingly permitting an unqualified, unlicensed subcontractor to connect her property to the city's sewer system and that the subcontractor's alleged negligence resulted in a severed gas line causing damage to Brown and her property. In response to her counterclaim, the city filed a plea to the jurisdiction, which was later amended, asserting governmental immunity from suit. The trial court granted the city's plea and dismissed Brown's counterclaim. Brown appealed.

The court of appeals concluded that the city's act of connecting residents to the city's sewer system and its decisions regarding whether and how to do so are governmental functions. Because the conduct underlying Brown's claim constitutes the city's performance of a governmental function, the court held that the city is immune from suit. The court also determined that even assuming that the city and Brown entered into a contract for wastewater services, such contract did not involve the provision of goods or services to the city. Because the contract is not a contract subject to Chapter 271 of the Local Government Code, entering into such contract did not waive the city's immunity from Brown's suit for breach of contract. Accordingly, the court affirmed the trial court's order.

Time Payment Fee: *Simmons v. State*, No. 10-18-00269-CR, 2019 WL 6464999 (Tex. App.—Waco Nov. 27, 2019). This is an appeal challenging, among other things, the constitutionality of the time payment fee assessed against Simmons, who was convicted of assault family violence with a prior conviction for assault family violence.

Section 133.103 of the Local Government Code provides that a $25 fee be charged to a person convicted of a felony or misdemeanor if the person pays "any part of a fine, court costs, or restitution on or after the 31st day after the date on which the judgment is entered assessing the fine, court costs, or restitution." The statute directs that the fee be allocated in the following manner: (1) fifty percent to the comptroller to the credit of the general revenue fund; (2) ten percent to the general fund of the city or county for the purpose of improving the efficiency of the administration of justice in the city or county; and (3) forty percent to the general revenue account of the county or city. Simmons contested the percentage of the $25 time payment fee directed to the comptroller and the general revenue account of the county or city, described in (1) and (3), above.

Like other Texas courts (including the First, Third, Eleventh, and Fourteenth Courts of Appeal), the Waco Court of Appeals concluded that, because these fees are general revenue not sufficiently related to a legitimate criminal justice purpose, Section 133.103(b) and (d) are facially unconstitutional. The trial court's judgment was modified to change the time-payment fee from $25 to $2.50.

(Note: Senate Bill 346, effective January 1, 2020, amends the court cost structure, including the time payment fee. It remains to be seen whether the amendments cure the constitutional defects identified in this and previous cases.)

Charter Amendment: *Nelson v. Head*, No. 13-18-00484-CV, 2019 WL 6315425 (Tex. App.—Corpus Christi Nov. 26, 2019) (mem. op.). In 2013, the voters amended the city charter for Bay City to limit councilmembers and the mayor from serving more than three consecutive terms. In 2018, resident Robert Head filed suit against the city, the mayor, and two councilmembers alleging that non-voter approved language was erroneously added to the city charter that identified the mayor as a councilmember. Head claimed that the provision destroyed the separation of powers between the executive and legislative branches of government. Among other things, Head sought a declaration that the charter provision is invalid, argued that the mayor engaged in ultra vires conduct by voting in council meetings, argued that the mayor is subject to the term limits adopted in 2013, and that two councilmembers were reelected in violation of the term limit provision of the charter. The trial court denied the city's plea to the jurisdiction and the city appealed.

During the pendency of the appeal, the city passed an ordinance striking the complained-of language from the charter and the voters elected to amend the charter by changing from a mayor-council form of government to a council/mayor-manager form of government, thus making the mayor a voting member of city council.

The appellate court reversed the trial court and rendered a dismissal for lack of jurisdiction after deciding virtually every issue in favor of the city and city officials. First, with regard to the

claims against the mayor, the court held that Head failed to allege sufficient facts demonstrating how the mayor's ultra vires votes caused him concrete, particularized injuries distinct from the effect on the general public. Further, the court held that Head's ultra vires claims were barred by governmental immunity.

As for Head's claims against the councilmembers, the court held the true nature of Head's claims were the basis for a quo warranto proceeding, and Head did not have standing to bring them outside of the quo warranto procedure. In addition, Head failed to meet the narrow taxpayer exception to standing regarding his claims against the councilmembers.

Texas Citizens Participation Act: *City of Port Aransas v. Shodrok*, No. 13-18-00011-CV, 2019 WL 6205466 (Tex. App.—Corpus Christi Nov. 21, 2019) (mem. op.). In July 2017, Julie Shodrok met with the mayor of Port Aransas in his office. Shodrok recorded their conversation using the recording device on her cell phone, with the mayor's consent. When the meeting concluded, Shodrok left the mayor's office but forgot her phone. The mayor and the city manager had a private conversation that was recorded on Shodrok's phone, and Shodrok later expressed her frustration on social media about the details of the recorded private conversation between the mayor and the city manager.

The city filed suit against Shodrok for violating the Texas Interception of Communications Act (TICA). Shodrok moved to dismiss the suit based on the Texas Citizens Participation Act (TCPA) or anti-SLAPP statute. The trial court granted Shodrok's motion to dismiss and awarded her attorney's fees, costs, and sanctions against the city pursuant to the TCPA. The city appealed.

Pursuant to the TCPA, the appellate court first examined whether the city met its burden of establishing by clear and specific evidence a prima facie case for each essential element of the claim in question. The court held that it was undisputed that neither the mayor nor the city manager consented to Shodrok's recording of their conversation in the mayor's office. Therefore, the city established by clear and specific evidence a prima facie case that Shodrok intercepted a communication uttered by the city manager and mayor to which she was not a party by using a recording device. The burden then shifted to Shodrok to establish by preponderance of the evidence each essential element of a valid defense to the city's claim. Because Shodrok could not do so, the court sustained the city's first issue that it satisfied its burden to establish its TICA claim. Because the trial court erred in granting Shodrok's motion to dismiss, she was not entitled to attorney's fees and the sanctions award was not authorized.

The court reversed the trial court's judgment and rendered judgment that Shodrok take nothing on her request for attorney's fees and sanctions.

Inverse Condemnation: *Starbright Car Wash LLC v. City of Belton*, No. 14-18-00261-CV, 2019 WL 6711398 (Tex. App.—Houston [14th Dist.] Dec. 10, 2019) (mem. op.). In May 2005, the City of Belton adopted an ordinance approving a developer's proposed change to a retail zoning district, which also indicated that the city would extend one particular road. Five years later, in November 2010, the city approved a revised plat that did not include the extension of the road. In December 2010, Starbright purchased the proposed car wash site. In May 2012, the plat was recorded without the extension of the road and the additional access point to the car

wash site. Starbright sued the city, arguing that the city's approval of the revised plat constituted a taking of its protected right in access to its property. The city filed a motion for summary judgment, which was granted by the trial court. Starbright appealed.

On appeal, Starbright argues that the city's 2005 ordinance created a constitutionally-protected property interest in access from the extended road. The court held that property owners do not acquire a constitutionally-protected vested right in zoning classifications because the city retains its legislative authority to rezone at any time as public necessity demands. Further, Starbright didn't purchase its property until after the city decided not to extend the road. Consequently, Starbright did not establish that it relied upon the city's original plan to extend the road differently from any property owner's reliance on more conventional zoning classifications. The filing for the revised plat did not constitute a taking; the court affirmed the trial court's judgment.

Open Meetings Act: *City of Austin v. Lake Austin Collective, Inc.*, No. 14-18-00068-CV, 2019 WL 6317337 (Tex. App.—Houston [14th Dist.] Nov. 26, 2019) (mem. op.). The City of Austin's posted agenda for a November 10, 2016, meeting gave notice of the approval of an ordinance authorizing the execution of an amendment to a settlement agreement relating to the development of a specific property in the city. The ordinance was subsequently adopted, and included language in the ordinance and ordinance's caption indicating that certain sections of city code and Lake Austin Watershed regulations were waived with regard to the property in question. Lake Austin Collective, Inc. filed suit alleging that the agenda item violated the Open Meetings Act (Act) by failing to provide proper notice of the subjects of the meeting since it did not make any mention of the waiver of city code or the watershed regulations. The trial court signed a final judgment in favor of Lake Austin Collective and the city appealed.

The issue on appeal was whether the city's notice was sufficient. The court compared the content of the notice with the action taken at the meeting to determine if there was substantial compliance with the Act's requirement to provide notice of the subject of a meeting. Finding that the city's notice was fatally flawed, the court determined that the reader of the agenda would have lacked any notion that waiver of provisions of the city code or the watershed regulations were to be addressed by the council. Therefore, the agenda item fell short of the full disclosure required for substantial compliance with the Act. The court affirmed the judgment of the trial court.

Delinquent Property Taxes: *Spring Branch Indep. Sch. Dist. v. Southwest Precision Printers, L.P*, No. 14-18-00559-CV, 2019 WL 6000322 (Tex. App.—Houston [14th Dist.] Nov. 14, 2019) (mem. op.). In 2016, Page International Communications, L.L.C. (Page) filed for bankruptcy. Prior to doing so, Page entered into a royalty agreement with Southwest Precision Printers, L.P. (Southwest). Spring Branch ISD, along with other taxing units including the City of Houston, sued to collect delinquent property taxes on business personal property from Southwest under the theory of successor liability pursuant to Section 31.081 of the Tax Code. The taxing units argued that Southwest purchased Page's name and goodwill through the royalty agreement, making Southwest liable for Page's delinquent property taxes. The trial court issued a take-nothing judgment in favor of Southwest, and the taxing units appealed.

On appeal, the taxing units argued that the trial court's judgment was against the great weight and preponderance of the evidence. More specifically, the taxing units contend that the agreement unambiguously establishes that Southwest purchased Page's name and goodwill. The court goes on to examine the language in the agreement, ultimately reaching the conclusion that the agreement unambiguously shows that Southwest did not purchase Page's name or goodwill. The court focused on one provision of the contract that listed the "purchased assets" and did not include Page's name. Further, there was no language in the contract that indicated Southwest was purchasing Page's goodwill. The court concluded that Southwest was not liable as a successor to Page pursuant to Section 31.081 of the Tax Code and affirmed the trial court's judgment.

November 2019

Note: Included cases are from October 11 through November 10, 2019.

Texas Tort Claims Act: *University of Tex. v. Garner*, No. 18-0740, 2019 WL 5275579 (Tex. Oct. 18, 2019). This is a Recreational Use Statute case where the Texas Supreme Court reversed the denial of the university's plea to the jurisdiction and dismissed the claims.

The University of Texas at Austin owns and operates the Colorado Apartments, a student housing complex. Within the complex are four roads that permit two-way traffic around the complex and contain parking spaces that are perpendicular to the road. They connect to City of Austin streets. Bicyclists commonly use the road. Garner was traveling by bicycle to the trail head at Eilers Park. A university employee, Angel Moreno, was backing out from a southwest-facing parking space and struck Garner. Garner sued the university for negligence, contending that the Tort Claims Act waived the university's immunity by the operation and use of a motor vehicle. The university filed a plea to the jurisdiction asserting the application of the Recreational Use Statute (RUS), which was denied, and the court of appeals affirmed. The university appealed.

The RUS limits the liability of all landowners — public and private — who permit others to use their property for activities the statute defines as "recreation." Such landowners are "effectively immunize[d]" from ordinary negligence claims, owing those who use their property for recreation only the duty not to injure them intentionally or through gross negligence. Garner's only claim against the university sounds in ordinary negligence. She does not allege that the university or Moreno acted with gross negligence, malicious intent, or bad faith. The court of appeals held the RUS did not apply because under subsection (c) it did not grant permission to use the roads for recreational use. However, the RUS subsection (f) states "Notwithstanding Subsections (b) and (c), if a person enters premises owned, operated, or maintained by a governmental unit and engages in recreation on those premises, the governmental unit does not owe to the person a greater degree of care than is owed to a trespasser on the premises." Subsection (f) contains no language (unlike subsection (c)) requiring permission or invitation. Here, it is undisputed that Garner: (1) entered premises owned by a governmental unit; and (2) engaged in an activity on those premises (bicycling) that qualifies as "recreation" under the statute. As a result, no waiver of immunity applies.*

Texas Tort Claims Act/Texas Citizens Participation Act: *Houston Forensic Sci. Ctr., Inc. v. Barette*, No. 01-19-00129-CV, 2019 WL 5792194 (Tex. App.—Houston [1st Dist.] Nov. 7, 2019) (mem. op.). This is a case involving a former employee of a municipal corporation who sued the municipal corporation for defamation. The trial court denied Houston Forensic Science Center's (HFSC) plea to the jurisdiction based on the Texas Tort Claims Act (TTCA) and motion to dismiss under the Texas Citizens Participation Act (TCPA).

HFSC terminated Barette's employment and issued a press release stating HFSC terminated an investigator because of the use of testing equipment that led to false negatives. Employees of HFSC eventually identified Barette as the terminated investigator. Barette sued for defamation per se because she claimed the allegations were false.

HFSC filed a combined motion to dismiss under the TCPA and a plea under the TTCA. HFSC asserted Barette could not prove a prima facie case of defamation per se and that it was entitled to dismissal under the TCPA because it was immune from intentional torts under the TTCA.

Three days after HFSC filed its combined motion, Barette amended her petition and dropped the claims of defamation against HFSC and added claims of defamation against four HFSC employees. HFSC argued it was entitled to attorneys' fees, costs, and expenses under the TCPA, despite Barette's nonsuit.

The First Court of Appeals first found that HFSC is a municipal corporation created under the Texas Transportation Code and is a "governmental unit" as the term is used in the TTCA. The court next determined defamation is an intentional tort for which immunity is not waived. Finally, the court found that because HFSC was immune from suit, the trial court lacked subject matter jurisdiction to take any action on the defamation claim other than to dismiss it.

The court rejected HFSC's argument that the TCPA applied and that HFSC was entitled to a monetary award under the cost-shifting provisions. The First Court of Appeals found that it could not issue an advisory opinion, and, based on the facts of the case, the trial court lacked jurisdiction to consider the question at all. The court vacated the trial court's order denying the TCPA motion to dismiss and dismissed the appeal.

Texas Tort Claims Act: *Juarez v. Harris Cty.*, No. 01-18-00690-CV, 2019 WL 5699741 (Tex. App.—Houston [1st Dist.] Nov. 5, 2019) (mem. op.). This is a Texas Tort Claims Act case where Harris County asserted that the emergency response exception applied to officers' pursuit of suspected dangerous felons.

The case involves a police pursuit of three individuals in a stolen truck who were suspected of armed robbery. After seeing the three individuals get into a stolen truck and drive off, the officers attempted to make a routine traffic stop. The suspects then fled and the officers pursued in the chase. The officers noted, among other things, that the driver's hazardous driving created a danger to the public that required intervention and outweighed the risks of a vehicle pursuit. The officers conducted their pursuit by monitoring their speed and the driving conditions and proceeding carefully through traffic and intersections.

The county asserted it was immune because the officers were responding to an emergency under the emergency response exception. The First Court of Appeals noted that the term "emergency" is construed broadly, and concluded that the facts in the case were sufficient to show that the officers were responding to an emergency. The court found that the officers did not violate the Transportation Code provisions related to operating an emergency vehicle because they did not operate with reckless disregard for the safety of others. The burden shifted to the plaintiff to show that there was a disputed issue of material fact. The plaintiff merely made conclusory statements in opposition, such as the officers could have used other methods to arrest the suspects that would not have ended in a high-speed chase or they did not follow their training.

The First Court of Appeals rejected the plaintiffs' conclusory arguments, and found that the county presented sufficient evidence to show that the emergency response exception applied and affirmed the trial court.

Taxpayer Lawsuits: *Perez v. Turner*, No. 01-16-00985-CV, 2019 WL 5243107 (Tex. App.—Houston [1st Dist.] Oct. 17, 2019). This is a long-standing/multi-opinion dispute challenging the City of Houston's drainage fee ordinance. In this substituted opinion (substituted for an opinion issued in August of 2018), the First District Court of Appeals affirmed the granting of the city's plea to the jurisdiction.

Voters in the City of Houston adopted a dedicated charter amendment for a "Pay-As-You-Go Fund for Drainage and Streets." The city then adopted a regulatory ordinance. One source of funding was a charge imposed on properties directly benefitting from the drainage system. The ballot language for the charter amendment was originally held misleading and invalid. After several disputes from the subsequent ordinance occurred, Perez brought this ultra-vires claim and sought: (1) a judgment declaring the drainage fee ordinance invalid (yet again); and (2) an injunction against the assessment, collection, and expenditure of taxes and fees pursuant to the ordinance, and reimbursement "on behalf of herself and all other similarly situated persons or entities" of taxes and fees assessed and collected pursuant to the ordinance and paid "under duress." The city filed a plea to the jurisdiction asserting Perez lacked standing because she had suffered no particularized injury separate from the public, which was granted. Perez appealed.

The prior judicial declaration that the charter amendment is void does not address the Drainage Fee Ordinance. Thus, to the extent that Perez's claims were based on her allegations that the prior opinions invalidated the ordinance, such are misplaced. The charter amendment was only needed to shift a portion of ad valorem tax revenue from debt services and was not required for authority to pass a drainage fee ordinance. Local Government Code Chapter 552 provided independent authority for such an ordinance. Perez pleaded that she paid "illegal" drainage fees, she has cited to no authority declaring the Drainage Fee Ordinance illegal. Further, Perez must demonstrate she "suffered a particularized injury distinct from that suffered by the general public" by the drainage fees collected. The municipal fees were assessed to property owners across the city. The payment of municipal fees, like the drainage fees assessed against Perez's properties and numerous other properties in the city, did not constitute a particularized injury. Taxpayer standing is an exception to the "particularized injury" requirement. However, it is not enough for the plaintiff to establish that she is a taxpayer; the plaintiff "may maintain an action solely to challenge proposed illegal expenditures." A litigant must prove that the government is

actually expending money on the activity that the taxpayer challenges; merely demonstrating that tax dollars are spent on something related to the allegedly illegal conduct is not enough. Perez asserted the fees were collected illegally. However, she was unable to establish the city is actually making any "measurable, added expenditure" of funds on illegal, unconstitutional, or statutorily unauthorized activities. As a result, she was not entitled to taxpayer standing. The plea was properly granted.*

Texas Tort Claims Act: *Tarrant Cty. v. Green*, No. 02-19-00159-CV, 2019 WL 5460679 (Tex. App.—Fort Worth Oct. 24, 2019) (mem. op.). This is a Texas Tort Claims Act (TTCA) case where the Fort Worth Court of Appeals reversed the denial of the county's plea to the jurisdiction based on an intentional tort.

While Green was a jail inmate, he asserted Corporal Davis at the jail pointed a temperature gun (which utilized a laser for measurements) at his left eye causing injury. Corporal Davis admitted to using a laser temperature gun, but denied the laser impacted Green. Green testified that he does not believe Davis hit him with the laser intentionally. However, he testified Davis pointed the temperature gun at him as a result of Green telling a joke about Davis moments before. The county filed a plea to the jurisdiction asserting Green alleged an intentional tort, even though Green disclaimed the injury was performed intentionally. The trial court denied the plea and the county appealed.

Although the specific intent to inflict injury is unquestionably part of some intentional torts, a specific intent to injure is not an essential element of a battery, which does not require physical injury and which can involve a harmful or offensive contact intended to help or please the plaintiff. The court noted that accidental injuries can sometimes result from an intentional tort. The court drew a distinction between criminal and civil analysis for "intentional" conduct regarding battery. Green's allegations constitute a common-law battery claim because the contact — either offensive or provocative — was an intentional act made in response to Green's own provocative statement. As battery is an intentional tort, no waiver of immunity existed. The plea should have been granted.*

Public Information: *Paxton v. Escamilla*, No. 03-18-00346-CV, 2019 WL 5779912 (Tex. App.—Austin Nov. 6, 2019). This is an appeal of the trial court's order finding that Escamilla, the Travis County Attorney, is not required to disclose deferred prosecution agreement (DPA) records due to exceptions to disclosure under the Texas Public Information Act (Act).

The county attorney received a request under the Act for each DPA that his office had executed in domestic violence cases since April 2015. The county attorney declined to release the records and sought an opinion from the Attorney General's Open Records Division. The county attorney asserted that the requested records were excepted from disclosure. The attorney general issued a ruling concluding that DPAs whose terms had concluded could be withheld pursuant to the law enforcement exception, Section 552.108(a)(2) of the Government, but the DPAs whose terms had not concluded were not excepted from disclosure and must be released. The county attorney filed suit seeking declaratory relief from the attorney general's ruling. The trial court determined that all of the DPAs were excepted from disclosure, dividing them into three categories: (1) DPAs pertaining to dismissed criminal cases that have not been refiled are excepted from public

disclosure by Section 552.108(a)(2); (2) DPAs pertaining to dismissed criminal cases that have been refiled and then dismissed again are excepted from disclosure by Section 552.108(a)(2); and (3) DPAs pertaining to dismissed criminal cases that have been refiled and are still pending are excepted from disclosure by Sections 552.108(a)(1), 552.103, and 552.107. The attorney general appealed.

The court of appeals affirmed the trial court's judgement. The court found that a dismissal pursuant to a DPA, even if conditional until the term of the DPA has run, satisfies the requirement of Section 552.108(a)(2) as an investigation that has not resulted in conviction or deferred adjudication. Similarly, the court determined that the dismissal of criminal charges that were refiled after the execution of a DPA satisfies the requirement of an investigation that has not resulted in conviction or deferred adjudication pursuant to Section 552.108(a)(2). The court also concluded that pending criminal charges that were refiled after the execution of DPA for failure to comply with one or more conditions of the agreement satisfy the requirement of Section 552.108(a)(1), as the release of such DPA would interfere with detection, investigation, or prosecution of a crime.

Quo Warranto: *State v. City of Double Horn*, No. 03-19-00304-CV, 2019 WL 5582237 (Tex. App.—Austin Oct. 30, 2019). This is an appeal of the trial court's order denying the State of Texas' petition for leave to file a quo warranto challenging the incorporation of the City of Double Horn as a Type B general law municipality.

The State of Texas filed its "Petition for Leave to File an Information in the Nature of Quo Warranto" (petition) seeking to declare the incorporation of the city invalid and void for failure to comply with statutory requirements for incorporation and to remove the city's officers from office. The State alleged that the incorporation failed to meet two statutory requirements: (1) that the community intending to incorporate constitutes an unincorporated town or village prior to incorporation; and (2) that the proposed boundaries include only the territory to be used strictly for municipal purposes. The trial court considered the ultimate merits of the case, denied the State's petition, and ultimately dismissed the suit. The State appealed, arguing that the trial court erred by applying the wrong pleading standard and failing to accept its allegations as true in determining whether it had probable ground to bring a quo warranto action.

The court of appeals reviewed the trial court's decision for abuse of discretion and determined that the petition stated a probable ground for a quo warranto action. The court concluded that, in making a probable-ground determination, the trial court need only determine if the petition stated a cause of action to proceed. Additionally, the court, after reviewing the State's factual allegations, found that the State sufficiently stated a claim for relief on its claim of invalid incorporation, and, thus, probable ground for a quo warranto proceeding. Accordingly, the court determined that the trial court erred in dismissing the State's petition, and remanded the case for further proceedings.

Texas Tort Claims Act: *Gomez v. City of Houston*, No. 14-17-00811-CV, 2019 WL 5580134 (Tex. App.—Houston [14th Dist.] Oct. 29, 2019) (en banc op.). Bobby Joe Simmons, a City of Houston police officer, was responding to a robbery call when his car collided with a vehicle driven by Maria Christina Gomez. Gomez sued the city, alleging negligence. The city filed a plea

to the jurisdiction asserting that it was immune from suit, and the trial court granted the city's plea and dismissed the lawsuit. Gomez appealed.

In December 2018, a panel of the Fourteenth District Court of Appeals reversed the trial court's judgment and remanded the case to the trial court. The city filed a motion for en banc reconsideration, which was granted. The court withdrew the earlier opinion and issued this en banc majority opinion, although the result does not vary from the opinion issued in December of 2018.

On appeal, the first question was whether Officer Simmons could be personally liable to Gomez under Texas law, as required under the Texas Tort Claims Act to waive governmental immunity. The city contended that the evidence conclusively established that Officer Simmons responded to the robbery call in good faith, and therefore could not be personally liable to Gomez under Texas law, meaning the city should retain its governmental immunity. But the court held that the city's evidence of good faith assumes the truth of a disputed fact – that Simmons was using his overhead emergency lights as he approached the intersection. No witnesses testified that the standard for good faith was satisfied if Simmons did not use his car's overhead emergency lights. Consequently, the court held that the city did not meet its burden to conclusively prove Officer Simmons' good faith. The trial court erred to the extent it granted the city's plea to the jurisdiction on the ground that the city's governmental immunity had not been waived under the Texas Tort Claims Act.

In her second issue, Gomez argued that the trial court erred to the extent it granted the city's plea based on the emergency exception to the waiver of immunity in Section 101.021 of the Civil Practice and Remedies Code. The city claimed that because it established that Officer Simmons did not act recklessly, the city was immune from suit. The court disagreed, holding that there was a material question of fact regarding whether Officer Simmons acted recklessly or with conscious indifference to the safety of others. Evidence showing that Officer Simmons did not slow his speed to compensate for the wet conditions, did not use his patrol car's siren and possibly the emergency lights, and did not maintain visual contact with the road as he approached the intersection could support a finding that he acted recklessly. Because there was a fact issue on whether Officer Simmons' acted recklessly, the court sustained Gomez's second issue.

The court reversed the trial court's judgment and remanded the case to the trial court for further proceedings consistent with the opinion.

Inverse Condemnation: *City of Houston v. Commons at Lake Houston, Ltd.*, No. 14-18-00664-CV, 2019 WL 5158725 (Tex. App.—Houston [14th Dist.] Oct. 15, 2019). The Commons at Lake Houston, Ltd. (Commons) began development of a master-planned community called "The Crossing" that contained portions located in the 100-year and 500-year floodplains. Following Hurricane Harvey, the city adopted an ordinance imposing new restrictions on building within the floodplain. The Commons sued the city before the effective date of the ordinance, asserting claims for inverse condemnation and a declaratory judgment. After the suit was filed, an individual working on the development project emailed a city engineer asking about the application of the vested rights statute. The city engineer responded by

stating that some of the proposed improvements are not part of the plat and therefore would not be vested. The city filed a plea to the jurisdiction arguing that The Commons' claims were not ripe because the city had not made a final decision applying its floodplain regulations to the development. The Commons responded by using the emails between the developer and the city engineer as evidence that a decision had been made by the city. The trial court denied the city's plea to the jurisdiction and the city appealed.

On appeal, the city contends that The Commons' claims were not ripe, since the city has not made any final decision applying the ordinance to deny a permit application for The Commons' property or decided whether the ordinance applied to The Crossing. First, the court held that the inverse condemnation claim was not ripe, as it was undisputed that The Commons did not have any permit or plat applications denied as a result of the amended ordinance. The Commons claimed that its inverse condemnation claim was ripe upon enactment because the ordinance prohibits the precise use intended for the property. However, the court points out that the ordinance allows for variances. Nothing in the ordinance prevents The Commons from seeking a variance from the ordinance. Because The Commons had not given the city the ability to exercise its discretion, the inverse condemnation claim was not yet ripe.

Similarly, the court held that The Commons' vested rights claim also was not ripe. The Commons argued that the email exchange with the city engineer shows that the city had finally decided that Chapter 245 of the Local Government Code was inapplicable. The court held that the email exchange did not constitute "official action" by the city. The Commons asked a general question about unspecified tracts of land, and the city employee, after specifying that she was not an attorney, gave a general answer. This did not constitute evidence that the city made a final decision to apply the new ordinance to the developed property, and the Chapter 245 claim was not ripe.

The trial court erred because The Common's inverse condemnation and vested rights claims were not ripe. The court sustained the city's issue, reversed the trial court's order, and rendered a judgment that The Commons' claims were dismissed without prejudice.

October 2019

Note: Included cases are from September 11 through October 10, 2019.

Red Light Cameras: *Watson v. City of Southlake*, No. 02-18-00143-CV, 2019 WL 4509047 (Tex. App.—Fort Worth Sept. 19, 2019). This is an interlocutory appeal of the granting of multiple pleas to the jurisdiction filed on behalf of multiple cities and the State of Texas for claims relating to red light cameras. The Second Court of Appeals found that Watson's prospective claims failed for lack of standing, his claims for reimbursement were barred by immunity, and his takings claim failed because Watson failed to exhaust his administrative remedies.

Watson was a resident of Louisiana who was cited by the City of Southlake for violating its red-light-camera ordinance. He did not take advantage of his administrative remedies. He sued all

cities in Texas who had red light cameras on behalf of all others who had been affected by the red-light-camera laws. He also sued the company that administered the city's red-light-camera program as well as other similar companies who administered other cities' red-light-camera programs. Finally, he sued the State of Texas. He alleged claims for (1) unconstitutional takings; (2) reimbursement of the civil fines; (3) an injunction prohibiting the government defendants from enforcing their red-light-camera laws; (4) declaratory judgment that the red-light-camera laws were unconstitutional; and (5) common law misrepresentation and deceptive trade practices violations.

The Second Court of Appeals found that Watson lacked standing to sue all of the defendants for prospective relief. Like in *Garcia v. City of Willis*, No. 17-0713, 2019 WL 1967140 (Tex. May 3, 2019), Watson's claims for prospective relief were too speculative for him to have standing. He had paid the fine, which put any imminent threat of injury in the past.

Watson likewise lacked standing to sue cities other than the City of Southlake and their private administrators for retrospective relief because he had not been harmed by the other cities. Additionally, although he sued on behalf of a class, he had not certified a class, and therefore, could not maintain claims based on a jurisdictional link. The court also determined that the trial court did not err in severing his claims against the other cities and administrators from his claims against the City of Southlake, the City of Southlake's red-light-camera-program administrator, and the State of Texas.

The court concluded the State of Texas and the city had immunity from suit for the reimbursement claims and Watson did not pay the fines under duress. Finally, as in *Garcia*, Watson had failed to exhaust his administrative remedies for his unconstitutional takings claim against the City of Southlake and the State of Texas because a hearing officer could have rendered his claims moot. Therefore, the trial court properly dismissed Watson's claims.

Immunity: *Stegall v. TML Multistate Intergovernmental Emp. Benefits Pool, Inc.*, No. 05-18-00239-CV, 2019 WL 4855226 (Tex. App.—Austin Oct. 2, 2019) (mem. op.). This is an appeal challenging the trial court's order finding that the TML Multistate Intergovernmental Employee Benefits Pool, Inc. (TML) and UMR, Inc., one of TML's third-party health benefits administrators, have governmental immunity in a health benefits coverage dispute.

Joe Stegall was the chief financial officer for the City of Royse and was a participant in the city's health benefits program provided by TML, an intergovernmental self-insurance risk pool. Stegall was diagnosed with bile cancer and liver cancer, and following an initial round of chemotherapy, his oncologist prescribed Nexavar, an FDA-approved drug designed to increase survival rates and life expectancy for patients with advanced liver cancer. TML and UMR initially denied coverage for the drug, but eventually reversed course and agreed to provide coverage for Nexavar. Stegall died several weeks later. Stegall's spouse sued TML and UMR for wrongful denial of medical benefits and additional acts of interference with the decedent's access to prescribed chemotherapy under tort and contract theories. TML and UMR filed general denials, and with respect to the tort claims, both filed pleas to the jurisdiction on the grounds of governmental immunity. The trial court, after separate hearings, granted both pleas to the

jurisdiction leaving only Stegall's breach of contract claim against TML. Stegall voluntarily nonsuited her breach of contract claim, and filed a motion for new trial. Her motion for a new trial was overruled by operation of law, and she appealed asserting that TML did not have governmental immunity because it was engaged in proprietary functions.

The court concluded that TML's "nature, purposes, and powers" demonstrate legislative intent that TML is a distinct governmental entity entitled to assert immunity in its own right, and that the Legislature intended for self-insurance pools to perform governmental functions and services. As a result, the court declined to extend the governmental/proprietary distinction to TML concluding that immunity had not been waived. The court also concluded that UMR, as TML's third-party administrator, has the same governmental immunity as TML. Accordingly, the court affirmed the trial court's order granting the pleas to the jurisdiction.

Employment: *Fratus v. City of Beaumont*, No. 09-18-00294-CV, 2019 WL 5076241 (Tex. App.—Beaumont Oct. 10, 2019) (mem. op.). This is an interlocutory appeal in a firefighter termination case where the Beaumont Court of Appeals affirmed the granting of the City of Beaumont's plea to the jurisdiction.

Fratus filed a petition seeking damages, declaratory relief and injunctive relief against the city based on discriminatory employment practices and his termination as a firefighter. The city filed a plea to the jurisdiction claiming governmental immunity and seeking dismissal of the claims. Fratus appealed arguing the trial court erred in granting the city's plea to the jurisdiction on: (1) his claim for declaratory and equitable relief from the city's retaliation against Fratus because of his exercise of protected speech under Article I, Section 8 of the Texas Constitution; (2) his claim for discriminatory employment action by the city because he is Hispanic or in retaliation for him having opposed the fire chief's sexual harassment of another employee; and (3) his claim that that the 2015-2019 Collective Bargaining Agreement (CBA) is void because the city failed to post the negotiations in compliance with the Texas Open Meetings Act (TOMA).

Because Fratus's claim for declaratory relief is based on harms that have already occurred, he has not pleaded a claim that overcomes the city's immunity. Fratus's claim for equitable relief for constitutional violations is not a claim against a city official at all and does not defeat the city's plea to the jurisdiction. Fratus failed to plead a prima facie free speech claim because he failed to show that the speech he engaged in was primarily as a citizen involving a matter of public concern. His first issue is overruled.

Fratus failed to plead an adverse employment action that would support a Texas Commission on Human Rights Act (TCHRA) claim. While Fratus was terminated, he appealed that termination under the CBA and does not dispute that he was reinstated. And his other complaints do not rise to the level of material adversity necessary to show an adverse employment action under the TCHRA. His second issue is overruled.

Fratus's TOMA claim "does not meet briefing requirements because it lacks citations to the record or to applicable authority and therefore presents nothing for" the court to review. Without a pleading to support the claim, the city's immunity is not waived. His third issue is overruled.

Employment: *Nix v. City of Beaumont,* No. 09-18-00407-CV, 2019 WL 4891704 (Tex. App.—Beaumont Oct. 3, 2019) (mem. op.). This is an interlocutory appeal in a firefighter suspension case where the Beaumont Court of Appeals affirmed the granting of the City of Beaumont's plea to the jurisdiction.

Nix filed a petition seeking declaratory and equitable relief against the city based on his indefinite suspension from his position as a firefighter. He asserted the Collective Bargaining Agreement (CBA) was invalid because the city allegedly failed to comply with the Texas Open Meeting Act (TOMA) requirements when the CBA was negotiated. He also asserted the "last chance" agreement he entered into with the fire chief was invalid. Nix's last-chance agreement probated part of the suspension, but noted he could be terminated if he violated any terms of the agreement. Nix's suspension in 2015 resulted in the last-chance agreement and the chief determined he violated the sick leave policy in 2017 resulting in an indefinite suspension. Nix asserted in the absence of a valid contract, the suspensions were invalid, depriving him of due process of law and a protected property interest. The city filed a plea to the jurisdiction, which was granted. Nix appealed.

TOMA has a limited waiver of immunity. An action taken in violation of TOMA is voidable, not void. When a department head suspends a firefighter for violating a civil service rule, the suspension may be for a reasonable period not to exceed fifteen calendar days or for an indefinite period. TEX. LOC. GOV'T CODE § 143.052(b). The firefighter may accept the suspension or appeal to the civil service commission. If the firefighter disagrees with the commission, the employee may file suit in district court. The question of whether the city posted the CBA 2012-2015 negotiations in accordance with TOMA is not relevant because it is the CBA 2015-2020 that is applicable to his underlying challenge to his indefinite suspension in 2017. The city provided evidence showing proper postings for the negotiation of the 2015-2020 CBA. When Nix accepted the last-chance agreement in 2015, he had the opportunity to refuse the chief's offer and appeal his suspension to the commission; however, Nix agreed to waive his right to appeal, including the right to appeal the chief's 2017 decision determining that Nix had violated the agreement. Nix waived all rights he may have to file suit against the city as to any issue directly or indirectly related to the last-chance agreement or to his indefinite suspension. As a result, the trial court properly granted the plea.*****

Texas Tort Claims Act: *City of Brownsville v. Brownsville GMS, Ltd.*, No. 13-19-00467-CV, 2019 WL 4741730 (Tex. App.—Corpus Christi September 27, 2019) (mem. op.). This is a governmental immunity/contract case where a temporary injunction was sought. The court held the trial court's failure to rule on the city's plea to the jurisdiction was not a denial of the city's plea because a simultaneous separate interlocutory appeal was filed staying the proceedings.

Brownsville GMS, Ltd. (GMS) sued the City of Brownsville, the mayor, and the city commission members complaining of the manner in which the city awarded its waste disposal contract. GMS obtained a temporary injunction to preclude the city from acting on the award and an order for expedited discovery. The individuals filed motions to dismiss based on Texas Civil Practice and Remedies Code Section 101.06(e). The city also filed two pleas to the jurisdiction asserting immunity. The trial court scheduled multiple motions to be heard on August 13, 2019. The trial court denied the motions to dismiss during the hearing. The individuals filed an

interlocutory appeal during the hearing for the denial. The trial court did not rule on any other motions during the hearing as the proceedings were stayed.

The city also appealed and argued that the trial court's refusal to rule on its pleas to the jurisdiction invokes the implicit ruling doctrine and cites *Thomas v. Long*, 207 S.W.3d 334 (Tex. 2006). In *Thomas*, the implicit ruling was predicated on the trial court's grant of affirmative relief to Long while at the same time failing to rule on Thomas's plea to the jurisdiction. The trial court did not have authority to grant the relief Long sought unless it affirmatively determined that it had jurisdiction. Here, the trial court became aware that DeLeon filed an instantaneous interlocutory appeal, thereby staying all proceedings. The trial court correctly recognized it did not have the power to rule on the pleas and adjourned the hearing. Because the trial court had no authority to rule on the pleas it did not implicitly deny the pleas. The appellate court therefore lacks jurisdiction to hear the city's appeal.*****

Contractual Immunity: *Naismith Engineering, Inc. v. City of Aransas Pass*, No. 13-18-00402-CV, 2019 WL 4493699 (Tex. App.—Corpus Christi September 19, 2019) (mem. op.). This is a governmental immunity/contract case where the court affirmed the granting of the city's plea to the jurisdiction.

The city manager, with council approval, entered into a contract with Naismith Engineering, Inc. (NEI) to design improvements to the boat-ramp area of the city's Conn Brown Harbor (CBH project). The city sued NEI and its surety alleging there were deficiencies related to the CBH project. NEI subsequently counterclaimed to recover outstanding fees for "general work" performed. NEI alleged that "[NEI] performed work ranging from general project services to general harbor engineering and planning and services for waterline extension…." The city filed a plea to the jurisdiction as to the counter-claim, which was granted. NEI appealed.

The court declined to "apply the common law of contracts to a governmental immunity question" and held no contract existed for "general services" between the city and NEI. Therefore, no waiver of immunity existed. NEI attempted to argue its counter-claim included unpaid fees for the CBH project; however, the evidence and statements of counsel made it clear the counter-claim was for other work which was simply near and around the boat ramp. A governmental entity retains immunity from suit as to those claims for monetary damages that are not germane to, connected with, and properly defensive to the entity's claim. The counterclaim does not arise from the same transaction or occurrence that is the subject matter of the city's claim and therefore no immunity is waived. The plea was properly granted.*****

September 2019

Note: Included cases are from August 11 through September 10, 2019.

Ordinance Enforcement: *Town of Flower Mound v. Eagleridge Operating, LLC*, No. 02-18-00392-CV, 2019 WL 3955197 (Tex. App.—Fort Worth Aug. 22, 2019) (mem. op.). This is an interlocutory appeal in a temporary injunction case where the Fort Worth Court of Appeals

held the zoning restriction on oil and gas equipment at issue was a penal ordinance and no vested property right existed, depriving the trial court of jurisdiction to issue a temporary injunction.

Plaintiff took over operation of a series of oil/gas wells in the Town of Flower Mound. The town passed an ordinance regulating operations, the removal of waste water, and hours of operation. The ordinance stated as part of its purpose that natural gas drilling and production operations involve or otherwise impact the town's environment, infrastructure, and related public health, welfare, and safety matters. In 2018, plaintiff filed three actions with the board of adjustment (BOA) and board of oil and gas appeals (OGA) regarding variances, which were denied. The town issued several criminal citations for after-hour operations and failure to remove wastewater. Plaintiff sought a temporary restraining order (TRO) and injunction to prevent the enforcement of the ordinance, which was granted. The town, BOA and OGA appealed.

The basic test as to whether a law is penal is whether the wrong sought to be redressed is a wrong to the public or a wrong to an individual. A public wrong involves the "violation of public rights and duties, which affect the whole community, considered as a community, and are considered crimes; whereas individual wrongs are infringements of private or civil rights belonging to individuals, considered as individuals, and constitute civil injuries." When an ordinance's primary purpose is to protect the welfare of a city's citizens, it "is clearly addressing a wrong to the public at large and is a penal ordinance." The court held the zoning ordinance was penal in nature. To be entitled to injunctive relief, the plaintiff had the burden to demonstrate irreparable injury to a vested property right. Contrary to plaintiff's position, allegations of injury to an interest in real property does not equate to irreparable injury of a vested property right. Increases in operating costs does not equate to irreparable harm to their mineral interests. Loss of profitability, alone, also does not equate to irreparable harm to their mineral interest. As a result, plaintiff is not entitled to injunctive relief to prevent enforcement of such a penal ordinance. Under sections of Texas Local Government Code Chapter 211 (dealing with BOA and appeals), no injunction is textually available for an appeal from the BOA to a district court, an appeal is only available from an official to the BOA. The legislature made a distinction between a restraining order and an injunction, and no injunctive relief is available under Chapter 211 for an appeal to district court from a BOA decision.

Chief Justice Sudderth concurred in a majority of the opinion, but dissented as to the interpretation under Chapter 211. She opined a temporary restraining order is a stopgap, place-holding measure to preserve the status quo 14 days until a litigant's application for temporary injunction can be heard. For practical purposes, depriving the trial court of the ability to extend the restrained enforcement makes little sense.*****

Public Information Act: *Brown v. City of Austin*, No. 03-19-00035-CV, 2019 WL 4068559 (Tex. App.—Austin Aug. 29, 2019) (mem. op.). This is a writ of mandamus seeking to compel the City of Austin to produce two police reports pursuant to a request under the Texas Public Information Act (PIA).

Brown, an inmate at the Texas Department of Criminal Justice, filed a writ of mandamus in trial court after the city refused to produce two police reports in response to his PIA request. The city filed a motion to dismiss under Chapter 14 of the Civil Practices and Remedies Code, which

permits courts to dismiss inmate claims that are frivolous, arguing that because Brown was an inmate, the city's compliance with his PIA request was purely discretionary. Additionally, the city argued that Brown did not meet the requirements that entitled him to mandamus relief. The trial court dismissed Brown's suit. Brown appealed.

The court of appeals concluded that the trial court did not abuse its discretion because a governmental body's duty to disclose information requested by an inmate is discretionary. Accordingly, the court affirmed the trial court's order.

Ballot Language: *In re Blythe*, No. 03-19-00577-CV, 2019 WL 4068571 (Tex. App.—Austin Aug. 28, 2019) (mem. op.). This is a petition for a writ of mandamus in which the realtor contends that the court should order the City of Austin to delete certain language from the ballot.

Blythe filed a writ of mandamus asserting that the court should order the city to delete the phrase "at an election for which the City must pay" from the ballot language because it implies that the city will necessarily incur additional election costs to comply with the voter-approval provisions contained in a proposition to adopt a citizen-initiated ordinance.

The court of appeals denied the writ finding that the proposed ordinance did not include language that limited voter approval to the "next required uniform election date." The court determined that the language in the proposed ordinance was ambiguous and could be read to require voter approval at the next uniform election date, whether or not the city was already planning an election on that date. Thus, the inclusion of the phrase "at an election for which the city must pay" in the ballot language is not misleading. As a result, the court denied the writ.

Public Information Act: *San Jacinto River Auth. v. Paxton*, No. 03-18-00547-CV, 2019 WL 3952829 (Tex. App.—Austin Aug. 22, 2019) (mem. op.). This is an appeal of the trial court's order granting the Office of Texas Attorney General's (AG) plea to the jurisdiction in a case involving the Texas Public Information Act (PIA).

The San Jacinto River Authority (SJRA) received two separate PIA requests on September 18, 2017, asking for information on pre-release of water related to Hurricane Harvey. The SJRA determined that some information responsive to each request was excepted from disclosure and sought decisions from the AG. On November 8, 2018, the AG issued a decision on one of the requests determining that the information was not subject to disclosure. On December 17, 2017, the AG issued a decision on the other request determining that SJRA had failed to timely submit its request for a decision and that, therefore, the information must be disclosed. The SJRA contended that it "deposited in the mail" each of its two requests for AG decisions on October 2, 2017. Believing that the AG had erred in its timeliness determination, SJRA's general counsel contacted the AG's office and spoke with a representative from its Open Records Division informing him that the PIA allows timeliness to be established by either the postmark or other proof establishing the request was timely mailed, and that another request for a decision mailed at the same time was deemed timely. The representative of the Open Records Division invited the SJRA to submit a request for reconsideration of the timeliness of its request for decision. SJRA did so on December 28, 2017, including an affidavit stating that it had deposited its request for a decision in the mail on October 2, 2017.

The AG responded on February 6, 2018, citing Section 552.301(f), Texas Government Code, which provides that a governmental body is prohibited from asking for a reconsideration of the attorney general's decision. On February 23, 2018, the SJRA filed a lawsuit seeking a declaration under the PIA and the Uniform Declaratory Judgement Act (UDJA) that it was not required to disclose the requested information. The AG filed a plea to the jurisdiction. The trial court granted the plea. SJRA appealed.

The court of appeals found that SJRA's petition was not filed timely because Section 552.324(b) of the Government Code refers to the date the governmental body receives the decision of the AG in determining that the requested information must be disclosed to the requestor, not the date of the post-decision correspondence informing the SJRA that it was prohibited from asking for a reconsideration. The court also determined that the UDJA claim did not confer jurisdiction on the trial court, and that the SJRA could not rely on an estoppel argument to confer jurisdiction on the trial court. Additionally, the court found that the SJRA's "compelling reason" argument to withhold disclosure of the requested documents was outside the jurisdiction of the trial court and the court of appeals. Accordingly, the court affirmed the trial court's order.

Ballot Language: *In Re Linder*, No. 03-19-00553-CV, 2019 WL 3978582 (Tex. App.—Austin Aug. 22, 2019) (mem. op.). This is a mandamus action seeking modification of ballot language of a proposition to adopt a citizen-initiated ordinance.

Linder and approximately 31,900 registered voters signed a citizen-initiated petition proposing an ordinance regarding the City of Austin's use of revenue from hotel-occupancy taxes. The proposed ordinance generally required the city to spend 15 percent of hotel occupancy taxes on cultural arts and 15 percent on historic preservation; limit its spending on the convention center to 34 percent of the hotel-occupancy tax revenue; spend the remaining hotel-occupancy tax revenue to support and enhance the city's cultural tourism industry; and obtain voter approval for the convention center improvement and expansion costing more than $20 million. The petition was certified, and the city prepared the ballot language that referenced "voter approval for Convention Center improvements or expansions of more than $20 million at an election for which the city must pay." Linder filed a suit for mandamus asking the trial court to order the city to correct the ballot language so that it adequately describes the ordinance proposed by the citizen-initiated petition. Linder argued that the proposed ballot language includes extraneous and misleading information regarding election costs, and fails to inform voters that under the proposed ordinance, hotel-occupancy tax revenue would be redirected from the convention center to cultural, arts, and other tourism-related programs.

The court found that the ballot language affirmatively misrepresents future election costs associated with the ordinance because there is no requirement under the proposed ordinance that the election to approve the convention center's improvement and expansions costs of more than $20 million be held within a given time. Additionally, the court found that the ballot language omits a chief feature of the proposed ordinance – that the ordinance would require the city to prioritize the spending of hotel-occupancy tax revenue on arts, historic preservation, and the city's cultural tourism industry. As a result, the court found that the city had abused its discretion.

Time Payment Fee: *Dulin v. State*, Nos. 03-18-00523-CR; 03-18-00524-CR, 2019 WL 3807866 (Tex. App.—Austin Aug. 14, 2019). This is an appeal challenging the constitutionality of the time payment fee assessed against a defendant convicted of two offenses in a single criminal action.

Dulin was convicted under two separate cause numbers and sentenced to imprisonment for one count of indecency with a child, nine counts of aggravated sexual assault of a child, one count of continuous sexual abuse of a child under the age of 14, and one count of "super" aggravated sexual assault of a child. The trial court also assessed court costs of $589 and $639 for the count of indecency and for the "super" aggravated sexual assault of a child, respectively. Dulin appealed asserting that the time payment fee assessed against him must be reduced because a portion of the fee is unconstitutional and that duplicative costs must be deleted.

The court first looked at the constitutionality of Section 133.103(b) and (d) of the Local Government Code, which provides that a person convicted of an offense shall pay a fee of $25 if any part of a fine, court cost, fee, or restitution is paid on or after the 31st day after the date judgement is entered with $12.50 remitted to the State Comptroller and $10 retained in the general revenue of a city or county. The court concluded that because these fees are general revenue not sufficiently related to a legitimate criminal justice purpose, subsections (b) and (d) are facially unconstitutional and violate the separation of powers doctrine under article II, section I of the Texas Constitution. The court also concluded that the trial court should not have assessed the same court costs against Dulin in both cause numbers as he was convicted of two offenses in a single criminal action.

Tort Claims Act: *Maspero v. City of San Antonio*, No. 04-18-00286-CV, 2019 WL 4044036 (Tex. App.—San Antonio Aug. 28, 2019) (mem. op.). This is an appeal of the trial court's order granting the City of San Antonio's plea to the jurisdiction in a personal injury case.

Narcotics detectives requested two police officers, Sergeant Scaramozi and Officer Kory, to conduct a traffic stop of an individual driving a suburban suspected of carrying drugs. Officer Kory responded, followed the suburban, and activated her lights. The suburban slowed down and pulled onto the shoulder, but then suddenly sped up and onto the main lanes of an interstate highway. Officer Kory initiated a chase of the vehicle, which was travelling over 100 mph while weaving in and out of rush hour traffic. When the suburban drove down a grass median and onto the frontage road, she followed the vehicle and exited the interstate at a speed of up to 94 mph. The suburban then drove through an intersection and lost control. Officer Kory proceeded to where the suburban had crashed, but the suburban suddenly emerged driving towards her. To avoid impact, Officer Kory veered off the right shoulder. The suburban drove past her and crashed head-on into Jimmy and Regina Masperos' vehicle. The crash killed the Masperos' sons and injured their two surviving children. The Masperos' sued the city for negligence alleging that the city was liable because Officer Kory and Sergeant Scaramozi's negligent and reckless actions proximately caused the crash. The city filed a plea to the jurisdiction, arguing immunity from suit. The trial court granted the plea. The Masperos' appealed.

The court of appeals first looked at whether the city's immunity under the Texas Tort Claims Act (TTCA) had been waived by the operation or use of a motor-driven vehicle. The court determined that there was a nexus between Officer Kory's operation of a motor vehicle and the Masperos' injuries because Officer Kory was actively operating her vehicle at the time of the crash; she used her patrol car to chase the suspect in her efforts to apprehend him; and her decision to use her patrol car to chase the suspect without activating her siren was a "but-for-cause" of the suburban's crash.

The court then looked at whether the city was immune under the "emergency exception" of the TTCA. The court found that Officer Kory knew the substantial risks to the public of initiating and continuing a high-speed chase of a suspect, and did not care about the result because she continued the chase even though she did not believe she could catch the suburban. As such, the emergency exception did not apply.

Finally, the court looked at whether the trial court erred in dismissing the Masperos' claim of negligent implementation of a policy, Procedure 609, which permits an officer to engage in a chase only when the benefit of apprehension outweighs the risk to the public. The court concluded that the Masperos' had established some evidence sufficient to create a fact issue about whether Procedure 609 was violated. They showed that Officer Kory's chase began as routine traffic stop of a driver who was only a suspect, and that Sergeant Scaramozi did not verbally authorize Officer Kory to pursue the suspect. As a result, the trial court erred in dismissing the Masperos' negligent implementation of a policy claim.

The court reversed the trial court's order and remanded the case for further proceedings.

Premise Defect: *City of San Antonio v. Herrera*, No. 04-18-00881-CV, 2019 WL 3937279 (Tex. App.—San Antonio Aug. 21, 2019) (mem. op.). This is an interlocutory appeal of the trial court's order denying the City of San Antonio's plea to the jurisdiction in a premise defect case.

Elena Herrera was exiting an elevator and fell as a result of a condition created by the curb and ramp leading to the parking garage owned and operated by the city. She sued the city for injuries she sustained as a result of the fall alleging that the city negligently created the dangerous condition, allowed it to exist, and failed to warn about the condition. The city filed a plea to the jurisdiction asserting that the premise liability claim arose out of its discretionary powers, for which the city retains immunity. The trial court denied the plea. The city appealed.

The court of appeals analyzed whether the city's failure to provide visible contrast between the curb and flares or to warn about the alleged hazard in the garage falls within the discretionary function exception to the waiver of governmental immunity. Because the city is not required by law to create contrast between the curb and flares, the court concluded that city's decision about what safety features to use and whether to provide additional warnings are discretionary decisions for which the city may not be sued. Accordingly, the court reversed the trial court's order denying the city's plea to the jurisdiction.

Breach of Contract: *Torres v. Dallas/Ft. Worth Int'l Airport*, No. 05-18-00675-CV, 2019 WL 4071994 (Tex. App.—Dallas Aug. 29, 2019) (mem. op.). This is an interlocutory appeal of the trial court's order granting Dallas-Fort Worth International Airport Board's (DFW) plea to the jurisdiction in a breach of contract claim.

Torres entered into a contract to provide human resources consulting services to Pursuit of Excellence (POE), a corporation that contracted with DFW to provide operations services. In July 2016, POE filed suit against Torres for breach of contract, breach of fiduciary duty, misappropriation of trade secrets, unjust enrichment, tortious interference with contract and business relationships, and commercial disparagement. Torres filed an answer, denying the claims, asserting counterclaims against POE, and added third-party claimants, including DFW. DFW filed a plea to the jurisdiction asserting governmental immunity from tort and contract claims. The trial court granted the plea. Torres appealed.

The court of appeals determined that the operation of DFW airport is a governmental function as a matter of law, and immunity applies. The court also concluded that the waiver of immunity for breach of contract under Section 271.152 of the Local Government Code does not apply because DFW did not directly contract with Torres. The court overruled Torres' remaining issues as they were not properly before the court. Accordingly, the court affirmed the trial court's grant of DFW's plea to the jurisdiction.

Open Meetings Act: *City of Plano v. Hatch*, No. 05-18-00927-CV, 2019 WL 4010777 (Tex. App.—Dallas Aug. 26, 2019). This is an interlocutory appeal of the trial court's order denying the City of Plano's plea to the jurisdiction in an action alleging a violation of the Texas Open Meetings Act (TOMA).

The Hatches sued the city after city council voted to rename and expand the city's non-discrimination policy, alleging that: (1) although the vote occurred at a public meeting, council actually held deliberations and voted on the ordinance in prior closed meetings in violation of the TOMA; (2) the city surveyed councilmembers for their policy positions, establishing a "walking quorum;" (3) the city failed to maintain an adequate certified agenda; and (4) the city's public notice was "deliberately dishonest" about the fact that the ordinance was new. The Hatches sought a declaration that the ordinance is void; the city's actions violated the Hatches' rights and the rights of the city's citizens and Texas law; and a declaration preventing the city from simply "reenacting" the ordinance.

The City filed a plea to the jurisdiction alleging that: (1) only a writ of mandamus or injunction, and not declaratory relief, is available under TOMA; (2) TOMA requires the Hatches sue the individual councilmembers, not the city; (3) the Hatches improperly "attempt to block" the city's legislative right to pass future ordinances; (4) there is no waiver of the city's immunity for the Hatches' claims that the city violated criminal statutes; (5) the Hatches' claims are moot, because only one of the members of the council who allegedly violated TOMA is still serving on the council; (6) because the city posted and conducted a public meeting where the ordinance was passed, any prior alleged TOMA violations are moot and "barred by ratification"; and (7) the Hatches claims against the city manager are improper because he is not a member of the city council. The Hatches responded by filing a supplemental petition adding an allegation that the

city's immunity was waived under TOMA, and pleaded additional causes of action for declaratory judgement, injunction, and mandamus. The court denied the city's plea to the jurisdiction. The city appealed.

The court of appeals first considered whether TOMA's waiver of immunity under Section 551.142 (permits suits "to stop, prevent, or reverse a violation or threatened violation . . . by members of a governmental body") and Section 551.141 ("[a]n action taken by a governmental body in violation of this chapter is voidable.") applies to cities. The court concluded that a city is a "governmental body" under which an action can be brought under Section 551.142 of the TOMA.

The court then considered whether TOMA or the Uniform Declaratory Judgement Act (UDJA) waive immunity for declaratory relief. Reading Sections 551.141 and 551.142 together, the court concluded that, in addition to requests for mandamus and injunctive relief, TOMA waives immunity for a request to declare void an action taken in violation of TOMA. The court determined that the trial court did not have jurisdiction over the Hatches' remaining requests for declaratory relief. The court also found that the subsequent ratification of the Ordinance did not deprive the trial court of jurisdiction over the Hatches' complaints about the city's actions. Accordingly, the court reversed the portion of the trial court's order denying the plea as to the Hatches' claims for declaratory relief other than their request to declare the ordinance void, and affirmed the remainder of trial court's order.

Firearms Regulation: *Thomas v. State*, No. 10-17-00138-CR, 2019 WL 4072073 (Tex. App.—Waco Aug. 28, 2019) (mem. op.). In this case, the Waco Court of Appeals overrules challenges to the application and constitutionality of Texas Penal Code Section 46.03's prohibition against possessing a firearm on the premises of a court.

Thomas entered the screening area of the Guinn Justice Center carrying a firearm inside her purse. She was subsequently convicted of carrying a weapon in a prohibited place and sentenced to five years' probation. Thomas challenged her conviction in five issues, three of which involve the application and constitutional validity of Texas Penal Code Section 46.03 which provides, in relevant part: "A person commits an offense if the person intentionally, knowingly, or recklessly possesses or goes with a firearm ... on the premises of any government court or offices utilized by the court, unless pursuant to written regulations or written authorization of the court...." Section 46.035(f)(3) defines "premises" as "a building or a portion of a building. The term does not include any public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area."

Thomas asserts that Section 46.03 is unconstitutionally vague because the definition of "premises" is insufficient to provide notice of what the statute prohibits. The court explains that the term "premises" does not include the exterior of a court facility, but does include areas inside a "building or a portion of a building." The common areas inside a building that are adjacent to courtrooms and offices used by the court are clearly part of the definition of "premises." Here, the security screening area is directly in front of and to the right of the 413th district court. Individuals who pass through the screening area are thus in a portion of the premises of a

building housing a government court. In addition, there is a warning sign posted at the bottom of the stairs leading into the Guinn Justice Center. The Waco Court of Appeals overrules this issue.

Thomas also asserts that a judicial decree by the sitting judges of Johnson County that applied 46.03 to the entire Guinn Justice Center violated the separation of powers clause of the Texas Constitution (by usurping the power of the legislature in defining the word "premises"), and is unconstitutional as applied to her. The Waco Court of Appeals overrules this issue, holding that the decree merely applies the language of Section 46.03(a)(3) and 46.035(f)(3) to the Guinn Justice Center, and does not expand the definition of premises.

Thomas also argues that 46.03 does not apply to the entryway to the Guinn Justice Center and that the attempt by the sitting judges to change the definition of "premises" is void and invalid. The court overrules this issue holding that "the plain language of § 46.003(a)(2), in conjunction with § 46.035(f)(3), covers the entryway to the Guinn Justice Center where Thomas was found with a firearm."

Overruling all of Thomas's issues, the judgment of the trial court is affirmed.

Breach of Contract: *Wasson Interests, Ltd. v. City of Jacksonville*, No. 12-13-00262, 2019 WL 4125973 (Tex. App.—Tyler August 30, 2019) (mem. op.). After the Texas Supreme Court held in 2016 that the proprietary-governmental dichotomy applied to breach of contract cases, it remanded this case back to the Tyler Court of Appeals to address the merits of the city's initial no-evidence motion for summary judgment.

The basic fact pattern is as follows. Wasson Interests, Ltd. (Wasson) was the successor in interest of a 99-year lease of city property specified for residential use for two separate lots – lot 43 and lot 46. Wasson began leasing the property for one week at a time. The city sent an eviction notice holding the short-term rentals constituted a commercial use of the property in violation of the lease. The city agreed to excuse past violations and cancel the eviction in exchange for Wasson entering into a reinstatement agreement under which the city imposed more specific conditions concerning the property's acceptable uses and occupancy limitations. Later, the city discovered an advertisement to rent the home on lot 43. The city sent notice to Wasson that the advertisement and rental terms violated the reinstatement agreement and that the city would terminate the leases if Wasson failed to cease all commercial activity within ten days. The city ultimately sent an eviction notice and Wasson sued the city for breach of contract. The city filed a traditional and no-evidence summary judgment which the trial court granted and Wasson appealed.

After remand from the Texas Supreme Court, the court of appeals considered Wasson's argument that the trial court erred when it granted summary judgment in favor of the city due to a fact issue on Wasson's breach of contract and wrongful eviction claims. The city alleged that Wasson breached the reinstatement agreement in three ways: (1) Wasson advertised the properties online for use as a vacation rental; (2) Wasson's rental scheme obligated a renter to stay a minimum of only one week (instead of 30 days); and (3) Wasson allowed its employees to stay at the properties in consideration for their labor. The court addresses whether Wasson

carried its burden to create a fact issue by producing more than a scintilla of evidence that it did not materially breach the reinstatement agreement.

The reinstatement agreement expressly prohibited the advertisement. Nevertheless, Wasson advertised the house on lot 43 on VRBO.com. The court held that the advertisement constituted not only a breach of the agreement, but also authorized the city to terminate the leases and evict Wasson on lot 43. (Note: although Wasson didn't carry its burden to show a fact issue regarding the advertisement for the lot 43 property, no advertisement for lot 46 was in the record, so Wasson presented more than a scintilla of evidence that complied with the reinstatement agreement's advertisement provision as to the lot 46 property.)

The court also sided with the city's contention that the rental scheme's obligation that a renter stay a minimum of only one week violated the reinstatement agreement. In doing so, the court again referenced the online advertisement for the property on lot 43. The agreement required any rentals to have a term that exceeded 30 consecutive days. Wasson did not offer sufficient evidence showing that it did not breach the 30 consecutive day requirement in the agreement in relation to the property on lot 43. Again, without any advertisement pertaining to the property on lot 46 in the record, Wasson raised a fact issue as to whether the city's termination of the lease for lot 46 and eviction was improper.

The reinstatement agreement also prohibited Wasson from renting the property as a vacation home "whether rent is paid in money, goods, labor, or otherwise." The city claimed that Wasson violated the agreement for both lots when it allowed employees to stay at both properties in consideration for their labor. But the court found no evidence in the record that Wasson allowed employees to stay at the property in consideration for their labor. The only evidence in the record showed that Wasson allowed employees to stay at the property gratuitously at times. The city therefore was without cause to terminate either lease and evict on this ground.

For the reasons stated above, the court held the city was authorized to terminate the lease and evict Wasson on lot 43, but Wasson raised a fact issue concerning the city's termination of the lease and eviction on lot 46. The court affirmed the trial court's order in relation to lot 43, but reversed the trial court's order and remanded as to lot 46.

Finally, Wasson argued that it should retain the equity for the improvements made to the city's land even if it violated the reinstatement agreement. Although Wasson was lawfully evicted from the property on lot 43, the court held that it would be inequitable for the city to retain the full value of the improvements made by Wasson to lot 43. According to the court this case represents an "unusual scenario" in which the city provided only the land and the leases authorized the tenant to construct permanent homes and other improvements. The city would be unjustly enriched to retain the full value of the extensive improvements without providing any compensation to Wasson. The court remanded the issue to the trial court to determine the amount of equitable reimbursement due to Wasson for the improvements to lot 43.

Texas Tort Claims Act: *Kirstein v. City of South Padre Island*, No. 13-18-00574-CV, 2019 WL 4200298 (Tex. App.—Corpus Christi Sept. 5, 2019) (mem. op.). Sean Kirstein was arrested for public intoxication in June 2018. While detained in jail, Kirstein was attacked by his

cellmate and suffered multiple injuries. Kirstein sued the city, arguing that the city's arresting officer and jailer should have known that due to the many prior times they had arrested Kirstein for alcohol-related offenses that he was a violent drunk. According to Kirstein, the city was negligent for a number of reasons, including the lack of adequate facilities for separating and monitoring inmates, for failing to follow written policies and procedures governing the jail; for the jailers not receiving adequate training, and for allowing the jailers to watch television at the booking desk thereby taking their attention away from the assault. The city filed a plea to the jurisdiction, which was granted by the trial court. Kirstein appealed.

In his sole issue on appeal, Kirstein argued that the trial court erred in granting the city's plea to the jurisdiction because his injuries were proximately caused by negligent actions involving a condition or use of tangible or real property (the jail), and the city's immunity was therefore waived under the Texas Tort Claims Act. However, the court held that Kirstein's claims do not allege more than mere incidental involvement of the jail and the cell he was placed in, and he did not show that the condition or use of the jail were substantial factors in bringing about his injuries. Thus, the court rejected Kirstein's arguments that the city waived immunity because it lacked adequate facilities or failed to transfer one of the inmates. Further, because written information in the form of instructions and manuals is not tangible personal property, the court held that the city's alleged failure to provide adequate "jail detention training" did not give rise to a claim under the Texas Tort Claims Act.

Kirstein also claimed that allowing the jailers to watch television at the booking desk in violation of the city's rules and regulations represented the negligent implementation of a formulated discretionary policy for which the Texas Tort Claims Act waives immunity. However, the court held that the use of the television by the jailers was not the cause-in-fact or proximate cause of Kirstein's injuries, so the city's immunity was not waived. The court overruled Kirstein's issue and affirmed the trial court's judgment.

Texas Tort Claims Act: *City of Houston v. Cruz*, No. 14-18-00080-CV, 2019 WL 4021881 (Tex. App.—Houston [14th Dist.] August 27, 2019) (mem. op.). Francisco Cruz sued Jailene Reyes in November 2017 after Reyes ran a red light at an intersection and collided with Cruz's vehicle. In April 2017, Reyes moved to add the City of Houston as a third-party defendant, arguing that the city was negligent under theories related to the red light. The city filed a plea to the jurisdiction arguing that Cruz did not give the requisite 90-day notice under the city's charter, or the six-month notice under the Texas Tort Claims Act. Cruz's attorney did send the city a letter related to the incident in March 2017, but referenced an accident on behalf of their client "Francisco Lopez" instead of a "Francisco Cruz." The city secretary submitted two affidavits indicating that it did receive notice of a claim for damages on a Francisco Lopez but not Francisco Cruz. Cruz did not dispute that the attorney failed to timely provide the requisite notice, but attached documents indicating the city was aware of the malfunctioning traffic signal on the day the accident occurred. The trial court ultimately denied the city's plea and the city appealed.

The only question on appeal was whether the evidence raised a fact issue as to the city's actual, subjective notice of (1) a death, injury, or property damage; (2) the city's fault that produced or contributed to the death, injury, or property damage; and (3) the identity of the parties involved.

The court recognized the city secretary's affidavits as evidence supporting the city's assertion that it lacked the subjective notice required under the Texas Tort Claims Act. Cruz did not object to those affidavits or offer controverting evidence, but instead submitted records showing the city knew there was a problem with the traffic lights at the intersection. The court held that because Cruz did not file either an affidavit explaining the need for further discovery or a verified motion for continuance, there was no evidence in the record that the city received timely notice of Cruz's claim or had actual notice of it. Lack of notice is an incurable jurisdictional defect. The court rendered judgment dismissing Cruz's claims against the city for lack of subject matter jurisdiction.

August 2019

Note: Included cases are from July 10 through August 10, 2019.

Injunctive Relief: *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, No. 03-18-00617-CV, 2019 WL 3756485 (Tex. App.—Austin Aug. 9, 2019) (mem. op.). This case arises from a second appeal filed by Reagan National Advertising of Austin Inc. (Reagan) regarding a billboard assessment charged by the City of Austin.

In 2010, Reagan, the owner and operator of billboards in the Austin area, sued the city in federal court challenging the constitutionality of billboard assessments charged by the city and paid by Reagan (in protest) from 2009-2014. After the federal court dismissed the suit for lack of jurisdiction, Reagan brought suit against the city in trial court. The trial court ordered that Reagan take nothing on its claims. Reagan filed its appeal, challenging the constitutionality of the assessment and seeking a refund of $198,450 and attorney's fees. Reagan did not seek injunctive relief. In October 2017, the court of appeals held that the billboard assessment was a tax that violated the Texas Constitution, ordered that Reagan recover $198,450 from the city, and remanded the cause to the trial court to determine the appropriate amount of attorney's fees. The Texas Supreme Court denied the city's petition for review, and the United States Supreme Court denied the city's writ of certiorari.

On remand, Reagan asserted that the city had sent it a notice on November 2017, attempting to collect a billboard assessment for the year 2018 at the same rate that the court of appeals had recently held to be unconstitutional. Reagan asked the trial court to prohibit the city from collecting the 2018 assessment. The court denied Reagan's request. Reagan then filed another motion in trial court requesting that the court render judgement awarding Reagan a refund of the total amounts it paid to the city for the years 2010-2018, enjoin the city from continuing to charge the unconstitutional tax, and award Reagan attorney's fees. While that motion was pending, Reagan filed a motion for enforcement of mandate, or in the alternative, for clarification with the court of appeals. The court of appeals denied the motion. The trial court then signed a final judgment, after remand, awarding Reagan $198,450 in damages, $303,907 in attorney's fees, and interest, and conditional appellate attorney's fees. The court denied Reagan's request for a refund for the additional years and Reagan's request for an injunction to enjoin the

city from continuing to charge the billboard assessment, concluding that such additional relief was outside the scope of the court's authority. Reagan appealed.

The court of appeals concluded that it was beyond the scope of the trial court's authority on remand to award an additional refund to Reagan. Additionally, because Reagan did not seek injunctive relief, the trial court had no authority on remand to reopen the record to consider an injunction. Accordingly, the court affirmed the trial court's judgement.

Preemption: *City of Houston v. Texas Propane Gas Ass'n*, No. 03-18-00596-CV, 2019 WL 3227530 (Tex. App.—Austin July 18, 2019) (mem. op.). This is an interlocutory appeal of the trial court's order denying the City of Houston's motion for summary judgement over claims for declaratory relief made by Texas Propane Gas Association (TPGA).

In 2015, the City adopted several ordinances and regulations that had the effect of placing new restrictions on the ability to store, use, handle, or dispense LP-Gas within the city. TPGA sued the city asserting that the ordinances imposed more restrictive conditions on the LP-Gas industry than those imposed by the Railroad Commission's LP-Gas Safety Rules, adopted pursuant to Chapter 113 of the Texas Natural Resources Code. TPGA sought a declaratory judgement that the ordinances and regulations were invalid because they were preempted by state law and the LP-Gas Safety Rules. In the alternative, TPGA sought declarations that certain portions of the city's regulations relating to fees and permits, aggregate water capacity of LP-Gas containers, required submission of applications and construction documents, and maximum storage capacity were preempted. TPGA filed a traditional motion for summary judgement on its claims, and the city responded with a motion for summary judgement for lack of jurisdiction and a traditional motion for partial summary judgement. The trial court denied the competing motions, and the city filed an interlocutory appeal on its jurisdictional challenge.

The court of appeals first looked at whether TPGA had standing to sue. The court concluded that it did not. The court determined that, although TPGA had met the first prong of the associational standing test by showing that at least one of its members had already been assessed fees for a permit that was required by the ordinances but not the LP-Gas Safety Rules, TPGA had failed to explain how any TPGA member, as opposed to a TPGA member's customer, had suffered an injury fairly traceable to enforcement of alleged invalid regulations on LP-Gas. Because TPGA's challenge to the city's ordinances was not limited to permitting requirements but to all LP-Gas regulations promulgated by the city, the court concluded that TPGA had failed to meet the second prong of the test, which requires a demonstration that at least one of its members has suffered a particularized injury, distinct from the general public, that is fairly traceable to each of the city's regulations relating to the LP-Gas industry that the declaration will redress. The court then addressed whether a civil trial court had the jurisdiction to determine the validity of ordinances and regulations that were penal in nature. The court concluded that TPGA's suit to declare certain regulations invalid may be brought in civil court because there is a threat of irreparable injury to vested property rights.

Accordingly, the court concluded that the trial court erred in denying the city's motion for summary judgement, and remanded the case so that TPGA may have a reasonable opportunity to

amend its pleadings, if possible, to demonstrate that it has standing to bring suit for declaratory relief.

Subpoena: *In re Moore*, No. 03-19-00233-CV, 2019 WL 3023973 (Tex. App.—Austin July 11, 2019). This is a writ of mandamus filed by the City of Austin challenging the trial court's order denying the city's motion to quash a subpoena compelling production of police personnel records in a capital murder case.

After a former Austin Police Department (APD) police officer was indicted for capital murder, the police officer's counsel sought to review the personnel files of five former and current APD officers who had investigated the alleged offense. The State served a subpoena duces tecum on the city seeking production of the requested records. In response, the city filed a motion to quash the subpoena arguing that the records contained confidential material that was not subject to disclosure pursuant to Section 143.089(g) of the Local Government Code. However, the city agreed to tender all confidential records to the trial court to conduct an in camera inspection for *Brady* material that may be contained in the confidential records. The court denied the motion to quash, including the city's request for an in-camera inspection of the records. The city then filed a petition for writ of mandamus.

The court of appeals granted the writ of mandamus. The court found that the trial court has a ministerial duty to conduct an in camera inspection of the personnel files before determining what, if any, portion of them should be disclosed. The court also concluded that because the city lacked an adequate remedy from the trial court's failure to conduct an in camera inspection, the writ of mandamus was proper. Accordingly, the court ordered the trial court to vacate the order denying the motion to quash; to conduct an in camera inspection; and to enter an order quashing the subpoena to the extent that the subpoena compels production of any materials that the trial court determines are not required to be produced under *Brady*.

Immunity: *Loy v. City of Alice*, No. 04-18-00969-CV, 2019 WL 3642656 (Tex. App. – San Antonio Aug. 7, 2019) (mem. op.). This case stems from an appeal of a trial court order granting the City of Alice's plea to the jurisdiction in a personal injury case.

Loy alleged that while she was jogging at a city park, her foot was caught on a severed metal post that was sticking up approximately two inches from the ground and that she fell to the ground and shattered her left elbow. Loy sued the city asserting that because the metal post was camouflaged by leaves, dirt, and grass, the city had created a dangerous condition and was grossly negligent by failing to remove the metal post despite actual knowledge of the dangerous condition. The city filed a plea to the jurisdiction asserting that it did not have actual knowledge or awareness of the severed post, and produced affidavits, testimony, and photo evidence to support its claims. The trial court granted the city's plea. Loy appealed.

The court of appeals applied a burden-shifting analysis to determine whether, pursuant to the recreational use statute, the city conclusively established it lacked subjective awareness, or actual knowledge, of the dangerous condition. The court found that Loy's allegation that the city created the dangerous condition permits an inference that the city had actual knowledge of the dangerous condition. The court then found that once the burden shifted to the city to produce

evidence conclusively establishing it did not create the condition, the city failed to conclusively negate Loy's allegation because none of the affidavits produced by the city positively and directly asserted that the city did not create the dangerous condition. The court also considered the alternative – if the evidence the city produced affirmatively negated that it did not create the dangerous condition would the city meet its burden. If that was the case, the burden would have shifted back to Loy to produce evidence raising a fact issue. The court found that Loy had met this burden by producing deposition testimony from city staff who testified that the responsibility falls on park employees to alter or modify the metal posts located in the parks, and it was reasonable to conclude that removal of the posts was done by the city. As such, the court concluded that the city failed to satisfy its burden to conclusively negate its actual knowledge of the alleged dangerous condition and, alternatively, that Loy raised a fact issue as to actual knowledge, the only issue the city raised in its plea.
Accordingly, the court reversed the trial court's order of dismissal and remanded the case.

Jurisdiction: ***Meuth v. City of Seguin*****, No. 04-18-00205, 2019 WL 3208830 (Tex. App.—San Antonio July 17, 2019) (mem. op.)**. The case arises from an appeal from the trial court's order granting the City of Seguin's second plea to the jurisdiction.

Meuth owns a residence located in a subdivision that backs up to the Guadalupe River. A steel drainage pipe runs underneath her residence and funnels storm water from a concrete inlet at the street underneath the property and into the river. In 2014, Meuth sued the city seeking monetary damages, declaratory relief, and injunctive relief because the flow of storm water from the subdivision through the drainage pipe culvert under her home caused soil erosion and instability on her property. In response to her suit, the city filed a plea claiming immunity from suit. The trial court granted the city's plea and dismissed Meuth's claims for an unconstitutional taking, declaratory judgement, intentional and negligent misrepresentations, fraud in a real estate transaction, and gross negligence. Meuth's remaining claim for injunctive relief was severed into a separate cause of action. The court of appeals affirmed the trial court's grant of the city's plea to the jurisdiction finding that Meuth failed to plead a valid takings claim; her declaratory judgement claim was an impermissible attempt to obtain monetary damages because she sought to hold the city liable for costs associated with removing the drainage culvert and restoring the property; and that the city's refusal to repair and replace the drainage culvert was a governmental function for which immunity is not waived (*Meuth I*). However, her claim for injunctive relief was not subject to the court's decision in *Meuth I*. After *Meuth I* became final, the city filed a second plea to the jurisdiction in the severed action asserting that *Meuth I* controls the disposal of Meuth's cause of action under the doctrine of "law of the case," which provides that questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages. Meuth amended her petition to include new factual allegations, a claim of nuisance, and broadened the injunctive relief requested. The trial court granted the city's plea. Meuth filed a motion to reconsider and a new trial, which was denied by the trial court. Meuth appealed.

The court of appeals considered whether the doctrine of the "law of the case" applies to the city's second plea to the jurisdiction. Because the "law of the case" only applies to questions of law, and not fact, when a party amends its pleadings in the second trial, the issues or facts may sufficiently change so that the law of the case no longer applies. The court determined that the legal analysis of the takings claim in *Meuth I* was based on the factual allegations in Meuth's

petition, as it existed at the time – allegations of inaction by the city. However, because Meuth amended her petition, before the trial court's ruling on the city's second plea, to add new factual allegations of affirmative, intentional acts by the city in support of her broadened request for injunctive relief and claim of nuisance, the "law of the case" doctrine did not apply. Additionally, the court concluded that the city waived any objections to Meuth's amended petition as the city did not raise an objection to the amendment in trial court. Accordingly, the court reversed the trial court's judgement and remanded the case.

Immunity: *City of Dallas v. Rodriguez*, No. 05-19-00045-CV, 2019 WL 3729504 (Tex. App.—Dallas Aug. 7, 2019). This case arises from an appeal of a trial court's order denying the City of Dallas' plea to the jurisdiction in a case involving an accident with a marked police vehicle.

Rodriguez alleged that she was injured after a Dallas police officer disregarded a red light and caused her vehicle to strike the officer's marked vehicle. Rodriguez sued the City of Dallas alleging negligence, gross negligence, respondeat superior, and negligence per se. The city filed a plea to the jurisdiction arguing that the police officer was entitled to official immunity and the city was shielded from liability by governmental immunity because the officer was performing a discretionary function within the scope of her employment and acting in good faith. The city's plea was supported by the officer's affidavit describing the circumstances of the accident and her actions and perceptions of the urgency of the situation and risks involved. Rodriguez objected to the police officer's affidavit arguing that it was hearsay and that five paragraphs of the affidavit should be excluded. The trial court denied the city's plea and sustained Rodriguez' objections to the affidavit except for one statement. The city appealed.

The court of appeals first looked at the sufficiency of the affidavit. The court concluded that Rodriguez did not state the specific grounds on which each identified section of the affidavit was objectionable, and as such the objections were not sufficiently specific. The court next addressed whether the officer in the performance of discretionary duties acted in good faith so as to sustain the defense of official immunity. The court determined that the following evidence conclusively established that the officer was acting in good faith: (1) the officer was responding to a potentially life threatening emergency involving several unknown people beating on a woman's door and threatening her with a gun; (2) the officer stopped at the intersection and believed, in good faith, that the need to get to the scene of the emergency call outweighed the perceived minimal risk of an accident; (3) the road was dry, traffic appeared to be yielding to the officer, and her emergency lights, siren, and air horn were activated; and (4) she did not perceive that proceeding through the intersection would cause any danger to any other driver near her location. Accordingly, the court concluded that the trial court erred in denying the city's plea to the jurisdiction.

Exactions: *City of Dallas v. 6101 Mockingbird, LLC*, No. 05-18-00328-CV, 2019 WL 3296976 (Tex. App.—Dallas July 23, 2019) (mem. op.). This case arises from an appeal of the trial court's order denying the City of Dallas' partial plea to the jurisdiction in a land use claim.

Mockingbird, LLC (Mockingbird) purchased two adjoining properties located at the northeast corner of Skillman Avenue and Mockingbird Lane (Property), in which a gas station was located.

The Property was zoned commercial retail, which required a minimum front-yard setback of 15 feet, measured from the edge of a dedicated roadway or highway. Mockingbird planned on developing the Property for medical services, and filed a plat application with the city to create two lots to allow for commercial use other than a gas station. The city approved the plat conditionally, providing that final approval required compliance with certain conditions, including a dedication to the city, in fee simple, of a 10-foot strip of land along Mockingbird Lane in furtherance of the city's thoroughfare plan. Mockingbird notified the city that it believed the required dedication was an illegal taking and requested that the city perform a rough proportionality analysis pursuant to Section 212.904 of the Local Government Code. The city declined to offer compensation for the required dedication after a city engineer determined that the required dedication was roughly proportional to the impact of the proposed development project. Mockingbird made the dedication in protest, but appealed the rough proportionality determination to the city's planning commission claiming the strip of land was valued at $327,603. The planning commission concluded that Mockingbird had failed to meet its burden of proof to overturn the city engineer's finding. Mockingbird then appealed to the city council, which affirmed the planning commission's decision. As a result, Mockingbird filed suit in county court alleging violations of Section 212.904 and substantive and procedural due-process rights. Mockingbird also alleged that although the city's setback requirement was not in and of itself an exaction, as applied, in combination with the required dedication, resulted in an exaction. The city filed a partial plea to the jurisdiction challenging the trial court's subject-matter jurisdiction. The trial court granted the plea as to Mockingbird's declaratory judgement claim and denied the city's plea as to Mockingbird's remaining claims. The city appealed.

The court of appeals determined that because Mockingbird did not assert a free-standing takings claim as to the setback requirement, the setback requirement may factor into the just compensation prong of its takings claim concerning the dedication.
The court then considered the city's claim that Mockingbird could not immediately complain about the setback impact because it did not present its complaints about the setback through the Section 212.904 process prior to bringing suit. The court concluded that it did not need to determine whether a complaint about a zoning requirement is a dedication because the setback requirement potentially relates to the just compensation prong of Mockingbird's dedication takings claim. The court also held that the fact that the city did not condition approval of Mockingbird's plat on the setback placement does not preclude a claim for the exaction of the 10-foot right-of-way and possibly the consideration of the application of the setback requirement in determining the extent of Mockingbird's damages. Accordingly, the court upheld the trial court's judgement with a modification to delete the trial court's references to setback regulations because Mockingbird clarified that its reference to the setback requirement related to damages it claimed as a result of the required dedication.

Immunity: *CJK Trucking, L.P. v. City of Honey Grove*, No. 05-18-00205, 2019 WL 3296978 (Tex. App.—Dallas July 23, 2019). This case stems from an appeal of the trial court's order granting the City of Honey Grove's plea to the jurisdiction in a case involving an automobile accident.

Williamson, an off-duty police officer for the city, was traveling north on a highway when he observed a City of Trenton police car with its lights activated parked behind a private vehicle and

an unmarked SUV blocking the police car in. Williamson thought the scene was not secure and atypical because he could not see the officer, and the patrol vehicle was blocked in at a liquor store attached to a gun shop after hours, raising concerns that the officer might be ambushed, in distress, in need of assistance or be in physical danger. Williamson engaged his emergency lights and attempted to make a U-turn to go south. Ketan and Manali Amine, who were travelling southbound on the highway, were able to stop and avoid colliding with Williamson; however, they were rear-ended by a tractor trailer that could not stop on time. The tractor trailer was owned or leased by CKJ Trucking and driven by Bond. The Amines filed suit against Bond and CKJ Trucking alleging various claims for negligence. Bond and CKJ Trucking then filed a third party petition against Williamson and the city alleging that the city's governmental immunity was waived because the accident and the Amines' injuries were proximately caused by the wrongful act or omission or negligence of an employee acting within the scope of his employment and the accident arose from the operation or use of a motor-driven vehicle or motor-driven equipment. The city filed a motion to dismiss and a motion to sever asserting that the case did not fall within the limited waiver of immunity under Section 101.021 of the Tort Claims Act and that the trial court lacked jurisdiction because Williamson was not acting within the scope of his employment at the time of the accident. The trial court granted the city's motion to dismiss with prejudice. Bond and CKJ Trucking appealed.

The court of appeals looked at whether Williamson was acting within the scope of his employment at the time of the accident. Police officers have a duty to prevent crime and arrest offenders 24 hours a day, and that public duty is triggered any time an officer observes a crime outside the hours of his official work. As a result, the court concluded that Williamson acted within the scope of his employment with the city as his authority to act as a peace officer was triggered by reasonable suspicion. Accordingly, the city's immunity was waived. The court reversed the trial court's order and remanded the case for further proceedings.

Immunity: *Socorro Indep. Sch. Dist. v. Hamilton*, No. 08-18-00091-CV, 2019 WL 3214154 (Tex. App.—El Paso July 17, 2019). In this Eighth Circuit District Court of Appeals case, the court affirmed the lower court's decision to deny the school district's plea to the jurisdiction because the settlement agreement entered into did not have the effect of creating governmental immunity.

Hamilton had been employed by the Socorro Independent School District (SISD) since 1996. In 2014, Hamilton entered into a contract to work as the head orchestra director at William D. Slider Middle School for the 2014-2015 school year. He was informed sometime later that his contract would not be renewed for the 2015-2016 school year. At this point Hamilton was over the age of forty and believed his nonrenewal was due to age discrimination. After some negotiations with the school district, he signed a "Separation Agreement and Release of Claims." Hamilton released his rights to any federal or state law claims including claims for discrimination under Federal and Texas law in exchange for the school district agreement to pay Hamilton up to the date of his resignation and provide neutral references to prospective employers. A year later Hamilton filed suit against SISD alleging they had breached the settlement agreement by providing references that were not neutral. SISD filed a plea to jurisdiction which was denied at the lower court, asserting that Hamilton's claims were barred by governmental immunity.

The court held that governmental immunity had been waived in this case on Hamilton's age discrimination claim. The court explained that if a claim asserted would have waived governmental immunity at the time that the settlement was signed then entering into the settlement agreement does not create governmental immunity. Further, the settlement agreement acknowledged SISD's exposure to discrimination claims. Hamilton signing the agreement precluded him from asserting his age discrimination claims during the required time frame, but did not have the effect of creating governmental immunity.

Immunity: *Houghton v. City of Cisco*, No. 11-18-00029-CV, 2019 WL 3023539 (Tex. App.—Eastland July 11, 2019) (mem. op.). In this interlocutory appeal, the Eleventh District Court of Appeals held that the City of Cisco waived its government immunity on an inverse-condemnation claim, but not under the Texas Tort Claims Act (TTCA).

Lloyd Houghton, Vicki Johnson, and Mark A. Smith all leased property from the city located along the shore of Lake Cisco. Lake Cisco and the attached dam that controls the water level of the lake are also owned by the city. In 2016, the lessees' properties were flooded which resulted in damages to the properties. The lessees alleged that the city's decision to continue to pump water into the lake and not open the sluice gates to the dam, even though the water had risen to higher levels due to rain, caused the flooding. The lessees sued the city under theories of inverse condemnation and negligence under the TTCA. The city filed a plea to jurisdiction on all claims which was granted at the lower court. The lessees appealed that decision.

In reviewing a plea to jurisdiction, a court must look at the plaintiff's jurisdictional evidence contained in their pleadings, construe them in a light most favorable to the plaintiff, and determine if jurisdiction is affirmatively demonstrated. The Eastland Court of Appeals held the lower court did have jurisdiction over the inverse condemnation claims and immunity had been waived because, taking the lessees' allegations as true, their pleadings sufficiently alleged each element of an inverse condemnation claim. However, the court held that immunity was not waived on the TTCA claim because the city's actions fell within the discretionary acts exception to the waiver of government immunity for property damage. Specifically, the court had held in past cases that a governmental entity's decision to release or not release water was a discretionary action.

Immunity: *City of Waco v. Citizens to Save Lake Waco*, No. 10-17-00202-CV, 2019 WL 3047205 (Tex. App.—Waco July 10, 2019) (mem. op.). Citizens to Save Lake Waco filed suit against the City of Waco for breaching a settlement agreement in which the city agreed, among other things, not to expand the boundaries of a landfill. The city filed a plea to the jurisdiction on the basis that it is immune from suit under the doctrine of governmental immunity. The trial court denied the city's plea, and the city appealed.

The appellate court held that the underlying claims of Citizens to Save Lake Waco are not ripe. The only action the city has taken is to purchase two tracts of land adjacent to the landfill. Nothing in the record shows the city has expanded or intends to expand the landfill. Accordingly, the case is remanded to the trial court with instructions to vacate its Order Denying Defendant's Plea to the Jurisdiction and dismiss the suit for want of jurisdiction.

Immunity: *City Of Tyler v. Owens*, No. 12-16-00128-CV, 2019 WL 3024756 (Tex. App.—Tyler July 10, 2019) (mem. op.). In this interlocutory appeal, the Twelfth District Court of Appeals affirmed the lower court's denial of a plea for jurisdiction because the City of Tyler waived its governmental immunity through proprietary contracting.

The city owns the property around Lake Tyler which it leases out to people for the purpose of building lake houses. The Chatelains lease property on the lake that is pie-shaped and is located between property owned by the Owens and the Terrys. The Chatelains wanted to build a boathouse and dock. Because of the shape of their property they had a limited waterfront which resulted in their neighbor's claiming that the boathouse and dock would encroach on their lot lines extending into the water. The city granted the Chatelains construction permit to build. The Owens and Terrys filed suit against the city and the Chatelains asserting several claims for actual and exemplary damages, injunctive, and declaratory relief. The city filed a plea to jurisdiction, asserting that they had governmental immunity from suit which was denied by the lower court. The city filed this interlocutory appeal.

A governmental entity waives immunity in a breach of contract claim when the entity is engaged in a proprietary function during the period the contract is entered into and not when the breach occurs. The court considered four factors when determining whether the city engaged in a proprietary or governmental function, whether: "(1) the City's act of entering into the leases was mandatory or discretionary, (2) the leases were intended to benefit the general public or the City's residents, (3) the City was acting on the State's behalf or its own behalf when it entered the leases, and (4) the City's act of entering into the leases was sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary." The city argued that this test should not apply to their actions, but the court held that the lessees' claims are based on the breach of the lease between the city and the tenants so it is the correct test.

The court held that the contract between the city and the tenants was made in the city's proprietary function after weighing all four of the factors. The decision to lease the property was discretionary. The city entered into the lease to benefit its own residents rather than the general public. The city acted on its own behalf when making the decision to lease the property. Finally, leasing the land was not essential to the operation or maintenance of the lake. Based on all these factors, the city acted in a proprietary manner when it contracted with the lessees which waived its immunity.

Texas Tort Claims Act: *City of McAllen v. Quintanilla*, No. 13-18-00062-CV, 2019 WL 3023325 (Tex. App.—Corpus Christi July 11, 2019) (mem. op.). In this Thirteenth District Court of Appeals case, the court reversed and rendered judgment in favor of the City of McAllen, dismissing the case for lack of jurisdiction.

Quintanilla slipped and fell at a bus station owned by the city. He did not have a bus ticket but was there to send off his aunt who did have a ticket. Quintanilla brought a premises liability

claim under the Texas Tort Claims Act (TTCA). The city filed a plea to jurisdiction, which was denied at the lower court. The city appealed that decision and asserted that the lower court did not have subject matter jurisdiction.

The TTCA provides a limited waiver of immunity for the conditions or use of real property. The defendant must prove that the governmental entity breached the duty owed for immunity to be waived. Governmental entities owe a lesser duty to licensees than they do to invitees. Quintanilla argued that the city owed him the duty owned to an invitee because he was there with his aunt who had purchased a ticket. To be an invitee, a person must have paid to be on the premises. The court concluded that the purchase of a ticket by Quintanilla's aunt did not mean he paid to be on the premises and thus was only owed the duty owed to a licensee.

The duty owed to a licensee required the owner to not "injure a licensee by willful, wanton, or grossly negligent conduct, and that the owner use ordinary care either to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not". The court held that there was no evidence that the city was grossly negligent in its behavior, nor did any of the employees have actual knowledge of the hazardous condition. Therefore, the city did not breach its duty and immunity was not waived under the TTCA.

Police Officers: *Williams v. City of Austin*, No. 14-18-00262-CV, 2019 WL 3227513 (Tex. App.—Houston [14th Dist.] July 18, 2019) (mem. op.). In this Fourteenth District Court of Appeals case, the court affirmed the district court's decision to grant the city's plea to jurisdiction.

Williams became a police officer with the city in 2008 and in the following years was involved in several incidents that he received suspensions for. The first incident was in 2011 when he was in an altercation while off-duty for which he was suspended and placed on probation. Williams later asked for and received an expunction order for certain information relating to the incident. The second incident occurred in 2013 in which Williams was suspended indefinitely for off-duty dishonesty and negligence of duty. Williams appealed the indefinite suspension to an independent hearing examiner. While the appeal was pending, Williams' name rose to the top of the promotion eligibility list. Officers at the top of the list must be promoted unless there is a valid reason not to promote them. The police chief passed over Williams for promotion three times because of the indefinite suspension that was pending. Williams appealed this decision to an independent examiner as well. In the appeal for the second incident, the examiner upheld the dishonesty charge, shortened the suspension, and Williams was allowed to return to duty. In Williams' promotion appeal, the independent examiner determined that the police chief had a valid reason to pass over Williams, but that the chief had improperly included documents related to the first incident in the materials he presented. Williams appealed that decision and asserted three points on error.

In municipal civil service promotional bypass cases, a police officer may appeal to the Fire Fighters' and Police Officers' Civil Service Commission or to an independent hearing examiner. If a police officer chooses an independent hearing examiner they lose their right to appeal to the

courts unless they can prove that the examiner either was without jurisdiction or exceeded their jurisdiction. Williams asserted that the lower court had jurisdiction because the examiner was sent documents prior to the hearing, the examiner exceeded his jurisdiction because the meet and confer document preempted several statutes and policies, and the examiner exceeded his jurisdiction by considering expunged documents.

The court held that the electronic submission of documents to the examiner before the hearing did not make the resulting order invalid. Examiners are required to make their decisions based only on evidence at the hearing. There was no evidence that the examiner had viewed the documents before the hearing and even if he had the documents presented at the hearing were the same ones that were submitted. Therefore, his decision was based on documents that were submitted at the hearing.

Next, the court held that all of Williams' arguments regarding preemption were without merit because there was no conflict between the meet and confer document and statutes or policies. Finally, the court held that the examiner did not exceed his jurisdiction because the examiner did not rely on the expunged information when making his decision. The examiner expressly stated in his opinion that he did not consider that information and that it had been improperly included in the materials.

Texas Tort Claims Act: *Nguyen v. SXSW Holdings, Inc.*, No. 14-17-00575-CV, 2019 WL 3231057 (Tex. App.—Houston [14th Dist.] July 18, 2019). After a driver maneuvered around a barricade and accelerated into a group of South by Southwest ("SXSW") festivalgoers ("plaintiffs"), killing four people and injuring several others, some of the injured parties and their survivors filed a civil action against the City of Austin and organizers of SXSW (the driver was charged with capital murder and convicted). The plaintiffs' sued to recover on claims of negligence, premises liability, and public nuisance, arguing that the safety measures were inadequate to protect pedestrians and that it was foreseeable that a vehicle would penetrate the barricades and collide with festivalgoers. The defendants filed several different summary judgment motions. The trial court merged all defendants' summary judgment motions into a final take-noting judgment. The plaintiffs appealed.

The trial court's final judgment did not identify which one of the city's summary judgment motions it granted, so on appeal the court considered the city's jurisdictional argument that the city did not waive its governmental immunity. The court held that the trial court should have granted the city's jurisdictional challenge, primarily because the plaintiffs' complaints relate to the adequacy of police protection, barricades, traffic control plans, and the maintenance of traffic hazards, all of which would be considered to be a governmental function for purposes of the Texas Tort Claims Act. Plaintiffs' contended that the city was actually engaged in a proprietary function because it was operating an amusement along with the other defendants. However, because the city did not own SXSW, the court could not conclude that the city engaged in a proprietary function on that basis. Because the plaintiffs' pleadings were unable to clearly articulate a valid waiver of immunity, the city retained its immunity. The court concluded that

the trial court should have dismissed the plaintiffs' claims against the city for want of jurisdiction.

July 2019

Note: Included cases are from June 11 through July 10, 2019.

Texas Tort Claims Act: *Worsdale v. City of Killeen,* No. 18-0329, 2019 WL 2479177 (Tex. June 14, 2019). This is a case involving the notice requirements under the Texas Tort Claims Act. The Texas Supreme Court determined the city had actual notice of the accident despite the fact that the city was unsure if it owned the road at the time of the accident.

The case arose out of a car accident where a motorcycle collided with a large dirt mound on the road. Within days, the city's police department investigated the accident. The investigator spoke with other departments in the city about whether the city was responsible for the road's maintenance and warning signs. There was a dispute between the city and the county about who owned the road, which is why the city had not removed the dirt mound. After the investigation, the deputy city attorney determined the city had annexed the road and never abandoned the road. Two days after the accident, the city removed the dirt mound and installed permanent road closure signs and barricades. The plaintiffs did not provide written notice, but claimed that the city had "actual notice" under Civil Practice and Remedies Code Section 101.101(c).

In analyzing whether the city had notice, the court discussed its prior cases holding that a governmental entity must have actual notice, meaning subjective awareness of its fault. In reviewing the actual notice issue de novo, the Texas Supreme Court determined the city had actual notice of its fault in causing the accident. Within the six-month deadline, the city knew the road condition and absence of warning signs were contributing factors and the city was responsible for maintaining the road. The city knew from its deputy city attorney that it never abandoned the road and was responsible for maintaining it; thus, the city removed the hazard. In finding the city had actual notice, the court reasoned that although subsequent remedial measures are inadmissible to prove liability, they are admissible to prove ownership, control, and notice.

The court declined to find *Cathey v. Booth* was wrongly decided as urged by the plaintiffs. *Cathey* required that a governmental entity's "subjective awareness" of its "alleged fault producing or contributing to the death, injury, or property damage," meaning "fault as ultimately alleged by the claimant."

The court reversed the intermediate court of appeals' judgment in favor of the city and remanded the case to the trial court for further proceedings.

Texas Tort Claims Act: *City of Houston v. Garza*, No. 01-18-01069-CV, 2019 WL 2932851 (Tex. App.—Houston [1st Dist.] July 9, 2019) (mem. op.). This is a Texas Tort Claims Act case where the First Court of Appeals affirmed the denial of the city's summary judgment because the city failed to establish that it was not responsible for the car that got into an accident with the plaintiff in the car.

Garza was arrested by the city's police department. While she was being transported from the city's jail to the county jail, the transport car got into an accident and Garza was injured. Garza did not know if it was the city's car or the county's car, so she sued both.

The city filed its plea to the jurisdiction with affidavits from the arresting officer and the officer on duty for transport on the date of the accident and arrest. The arresting officer's affidavit stated he arrested Garza at about 5:14 a.m. and took Garza to the city's jail. The transport officer's affidavit stated his shift began at 2:00 p.m. and he did not get into an accident on the date and did not observe an inmate displaying any of the things Garza had claimed. The county filed an affidavit stating: (1) it has never been the practice of the county to transport inmates from the city's jail where Garza was housed; and (2) there were only 2 fleet vehicle accidents on the date of the accident, and neither were driven by an officer assigned to inmate transport.

The Texas Supreme Court held that the denial of summary judgment was proper because the city had a gap in the timeline from 5:14 a.m. to 2:00 p.m. where Garza could have been transported by the city. The city did "not conclusively establish that no City employee was operating the motor vehicle that Garza alleged was involved in the collision that caused her injuries."

Inverse Condemnation: *Schrock v. City of Baytown,* No. 01-17-00442-CV, 2019 WL 2621736 (Tex. App.—Houston [1st Dist.] June 27, 2019). In this inverse-condemnation case, the First Court of Appeals remanded the regulatory-takings claim back to the lower court for a new trial because there was enough evidence that a directed verdict was in error.

In 1993, Schrock purchased a house to use as a rental property. From 1993 until the beginning of 2010, the house was rented by a series of tenants and there was only ever a few weeks between tenants when the house was not occupied. During this time, the city required that tenants renting houses provide a copy of the lease agreement to the city and pay a larger deposit than home buyers before the city would provide utility services. In 2009, the city informed Schrock that he owed the city $1,999.67 for the unpaid utility bills of his prior tenants dating back to 1993. A city ordinance required that landlords submit a declaration that the property was a rental or they would be responsible for unpaid utilities. Even though Schrock had failed to file the declaration, the city had notice at all times that the property was a rental. Schrock requested a hearing and that amount was reduced to $1,157.39 in unpaid bills that had accrued over the prior four years. The city sent notice to Schrock's attorney that he would need to pay within fourteen days or the city would place a lien on the property pursuant to a city ordinance. The attorney never provided Schrock with the letter. The city's ordinance was in direct conflict with provisions of the Local Government Code that prohibited cities from charging property owners for unpaid tenant bills.

In 2010, a new tenant at the rental attempted to pay a deposit and have the utilities turned on but was told that Schrock had to pay the lien before utilities would be turned on. Schrock attempted to pay the lien but was told that in addition to the adjudicated amount, he would also have to pay for an unpaid bill that had happened after the adjudication, even though he had since submitted a declaration. Schrock ultimately did not pay the lien and brought a regulatory-taking and declaratory-judgment claim against the city. Schrock alleges that since 2010, the city has refused to provide water service to the property, which has led to damages. The house has been without a

tenant since 2010. With no tenant to maintain the home, it fell into disrepair and became uninhabitable. Schrock sought damages for the loss of the property value and lost revenue from the inability to lease the property.

After a jury trial, the lower court rendered judgment in favor of the city on both the taking and declaratory-judgment claims. Schrock brought this appeal and argued that the lower court erred in granting a directed verdict because there were material fact issues to be determined by the jury.

To determine whether a regulatory-taking occurred, courts weigh the following three factors: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation interferes with the property owner's distinct investment-backed expectations; and (3) the character of the government action. The First Court of Appeals held that, after looking at all the evidence, there was at least some of probative value for each of the factors. Therefore, the trial court erred in granting the city a directed verdict. However, the court did affirm the trial court's directed verdict on the declaratory-judgment claims because the court either did not have jurisdiction to decide them or they were rendered moot during the case.

Charter Amendment Election: *Bryant v. Parker*, No. 01-18-00400-CV, 2019 WL 2588107 (Tex. App.—Houston [1st Dist.] June 25, 2019). In this case, the First Court of Appeals held that the City of Houston's ballot proposition regarding term limits was not misleading.

Bryant and Scarborough were election contestants who challenged a ballot measure about term limits for the city's elective offices. In the months leading up to the November 2015 elections, the city sought to amend the provision in its charter governing term limits to establish four-year terms of office and two-term limits. Specifically, the language submitted to the voters was:

> (Relating to Term Limits for City Elective Offices) Shall the City Charter of the City of Houston be amended to reduce the number of terms of elective offices to no more than two terms in the same office and limit the length for all terms of elective office to four years, beginning in January 2016; and provide for transition?

The city's voters approved the measure. Bryant filed an election contest on the grounds that the ballot language was misleading. Scarborough intervened and said the ballot language was insufficient to submit the issue to the voters. The parties all filed motions for summary judgment. The trial court granted the city's motion and denied Bryant's and Scarborough's motions.

The First Court found that cities have broad—but not unlimited—discretion in the wording of ballot propositions. The court looked at the language of the ballot measure and found that the ballot language communicated the number of terms an individual could serve in the same office and the length for all terms. It also informed the voters that the amendment would provide for transition. The court concluded that the ballot language was not misleading and the city was entitled to judgment as a matter of law. The court overruled Bryant and Scarborough's remaining arguments. It confirmed the trial court's grant of the city's summary judgment.

Historic Preservation/Zoning: *Powell v. City of Houston*, No. 01-18-00237-CV, 2019 WL 2588104 (Tex. App.—Houston [1st Dist.] June 25, 2019). In this case, the First Court of Appeals affirmed the lower court's holding that the City of Houston's use of historical districts does not constitute zoning.

Houston's charter provides that zoning ordinances can only be adopted after a six-month hearing and debate period and a binding referendum at an election. In 1995, the city council adopted the Historical Preservation Ordinance (HPO) which allowed for areas to be designated as historical districts. Once a historic district is created, a landowner has to apply to the city council for a certificate of appropriateness when "demolishing, modifying, or developing property" located with the district. In 2010, Houston amended the HPO to allow for a reconsideration process to be initiated by 10% of the owners in a historic district to challenge the historical designation. A group of homeowners in one of these historic districts initiated a reconsideration process which ultimately failed to change the historical designation of their district. These homeowners later brought suit against the city seeking a declaratory judgment that the HPO is void and unenforceable because it is a zoning or de facto zoning ordinance that violates the charter's prohibition of zoning ordinances.

Zoning ordinances are adopted in accordance with a comprehensive plan and used as a "tool of community planning, allowing a municipality, in the exercise of its legislative discretion, to restrict the use of private property." Houston argued that the HPO was not a zoning ordinance because it was not adopted as part of a comprehensive plan and the restrictions are on the modification and preservation of the property and not on how property can be used. The homeowners argued that either the HPO itself or Houston's "general plan" was a comprehensive plan and that the use of the property was regulated and, therefore, the HPO should be considered a zoning ordinance. The First Court of Appeals concluded that none of the documents that the homeowners point to constitute a comprehensive plan because the HPO is meant to preserve an area and does not contain language implementing a comprehensive plan for community development and the general plan does not contain zoning ordinances. Further, the court found that the HPO is not a zoning ordinance because it regulates the style and aesthetic of historical buildings but not what uses or classes of buildings may exist in an area. While historical preservation districts can be part of a comprehensive zoning plan, there is no restriction on these districts being created through other non-zoning means.

Inverse Condemnation: *City of Arlington v. Warner*, No. 02-18-00427-CV, 2019 WL 2554237 (Tex. App.—Fort Worth June 20, 2019) (mem. op.). In this inverse-condemnation case on interlocutory appeal, the Second Court of Appeals affirmed the lower court's decision to deny the City of Arlington's no-evidence summary-judgment motion challenging subject matter jurisdiction.

Warner is the owner of a three-acre piece of property in the city. The city has a drainage easement across her property. Warner alleges that when it rains, water running through the easement causes her pond and property to flood, resulting in damage. Warner filed suit against the city seeking injunctive and monetary relief based on a theory of inverse-condemnation.

At the lower court, the city filed a no-evidence summary judgment motion asserting that Warner had failed to adequately plead her claim and that she presented no evidence of those claims. The city filed the interlocutory appeal after the lower court denied its summary-judgment motion.

The court held that a governmental entity cannot use a no-evidence summary-judgment motion on governmental immunity grounds to avoid the burden of asserting the evidence needed for a plea to jurisdiction. Thus, the trial court's denial of the motion was proper and the court affirmed the ruling.

Governmental Immunity: *City of Richardson v. Phelps*, No. 05-18-00753-CV, 2019 WL 2912238 (Tex. App.—Dallas July 8, 2019) (mem. op.). This is an interlocutory appeal in which the court of appeals reversed the trial court's order denying the City of Richardson's plea to the jurisdiction in a personal injury case.

Van Phelps sued the city after he sustained an injury while riding his bicycle in a designated bike lane. Phelps alleged that the left side of the bike lane was higher than the right side, resulting in a "lip" that was a hazardous condition, and that this condition was either a premises defect or a special defect. The city filed a plea to the jurisdiction, asserting governmental immunity barred Phelps's claims because the alleged defect was not a special defect and the city did not have actual knowledge of the condition, which is required for a premises defect. The trial court denied the plea, and the city filed an interlocutory appeal.

The court of appeals concluded that the difference in elevation in the bike lane was not a special defect as a matter of law because there was no evidence that the "lip" presented a condition like an excavation or obstruction for cyclists. Phelps testified that the other cyclists with him avoided the defect and that, if he had known about the condition, he could easily have avoided it. As such, the court determined that if the condition could be easily avoided, it was not in the nature of an excavation or obstruction on the roadway.

Additionally, the court of appeals determined that the condition of the bike lane was not a premise defect because Phelps did not raise a fact issue on the city's actual knowledge of the dangerous condition. The evidence presented showed that the city was informed about one defect, which was repaired before Phelps's accident, and the city did not have actual knowledge of the height difference even though the defect was a few yards away from where it had made other repairs. Accordingly, the city was immune from Phelps's premises liability claim.

Employment Retaliation: *Lovelace v. Dallas Indep. Sch. Dist.*, No. 05-18-00207-CV, 2019 WL 2723801 (Tex. App.—Dallas July 1, 2019) (mem. op.). This is an appeal in which the court of appeals affirms the trial court's order granting the Dallas Independent School District's (DISD) plea to the jurisdiction in an employment retaliation claim under the Texas Commission on Human Rights Act (TCHRA).

After her employment was terminated, Jacqueline Lovelace, an African-American Executive Director in the DISD, sued DISD under the TCHRA. She argued DISD had retaliated against her for expressing opposition to discrimination. Lovelace argued that it was discriminatory to invite a LULAC representative to discuss complaints about an African-American principal; a parent's

decision not to meet with Lovelace could be viewed as racist; her supervisor's meeting with the parent in Lovelace's absence placed her in a position of marginalization; and in an email she sent to her supervisor, her supervisor's actions appeared biased, unethical and to have a racist tenor directed toward her and the African-American principal. DISD filed a plea to the jurisdiction asserting governmental immunity from suit and arguing that Lovelace's claims did not fall within the waiver of immunity provided by the TCHRA. The trial court granted the plea to the jurisdiction and dismissed Lovelace's suit. Lovelace appealed.

The court of appeals applied the burden-shifting analysis required by *McDonnell Douglas* to the retaliation claim. The court found that Lovelace's email to her supervisor and her later termination satisfied the prima facie case of discrimination element of the burden-shifting framework and that DISD's evidence in its plea to the jurisdiction and supplemental filings rebutted that presumption. However, the court found that Lovelace failed to present evidence raising a question of fact that DISD's stated reasons for terminating her employment were a pretext for retaliatory intent. Therefore, she failed to establish a waiver of governmental immunity under TCHRA.

Texas Tort Claims Act: *Doe v. City of Dallas*, No. 05-18-00771-CV, 2019 WL 2559755 (Tex. App.—Dallas June 21, 2019) (mem op.). In this case, the Dallas Court of Appeals affirms the trial court's order dismissing claims against the City of Dallas.

Jane Doe, individually and as next friend of S.D. (Doe's minor child), sued the City of Dallas after S.D. was sexually assaulted while performing community service at the Umphress Recreation Center, which the city owns and operates. Doe sued the city for premises liability and personal injury proximately caused by a condition or use of tangible personal or real property. Doe alleged the layout of the recreation center was defective; the security camera system was not installed properly; that management knew about these design defects and broken surveillance system; and that these defects led to the sexual assault. The city filed a plea to the jurisdiction arguing that the city did not receive timely written or actual notice of Doe's claims as required by the Texas Tort Claims Act (TTCA). The trial granted the plea and dismissed the claims against the city. Doe appealed.

On appeal, Doe argues the city had subjective awareness that it was at fault because of the following facts: the city knew S.D. was instructed to clean the men's restroom without supervision and knew the men's restroom was hidden from view because of the facility's layout; the city knew it was not unusual for only one person to be in the weight room; the city's employees agreed S.D. did not cause the sexual assault; the city failed to follow its volunteer program policies and procedures with S.D., including failure to timely complete S.D.'s application to the volunteer program, obtain a signed acknowledgement from S.D. to confirm she received a copy of the volunteer program policies, and train S.D.; the city was aware the risk of leaving children alone with adults included potential sexual assault; the city lacked training, policies, or procedures for its staff and employees to protect minor children from sexual assaults; the city had a security surveillance system installed in the building to protect people, and the city knew the system was not working on the day of the incident; the city did not train employees at Umphress to use the camera surveillance system, instruct staff to monitor the surveillance system, and place a display monitor in an area accessible to multiple employees; and the city did

not prohibit sex offenders or other violent criminals from using its recreation centers and did not perform background checks for those individuals.

The court concludes that whether the cumulative evidence implies the city was responsible for the injury is not the proper inquiry; the standard for actual notice is "That a governmental unity has subjective awareness that its fault, as ultimately alleged by the claimant, produced or contributed to the claimed injuries." Doe testified that she did not inform the city or city staff that the city was responsible for what occurred. Doe's interaction with the city was limited to identifying the perpetrator. The court holds that the evidence does not show the city had subject awareness that its fault, if any, produced or contributed to the injury. The trial court's order is affirmed.

Texas Tort Claims Act: *Grand Prairie Indep. Sch. Dist. v. Castro*, No. 05-18-01415-CV, 2019 WL 2521724 (Tex. App.—Dallas June 19, 2019) (mem. op.). This is an appeal in which the court of appeals affirmed the trial court's denial of Grand Prairie Independent School District's (GPISD) plea to the jurisdiction and remanded the case to the trial court for further proceedings.

JIC, a school child, was on a bus operated by GPISD waiting to be transported from his middle school to another destination. At some point after the bus driver started the bus to begin the trip, but while the bus remained stationary, JIC reached beneath his seat to place his backpack out of the way. When he did, three fingers on one of his hands were lacerated by the turning blades of an unscreened fan that became operational when the bus was started by its driver. GPISD personnel knew of the exposed fan blades before the bus was started. JIC's next friend, Castro, sued the school district for negligence. The district filed its plea to the jurisdiction claiming immunity because the injuries did not arise from the "operation or use" of the school bus, a motor-driven vehicle, within the meaning of the Texas Tort Claims Act (TTCA). The district court denied the plea, and GPISD filed an interlocutory appeal.

The court of appeals determined that JIC's injuries arose from the operation or use of the school bus. The court looked to the ordinary meaning of the term "operation or use" to reject the school district's claims that because the bus was stationary, and, at most, idling, it was doing or performing a practical work and could not constitute the operation or use of a motor vehicle. The court found that the bus motor powered the fan that caused injury to JIC, and absent the motor's power, the fan would have been incapable of causing the injury. As a result, the court found that JIC properly pleaded a waiver of the school district's governmental immunity.

Open Meetings Act: *TOMA Integrity, Inc. v. Windermere Oaks Water Supply Corp*., No. 06-19-00005-CV, 2019 WL 2553300 (Tex. App.—Texarkana June 21, 2019) (mem. op.). In this Texas Open Meetings Act (Act) case, the Sixth District Court of Appeals affirmed the lower court's decision to not invalidate an action taken after a violation of the Act because the challenge was not immediate.

The Windermere Oaks Water Supply Co. (Windermere) held a meeting relating to the sale of a portion of their property to another party but failed to include an agenda item describing the action on their meeting notice. After Windermere completed the sale of the property, TOMA Integrity, Inc. sought to void the sale of the property because of the violation of the Act.

The court held that while a violation of the Act had occurred, the action taken was voidable but not void. Instead of seeking immediate relief after the violation of the Act, TOMA Integrity, Inc. waited until the sale had already occurred. Because the sale had already taken place the case was now moot and the court upheld the lower court's decision to not invalidate the action.

Texas Tort Claims Act: *Jarpe v. City of Lubbock*, No. 07-17-00316-CV, 2019 WL 2529670 (Tex. App.—Amarillo June 19, 2019) (mem. op.). In this Texas Tort Claims Act Case, the Seventh District Court of Appeals reversed the lower court's grant of plea to the jurisdiction because the officer's actions did not fall within the emergency exception to the general waiver of immunity in negligence actions involving the use of a motor-driven vehicle.

Alexa Jarpe and Jeremy Leech were involved in a car accident with a City of Lubbock police officer, Officer Cooke. On the night in question, Jarpe was driving and attempted to exit a parking lot and turn on to one of the main throughways. Officer Cooke was responding to an attempted robbery when his car collided with Jarpe's car.

Jarpe argued that sovereign immunity was waived by the city under the Texas Tort Claims Act because the officer was operating a motor vehicle at the time of the accident and the officer's actions did not fall within the official immunity exception to waiver. The city argued that immunity was not waived because the officer was responding to an emergency during the course and scope of his employment. Government employees are entitled to official immunity when they are acting in good faith in the performance of a discretionary duty within the scope of their employment. An officer acts in good faith when responding to an incident if the reasonably prudent officer would have believed that such a response to the incident outweighed the risk to public safety.

The court held that sovereign immunity was waived because Officer Cooke did not act in good faith when responding to the incident. Officer Cooke was traveling twenty-three miles over the speed limit and did not have his sirens or lights on, both of which violated the police department's policy. He also admitted to glancing down at his on-board mobile date computer at the time of the incident. All these actions presented a risk to public safety. At the time Officer Cooke chose to respond, the robbery had been de-escalated. Two other officers had already responded to the robbery and the suspect had fled the scene, thus Officer Cooke's response to the situation was not reasonable.

The court held that Officer Cooke's actions were not in good faith because a reasonably prudent officer would have acted differently. Therefore the city's sovereign immunity was waived because the officer's actions did not fulfill the requirements of the emergency exception to waiver.

Vested Rights: *Jacks v. Zoning Bd. of Adjustment of City of Bryan*, No. 07-18-00174-CV, 2019 WL 2998807 (Tex. App.—Amarillo July 9, 2019) (mem. op.). Jon Jacks (Jacks) purchased a piece of property in a residential subdivision with the intent of building a commercial laundromat on the land. Because the original plan for the subdivision had been filed with the City of Bryan in 1960, Jacks contended that he possessed vested rights under Chapter

245 of the Texas Local Government Code that requires that only those zoning laws and regulations that were in effect in 1960 apply to Jacks' property. When the city denied Jacks' application for a permit, Jacks appealed to the Zoning Board of Adjustment (board). The board denied Jacks' request because he failed to identify any specific regulation that had changed since 1960 that affected the development of his property and he failed to identify any permit application that he had submitted to the board that had been denied. Jacks appealed the board's decision to the district court. Jacks and the board both filed motions of summary judgment asserting both traditional and no-evidence grounds. After holding a hearing, the trial court granted the board's motion and Jacks filed this appeal with five issues.

The court overruled all of Jacks' issues and affirmed the trial court's judgement. The court combined Jacks' first and fourth issue. Jacks contended that the trial court erred when it failed to find that Jacks possessed vested rights in the property pursuant the Chapter 245 of the Texas Local Government Code. Conducting a *de novo* review, the court first reviewed whether the trial court properly applied the no-evidence standard for the motion of summary judgment. The motion for a no-evidence summary is required to be granted if the nonmovant fails to produce summary judgment evidence that raises a genuine issue of material fact on the challenged elements. The court determined that Jacks had no evidence that he properly raised the issue of his vested rights by filing an application for a permit which is required by Chapter 245, and therefore it could not conclude that trial court erred in granting the board's no-evidence summary judgment or that the board improperly analyzed and applied chapter 245.

Next, the court reviewed Jacks' second and third issues together. Jacks stated the trial court erred when it considered evidence on appeal that was not presented to the board prior to its decision to deny Jacks' vested property rights and that the trial court considered defective affidavits as proper summary judgment evidence. The only evidence Jacks said the trial court considered that the board was not presented with were the defective affidavits. The court determined that since Section 211.011 of the Texas Local Government Code does allow the trial court to receive additional evidence that was not part of the record before a board of adjustment the trial court did not err in considering the two affidavits. This is especially the case since Jacks did not obtain any ruling on any evidentiary objection he raised at either the trial court nor with the board and he made no effort in establishing how he was harmed by the trial court's consideration of the those affidavits.

Lastly, Jacks fifth issue contends that the trial court erred in denying his no-evidence summary judgment since the board did not respond to his motion with necessary evidence to defeat his motion. Though Jacks' no-evidence motion of summary judgment only challenged the propriety of the board's affirmative offense, which is all that could have been challenged, the trial court still had to determine whether Jacks had asserted a proper claim for vested rights. Since the Court had already determined that he had not properly asserted his vested right claim, the fifth issue was immaterial.

Governmental Immunity/Breach of Contract: *Lower Valley Water Dist. v. Danny Sander Constr., Inc.*, No. 08-17-00261-CV, 2019 WL 3001523 (Tex. App.—El Paso July 10, 2019). The Lower Valley River District (district) solicited bids for contractors for the construction of water lines and other improvements for a construction project located in the Town of Clint and

surrounding areas in 2014. Danny Sander Construction, Inc. (Sander) was the successful bidder on the project. The district and Sander entered into a written contract which required Sander to complete all work specified and indicated in the "Contract Document" by furnishing all labor, materials, transportation, and services for the construction of water lines and other improvements and related activities. The contract provided that it could be amended by change orders; the district could terminate the contract for convenience; and that Sander would be paid for work and expenses sustained prior to the termination.

Sander commenced work on the project in January 2016. There were two change orders presented to the district, which the district approved contingent upon release of funds by the Texas Water Development Board. The funds were released for Change Order 2, but not for Change Order 1. In February of 2017, the district sent an email to notify Sander that it was terminating the contract due to problems acquiring a right of entry to the site and problem encountered in a probate-court proceeding. Sander sent the district a summary of expenses incurred, but the district refused to pay the invoiced expenses. Sander filed suit asserting breach of contract for the unpaid expenses and a claim for withholding of retainage for the project. The district filed a plea to the jurisdiction asserting it had not waived governmental immunity for the expenses because they were based on Change Order 1, which was not incorporated into the contract. Sander responded to the plea stating that the expense did not included Change Order 1 only expense from the contract and Change Order 2. The trial court denied the district's plea.

The only issue argued by the district was that it did not waive its immunity regarding delays or expenses caused by denial of funding for Change Order 1 because the change order was never incorporated into the contract and therefore the trial court lacked subject matter jurisdiction. The court disagreed with the district. Conducting a *de novo* review, the court stated that governmental immunity has two components: immunity from liability and immunity from suit. In this case, immunity from suit is not waived just because a governmental entity enters into a contract. Section 271.152 of the Texas Local Government Code does waive qualifying local governmental entities' immunity from suit for certain breach of contract claims. To determine if immunity is waived under section 271.152, three elements must be established: (1) the party against whom the waiver is asserted must be a "local government entity" as defined by Section 271.151(3); (2) the entity must be authorized by statute or the Constitution to enter into contracts; and (3) the entity must in fact have entered into a contract that is "subject to this subchapter" as defined by Sections 271.151 and 271.152.

The court determined that the district is a "local governmental entity" and that it is authorized to enter into contracts. The court analyzed if the district entered into a written contract stating the essential terms of the agreement for providing goods or services to the local government entity that is properly executed on behalf of the local governmental entity. The court determined that the district did since the district acknowledged that it did enter into a properly executed contract with Sander and the trial court had jurisdiction over claims arising out of that contract. However, the district's argument that Sanders' claims are based on Change Order 1 is an argument that the claim will fail on its merits. The court stated that such a claim does not deprive the trial court of subject matter jurisdiction.

Official Immunity: *Hernandez v. Blackburn*, No. 09-17-00452-CV, 2019 WL 2455272 (Tex. App.—Beaumont June 13, 2019) (mem. op.). In this case, the Beaumont Court of Appeals affirms the trial court's judgment granting the motion for summary judgment.

Kevin Blackburn, an officer employed by the City of Livingston Police Department and working as a school resource officer sprayed Hernandez with pepper spray during an altercation at a high school soccer game. Hernandez sued Blackburn asserting causes of action for assault and battery and negligence. Blackburn filed a motion for summary judgment based on the affirmative defense of official immunity. The trial granted the motion and Hernandez appealed.

A government employee is entitled to official immunity: (1) for the performance of discretionary duties, (2) performed within the scope of the employee's authority, (3) provided the employee acts in good faith. The Beaumont Court of Appeals holds the evidence established all three elements of the defense. Blackburn was performing a discretionary function. He had to make several decisions when the fighting began, he decided (was not instructed) to go on to the soccer field, he was responding to an emergency, and the force used to break up the fight was a judgment call. Blackburn was acting within the scope of his authority. Even though Blackburn was working the soccer game off-duty, as an officer of the Livingston Police Department, he was subject to his peace officer's oath and once the fighting started Blackburn became an on-duty officer. Blackburn acted in good faith. The key facts about the fight are not in dispute. Blackburn was the only law enforcement official present at the soccer game. After issuing verbal commands and physically trying to stop the altercation involving Hernandez, Blackburn administered the pepper spray. The evidence established that Blackburn needed to break up the fight quickly before one of the boys was hurt and to address other fights that were occurring. Once the burden shifted, Hernandez failed to present evidence that no reasonable officer could have believed using pepper spray under the circumstances was warranted.

Governmental Immunity: *Houston Firefighters' Relief & Retirement Fund v. City of Houston*, No. 14-17-00533, 2019 WL 2536652 (Tex. App.—Houston [14th Dist.] June 20, 2019). Following the passage of S.B. 2190 in 2017, which made amendments to the Houston Firefighters' Relief and Retirement Fund statute, the Fund sued the City of Houston and various city officials alleging that the legislation violated Article XVI,
Section 67(f) of the Texas Constitution by infringing upon the exclusive authority of the Fund's board of trustees to determine "sound actuarial assumptions." The city and city officials asserted pleas to the jurisdiction on various grounds, including that their governmental immunity had not been waived. The trial court sustained the pleas to the jurisdiction and the Fund appealed.

On appeal, the Fund asserted that by pleading a claim for a declaratory judgment that S.B. 2190 violates the Texas Constitution, it established a waiver of the city's governmental immunity under both the Declaratory Judgments Act and the common law. The city argued that the city's governmental immunity is waived only to the extent the Fund pleaded a viable or valid constitutional claim, which the Fund did not do. The court goes on to examine whether the Fund asserted a viable claim that S.B. 2190 facially violates Article XVI, Section 67(f).

For a statute to facially violate a constitutional provision, the statute must by its terms always and in every instance operate unconstitutionally. The Fund asserted that S.B. 2190 facially

violates the constitutional mandate that the board adopt sound actuarial assumptions by: (1) mandating the required assumptions; (2) requiring the averaging of contribution rates; and (3) requiring the use of the independent-actuary assumption. With regard to all three provisions, the court held that the facial challenge failed as a matter of law because the statute does not always operate unconstitutionally. Consequently, the Fund did not plead a viable or valid constitutional claim, and therefore the city's governmental immunity was not waived. The court held that the trial court did not err in dismissing the Fund's claims for lack of subject-matter jurisdiction.

Workers' Compensation: *City of Dallas v. Thompson*, No. 12-19-00032-CV, 2019 WL 2710247 (Tex. App.—Tyler June 28, 2019) (mem. op.). Following a determination by a hearing officer with the Texas Department of Insurance's Division of Workers' Compensation (DWC) that Gregory Thompson sustained a compensable injury while employed by the City of Dallas, and the subsequent final decision by the DWC, the city ultimately filed suit for judicial review of the hearing officer's determinations and final decision of the DWC. Thompson filed counterclaims complaining that the DWC's determination that the city's notice of denial of compensability was sufficient to contest compensability of the claimed injury. Thompson also requested attorney's fees. The city filed a plea to the jurisdiction challenging the trial court's jurisdiction over Thompson's counterclaims. The trial court denied the city's plea to the jurisdiction regarding Thompson's complaints about sufficiency of the notice, but sustained the city's plea as to the counterclaim for an award of attorney's fees. Each side appealed.

On appeal, the city argued that the trial court had no jurisdiction regarding Thompson's failure to seek judicial review of his counterclaims within 45 days after the date the DWC mailed the final decision to the parties as required by Section 410.252 of the Labor Code. The court relies on the Texas Supreme Court decision from April 2019 in *Tex. Mut. Ins. Co. v. Chicas* to dismiss the city's argument. That decision provided that the 45-day deadline to file suit for judicial review of a DWC decision is not jurisdictional. Therefore, the trial court did not err in denying the portion of the city's plea complaining that Thompson's counterclaims were not timely.

In his cross point, Thompson argued that the trial court erred in granting the city's plea as to his claim for attorney's fees, contending that the legislature intended that cities are to be held liable for attorney's fees pursuant to Section 408.221(c) of the Labor Code. The city argued that governmental immunity protected the city against Thompson's claim for attorney's fees. The court held that the city availed itself of its statutory right to challenge Thompson's award by pursuing an appeal of the administrative decision, and that decision by the city did not result in a loss of the city's governmental immunity from Thompson's claim for attorney's fees. The trial court did not err in sustaining the city's plea as to Thompson's counterclaim for attorney's fees.

June 2019

Note: Included cases are from May 11 through June 10, 2019.

Texas Tort Claims Act: *Garza v. Harrison*, No. 17-0724, 2019 WL 2237875 (Tex. May 24, 2019). This is a Texas Tort Claims Act (TTCA) case regarding Civil Practice and Remedies

Code Section 101.106(f). The Texas Supreme Court reversed the Fourteenth Court of Appeals and rendered judgment dismissing the suit against the officer.

In this case, an off-duty law enforcement officer fatally shot a suspect during the course of an attempted arrest outside his primary jurisdiction. The decedent's parents sued the officer in his individual capacity for wrongful death, but the officer asserted the action is actually an official-capacity suit that must be dismissed under the TTCA. The election-of-remedies provision in Section 101.106(f) of the TTCA requires courts to grant a motion to dismiss a lawsuit against a governmental employee sued in an "official capacity" but allows the governmental unit to be substituted for the employee.

As defined in Section 101.106(f), a governmental employee is sued in an official capacity when the suit: (1) is "based on conduct within the general scope of that employee's employment"; and (2) "could have been brought under [the Act] against the governmental unit." The Texas Supreme Court stated that the scope-of-employment inquiry under Section 101.106(f) focuses on whether the employee was doing his job, not the quality of the job performance. Even if work is performed wrongly or negligently, the inquiry is satisfied if, when viewed objectively, "a connection [exists] between the employee's job duties and the alleged tortious conduct." The Supreme Court found a connection existed between the defendant law enforcement officer's job responsibilities and the alleged tort because he was exercising a statutory grant of authority to make a warrantless arrest for a crime committed in his presence—authority he possessed solely through his governmental employment. The Court found that the officer should have been dismissed under Section 101.106(f) and rendered judgment dismissing the officer.

Texas Tort Claims Act: *Tarrant Cty. v. Bonner*, No. 18-0431, 2019 WL 2256509 (Tex. May 24, 2019). This is a Texas Tort Claims Act (TTCA) claim where the Texas Supreme Court held Tarrant County (county) was immune from liability for a defective chair while treating an inmate for his medical condition.

A deputy accidently damaged the leg of a chair while working at the jail where Bonner was housed. The deputy notified his supervisor of the damaged chair, who instructed the deputy to place the chair in the multipurpose room before filling out a report. Bonner, an inmate, had diabetes and entered the multipurpose room for treatment. When he attempted to use the chair, it collapsed. Bonner sued for injuries under the TTCA asserting the negligent use of personal property. At the summary judgment stage, the county argued despite the waiver under the TTCA, it retained immunity under the Texas Code of Criminal Procedure (TCCP) and Texas Government Code. The trial court granted the motion, the court of appeals reversed, and the county filed a petition for review.

Under TCCP Article 42.20, certain individuals and governmental entities are not liable for damages arising from action or inaction in connection with an inmate activity, including treatment activities, if the action or inaction was performed in an official capacity and was not performed with conscious indifference. Similarly, under the Texas Government Code Section 497.096, county and sheriff's department employees are not liable for damages arising from action or inaction in connection with an inmate or offender treatment activity if the action or inaction was not intentional, willfully negligent, or performed with conscious indifference or

reckless disregard. After analyzing the statutory sections, the Court held Bonner's allegations are more than simply the county failing to warn of the broken chair, it was the use of the chair during treatment which caused his injury. The two statutes immunize negligent acts and omissions that are reasonably related to the covered programs or activities, even when the relationship is indirect. As a practical matter, this includes acts or omissions, which give rise to damages during covered programs and activities. The Court recognized the statutes only immunize the county from liability to the extent its corporate actions or omissions were not performed with conscious indifference or reckless disregard for the safety of others. As a result, the county had immunity from liability, not immunity from suit. The county must assert it qualifies for the conditions, thereby placing the burden on the county. Once the defendant establishes that those conditions exist, the burden falls on the plaintiff to establish the statute's exception to that defense, which is expressed as a heightened liability standard. The Court referred to this as a form of statutory immunity. Under this heightened standard, a defendant must have actual subjective knowledge of an extreme risk of serious harm. Based on the record, the Court concluded no evidence exists of conscious indifference towards Bonner. As a result, the trial court's granting of the summary judgment was proper.

Justice Boyd concurred in the judgment, but wrote separately as he disagreed that: (1) conscious indifference is "the same as" gross negligence; or (2) a person cannot be consciously indifferent to a risk that is less than "extreme."*****

Contracts: ***Dallas/Fort Worth Int'l Airport Bd. v. Vizant Techs., L.L.C.*****, No. 18-0059, 2019 WL 2147262 (Tex. May 17, 2019).** This is a governmental immunity defense in a breach of contract case where the Texas Supreme Court held Chapter 271 of the Texas Local Government Code did not waive immunity for the specific relief required under the contract.

The Dallas/Fort Worth International Airport Board (board) retained Vizant Technologies, L.L.C. (Vizant) by contract to provide recommendations on how the airport could reduce payment-processing costs. The contract contained provisions where the board would pay Vizant a percentage of savings and/or refunds based on its advice. The contract stated the cap on payments shall not exceed $50,000. The Court commented in a footnote that it appeared this was done to avoid competitive bidding limits or authorizations by delegation to staff without board approval. However, the contract also contained a provision that in the event Vizant's fee exceeds this cap the Board "will make a good faith effort to receive board authorization to increase the compensation," and "if approved," the parties would amend the contract to reflect the higher amount. The board's staff paid the $50,000 and ultimately asked the board to approve an increase to $330,000, but the board denied that request. Vizant sued. Vizant asserts its fees should have exceeded $300,000, but the airport failed to use a good faith effort to obtain board approval. The board filed a plea to the jurisdiction which was denied, but the court of appeals reversed and dismissed. Vizant filed its petition for review.

The Court first held the board was acting in a governmental not proprietary capacity. The legislature has unambiguously declared that the "maintenance, operation, [and] regulation" of an airport and the "exercise of any other power granted" for that purpose, whether exercised "severally or jointly" by local governments, "are public and governmental functions, exercised

for a public purpose, and matters of public necessity." As a result, the board is immune absent a waiver.

Contract waivers are primarily found in Chapter 271 of the Texas Local Government Code. While it has a waiver of immunity, it has limiting language as to the types of damages allowed and contractual approvals which apply. The "good faith" effort language becomes pivotal for this analysis. A contractual duty to act in good faith does not create a new obligation or independent cause of action; instead, it merely governs the conduct by which the party must fulfill the contractual obligation to which it applies. Under the written terms of the contract, read literally, the board promised to make a good-faith effort to obtain its own authorization for the higher payments. The parties agreed the board's staff negotiated based on delegated authority and executed the contract on the board's behalf, with the board's authority, but without the board's express approval. Under these circumstances, the Court held it was reasonable to construe the clause as a promise by the board's staff to make a good-faith effort to obtain the board's authorization for any higher payment. The staff had no authority to contractually obligate the board to pay anything more than $50,000. To the extent the staff agreed to make a good-faith effort, that promise is not enforceable against the board, and even if it were, the remedy could never be to require the board to pay more than it authorized the staff to negotiate. To the extent the board made any form of agreement, the board merely promised to make an effort to agree to the higher payment, but to do so in good faith. "In this sense, its promise was the equivalent of a promise to negotiate towards a future bargain in good faith." Agreements to negotiate toward a future contract are not legally enforceable. However, even if such were enforceable, the listed measure of damages constitutes *consequential* damages incurred as a result of the defendant's failure to act in good faith, not as a result of the defendant's failure to perform under the anticipated contract. And since Section 271.153 expressly excludes this type of consequential damages, the board retained immunity.*

Public Utility Regulatory Act: *Time Warner Cable Texas L.L.C v. CPS Energy*, No. 17-0840, 2019 WL 2147257 (Tex. May 17, 2019). This case deals with utility-pole-attachment rents. The Texas Supreme Court held that the utility's failure to take timely action to collect on one provider's unpaid utility-pole-attachment invoices constituted discrimination between providers in violation of the Public Utility Regulatory Act (PURA).

CPS Energy is a municipally-owned utility. It agreed with Time Warner and AT&T to charge the same utility-pole-attachment rent. However, AT&T did not pay the full amount and paid a lesser, older rent amount. CPS Energy did nothing for almost 2 years until it initiated an administrative action with the Public Utility Commission (PUC). The PUC determined that because CPS Energy failed to take "meaningful," "serious," and "timely action to ensure all pole attachers paid the uniform rate it invoiced," it had violated Section 54.204(b) and (c) of PURA. CPS Energy appealed. The district court affirmed and the court of appeals reversed.

The Supreme Court determined that there was no dispute that while CPS Energy charged Time Warner and AT&T the same rates, it collected far more from Time Warner. The Court found that the PUC could have reasonably concluded that CPS Energy violated the plain terms of Section 54.204(b) and did not address whether the same conduct also violated subsection (c). The

Supreme Court reversed the court of appeals' judgment in part and remanded the case to the trial court.

Eminent Domain: *KMS Retail Rowlett, LP v. City of Rowlett*, No. 17-0850, 2019 WL 2147205 (Tex. May 17, 2019). In this eminent domain case, the Texas Supreme Court held that the condemnation of an easement that conferred an incidental benefit on a private party did not rise to the level of fraud that would prevent the taking.

The City of Rowlett became interested in recruiting Sprouts Farmers Market to put one of their grocery stores in Rowlett. Sprouts was similarly interested in putting a location in Rowlett and entered into a lease with Briarwood Armstrong, L.L.P. (Briarwood) to put a location on a tract owned by Briarwood. Briarwood's tract was located next to tracts owned by KMS. KMS owned several businesses that had a private drive running in front of them ending in a dead end. The city entered into a deal with Briarwood that required Briarwood to put in a private circulation drive that would provide access to adjacent properties. The circulation drive would begin on the Briarwood property, run across part of KMS's tract and connect with the existing private drive. Briarwood and KMS entered into negotiations for the purchase of an easement to build the circulation drive but never made a deal. Rowlett decided to condemn the area needed to build the circulation drive and filed a petition for eminent domain, ultimately awarding KMS $31,662 for the taking. KMS moved to dismiss the petition for eminent domain.

The Texas Supreme Court affirmed the lower court and held that the city had the authority to condemn the land. KMS argued that language in Section 2206.001(b) of the Texas Government Code prohibiting a taking "for a public use that is merely a pretext to confer a private benefit on a particular private party" should apply in this case. Section 2206.001(c) states that "the section does not affect the authority of an entity authorized by law to take private property through the use of eminent domain for . . . transportation projects." The Court held that Section 2206.001(c) was an exception to Section 2206.001(b), rendering it inoperative when it applied. Here, the Court found that the circulation drive clearly fell within the definition of transportation project and therefore was an authorized taking. KMS argued that the definition of "transportation project" should come from Section 370.031(a) of the Texas Transportation Code. The Court did not agree and found that the broad definition in Section 2206.001(c) was the correct one to use.

KMS next argued that the condemnation was not a constitutionally valid exercise of Rowlett's eminent domain powers because the circulation drive was not for a public use. The Court concluded evidence relied on by the court of appeals established that the drive was for a public use and therefore constitutional. Finally, KMS argued fraud should preclude the taking because the city used its eminent domain authority to confer a benefit on a private party. The Court held that a private party receiving an incidental benefit from a taking was insufficient to deprive the taking of its public character. That Briarwood received some monetary benefit from the taking did not change the fact that the circulation drive was for public use.

Ballot Measure: *Noteware v. Turner*, No. 01-18-00663-CV, 2019 WL 2180635 (Tex. App.—Houston [1st Dist.] May 21, 2019). In this challenge to the sufficiency of a bond measure, the First Court of Appeals affirmed the lower court's decision to dismiss the case for lack of subject-matter jurisdiction.

Pursuant to a pension reform bill passed by the Texas Legislature, the City of Houston set out to hold an election to approve certain bonds to fund a portion of the unfunded liability with respect to the Houston Municipal Employee Pension System and the Houston Police Officers' Pension System. The city's home rule charter includes a revenue cap on the amount that ad valorem taxes may be increased in a fiscal year. The city council adopted an ordinance ordering an election on the issuance of bonds and containing specific language for the ballot proposition. The ballot measure ultimately succeeded and the city sought to have the bonds approved by the Office of the Texas Attorney General (AG).

Noteware sued the city alleging that the ballot measure was insufficient because it included a materially misleading ballot description for the proposition. He argued that the ballot measure allowed the city to levy a tax in excess of the revenue cap in the city charter. He filed for an emergency temporary restraining order and a temporary injunction, which were not granted.

The AG issued an opinion approving the bonds, concluding that the bonds were payable from proceeds of an annual ad valorem tax levied. The bonds were issued and delivered. The city moved to dismiss the suit for lack of subject-matter jurisdiction and the trial court granted their motion.

The First Court of Appeals first noted that, even if the ballot measure was found to be insufficient, the court could only void the results of the election and not the bonds. Under Section 1202.006, once bonds are approved and issued, they are valid and incontestable. The court notes that the bonds were approved on the representation that the tax levied would be within the revenue cap and the city is bound by terms of the bond. For these reasons, the court held that Noteware lacked subject-matter jurisdiction because the suit was moot.

Public Information: *King v. Paxton*, No. 03-18-00298-CV, 2019 WL 2392711 (Tex. App.—Austin June 6, 2019). This is an appeal of the trial court's order requiring the disclosure of certain information and the withholding of other information under the Public Information Act.

On the night in question, police officers from the City of Abilene Police Department arrived at Susan King's home to initiate a welfare check on King. The officers had discussions with King in her home, on her front porch, in a police cruiser, and eventually in the presence of a mental healthcare professional. The officers' patrol-car dash cameras that captured video from within the cars and audio from microphones that were worn on each officer's body recorded the entire encounter. Toward the end of the incident, King accompanied the officers to a location where her mental health could be evaluated. The police vehicle that transported King to that location was equipped with a camera that recorded from inside the vehicle, while the body microphones of the two officers involved in the transport recorded the audio inside the vehicle. Following this interaction, the city received a public information request for the audio and video recordings from the night of the encounter, incident reports and notes prepared by the officers, and email exchanges among police officers, the city attorney, and the Texas Department of Public Safety (DPS).

The city submitted a request for a ruling from the Office of the Attorney General (attorney general) raising two exceptions: Sections 552.108(a)(2) and 552.101 of the Government Code. The attorney general marked some of the recordings as confidential but concluded that the rest of the recordings could be disclosed. King and her husband filed suit against the city and the attorney general seeking declaratory and injunctive relief to prevent all of the recordings from being released under Sections 552.108(b)(2) and 552.109 of the Government Code, Section 1701.661(f) of the Occupations Code, Section 611.002 of the Health and Safety Code, and constitutional and common-law rights to privacy. The trial court agreed that the material withheld by the attorney general was excepted from disclosure but concluded that additional information should also be withheld, mostly under the doctrine of common-law privacy. The court also ruled that additional information was excepted from disclosure: one of the emails between an officer and DPS, citing Section 411.192 of the Government Code; three portions of the audio recordings of King's conversations that occurred inside her home, citing Section 1701.661(f) of the Occupations Code; and three portions of audio records of King's conversations with a mental-health professional, citing Section 611.002 of the Health and Safety Code. The Kings and the attorney general filed this appeal.

The court of appeals first addressed whether the audio recordings could be excepted from disclosure under Section 552.108 of the Government Code, which excepts information held by a law enforcement agency that relates to investigations that did not result in conviction or deferred adjudication. Although the city did not assert this exception in its request for a ruling, King wished to assert the exception to prevent all of the audio records from being disclosed. The court did not determine whether a third party could assert this exception. Rather, the court determined that this exception did not apply to the audio recordings in question because a welfare check, absent evidence that the welfare check became a criminal investigation, is not a violation of the law that could result in a conviction or deferred adjudication.

The court then addressed whether recordings taken within King's home and her front porch were recordings made in a "private space" and by a "body worn camera." The Kings argued that because the recordings at issue were recorded by "cameras that capture video from within a patrol car and audio from microphones on each officer's body," the recordings were created by recording devices that are within the statutory definition of "body worn cameras." The court agreed, concluding that the plain language of the statute encompasses such recording devices. The court also determined that a person's home is considered a "private space," and that, under the circumstances, King had a reasonable expectation of privacy on her front porch, making her porch a "private space."

Next, the court addressed whether all the recordings between King and the officers could be excepted from disclosure under Section 611.002 of the Health and Safety Code, which applies to communications between a patient and a medical professional. The court held that the officers did not fall within the meaning of this provision and therefore only King's conversations with the actual healthcare professional were confidential while her conversations with the officers were not.

Finally, the court looked at whether the remaining parts of the recordings could be excepted from disclosure under constitutional, common-law, and statutory privacy rights. The court held that

some of the information relating to King's marriage and family on the recordings fell within constitutional "zones of privacy" and could not be disclosed. However, the court found that the rest of the information did not fall within the common-law right to privacy because it did not rise to the level of "highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person."

Governmental Immunity: *City of New Braunfels v. Carowest Land, Ltd.*, No. 03-17-00696-CV, 2019 WL 2127743 (Tex. App.—Austin May 16, 2019). This is an interlocutory appeal of the trial court's order denying pleas to the jurisdiction each filed by the City of New Braunfels and its contractor, Yantis, in a suit brought by a local property owner, Carowest.

Carowest owned property within the city, a portion of which it voluntarily conveyed to the city for the construction of a drainage channel. The city hired Yantis to construct the drainage channel. There were two parts of the project, the South Tributary Project and the North Tributary Project. The South Tributary Project did not go smoothly, and the city and Carowest entered into an agreement allowing Carowest to modify the location and design of the channel in exchange for Carowest paying for certain costs related to the modification and to indemnify the city for any claims brought by, incurred by and claimed by Yantis attributable to the modification. Without telling Carowest, the city and Yantis entered into several agreements that had the effect of releasing all of Yantis' claims against the city for the Carowest portion of the South Tributary Project. Yantis sent several delay claims to the city which the city then forwarded to Carowest.

Carowest brought this suit against both the city and Yantis after the city refused to rescind its request that Carowest handle the delay claims and Yantis refused to drop the delay claims. Carowest asserted multiple declaratory claims related to the validity of Yantis's delay claim and the parties' corresponding obligations under the agreements. The city and Yantis each filed a plea to the jurisdiction. The trial court denied the pleas and the city and Yantis appealed.

The court of appeals held that the city had not waived governmental immunity because this was a bare claim for declaratory judgment relief in which the city did not assert an affirmative claim of relief. Additionally, the court found that because there was no pending breach of a contract claim, Chapter 271 of the Local Government Code did not waive the city's immunity from suit. Finally, the court held that because Yantis had not shown that it is a governmental unit, it was not entitled to an interlocutory appeal of a ruling on a plea to the jurisdiction.

Public Information Act: *Paxton v. City of Dallas*, No. 06-18-00095-CV, 2019 WL 2119644, (Tex. App.—Texarkana May 15, 2019) (mem. op.). In this Texas Public Information Act (PIA) case, the Texarkana Court of Appeals held noncore attorney work product is confidential and not subject to public disclosure under the PIA.

The city received seven PIA requests for reports and other records relating to specified incident investigations, each conducted in response to a notice of claim for damages received by the city. In each case, the city sought an attorney general (AG) opinion and was told to release the information. The city filed suit as an appeal. In cross-motions for summary judgment, the trial court ruled for the city holding the information was confidential. The AG appealed.

"Core public information" (also referenced as "super-public" information) is protected from disclosure only "if it is confidential under either the PIA or other law." Core public information includes "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body." TEX. GOV'T CODE § 552.022(a)(1). It is confidential only if made so by other law. The city asserted the information is noncore work product under Rule 192.5 of the Texas Rules of Civil Procedure and, therefore, is "confidential under . . . other law." The Texas Supreme Court has described the level of protection accorded to core work product as, "inviolate," "flatly not discoverable," and "sacrosanct and its protection impermeable."

In contrast, noncore work product is "[a]ny other work product" that is not core work product. The record indicates the information at issue includes the city's investigations and evaluation of claims filed against the city and liability analysis prepared by the city's employees and agents after the city received the notices of claim. The city employees testified the information constitutes material prepared or mental impressions developed in anticipation of litigation or for trial. Each of the notices of claim in question constituted statutory notices required by the Texas Tort Claims Act. As such, they satisfy the objective standard for anticipated litigation. The in-camera review of the records indicated to the court that the city's investigations were conducted for the purpose of preparing for potential litigation, therefore qualifying for the subjective prong of the anticipated litigation analysis. Thus, the records are "noncore" work product under Rule 192.5. After a lengthy analysis of Rule 192.5, the court held the noncore work product was confidential. The trial court judgment was affirmed.*

Governmental Immunity: *County of El Paso v. Baker*, No. 08-18-00012-CV, 2019 WL 2315005, (Tex. App.—El Paso May 31, 2019). This is an interlocutory appeal in a premise defect case where the El Paso Court of Appeals held the County of El Paso was entitled to governmental immunity.

While entering an elevator in the El Paso County Courthouse, Baker claims the doors shut on her causing bodily injury. She reported the injury that day. After Baker sued, the county filed a plea to the jurisdiction, which was denied. The county appealed.

Under a premise defect theory, a landowner owes a duty not to "injure a licensee by willful, wanton or grossly negligent conduct," and to "use ordinary care either to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not." Baker's petition asserts the county failed to inspect and failed to discover the malfunction in the doors. Such is applicable to an invitee status, not a licensee status. Baker filed four amended pleadings and was not able to properly plead the claims. Therefore, the court was not inclined to remand for a fifth opportunity.

Under the licensee status, actual knowledge rather than constructive knowledge is required. The county's affidavit noted the last time the elevator had been inspected, that no notice of the defect was reported prior to Baker's incident, and no report has reoccurred. Baker's evidence of a newspaper article that a woman got stuck in the elevator a year and a half later is insufficient to show the county had actual knowledge the doors were likely to close on Baker. Nor would the fact that the county knew that the elevators were "old" and should be replaced show the kind of

knowledge required for a valid licensee-premises-liability claim. The plea should have been granted.*

Governmental Immunity: *University of Tex. of the Permian Basin v. Banzhoff*, No. 11-17-00325-CV, 2019 WL 2307732 (Tex. App.—Eastland May 31, 2019) (mem. op.). This is an ultra vires and abuse of process case where there Eastland Court of Appeals held the University of Texas at Permian Basin (UTPB) retained governmental immunity.

UTPB hired Banzhoff as a golf coach but terminated him within a year. He was issued a criminal trespass notice prohibiting him from attending UTPB sporting events. Shortly after his termination, Banzhoff was arrested at the Odessa Country Club for criminal trespass. Banzhoff sued UTPB, the athletic director (Aicinena), and the interim coach who replaced him (Newman) alleging seven different causes of action. Aicinena and Newman moved to be dismissed under Section 101.106(e) of the Texas Tort Claims Act (TTCA) and UTPB filed a plea to the jurisdiction. The trial court granted the dismissal as to Aicinena and Newman, and partially granted UTPB's plea. The trial court allowed the abuse of process and ultra vires claims to proceed. UTPB filed this interlocutory appeal.

As to the abuse of process claim, no waiver of governmental immunity exists for such a tort. To fall within the ultra vires exception, "a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." Suits complaining of ultra vires actions must be brought against government officials in their official capacity and may seek only prospective injunctive remedies. In this case, UTPB—a governmental entity—is not a proper defendant to Banzhoff's ultra vires claim. As to the individuals, the general allegations in the pleadings are insufficient to plead an ultra vires claim against Aicinena or Newman. Further, Banzhoff failed to plead any facts that support a finding that Aicinena or Newman exceeded any delegated authority, failed to perform a ministerial duty, or violated Banzhoff's constitutional rights. The court expressly noted the criminal trespass notice in the record was not issued by either Aicinena or Newman and that there was no specific allegation either man called the police regarding Banzhoff's presence at the Odessa Country Club. However, even if the court were to take Banzhoff's allegations as true, "he fails to explain how issuing a criminal trespass notice or calling the police—even if done erroneously—are anything but discretionary actions by Aicinena or Newman." As a result, the plea should have been granted in its entirety.*

Texas Tort Claims Act: *City of Corpus Christi v. Trevino*, No. 13-18-00442-CV, 2019 WL 2381455 (Tex. App.—Corpus Christi June 6, 2019) (mem. op.). In May 2016, the City of Corpus Christi issued a 12-day water boil advisory. Becilia Trevino filed suit against the city, claiming that she was out of water for two weeks and forced to pay for services she wasn't receiving. She alleged causes of action for negligent misrepresentation, negligence, common law fraud, breach of contract, and violation of civil rights. The trial court denied the city's plea to the jurisdiction and the city appealed.

On appeal, the court first analyzed Trevino's negligence and negligent misrepresentation claims. The court held that although Trevino alleged a viable negligence claim for personal injury under the Texas Tort Claims Act (TTCA) based on the condition of the water,

the trial court lacked jurisdiction because Trevino failed to comply with the TTCA's notice requirement. Trevino alleged that the water boil advisory itself was proof of actual notice, but the court held that the city's notice to the public at large about a potential health hazard does not constitute actual notice that Trevino subsequently suffered an injury from the hazard. Because Trevino did not satisfy the TTCA's notice requirements, the trial court erred in denying the city's jurisdictional challenge to her negligence claim.

The court also resolved Trevino's fraud claim in favor of the city, since the TTCA specifically exempts intentional torts from its limited waiver of immunity. The court held that the trial court erred in denying the city's jurisdictional challenge to Trevino's fraud claim.

On the breach of contract claim, Trevino contended that the city had a duty to provide water to Trevino but failed to do so, thereby breaching its contract with Trevino. According to the court, the agreement between Trevino and the city did not fall under the limited waiver of immunity from suit in Local Government Code Section 271.152 because the city was providing goods or services to Trevino (the goods and services were not being provided to the city). Trevino further argued that her breach of contract claim was not subject to governmental immunity in the first place because the city was performing a proprietary function. However, the court determined that the city was performing one of the TTCA's enumerated governmental functions by providing Trevino water services, which foreclosed Trevino's argument. The trial court therefore erred in denying the city's jurisdictional challenge to Trevino's breach of contract claim.

Lastly, the court addressed Trevino's civil rights violation claims. While the court expressed no opinion on the validity of these claims under the circumstances of the case, because federal constitutional claims enjoy supremacy over governmental immunity, the court held that a plea to the jurisdiction was not an appropriate procedural vehicle to dispose of Trevino's civil rights claims. The court affirmed the trial court's order denying the city's plea to the jurisdiction on the civil rights violation claims.

Texas Tort Claims Act: *City of Corpus Christi v. Muller*, No. 13-18-00443-CV, 2019 WL 2384162 (Tex. App.—Corpus Christi June 6, 2019) (mem. op.). Marie Muller was employed by the City of Corpus Christi and injured herself when she stepped in a pothole in the city hall parking lot on her way into the office. She filed a lawsuit against the city under a premises liability theory pursuant to the Texas Tort Claims Act (TTCA). The city filed a plea to the jurisdiction, arguing that because Muller's injury occurred in the course and scope of employment, her remedy was limited solely to the benefits under the workers' compensation insurance offered by the city. The trial court denied the city's plea and the city appealed.

On appeal, the central question for the court was whether Muller was in the course and scope of her employment when she suffered her injuries. The court cited the general rule in Texas that travel to and from work is not considered to be within the course and scope of the employee's employment. The city contended that the facts of the case fit within the "access doctrine" exception to the general rule that applies when the employer has evidenced an intention that a particular access route be used by an employee going to and from work when such a route is so closely related to the employer's premises as to be fairly treated as part of the premises. However, the court found that the city presented no evidence along with its plea indicating that

the city implicitly or directly intended, authorized, or instructed Muller to use the city hall parking lot as her access route to work. The court overruled the city's sole issue.

May 2019

Note: Included cases are from April 11 through May 10, 2019.

Red Light Cameras: *Garcia v. City of Willis*, No. 17-0713, 2019 WL 1967140 (Tex. May 3, 2019). In this constitutional takings challenge to red light cameras, the Texas Supreme Court held the plaintiff was required to exhaust administrative remedies before bringing his claim.

Luis Garcia sued the City of Willis on behalf of himself and "others similarly situated" who paid a civil penalty for violating a city ordinance for red light infractions caught on camera. He sought the invalidation of the ordinance, a refund, or a takings claim. The city filed a plea to the jurisdiction, which was denied by the trial court, but granted by the court of appeals. On appeal to the Texas Supreme Court, the state filed an amicus brief arguing additional authority in support of the city.

While the city did not initially challenge Garcia's standing to bring suit, the state's amicus brief raised the issue and the court felt it was required to address it first. After receiving notice from the city of his red-light violation, Garcia paid the requisite civil fine. He had no outstanding fines and did not assert he planned to violate red light laws in the future. And for standing purposes the court "assume[s] that [plaintiffs] will conduct their activities within the law," barring some stated intent otherwise. Because no pending charges exist, Garcia lacked standing for prospective injunctive relief and could not be a class member of others similarly situated who have not paid the fine. However, he did have standing to seek a refund of his past payment. In this context, immunity is waived only if Garcia paid the fine under duress. Here, Garcia chose to voluntarily pay a fine and forgo administrative remedies that would have entitled him to an automatic stay of the enforcement of his fine under the Transportation Code Section 707.014(a).

Because Garcia could have invoked this automatic reprieve from payment and challenged the notice of violation administratively but chose not to, he cannot now claim he paid his fine under duress. Therefore, the city maintained its immunity. Garcia additionally argued the fine imposed on him constitutes an unconstitutional taking because the underlying ordinance was unconstitutional and because the city failed to conduct the statutorily required engineering study. He asserted he could not challenge the constitutionality of the fine in the administrative hearing. However, the fact remained that the hearing officer might have ruled in his favor for other reasons that would moot his constitutional arguments. As a result, he failed to exhaust his administrative remedies.*****

Texas Tort Claims Act: *PHI, Inc. v. Texas Juvenile Justice Dep't*, No. 18-0099, 2019 WL 1873431 (Tex. Apr. 26, 2019). This is an interlocutory appeal in a Texas Tort Claims Act (TTCA) case where the Texas Supreme Court held jurisdiction exists to determine whether the failure to engage an emergency brake is the "operation or use" of a motor vehicle.

PHI, Inc. owned a helicopter which was located at the bottom of an incline. When the Texas Juvenile Justice Department parked a bus at the top of the hill and exited, the bus began to roll backwards. It struck the helicopter causing significant damage. A local police officer investigated the accident. His report states that the accident occurred after the driver placed the vehicle in park and identified as a contributing factor the failure to engage parking brake. The driver did not dispute the police officer's finding but later asserted the brake had been broken. Phi sued. The Department filed a plea to the jurisdiction. The court of appeals held no jurisdiction existed. The Court granted review.

Under the TTCA, a waiver of immunity requires that the damage "arises from" the operation or use of the vehicle and the statute requires a nexus between the injury negligently caused by a governmental employee and the operation or use of a motor-driven vehicle. The evidence the brake was not engaged is a sufficient nexus. With regards to the terms "operation" or "use," in general courts should strive to give simple words like "operation" and "use" a simple construction, rather than converting them into terms of art intelligible only to experts in the case law. The Court held "[i]n terms of the everyday experience of driving, we think it self-evident that ensuring your car will not roll away after you leave it, including engagement of the emergency brake when necessary, is an integral part of the 'operation or use' of a vehicle. It seems no less a part of driving than any other act by which the driver controls the vehicle." The Court spent the remainder of the opinion explaining why this opinion is consistent with prior caselaw in order to avoid future confusion.**

Discovery Sanctions: *Medina v. Zuniga*, No. 17-0498, 2019 WL 1868012 (Tex. Apr. 26, 2019). In this case, which will be primarily of interest to litigators, the Texas Supreme Court held the trial court abused its discretion when it awarded sanctions against a defendant who denied liability in discovery but conceded it during trial.
In the vehicle accident case, Medina exited a parking lot without stopping or properly looking and struck Zuniga. Zuniga sued for negligence and gross-negligence and served Medina with discovery. In admissions, the plaintiff essentially asked the defendant to concede his negligence in every possible respect and confess he was the sole cause of the accident at issue. The defendant predictably denied those requests. Relying on an exception to Rule 215.4's applicability, Medina argued that when he denied Zuniga's requests for admissions, he had a reasonable ground to believe he might ultimately prevail in showing he was not negligent. The case proceeded to trial at which time, Medina made the strategic decision to concede ordinary negligence but contest the plaintiff's gross-negligence claim. The jury found for Zuniga. After the trial, Zuniga's attorney moved for sanctions for the failure to admit negligence during discovery and to collect attorney's fees on having to establish the facts admitted at trial. The trial court granted the sanctions.

The Court started out by asserting "[r]equests for admission are a tool, not a trapdoor." They primarily serve "to simplify trials by eliminating matters about which there is no real controversy, but which may be difficult or expensive to prove." They address uncontroverted matters or evidentiary ones like the authenticity or admissibility of documents. They were not intended to be used as a demand upon a plaintiff or defendant to admit that he had no cause of action or ground of defense. Since the plaintiff has the burden of proof, it cannot follow that the defendant who puts the plaintiff to his/her burden should later face sanctions for not admitting

what he/she was entitled to deny. Due process limits the extent to which sanctions can attach to denials of those requests. Just as a defendant may answer the claims against him with a general denial, see TEX. R. CIV. P. 92, he may also deny a merits-preclusive request for admission for which the other party bears the burden of proof. The very nature of the request provides the respondent "good reason" for failing to admit. As a result, the trial court abused its discretion. Medina also challenged the jury's gross-negligence finding, arguing no evidence supports a conclusion that his actions rose above ordinary negligence. The objective gross-negligence standard must remain functionally distinguishable from ordinary negligence. As to the objective component, an "extreme degree of risk" is "a threshold significantly higher than the objective 'reasonable person' test for negligence." Viewing the evidence in favor of the jury's verdict, no doubt exists that Medina's driving was thoughtless, careless, and risky. But any driver knows that our roads are replete with thoughtless, careless, and risky drivers. The Court found gross negligence can be supported only by an extreme degree of risk, which was not present here.*

Public Information Act: *Texas Dep't of Criminal Justice v. Levin*, No. 17-0552, 2019 WL 1575407 (Tex. Apr. 12, 2019). This is a Public Information Act (PIA) case where the Texas Supreme Court held the PIA must yield to protecting information that, if released, would create a substantial threat of physical harm to the source's employees and others.

The plaintiffs (Levin) represent capital defendants on death row. Concerned with the possibility of mismanaged executions by lethal injection, Levin made a PIA request of the Texas Department of Criminal Justice (department), which included a request for the list of drugs used for lethal injections and their source. The department did not release the specific identity of the pharmacy or pharmacist that compounded the drugs (i.e. source) and requested an attorney general (AG) opinion. The AG agreed with the department that the PIA has a common law exception regarding a release that would create a substantial risk of harm. Levin appealed. While on appeal, the legislature amended the PIA to create a statutory exception for the source of drugs used for executions.

In prior court and AG opinions, a threat to a specific party was required in order to take advantage of the common law exception. Here, no one but the department and the pharmacy itself knows the identity of the source that supplies the lethal injection drugs to the State of Texas. There is no evidence of a history of specific threats to that particular pharmacist or pharmacy because the source's identity has been kept confidential. The court noted, however, the word "substantial" as used in prior opinions does not refer to the degree to which harm is likely to occur, but rather, the degree of the potential threat of harm itself. Courts should focus on the connection between the requested information, on the one hand, and the potential threat and magnitude of such harm, on the other. The court found, based on the summary judgment evidence, the department properly established release of the information would create a potential substantial physical harm which does not currently focus on an identified person, including evidence of what happened to other pharmacies when release of similar information became public (Note: some but not all of the evidence was considered relevant). As a result, the department must withhold the information requested.*

Texas Tort Claims Act: *Tarrant Reg'l Water Dist. v. Johnson*, No. 17-0095, 2019 WL 1575591 (Tex. Apr. 12, 2019). This is a Texas Tort Claims Act (TTCA) case where the Texas

Supreme Court held no waiver of immunity exists for the wrongful death action against the Tarrant Regional Water District (District).

Brandy Johnson, while five months pregnant, attempted to cross the Trinity River by walking across Dam #2. She slipped, fell into the river, and drowned. The District built, then demolished and rebuilt a series of dams as part of an effort to channelize part of the Trinity River to help with flood control. The parents brought a wrongful death action against the District asserting it maintained the Dam #2. The District filed a plea to the jurisdiction which was denied and the District appealed.

The District's Director of Operations testified that rather than filling in the eroded area below the dams and raising the depth to the level existing when the dams were constructed, the dam design engineer for the rebuild decided the deeper river bottom should remain in place to prevent kayakers and tubers from injuring themselves when passing through the chute. The Plaintiffs alleged that the kayak chute was slippery and the current running through it was deceptively dangerous. However, section 101.056 of the Tort Claims Act (discretionary functions) allows an entity to retain immunity if the negligent acts complained of were discretionary in nature. The Plaintiffs alleged the claims relating to the deeper river bed (and hydraulic boil) were not related to the original design but a failure to maintain that design, which is not discretionary. The Court disagreed. The design versus maintenance "test" is simply the policy-level versus operational-level test applied to public works. However, the Court noted neither "design" nor "maintenance" appears in the text of section101.056. For that matter, neither do the terms "policy-level" or "operational-level." Those terms are useful guides for interpretation, but are not part of the statute. The interpretational rubrics are only useful to the extent they yield results faithful to the statute's textual distinction between discretionary and non-discretionary government decisions, which the Court recognized as a difficult task. The Court noted the statute's focus is on preservation of the government's discretionary decision-making authority, rather than on the often-useful but extratextual distinction between design and maintenance. The District's decisions related to the depth of the river at the base of the dam are discretionary design decisions, even at the rebuild level. Further, the Court emphasized the "public work" the District is alleged to have improperly maintained is the natural bed of a flowing river. Analyzing the riverbed as if it were a structural public work already stretches credulity. The notion that the District had a legal obligation to keep this natural "public work" at a constant depth beneath an opaque and running body of water is unsupportable. The Court held the District was immune from suit.*

Texas Tort Claims Act: ***University of Texas MD Anderson Cancer Ctr. v. Contreras*****, No. 01-18-01046-CV, 2019 WL 1996813 (Tex. App.—Houston [1st Dist.] May 7, 2019)**. In this Texas Tort Claims Act (TTCA) case the First District Court of Appeals holds a medical facility does not waive its sovereign immunity by providing, furnishing, or allowing a patient to use tangible personal property.

Roger Contreras went to MD Anderson's barbershop with the assistance of a nurse, a walker, and a rolling IV pole. The nurse departed and left the IV pole but took the walker. She informed Contreras he could use the IV pole as an assisting device and did not need the walker. Contreras got up to go to the shampoo station after his haircut, his knee buckled causing him to fall, but

when he tried to use the IV pole to catch himself, the pole rolled away. He hit the floor and was injured. Contreras's medical expert opined that an IV pole is not a proper walking aid. Contreras sued. MD Anderson filed a plea to the jurisdiction, which was denied. MD Anderson appealed.

Contreras maintained that MD Anderson's negligent use of a rolling IV pole as a mobility-assistance device (i.e. negligent use of personal property) caused his injuries. He argued that a nurse took his walker away and told him to use the IV pole to get around. A governmental unit does not use personal property merely by providing, furnishing, or allowing another to use it. An exception applies when personal property is provided that lacks an integral safety component. However, the exception applies solely when the component is entirely missing; the failure to provide a more effective safety feature does not trigger the exception. Otherwise, for purposes of Section 101.021(2), a governmental unit uses tangible personal property if and only if the governmental unit itself is the user of the property. An allegation that the government enabled, authorized, or approved another's use of the property is not enough. Non-use is not use. The court then held MD Anderson's alleged defects in the plea are immaterial because the questions are jurisdictional. As a result, the plea should have been granted.*

Employment: *Smith v. Harris Cty*., No. 01-18-00247-CV, 2019 WL 1716418 (Tex. App.—Houston [1st Dist.] Apr. 18, 2019) (mem. op.). This is an employment case where Smith alleges retaliation under the Texas Commission on Human Rights Act. The First Court of Appeals affirmed the trial court's grant of summary judgment on the grounds that Smith failed to show a prima facie case for retaliation.

Smith filed charges of discrimination in 2008 and 2012 with the Equal Employment Opportunity Commission (EEOC). He also filed a lawsuit as a result of the later EEOC charge. He claimed in June 2015 that Harris County retaliated against him when it did not promote him to intake supervisor because he had filed claims of discrimination with the EEOC. Harris County asserted that Smith had failed to show: (1) he had engaged in a protected activity, (2) he suffered an adverse employment action, and (3) a causal link existed between his protected activity and the adverse employment action. Smith argued on appeal that he had established a causal link. Although the First Court of Appeals noted that a causal link can be established by circumstantial evidence, the evidence presented by Harris County established that there was no link.

First, the court found that Harris County complied with its hiring policies despite Smith's claims to the contrary. The court also determined that Smith was not similarly situated to those he claimed to be; thus, there was no discriminatory treatment compared to those similarly situated. Smith was not similarly situated with the applicant Harris County hired because she had leadership experience, had the trust and respect of her fellow officers, and went above and beyond her normal duties. Smith did not have any of those attributes. The two did not hold the same leadership position and were, therefore, not similarly situated.

The court found that Smith's argument that the stated reason for the adverse employment decision was false and meritless. Smith's only evidence was his subjective belief that the applicant who was hired was significantly less qualified than him. However, all of the evidence demonstrated the opposite.

The court next determined the time between the protected conduct and the adverse act were insufficient to raise a fact issue. The court also found that Smith failed to raise a fact issue regarding his claims that two of the individuals who were on the hiring committee were aware of his EEOC claims and lawsuit because the evidence presented was insufficient to establish causation between the protected activity and adverse employment decision.

The First Court of Appeals affirmed summary judgment in favor of Harris County because Smith failed to present any evidence to create a fact issue for his prima facie case of retaliation.

Reasonable Accommodation: *Texas Dep't of Transp. v. Lara*, No. 03-18-00153-CV, 2019 WL 2052930 (Tex. App.—Austin May 9, 2019). This case stems from a suit by Albert Lara, Jr. (Lara) against the Texas Department of Transportation (department) for terminating his employment after he took extended leave to recover from surgery.

Lara exhausted his paid sick leave, vacation time, and compensatory time after he was diagnosed with an illness that required him to have surgery. Thereafter, he requested extended paid leave from hours donated by co-workers through the department's sick-leave pool (SLP leave). Because his physician indicated that he did not suffer from a catastrophic illness, the department denied him paid SLP leave. However, the department granted him unpaid leave under the Family and Medical Leave Act. Following complications from surgery, Lara updated his leave request and included a physician's statement that Lara would need multiple treatments, did not expect to return until a certain date, and could not perform work of any kind. The physician's revised statements lead the department to designate him as an employee with a catastrophic condition and to offer him SLP leave sufficient to compensate for the time off work. Lara subsequently filed another request for SLP leave with a new estimated return date of October 21. The physician reported that Lara could not work in any capacity and would require one or more follow-up procedures upon recovery. The department granted him additional SLP leave, bringing the total award to its maximum of 720 hours. The department also explained that the leave would expire on September 16, and no further leave would be available. Lara then began contacting various staff members in hopes of obtaining additional leave. One week before his leave expired, the department sent Lara written notice of termination if he could not return to work by September 16. He did not do so and was terminated.

Lara filed suit alleging that the department failed to provide him with the reasonable accommodation required by the Texas Commission on Human Rights Act (the Act) and retaliated against him for exercising his rights under the Act. The department responded with a defense of undue hardship. It then filed a combined motion for summary judgement and plea to the jurisdiction. The trial court denied the motion and overruled the plea, and the department filed an appeal.

The court first looked at whether Lara was a qualified individual with a disability. The court concluded that the determination of whether an employee is a qualified individual is based on the facts as they existed at the time the request for accommodation is accepted or rejected. Thus, the court concluded that the evidence might allow a reasonable juror to conclude that the requested accommodation for additional leave rendered Lara qualified for his position at the time his request for additional leave was rejected.

The court then addressed whether Lara requested for a reasonable accommodation. The department argued that it could not have denied Lara an accommodation because Lara never filed a formal application for unpaid leave. Lara provided evidence indicating that he began asking for an accommodation as soon as he understood the expiration date of his SLP leave, he repeatedly asked if he might be afforded additional leave and what steps he might take to keep his position, and he was initially told that he had received the maximum leave, and then told additional leave would be available at the discretion of his supervisor. The court rejected the department's characterization of Lara's request for leave as somewhat insufficient to constitute a request for accommodation and concluded that Lara had satisfied his burden to generate a genuine question of fact on the issue.

The court next addressed the department's affirmative defense of undue hardship. The department produced an affidavit by Lara's supervisor indicating that Lara's absence was placing a mounting strain on operations and taking a toll on the office. However, the supervisor also indicated that two other employees had left employment during Lara's absence and that these vacancies hurt even more than Lara's absence, but did not explain why the department could not have filled those two vacancies to alleviate the strain while granting Lara's request for a few more weeks of leave. Additionally, the department failed to produce any comments reflecting strain caused by Lara's leave or revealing co-worker opposition to his request for additional time off. In turn, Lara produced evidence that included emails and texts from his co-workers that showed they were understanding and supportive of him. The court concluded that the record presents genuine questions of fact as the reasonableness of Lara's requested accommodation and the undue hardship alleged by the department, and the trial court did not err in denying the department's motion for summary judgement.

In his claim for retaliation, Lara asserted that a request for a reasonable accommodation is a protected activity, and asked the court to follow the federal courts in holding an accommodation request is a protected activity under the Act for purposes of establishing a prima facie retaliation claim. The court declined to extend such federal interpretation to the Act and concluded that because Lara's only claim of retaliation was his filing of a discrimination complaint, he was not able to establish the causation element of his claim. Accordingly, the court dismissed the retaliation claim.

Whistleblower: *Walck v. City of Lubbock*, No. 07-17-00096-CV, 2019 WL 1716781 (Tex. App.—Amarillo Apr. 17, 2019) (mem. op.). Lazaro Walck (Walck) was a police officer for the City of Lubbock. He submitted two grievances under the city's grievance procedure, complaining of the suspension of his outside work permit and the issuance of a letter of reprimand. Subsequently, Walck filed a Whistleblowers Act suit against the city alleging that the actions he complained were retaliation for his report of a violation of law that he sent to the chain of command. The city filed a plea to the jurisdiction that was denied by the trial court. The city brought an interlocutory appeal in which the Seventh Court of Appeals (Court) found the Walck's Whistleblower Act complaint was not timely concerning the loss of his outside work permit and that the city had not established that Walck failed to properly initiate the city's grievance procedure as to the letter of reprimand. The Court remanded the case concerning the letter of reprimand back to the trial court. The Supreme Court denied discretionary review and

the case was returned to the trial court. After the remand, the city amended its plea to the jurisdiction which was granted by the trial court and the remainder of Walck's case was dismissed.

Walck appealed this case to the Court on three issues. Walck's first issue contended that the trial court erred by sustaining, after the remand, the city's plea to the jurisdiction on his Whistleblower Act claim. He argued that the city's amended plea to the jurisdiction was precluded by the law of the case doctrine. The law of the case doctrine is a question of law decided on appeal to a court of last resort that governs the case throughout its subsequent stages. The Court disagreed stating that the law of the case doctrine does not limit its consideration of issues presented in this appeal since the doctrine may not apply when issues or facts have changed through amended pleadings. Since the city's amended plea to the jurisdiction addressed an issue that was not briefed or addressed in the previous interlocutory appeal, the Court disagreed with Walck about the application of the law of the case doctrine and overruled his first issue.

Walck's second issue contended that the trial court erred in granting the city's amended plea to the jurisdiction since the parties' stipulated facts did show that the rescinded letter of reprimand was an adverse personnel action that was retaliation under the Whistleblower Act. For a personnel action to be considered adverse within the meaning of the Whistleblower Act, the court must apply an objective standard of material adversity meaning the personnel action must be material, and thus likely to deter a reasonable, similarly situated employee from reporting a violation of the law. Based on the stipulated facts, the Court did not find the rescinded letter of reprimand was adverse since the reprimand did not cause Walck any job-related consequences. Walck was not demoted because of the letter of reprimand, nor had he been denied a promotion or raise. Walck's subjective reaction to the letter of reprimand, such as stress and loss of sleep, does not make the personnel action adverse under the Whistleblower Act, and therefore the Court overruled the second issue. As for Walck's third issue concerning reporting a violation of law to the appropriate law enforcement agency, the Court found it unnecessary to the disposition of the appeal since it had already found that the letter of reprimand was not an adverse personnel action.

Overruling all of Walck's issues, the Court affirmed the order of the trial court and did not remand the case for repleading since a Whistleblower Act violation could not be shown based on the stipulated facts.

MOU Electric Rates: *Data Foundry, Inc. v. City of Austin*, No. 14-18-00071-CV, 2019 WL 1768615 (Tex. App.—Houston [14th Dist.] Apr. 23, 2019). Data Foundry, Inc. sued the City of Austin over its pricing of electricity, claiming the city's retail rates were illegal, unenforceable, excessive, and discriminatory. The trial court granted the city's motion to dismiss the suit due to a lack of standing. Data Foundry appealed.

Reviewing Data Foundry's claims de novo, the court of appeals first addressed claims that the city's rates were excessive. Data Foundry's primary argument was that the city unlawfully included recovery of wholesale power-generation costs and a return on power-generation assets in its calculation of retail electricity rates. Pursuant to Texas Utilities Code Section 40.055(a)(2),

a municipally-owned utility has exclusive jurisdiction to determine whether to unbundle any energy-related activities. The court affirmed that the trial court lacked jurisdiction to grant declaratory and injunctive relief, as requiring the city to separate recovery of wholesale costs from its calculation of retail rates would be to functionally unbundle its wholesale business activities from its retail business activities. The court affirmed the trial court on all of Data Foundry's claims that sought to prohibit the city from continuing to bundle wholesale power-generation costs and a return on power-generation assets into its calculation of retail rates.

Data Foundry also brought claims that the city's retail rates were unlawfully high and not based on the city's inclusion of power-generation costs and a return on power-generation assets. Included is the claim that city retail rates were excessive because the city transfers 12 percent of its average base-rate revenue to its general fund, and the city's debt-service coverage ratio is 2.36 times the amount of the city's electric utility bonds. On this point, the court held that Data Foundry alleged a particularized injury, namely, that the city required it to pay unlawful charges and Data Foundry has a cognizable property interest in its own money. Further, the Public Utility Regulatory Act is silent on the question of whether judicial review is available to a ratepayer who takes service inside the city limits. The court reversed the portion of the judgment dismissing those claims for lack of standing.

April 2019

Note: Included cases are from March 11 through April 10, 2019.

Employment Contracts: *City of Denton v. Rushing*, No. 17-0336, 2019 WL 1212188 (Tex. Mar. 15, 2019). This is an interlocutory appeal from an order denying a plea to the jurisdiction in a breach of contract case. The Texas Supreme Court reversed the denial and dismissed the case.

Rushing, Patterson, and Marshall were employees of the City of Denton Utilities Department. All three employees worked uncompensated, on-call shifts between 2011 and 2015. Policy 106.06 of the City of Denton's Policies and Procedures Manual defines the rights and responsibilities of an on-call employee. On-call time was listed as uncompensated. In 2013, the city manager modified Policy 106.06 and defined an explicit pay schedule for on-call time. These amendments were not approved by the city council. The employees sued the city asserting Policy 106.06 was a unilateral contract and they were entitled to payment of on-call time dating back to 2011. The court of appeals held the city manager's policy adjustments equated to a unilateral contract and immunity is waived under Texas Local Government Code Section 271.152. The Texas Supreme Court granted review.

The Texas Supreme Court first held interpreting Policy 106.06 to be a unilateral contract conflicts with the disclaimer in the manual that nothing in the manual "in any way" constitutes terms of a contract of employment. Further, Policy 106.06 is a provision of a policies and procedures manual, not the adoption of a contract by ordinance. Although city ordinances may create enforceable contracts, the court held it has not previously determined a city's policies and

procedures manual can create an enforceable contract. The court reversed and rendered a decision for the city.*

Contracts: *Hays St. Bridge Restoration Grp. v. City of San Antonio*, No. 17-0423, 2019 WL 1212578 (Tex. Mar. 15, 2019). This is a breach of contract case where the Texas Supreme Court held the waiver of immunity found in Texas Local Government Code Section 271.151–.160 (as it existed at the time the contract was executed) also applied to specific performance.

The Hays Street Bridge is a historic cultural landmark in San Antonio. In the 1980s, when the city closed the bridge and Union Pacific Railroad sought to demolish it, a group of citizens formed the restoration group to save the bridge. The city obtained a $2.89 million federal grant administered by the Texas Department of Transportation to fund restoration and the restoration group promised, through a memorandum of understanding (MOU), to match any funds for restoration. Over the next decade, the group raised and transferred to the city more than $189,000 in cash and arranged for significant in-kind donations. In 2012, the city adopted an ordinance authorizing the sale of the property to Alamo Beer Company as part of an economic-incentive package. The restoration group sued, alleging the transfer would breach the city's promise in the MOU to use the funds for repair of the bridge. For its breach of contract claim, the restoration group sought only specific performance. The trial court ordered specific performance, but the court of appeals reversed holding the city was immune. The Texas Supreme Court granted review.

Citing its recent holding in *Wasson Interests v. City of Jacksonville* (*Wasson II*), the court held the MOU was of a governmental nature and not proprietary. The MOU was made to support the city-state funding agreement for restoration of the bridge and revitalization of the surrounding area. Under the *Wasson II* four-part test, only the first factor (mandatory vs. discretionary) leans towards proprietary. As a result, the city maintains immunity unless waived. Section 271.152 of the Local Government Code "waives" the city's immunity, but that waiver is limited by the provisions found in other portions of the law. Local Government Code Section 271.153 limits damages, not remedies. Damages equate to money and specific performance equates to equitable remedies. Since the waiver is not limited by Section 271.153 on the subject of specific performance, such relief is a remedy encompassed within the waiver.*

Employment: *Hillman v. Nueces Cty.*, No. 17-0588, 2019 WL 1231341 (Tex. Mar. 15, 2019). This is an employment related suit where the Texas Supreme Court held the county was immune from a suit brought by a former assistant district attorney.

Hillman, a former assistant district attorney, filed suit alleging that the county wrongfully terminated his employment because he allegedly refused his supervisor's order to withhold exculpatory evidence from a criminal defendant charged with intoxicated assault. Specifically, a witness statement noting the defendant was not intoxicated at the time of the assault. Hillman was terminated for failing to follow instructions, presumably related to the disclosure. Hillman sued. The trial court dismissed the case and the court of appeals affirmed. Hillman filed the petition for review.

Hillman essentially brings a *Sabine Pilot* cause of action, which allows suit against an employer for terminating an employee who refused to perform an illegal act. However, historically, sovereign/governmental immunity is not waived for a *Sabine Pilot* cause of action. The court declined to abrogate or clarify the lack of waiver. Alternatively, Hillman asserted immunity was waived under the Michael Morton Act (2017 legislative changes to Texas Code of Criminal Procedure § 39.14(h) on criminal discovery and disclosure). However, the Act does not address governmental immunity. It serves obvious purposes separate and apart from any wrongful-termination issues. Finally, Hillman requested the court abrogate the immunity doctrine. The court held that having existed for more than 600 years, the governmental-immunity doctrine is "an established principle of jurisprudence in all civilized nations." Although courts defer to the legislature to waive immunity, the judicial branch retains the authority and responsibility to determine whether immunity exists in the first place, and to define its scope. To hold that governmental immunity does not apply to *Sabine Pilot* claims, the court would have to trespass across the boundary between defining immunity's scope (a judicial task) and waiving it (a legislative task). It declined to do so.

The concurring opinion agreed with the majority opinion, but Justice Guzman wrote separately to emphasize, to the legislature, more is required if the purposes behind the Michael Morton Act are to have a full impact. But she agreed such additional actions must come from the legislature.*

Contracts: *Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc.*, No. 17-0660, 2018 WL 7572497 (Tex. March 8, 2019). The Texas Supreme Court holds type B economic development corporations are not entitled to governmental immunity in breach of contract cases.

Rosenberg Development Corporation (RDC) is a type B economic development corporation created by the City of Rosenberg. RDC executed a contract with Imperial Performing Arts, Inc. (Imperial), a nonprofit organization for performance and visual art activities, including reopening a local arts center and theater. However, the reopening and renovations exceeded the agreed amounts more than ten fold. RDC and Imperial filed suit and counterclaims. The immunity issue addressed the breach of contract claims. RDC filed a plea to the jurisdiction, which was denied as to Imperial's contract claim, and was affirmed by the court of appeals. RDC filed for discretionary review.

The threshold issue for the court was whether RDC—a city's statutorily authorized corporate creation—is immune from suit under the common law even though RDC is neither a sovereign entity nor a political subdivision of the state. The Development Corporation Act (Title 12, Subtitle C1, Texas Local Government Code) authorizes cities to create EDC corporations. The court analyzed the Act, its purpose, and its language. The court noted that for the purpose of interlocutory appeals, the RDC qualifies given the specific definition in the Texas Tort Claims Act. The court then noted the Development Corporation Act does not speak to governmental immunity directly, but in Section 505.106, the legislature declared that: (1) a Type B corporation is "not liable for damages arising from the performance of a governmental function of a Type B corporation or the authorizing municipality"; and (2) "[f]or purposes of Chapter 101, Civil Practice and Remedies Code, a Type B corporation is a governmental unit and the corporation's actions are governmental functions." Notably, however, an economic development corporation "is not a political subdivision or a political corporation for purposes of the laws of this state . . ."

and the legislature has forbidden cities from bestowing on the corporation any "attributes of sovereignty." As to the RDC's argument, it obtains statutory immunity from suit and liability, the court held "[b]ecause section 505.106 merely purports to limit the remedies available when economic development corporations perform governmental functions, we need not consider whether the Legislature can confer immunity by statute or only waive it." Where the governing statutory authority demonstrates legislative intent to grant an entity the "nature, purposes, and powers" of an "arm of the State government," that entity is a government unit unto itself and is entitled to assert immunity in its own right. The court analyzed cases where governmental self-insurance risk pools have been determined to be governmental entities and determined what is required to qualify as a governmental unit unto itself. While promoting and developing business enterprises and job training is a public purpose merely engaging in such an act does not, ipso facto, make the actor a governmental unit. The common-law rule of immunity is exclusively for the judiciary to define, and in doing so, the court does not just consider whether the entity performs governmental functions, but also the "nature and purposes of immunity." Granting immunity to an EDC is not necessary to satisfy the political, pecuniary, and pragmatic policies underlying the immunity doctrines. Further, the legislature simply did not grant these entities "powers of government" to perform essential governmental functions or activities. Also, since the Act already limits liability and damages exposure, the fiscal analysis used to determine if an entity is governmental is not applicable. Ultimately, the court held "that the Legislature did not authorize municipalities to create economic development corporations as distinct governmental entities entitled to assert immunity in their own right."

Chief Justice Hecht wrote separately only to point out the highly unusual features of a Type B economic development corporation. While he agreed an EDC is not a governmental unit by itself, an EDC is not liable for damages arising from the performance of its governmental functions for purposes of the Texas Tort Claims Act (TTCA). Since the TTCA only waives immunity, he opines an EDC has immunity from suit and liability for tort claims. In dicta, the Chief Justice noted that since an EDC's expenditures must be approved by its city, a judgment against an EDC in any circumstance may not be enforceable.*****

Employment Discrimination: *DeFrancesco v. Memorial Vills. Police Dep't*, No. 01-17-00660-CV, 2019 WL 1388006 (Tex. App.—Houston [1st Dist.] Mar. 28, 2019) (mem. op.). This is a race and age discrimination case. Memorial Villages Police Department (MVPD) terminated DeFrancesco, an officer. After MVPD terminated him, he brought a lawsuit alleging race and age discrimination. MVPD filed a plea to the jurisdiction and a motion for summary judgment, arguing that the trial court lacked subject-matter jurisdiction because he failed to state a viable retaliation claim.

DeFrancesco claimed MVPD officers harassed him because of his Hispanic heritage, but whether he has Hispanic heritage was in dispute. He identified as "white" while employed at the Houston Police Department (HPD) until HPD settled a lawsuit brought by and on behalf of African-American and Hispanic officers. After that lawsuit, he identified himself as "Hispanic" on an application for promotion to sergeant. Additionally, he has a history of voicing racially derogatory criticisms of Hispanic people on social media.

The record also showed that DeFrancesco had complained about his female supervisor, Rebecca Sosa, and another supervisor which resulted in complaints about DeFrancesco to MVPD. DeFrancesco received a written reprimand for those issues. DeFrancesco hired an attorney who notified MVPD of his complaints of age and race discrimination, but provided no facts. After that letter, DeFrancesco had additional disciplinary issues and was put on administrative leave. Another of DeFrancesco's attorneys provided a second letter with no details after he was put on administrative leave. Eventually, the police chief met with DeFrancesco, counseled him on the issues that had come up with his performance, and took him off administrative leave. DeFrancesco continued to have performance issues, which ultimately resulted in his termination.

The First Court of Appeals only reached the first issue, which was DeFrancesco's claim that the trial court improperly granted the plea to the jurisdiction on the grounds that DeFrancesco failed to allege a TCHRA violation. The court first found that the vague letters from DeFrancesco's attorneys, which did not provide details of the alleged discrimination, did not give rise to a protected activity. Further, the court did not find any protected activity when DeFrancesco complained to two supervisors about the behavior of others because he did not base the others' actions on his race or age, but instead on DeFrancesco's perception that others were jealous or intimidated by him because he had better credentials, experience, and education. His conversations did not indicate he believed he was being mistreated because of his race or age.

Because the evidence conclusively demonstrated that DeFrancesco did not engage in a protected activity, the appellate court found that DeFrancesco did not state a claim for discrimination and that the trial court properly granted MVPD's plea to the jurisdiction and motion for summary judgment.

Texas Tort Claims Act: *City of Houston v. Hussein*, No. 01-18-00683-CV, 2019 WL 1246417 (Tex. App.—Houston [1st Dist.] Mar. 19, 2019) (mem. op.). This is a Texas Tort Claims Act (TTCA) case where the City of Houston claimed it was entitled to immunity for rendering emergency services. The First Court of Appeals determined that the emergency response exception to the TTCA did not apply. Therefore, the city did not retain sovereign immunity.

Obeid's daughter called 911 after Obeid complained of chest pains and thought she was having a heart attack. EMS responded and transported Obeid and her daughter to the hospital. While en route, Obeid requested to go to a different hospital to which she had previously been. When the ambulance driver exited the tollway to take Obeid to her requested hospital, he exited through a "cars only" lane. The bottom of the ambulance struck the tollbooth lane, causing injuries to Obeid and her daughter. Obeid and her daughter brought suit against the city alleging negligence and respondeat superior. The city filed a summary judgment motion based on the emergency response exception.

The First Court of Appeals determined that the driver was responding to an emergency situation because Obeid was experiencing a life-threatening situation, required transportation to a hospital as quickly as possible, and believed she needed urgent medical assistance. However, the court determined there was a fact issue because the ambulance did not use lights and sirens for the transport to the hospital and the ambulance driver changed routes to go to a different hospital. Further, the police report did not check the box in the crash report indicating the ambulance was

"on emergency." Therefore, the evidence presented a fact issue as to whether the ambulance was still responding to an emergency while transporting Obeid to the hospital.

The court also determined that the facts alleged did not present a health care liability claim requiring an expert report. The appellate court affirmed the trial court's denial of summary judgment.

Texas Citizens Participation Act: *Weber v. Fernandez*, No. 02-18-00275-CV, 2019 WL 1395796 (Tex. App.—Fort Worth Mar. 28, 2019) (mem. op.). The Second Court of Appeals determined that the trial court should have granted the appellants' Texas Citizens Participation Act motion to dismiss in part.

The case involves a former city councilmember, Fernandez, and a current city councilmember. Fernandez was a former city councilmember who pleaded guilty to theft and resigned from city council. Fernandez then petitioned to recall a current councilmember, Janie Joplin. In the ensuing political issues for the recall, Weber, Elam, and Palmer (the defendants) all made comments about Fernandez, including saying he was a "convicted criminal," "convicted robber," and "known thief," among others.

The Second Court of Appeals initially determined the statements were made in connection with a matter of public concern because they were made during a political contest (the recall). The court also determined that Fernandez was still a public figure because he was a former councilmember, had only resigned less than one year before at the time the allegedly defamatory statements were made, and was involved in the political campaign to recall Joplin. Because of his status as a public figure, he had to show that the defamatory statements were made with actual malice.

The court found some of the statements to be false (like the statements about robbery), but found that Fernandez had failed to establish that the defendants made the statements with knowledge that the statements were false or with reckless disregard of whether they were true or not. The only evidence Fernandez put forward to show actual malice was that the defendants did not take the statements down for at least one month after they had been served with a cease-and-desist letter. The court determined that evidence was insufficient to establish malice. The court also reasoned although the statements regarding robbery were not substantially true, the legal distinctions between robbery and theft are likely too technical to be known by reasonable people of ordinary intelligence. Because of this, Fernandez needed, and failed, to show that the defendants actually knew the difference between the two offenses and still alleged he had committed robbery. The court also noted that failure to investigate fully, without more, is not evidence of actual malice. The court reversed the trial court's denial of the defendants' motion to dismiss.

The Second Court of Appeals also analyzed Fernandez's conspiracy claims although it was not addressed in the defendants' motion or brief and determined that it required dismissal because it alleged that the defendants engaged in a conspiracy to defame him.

Finally, the court noted that the defendants did not address Fernandez's claims for intentional infliction of emotional distress. Although Fernandez's allegations were not particularly detailed,

the court affirmed the trial court's denial of the motion to dismiss because the allegations involved actions independent of the defamatory conduct.

Contracts: *Haltom City Econ. Dev. Corp. v. Flynn*, No. 02-18-00145-CV, 2019 WL 1284906 (Tex. App.—Fort Worth Mar. 21, 2019) (mem. op.). This is a breach of contract case where the Fort Worth Court of appeals upheld the denial of an economic development corporation's plea to the jurisdiction.

Haltom City Economic Development Corporation (HCEDC) and Flynn entered into a contract for services. When Flynn believed the HCEDC did not properly pay the amounts owed under the contract, he sued. The HCEDC filed a plea to the jurisdiction, which was denied. The HCEDC appealed.

The HCEDC is a Type B economic development corporation (EDC). Section 505.106(b) of the Texas Local Government Code provides that for purposes of the Texas Tort Claims Act, a Type B EDC "is a governmental unit and the corporation's actions are governmental functions." Section 505.106(a) provides that EDCs "are not liable for damages arising from the performance of a governmental function of a Type B [EDC] or the authorizing municipality." The Local Government Code specifically prohibits a city from "delegate[ing] to [an EDC] any of the [city's] attributes of sovereignty, including the power to tax, the power of eminent domain, and the police power." TEX. LOC. GOV'T CODE § 501.010. The statute specifies that an EDC "is not a political subdivision . . . for purposes of the laws of this state." *Id.* § 501.055(b). Citing to *Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc*. (summary found above), the court held that EDCs "are not governmental entities in their own right and therefore are not entitled to governmental immunity." Essentially, they may only get liability protection in relation to tort claims, not contract claims. As a result, the plea was properly denied.*****

Governmental Immunity: *Holms v. West Travis Cty. Pub. Util. Agency*, No. 03-17-00584-CV, 2019 WL 1141870 (Tex. App.—Austin Mar. 13, 2019) (mem. op.). This case involves a claim of waiver of governmental immunity against West Travis County Public Utility Agency ("WTCPUA"), a public utility agency that provides retail water service.

After receiving normal water bills for over a year, Holms' water bill increased to $401.63 and remained higher than normal for several months. He contacted WTCPUA to inquire about those bills but nevertheless paid them. After making several billing inquiries, WTCPUA's general manager visited Holms' residence, examined the water meter, and replaced it with a new one. Holms asserted that thereafter the bills returned to normal, but WTCPUA refused to issue him a credit for the alleged over-billing. Holmes initially complained to the Public Utility Commission (PUC), but the PUC determined that it lacked jurisdiction over WTCPUA. Thereafter, Holmes sued WTCPUA and the general manager for breach of contract, tort, and deceptive trade practices, seeking monetary damages, including a refund for over-payments made due to excessive water bills.

WTCPUA filed a plea to the jurisdiction asserting governmental immunity. The court granted the plea and dismissed Holmes' claims with prejudice. Subsequently, Holms filed a motion for reconsideration and for a new trial, and amended his pleadings, without leave of the court, adding additional claims. He also filed an interlocutory appeal arguing that the county court at

law erred in granting the plea to the jurisdiction and dismissing his claims because: (1) WTCPUA is not a governmental entity entitled to immunity; (2) WTCPUA's enabling statute is silent as to immunity and thus immunity is waived; (3) various statutory waivers of immunity apply to WTCPUA; (4) WTCPUA is being sued for "proprietary" functions to which immunity does not apply; (5) WTCPUA is permitted to sue its customers, and therefore, customers should be permitted to sue WTCPUA; and (6) dismissing his claims violates his due-process and equal protection rights. Holms also asserted that trial court erred in dismissing his claims with prejudice without allowing him an opportunity to amend to cure any jurisdictional defect in his pleadings.

The court first addressed whether governmental immunity was waived. The court found that, as a public utility agency, WTCPUA is a political subdivision, and, therefore, is immune from suit absent a clear and unambiguous legislative waiver of immunity. The court also rejected Holms' argument that governmental immunity does not apply because WTCPUA's enabling legislation is silent as to immunity. The court also found that the Texas Tort Claims Act, the Local Government Contract Claims Act, and the Uniform Declaratory Judgment Act were inapplicable to Holms' claims. Additionally, the court determined that the provision of water services is expressly classified as a governmental function, and not a proprietary one. Further, the court found that WTCPUA had not waived its immunity from suit because it had not joined into the litigation process by asserting its own affirmative claims for monetary relief. Finally, the court found that Texas and federal courts have held that governmental immunity violates neither due process nor equal protection.

The court then addressed whether the trial court erred in dismissing Holms' claims with prejudice without allowing him to amend his pleadings to cure any jurisdictional defect. Generally, a plaintiff is entitled to amend his pleadings before his claims are dismissed with prejudice, except where the pleadings are incurably defective with respect to jurisdiction. The court concluded that none of the bases Holms had offered to support a waiver of immunity conferred jurisdiction on the facts alleged. Accordingly, the court affirmed the trial court's order.

Workers' Compensation Retaliation: *Ellis v. Dallas Area Rapid Transit*, No. 05-18-00521-CV, 2019 WL 1146711 (Tex. App.—Dallas March 13, 2019) (mem. op.). This is a case involving the interpretation of legislative enactments regarding the governmental immunity doctrine and the anti-retaliation provision of the Texas Workers' Compensation Act (Act).

Ellis, a former bus driver, filed suit against his former employer, the Dallas Area Rapid Transit (DART), alleging workers' compensation retaliation. He asserted that after he sustained an on-the-job injury, DART harassed, discriminated against, and fired him because he filed, in good faith, a worker's compensation claim, hired a lawyer to represent him in his claim, and instituted or cause to be instituted an employment retaliation proceeding under Chapter 451 of the Labor Code. DART filed a plea to the jurisdiction against Ellis' Chapter 451 retaliation claim, asserting governmental immunity. Following a hearing, the trial court granted the plea and dismissed the retaliation claim. Ellis appealed.

The court first looked at the legislative history of the interplay between governmental immunity and workers' compensation retaliation. In 1995, the Texas Supreme Court concluded that a

political subdivision's immunity from workers' compensation retaliation claims had been clearly and unambiguously waived by Chapter 504 of the Labor Code, which made Chapter 451 applicable to political subdivisions. Critical to the court's determination was a provision in the 1989 and 1993 versions of the Public Subdivisions Law that required an employee to elect between an action for workers' compensation retaliation and a claim under the Whistleblower Act. The court concluded that if the legislature had not intended a waiver of immunity, it would not have required an employee to elect between an action barred by immunity and one not barred. A decade later, the legislature amended Chapter 504 providing that nothing in the chapter waives sovereign immunity or creates a new cause of action. As a result, the Texas Supreme Court concluded that there was no longer a clear and unambiguous waiver of immunity to effectuate a waiver. Effective September 1, 2017, after Ellis filed his lawsuit, Chapter 504 was again amended to provide damage limitations on the liability of political subdivisions for workers' compensation retaliation claims brought by their employees. At the same time, Chapter 451 was amended to expressly allow first responders to seek relief under the chapter and in such instances sovereign and governmental immunity was waived and abolished to the extent of liability created by the chapter.

Applying the legislative enactments to Ellis's workers' compensation retaliation claim, the court concluded that the 2017 legislative amendments to Chapters 504 and 451 did not clearly and unambiguously waive governmental immunity for Ellis' claim. Accordingly, the district court's order granting the plea and dismissing the case was affirmed.

Substandard Building: *Harker Heights Condos., LLC v. City of Harker Heights*, No. 13-17-00234-CV, 2019 WL 1388739 (Tex. App.—Corpus Christi Mar. 28, 2019) (mem. op.). In this case the Thirteenth Court of Appeals affirmed the granting of the City of Harker Heights' plea to the jurisdiction dismissing a claim for injunctive relief to prevent the demolition of a building.

Harker Heights Condominiums, LLC (HHC) owns property on which thirty-three condominium units sit and that are leased to low income residents in need of housing. The city inspected the property, found defects, and ordered repair. The inspector found substandard conditions rising to such a level as to pose substantial danger to life, health and property. The city's building and standards commission ordered certain properties be repaired within ninety days or be demolished. HHC was able to bring one unit up to code, but was not able to timely repair the remaining units. After the city awarded a demolition contract, HHC sued to prevent destruction of the units. An initial temporary injunction was granted. After HHC added a claim for violating the Texas Open Meetings Act (TOMA) the city filed a plea to the jurisdiction which was granted. HHC appealed.

Texas law permits cities to establish commissions to consider violations of ordinances related to public safety. The Local Government Code provides for judicial review of any decision of a building and standards commission panel, but the "district court's review shall be limited to a hearing under the substantial evidence rule." To appeal an order of a building and standards commission, an aggrieved party must file a verified petition in district court within thirty days of the commission's order. HHC waited eighty days. HHC asserted the "decision" was actually the city council decision to award the demolition contract, not the commission's decision. However, the city's award was merely the granting of a contract, not an order outlined in Chapter 214 of

the Local Government Code. The court noted that even if the HHC injunctive relief were interpreted to be a proper petition for review under Chapter 214, it was nonetheless untimely. This untimely filing also means HHC's TOMA suit is untimely as holding otherwise would subject the commission order to impermissible collateral attack. The plea was properly granted.

March 2019

Note: Included cases are from February 11 through March 10, 2019.

Pension Plan: *Eddington v. Dallas Police & Fire Pension Sys.*, No. 17-0058, 2019 WL 1090799 (Tex. Mar. 8, 2019). This is a statutory construction case where the Texas Supreme Court held the City of Dallas's amendment to its pension plan did not violate the Texas Constitution.

Article XVI, Section 66 of the Texas Constitution prohibits the reduction of benefits in certain local public retirement plans. The Dallas Police and Fire Pension System (System) amended its pension plan to reduce the interest rate paid on Deferred Retirement Option Plan (DROP) accounts. After a member is eligible for retirement, the member can choose to continue working and draw a higher monthly annuity when he or she leaves active service. However, a member's annuity is fixed at retirement age and does not increase with continued service. In effect, members working past retirement eligibility can choose between a higher annuity on leaving active service, or a lower annuity plus a forced savings account. The petitioners sued asserting the amendments to the changed interest rate was unconstitutional. The trial court and appellate court denied petitioner's relief.

After analyzing the text of Section 66 and the uncontested facts asserted, the Texas Supreme Court held lowering the interest rate that as-yet unearned DROP payments will bear does not affect a benefit accrued or granted to employees. Interest already credited to DROP accounts is not impacted. The reduction in DROP account interest is *prospective only*. Section 66(d) protects only "accrued" benefits. Accrued benefits have been earned by service, not by future service.

Finally, the Court held the trial court did not err in excluding the legislative history evidence submitted and the fiscal notes of the Legislative Budget Board. The Court reasoned that while the judiciary can consider such information, those are construction aides. Courts should rely heavily on the literal text, and the text of Section 66 is plain as it affects the parties, so the trial court did not err.*****

Attorney-Client Privilege: *In re City of Dickinson*, No. 17-0020, 2019 WL 638555 (Tex. Feb. 15, 2019). This is a mandamus action of primary interest to litigators where the Texas Supreme Court held the attorney–client privilege protects expert testimony when the client is also the expert.

The City of Dickinson purchased a commercial windstorm policy from the Texas Windstorm Insurance Association (TWIA). In the underlying litigation, the city alleges that TWIA has not paid all it owes under the policy and sued. In the motion for summary judgment TWIA included

the affidavit of its corporate representative and senior claims examiner, Paul Strickland. Strickland's affidavit provided both factual and expert opinion testimony on TWIA's behalf. Strickland's affidavit had been revised in a series of emails between Strickland and TWIA's counsel and the city sought the drafts in discovery. TWIA asserted the communications were privileged while the city asserted, as a testifying expert, the communications were not privileged. The trial court ordered TWIA to produce the communications. The court of appeals conditionally granted a writ of mandamus. The Texas Supreme Court heard the mandamus filed by the city.

TWIA responds that the expert disclosure rules do not override the attorney–client privilege and do not require a party to choose between defending itself and maintaining its privileges. It asserted the attorney–client privilege is substantively distinct from the work-product doctrine. There was no dispute the communications at issue were encompassed within the attorney–client privilege. The Court declined to create any new privileges in the opinion and confined its analysis to the rules of discovery already in place. Because the discovery rules are part of a cohesive whole, the Court considered them in context rather than as isolated provisions. While Texas Rule of Civil Procedure 192.3 states a party may discover expert information, it does not expressly permit discovery when the information is protected by the attorney–client privilege. In fact, Rule 192.3(a) expressly contains the phrase "absent some specific provision otherwise" which the Court interpreted to include the attorney–client privilege. Further, Rule 194.2 permits a party to seek a disclosure on expert information, but such disclosure is permissive, not mandatory, and is subject to privileged communications. Additionally, the official comments to Rule 194 explain that a responding party may assert any privilege to a Rule 194.2 request except work-product. The city's supporting cases were largely based in the work-product privilege, not the attorney–client privilege. As a result, they are inapplicable. The Court reemphasized some of its more recent opinions holding the attorney–client privilege is "quintessentially imperative" to our legal system. A lawyer's candid advice and counseling is no less important when a client also testifies as an expert. As a result, it upheld the mandamus and allowed TWIA to withhold the communications.*****

Texas Tort Clams Act: *City of Forest Hill v. Cheesbro*, No. 02-18-00289-CV, 2019 WL 984170 (Tex. App.—Fort Worth Feb. 28, 2019.) (mem. op.). This is Texas Tort Claims Act case primarily of interest to litigators. The Second Court of Appeals determined that only the City of Forest Hill's plea to the jurisdiction on the pleadings should have been granted, but that Cheesbro should be granted leave to amend.

Cheesbro claimed he was driving his motorcycle on one of the city's streets when "his tire caught in a defect on the road[,] which caused him to lose control . . . and crash." Cheesbro suffered injuries and sued the city for damages, asserting a negligence claim. Without specifying what the "defect" was, he pleaded on "information and belief" that before the crash, the city was aware of the defect and the danger it caused and did not warn motorists of the danger. The city filed a plea to the jurisdiction based on the petition, claiming that Cheesbro: (1) had not described facts to establish the existence or nature of a defect, but had only asserted the defect in a conclusory fashion; and (2) had not described facts supporting his claim that the city knew or should have known of the defect. The trial court denied the city's plea and the city appealed.

The Second Court of Appeals determined that Cheesbro had not provided enough facts in the petition to waive the city's sovereign immunity. The Court noted that Cheesbro had not pled facts to allow the city to determine if it was being sued for a premises defect or a special defect. The difference between the two determines the duty the city would owe Cheesbro between that of an invitee or a licensee.

Although the court found that the petition did not allege sufficient facts to waive the city's sovereign immunity, it held that the petition did not demonstrate an incurable jurisdictional defect. Therefore, it remanded the case to the trial court to afford Cheesbro an opportunity to amend the pleadings.

Employment Discrimination: *Lund v. Texas Health & Human Servs. Comm'n*, No. 04-17-00625-CV, 2019 WL 1049347 (Tex. App.—San Antonio Mar. 6, 2019) (mem. op.). This is an employment discrimination and retaliation case in which the court of appeals affirmed the trial court's decision in favor of the Texas Health and Human Services Commission (commission).

On April 30, 2015, Deborah Lund, an employee of the commission, filed an internal complaint alleging that she was not selected, after applying, for a certain position that was posted in April 2015, as a result of disability discrimination and retaliation for filing previous complaints against the commission. She identified the protected activity underlying her retaliation claim as an Equal Employment Opportunity Commission (EEOC) charge she had filed in 2010. On June 26, 2015, she filed a similar charge of discrimination and retaliation with the EEOC, complaining of the commission's failure to hire her for a position that was posted in February 2015, and for the April 2015 position. In this charge, she identified the protected activity underlying her retaliation claim as EEOC charges she had filed in 2009 and 2010. She further alleged that the commission learned about her disability in March 2013.

Meanwhile, on June 3, 2015, Lund's mother reported to the commission her belief that Lund had improperly certified her own daughter for Medicaid pregnancy benefits and that Lund was improperly using a Lone Star Card issued to her nephew. An internal investigation revealed that Lund had accessed her daughters' commission records in 2013 and performed 22 actions while logged into those records, and that she had used her nephew's card to make purchases at a store. Lund learned of the internal investigation on August 10, 2015, when an investigator called to ask her to meet with him to discuss the allegations. Lund told him that she was on medical leave and could not meet with him at the office, and later informed him that she had an attorney and the investigator could discuss the matter with her attorney. Lund never met with the investigator. On August 14, 2015, Lund submitted a Family Medical Leave Act (FMLA) certification to the commission, which noted that she suffered from severe depression, bipolar depression, and anxiety, and that she was considered a suicide risk until better control of her symptoms were obtained. On September 25, 2015, Lund's supervisor sent her formal written notice of the internal investigation allegations against her and asked her to provide any information in defense or mitigation of the allegation by September 30, 2015. Lund did not provide a written response, but she stated she spoke with her supervisor by telephone instead, and denied committing any violations. On October 2, 2015, Lund was terminated for violating policy by accessing her daughter's case without a valid business reason and using her nephew's card without authorization. Four days later, Lund filed an additional charge with the EEOC alleging disability

discrimination and retaliation based on "being forced to disclose her disability and forced to complete paperwork for FMLA" and having her terminated for employee misconduct. The EEOC filed a dismissal and notice of claim stating that it was unable to conclude, after investigation, that there were any statutory violations. Lund filed suit, and the commission filed a plea to the jurisdiction asserting sovereign immunity. The trial court granted the plea and dismissed Lund's claims. This appeal followed.

The appellate court first looked at whether Lund had stated a claim for conduct that violates the Texas Commission on Human Rights Act such that the claim waives immunity from suit. The court applied the McDonnell Douglas burden-shifting framework to determine whether Lund had raised a fact issue regarding waiver of immunity. The court determined that the commission produced evidence of legitimate nondiscriminatory reasons for not hiring Lund for the February and April positions, and for terminating her employment. The court concluded that Lund failed to sustain her burden of producing evidence beyond her own subjective belief that those stated reasons were false and were a pretext for discrimination or retaliation. As such, the court affirmed the trial court's order granting the commission's plea to the jurisdiction and dismissing Lund's claims for lack of subject matter jurisdiction.

Breach of Contract: *Primestar Constr., Inc. v. City of Dallas*, No. 05-17-01447-CV, 2019 WL 1033978 (Tex. App.—Dallas Mar. 5, 2019) (mem. op.). This is a breach of contract case in which the court of appeals affirmed the trial court's order upholding the City of Dallas's plea to the jurisdiction.

The city awarded Primestar Construction, Inc. (Primestar) a contract to renovate and expand a recreational center. The contract provided that the work would be completed in 200 days for a total sum of approximately $1.3 million. Travelers Casualty and Surety Company of America (Travelers) issued performance and payment bonds for the project after entering into an indemnity agreement with Primestar. Under the indemnity agreement, Primestar agreed to indemnify Traveler's against losses related to Primestar's contract with the city and gave Primestar sole discretion to pay or settle claims on the bond. The city subsequently terminated the contract with Primestar for cause and demanded that Travelers complete the project. Traveler's completed the project and the city paid Travelers the remaining amounts due under the contract with Primestar. Travelers subsequently brought suit against Primestar in federal district court seeking to recover its losses under the bonds and obtain judgement against Primestar. Primestar then filed a suit against the city alleging that the city wrongfully terminated the contract.

The city filed a plea to the jurisdiction on two grounds: (1) Primestar's lack of standing; and (2) the city's immunity from suit and liability. The city also filed a plea of res judicata and collateral estoppel and a motion to dismiss for failure to file a certificate of merit. Primestar asserted that the city had waived its immunity by entering into the contract under Section 271.152 of the Local Government Code. The trial court granted the plea to the jurisdiction, the pleas of res judicata and collateral estoppel, and the motion to dismiss. Subsequently, the trial court denied Primestar's motion to modify the judgement and motion for new trial and its request for findings of fact and conclusions of law.

Primestar appealed arguing that: (1) the city's immunity had been waived by statute; (2) the doctrines of res judicata and collateral estoppel do not apply to preclude its claims against the city; (3) Primestar had standing to pursue its cause of action for breach of contract; (4) Primestar was not required to file a certificate of merit to pursue claims against the city; and (5) the trial court erred by not entering findings of fact and conclusions of law when Primestar properly request the court to do so.

The court concluded that because Primestar assigned its "rights, title and interest" in its contract with the city to Travelers, Primestar lacked standing to sue the city. Additionally, the court found that Primestar did not raise a fact issue that it had standing to assert a claim for which the city's immunity was waived under Section 271.153 of the Local Government Code. With respect to the claim for findings of fact and conclusions of law, Civil Procedure Rule 296 provides that in any case tried in district court without a jury, a party may request the court to state in writing its findings of fact and conclusions of law. However, a trial court's refusal to make findings and conclusions upon proper request is presumed reversible error unless the record affirmatively shows that the requesting party suffered no harm. The court determined that Primestar had not pointed out and the court did not see how the trial court's failure to make findings and conclusions of law caused Primestar to guess at the basis for the court's rulings or prevented it from properly presenting its case to the court. As such the trial did not err in not entering findings of fact and conclusions of law. Accordingly, the court affirmed the trial court's order dismissing the case for want of jurisdiction.

Premises Defect Liability: *City of Richardson v. Slaver*, No. 05-18-00562-CV, 2019 WL 967333 (Tex. App.—Dallas Feb. 28, 2019) (mem. op.). This is a personal injury case in which the court of appeals reversed the trial court's order denying the City of Richardson's plea to the jurisdiction.

Deborah Slaver filed suit against the city alleging that she fell and sustained injuries as a result of stepping on a water meter cover, located on private parking lot, that gave way and flipped open under her. She further alleged that the city, acting through one or more of its employees, agents, and/or servants, removed the cover to read the meter in the hole beneath the cover or for some other reason, and failed to secure the cover, creating an unreasonable risk of harm. Based on these allegations, Slaver asserted claims of negligence and premises liability. The city responded with a plea to the jurisdiction asserting that the basis of the suit did not occur on premises owned by the city, and the city's immunity under the Texas Tort Claims Act was not waived because the city did not have actual knowledge of any condition that presented an unreasonable risk of harm. After conducting a hearing, the district court denied the city's plea. This appealed followed.

The court first looked at whether the claim was based on a premises defect or on the condition or use of real property. The court determined that although the water meter was in the ground under the level of the parking lot and the water meter cover was separate from the water meter and could be removed, this was a premises defect case because the allegedly defective property was affixed to the land or other property regardless of whether the water meter cover could be removed.

Next, the court looked at whether the city had actual knowledge of the premises defect. The city submitted evidence to show that, one week before Slaver's accident, the water meter cover was properly in place and there were no reports to the city of any safety issues concerning the meter. The evidence further showed that the cover was stable when properly in place and was not moved by the city employee who read the meter. In contrast, Slaver did not submit any evidence to show that the city had actual knowledge that the meter cover was unstable or had been moved. As a result, Slaver failed to raise a fact issue regarding the city's lack of knowledge of the alleged premises defect that caused her accident. Accordingly, the court held that the city demonstrated its immunity was not waived, and reversed the trial court's order denying the city's plea and dismissed Slaver's claims against the city for lack of jurisdiction.

Texas Tort Claims Act: *Running v. City of Athens*, No. 12-18-00047-CV, 2019 WL 625972 (Tex. App.—Tyler Feb. 14, 2019) (mem. op.). Peter Running filed negligence, state and federal inverse condemnation, and Texas Water Code violation claims against the City of Athens, alleging that the city caused water to overflow from its water treatment plan, which flooded Running's home. The trial court denied the city's plea to the jurisdiction as to Running's negligence claim and state and federal inverse condemnation claims. The city appealed.

On appeal, the city claimed that Running failed to establish the Texas Tort Claims Act (TTCA) requirement that his claim arose from the use or operation of motor-driven equipment. The court held that while motor-driven pumps do constitute "motor-driven equipment," in this case the use or operation of the high service pumps merely furnished the condition that allowed the backflow to occur. The defective, non-motorized mechanical valve was the actual cause of the overflow, not the motor-driven high service pumps, which was insufficient to establish a waiver under the TTCA.

The city also claimed that the trial court erred because Running failed to raise a viable inverse condemnation claim under the Texas Constitution. In an inverse condemnation suit under the Texas Constitution, the plaintiff must prove that the government intentionally performed certain acts. Because Running's claim centers upon the city's negligence in failing to prevent overflow from its water treatment plant, the requisite intent was not present and the claim cannot be a viable inverse condemnation claim. Further, Running's federal takings claim was subsumed into his nonviable state inverse condemnation claim.

The court reversed the trial court's order denying the city's plea to the jurisdiction and dismissed Running's suit against the city for lack of subject matter jurisdiction.

Certificate of Convenience and Necessity: *City of Palmview v. Agua Special Util. Dist.*, No. 13-18-00416-CV, 2019 WL 1066423 (Tex. App.—Corpus Christi Mar. 7, 2019) (mem. op.). The City of Palmview filed suit seeking a writ of mandamus against the Agua Special Utility District (Agua SUD) to permit the city to construct wastewater lines and facilities related to prospective businesses in an area of the city covered by Agua SUD's certificate of convenience and necessity (CCN). Agua SUD filed a counterclaim in which it sought a permanent injunction prohibiting the city from constructing those utilities. The trial court granted Agua SUD's request for an injunction and stated that the city acted in violation of the Texas Water Code. The city appealed.

On appeal, the court first addressed the city's argument that the trial court lacked subject matter jurisdiction because Agua SUD failed to plead a waiver of the city's governmental immunity. A governmental entity does not have immunity from suit for claims against it that are germane to, connected with, and properly defensive to affirmative claims made by the entity, to the extent that the claims against the entity offset the entity's own claims. Because the city brought suit compelling Agua SUD to construct wastewater lines and facilities, and Agua SUD filed a counterclaim to the city's initial claim, the trial court did not lack subject matter jurisdiction over the controversy due to the doctrine of governmental immunity.

Next, the court addressed the city's argument that the trial court lacked subject matter jurisdiction because the Public Utility Commission (PUC) has exclusive jurisdiction over Agua SUD's counterclaim. Holding that the PUC did not have exclusive jurisdiction, the court referenced Water Code Section 13.042, which provides that the governing body of a city by ordinance may elect to have the PUC exercise exclusive original jurisdiction over the utility rates, operation, and services of utilities within the incorporated limits of the city. The city did not present any evidence that it adopted an ordinance electing for the PUC to have exclusive original jurisdiction. Accordingly, the court held that the PUC did not have exclusive jurisdiction to issue the injunction in dispute.

The city also contended that the trial court abused its discretion when it granted Agua SUD's request for a temporary injunction, as Agua SUD did not establish that it would suffer a probable, imminent, and irreparable injury. According to the court, there was evidence that because the wastewater lines and facilities would be useless to Agua SUD, and because the city had already begun construction and intended to continue with the construction, that there was evidence that the harm was imminent. Evidence also existed that Agua SUD would suffer irreparable injury from the time and money it would take to maintain the lift station and main built by the city, because Agua SUD would be responsible for them as holder of the CCN. Finally, because at least some of the harm offered by Agua SUD could not be remedied with the recovery of money, the court held that Agua SUD lacked an adequate remedy at law.

The court concluded that the trial court did not abuse its discretion when it granted Agua SUD's injunction.

Contractual Immunity: *La Joya Indep. Sch. Dist. v. Trevino,* No. 13-17-00333-CV, 2019 WL 613272 (Tex. App.—Corpus Christi Feb. 14, 2019) (mem. op.). This is a breach of contract case where the Thirteenth Court of Appeals reversed the denial of the school district's plea to the jurisdiction and dismissed the case.

Pursuant to a written agreement between Trevino (an insurance agent/consultant) and La Joya Independent School District (LISD), Trevino would provide various services in connection with LISD's provision of health care benefits to its employees. After LISD terminated the contract, Trevino filed suit alleging that LISD terminated it without good cause and without providing an opportunity to cure. LISD filed a plea to the jurisdiction, which was denied. LISD appealed.

The court first noted that Trevino's argument the contract was proprietary is inapplicable because the proprietary/governmental dichotomy only applies to cities. Next, for a Texas Local Government Code Section 271.152 waiver of immunity to apply, a party must claim damages within the limitations of the chapter (i.e. balance due and owed). Trevino did not sue for non-payment of work actually performed, but for the benefit of the bargain in terms of lost profits. Trevino sought recovery of the fees and commissions he would have earned for future services rendered had the contract continued through the end of its term. Such damages are not permitted under Section 271.152 and no waiver of immunity therefore exists. Finally, Trevino amended his petition twice prior to the hearing on the plea, so had a reasonable opportunity to amend and correct any jurisdictional defects. No further opportunity is required.*

February 2019

Note: Included cases are from January 11, 2019 through February 10, 2019.

Election Contest: *Pressley v. Casar*, No. 17-0052, 2019 WL 321196 (Tex. Jan. 25, 2019). This is an election contest case for a city council seat where the losing party and her attorney were sanctioned for bringing a frivolous claim. The Texas Supreme Court reversed the award of sanctions and dismissed the case as currently moot.

Gregorio Casar and Laura Pressley finished first and second, respectively, in the 2014 City of Austin general election for the District 4 city council seat. Pressley filed a request for recount, which included a recount of the electronic voting system information. For the manual recount, the CVR file for each voter was printed and counted by hand. The manual recount found no discrepancies with the original canvass and confirmed the original results that Casar won. Pressley next filed an election contest, arguing that CVRs are not "ballot images" or "images of ballots cast," as the Election Code requires. She also asserted the election officials failed to allow her and the poll watchers the ability to observe the retrieving of the images from the machines. Casar filed traditional and no-evidence summary judgment motions and moved for Chapter 10 sanctions, which the trial court granted and the court of appeals affirmed.

The appellate court first noted Casar was reelected and began his second term in 2017. Because Pressley's petition for review was filed after the completion of Casar's contested term, the first issue the court decided was whether the election contest was moot. Casar argued the election contest was moot because no remedy exists to contest an expired term of office. The court agreed and found no exception to the mootness doctrine applied. However, even though the election contest provision was moot, the court still considered the sanctions holdings. Chapter 10 of the Civil Practice and Remedies Code permits sanctions for pleadings that are filed for an improper purpose or that lack legal or factual support. Pleaded claims must be warranted by existing law or a nonfrivolous argument to change existing law. The trial court sanctioned Pressley for three claims: (1) election irregularities, (2) criminal violation by election officials, and (3) voter disenfranchisement. After analyzing each, the court held at least some evidence exists to support the claims asserted. There was nothing frivolous about presenting a statistical analysis showing that the results were unlikely as persuasive support. Pressley's computer-science and data expert testified that he found at least nine corruption errors in the files, which constituted irregularities

and were also an indicator of potential corruption. The seals on the election machines were also broken. Pressley did not need to be right or produce enough evidence to prevail on her entire suit to avoid sanctions. Pressley's claims had some evidentiary support, which was enough to make them non-frivolous. The sanctions order was reversed and the remainder dismissed as moot.*

Dangerous Dog Appeal: *In re Pool*, No. 03-18-00299-CV, 2019 WL 287940 (Tex. App.—Austin Jan. 23, 2019) (mem. op.). This case stems from a writ of mandamus to compel a county court at law to vacate an order issued by the City of Austin Municipal Court denying a jury trial in a matter pertaining to a dangerous dog.

Pool owns a dog named Pepper who allegedly attacked a jogger named Hoffman. Following a hearing by an independent hearing examiner at which Pool and Hoffman provided sworn testimony, the examiner determined that Pepper was a "dangerous dog" under Section 822.041(2) of the Texas Health and Safety Code. Pool appealed the decision to the municipal court. The municipal judge, without a jury, held a hearing and confirmed Pepper was a dangerous dog. Pool appealed to the county court at law and requested a jury trial de novo. In response, the State of Texas argued that because the municipal court is a municipal court of record, Section 30.00014(b) of the Government Code prohibits a trial de novo. The court agreed and held that Pool was not entitled to a de novo review. Pool brought this mandamus action to compel a jury trial.

The court of appeals determined that this was an issue of statutory interpretation. Section 30.00014(b) of the Government Code provides that an appellate court shall determine each appeal from a municipal court of record conviction, and that such appeal may not be by trial de novo. However, under Section 822.0424(a) of the Health and Safety Code, a party to an appeal of a decision of a municipal court may appeal the decision and is entitled to a jury trial on request. In harmonizing these two sections, the court noted that in one of its prior decisions, it had concluded that a municipal court of record's dangerous dog determination was a civil judgment rather than a criminal conviction. Because the term "conviction" refers to a judicial decision in a criminal matter, while a "judgement" commonly refers to a judicial decision in a civil case, Section 30.00014(b) does not apply to an appeal of a dangerous dog determination from a municipal court of record. Accordingly, Pool was entitled to a jury trial upon request. The court further held, in a footnote, that even if the two statutes could not be harmonized, Section 822.0424 would still prevail as it is the most recent and specific statute.*

Breach of Contract: *Kempner Water Supply Corp. v. City of Lampasas*, No. 13-17-00047-CV, 2019 WL 386136 (Tex. App.—Corpus Christi Jan. 31, 2019) (mem. op.). This is a breach of contract case for water treatment where the Corpus Christi Court of Appeals held as a matter of law the City of Lampasas was entitled to damages in its breach of contract claim, but remanded the case for a determination on a damage amount.

The city sued appellant Kempner Water Supply Corporation (Kempner) for a breach of contract claim. The city assigned its raw water reservation right to a third-party named Central Texas in order for Central Texas to treat the water and deliver it to Kempner for final delivery. Kempner and the city have differing interpretations of the contract, which focused on the city's payments for water treatment performed by Central Texas and whether the contract intended to cover

payment for water treatments performed directly by Kempner. When the parties entered into the contract, Kempner did not have its own water treatment facility, but later built one. Kempner charged the city for water it treated as well as treatments performed by Central Texas which Kempner distributed. The trial court granted the city's motion for summary judgment and denied Kempner's. Kempner appealed.

After a lengthy contract construction analysis, the court held the contract states the city agreed to pay Kempner for costs Kempner incurred for water treated by Central Texas. It did not obligate the city to pay Kempner for water that Kempner treated. The city conclusively established Kempner breached the contract by charging it for Kempner-treated water. However, when analyzing damages, the court noted the record did not separate out the allowable damages. As a result, the case was remanded back to the trial court for a hearing on damages.*

Property Tax Collection: *Harris Cty. v. Falcon Hunter, LLC*, No. 14-18-00247-CV, 2019 WL 470400 (Tex. App.—Houston [14th Dist.] Feb. 7, 2019) (mem. op.). This is a delinquent tax case where the taxpayer company, Falcon Hunter, LLC. (Falcon), sued for a refund of penalties and interest paid. The Fourteenth Court of Appeals reversed the denial of the taxing entities' plea to the jurisdiction and dismissed the case.

After the taxing units sent the tax bill to an incorrect address, Falcon, failed to pay property taxes. When it discovered it was listed as delinquent, Falcon paid the taxes including penalties and interest. Three years later, Falcon applied for a refund of the penalties and interest, but did not seek a refund of any property taxes paid. When Falcon did not receive a response, it sued for the amount in penalties and interest, plus collection fees and attorney's fees. The taxing units filed a plea to the jurisdiction, which was denied. The taxing units appealed.

Taking Falcon's pleadings as true for purposes of the analysis, the Texas Tax Code Section 31.11(k) states that, after a request for refund has been denied, the taxpayer may file suit against the taxing unit in district court to compel the payment of the refund within 60 days. However, it applies when a tax bill is returned to the taxing unit by the post office under certain conditions. To secure the benefit, the taxpayer must submit a request for waiver of penalties and interest under the code. The request must be made before the 181st day after the delinquency date. Since Falcon waited almost three years, it did not timely request a waiver and did not exhaust its administrative remedies.
Section 31.11 waived immunity for a refund of "taxes." However, the legislature took care to clearly distinguish the terms "penalty" and "interest" from the term "tax." A taxpayer has three years to seek a refund of the tax. However, if a taxpayer wants penalties and interest on a delinquent tax waived, the taxpayer has, as relevant here, 180 days from the delinquency date to request the waiver in writing. Falcon sought a refund of penalties and interest, not the tax. As a result, no waiver of immunity exists for a refund of penalties and interest outside the 180-day limitation. The plea should have been granted.

January 2019

Note: Included cases are from December 11, 2018 through January 10, 2019.

Contractual Immunity: *Owens v. City of Tyler*, No. 17-0888, 2018 WL 6711522 (Tex. Dec. 21, 2018). The City of Tyler built Lake Tyler in 1946 and leased lakefront lots to residents in a manner very similar to that in *Wasson Interests, Ltd., v. City of Jacksonville*, 559 S.W.3d 142 (Tex. 2018). Tenants decided to build a new pier and boathouse extending from their lot onto the water. This caused neighboring tenants to object. The neighboring tenants sued the city after it issued a building permit. After the intermediate court of appeals issued an opinion, the Texas Supreme Court issued the most recent *Wasson* decision. As a result, the Supreme Court remanded the case back to the court of appeals in order analyze the case under the four-part *Wasson* test.*****

Unconstitutional Local Law: *City of Tyler v. Liberty Util. Corp*., No. 01-17-00745-CV, 2018 WL 6693563 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018). This is a declaratory judgment case where the First District Court of Appeals in Houston held a provision of the Texas Water Code unconstitutional.

Liberty Utilities Corporation (Liberty) provides retail sewer utility service in Smith County under a certificate of convenience and public necessity. The City of Tyler desired to provide sewer service in Liberty's service areas. State law prohibited the dual service in the area, so the city went to the legislature, which passed Section13.2475, Texas Water Code. This created an exception from the generally-applicable law allowing the city to provide sewer service within its boundaries, even in Liberty's service areas. Liberty then sued the city, successfully obtaining a declaratory judgment that Section13.2475 is unconstitutional. The city appealed.

In this 21-page opinion, the court analyzed the constitutional prohibition against local laws under Article III, Section 56 of the Texas Constitution. The court analyzed the legislative debate and the author's stated intended purpose. The court determined the section was bracketed and intended to address City of Tyler and regulated its affairs as a local law. The court further determined none of the constitutional exceptions from the prohibition applied. "The City of Tyler's legislative strategy to uniquely exempt itself from the operation of Water Code Section 13.247(a) was a violation of the Texas Constitution's default preference for laws of general applicability and general prohibition of local laws." As a result, it held Section13.2475 unconstitutional.*****

Public Information Act: *Leander Indep. Sch. Dist. v. Office of the Attorney Gen*., No. 03-18-00243-CV, 2018 WL 6581523 (Tex. App.—Austin Dec. 14, 2018) (mem. op.). This is a case where the Austin Court of Appeals affirms the trial court's judgment that certain employee-related investigation information is subject to public disclosure under the Public Information Act (PIA).

The school district received an open records request for policies, procedures, or logs of employee-related investigations. A responsive document prepared by Assistant Superintendent McSpadden listed the affected program, the category of complaint, date of complaint, status of investigation, complainant, employee against whom allegations were made, nature of the complaint, and comments regarding the investigation (document). The attorney general ruled that the complainants' identity could be withheld, but otherwise the document was subject to disclosure under the PIA. The school district sought a declaratory judgment that the remaining

information could also be withheld. The district court denied the school district's motion and rendered judgment that the information must be released. The school district appealed.

The school district argues the district court erred and that the document is excepted from disclosure as a matter of law under Texas Government Code Sections 552.111, 552.101, 552.103, and 552.107. Section 552.111 excepts an interagency or intraagency memo or letter that would not be available by law to a party in litigation with the entity (encompassing the common law deliberative process privilege and attorney work product privilege). The court concludes the document consists of purely factual and evaluative information used by McSpadden and is raw data upon which decisions can be made, but is not part of the decisional process and does not contain advice or opinions regarding policy matters. Moreover, the school district's evidence failed to show the document was of a nature to cause a reasonable person to conclude there was a substantial chance of litigation or that McSpadden actually believed there was a chance litigation would ensue. Thus, the document is not excepted from public disclosure under Section 552.111.

The school district argues that under 552.101, the constitutional and common law rights to privacy protect the document. The document includes complaints about workplace harassment and discrimination, employee romantic affairs, and CPS investigations. Noting a recent split among the federal courts as to whether there is a constitutional right to privacy regarding extramarital affairs between public employees, the appellate court concludes that the school district fails to identify a specific zone or zones of privacy for protection under the constitution. As to common law privacy, the record fails to show that the document involves matters relating to a person's private affairs; instead, the document relates to work conduct and job performance (the court notes that both the CPS investigation and romantic affair constituted the circumstances of the employees' resignation, which is generally a matter of legitimate concern to the public). The fact that some allegations were determined to be unfounded is of no consequence. The court holds the document is not excepted from public disclosure under 552.101.

Section 552.103 excepts information related to litigation of a civil or criminal nature if the litigation is pending or reasonably anticipated on the date of the open records request. The appellate court holds the record contains no concrete evidence that any litigation was reasonably anticipated at the time of the request; thus, the document is not excepted under 552.103.

Finally, the school district asserts the document is an attorney-client privileged communication and is excepted under 552.107, which provides an exception for information protected under Texas Rule of Evidence 503. McSpadden's affidavit indicates she may have used the document to consult with legal counsel, but did not assert it was created to transmit information to legal counsel or that it was communicated to counsel. Moreover, the record did not identify exactly which staff McSpadden shared the document with and whether those staff members constitute representatives such that the communication would be privileged, or that the communications were received by staff for the purpose of facilitating the rendition of legal services. The court holds that the document is not excepted under 552.107. The district court's judgment is affirmed.

F-5 Determination: *Stacks v. Burnet Cty. Sheriff's Office*, No. 03-17-00752-CV, 2018 WL 6519584 (Tex. App.—Austin Dec. 12, 2018). This is an appeal of a dishonorable discharge in an F-5 determination.

Patrick Stacks (Stacks) was terminated from his position as a deputy sheriff with the Burnet County Sheriff's Office (BCSO) for omitting crucial details from an offense report and probable cause affidavit that described his arrest of a suspect, which rendered both documents misleading. As required by law, BCSO reported the termination to the Texas Commission on Law Enforcement stating that Stack's had been dishonorably discharged. Stacks petitioned to correct the report to reflect an honorable or general discharge. BCSO argued that an honorable discharge was not appropriate because Stacks was fired for untruthfulness. Stacks did not dispute that he was terminated for omitting details from the offense report and affidavit he prepared but argued that the omissions did not amount to "untruthfulness." He argued that even though further information may have assisted those assigned to the suspect's case, "every single word" in both documents was true. An administrative law judge (ALJ) issued an order denying the petition. On appeal, the trial court affirmed the order. Stacks appealed the decision of the trial court.

The court reviewed the meaning of the term "untruthfulness" under the Occupations Code, and determined that a discharge for untruthfulness includes a discharge for omitting material information or facts that render a statement misleading or deceptive. The court concluded that the trial court did not err in affirming the ALJ's order that Stacks was not entitled to have the termination report changed.

Immunity: *City of San Antonio v. Rocha*, No. 04-18-00367-CV, 2018 WL 6517169 (Tex. App.—San Antonio Dec. 12, 2018) (mem. op.). This appeal stems from the trial court's decision denying a plea to the jurisdiction filed by the City of San Antonio in a motor-vehicle collision involving a city-owned police vehicle.

Gabriela Rocha (Rocha) filed a negligent suit against the city for damages she sustained after a vehicle she was driving was struck by a police vehicle. The city filed a plea to the jurisdiction asserting that the trial court lacked subject-matter jurisdiction over the suit because the city had not received formal or actual notice of Rocha's claims as required by statute. Rocha filed a response to the plea accompanied by evidence including an affidavit from her lawyer stating that he had sent a letter to the city advising of Rocha's claims just weeks after the collision occurred. The trial court denied the city's plea to the jurisdiction. The city appealed.

The Texas Tort Claims Act (TTCA) requires a plaintiff to provide written notice of a claim within 180 days in order to waive immunity. The TTCA also ratifies a city charter provision that requires notice of a claim. The city charter provided a 90-day window to provide a notice of a claim. The court first looked at whether the city had received formal notice within 90 days required under the City charter. Rocha's lawyer's affidavit noted that he "sent" the notice timely, but the plain language of the TTCA and city charter require the notice to have been "received" within the time period. As a result, the court determined that the city had not received formal notice.

The court then analyzed whether the city had actual notice. Rocha argued that the city was placed on reasonable notice by the investigation and the facts of the collision collected and researched on the day of the actual event. After examining the record, the court found nothing indicated that the city had actual notice of an injury or property damage until it was served with

the original petition almost two years after the collision. As a result, the court concluded that immunity was not waived. The court reversed the trial court's ruling, granted the city's plea to the jurisdiction, and dismissed Rocha's suit for lack of subject-matter jurisdiction.

Employment Discrimination: *Sanchez v. Texas A&M Univ.-San Antonio*, No. 04-17-00197-CV, 2018 WL 6517407 (Tex. App.—San Antonio, Dec. 12, 2018) (mem. op.). This appeal stems from the trial court's order dismissing a discrimination claim filed by Francisco Sanchez (Sanchez), a Texas A&M University employee.

Sanchez was serving as Assistant Vice President (AVP) for Enrollment Management when he was transferred to serve as project lead on a software implementation project that was expected to end in two years. Sanchez believed that he still held his AVP position or that the position would be held open for him until the end of the project. Before the date of the expiration of the project, the university posted a job opening for an AVP for Enrollment. Sanchez complained to his supervisor that the decision to post the job opening for an AVP was wrong and discriminatory. Sanchez applied for the position, but was never interviewed. Instead, in September 2013, Sanchez discovered the university had hired someone else. On May 1, 2014, Sanchez was informed that his current position would be eliminated and the university sought to terminate the position in accordance with its reduction-in-force (RIF) procedure. Sanchez was offered another position with a lower salary, which he accepted in protest. On September 29, 2014, Sanchez filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) complaining that the hiring of another employee for a position he had applied for and the elimination of his position were based on retaliation and his national origin. He received his right to sue letter from the EEOC on February 23, 2015. On April 14, 2015, Sanchez filed suit.

The university filed a plea to the jurisdiction, a motion for summary judgement and a no-evidence motion for summary judgement arguing that Sanchez failed to timely file his EEOC charge and failed to timely bring suit. The university also challenged elements of Sanchez's employment claims and argued that there was no evidence showing the RIF was a pretext. After a hearing, the court granted the plea and motion without stating the grounds. Sanchez appealed asserting that the EEOC charge was timely filed under the "continuing violations" doctrine.

The doctrine of "continuing violation" applies when an unemployment practice manifests itself over time, rather than as a series of discrete acts. When a charge is timely filed as to one act of discrimination, the doctrine of continuing violation expands the scope of those discriminatory events that are actionable, as long as one of the events occurs within the 180-day period. The court determined that the doctrine did not apply to Sanchez's claims. Additionally, the court held that the continuing violation doctrine does not apply to demotions because demotions are generally discrete acts. The court also found that Sanchez could not establish discrimination through direct evidence. Further, the court determined that the RIF was a legitimate non-discriminatory reason which was not disputed with competent evidence. As a result, the court affirmed the trial court's judgement.

Board of Adjustment: *EMF Swiss Ave., LLC v. Peak's Addition Homeowner's Assoc.*, No. 05-17-01112-CV, 2018 WL 6836715 (Tex. App.—Dallas Dec. 28, 2018) (mem. op.). This

case stems from an appeal of the trial court's decision overturning the City of Dallas Board of Adjustment's (board) decision of a permit to construct a five-story apartment complex.

After the City of Dallas issued building permits to EMF Swiss Avenue LLC (EMF) for the construction of an apartment complex in east Dallas, Peak's Addition Homeowner's Association (HOA) appealed, to the board, one of those permits permitting the third floor of the multifamily dwelling. The board affirmed the permit's issuance, and the HOA sought judicial review of the board's decision in district court arguing that the board abused its discretion by misinterpreting the City of Dallas Development Code. Before the district court's scheduled date to hear the motion, EMF intervened and moved to continue the summary judgement hearing. The district court granted summary judgement in favor of the HOA. EMF appealed. The city and the board filed a joint brief arguing that the trial court erred.

The court found that the city and board were not proper parties to the appeal, but treated their brief as the equivalent of an amicus curiae brief. The HOA alleged two potential jurisdiction defects with EMF's appeal: (1) EMF has not exhausted its administrative remedies because EMF did not appeal to the board to preserve its legal argument supporting the permit's issuance; and (2) EMF lacks standing to appeal. The court determined that EMF was not required to exhaust administrative remedies by appealing the permit in question to the board. The court also found that EMF had standing to appeal the judgment because it intervened before final judgment was rendered and it asserted an injury that was personal to itself. To determine the merits of the case, the court looked at whether the board misapplied the city's ordinances. After a review of the applicable ordinances, the court determined that trial court erred by granting the HOA's summary judgement motion. However, because the city and the board did not appeal the denial of the summary judgement motion, and because EMF did not move for summary judgement, the court did not render judgement in EMF's favor. Accordingly, the court reversed the trial court's judgement and remanded the case for further proceedings.

Economic Development: ***City of Lancaster v. White Rock Commercial, LLC*****, No. 05-17-00583-CV, 2018 WL 6716932 (Tex. App.—Dallas Dec. 21, 2018) (mem. op. on reh'g)**. The court of appeals issued an opinion on August 20, 2018, which is summarized here. In response, the City of Lancaster filed a motion for rehearing. The court of appeals denied the motion, withdrew the initial opinion, vacated the judgement, and issued a new opinion. Like the initial opinion, the court concluded that the trial court did not err in denying the city's plea to the jurisdiction. However, the court concluded that the trial court's damages award was erroneous in certain respects. The court reversed the case to the trial court for the limited purpose of determining: (1) the amount owed by the city after crediting the $1.8 million paid by the Lancaster Economic Development Corporation; (2) the amount of insurance costs and gas-line installation costs, that the court held must be excluded from the court's damages award; and (3) the recalculation of interest based on the revised damages award.

Immunity: ***State of Texas v. Dallas Pets Alive*****, No. 05-18-00084-CV, 2018 WL 6722690 (Tex. App.—Dallas Dec. 21, 2018) (mem. op.)**. This case stems from an appeal of a county court's decision to deny a plea to the jurisdiction by the State of Texas, by and through, the City of Dallas in a case involving a dog injury.

The City of Dallas Animal Services took in a pit bull terrier-type dog, Rusty, and soon after Dallas Pet Alive (DPA), a non-profit animal rescue organization accepted Rusty and placed him in foster care. The DPA took Rusty to an adoption event held at a public park, at which Rusty bit and injured a two-year old child. Rusty was taken to City of Dallas Animal Services for a mandatory ten-day bite quarantine. After that quarantine period had expired, a city animal control officer signed an affidavit for probable cause requesting a warrant to seize Rusty for causing death or serious bodily injury to a person pursuant to Section 822.002 of the Health and Safety Code. Following a hearing at municipal court to determine whether Rusty caused serious bodily injury to a person by attacking, biting or mauling the person, the court found Rusty had attacked a minor child and caused serious bodily injury, and pursuant to Section 822.003(e) of the Health and Safety Code, the court ordered the dog to be humanely euthanized.

The DPA filed an appeal of the municipal court in the county court of law. Two days later, but before the appeal of the municipal court order was docketed, DPA filed an application for a temporary restraining order (TRO), a temporary injunction, and permanent injunction seeking to stay the municipal court's order. DPA asserted that the city would not agree to stay the euthanization pending the appeal of the municipal court's order and that the requested injunction was necessary to preserve the subject matter of the suit. The court granted the application and signed an order directing the city to cease and desist from euthanizing Rusty during the temporary restraining period and set a hearing date. The city filed a plea to the jurisdiction asserting that the county court at law lacked subject-matter jurisdiction over DPA's TRO application because of a lack of waiver of government immunity and because Chapter 822 does not provide a right of appeal. The court, after a hearing, denied the city's plea. The city filed an accelerated appeal.

The court of appeals determined that the city waived its immunity from suit by initiating the underlying proceedings in municipal court. Additionally, the court determined that the county court at law had subject-matter jurisdiction to hear DPA's appeal of the municipal court's order pursuant to Section 822.003 of the Health and Safety Code. Accordingly, the court properly issued the TRO to preserve the court's subject-matter jurisdiction. The court also remanded the case back to the county court at law for further proceedings consistent with its opinion.

Retaliation: ***City of Dallas v. Nkansah*, No. 05-18-00069-CV, 2018 WL 6599025 (Tex. App.—Dallas Dec. 17, 2018) (mem. op.)**. This case stems from the trial court's order denying the City of Dallas' plea to the jurisdiction regarding a former employee's claims for retaliation.

Nkansah worked for the city for over 17 years. In May 2014, he filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) asserting that he had been passed over for three promotions over the year despite being well qualified and that he was harassed, discriminated against, and retaliated against on the basis of his national origin, gender, and age. In November 2014, Nkansah was suspended without pay for five days. His supervisor cited several reasons for his suspension, including failure to inform his supervisor of his absence from work to attend a training session, his discourteous and argumentative behavior, his discourteous emails to his supervisor and other city employees, inappropriate face-to-face interaction with a coworker, and his spending time during work hours on personal matters. After his suspension, Nkansah filed a second charge of discrimination with the EEOC, maintaining that he had been

discriminated against and alleging retaliation for participating in protected activities, specifically citing five internal grievances he had filed with the city between July 2013 and December 2014 and his previous EEOC charge. In June 2015, the city sent Nkansah a letter notifying him of possible disciplinary action, including termination of his employment due to alleged violations of personnel rules, including an incident in April 2015, during which Nkansah allegedly became combative in a meeting with his supervisor and created a workplace disturbance, and not following the earlier directive to not spend time on personal matters at work. In July 2015, after Nkansah had had an opportunity to respond to the allegations, he was notified that his employment was terminated for the reasons provided in June 2015.

In October 2016, Nkansah sued the city for retaliation under the Texas Commission on Human Rights Act (TCHRA), alleging that he was suspended and later wrongfully discharged in retaliation for filing grievances due to the city's discriminatory promotion purposes. The city filed a plea to the jurisdiction asserting that the TCHRA's waiver of governmental immunity does not apply because Nkansah cannot establish a prima facie case of retaliation by showing a causal link between Nkansah's protected activity and the adverse employment action. The trial court denied the city's plea to the jurisdiction with respect to his retaliation claims.

To prevail in a retaliation action under the TCHRA, the plaintiff must prove that a causal link existed between the protected activity and the adverse action. Violations can be established by either direct or circumstantial evidence. For circumstantial evidence, the burden-shifting framework set out in *McDonnel Douglas Corp. v. Green* applies. After reviewing the affidavits of Nkansah's three former coworkers provided in response to the city's plea, the court determined that Nkansah had produced direct evidence of discrimination. As such, the court determined that the *McDonnell Douglas* burden-shifting analysis did not apply. Thus, the court concluded that the trial court properly denied the city's plea on the retaliation claim.

Open Meetings Act: *Terrell v. Pampa Indep. Sch. Dist.*, No. 07-17-00189-CV, 2019 WL 150884 (Tex. App.—Amarillo Jan. 9, 2019). This is a Texas Open Meetings Act (TOMA) case where the Amarillo Court of Appeals affirmed a take-nothing judgment in favor of the Pampa Independent School District (PISD).

PISD hired Terrell as a teacher on a probationary basis. At the end of the school year, the PISD board voted to terminate her. Terrell brought suit asserting PISD committed TOMA violations in twenty-one separate meetings and demanded that all actions taken during those meetings (including her termination) are void. Physical notice for each of the twenty-two challenged meetings was posted to the inside of an external glass door of the administrative building for PISD in a manner in which the public could view them at any hour. These physical notices identified the date, time, and place of each respective meeting. Meeting notices were also posted to PISD's website most of the time. Due to an issue arising from a transfer to a new website for PISD, notice of meetings were not posted on PISD's website for five months. PISD was unaware of the website glitch, but upon learning of it, the board took corrective action. PISD also only posted notices on the outside bulletin board and not the one inside its administrative offices. The trial court issued a take-nothing judgment against the plaintiffs and they appealed.

The panel opinion noted the Texas Supreme Court has indicated that substantial compliance with TOMA's notice requirements is sufficient. To determine whether a governmental entity substantially complied with the requirements of TOMA, courts look to whether the notice fairly identifies the meeting and "is sufficiently descriptive to alert a reader that a particular subject will be addressed." Courts are not to determine whether the entity could have posted a better notice in a better manner; rather, courts are tasked with determining whether the notice was sufficient to notify the public of the specific meeting and its topics. Physically posting the agendas in a glass case outside the building for all to see at any time was sufficient for substantial compliance under TOMA. PISD provided sufficient evidence to constitute a good faith effort to post on the website, explained how the glitch occurred, and what was done to fix it.

Terrell next argued that PISD violated TOMA by including only a partial description of the place of the meetings, such as "Pampa High School," without identifying the meeting room, full street address, or name of the city. TOMA requires that the notice identify the "place" of the meeting. The panel held that while it would be more helpful if the notices had identified the specific room, it finds the school title descriptions were sufficiently specific to alert the public of the location of the school board meetings. As a result, the take-nothing judgment was affirmed.*

Plea to the Jurisdiction: *Orr v. City of Red Oak*, No. 07-17-00281-CV, 2018 WL 6581721 (Tex. App.—Amarillo Dec. 13, 2018). Nathan Orr (Orr) owns Republic Heating & Air located in the City of Red Oak. Orr purchased a parcel of improved land with an existing building for the relocation of his business. When he submitted a parking lot permit application for his newly purchased property, the city's director of public works (director) reviewed the permit application for general compliance with certain ordinances and issued comments on Orr's proposed parking lot expansion plans. Orr objected to the comments and instead of appealing the city's board of adjustment (BOA), Orr filed suit in district court. In his petition seeking a declaratory judgement and injunction, Orr claimed the city's requirements are not required by applicable city ordinances, and pre-purchase assurances by the city estop the city from imposing the requirements.

The city filed a plea to the jurisdiction asserting the district court lacked subject matter jurisdiction because Orr did not exhaust his administrative remedies by first presenting his claims to the BOA as required by the Local Government Code and the city's ordinances. Orr amended his petition and alleged the conduct of city officials involved were "ultra vires in nature" because the director was without jurisdictional authority and continued to prevent him from obtaining the legally required parking permit. After the hearing on the plea to the jurisdiction, the trial court granted the city's plea to the jurisdiction, dismissed Orr's suit with prejudice, and denied Orr's motion to modify, correct and reform the judgment or, in the alternative, motion to reinstate.

Orr appealed, raising two issues challenging the trial court's order granting plea to the jurisdiction and two issues related to the trial court's refusal to allow discovery. With a *de novo* review of the trial court's ruling, the court first analyzed whether the trial court correctly granted the city's plea to the jurisdiction. Generally, district courts are authorized to resolve disputes unless the Texas Constitution or other law conveys exclusive jurisdiction on another court or an administrative body. If an administrative body has exclusive jurisdiction, then a party must

exhaust all administrative remedies before seeking judicial review of a decision. Section 211 of the Local Government Code provides administrative remedies that must be exhausted before a party may seek judicial review of a determination. In this case, Orr did not exhaust his administrative remedies. The court found that Orr's lawsuit stemmed from a decision by an administrative official of the city authorized by the city's ordinance to make decisions that Orr is complaining about. Because Orr failed to pursue all available administrative remedies within the city's ordinance and the Local Government Code before he filed suit in district court, the district court lacked jurisdiction to hear his claims.
Next, the court analyzed whether Orr had an *ultra vires* claim. For a claim to fall within the *ultra vires* exception to governmental immunity, a plaintiff must plead an *ultra vires* claim as a suit against the official in his official capacity and prove that the officer acted without legal authority or failed to perform a purely ministerial act. As for Orr's *ultra vires* claim, the court determined Orr did not prove his claim. The court found Orr did not sue the director or any other city official. Also, he did not present any evidence that: (1) the director was acting outside of his official capacity when the director issued the decision letter; or (2) the director or the city failed to perform a purely ministerial act. It was not enough that Orr did not agree with the director's decision. Additionally, Orr argued that the city did not address his *ultra vires* claim; however, the court found that the City did address it.

Lastly, the court determined that the trial court properly exercised its discretion concerning Orr's discovery claims. The trial court must determine at its earliest opportunity whether it has the constitutional or statutory authority to decide the case before allowing the litigation to proceed. In this case, the trial court determined that discovery was not necessary to determine the city's plea to the jurisdiction because Orr's pleadings clearly showed the trial court did not have jurisdiction since Orr did not exhaust his administrative remedies before filing his lawsuit. Overruling all of Orr's claims, the court affirmed the trial court's granting the city's plea to the jurisdiction.

Texas Tort Claims Act: *City of Fort Worth v. Hart*, No. 10-17-00258-CV, 2019 WL 91676 (Tex. App.—Waco Jan. 2, 2019) (mem. op.). This is a vehicle accident/Texas Tort Claims Act (TTCA) case where the Waco Court of Appeals reverses the denial of the city's plea to the jurisdiction.

Plaintiffs assert a City of Fort Worth police officer, Castaneda, negligently drove a vehicle within the course and scope of his employment with the city and caused damage to their vehicle and injuries to the passengers. The city filed a plea to the jurisdiction. After a hearing, the trial court denied the plea and sustained objections to several exhibits presented by the city as evidence in support of its plea (including excerpts of Castaneda's deposition).

The court of appeals holds that deposition excerpts attached to a city's plea to the jurisdiction do not require separate authentication and that highlighting portions of the deposition does not constitute a modification that changes the details of the deposition. In sum, the trial court's order was an abuse of discretion that resulted in the exclusion of evidence material to the ultimate issue—whether Castaneda was acting within the scope of his employment when the accident occurred.

The court of appeals then holds that, at the time of the accident, Castaneda was off-duty, not being paid for his time, had no official duties, and was merely commuting to work. The fact that the accident occurred during his scheduled work hours; that he failed to file a report regarding the off-duty use of the city-owned vehicle in violation of city policy; that he was issued a mobile phone and radio to respond to after-hours calls; that he identified himself as a police officer after the wreck; and that he was incorrectly advised to name the city as the financially responsible party on the police report did not alter Castaneda's off-duty status. The city's plea should be granted.

Civil Procedure: *In re City of Tatum*, No. 12-18-00285-CV, 2018 WL 6715889 (Tex. App.—Tyler Dec. 21, 2018). This is a writ of mandamus original proceeding where the Tyler Court of Appeals conditionally granted the city's relief and precluded a potential party from taking pre-suit depositions pursuant to Texas Rule of Civil Procedure 202.

Peterson filed a petition for a pre-suit deposition of the police chief pursuant to Texas Rule of Civil Procedure 202. The grounds for the deposition are that Peterson asserts a City of Tatum police officer sexually assaulted her when the officer arrived in response to a call for assistance at the home. She alleged that the city knew the officer "exhibited indicators" of this type of behavior; negligently hired, trained, controlled, supervised, and monitored the officer; did not have a policy to prevent such behavior and she anticipated being a party to a lawsuit involving the city. The city objected. The trial court signed an order allowing the deposition and the city filed this original mandamus proceeding.

Pre-suit discovery is not intended for routine use; it creates practical and due process problems because discovery demands are made of individuals or entities before they are told of the issues. Rule 202.4 states a trial court must order a pre-suit deposition to be taken *only if* it finds: (1) allowing the deposition may prevent a failure or delay of justice in an anticipated suit (to be used if the purpose is to collect evidence for a lawsuit); or (2) the likely benefit to investigate a potential claim outweighs the burden or expense of the procedure (to be used in order to investigate if a claim even exists). The verified statements in a Rule 202 petition are not considered competent evidence. Peterson presented no evidence to support possible claims to investigate or collect. That a party (i.e. city) may be in possession of evidence pertinent to the subject matter of the anticipated action or to the petitioner's potential claims does not alleviate the petitioner of her burden of providing evidence to support a Rule 202 request for pre-suit deposition. Further, the order does not contain the findings required to make it a proper order. The Texas Supreme Court has made clear that Rule 202.4 findings cannot be implied from the record and the findings are mandatory. Because the requirements of Rule 202.4 are mandatory, the city's failure to object in the trial court does not result in waiver. The court conditionally granted the writ and stated an unconditional writ will issue only if the trial court's order is not corrected.*****

Annexation: *Jimenez v. City of Aransas Pass*, No. 13-17-00514-CV, 2018 WL 6565090 (Tex. App.—Corpus Christi Dec. 13, 2018) (mem. op.). On September 8, 2015, the City of Aransas Pass announced plans to annex a neighborhood in San Patricio County. On December 28, 2015, Daniel Jimenez filed a suit seeking a temporary restraining order and injunction to prevent the city from annexing the land. The trial court denied relief and the city annexed the neighborhood

on January 4, 2016. The same day, Jimenez filed suit seeking, among other things, a declaratory judgment that the annexation was void because the city failed to comply with two requirements set out in the annexation statute: (1) the requirement to establish a three-year annexation plan; and (2) the requirement to complete the annexation proceedings within 90 days after they were instituted. The trial court granted the city's motion for summary judgment against all claims and Jimenez appealed.

On appeal, Jimenez's first claim was that the city failed to establish and adhere to a three-year annexation plan, which rendered the annexation wholly void. The city argued that even assuming the three-year plan requirement applied, the city's failure to establish a three-year plan is a procedural defect that does not render the annexation void, but only voidable. Because the annexation was not wholly void, the city argued that Jimenez had no standing to challenge the procedural error. Agreeing with the city, the court held that failure to adhere to a three-year plan renders an annexation voidable, and a citizen only has standing to bring a private challenge where an annexation ordinance is wholly void. The only means to attack the failure to establish a three-year plan is a quo warranto action brought by the state.

In his second issue, Jimenez complained that the city's failure to complete the annexation proceedings within 90 days after they were instituted made the annexation proceedings void. The court rejected Jimenez's argument that the notice of hearing instituted the annexation proceedings and 90 day window. According to the court, the proceedings were only instituted when the annexation ordinance was passed. Because the annexation ordinance was passed on January 4, 2016, that date represented both the institution of and completion of annexation proceedings. Because the annexation proceedings concluded the same day they began, the court held that as a matter of law the city did not exceed the 90-day timetable for completion of the proceedings.

The court concluded that the trial court properly granted summary judgment concerning all claims addressed in the city's motion, as Jimenez lacked standing to complain about the first error because it was procedural only, and the record established that as a matter of law the second error did not occur.

Texas Tort Claims Act: *Gomez v. City of Houston*, No. 14-17-00811-CV, 2018 WL 6722345 (Tex. App.—Houston [14th Dist.] Dec. 21, 2018) (mem. op.). Bobby Joe Simmons, a City of Houston police officer, was responding to a robbery call when his car collided with a vehicle driven by Maria Christina Gomez. Gomez sued the city, alleging negligence. The city filed a plea to the jurisdiction asserting that it was immune from suit, and the trial court granted the city's plea and dismissed the lawsuit. Gomez appealed.

On appeal, the first question was whether Officer Simmons could be personally liable to Gomez under Texas law, as required under the Texas Tort Claims Act to waive governmental immunity. The city contended that the evidence conclusively established that Officer Simmons responded to the robbery call in good faith, and therefore could not be personally liable to Gomez under Texas law, meaning the city should retain its governmental immunity. But the court held that the city did not meet its burden to conclusively prove Officer Simmons' good faith, as the city's evidence did not address the risks created by Officer Simmons' decisions not to reduce his speed due to

the wet street conditions, to not use his siren, and to look down and away from the road when he approached an intersection he knew had a quick light. The trial court erred to the extent it granted the city's plea to the jurisdiction on the ground that the city's governmental immunity had not been waived under the Texas Tort Claims Act.

In her second issue, Gomez argues that the trial court erred to the extent it granted the city's plea based on the emergency exception to the waiver of immunity in Section 101.021 of the Civil Practice and Remedies Code. The city claimed that because it established that Officer Simmons did not act recklessly, the city was immune from suit. The court disagreed, holding that there was a material question of fact regarding whether Officer Simmons acted recklessly or with conscious indifference to the safety of others. Evidence showing that Officer Simmons did not slow his speed to compensate for the wet conditions, did not use his patrol car's emergency lights and siren, and did not maintain visual contact with the road as he approached an intersection he knew he had a "quick light," could support a finding that he acted recklessly. Because there was a fact issue on whether Officer Simmons' acted recklessly, the court sustained Gomez's second issue.

December 2018

Note: Included cases are primarily from November 11, 2018 through December 10, 2018.

Taxation: *Ward Cty. Appraisal Dist. v. EES Leasing LLC*, No. 15-0965, 2018 WL 6004939 (Tex. Nov. 16, 2018). The Texas Supreme Court issued several connected opinions relating to the proper taxing entity for compressor equipment and pipelines.

EXLP Leasing, LLC, (EXLP) owns and leases compressor stations used to deliver natural gas into pipelines, with some of the pipelines located in Ward County and some in Midland County. EXLP began paying taxes on the compressors located in Ward County to Midland County, where EXLP contends it "maintain[s] a yard from which its inventory … is leased, to which leased compressors are returned after [the] leases expire[s], and where the inventory in the area is serviced." But Ward County continued to tax full market value. EXLP filed suit arguing Tax Code provisions amended in 2012 are unconstitutional on their face and as applied because the statutory formula for valuing leased heavy equipment bears no relationship to any measure of market value as required by the Texas Constitution. The court, on October 10, 2018, issued an opinion in *EXLP Leasing, LLC v. Galveston Cent. Appraisal Dist.*, 554 S.W.3d 572 (Tex. 2018), which disposed of the issues by holding taxable situs for dealer-held heavy equipment was the location where the dealer maintained its inventory, rather than the various locations where leased equipment might have otherwise been physically located.

The Texas Supreme Court adopted its reasoning in *EXLP Leasing* to the varying claims and facts in the consolidated cases. The court upheld the constitutionality of the Tax Code provisions but held EXLP neither expects nor intends for the compressors located in Ward County to permanently remain in Ward County. Their "permanent" home is the inventory yard and therefore, the proper place for taxation of inventory. However, specific to this case, the county argued the specific compressors were not "heavy equipment" as listed in the Tax Code. The

court held the definition of "heavy equipment" applied to self-powered machines. The legislature intended "self-powered" to mean a piece of a machinery or equipment supplied with mechanical power through an internal motor or engine. As a result, EXLP Leasing's engines are "heavy equipment" falling under the same Tax Code provisions.*

Takings: *San Jacinto River Auth. v. Burney*, No. 01-18-00365-CV, 2018 WL 6318506 (Tex. App.—Houston [1st Dist.] Dec. 4, 2018). In consolidated cases for the flooding of homes during Hurricane Harvey, the First Court of Appeals found that homeowners had stated sufficient facts in their petition for takings claims to overcome governmental immunity, but that the trial court lacked jurisdiction over the inverse-condemnation claims.

During Hurricane Harvey, the San Jacinto River Authority released water from Lake Conroe into the San Jacinto River, flooding homes in Kingwood, Texas. Homeowners brought inverse-condemnation and statutory takings claims against the river authority.

Of interest to litigators, the First Court of Appeals determined it could not take judicial notice of any attached evidence put forth as "adjudicative facts" in reviewing the river authority's motion to dismiss. The court found Rule 91a expressly forbids courts from looking at any evidence outside of the petition and its attachments.

The First Court of Appeals also determined that the Harris County civil courts at law had exclusive jurisdiction over the inverse-condemnation claims pursuant to Government Code Section 25.1032(c). The court reasoned that the amendment to the statute in 2015 giving district courts jurisdiction over cases where the amount in controversy exceeds $200,000 only applied to statutory condemnation claims, not inverse condemnation. Thus, the district court lacked jurisdiction over the inverse-condemnation claims.

The court held the homeowners had sufficiently pleaded a constitutional takings claim and a statutory takings claim under Chapter 2007 of the Government Code. The court determined that Chapter 2007 of the Government Code applied to physical takings like flooding. The court determined that the homeowners had pled sufficient facts to allege the river authority's release of water was intended to, or was known to be substantially certain to, result in the flooding or exacerbated flooding of the specific properties. The court also found the allegations were sufficient to establish recurrent flooding. The court further decided the homeowners' allegations that the river authority's governmental actions protected the stability and integrity of the dam, among other things, were sufficient to establish a public use.

Civil Rights/Torts: *Washington v. City of Arlington Police Dep't*, No. 02-17-00337-CV, 2018 WL 4782160 (Tex. App.—Fort Worth Oct. 4, 2018) (mem. op.). This is a civil rights and tort case where the Fort Worth Court of Appeals affirmed the dismissal of the plaintiff's claims.

Washington was arrested on three outstanding warrants for offenses related to drugs. A jury convicted Washington of one of the drug offenses. The criminal judgment was affirmed by the court of appeals. However, prior to the criminal affirmation, Washington filed suit against the police department and the prosecutors. The police department filed a summary judgment motion

asserting the criminal conviction precluded Washington from bringing a civil suit. The trial court construed the motion as a plea to the jurisdiction and granted the plea. Washington appealed.

The crux of Washington's claims against each named defendant is that law enforcement and legal counsel worked in tandem to have Washington falsely arrested and convicted of delivery of cocaine. An inmate plaintiff's civil-rights or tort claims based on facts that, if true, would undermine the validity of his conviction are not legally cognizable unless the plaintiff can show that the conviction was reversed on direct appeal, expunged by executive order, declared invalid by an authorized state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus. *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994). Washington argued the state dismissed two of the three charges and that he is not seeking release from jail, only money. Washington was arrested based on three warrants, one of which led to his conviction. Even assuming the two indictments were dismissed, the dismissals would not qualify as the relief required under *Heck* because Washington was validly held on the remaining warrant until his conviction. In other words, the facts Washington sought to litigate regarding his civil suit are facts essential to his conviction. No amount of repleading could cure these defects so Washington was not entitled to replead. The court of appeals held the trial court lacked subject matter jurisdiction to hear the claims. The dismissal was affirmed.*

Minimum Wage: *Texas Ass'n of Bus. v. City of Austin*, No. 03-18-00445-CV, 2018 WL 6005551 (Tex. App.—Austin Nov. 16, 2018). This case stems from an interlocutory appeal of the trial court's order upholding the City of Austin's paid-sick-leave ordinance.

The city adopted an ordinance that required private employers to provide paid-sick leave to their employees. The Texas Association of Business and other entities (private parties), and later the State of Texas as intervenor, sued the city and its city manager asserting that the paid sick leave ordinance was unconstitutional and sought temporary and permanent injunctive relief. The city challenged the district court's jurisdiction, arguing that the claims against it were unripe and not viable and the State lacks standing to intervene. The district court denied the application for a temporary injunction and the city's jurisdictional challenges. The private parties filed an appeal asserting that the paid sick leave ordinance was preempted by the Texas Minimum Wage Act.

The court of appeals determined that paid sick leave equates to "wages" under the Texas Minimum Wage Act (Act). As a result, the ordinance was preempted by the Act and violates the Texas Constitution. The court remanded the case back to the trial court for issuance of a temporary injunction and further proceedings in accordance with the ruling.

Chapter 143: *Hood v. Munoz*, No. 04-17-00563-CV, 2018 WL 6331139 (Tex. App.—San Antonio Dec. 5, 2018) (mem. op.). This case stems from an appeal by Fire Chief Hood of the trial court's decision related to filling a vacancy under Chapter 143 of the Local Government Code.

Three firefighters, Valencia, Vallejo, and Alva, retired on July 31, 2015. Chief Hood filled the vacancies created by their retirements, effective August 1, 2015, from a promotional list. The three fire fighters who would have been eligible to fill the vacancies from the promotional list effective on July 31, 2015, sued seeking a declaratory judgement that Chief Hood violated

Chapter 143 by utilizing the August 1, 2015, promotional list to fill the vacancies. The trial court declared that Chief Hood violated Chapter 143 by using the August 1, 2015, promotional list. Chief Hood appealed.

Section 143.036(a) provides that a vacancy in a firefighter position occurs on the date the position is vacated by resignation, retirement, death, promotion, or issuance of an indefinite suspension. The court determined that Valencia, Vallejo, and Alva retired on July 31, 2015, because the firefighters: (1) still occupied their positions on their retirement date; (2) were subject to all rules and regulations applicable to employees on that date; and (3) remained on the payroll and were eligible for all employee benefits through that date. Accordingly, the firefighters did not surrender occupancy of their position until August 1, 2015, because that was the date on which they did not have a job with the fire department. The court reversed the trial court's judgement.

Eight-Liners/Declaratory Judgement: *City of Pearsall v. Correa*, No. 04-18-00331-CV, 2018 WL 5928494 (Tex. App.—San Antonio Nov. 14, 2018) (mem. op.). This case stems from an appeal by the City of Pearsall of the trial court's denial of the city's plea to the jurisdiction with regard to a claim that the city's gaming room ordinance was invalid or unconstitutional.

In 2012, the city passed an ordinance which allowed residents to own and operate a gaming room with eight-liner machines provided that the owner paid an annual permit application fee of $3,000 per game room, and an annual inspection permit fee of $1,800 per machine. In September 2016, the city seized 48 eight-liner machines owned by Sergio Correa (Correa) asserting that the seizure was authorized by ordinance. Correa sued the city alleging numerous claims, including a claim seeking a declaration that the ordinance was unconstitutional. The city filed a plea to the jurisdiction with respect to all of Correa's claims. The trial court granted the plea as to all claims except the claim seeking a declaration that the ordinance was unconstitutional. The city appealed the ruling asserting governmental immunity. Correa asserted that the city's immunity was waived under the Uniform Declaratory Judgement Act (UDJA).

The court found that the Texas Supreme Court has expressly recognized that the UDJA waives a city's immunity in a suit that involves the validity of a city ordinance. Additionally, the city's ordinance directly affected Correa's right to own and operate a gaming room with eight-liner machines; therefore, a justiciable controversy existed as to the validity of the ordinance. Accordingly, the city's immunity was waived, and the trial court did not err in denying the city's plea.

Takings: *City of Mason v. Lee*, No. 04-18-00275-CV, 2018 WL 5808260 (Tex. App.—San Antonio, Nov. 7, 2018) (mem. op.). This is an interlocutory appeal in a regulatory takings case where the Fourth Court of Appeals reversed the denial of the city's plea to the jurisdiction and dismissed the takings claims.

The Zeschs' trust asserted they owned property adjacent to or downhill from property owned by Tyler and Reyeses. The city approved a minor plat and Reyeses began constructing a single-family residence. The Zeschs assert the development caused increase water runoff damaging the property. Additionally, the Zeschs assert the construction generated nuisance level noise and

dust. They assert the city committed a regulatory taking by approving the plat, then refusing to enforce various city ordinances against Reyeses. The city filed a plea to the jurisdiction, which was denied. The city took this interlocutory appeal.

The court first noted a justiciable controversy still exists, even though the Zeschs settled with Tyler and Reyes and now own the property since a question remains as to whether the Zeschs' property was damaged due to the city's actions. To state a valid takings claim, a plaintiff generally must allege: (1) an intentional governmental act; (2) that resulted in the property being taken; (3) for public use. The crux of the Zeschs' claims is that the city failed to impose applicable regulations to the subdivision and to the property owned by the Reyeses. The Texas Supreme Court and the Fourth Court have recognized "the law does not recognize takings liability for a failure to" act. A city's failure to enforce applicable zoning ordinances and special permit restrictions does not constitute a regulatory taking. The court also cited to precedent, noting that if the government's alleged affirmative conduct is nothing beyond allowing private developers to use their property as they wish, the more appropriate remedy is a claim against the private developers rather than a novel taking claim against the government. Interestingly, in a footnote, the court held that the *Penn Central* analysis (applicable when a regulation unreasonably interferes with a property owner's use and enjoyment of the property) does not apply in this type of case because the Zeschs were not complaining of regulations applied to them, but of the lack of regulations applied to others. No intentional conduct occurred so the plea should have been granted.*

Official Immunity: ***City of Dallas v. Hernandez-Guerrero*****, No. 05-18-00033-CV, 2018 WL 6427641 (Tex. App.—Dallas Dec. 7, 2018)**. This case stems from an appeal by the City of Dallas of the trial court's denial of the city's plea to the jurisdiction in a case involving a motor vehicle accident.

Blanca Hernandez-Guerrero (Hernandez-Guerrero) was a passenger in a vehicle that was struck by the unknown driver of a city-owned marked police car. The city asserted that one of its police officer was dispatched to an emergency call at a group home where a man had stolen a purse, threatened to kill staff and residents, and was potentially armed with a knife. The officer activated his emergency lights and siren and proceeded to the location. At an intersection where the traffic light was red, the officer applied his brakes and slowed to clear the intersection, then proceeded when he believed the intersection was safe. As the officer proceeded through the intersection, a vehicle in which Hernandez-Guerrero was a passenger collided with the officer. The dash camera video from the police officer's vehicle showed that the officer's emergency lights and siren were engaged for five minutes before he approached the intersection, and at least thirteen vehicles pulled over for him. After she filed suit for negligence, injury by motor vehicle and respondeat superior, the city filed a plea to the jurisdiction asserting that the police officer was entitled to official immunity because he was performing a discretionary function within the scope of his employment and acting in good faith. The plea was denied, and the city appealed.

A governmental employee has official immunity for the performance of discretionary duties within the scope of the employee's authority, provided the employee acts in good faith. In the context of an emergency response, a need versus risk analysis is applied. The court reviewed the officer's affidavit and found that: (1) the need to which the officer was responding was a

potentially life threatening emergency at a group home; (2) the officer slowed at the intersection; (3) he believed in good faith that the need to get to the emergency call outweighed the perceived minimal risk of an accident; (4) the road was dry; (5) the vehicles the officer observed were stopped in the eastbound and westbound lanes of traffic; (6) the officer's emergency lights and siren were activated; (7) the officer did not perceive that proceeding through the intersection would cause any danger to any other driver close to him; and (8) the potential danger posed by proceeding through the intersection was far less than the danger posed to the potential victims at the location of the reported emergency disturbance. As a result, the court concluded that the police officer acted in good faith and reversed the court's order denying the city's plea to the jurisdiction.*

Immunity: *Zaidi v. North Texas Tollway Auth*., No. 05-17-01056-CV, 2018 WL 6426798 (Tex. App.—Dallas Dec. 6, 2018) (mem. op.). This case stems from an interlocutory appeal by Azhar S. Zaidi (Zaidi) of the trial court's denial of his motion for continuance and granting of North Texas Tollway Authority's (NTTA) plea.

The vehicle Zaidi's son was driving collided with a downed light pole on the tollway. Zaidi sued the NTTA. NTTA filed a plea to the jurisdiction asserting governmental immunity. NTTA supported its plea with: (1) evidence regarding the design and construction of the relevant portion of the tollway, including light poles; (2) affidavits from NTTA's engineers; (3) maintenance and inspection records for the light pole; (4) Texas Department of Public Safety crash reports; and (5) records from the NTTA Safety Operations Center from the date of the accident. Zaidi filed a responsive brief, but did not present any evidence to controvert NTTA's plea. However, he filed a motion for continuance to conduct additional discovery five days before the hearing on NTTA's plea and over nine weeks after NTTA had filed its plea. The trial court denied the motion and granted NTTA's plea. Zaidi appealed.

A trial court abuses its discretion when its ruling is so arbitrary and unreasonable so as to amount to a clear and prejudicial error of law. The court looked to the following factors to determine if the trial court had abused its discretion in denying Zaidi's motion for continuance: (1) the length of time the case has been on file; (2) the materiality and purpose of the requested discovery; and (3) whether the party seeking the continuance has exercised due diligence in obtaining the discovery sought, including providing a description of the evidence sought, and its materiality. The court determined that Zaidi's motion did not outline his due diligence effort to obtain the discovery requested and his counsel could not confirm whether he had attempted to notice the depositions of the NTAA since receiving the plea. As a result, the court concluded that the trial court did not abuse its discretion in denying Zaidi's motion for a continuance.

With respect to the plea to the jurisdiction, NTTA asserted that Zaidi's premises defect or special defect claim failed to trigger the waiver of immunity provisions under Section 101.021 of the Texas Civil Practices and Remedies Act because NTTA lacked the requisite knowledge of the alleged defect and Zaidi could not establish NTTA failed to use ordinary care to protect Zaidi's son from danger. The court concluded that because NTTA did not have actual knowledge of any dangerous condition caused by the pole until one minute before Zaidi's son collided with it, NTTA's immunity was not waived. Accordingly, the trial court's judgement was affirmed.

Breach of Contract/Easement: ***North Texas Mun. Water Dist. v. Jinright*****, No. 05-18-00152-CV, 2018 WL 6187632 (Tex. App.—Dallas Nov. 27, 2018) (mem. op.)**. This case arises from an appeal by the North Texas Municipal Water District for a portion of the trial court's order denying the district's plea in a case involving an easement.

The district requested an easement from certain property owners so that it could build an underground water pipeline. The district conducted tree surveys that identified which trees on the property would be preserved and which trees would be removed or replaced, and offered to pay the landowners $151,200 for settlement of the easement. The sum included sums for: (1) the district's removal of 373 trees, as identified in the tree surveys; and (2) the landowner's removal of a fence and the installation of a gate on the property so that the district could access the easement. Following receipt of the district's letter, the landowners expressed concerns regarding the district's obligations in the event it damaged their property while working in the easement. To address these concerns, the district's land agent forwarded two pages from its "contractor specs," which, among other provisions, provided that: (1) the "Contractor" assumed full responsibility for any damage to the property; (2) the "Contractor" was required to clear all trees within the easement; and (3) described the "Contractor's" obligations to replace or compensate the "Owner" for any trees that were removed without the "Owner's" consent.

The parties signed the easement and the district commenced construction of the pipeline. Following disputes regarding damage to the property owners' fence, damage to trees that had not been slated for removal, and off-easement use of the property for equipment storage, the property owners filed suit asserting breach of contract, inverse condemnation, trespass, unjust enrichment, reformation of instrument, and mandamus relief. The property owners also asserted that the district intentionally withheld the portion of the specs that defined the terms "Owner" and "Contractor," and were therefore misled into believing that they were the "Owners" who were owed obligations by the "Contractor," who in their view was the district. The trial court granted the district's plea with respect to the property owners' claims for trespass, unjust enrichment, and mandamus relief, and denied the plea as to the property owners' claims for breach of contract, inverse condemnation, and reformation of instrument. The district appealed.

With respect to the breach of contract claim, the court looked at whether the property owners sought contract damages to which a waiver of immunity extends under Chapter 271 of the Local Government Code. The court determined that Section 271.152's waiver of immunity from suit does not extend to claims for damages not recoverable under Section 271.153. The property owners did not seek recovery of any "balance due and owed" by the district as payment for the property owners' fence removal and gate installation services, nor did they dispute the district's contention that it had already paid this amount. Instead, they sought damages for the restoration of the property necessitated by the district's actions and for delays in the construction of one of the property owner's home as a result of the actions. The court concluded that these damages were consequential damages which are not recoverable under Section 271.153. Accordingly, the trial court erred in denying the district's plea with respect to the breach of contract claim.

Regarding the inverse condemnation claim, the court affirmed the trial court's denial of the district's plea to the extent that such claim related to takings other than the taking of trees. The court determined that the property owner had alleged facts establishing that the district exercised

a right neither granted by the easement nor reasonably necessary for the district to fully enjoy the easement for the purpose it was granted.

With respect to the property owners' claim that they were induced to sign the easement based on the district's letter and the "contractor's specs," the court determined that the trial court lacked jurisdiction to hear the property owners' reformation claim. The court found that even if the easement was reformed to include the additional terms, the property owners did not allege any contract damages covered by the waiver of immunity applicable to contract claims.

Public Information Act: *Texas Tech Univ. v. Dolcefino Comm., LLC*, No. 07-18-00225-CV, 2018 WL 6332572 (Tex. App.—Amarillo Dec. 4, 2018). This is a Public Information Act (PIA) case where the Amarillo Court of Appeals reversed the denial of a plea to the jurisdiction and held Texas Tech University properly complied with the PIA.

Dolcefino Communications, LLC (Dolcefino) requested various records from the university under the PIA. The university produced some, but not all, of the records requested. Dolcefino filed a petition for mandamus relief under Texas Government Code Section 552.321. The university filed a plea to the jurisdiction, which was denied. Texas Tech University appealed.

The legislature has prescribed that all statutory prerequisites to suit are jurisdictional in suits against governmental entities. While the PIA waives immunity to a limited extent, the waiver is not all-encompassing. Under the PIA, a requestor may file suit only upon showing that the governmental body "refuses to supply public information" or "refuses to request an attorney general's decision." Such are statutory prerequisites to suit. The bulk of Dolcefino's requests at issue were deemed "withdrawn as a matter of law" by the university because Dolcefino did not respond in writing to the itemized statement of costs or provide a bond within the time period. Dolcefino did not: (1) accept the estimated charges, (2) modify its requests, or (3) send a complaint to the attorney general. Dolcefino and the university did engage in what Dolcefino characterizes as a "back-and-forth" regarding the charges due. However, an ongoing parleying over price does not provide a basis for overriding the statutory scheme for responding to an estimate of charges. The request was properly considered withdrawn.

The court also dismissed Dolcefino's argument that the university waived the withdrawal language since estoppel does not run against a governmental entity. Regarding the remaining portions of the request, the university asserts no responsive documents exist. However, a movant in a plea to the jurisdiction must assert and support with evidence the trial court's lack of subject matter jurisdiction. The court analyzed the emails back and forth with Dolcefino where Texas Tech University asserted it did not have certain specific documents. Dolcefino asserted the statements were conclusory and not competent evidence. The court held "[a]s sparse as this additional data may be, it nevertheless insulates Texas Tech's reply from a potential attack as conclusory." The university produced some evidence that it was not "refusing" to provide public information to Dolcefino. As a result, the plea should have been granted.*****

Takings: *Waller v. Sabine River Auth*., No. 09-18-00040-CV, 2018 WL 6378510 (Tex. App.—Beaumont Dec. 6, 2018) (mem. op.). Following a historic flooding event in March of 2016, Jim Waller, along with one hundred other landowners (landowners) sued the Sabine River Authority

of Texas (SRA-T) alleging their properties flooded after SRA-T released water from the Toledo Bend Dam. Despite acknowledging that the release was consistent with SRA-T's FERC license, landowners sued for inverse condemnation, private nuisance, and trespass to real property. SRA-T filed a plea to the jurisdiction, arguing it was immune because landowners could not establish causation, could not establish that SRA-T had the requisite *mens rea* for a takings claim, and that landowners were preempted by federal law. The trial court granted SRA-T's plea. The landowners appealed.

To establish a constitutional takings claim, a plaintiff must prove: (1) the state intentionally performed certain acts in the exercise of its lawful authority; (2) the acts resulted in a "taking" or damaging of property; and (3) the taking was for public use. Whether a taking occurs under inverse condemnation is a question of law. Similarly, under article I, section 17, a claim for nuisance is an alternative ground of recovery and exception to immunity if the nuisance rises to the level of a constitutional taking.

The court of appeals finds the facts in this case distinguishable from *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012) (a case holding that a temporary flooding event could give rise to a governmental taking) because: (1) this case involves a hydroelectric power plant subject to FERC regulations; (2) the Toledo Bend Dam was not created for the specific purpose of controlling floods; and (3) the entity in *Arkansas Game and Fish* intentionally deviated on several occasions from the procedures spelled out in the dam's operation manual, which resulted in downstream flooding, whereas, here, the dam was operated in compliance with its license.

As to the issue of causation, the court holds there are no findings that SRA-T deliberately damaged landowners' property or that the act of opening the dam gates was a proximate cause of the damage to their property. In sum, the court found landowners failed to establish a takings claims.

As to the preemption claims, the court found that landowners were arguing that a duty to pre-release water should be imposed on SRA-T even though such action would have been inconsistent with federal law and regulations (the FERC license) that govern SRA-T's operations. Landowners' claims were conflict preempted. The trial court's judgment is affirmed.

Tort Claims Act: *Jefferson Cty. v. Reyes*, No. 09-18-00236-CV, 2018 WL 5986004 (Tex. App.—Beaumont Nov. 15, 2018) (mem. op.). This is a vehicle accident/Texas Tort Claims Act (TTCA) case where the Beaumont Court of Appeals reversed the denial of the county's plea to the jurisdiction based on formal written notice and dismissed the claims.

Reyes asserts a county employee, Flanagan, negligently drove a vehicle within the course and scope of his employment with the county and collided with his vehicle. Reyes' attorney sent a letter less than two months after the accident to the county's risk management advising of the collision. The county's third-party administrator sent a notification letter the claim was received and was being handled. The county denied the claim within weeks. Reyes filed suit nearly two years later. The county filed a plea to the jurisdiction attacking compliance with notice provisions. The trial court denied the plea and the county appealed.

Reyes asserts he complied with Texas Civil Practice and Remedies Code Section 101.101 entirely, and substantially complied with Texas Local Government Code Section 89.004(a), which is a notice statute for county claims. After analyzing the claim letter language, the court held the written letter sent to the county's risk management department did not include the requisite information as outlined in the TTCA notice provision Section 101.101(a). Specifically, the letter failed to provide a place description of the incident and failed to "reasonably describe" the incident. Thus, formal written notice was not received. The court then analyzed whether the county had actual notice of the claim. Even though the county's third-party claims administrator acknowledged receipt of the claim, the court found this insufficient. The county explained its "investigation failed to find any negligent conduct on the part of the County or its employees which proximately caused [Reyes's] damages." The evidence established the county failed to uncover any negligent conduct in its investigation. Therefore, it lacked the subjective awareness necessary for actual notice. As a result, the plea should have been granted.*

Contractual Immunity: *M.E.N. Water Supply Corp. v. City of Corsicana*, No. 10-16-00364-CV, 2018 WL 5986953 (Tex. App.—Waco Nov. 14, 2018). The Tenth Court of Appeals affirmed in part and reversed in part the trial court's granting of the City of Corsicana's motion to dismiss (on the ground of failure to satisfy a condition precedent to sue), motion for summary judgment (on the ground of lack of evidence), and plea to the jurisdiction (on the ground of governmental immunity from suit).

Appellants (the City of Frost, the City of Kerens, and multiple water supply corporations) sued the City of Corsicana for breach of contract claiming that the city was charging ratepayers higher water rates than those authorized by the contracts in question. Appellants requested specific performance of the contracts, and asserted that the City of Corsicana did not retain governmental immunity from the suit because the suit involved a proprietary function. The city responded by filing a plea to the jurisdiction, arguing that it did retain governmental immunity over the breach of contract claim. The city also moved to dismiss appellants' claims, asserting that the City of Frost failed to satisfy a contractually required condition precedent to filing suit for a breach of contract. Additionally, the City of Corsicana moved for summary judgment based on lack of evidence of the existence, breach, and damages from breach of a valid contract. The trial court granted the City of Corsicana's summary judgment motion, plea to the jurisdiction, and motion to dismiss. The trial court denied all relief requested by the appellants, and the appellants appealed.

The City of Corsicana incorrectly claimed that its contract with the City of Frost required an agreement or unappealable court order as a condition precedent to filing suit for breach of contract. In fact, nothing in the contractual language contemplated the filing of a lawsuit. The trial court's dismissal order was premised on an erroneous finding concerning the presence of a condition precedent. Therefore, the trial court erred in dismissing the City of Frost's claims for failure to satisfy a non-existent condition precedent. Moreover, the City of Kerens incorrectly interpreted its contract with the City of Corsicana; its actions did fall within the contractually authorized establishment of a rate based upon the volume of water purchased. Therefore, the City of Kerens failed to proffer the necessary amount of evidence to create a material fact issue as to the breach element of its breach of contract action, and the trial court correctly dismissed its

overall breach claim. Additionally, the act of selling water wholesale to non-resident entities is not a proprietary act for which governmental immunity from suit is relinquished. Under the Texas Tort Claims Act, selling wholesale water falls under "water and sewer service" and is a governmental function, not a proprietary function. The City of Corsicana's governmental immunity for breach of contract claims is also not waived under Section 271 of the Local Government Code. Section 271 does not extend to contracts where a city only receives indirect benefits. Therefore, the trial court correctly granted the City of Corsicana's plea to the jurisdiction. The granting of the City of Corsicana's motion to dismiss was reversed, and the granting of its motion for summary judgment and plea to the jurisdiction was affirmed.

Uniformed Services Employment and Reemployment Rights Act: *Texas Dep't of Pub. Safety v. Torres*, No. 13-17-00659-CV, 2018 WL 6067300 (Tex. App.—Corpus Christi Nov. 20, 2018). This is a case of first impression considering whether sovereign immunity bars claims by private individuals against units of state government under the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

Leroy Torres was employed as a trooper with the Texas Department of Public Safety (DPS) when he was deployed to Iraq in 2007. In 2008, Torres was honorably discharged and sought to be reemployed by DPS. Due to a lung condition acquired in Iraq, Torres requested reemployment in a different position. DPS declined to offer him a different job, but offered a temporary duty position that Torres refused. Torres resigned and ultimately sued DPS in 2017. Torres claimed that DPS's failure to offer him a job that would accommodate his disability violated USERRA, which prohibits adverse employment actions based on the employee's military service. DPS filed a plea to the jurisdiction arguing that sovereign immunity applied and deprived the trial court of subject-matter jurisdiction. The trial court denied DPS's plea, and DPS appealed.

The primary issue on appeal was whether DPS's immunity to suit in state court for damages under USERRA was validly abrogated by the U.S. congress or validly waived by the Texas Legislature. In deciding the congressional abrogation question in favor of DPS, the court relied chiefly on the United States Supreme Court decision in *Alden v. Maine*, which held that "[t]he powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." 527 U.S.706, 712 (1999). Because USERRA was arguably enacted pursuant to Congress's Article I War Powers, or alternatively, Article I's "Necessary and Proper" clause, USERRA did not constitutionally abrogate DPS's sovereign immunity to private suits for damages in Texas courts.

Determining that DPS's sovereign immunity to private claims in state court had not been validly abrogated by USERRA, the court turned to whether the Texas legislature validly waived DPS's sovereign immunity through "clear and unambiguous" statutory language. Torres claimed that the legislature demonstrated its intent to waive sovereign immunity by enacting Chapter 437 of the Government Code. Chapter 437 entitles a state employee (or employee of a political subdivision) to be restored to the position that the employee held when ordered to duty, authorizes an aggrieved person to file a complaint with the Texas Workforce Commission, and authorizes the complainant to bring a civil action against the employer within sixty days after receiving notice of a dismissal from the Texas Workforce Commission. The court held that to the extent Chapter 437 of the Government Code waives sovereign immunity, it does so only in cases

in which the administrative process has been exhausted as set forth in the statute. In this case, there was no dispute that Torres did not exhaust his administrative remedies with respect to his claims against DPS.

DPS's immunity to Torres's suit was not validly abrogated by the U.S. congress or waived by the Texas legislature. The court reversed the trial court's judgment and rendered judgment granting DPS's plea to the jurisdiction.

Contractual Immunity: *Tri-Stem, Ltd. v. City of Houston*, No. 14-17-00545-CV, 2018 WL 6216868 (Tex. App.—Houston [14th Dist.] Nov. 29, 2018). The City of Houston contracted with Tri-Stem, Ltd. to audit the city's utility bills and seek refunds for past billing errors and overcharges, specifically pertaining to the city's unmetered streetlights and electric and natural-gas utility bills. The contract provided that the city was to pay Tri-Stem 45% of any cash refunds the city actually received as a result of Tri-Stem's work for up to four years after the contract terminated. Tri-Star found city overcharges by CenterPoint Energy related to the city's streetlights. When CenterPoint refused to refund the overcharges, the city sued CenterPoint. Ultimately, the city and CenterPoint reached a non-cash settlement to the lawsuit.

Tri-Stem sued the city for breach of contract, seeking to recover a percentage of any cash the city ultimately received under the city's settlement with CenterPoint. In its motion for summary judgment, the city argued that because the city received no cash recovery in the CenterPoint settlement, it owes Tri-Stem nothing under the "cash recovery" provision of the contract. The trial court granted the city's motion for summary judgment and rendered judgment that Tri-Stem take nothing by its suit. Tri-Stem appealed.

On appeal, Tri-Stem first argued that the trial court erred in granting the city's motion for summary judgment before addressing whether it had subject-matter jurisdiction. Because the trial court did not dismiss the case for lack of jurisdiction but instead rendered a take-nothing judgment on Tri-Stem's claims, the court of appeals held that the trial court implicitly rejected the city's argument that the claims were barred by governmental immunity. The court further found this implied rejection of the city's governmental immunity argument to be justified based upon recent case law relating to contractual immunity, most notably the Texas Supreme Court's recent decision in Wasson Interests, Ltd. v. City of Jacksonville. The court concluded that the city performed a proprietary function in entering into its agreement with Tri-Stem, and therefore the trial court did not err in implicitly denying the city's assertion of governmental immunity.

In its second issue, Tri-Stem contends that the trial court erred in denying its motion to continue the summary-judgment hearing so that it could conduct further discovery. When the city filed its summary-judgment motion, eleven months remained in the discovery period. The court concluded that the trial court abused its discretion in failing to grant Tri-Stem's motion for a continuance, as the discovery Tri-Stem sought was material and there was ample time left in the discovery period. Tri-Stem exercised diligence in seeking the discovery but received no substantive reply.

The court reversed the trial court's grant of summary judgment on the merits, and remanded the case to trial court for further proceedings consistent with its opinion.

November 2018

Note: Included cases are primarily from October 11, 2018 through November 10, 2018.

Public Information Act: *City of Houston v. Dolcefino Commc'ns, LLC*, No. 01-17-00979-CV, 2018 WL 5539447 (Tex. App.—Houston [1st Dist.] Oct. 30, 2018) (mem. op.). The City of Houston appealed the trial court's grant of a motion to compel in a mandamus proceeding under the Texas Public Information Act (PIA). Dolcefino brought a petition for writ of mandamus, seeking to have the trial court conduct an in camera review of the responsive documents from a PIA request that the city claimed were exempt from disclosure. Dolcefino filed a motion to compel, claiming that the city had not produced documents under the PIA from a request almost four months earlier. At the hearing, the city's attorneys represented that not all of the documents were produced yet but had previously represented it had complied in its filings with the court. The trial court granted the motion to compel and ordered the city to produce the documents that were not being withheld, produce the withheld documents to the court for in camera review, and state in writing that it had complied with the initial and subsequent PIA requests.

The city appealed and invoked the appellate court's jurisdiction under the theory the trial court's order was an injunction, or in the alternative, the city was entitled to a writ of mandamus. The issue before the First Court of Appeals was whether the order was an injunction, thus granting the court jurisdiction over the city's appeal. The First Court of Appeals determined the order requiring the city to perform an action did not rise to the level of an injunction; rather, the order attempted to clarify if the city had complied with the PIA requests because the city had given conflicting information on whether it had complied. The order further narrowed the issues in dispute. Because the order was not an injunction, the court determined it lacked jurisdiction over the city's appeal. The court further determined that the record would not support a writ of mandamus. Thus, the city's appeal was dismissed.

Texas Tort Claims Act: *City of Killeen v. Cheney*, No. 03-18-00139-CV, 2018 WL 5832088 (Tex. App.—Austin Nov. 8, 2018) (mem. op.). This case arises from an order of the trial court denying the City of Killeen's plea to the jurisdiction in an automobile accident.

When a particular interchange was first opened to the public, the city was unable to obtain certain parts necessary for the installation and operation of additional traffic detection cameras. As a result, the city initially placed the traffic signals at the interchange into a four-phase signal operation. At a later date, the city reprogrammed the four-phase traffic signal operation to a three-phase signal operation. Mary Cheney's husband was subsequently killed in an automobile accident at the interchange after allegedly assuming (based on prior experience) that there would be a "green light" at a second intersection because there had been a "green light" at the first intersection. Six days later, after several additional accidents occurred at the second intersection, the city erected a sign warning motorists to use caution because of the traffic signal timing change.

Cheney sued the city, asserting that: (1) the reprogramming of the traffic signals created an unreasonably dangerous condition for motorists based on their prior experiences at the interchange, and that the city had actual knowledge that implementing drastic change to the signals' programming with no advance warning would likely cause traffic fatalities; (2) the city was negligent by reprogramming the signal at a peak period on a high-volume traffic weekday; and (3) the city's governmental immunity was waived under the Texas Tort Claims Act because a negligent premises-defect claim had been sufficiently alleged. The city filed a plea to the jurisdiction and asserted governmental immunity. The trial court denied the city's plea to the jurisdiction, and the city appealed.

First, the court considered whether the city's immunity was waived with respect to claims arising from the "absence, condition, or malfunction" of a traffic signal. The court concluded that Cheney's claim did not arise from the absence, condition or malfunction of a traffic signal.

The court then considered whether Cheney pled facts demonstrating a premise-defect claim, and if so, whether that premise-defect claim was excepted from waiver, and thus immunity retained under the discretionary-function exception. To prevail on a premise-defect claim, a claimant must show that the city failed to either: (1) use ordinary care to warn of an unreasonably dangerous condition of which it was actually aware and the claimant was not; or (2) make the condition reasonably safe. The court found that: (1) the traffic signals at the intersection accurately reflected the signal under a four-phase signal operation, and therefore, there was no "condition" for the city to correct; and (2) any possible danger at the intersection created by the city's decision to reprogram the signals would be negated by motorists' compliance with the signals. Accordingly, the court concluded that the change in the traffic signals at the interchange does not constitute an unreasonably dangerous condition under premise-defect law, such that the city had a duty to warn motorists, regardless of when or how the change was implemented.

Expedited Declaratory Judgments Act: *Ex parte City of El Paso*, No. 03-17-00566-CV, 2018 WL 5815098 (Tex. App.—Austin Nov. 7, 2018). This appeal stems from a bond-validating proceeding in which the trial court validated the bond election, the bonds, and the City of El Paso's authority to use bond proceeds to finance the design and construction of various projects, but limited the city's authority to use bond proceeds to build a facility "suitable for a sports arena."

The city adopted an ordinance ordering an election on a proposed bond issue for various "quality of life" projects, including a "multipurpose performing arts and entertainment facility" (Facility). The bond was approved by the voters. The city thereafter, began to take steps to create the Facility and proposed the development and construction of a "Multipurpose Cultural and Performing Arts Center" describing the project as a "mid-sized arena anticipated to have between 12,000 and 15,000 seats," and noting that it was the city's intent to build an arena that provides a flexible and usable sports and entertainment venue for the public.

To preemptively combat potential opposition to the Facility, the city filed a suit in Travis County under Chapter 1205 of the Government Code (commonly referred to as the Expedited Declaratory Judgements Act (EDJA)), which allows the issuer of public securities to obtain

declarations establishing the legality or validity of public security authorizations through an expedited process. The city asked the trial court to declare that the Facility could be used for sporting events. Multiple interested parties challenged the city's suit, claiming that the language of the ordinance authorized the facility for "performing arts," and that sports do not fall under this description. The trial court held that, while the ordinance was valid and the city was authorized to use bonds to finance the Facility, the plain language of the ordinance prohibited the city from constructing a facility that would be "suitable for a sports arena" and from using funds from other sources to modify the Facility for sports usage.

Near the end of the trial court's proceedings, Max Grossman, an interested party, sued the city in a separate proceeding in El Paso County (EL Paso suit) alleging that the city's plans for construction of the Facility were in violation of the Antiquities Code provision requiring notice to the Texas Historical Commission before ground is broken on a project taking place on state or local public land. The city asked the trial court in the underlying case to enjoin the El Paso suit under the EDJA or the court's equitable power to issue an anti-suit injunction. The trial court held that the El Paso suit was proper in El Paso County and the trial court's final judgement did not adjudicate or affect the claims asserted in the El Paso suit. The city and Grossman filed motions to modify the judgement, but the district court denied the motions. Grossman had asked the trial court to modify its judgement arguing that the election ordinance mandated that the city build a cultural center before it could build the Facility. The city and Grossman appealed.

The court of appeals concluded that under a plain-meaning review of the ordinance, the city may use bond proceeds to build a Facility that accommodates sports. The court of appeals also found that the trial court's declaration that the city could not use funds from other sources to modify the Facility for sports usage exceeded the limited scope of the district court's authority in an EDJA suit. Finally, the court found that the trial court erred in its failure to enjoin the El Paso suit because the purpose of the EDJA is to prevent a single individual from stopping an entire bond issue by simply filing suit, and the El Paso suit prevented final resolution of the city's EDJA suit.

Board of Adjustment: *City of Wimberley Bd. of Adjustment v. Creekhaven, LLC*, No. 03-18-00169-CV, 2018 WL 5074580 (Tex. App.—Austin Oct. 18, 2018) (mem. op.). This appeal stems from the trial court's denial of a plea of jurisdiction filed by the City of Wimberley Board of Adjustment (Board) in a case involving a request for a variance.

Alison Campbell owns property that is adjacent to property that is owned by Creekhaven, LLC (Creekhaven). Beginning around 2003, Campbell began constructing a pole barn on her property, which led to various disputes between her and Creekhaven regarding the location and features of the structure. Campbell requested, from the Board, a variance from the setback requirements of the city's ordinances on the east side of the pole barn. In October 2013, the Board granted Campbell's request for a variance on the condition that Campbell provide the city with evidence that the property was in compliance with all other applicable city ordinances, rules and regulations on or before March 1, 2014 (October 2013 Variance). Failure to comply with the condition would result in the variance automatically expiring. The Board also affirmed a decision by the city administrator that an ordinance specifying setback requirements for "alley easements" did not apply to Campbell's pole barn. In November 2013, Creekhaven filed suit for judicial review of both the Board's variance decision and the decision affirming the administrative

determination. The trial court granted a writ of certiorari directing the Board to submit its briefing related to the challenged decisions. The Board filed documents in response to the writ in April 2014.

In the meantime, the deadline to comply with the October 2013 Variance decision expired without Campbell satisfying the required condition. Campbell continued to work on her property and in late 2014 sought variances from the setback requirements on both the east and the west side of the pole barn on her property. The Board, after conducting a hearing, granted with conditions, both requested variances in September 2014 (September 2014 Variances). Creekhaven filed a second amended petition to its judicial review, adding challenges to the September 2014 Variances, and seeking a declaration that the October 2013 Variance had expired and was no longer in force and effect. Creekhaven asserted that the Board did not have the authority or jurisdiction to act on Campbell's September 2014 variance request because of the doctrine of "res judicata." The trial court granted a writ of certiorari directing the Board to submit its briefing related to the September 2014 Variances. The Board filed a response in March 2015.

In January 2018, the Board filed a motion for summary judgement arguing that: (1) it did not abuse its discretion in granting the city's administrator's decision regarding the applicability of the "alley easement" ordinance; (2) it did not abuse its discretion when it approved the September 2014 Variances; and (3) it conceded with Creekhaven's finding, on a different reasoning, that the October 2013 Variance was moot. In turn, Creekhaven filed a motion for partial summary judgement on its Uniform Declaratory Judgement Act (UDJA) claims. While the summary-judgement motion was pending, the Board filed a plea to the jurisdiction arguing that the trial court lacked subject-matter jurisdiction over Creekhaven's UDJA claims based on governmental immunity, the doctrine of redundant remedies, and mootness. The same day, Creekhaven amended its petition dropping its challenge to the Board's September 2014 grant of a variance on the west side of Campbell's property. The trial court denied Creekhaven's motion for partial summary judgement, the Board's motion for summary judgement, and the Board's plea to the jurisdiction. The Board then filed an interlocutory appeal of the denial of its plea to the jurisdiction.

The court of appeals first considered whether the trial court lacked subject-matter jurisdiction to entertain Creekhaven's claims for declaratory relief under the UDJA regarding: (1) the legal effect of the October 2013 Variance; and (2) the Board's decision to grant the September 2014 Variances. The court found that the trial court lacked subject-matter jurisdiction over these claims because they did not constitute a request for a declaration concerning the validity of any city ordinance such that the Board's immunity is waived. Rather, the court found that the claim constituted a request for a declaration construing a statute or ordinance. The court also considered Creekhaven's claim for declaratory relief regarding the Board's authority to grant the September 2014 Variances. The court held that Creekhaven's appeal of the October 2013 Variance did not deprive the Board of authority to consider Campbell's request for a variance in September 2014.

The court then considered Creekhaven's claim that the Board acted without authority because the doctrine of res judicata barred the Board from acting on Campbell's September 2014 request for

a variance on the east side of her property. The court found that the doctrine was inapplicable in this case because it is an affirmative defense. Finally, the court concluded that the trial court lacked subject-matter jurisdiction over Creekhaven's challenge to the legality of the October 2013 Variance because that issue is moot. As a result, the court reversed the trial court's order denying the Board's plea to the jurisdiction and dismissed Creekhaven's UDJA claims and its suit for judicial review of the October 2013 Variance.

Workers' Compensation: *Martinez v. State Office of Risk Mgmt.*, No. 04-14-00558-CV, 2018 WL 5808333 (Tex. App.—San Antonio Nov. 7, 2018). This case arises from a Texas Supreme Court ruling reversing the court of appeals judgment in part, and remanding the case to the court to consider the merits of Edna Martinez's workers' compensation claims.

Martinez was employed as a caseworker for the State of Texas, and was at her home preparing for court hearings for the following Monday when she slipped and fell, breaking her shoulder and striking her head during the fall. She reported her injury and submitted her claim for workers' compensation benefits to the State Office of Risk Management (SORM), the claim administrator for state-agency employees. Her claim was denied by SORM on the grounds that she had not been injured in the course and scope of her employment, was not engaged in the furtherance of her employer's business at the time of the injury, and had not established a causal connection between her injuries and her employment. At a benefit review conference, SORM argued that Martinez's injuries were not compensable because she had not received prior approval to work from home in violation of her employer's policy. Martinez argued that caseworkers like her often took work from home without prior approval. At a contested hearing, the hearing officer concluded that Martinez was furthering the business and affairs of her employer at the time of her fall, but that her injuries did not arise out of or occur in the course and scope of her employment. As a result, the hearing officer ruled in favor of SORM, holding that Martinez had not sustained a compensable injury. Martinez appealed to the Texas Workers' Compensation Commission's Appeals Panel (Panel). The Panel reversed the hearing officer's decision, finding that Martinez had sustained a compensable injury.

SORM then appealed to the district court, and both parties moved for summary judgement. In her motion, Martinez argued that a violation of an employer's policy or rule that merely regulates the manner of doing work does not, as a matter of law, preclude compensability for an injury otherwise sustained in the course and scope of employment. SORM argued that Martinez's injuries were not compensable because she had violated state law, which limits the locations where work can be performed and explicitly prohibits working from home without prior approval. The district court denied Martinez's motion for summary judgement and granted SORM's motion for summary judgement. Martinez appealed.

The court of appeals found that the trial court had erred in granting SORM's motion for summary judgement because SORM's statutory violations argument was never presented for consideration in the administrative review process, and as such, the trial court lacked summary judgement. Finding that the trial court did not have jurisdiction over the statutory violations, the court of appeals declined to reach a decision on whether the statutory violations affected the compensability of Martinez's injury. The court further held that the trial court did not err in denying Martinez's motion for summary judgement. Both Martinez and SORM sought review of

the court of appeal's decision at the supreme court. The supreme court remanded the case to the court of appeal's to determine whether the statutory violation is evidence that Martinez did not sustain a compensable injury.

The court of appeals considered the plain language of the statutes to determine whether the statutes limit the scope of Martinez's employment. The court concluded that the statutes limit a state employee's scope of employment by mandating that the employee obtain prior written authorization before working at home. Because Martinez did not obtain prior approval before working from home, she did not comply with the statutes. As a result, she did not sustain a compensable injury. Accordingly, the court found that the trial court did not err in granting summary judgement in SORM's favor.

Contractual Immunity: *CHW-Lattas Creek, L.P. v. City of Alice*, No. 04-18-00251-CV, 2018 WL 5623614 (Tex. App.—San Antonio Oct. 31, 2018). This appeal arises from the trial court's order granting the City of Alice's plea to the jurisdiction in a case involving a Chapter 380 economic development agreement.

The city and CHW-Lattas Creek, L.P. (CHW) entered into a Chapter 380 development agreement whereby CHW agreed to sell and dedicate specific real property to the city. The city, in turn, agreed to construct a multi-use complex, including an outdoor amphitheater, an aquatic center, and a conference center, and facilitate the construction of a hotel on the property. The development agreement contained a provision making the agreement subject to the requirements of Chapter 271 of the Local Government, and specifically providing that the parties have "entered into a written contract for providing goods and services." The agreement also contained a provision in which the city expressly waived sovereign immunity to suit for purpose of adjudicating a claim for breach of contract.

Four years after the effective date of the agreement, CHW sued the city for failing to fulfill certain requirements of the agreement alleging breach of contract, declaratory relief, and fraud. The city filed a plea to the jurisdiction asserting immunity from suit because: (1) the agreement was not a contract for providing goods and services to the city as required for immunity to be waived under Section 271.152 of the Local Government Code for a breach of contract claim; (2) Section 271.152 does not waive immunity for a claim for declaratory relief; and (3) the fraud claim is an intentional tort for which immunity is not waived. CHW asserted that immunity was waived because: (1) the agreement was a contract for services; (2) the city was engaged in proprietary functions in execution of the agreement; and (3) the city was estopped from claiming its immunity was waived. The trial court granted the city's plea and dismissed CHW's claims for lack of subject matter jurisdiction.

The court of appeals first considered whether the city was engaged in a governmental or proprietary function when it entered the agreement. One of the governmental functions enumerated by the Texas Tort Claims Act (Act) is "community development or urban renewal activities undertaken by municipalities and authorized under Chapters 373 and 374, Local Government Code." The court looked to the legislative intent of the legislation that amended the Act to add that provision, and concluded that the amendment extends to all community development activities regardless of which chapter of the Local Government Code applies. As a

result, the court concluded that because the purpose of the development agreement was to promote economic development under Chapter 380 of the Local Government Code, the city was engaged in a governmental function when it entered into the agreement.

The court then considered whether the city's immunity was waived under Section 271.152 of the Local Government Code. Section 271.152 applies only to written contracts for providing goods and services to a local governmental entity. Because the development agreement did not obligate or require CHW to provide any services to the city, and the city did not agree to pay CHW for any services, the court concluded that the agreement was not an agreement for providing services to the city. Consequently, the city's immunity was not waived under the development agreement.

The court then addressed CHW's assertion that courts have no authority to interfere with a city's exercise of its legislative direction because the development agreement involves municipal legislative discretion. The court looked to case law involving the adoption of ordinances or zoning regulations by a municipality and distinguished those actions from the execution of a contract. As a result, the court found that the law relating to the exercise of municipal legislative discretion did not apply to the execution of the development agreement.

Finally, the court considered CHW's argument that the city was estopped from asserting immunity or denying its waiver because the language in the development agreement expressly provided that the agreement was subject to Chapter 271 and the city expressly waived sovereign immunity. The court held that the city should not be estopped from asserting its immunity based on the "mistake, neglect, or intentional act," of city officials. Instead, parties who enter into an agreement with a local governmental entity should be charged with the law regarding the entity's immunity and enter into an agreement at the parties' own peril.

Contractual Immunity: *Harlandale Indep. Sch. Dist. v. Jasmine Eng'g, Inc.*, No. 04-18-00388-CV, 2018 WL 5623612 (Tex. App.—San Antonio Oct. 31, 2018) (mem. op.). This appeal arises from the trial court's denial of a plea to the jurisdiction in a case involving a breach of contract.

Jasmine Engineering and the Harlandale Independent School District entered into a professional services agreement for consulting services. In a letter dated January 24, 2018, the district informed Jasmine Engineering that the agreement was terminated without cause. In February 2018, Jasmine Engineering sued the district asserting: (1) a cause of action because the agreement required cause to terminate; (2) the district's immunity was waived under Section 271.152 of the Local Government Code; and (3) a declaratory judgement. In addition, Jasmine Engineering sought to recover attorney's fees under the Texas Civil Practice and Remedies Code and Section 271.153 of the Local Government Code.

The district filed its first plea to the jurisdiction acknowledging its immunity from suit was waived under Section 271.152. However, the district asserted that its immunity was waived only for relief recoverable under Section 271.153, which did not include declaratory relief or attorney's fees under the Texas Civil Practice and Remedies Code. Jasmine Engineering countered with an assertion that the declaratory relief it sought was incidental to the contractual relief it sought. The trial court granted the district's plea and dismissed Jasmine Engineering's

claim for declaratory relief and attorney's fees. The trial court also ordered Jasmine Engineering to replead its claim for breach of contract to expressly comply with Sections 271.152 and 271.153 of the Local Government Code. In response, Jasmine filed its amended petition alleging only a breach of contract claim and a request for attorney's fees under Section 271.152 and 271.153 of the Local Government Code. Jasmine Engineering filed a motion for partial summary judgement as to liability, requesting that the trial court conclude as a matter of law that the district had breached the agreement by terminating the agreement without notice and an opportunity to cure, and by failing to pay Jasmine Engineering for all services actually performed and all expenses actually incurred prior to the termination. The district filed a plea to the jurisdiction asserting that Jasmine Engineering's motion for summary judgement sought the same declaratory relief that the trial court had dismissed when it granted the district's first plea. Jasmine Engineering filed a reply asserting that it was not precluded by the Texas Rules of Civil Procedure from seeking a partial summary judgement as to liability. The trial court denied the district's second plea, and the district filed an interlocutory appeal.

The court of appeals affirmed the trial court's order, rejecting the district's contention that a motion for partial summary judgment on liability is an improper procedural vehicle for determining the District's liability for breach of contract claim.

Pre-suit Deposition: ***In re City of Dallas v. Dallas Companion Animal Project*****, No. 05-18-00453-CV, 2018 WL 5306943 (Tex. App.—Dallas Oct. 26, 2018) (mem. op.)**. This is an interlocutory appeal from the trial court's order denying the City of Dallas' plea to the jurisdiction in a case involving a pre-suit deposition suit pursuant to Texas Rule of Civil Procedure 202.

The Dallas Companion Animal Project (DCAP) provided goods and services to the City of Dallas Department of Animal Services (DAS) for a number of years. In December 2016, the head of DAS was replaced, and DCAP was informed by the city that there were questions regarding its activities. The city requested DCAP provided certain financial information, which they did. The city also informed DCAP that a memorandum of understanding would be required before DCAP could continue its services to the DAS. In February 2017, a reporter told DCAP that there was a purported criminal investigation into DCAP's activities. DCAP repeatedly attempted to obtain information from the city of the alleged investigations, culminating in a December 2017 letter to the city manager requesting information about the status of the alleged investigation. After the city failed to respond, DCAP filed a Rule 202 petition seeking authorization to depose a representative of the city about the existence, focus, and current status of the investigation.

The city filed a plea to the jurisdiction arguing that the trial court did not have jurisdiction over the Rule 202 petition because DCAP failed to allege facts demonstrating a potential injury caused by the city's action that would constitute a claim that was not barred by governmental immunity. The trial court denied the city's plea. The city did not file an interlocutory appeal of the ruling; rather, it filed a second plea to the jurisdiction arguing that, to the extent that DCAP intended to assert claims against employees of the city, those employees were entitled to dismissal of the claims under Section 101.106(f) of the Civil Practice and Remedies Code and the city had not waived immunity for those claims. DCAP filed an amended Rule 202 petition

alleging, among other things, possible viable claims against: (1) the city for negligence and negligent defamation; and (2) city employees acting in their individual capacities or acting ultra vires. The trial court denied the city's second plea.

The city filed an interlocutory appeal from the trial court's denial of the second plea arguing that because the amended Rule 202 petition was a final order, it was appealing not only that order, but the trial court's orders denying both pleas, and, alternatively, it was bringing an interlocutory appeal from an order denying a plea to the jurisdiction. The city also filed a writ of mandamus contending that the trial court abused its discretion by ordering the city to submit to a pre-suit deposition and the city did not have an adequate appellate remedy.

The court of appeals concluded that DCAP was seeking, in part, to investigate potential claims against the city, and the trial court's order granting DCAP's amended Rule 202 petition is not final and appealable. Accordingly, the court dismissed the city appeal for lack of jurisdiction. The court further denied the city's petition for writ of mandamus because DCAP alleged sufficient facts to establish the trial court had jurisdiction over the amended Rule 202 petition and the trial court did not clearly abuse its discretion by determining the benefit of the ordered deposition outweighs the burden or expense of the procedure. The court also dismissed the city's interlocutory appeal as moot.

Pre-suit Deposition: *In re City of Dallas v. Russell*, No. 05-18-00289-CV, 2018 WL 5306925 (Tex. App.—Dallas Oct. 26, 2018) (mem. op.). This is an interlocutory appeal from the trial court's order denying the City of Dallas' plea to the jurisdiction in a case involving a pre-suit deposition pursuant to Texas Rule of Civil Procedure 202.

Heather Russell filed a petition for Rule 202 depositions to investigate Section 1983 claims related the shooting and death of her son by a City of Dallas police officer. She sought authorization to depose the police officer and issue a subpoena duces tecum to the city and the Dallas County Medical Examiner (Medical Examiner). Russell filed her petition after she was unable to obtain the records through the Texas Public Information Act. The city and the police officer filed a plea to the jurisdiction, and the Medical Examiner filed a separate response. The trial court issued an order that: (1) denied the city and the police officer's plea to the jurisdiction; (2) found the likely benefit of allowing Russell to take the requested depositions outweigh the burden or expense of the procedure; (3) granted the Rule 202 petition as to the city and the Medical Examiner, but not to the officer; and (4) ordered, Russell and her counsel, to refrain from discussing or disclosing to anyone information obtained through the taking of the deposition until the earlier of either a grand jury determination to indict the officer or further order of the trial court. The city filed a petition for writ of mandamus or, in the alternative, an appeal to the trial court's order granting the Rule 202 petition, and an interlocutory appeal arguing that the trial court erred when it denied the city's plea to the jurisdiction.

The court of appeals first considered the appropriate remedy available to the city. The court concluded that the appropriate remedy for the city is a petition for writ of mandamus. As a result, the court dismissed the city's interlocutory appeal.
The court then considered whether the city was entitled to mandamus relief. To be entitled to mandamus relief, a realtor must show: (1) the trial court has clearly abused its discretion; and (2)

there is no adequate remedy by appeal. The court concluded that the trial court abused its discretion because Russell failed to adequately plead a specific cause of action as required by Rule 202.2 or to state with sufficient specificity a basis for overcoming governmental immunity. The court also found that the city had no adequate remedy for appeal because the city's only opportunity to appeal the trial court's order would be after the deposition with subpoena duces tecum occurred, which would compromise the city's procedural and substantive rights. As a result, the court granted the city's petition for writ of mandamus. Having ruled on the merits of the city's writ of mandamus, the court found no need to address the city's appeal of the trial court's order denying the city's plea to the jurisdiction.

Civil Procedure: *Thompson v. Dallas City Attorney's Office*, No. 05-17-00847-CV, 2018 WL 5077795 (Tex. App.—Dallas Oct. 18, 2018) (mem. op.). This appeal arises from the trial court's order granting the Dallas City Attorney's Office's motion for summary judgment and dismissing Petrina Thompson's claims with prejudice.

Thompson, a former employee of the City of Dallas' City Attorney's Office (City Attorney Office), filed a complaint against the City Attorney Office with the Texas Workforce Commission alleging employment discrimination. On October 26, 2016, the commission informed Thompson that it was unable to conclude that a statutory violation had occurred and advised her that she had until December 25, 2016, to file suit on her claims. Thompson timely filed her suit against the City Attorney Office on December 8, 2016, but did not identify a person to be served. As result, the City Attorney Office was not served until December 25. Thompson filed an amended petition, again listing "Dallas City Attorney's Office," as the defendant, and that the defendant could be served though service on the city attorney and the mayor. The city attorney and the mayor were served on January 6, 2017.

The City Attorney Office filed an answer asserting a general denial and several affirmative defenses, including that Thompson's claims were barred by the statute of limitations. The City Attorney Office later filed a supplement to its answer asserting that Thompson's claims were barred by defect of parties because Thompson had sued the City Attorney Office, a department within the City of Dallas, which is a non-jural entity that has no legal capacity to be sued. Thompson did not amend her petition to allege suit against the City of Dallas, and did not file a response to the motion for summary judgement. The trial court held a hearing (at which Thompson did not appear) and eventually signed a final judgement granting the City Attorney Office's motion for summary judgement and ordering Thompson's claims dismissed with prejudice. Thompson filed a motion to reinstate under Rule 165a of the Rules of Civil Procedure, which provides for reinstatement of a case that has been dismissed for want of prosecution. She also filed a motion for a new trial arguing that trial court should have denied the motion for summary judgement and the disposition of the case should have been without prejudice. She also filed a motion for leave to file a response to the summary judgment and to correct or reform the judgement. The trial denied the motions. Thompson appealed the trial court's judgement arguing that the trial court erred (1) by denying her motion for a new trial because she satisfied the requirements of *Craddock v. Sunshine Bus Lines*; (2) by denying her motion for a new trial on the grounds that she misnamed the defendant; (3) by denying her motion to reinstate; and (4) by denying her motion to modify the judgement.

The court of appeals first considered Thompson's motions for a new trial under the provisions of *Craddock v. Sunshine Bus Lines*. Under *Craddock*, a motion for a new trial shall be granted in any case in which: (1) the failure to answer before judgement was not intentional, or the result of conscious indifference, but was due to a mistake or accident; (2) the motion for a new trial sets up a meritorious defense; and (3) the motion is filed at a time when the granting thereof will occasion no delay or otherwise work an injury. The court found that Thompson's motions did not satisfy the second and third elements of *Craddock*. Therefore, she failed to show that the trial court abused its discretion by denying her motion for a new trial.

The court then considered her motion to reinstate under Rule 165a, which governs dismissals for want of prosecution. The court concluded that Rule 165a does not apply in this case because the trial court did not dismiss the case for want of prosecution. Instead, the trial court granted the City Attorney Office's motion for summary judgement, and dismissed Thompson's claims. Accordingly, the trial court did not abuse its discretion in refusing to grant Thompson's motion to reinstate.

Finally, the court considered Thompson's motion to modify the judgement under Rule 329b, which provides that the judgement must be filed within the time for a filing a motion for a new trial, which is 30 days from the date the trial court signs the judgement. Thompson filed her motion 69 days after the trial court signed its judgement. As a result, the court may not review the trial court's decision to deny the motion.

Texas Recreational Use Statute: *City of Conroe v. Thomas*, No. 09-18-00215-CV, 2018 WL 4924849 (Tex. App.—Beaumont Oct. 11, 2018) (mem. op.). The Ninth Court of Appeals reversed the trial court's denial of the City of Conroe's plea to the jurisdiction on the grounds that the appellants failed to prove gross negligence under the Recreational Use Statute, and dismissed the appellants' claims for lack of subject matter jurisdiction.

Appellants (on behalf of an injured minor) sued the city for negligence under Texas Civil Practice & Remedies Code Section 75 (the Recreational Use Statute), claiming that at a summer day camp operated by the city, a camp supervisor negligently caused the minor's eye injury during the course of his employment. While facilitating recreational activities inside of a classroom, the counselor swung a makeshift baseball bat and struck the minor, causing him to lose sight in his left eye. The city filed a plea to the jurisdiction asserting that appellants' claims must fail because, under the Recreational Use Statute, the city does not owe a person engaged in recreation on its premises any more care than a trespasser would be owed. The city claimed that it only owed the minor a duty to not injure him by gross negligence, and that the appellants did not prove that the city was grossly negligent because the city never parted from an ordinary standard of care as to create an extreme risk of harm. The city, therefore, argued that it retained government immunity under the statute. Appellants filed an amended petition that included a gross negligence claim, and also claimed that the case did not fall under the Recreational Use Statute because the city's summer camp did not satisfy the statute's definition of "camping" and that playing baseball inside of a classroom did not fall under the statute's definition of "recreation." Appellants argued that the city therefore did not retain governmental immunity and could be tried on the negligence and the gross negligence theories. The trial court denied the

city's plea to the jurisdiction, and held that, because the city's activity did not fall under the Recreational Use Statute, the city could be tried for the negligence claims.

Under the Recreational Use Statute, "recreation" is defined as "any activity associated with enjoying nature and the outdoors." The statute does apply to informal ball games, and just because the game was moved indoors due to inclement weather does not mean that the game was not associated with the outdoors. Therefore, the informal baseball game played in an indoor classroom at the city's summer camp did fall under the Recreational Use Statute, and the statute does apply to appellants' claims. Thus, the city only owed the injured minor the care that a trespasser would be owed. This only encompasses a duty "not to injure a person willfully, wantonly, or through gross negligence," and gross negligence is only satisfied by "subjective awareness of an extreme degree of risk, indicating conscious indifference" to the safety of others. Appellants failed to satisfy the pleading requirements of gross negligence because they did not allege any acts or omissions that showed the city's indifference to the consequences of a known extreme risk of danger. Appellants' claim failed under the Recreational Use Statute and the city retained its governmental immunity.

Texas Tort Claims Act: *City of Fort Worth v. Hart*, No. 10-17-00258-CV, 2018 WL 4925810 (Tex. App.—Waco Oct. 10, 2018) (mem. op.). The Tenth Court of Appeals reversed the trial court's denial of the City of Fort Worth's plea to the jurisdiction on the grounds that the appellee's objections to the city's evidence were improperly sustained and that the appellee failed to show that the city's employee was acting in the scope of his duties at the time of the accident.

A City of Fort Worth police officer (while operating a city-owned vehicle) was involved in an accident with a car in which Jeff Hart's son was riding. Hart's son was injured and he sued for damages on behalf of his son. The city entered a plea to the jurisdiction, claiming that Hart had failed to demonstrate the police officer was acting in the scope of his employment duties at the time of the accident. The trial court sustained objections to the city's evidence and exhibits, and denied the city's plea to the jurisdiction under the Texas Tort Claims Act because there was a fact issue as to whether the officer was acting within the course and scope of his duties.

The Tenth Court of Appeals concludes that the trial court erred. The trial court incorrectly held that the officer's deposition was hearsay; statements made during a deposition cannot count as hearsay. The trial court incorrectly held that the excerpts of the officer's deposition were improperly authenticated because deposition excerpts do not have to be separately authenticated. Finally, the trial court abused its discretion by holding that the excerpts were "altered" simply because they were highlighted; the highlighting did not modify the evidence or make the evidence substantively different. Moreover, the trial court improperly held that there was a fact issue as to whether the officer was acting within the scope of his employment duties. Because the excerpts of the officer's deposition should have been admitted and are sufficient to support the city's governmental immunity, Hart could only sue the city under the immunity waiver portion of the Texas Torts Claims Act if the officer was acting within his "scope of employment."

At the time of the accident, the officer was employed by the city and was driving a vehicle that was both owned and fully maintained by the city. The accident occurred during the officer's

usual work hours, he identified himself to the 911 operator using his job title, and he called his supervisor to advise him of the incident. However, in order to be "acting within the scope" of his employment under the Texas Tort Claims Act, the officer's actions must have been "undertaken in furtherance of his employer's business." While there is a presumption that an employee was furthering his employer's business if he was driving his employer's vehicle, the city rebutted that presumption in this case. The city presented evidence that at the time of the accident, the officer was off-duty, not being paid for his time, and had no official duties. None of the circumstances surrounding the accident raised a sufficient fact issues as to whether the officer was within the scope of his employment. Therefore, because there was no fact issue, the city's immunity was not waived, and appellee's claims must fail due to lack of subject matter jurisdiction.

Contract Claims Act: *City of Merkel v. Copeland*, No. 11-16-00323-CV, 2018 WL 5074551 (Tex. App.—Eastland Oct. 18, 2018). The Eleventh Court of Appeals reversed the trial court's denial of the City of Merkel's plea to the jurisdiction on the grounds that the city did not waive its governmental immunity under the language of the Contract Claims Act at the time of the execution of its contract with appellees.

The owners of a country club contracted with the city to purchase treated wastewater to irrigate the country club's golf course. Under the terms of the contract, the country club owners agreed to accept 100% of the city's treated wastewater and to pay $1.50 per 100,000 gallons of wastewater delivered by the city. The city agreed to deliver the wastewater to the country club from its wastewater treatment plant. Appellees later purchased the country club and became successors in interest to the contract. Appellees and the city both fulfilled their obligations under the contract for multiple years. However, the contract was subject to state wastewater quality standards, and the city halted its delivery of wastewater to the country club in 2014 because the water did not meet the minimum quality standards. Appellees sued the city for breach of contract, and the city filed a plea to the jurisdiction asserting governmental immunity. Appellees claimed that the immunity did not apply because the city's sale of wastewater represented a proprietary function rather than a governmental function. Appellees also claimed that the city had waived its immunity under the Contract Claims Act by entering into the contract. The city responded that the contract at issue was not subject to the Contract Claims Act, and that appellees had not sought the type of damages for which immunity is waived under the Act.

Under the Texas Tort Claims Act, "sanitary and storm sewers," "waterworks," and "water and sewer service" are included within the definition of "governmental functions." The disposal of treated wastewater is necessary and essential to the city's operation of its wastewater treatment facility. The city provided a key governmental service by disposing of treated waste. Therefore, the city did exercise a governmental function (and not a proprietary function) when it contracted to sell wastewater to appellees. Moreover, under the Contract Claims Act, a city waives its governmental immunity when it enters a contract to sell reclaimed water intended for industrial use. However, this language in the Contract Claims Act was included in 2013; the contract in this case was executed in 2011, when immunity was only waived for contracts that provided goods and services to a city. The appellees did not provide any services to the city under the contract in this case. Therefore, the contract in this case was not subject to the Contract Claims Act, and the city did not waive its governmental immunity. Appellees claim failed due to lack of subject matter jurisdiction and was dismissed.

Takings: *City of South Padre Island v. La Concha Condominium Ass'n*, No. 13-18-00037-CV, 2018 WL 5289720 (Tex. App.—Corpus Christi Oct. 25, 2018) (mem. op.). The Thirteenth Court of Appeals affirmed the trial court's denial of the City of South Padre Island's plea to the jurisdiction on the grounds that the Uniform Condominium Act authorizes condominium associations to sue on behalf of individual unit owners. The court held that La Concha Condominium Association has standing to assert its takings claims on behalf of its individual condominium owners.

The La Concha Condominium Association represented the individual owners of a condominium complex, and the City of South Padre Island erected a wooden walkway on city-owned land adjacent to the complex. The association and its owners sued the city, asserting that construction of the walkway constituted an unlawful taking and inverse condemnation without due process. The city filed a motion to dismiss the suit, claiming that the association lacked standing to bring suit. The association responded that it had authority to sue under the Uniform Condominium Act (which allows condominium owners' associations to sue on behalf of multiple owners) and the Private Real Property Rights Preservation Act (which allows property owners to bring takings claims against government entities). The city argued that the association did not have standing to bring takings claims on behalf of condominium owners for individual units that it did not own, as the association did not own legal or equitable title over any of the subject property. The trial court denied the city's motion to dismiss, and the city appealed.

Condominium associations are specifically authorized by Section 82.102 of the Uniform Condominium Act to sue on behalf of personally-aggrieved individual unit owners, even when the association itself is not personally aggrieved. The La Concha Condominium Association consistently identified itself as a condominium association throughout litigation, and Section 82.102 applies to all Texas condominium regimes. Additionally, Section 82.007 of the Uniform Condominium Act and article 6 of the association's bylaws (which allow the association to litigate the "common elements" of the condominium) do not purport to restrict the manner in which the association can bring suit on behalf of its owners and do not limit the legal rights of the association. Moreover, the association asserts that all of its owners were in agreement to pursue the case and authorized the association to prosecute the suit under Section 82.102, and there is no evidence to the contrary. Therefore, the association has standing to bring the suit. This standing is not overridden by governmental immunity because the Texas Constitution waives governmental immunity for the taking, damaging, or destruction of property for public use. The city's issues were overruled, and the denial of its appeal to the jurisdiction was affirmed.

October 2018

Note: Included cases are primarily from September 11, 2018 through October 10, 2018.

Contractual Immunity: *Wasson Interests, Ltd. v. City of Jacksonville*, No. 17-0198, 2018 WL 4838309 (Tex. Oct. 5, 2018). On petition for rehearing, the Texas Supreme Court withdrew the judgment issued on June 1, 2018, and determined that the contract claim arising out of the lease

was a proprietary function of the city. Therefore, the city was not entitled to sovereign immunity for the Wassons' breach of contract claim.

The city constructed Lake Jacksonville in the late 1950s to serve as the city's primary source of water. In the 1990s, the Wassons entered into long-term leases of lakefront property owned by the city. The leases incorporated the city's rules and regulations governing Lake Jacksonville by reference. Those rules and regulations specify, among other things, that the property is to be used for residential purposes only. After living on the property for several years, the Wassons moved and conveyed their interest in the lease to Wasson Interests, Ltd. ("WIL"). WIL then began operating the property as a bed-and-breakfast and event center, which the city asserted violated the terms of the lease. The Wassons filed suit, alleging the city breached the lease agreement. The trial court found that entering into the lease was a governmental function and granted summary judgment on that ground. In doing so, the trial court did not consider other grounds put forth by the city.

Cities are entitled to sovereign immunity only when they perform governmental functions solely for the public benefit. In contrast, proprietary functions are those "performed by a city, in its discretion, primarily for the benefit of those within the corporate limits of the municipality," and "not as an arm of the government." In determining that the city engaged in a proprietary function when it entered the lease, the Texas Supreme Court considered "whether (1) the City's act of entering into the leases was mandatory or discretionary, (2) the leases were intended to benefit the general public or the City's residents, (3) the City was acting on the State's behalf or its own behalf when it entered the leases, and (4) the City's act of entering into the leases was sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary."

The Texas Supreme Court concluded that all four factors weighed in favor of finding that the city engaged in a proprietary function rather than a governmental function when entering into the lease. First, entering into the lease was discretionary because the city did not have an obligation to lease lakefront lots to private parties. Second, the lease benefitted the city's residents over the general public because the primary objective of leasing the property was to raise funds for the city's budget. Third, the lease primarily benefitted the city's residents and was not done on behalf of the State of Texas. Fourth, although the lease's "overarching purpose" was to develop the water supply reservoir, merely being "associated" with a governmental function did not make entering into the lease a governmental function. The action may be treated as governmental only when it is essential to the city's governmental actions—the lease was not.

Because the Texas Supreme Court held that entering into the lease was a proprietary function, it reversed the court of appeals' judgment and remanded to the trial court to consider the city's additional grounds.

Texas Tort Claims Act: *City of Houston v. Crawford*, No. 01-18-00179-CV, 2018 WL 4868306 (Tex. App.—Houston [1st Dist.] Oct. 9, 2018) (mem. op.). This is a premises defect case where the First District Court of Appeals in Houston affirmed the trial court order denying the city's plea to the jurisdiction.

Crawford, a United Airlines passenger, was on a layover in the Houston airport. Crawford alleged he slipped and fell due to a negligently maintained floor. Crawford asserted the city had actual knowledge of the defect and failed to correct it. Specifically, a greasy area of the floor had cones placed around the area. She asserted first she was an invitee, but even if a licensee, the city had actual knowledge of the danger. The city filed a plea to the jurisdiction. The trial court denied the plea and the city appealed.

The court first determined Crawford was a licensee as slippery floors fall under ordinary premise defect theories. Next, to prove actual knowledge, the licensee must show that the owner actually knew of a "dangerous condition at the time of the accident." The airport supervisor testified she reviewed the records and reports in the Airport Safety and Operations Compliance System (ASOCS) and found "no records or reports concerning notice of a dangerous condition, including grease or other liquid or foreign substance, or of any person slipping and falling or any incidents, in Terminal A for June 18, 2015," or for the six months prior to that date. Crawford's husband testified he was walking ahead of her and observed cones around the greasy area of the floor but, that his wife did not see them prior to slipping. "Warnings must be taken in context of the totality of the circumstances." Crawford's husband further testified that the cones failed to encompass the entire defective area, and that she slipped and fell outside the coned area. Accepting as true all evidence favorable to Crawford, indulging all inferences in her favor, and resolving all doubts in her favor, the court concluded Crawford raised a fact issue regarding whether the city adequately warned her of the extent of the dangerous condition. The plea was therefore properly denied.*

Eight Liners: *City of Fort Worth v. Rylie*, No. 02-17-00185-CV, 2018 WL 4782291 (Tex. App.—Fort Worth Oct. 4, 2018). The Second Court of Appeals reversed the trial court's holding that the Texas Alcoholic Beverage Code does not preempt the city's "game room alcohol ordinance." The court affirmed the trial court's holding that portions of a city's zoning ordinance conflicted with Chapter 2153 of the Texas Occupations Code, and found that the Texas Occupations Code does not completely preempt cities from regulating "skill or pleasure coin-operated" machines. The court also reversed and rendered judgment on the city's declaratory-judgment counterclaim for want of jurisdiction.

The lower court granted summary judgment to the operators because some of the ordinances' zoning and sealing-fee provisions conflicted with and were partially preempted by the Occupations Code, but denied summary judgment to the operators on the alcohol restrictions issue and their argument that the Texas Occupations Code completely preempted the ordinances. The lower court denied summary judgment to the city on the issue of the constitutionality of the fuzzy-animal exception.

The Texas Constitution directs and allows the legislature to pass laws prohibiting "lotteries," and Texas passed a law banning "gambling devices." However, the ban does not proscribe devices designed solely for amusement purposes and that reward non-cash merchandise (prizes, toys, etc.); this exception is called the "fuzzy-animal exception." The appellees are operators who own, lease, and exhibit electronic gaming machines that produce tickets/coupons that can be redeemed for a prize. The city passed two ordinances regulating these machines. One placed zoning restrictions on where the machines can be located in order to protect certain areas from

alleged deleterious effects on surrounding businesses and the quality of the areas. The other placed an alcohol restriction on the "game rooms" in which the machines were located. The operators sued and argued that the ordinances were void under the Texas Occupations Code and the Texas Alcoholic Beverage Code. The city counterclaimed and argued that the "fuzzy-animal exception" was unconstitutional under the Texas constitution's ban of "lotteries."

The city argued that Chapter 2153 of the Texas Occupations Code did not preempt the ordinances because the machines were not "skill or pleasure coin-operated machines." The city further argued that the fuzzy-animal exception in the Penal Code is unconstitutional because it legalizes lotteries. The Second Court of Appeals held that the machines are "skill or pleasure coin operated machines" under Chapter 2153 Texas Occupations Code, and that the power to regulate the machines, therefore, generally belonged to the state legislature rather than cities. The court rejected the city's argument that machines were illegal and unconstitutional. Instead, the court found Chapter 2153 of the Texas Occupations Code applies to all legal and illegal skill or pleasure coin-operated machines and declined to issue an advisory opinion on the constitutionality of the fuzzy-animal exception. When considering the operators' contention that Chapter 2153 entirely preempted the city's regulations, the court found that Chapter 2153 does not reflect legislative intent to completely and totally preempt any local regulation of coin-operated machines. The court affirmed the trial court's ruling that Chapter 2153 partially preempted the ordinance.

The court also held that Section 109.57 of the Texas Alcoholic Beverage Code dictates that the manufacture and sale of alcoholic beverages are exclusively governed by state law. This explicitly precludes cities from passing ordinances that go beyond the scope of state law, and the city's attempt to ban the sale of all alcohol in "game rooms" containing the gaming machines in question goes beyond the narrow circumstances in which the Alcoholic Beverage Code allows cities to pass alcohol restrictions.

Finally, the appellants raised a "substantive-due-course-of-law" argument that the ordinances' real world effect was not rationally related to the city's interests. However, because the appellants did not raise this issue until appeal, the court refused to consider it.

Contracts and Personal Jurisdiction of Out-of-State Entities: *City of White Settlement v. Emmons*, No. 02-17-00358-CV, 2018 WL 4625823 (Tex. App.—Fort Worth Sept. 27, 2018) (mem. op.). While involving a city, this case is more about personal jurisdiction over an out-of-state financial institution involved in an economic development corporation (EDC) project. It will likely only be of interest to litigators and contract drafters.

In September 2013, the city and EDC entered into a transaction with Hawaiian Parks – White Settlement, LLC (HPARKS) where the city would ground lease land to HPARKS to construct a water and adventure park and would pay up to $12.5 million for the construction, to be financed by debt obligations issued by either the city or the EDC. The ground lease agreement allowed HPARKS to encumber the leasehold interest and capital improvements but only with the city's consent. The owners of HPARKS mortgaged the park in order to finance the park construction. HPARKS ran out of money and could not meet its past due obligations or complete construction. Capital One and the Source Capital Lenders issued notices of default. As part of a financial

reorganization, the city and EDC agreed that HPARKS could execute documents granting a lien on all of its right, title, and interest under the ground lease and that Capital One could foreclose on that interest in an event of default of its loan to HPARKS. Despite receiving new loans and changing ownership, HPARKS failed to make good on its obligations to the city or bank. The city sued the owners and lenders claiming the banking entities falsely represented that the city would be provided payment in exchange for allowing the encumbrances and not declaring a default. Further, instead of making the October 2015 lease payment and ensuring that the park had enough income, the defendants diverted HPARKS's income to operate other parks in other cities. The Source Capital defendants filed a special appearance noting a lack of personal jurisdiction. The trial court granted the special appearance without holding a live hearing. The city and EDC appealed.

A Texas court may assert personal jurisdiction over a nonresident defendant only if the requirements of the Texas long-arm statute and of due process under the Fourteenth Amendment are satisfied. A trial court may exercise specific jurisdiction over a defendant only if the suit arises out of or relates to the defendant's forum contacts. This depends on the existence of activity or an occurrence that takes place in the forum state and, therefore, the party is subject to the state's regulation. The court went through a lengthy listing of evidence and testimony. The evidence showed the various defendants were physically present in the state and made allegedly fraudulent representations on which the city and EDC relied. The court held the Source Capital defendants purposefully availed themselves of the privilege of conducting business and investment activity in Texas sufficient to confer specific jurisdiction on the trial court for fraud and torts. However, personal jurisdiction over the individual agents of Source Capital does not extend to the breach of contract claim. Unlike in a tort context, a corporate agent who is not individually a party to a contract may not be held liable for breaching a contract to which only his principal is a party. As a result, the trial court's order is affirmed-in-part and reversed-in-part.*

Junk Vehicles: *In re Pixler*, No. 02-18-00181-CV, 2018 WL 3580637 (Tex. App.—Fort Worth July 26, 2018). This is a mandamus suit where the Fort Worth Court of Appeals held the district court had jurisdiction over the City of Newark's enforcement of its junk vehicle ordinance, but that the city ordinance did not properly create an alternative mechanism to allow for administrative penalties.

Pixler owns an auto-tech business and would sometimes store vehicles in parking spaces on the neighboring property. Pixler was given eight complaints which were submitted to an administrative board under the city's ordinances. The board determined the vehicles were junk vehicles and assessed $8,000 in administrative penalties. Pixler did not challenge the board decision directly. The city then filed a petition in district court seeking: (1) to enjoin Pixler from further violating its ordinances; (2) to collect the $8,000 in administrative penalties; and (3) to impose separate civil penalties against Pixler for continuing to violate its ordinances. The city won a partial summary judgment motion and awarded penalties totaling $80,000.00, but since the City's Texas Uniform Fraudulent Transfers Act claim is still pending, no final judgment has been entered. Pixler filed this mandamus proceeding challenging the district court's subject matter jurisdiction over the matter.

The Fort Worth Court of Appeals divided its holding into roughly three parts: district court jurisdiction over junk-vehicle determinations, district court jurisdiction over administrative penalties assessed by the administrative board, and the district court's jurisdiction over the additional civil penalties. Subchapter B of Chapter 54 of the Texas Local Government Code addresses health and safety ordinances and allows a district court to have jurisdiction over enforcement of such ordinances. Section 54.016 permits a city to obtain injunctive relief against the owner of the premises that is allegedly in violation of the ordinance. Since the city ordinance declares any junked vehicle visible from a public place to be detrimental to the safety and welfare of the public, enforcement is proper in the district court. And since Section 54.017 allows civil penalties of no more than $1,000 per day, the district court has jurisdiction over the civil penalties. However, for administrative penalties assessed by the administrative board, the city's ordinances did not comply with the statutory requirements. The city's ordinances adopt the procedures established under the Texas Transportation Code Chapter 683 for abatement of junked vehicles. But, the procedures adopted address enforcement in municipal court before a judge. And while Subchapter E of Chapter 683 allows a city to adopt an alternative procedure for junked vehicles and Section 54.044 of the Local Government Code likewise allows a city to adopt a general alternative procedure, none of the City of Newark's ordinances actually did that. The court acknowledged the city has the statutory authority to adopt an alternative administrative procedure, but to do so, the city must adopt a specific ordinance setting out the process. Simply because the city has a municipal court of record does not, by default, mean it can utilize an alternative administrative procedure. Because the city utilized that procedure when its ordinances did not adopt one, the administrative board lacked authority to assess the $8,000 administrative penalty.**

Special Defect: *City of Lancaster v. LaFlore*, No. 05-17-01443-CV, 2018 WL 4907843 (Tex. App.—Dallas Oct. 10, 2018) (mem. op.). This appeal stems from the trial court's denial of the City of Lancaster's plea to the jurisdiction and motion to dismiss in a case involving injuries sustained by LaFlore and his children after LaFlore drove across a city street and ran over a manhole with a partially dislodged cover.

In its appeal, the city argued that: (1) the partially dislodged manhole cover was not a "special defect"; (2) the city had no knowledge of the condition at the time of LaFlore's accident; and (3) it is immune from LaFlore's claims for property damage. The court of appeals reversed the trial court's order denying the city's plea to the jurisdiction and rendered judgment dismissing LaFlore's claim for lack of subject matter jurisdiction.

The court, applying its own precedent, found that the partially dislodged manhole cover was not a special defect because it was not of the same kind or class as an excavation or obstruction. The court contrasted the size of the manhole, which was two feet in diameter, in the center of the road, along the center strip between two opposing lanes of traffic, to a pothole, ten feet in diameter and five to six inches deep, that the court had, in another case, held to be a special defect. It also compared the dislodged manhole cover to another case in which the court found a hole in the road that varied from six to ten inches in depth, was four to nine feet wide, and extended over ninety percent of the width of the highway was a special defect. Using these cases as precedent and the Texas Supreme Court's clear direction to construe the Texas Tort Claims Act narrowly, the court found that the dislodged manhole cover was not a special defect.

Because the court found that the dislodged manhole cover was not a special defect, and the city needed only to establish that it did not have actual knowledge of the condition to prevail on a premise defect claim. The city proffered evidence that it had not received any reports, calls, or other notices that the manhole's cover was missing, dislodged, or defective in any way or of any accident caused by or related to the manhole or its cover.

With respect to waiver of immunity, a city does not waive immunity from claims for property damage unless the damage is caused by the negligent act or omission of a city employee and arises from the operation of motor-driven equipment. Because LaFlore did not plead that property damage arose from the city's operation of a motor-driven vehicle or equipment, the court sustained the city's argument.

Texas Whistleblower Act: *Sims v. City of Madisonville*, No. 08-15-00113-CV, 2018 WL 4659572 (Tex. App.—El Paso Sept. 28, 2018). David Sims (Sims) was a police officer with the City of Madisonville Police Department from November 2004 to July 27, 2012. In July 2012, Sims reported to the chief of police that his supervising officer, Sergeant Covington, and another officer were attempting to recruit individuals to plant narcotics in the vehicles of Covington's ex-wife, with whom Covington was in a contentious custody dispute. The police chief immediately dismissed this information. Sims also discovered that Covington was compiling an investigative file on him seeking to dismiss him. Sims asked the police chief if he was being investigated and Sims was told he was not being investigated. On July 26, 2012, Sims met with the police chief and Covington. Prior to the meeting, Sims accessed the office computers and found Covington's investigative notes and other information that he took to the meeting. Sims was accused of dereliction of duties and was placed on six months probation. The next day, the police chief dishonorably discharged Sims for accessing the police department's computer, stating that it was a violation of the computer-use policies.

Sims appealed his "dishonorable" discharge through the State Office of Administrative Hearings (SOAH). During the SOAH hearing, the police chief testified that he had authorized an internal investigation on Sims. This was the first time the police chief had admitted he authorized the investigation. After Sims prevailed at SOAH, Sims filed a suit under the Texas Whistleblower's Act. His claim was based on the chief's testimony during the SOAH hearing.

The city filed a plea to the jurisdiction asserting the trial court lacked jurisdiction and that Sims' case should be dismissed as untimely. The city did not seek a disposition of its plea to the jurisdiction based on challenges to the jurisdictional facts of Sims' case but, relied, in part, on Section 311.0347 of the Government Code to argue that the statutory prerequisites to suit are jurisdictional requirements in all suits against a governmental entity and that the timely filing of a lawsuit is a statutory, jurisdictional prerequisite to suits against a governmental entity. During the plea to the jurisdiction hearing, Sims informed the trial court that Texas courts had determined that timeliness is not jurisdictional under the Texas Whistleblower Act. The trial court granted the plea to the jurisdiction based on the reasons stated in the city's plea to the jurisdiction.

Originally, the Eighth Court of Appeals dismissed Sims' appeal for lack of jurisdiction. However, the court granted his motion for rehearing, withdrew its original opinion and judgment (issued on June 8, 2018) and substituted this opinion and judgment.
The court did a *de novo* review of the trial court's ruling regarding subject matter jurisdiction. Sims argued that the trial court erred in granting the city's plea to the jurisdiction because non-compliance with the Texas Whistleblower Act's limitations provision is not jurisdictional and, an affirmative defense of limitation cannot be raised in a plea to the jurisdiction, but must be proven in summary judgment proceedings. Sims based his argument on *State v. Lueck*, 290 S.W.3d 881 (Tex. 2009), where the Texas Supreme Court held that the facts necessary to allege a violation under Section 554.002 of the Government Code were jurisdictional because they were indispensable to the jurisdictional questions of the waiver of sovereign immunity in Section 554.0035. The Eighth Court of Appeals agreed with Sims.

The court found that the city did not challenge the specific jurisdictional facts of Sims' case regarding waiver of sovereign immunity. Instead, the city argued the untimeliness of Sims' suit based on *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500 (2012), where the Texas Supreme Court granted the university's plea to the jurisdiction based on the untimeliness of a suit filed under the Texas Commission of Human Right Act (TCHRA). However, based on *Lueck* and several other rulings by sister courts that untimeliness of a whistleblower's suit is not a statutory prerequisite, the court determined that the trial court erred in granting the city's plea to the jurisdiction, reversed the judgment of the trial court, and remanded the case for further proceedings.

Texas Tort Claims Act: *City of Beaumont v. Mahmood*, No. 09-18-00145-CV, 2018 WL 4623420 (Tex. App.—Beaumont Sept. 27, 2018). In this case, the Ninth Court of Appeals affirms the trial court's denial of the City of Beaumont's plea to the jurisdiction on the grounds that there was a fact issue that would allow a reasonable jury to conclude that the city's operation and use of a motor vehicle and fiberglass manhole caused the plaintiff's injuries.

Mahmood was driving a minivan down a city street when a large fiberglass manhole fell from one of the city's trucks, striking Mahmood's vehicle. The city-owned truck was being driven by a city employee named Christopher Norman. Two years later, Mahmood sued the City of Beaumont, claiming that he was injured during the accident and that: (1) Norman was in the course and scope of his employment when the incident occurred; (2) the city (through its employees) negligently secured the manhole to the truck; and (3) Norman's negligent operation of the truck was the reason the manhole fell from the truck. The city challenged the trial court's jurisdiction by filing a plea to the jurisdiction. In the plea, the city argued (based on information from discovery, Mahmood's deposition, Norman's deposition, & the deposition of an employee witness) that: (1) Mahmood could not show a nexus between his alleged injuries and the city's use of motor-driven equipment; and (2) Mahmood could not show that his injuries were caused by the use of property by a city employee. The trial court denied the city's plea and the city appealed.

The Ninth Court of Appeals held that trial courts do not have jurisdiction over a suit against the government unless there is a state statute waiving the government's immunity for the type of claim in the suit. Under the Texas Tort Claims Act, the government's immunity is waived for

certain torts. Accordingly, a court must deny a city's plea to the jurisdiction if a reasonable jury could find that the city's operation or use of its vehicle caused an injurious collision to occur. Mahmood asserted that the manhole fell off the truck as he was driving behind it, rolled toward him, and struck his car as he attempted to avoid it. Conversely, Norman claimed that when the manhole fell of the truck, Mahmood struck it after the employees had stopped the truck, gotten out to retrieve the manhole, and were rolling it back toward the truck. The city failed to conclusively prove that the collision occurred as the city described and not as Mahmood described. Therefore, a reasonable jury could potentially conclude that there was a nexus between the city's negligence and the accident. Also, a reasonable jury could conclude that the manhole was in use by the city employees even though it had not been installed. The court affirmed the denial of the city's plea to the jurisdiction.

Texas Tort Claims Act: ***City of Fort Worth v. Hart*****, No. 10-17-00258-CV, 2018 WL 4925810 (Tex. App.—Waco Oct. 10, 2018) (mem. op.)**. In this case, the Tenth Court of Appeals reverses the trial court's denial of the city's plea to the jurisdiction.

Hart, on behalf of his minor child, sued the City of Fort Worth for injuries the child suffered as the result of an auto accident involving a city police officer (Officer Castaneda). At the time of the accident, Officer Castaneda was driving a city-owned vehicle on his way to work. In support of its plea to the jurisdiction, the city presented certain evidence to which Hart objected. The trial court denied the city's plea to the jurisdiction and sustained objections to the exhibits, orally stating: "I do not find that the fact issue does exist as to whether or not the Officer was acting within the course and scope of his duties." The city appealed arguing: (1) the objections to the city's evidence should not have been sustained; and (2) Hart failed to demonstrate the officer was acting in the course and scope.

The appellate court concluded that the trial court's order granting the objections to the city's evidence was an abuse of discretion. The Tenth Court of Appeals also concluded that the evidence presented by the city showed that Officer Castaneda, at the time of the accident, was off-duty, not being paid for his time, had no official duties, and was merely commuting to work. Harts arguments that: (1) the accident occurred during the hours the officer was scheduled to work; (2) city policy only allowed the officer to use the vehicle for city business; (3) the officer was on-call at all times; (4) Castaneda identified himself as an officer; (5) the police report identified the city as the financially responsible party; and (6) Castaneda was required to, but did not, report off-duty usage of the vehicle were insufficient to raise a fact issue about whether the officer was in the course and scope. The trial court's order denying the city's plea to the jurisdiction is reversed.

Governmental Immunity: ***Ray's Drive Inn Inc. v. Angelina Cty. & Cities Health Dist.*****, No. 12-18-00076-CV, 2018 WL 4474054 (Tex. App.—Tyler Sept. 19, 2018) (mem. op.).** In this case, the Twelfth Court of Appeals affirms the granting of a motion to dismiss for lack of jurisdiction on the grounds that the health district's actions were within its authority and were not ultra vires acts.

The Angelina County and Cities Health District (health district) is charged with enforcement of the Texas Food Establishment Rules. Ray's is a restaurant in Lufkin and the health district

refused to reissue a permit to Ray's unless it replaced its two-compartment sink with a three-compartment sink. This was despite the fact that the health district had inspected Ray's five times over the course of 2013-2015 and had never issued a complaint about the sinks. Ray's sued, claiming that the health district's refusal to reissue the permit was beyond its authority under the rules. The health district moved to dismiss Ray's suit for want of jurisdiction, contending that it was barred by sovereign immunity. The trial court granted the motion to dismiss. Ray's appealed and argued that the trial erred in granting the motion to dismiss for lack of subject matter jurisdiction.

As a general rule, governmental immunity deprives Texas courts of subject matter jurisdiction to review agency actions unless there is a legislatively granted right to judicial review. The Texas Uniform Declaratory Judgment Act is not a general waiver of sovereign immunity and does not enlarge a trial court's jurisdiction. However, a suit against a state official who violated a private party's rights without legal or statutory authority is not protected under sovereign immunity. Accordingly, failure to perform ministerial duties (which are performed with precision and are not subject to the official's discretion) is not protected under sovereign immunity. Under Chapter 437 of the Texas Health and Safety Code, public health districts can determine whether food establishments are complying with state law, and can suspend or revoke a permit if such laws are not being properly followed. Whether a restaurant has complied with the code is within the health district's discretion, and is not a strict ministerial decision. Though the code recommends that approval of a restaurant's two-compartment sink by a regulatory authority is sufficient to maintain a permit, this is merely a guideline, not a law. The state legislature intended for health districts to have wide latitude to deal with the issues addressed in the Texas Health and Safety Code. The actions or failures to act that Ray's described as beyond the health district's authority are, in reality, within the health district's authority, so the trial court did not err in granting the health district's motion to dismiss for lack of subject matter jurisdiction.

Inverse Condemnation: *APTBP, LLC v. City of Baytown*, No. 14-17-00183-CV, 2018 WL 4427403 (Tex. App.—Houston [14th Dist.] Sept. 18, 2018) (mem. op.). In this case, the Fourteenth Court of Appeals affirms the granting of a city's plea to the jurisdiction regarding a private company's takings claim.

APTBP purchased Bay Pointe Apartments, which had been damaged by Hurricane Ike. APTBP began to repair the apartments and a dispute arose when the City of Baytown allegedly refused to restore electricity to repaired, vacant units in the apartment complex. Though the city eventually restored power to the complex, APTBP sued the city under Article 1, Section 17 of the Texas Constitution, claiming an inverse condemnation/regulatory taking. APTPB claimed that the city had arbitrarily refused to reinstate electricity to the repaired units until the entire complex obtained a certificate of occupancy. They argued that no other complex had to fulfill this requirement, and that they had lost revenue from ready-to-lease units. The city claimed governmental immunity and argued that APTBP lacked subject matter jurisdiction because there were insufficient facts to establish a viable takings claim. The city asserted that it had inspected the Bay Pointe Apartments and it did not meet minimum requirements to obtain a certificate of occupancy. They claimed that power was restored once the apartments were up to code. APTBP responded that the city had misapplied its ordinances. The trial court granted the city's plea to the jurisdiction and dismissed APTPB's claim against the city.

The court held that the city's actions did not constitute a viable taking under the Texas Constitution. The Texas Supreme Court concluded in *City of Houston v. Carlson* that a complaint about the misapplication of a city's safety regulations with regard to the owners' property, or a complaint about the manner in which a city enforces its standards, is not a takings. APTBP did not challenge the city's regulations or standards; they only challenged the city's application of those regulations and standards. Therefore, they did not present a viable takings claim under *Carlson*. The Court held that the trial court properly granted the city's plea to the jurisdiction.

September 2018

Note: Included cases are from August 11, 2018 through September 10, 2018.

Drainage Fee Ordinance: *Perez v. Turner*, No. 01-16-00985-CV, 2018 WL 4131009 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018). The First Court of Appeals reversed in part and remanded the grant of a plea to the jurisdiction, finding that the plaintiff, Elizabeth Perez, had standing to pursue her claims for prospective and declaratory relief for a drainage fee ordinance against the City of Houston, the Director of Public Works and Engineering, and the Mayor.

Perez had previously filed a lawsuit regarding ballot language over a charter amendment (Proposition I) for dedicated drainage and street renewal. Ultimately, the election over Proposition I was held void. While the lawsuit over Proposition I was pending, Houston passed the Drainage Fee Ordinance (ordinance). Perez filed the current lawsuit challenging the ordinance, seeking: (1) a judgment declaring the ordinance invalid; (2) an injunction against the assessment, collection, and expenditure of taxes and fees pursuant to the ordinance; and (3) reimbursement, on behalf of herself and others similarly situated, of taxes and fees assessed and collected pursuant to the ordinance and paid "under duress." The trial court granted the city's plea to the jurisdiction.

The First Court of Appeals determined Perez did not have standing to seek reimbursement for the "illegal" drainage fee; however, Perez did have taxpayer standing to pursue her claims for prospective relief of the proposed illegal expenditures. In order for a taxpayer to have standing to sue the government for past damages, the taxpayer must show that she suffered a particularized injury distinct from that suffered by the general public. Perez failed to do so. The ordinance had not been declared void, which the court determined did not support Perez's assertion that she had paid "illegal" fees. However, the court determined Perez could pursue her claims for injunctive and declaratory relief based on the proposed illegal expenditures. In doing so, the court reasoned that Perez had established that the city was assessing and spending money based on the ordinance.

The court also determined that Perez could sue the individual defendants in their official capacities for prospective relief under the *ultra vires* exception. An *ultra vires* action is allowed when a state officer acts without legal authority if he exceeds the bounds of his granted authority. The court held that the named city officials would be acting without legal authority in collecting taxes and spending money under the ordinance (if the ordinance were found to be unlawful).

Therefore, Perez could pursue her claims to enjoin this conduct. The court also held that the City of Houston did not have governmental immunity for the injunctive and declaratory claims.

Finally, the court found that the issues were ripe for decision. The court reversed in part and remanded to the trial court on Perez's claims for a declaration that the ordinance is invalid and an injunction on any future collection or expenditure of fees pursuant to that ordinance.

Texas Tort Claims Act: *Hinojosa v. Metro. Transit Auth. of Harris Cty.,* No. 01-17-00824-CV, 2018 WL 4131890 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018). The First Court of Appeals affirmed the grant of a plea to the jurisdiction because the court found that the driver of the bus was not a transit authority employee.

Connie Hinojosa sued the Metro Transit Authority of Harris County (Metro) because she fell when a Metro bus driver abruptly stopped while she was walking to her seat. She sued Metro based on the motor-driven vehicle waiver of sovereign immunity under the Texas Tort Claims Act. The trial court granted Metro's plea to the jurisdiction because the bus driver was not an employee of Metro, but rather an employee of First Transit, Inc., with whom Metro contracted to operate some of its bus routes.

The court analyzed whether the bus driver was Metro's employee using the requirements of both "control" and "paid employee" to invoke the waiver of sovereign immunity. The evidence unequivocally showed that First Transit paid the bus driver; thus, the court determined bus driver was not Metro's employee. Likewise, the court rejected Hinojosa's argument that the bus driver was a borrowed employee. Instead, the court found that which entity paid the bus driver was determinative. The court found that Metro had conclusively proved the bus driver was not its paid employee and affirmed the trial court's judgment.

Texas Tort Claims Act: *City of Houston v. Ellis*, No. 01-17-00423-CV, 2018 WL 4087415 (Tex. App.—Houston [1st Dist.] Aug. 28, 2018). The First Court of Appeals affirmed the denial of a plea to the jurisdiction on the grounds that there was a fact issue as to whether the city had notice that a stop sign was down at the time of the plaintiffs' accident.

Lucille Ellis was in an accident with her sister, Margie Williams, as the passenger. Ellis drove through a stop sign and got into an accident with traffic from the adjacent road, which did not have a stop sign. Ellis claimed she did not see the stop sign on her road, and presented evidence that the city had notice of the downed stop sign. Ellis and Williams presented affidavit testimony from a resident of the area, who testified that the sign was down before the accident and that the stop sign was missing for approximately three weeks. The city presented testimony from a police officer who patrolled the area shortly before the accident. The officer testified that the stop sign was not down two days before the accident. The officer further testified that when she arrived on the scene of the accident, the sign was not down, only leaning. The city also presented evidence that the stop sign was repaired two days before the accident. The trial court denied the city's plea to the jurisdiction.

Under Section 101.060(a)(2) of the Texas Tort Claims Act, a city is only liable for the "absence, condition, or malfunction" of a traffic sign or signal when the city has notice of the defect. The

Texas Supreme Court has found there is a waiver of immunity only when the sign or signal was either: (1) unable to convey the intended traffic control information, or (2) conveyed traffic control information other than what was intended. The evidence presented created a fact issue about whether the city had notice of the condition of the stop sign. The court reasoned that "a factual dispute exists as to whether the sign was up or down when [the officer] patrolled the intersection two days before the accident happened." Based on the fact issue, the court affirmed the denial of the city's plea to the jurisdiction.

Historic Property: *City of El Paso v. Grossman*, No. 02-17-00384-CV, 2018 WL 4140461 (Tex. App.—Ft. Worth Aug. 30, 2018) (mem. op.). Max Grossman, an assistant professor of Art History at the University of Texas-El Paso serving on the El Paso County Historical Commission (Commission), sought a declaratory judgment to prevent the city from demolishing an older downtown area, "Duranguito" (Union Plaza), and putting up a multipurpose cultural, athletic, and performing arts facility. The city filed a plea to the jurisdiction, which was denied. During the pendency of the appeal, the court of appeals issued emergency relief to prevent demolition while the appeal was pending. The city moved the court of appeals dismiss its appeal, explaining that since its notice, the city had purchased the property in question and wished to proceed to trial. Grossman opposed the dismissal.

Texas Natural Resources Code Section 191.0525(a) requires notice to a historical commission before an entity breaks ground in order for the commission to determine historical significance. After acquiring title, the city did notify the Commission. This mooted the declaratory judgment claims. The remainder of Grossman's claims are not yet ripe as they occur after notice and historic analysis are provided. As a result, the court granted the city's motion to dismiss the appeal as moot and release the emergency stay.*****

Inverse Condemnation: *City of Crowley v. Ray*, No. 02-17-00409-CV, 2018 WL 4025086, (Tex. App.—Fort Worth Aug. 23, 2018). Doug Ray (Ray) purchased 2 two-acre tracts of land (Ray's Place II) to develop a multifamily residential subdivision in May 1999. Ray was aware that Ray's Place II was covered by a Flood Insurance Rate Map (FIRM) and a Flood Insurance Study (FIS) from August 1995, as modified by a Letter of Map Revision (LOMR) from March and July 1999. The 1999 LOMR was based on a study by Jerry Parché Consulting Engineers and it listed the 100-year floodplain elevation where Ray's Place II is located at 751 feet. Though Ray originally submitted a preliminary plat for the entire four acres of Ray's Place II in October 2001, eventually he split Ray's Place II into two phases. In October 2002, Ray submitted a final plat for Phase 1 using the 1999 LOMR for information needed for the 100-year floodplain. The city accepted the 1999 LOMR for Phase I as part of the final plat and Ray constructed Phase I.

In December 2006, Ray started developing Phase 2 and submitted a preliminary plat with 1999 LOMR to the city. The city approved the preliminary plat in April 2007. The following month, Ray submitted the proposed final plat for Phase 2, but the city required him to have a new flood study performed. Ray had a new flood study done and the results affected the city's opinion about the minimum finished floor elevations for Phase 2. Based on the new flood study and advice from Teague Nall and Perkins, the city required Ray to have the 100-year floodplain elevation for Phase 2 at 761.5 feet. Ray thought the new elevation was arbitrary, made Phase 2

economically infeasible to develop, and left the land with no potential use without "raising the dirt."

In 2009, Ray sued the city for declaratory relief and Teague Nall and Perkins for negligence and other claims. The city filed a plea to the jurisdiction arguing it was immune because Ray failed to allege a valid claim for declaratory relief. The trial court denied the city's plea and the Fort Worth Court of Appeals affirmed the trial court's first interlocutory order. Before the trial court granted the city's summary judgment on some of Ray's claims for declaratory relief, Ray filed an amended petition that added a claim against the city for inverse-condemnation, claiming that the city's actions affected an unconstitutional taking of property. The city filed another plea to the jurisdiction arguing that Ray's inverse-condemnation claim is not ripe and that the city's governmental immunity has not been waived. The trial court denied the city's plea and the city appealed.

In its first four issues, the city argued that the trial court lacked subject-matter jurisdiction over Ray's inverse-condemnation claim because: (1) the claim was not ripe, (2) Ray failed to exhaust administrative remedies, (3) the city was immune from suit, and (4) the claim failed as a matter of law. In its fifth issue, the city challenged the trial court's authority to award attorneys' fees after summarily disposing of Ray's claim for declaratory relief. The Fort Worth Court of Appeals did a *de novo* review of the trial court's ruling on the plea to the jurisdiction.

In the city's first issue, it argued that Ray's inverse-condemnation claim was not ripe for judicial review because the city had not made a final decision involving Phase 2's development. The city joined the second issue with the first and contended that Ray failed to exhaust administrative remedies or other procedures that might have alleviated the alleged regulatory taking. The court explained that for there to be a regulatory taking per se, the governmental entity has to either completely deprive an owner of all economically beneficial use of the owner's property or an owner suffers a permanent physical invasion of her property, no matter how small. *Lingle v. Chevron U.S.A, Inc*., 544 U.S. 528, 538, 125 S. Ct 2074, 2081 (2005). If the regulatory taking challenge is not covered by the two categories, then the factor analysis set out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978) is used. *Id*. at 538-39. An inverse-condemnation claim is not considered ripe "until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson Cit*y, 473 U.S. 172, 186 (1985). The court did not agree with the city's argument that Ray had not considered other options for the development of Phase 2 other than the fullest extent possible similar to the case of *MacDonald, Sommer & Frates v. Yolo Cty*., 477 U.S. 340, 348 (1986). In *MacDonald*, the court determined the petitioner still had a possibility of development and had not received a final decision from the county when he sued. The court determined that the city's ripeness argument was not analogous to *MacDonald*. The court felt that no matter what other plans Ray submitted for Phase 2, the city would probably still insist on the same requirement concerning the 100-year floodplain elevation making the city's decision final even if the development was scaled down. The city also argued that Ray's regulatory-taking claim was not ripe because Ray did not file or request any administrative appeals, such as variances or flood determination appeals. But, the court, reviewing the record, felt that the city had taken a

definitive position on the minimum finished floor elevations for Phase 2 and Ray pursuing a variance would have been futile. The court overruled the city's first issue.

To support its second issue concerning exhausting administrative remedies, the city argued one of the same arguments above that Ray did not file or request any administrative appeals. For a final decision to be determined under an exhaustion of administrative remedies claim, the court has to determine "whether an agency has exclusive jurisdiction in making an initial determination on the matter in question and whether the plaintiff has exhausted all required administrative remedies before filing a claim in trial court." *Garrett Operators, Inc. v. City of Houston*, 360 S.W.3d 36, 42 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). Though the city argued Ray never formally appealed any administrative determination under the city's subdivision ordinance or flood prevention regulations, the court could not conclude that Ray failed to exhaust any administrative remedies since the city did not disclose or direct the court to any remedial statutory schemes. The court did not accept the city's argument that Ray should have sought a variance since Ray was trying to design Phase 2 according to the floodplain elevations allegedly adopted by the city. The court overruled the city's second issue.

In its third issue, the city argued that its governmental immunity had not been waived because Ray failed to allege or produce evidence that the city intentionally and directly acted to cause a taking. "To state a cause of action for inverse condemnation under the Texas Constitution, a plaintiff must allege (1) an intentional governmental act, (2) that resulted in a taking of property, (3) for public use." *Gen. Servs. Comm'n v. Little-Tex Insulation Co*., 39 S.W.3d 591, 598 (Tex. 2001). The court did not accept the city's argument that Ray's failure to state a valid claim by seeking to hold the city liable under a taking theory based on the 1999 LOMR that set the floodplain elevation was analogous to the case of *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W 3d 468, 484 (Tex. 2012). In *Heart Bluff*, the Texas Supreme Court concluded that the plaintiff had not alleged a valid takings claim against the State because the United States Army Corps of Engineers (Corps) had denied the plaintiff a permit for a federal mitigation bank, not the State, and because the State did not directly restrict the land by merely designating the property as "unique" as a possible drinking water reservoir in a 2006 water plan issued by the Texas Water Development Board. The court found the city, not the LOMRs, was responsible for the city's refusal of Ray's development plan for Phase 2 since the city prohibited him from developing Phase 2 using the "effective" floodplain criteria. Also, the court stated that the city was more analogous to the Corps' denial in *Heart Bluff* than the State. Thus, the court held Ray did complain of a direct, governmental action by the city and overruled the city's third issue.

The court next examined the city's fourth issue, that Ray's *Lucas* claim failed as a matter of law because the relevant parcel for a takings analysis must include Phase 1. The city argued Phase 1 and Phase 2 should be treated as one property for the purposes of a value determination because Ray purchased the phases at the same time and initially planned to simultaneously develop the entire four acres. In *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945-46 (2017), the United States Supreme Court explained how a court should identify the relevant parcel for purposes of determining whether a regulatory taking has occurred by utilizing a factors analysis which included the treatment of the land under state and local laws, the physical characteristics of the land, and the prospective value of the regulated land. The U.S. Supreme Court stated that "[t]he endeavor should determine whether reasonable expectations about property ownership would

lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." *Id*. at 1945. The Fort Worth Court of Appeals disagreed with the city stating that Phase 1 was not relevant to Phase 2's value determination because the court failed to see how purchasing the phases at the same time overrode the separate legal identity of each tract. The court stated though Ray initially submitted a preliminary plat for the property as a whole, he decided to develop the properties in two separate phases and submitted a final plat for only Phase 1 which he proceeded with and finished before developing Phase 2. The court also took into account that the city allowed Phase 1 to be built under the flood elevation figures in the 1999 LOMR which is the same LOMR that is disputed in this case. The court felt the *Murr* factors weighed against treating Phase 1 and Phase 2 as a single unit for the purposes of making an economic-value determination and overruled the city's fourth issue.

Last, the court reviewed the city's fifth issue which argued that the court should dismiss Ray's still pending claim for attorneys' fees because the trial court, by summary judgment, disposed of the request for declaratory relief upon which the fees were predicated, and in the absence of a valid waiver of immunity, attorneys' fess are not recoverable under the Uniform Declaratory Judgment Act. However, the trial court had not made any award of attorneys' fees either way and a final judgment had not been entered. The court overruled the fifth issue. Having overruled all of the city's issues, the trial court's order denying the city's plea to the jurisdiction was affirmed.

Texas Tort Claims Act: *Texas Facilities Comm'n v. Speer*, No. 03-17-00244-CV, 2018 WL 4171257 (Tex. App.—Austin Aug. 31, 2018). The Texas Facilities Commission (commission) filed this appeal following a denial of its plea to the jurisdiction in a trip-and-fall case. The Austin Court of Appeals reversed the trial's holding.

The commission manages State-of-Texas-owned properties including a surface parking lot, designated as "Lot 27." Lot 27 was constructed with vehicle access points that included a short driveway near its northwestern corner which crosses an adjacent sidewalk. A vehicle barrier consisting of two concrete posts with a cable suspended between the posts was constructed across the driveway to address pedestrian and vehicular problems. Speers alleged that, one night, as he was walking through Lot 27, he tripped over the cable and was injured. He brought suit against the commission, asserting the cable, over time, had drooped lower than designed due to a partially uprooted post and had lost its reflectors. The commission filed a plea to the jurisdiction, which was denied. The commission appealed arguing that its duty to Speer was limited to that owed by a private landowner to a licensee with respect to an ordinary premise defect.

Section 101.021 of the Texas Tort Claims Act (TTCA) provides that immunity is waived for a premise defect. However, other TTCA provisions modify the scope and effect of the waiver. The commission asserted that Section 101.022 provides that a property owner must have actual notice of a dangerous condition in order to attribute liability as a premise defect. Speers asserted that the cable and posts were traffic control devices, and that, under Sections 101.022(b) and 101.060, a heightened standard applies to traffic control devices. As such, a heightened standard applied to the commission.
The court, putting the sections into practical context, concluded that the net effect of the TTCA provisions is that the TTCA waives immunity with respect to a premises-defect claim founded on

an unreasonably dangerous condition arising from "the absence, condition, or malfunction of a traffic or road sign, signal, or warning device," but only in instances where the governmental unit had actual or constructive notice of the "absence, condition, or malfunction" and failed to correct it within a "reasonable time" thereafter. However, the court found that such a claim is not subject to the licensee standard generally imposed by Section 101.022(a). The court then analyzed whether the cable was a "traffic control" sign, signal or warning device, which are used in connection with hazards *normally* connected with the use of the *roadway*. The court found that cable does not direct normal users of the roadway in the traditional sense, and is therefore, not a traffic control sign, signal or warning device. Taking a detailed analysis, the court held that such devices are distinguishable from special-defect-types-of- situations, which carry a higher standard of care. As such, Section 101.060 is not a standalone provision. Section 101.060 presumes a premise defect waiver under Section 101.021 and modifies that waiver. Finding that this was a premise-defect case, the court held that Speers failed to establish that the commission had actual or constructive notice of the dangerous condition. As a result, the plea should have been granted.*****

Texas Tort Claims Act: *Roche v. City of Austin*, No. 03-17-00727-CV, 2018 WL 3978333 (Tex. App.—Austin Aug. 21, 2018). Roche filed this appeal after the trial court dismissed his Texas Tort Claims Act suit for lack of jurisdiction in a case involving an automobile collision. The Austin Court of Appeals affirmed the dismissal.

Roche was involved in an after-dark automobile collision with a police car driven by a City of Austin police officer. The officer received a 9-11 call that a man brandishing a knife was threatening people in a Dollar General parking lot. Responding to the call, the officer drove eastbound with his emergency lights and siren on. As he approached an intersection, the traffic light was red, and traffic was stopped in all lanes in his direction. To proceed, the officer elected to drive over the median dividing the eastbound and westbound lanes. Roche entered the intersection under a yellow light. When the officer was almost through the intersection, Roche's truck collided with the passenger side of the police car. Although Roche heard the emergency siren before he proceeded into the intersection, he did not see the police car until it was too late. The officer was later reprimanded for violating department policies on how to respond to such calls. Roche sued the city. The city filed a motion for summary judgment asserting immunity, which was granted. Roche appealed.

Under the emergency exception provision of the Texas Tort Claims Act, waiver of immunity does not exist if: (1) the employee was responding to an emergency; (2) the employee was acting in compliance with applicable laws and ordinances governing the employee's response; or (3) in the absence of such a law or ordinance, the employee did not act with conscious indifference or reckless disregard to the public's safety. The emergency exception provision is designed to balance the public's safety with the need for prompt response from public-safety personnel. Imposing liability for a simple failure in judgment could deter emergency personnel from acting decisively and from taking calculated risks. Additionally, the emergency exception provision is intended to prevent judicial second-guessing of split-second and time pressured decisions emergency personnel are forced to make.

The court reviewed the officer's conduct and found that "the Officer's timely presence at the store was crucial to protect the safety, and perhaps lives, of these people. The need to reach the Dollar General premises as quickly as possible was manifest." The court analyzed the "laws" and "ordinances" governing the officer's response under the Texas Transportation Code. Section 546.001 allows, among other acts, the operator of an emergency vehicle to "proceed past a red or stop signal or stop sign, after slowing as necessary for safe operations," and to "disregard a regulation governing the direction of movement or turning in specific directions." A police department's internal policy or procedure is not a "law" or "ordinance" for purposes of waiver of immunity, so the reprimand is irrelevant. The evidence showed that witnesses stated no other vehicles were in the intersection when the officer entered it. The officer was driving "relatively slowly" and slowed down before he entered the intersection, the officer took his foot off the accelerator before entering the intersection, and Roche entered the intersection at a "relatively fast" pace, without hesitation. After reviewing the submitted evidence, the court held the summary-judgment record established, as a matter of law, that the officer complied with the laws applicable to the emergency situation. As a result, the trial court's judgment was affirmed.*

Governmental Immunity: *Triple BB, LLC v. The Village of Briarcliff*, No. 03-17-00149-CV, 2018 WL 3863252 (Tex. App.—Austin Aug. 15, 2018). Triple BB, LLC (Triple BB) filed this interlocutory appeal in response to the district court's granting of the Village of Briarcliff's plea to the jurisdiction in a case involving a billboard. The Austin Court of Appeals affirmed the dismissal.

A local marina owned a billboard that was located on a cliff-side property owned by the Village of Briarcliff. In 2002, the village entered into a separate contract with the owners of the marina for an easement across the marina's land to install and maintain a raw water line in exchange for the village granting the marina, "its successors and assigns" a license to continue to display the billboard on the village's property (2002 Contract). Several years later, the marina and the interests in the 2002 Contract was sold to Triple BB. Additionally, the village conveyed the property on which the billboard was located to a third party, who demanded that Triple BB remove the billboard. The deed from the village to the third-party was silent as to the billboard or the license granted in the 2002 Contract. Triple BB sued the third party and later added the village seeking a declaratory judgement, a permanent injunction to keep the billboard in place, and an award of attorney's fees. The district court granted the third-parties' motion for summary judgement. The village filed a plea to the jurisdiction asserting that Triple BB had failed to establish a waiver of its governmental immunity. Triple BB responded by amending its pleadings and asserted that it acquired a prescriptive easement to display the billboard and that the village breached the 2002 Contract by failing to convey its cliff-side property subject to its license and, therefore, the village took its property without compensation in violation of the Texas Constitution. Triple BB also sought declaratory relief based on its alternate theory that the 2002 Contract was void for failure of consideration. The district court granted the village's plea to the jurisdiction.

First, the court briefly addressed the proprietary versus governmental function distinction and held that the contract at issue was primarily to allow water and sewer service, with the billboard being merely a form of consideration. As a result, the village acted in a governmental capacity. Next, the court addressed Triple BB's claim that a prescriptive easement does not implicate

governmental immunity because it "does not involve state action." As a general rule, when the government "is made a party defendant to a suit for land," immunity bars the suit absent legislative consent. The court held that an easement is a nonpossessory interest in land, and Triple BB's claim that it gained the right to use the village's land to display the billboard is, in substance, a suit for land that is barred by governmental immunity.

The court then addressed Triple BB's claim that Section 271.152 of the Local Government Code waives the Village's immunity from suit for its breach-of-contract claim. The court found that by conveying an easement, the previous owners granted the village a legal right to use their land in a certain way, but made no promise to perform an act or provide anything; therefore, the 2002 Contract was not a contract for a service and immunity was not waived. As to Triple BB's declaratory judgment claim, except for a narrow waiver of immunity for claims challenging the validity of ordinances or statutes, the Uniform Declaratory Judgment Act generally does not waive immunity. Finally, to plead a viable inverse condemnation claim, "a plaintiff must allege an intentional government act that resulted in the uncompensated taking of private property" for public use. The court found that Triple BB's factual allegations, taken as true, do not include an intentional act by the village which resulted in the taking of Triple BB's land; it merely conveyed the land to a third party. As a result, the trial court properly granted the village's plea.*

Civil Service: *City of San Antonio v. Int'l Ass'n of Fire Fighters*, No. 04-17-00450-CV, 2018 WL 4096397 (Tex. App.—San Antonio Aug. 29, 2018). This appeal stems from the trial court's judgment declaring that the City of San Antonio, its fire chief, and its city manager violated Chapter 143 of the Texas Government Code by creating a new non-classified position in the fire department and filling it with a non-civil-service employee, enjoining them from maintaining the non-classified position, and awarding the International Association of Firefighters (Association) attorney's fees.

In late 2013, the city's fire chief asked the city to create a new civilian (non-civil-service), non-classified, position of Assistant to the Director of the Fire Department. The city manager's office and the city's human resources department approved the request and posted the position over the Christmas holidays. The position was funded, in part, by eliminating a civilian, non-classified position in the fire department. After conducting interviews, the fire chief recommended the hiring of an individual who had worked for the fire department for 34 years and was a deputy chief when he retired in December 2013. The individual began work in the civilian position in January 2014.

The Association sued the city, the fire chief, and the city manager, in their official capacities, alleging: (1) the position of assistant to the director is a firefighter position within the scope of Chapter 143 that must be a classified position; and (2) the fire chief and the city manager, in their official capacities, acted ultra vires by creating and filling the position in violation of Sections 143.003 and 143.021 and violated the corresponding rights of the Association members. The Association further sought prospective injunctive relief and recovery of its attorney's fees under the Uniform Declaratory Judgement Act (UDJA).

The court first addressed whether the city was immune from suit. The court found that Chapter 143 does not provide a waiver of immunity from the claims made in the lawsuit. Additionally,

the UDJA waives immunity of a city if the plaintiff challenges the validity of an ordinance, but does not waive immunity from a claim that it violated the law. As a result, the court found that the city is immune from this lawsuit, and reversed the trial court's judgement against the city and rendered judgement dismissing the Association's claims against the city for lack of jurisdiction.

The court then addressed the Association's ultra vires claims against the fire chief and the city manager. The central question is whether the new position is a "firefighter" within the meaning of Chapter 143. Pursuant to Chapter 143, all of the city's "fire fighters" must be classified. A member of a fire department is a "firefighter" if their position requires substantial knowledge of firefighting and of work in the fire department, and includes an employee who performs: fire suppression; fire prevention; fire training; fire safety education; fire maintenance; fire communications; fire medical emergency technology; fire photography; fire administration; or fire arson investigation.

The court of appeals found that the city had sovereign immunity, and reversed the trial court's judgement and rendered a judgment of dismissal. The court further held that the new position of assistant to the director of the fire department is a "firefighter" position that must be classified, and affirmed the judgement for declaratory and injunctive relief against the fire chief and the city manager, in their official capacities. Lastly, the court found that the officials are not immune from the award of attorney's fees in an ultra vires action under the Uniform Declaratory Judgement Act, and affirmed the award.

Texas Tort Claims Act: *City of San Antonio v. Smith*, No. 04-17-00572-CV, 2018 WL 3998664 (Tex. App.—San Antonio Aug. 22, 2018). The district court denied the City of San Antonio's, by and through City Public Service Board of San Antonio d/b/a CPS Energy (CPS Energy), plea to the jurisdiction in a case involving a motorcycle accident. The San Antonio Court of Appeals reversed the district court's ruling.

Smith alleged that while he was driving his motorcycle on an exit ramp, he struck a light pole that had fallen on the roadway. Smith also alleged that he was unable to avoid the light pole and was thrown from his motorcycle sustaining serious injuries. Smith sued CPS Energy alleging that CPS Energy was negligent in failing to timely remove the light pole blocking the roadway and in failing to warn him of the light pole blocking the roadway. He asserted negligent activity, premises liability, and gross negligence claims against CPS Energy. CPS Energy filed a plea to the jurisdiction asserting that it was entitled to governmental immunity because: (1) the Texas Tort Claim Act's (TTCA's) limited waiver of immunity provided by Section 101.021 of the TTCA did not apply; (2) even if Smith had alleged facts that brought his claims within Section 101.021's limited waiver of immunity, his claims were barred by statutory exceptions for emergencies provided under Sections 101.055(2) and 101.062(b) of the TTCA; and (3) any act on its part regarding the downed light pole was a discretionary act for which the legislature had not expressly waived immunity. In his response to the plea, Smith argued that: (1) CPS Energy shared with the City of San Antonio responsibility for the maintenance and removal of downed light poles in emergency situations under a joint enterprise theory; (2) CPS Energy and the city's light pole maintenance was a proprietary function that was not protected by immunity; (3) CPS Energy was not protected by immunity because immunity does not extend to private companies exercising independent discretion; and (4) even if immunity did apply, it would be waived

because the light pole obstructing the roadway was a special defect under the TTCA. The trial court granted CPS Energy's plea as to Smith's negligent activity claims, but denied its plea as to Smith's premises liability and gross negligence claims.

The court first addressed whether the activities that form the basis of Smith's claims were proprietary in nature. A governmental entity like CPS Energy does not have immunity when it engages in a proprietary function, and a municipality's operation of its own public utility is a proprietary function. However, the fact that CPS Energy primarily functions as a public utility does not prevent it from performing activities that are governmental in nature. The court found that the activity that formed the basis of Smith's claims – responding to a traffic hazard either by removing the hazard from the roadway or by warning drivers of the hazard – was a governmental function. The court then addressed CPS Energy's argument that Smith's claims were barred by Section 101.055(2) of the TTCA (the "emergency exception"). The emergency exception provides that immunity is not waived for a claim arising from the action of an employee while responding to an emergency call or reacting to an emergency situation, if the action was in compliance with the laws and ordinances applicable to the situation. If no law or ordinance is applicable to the situation, then the emergency exception will apply if the employee's action was not taken with conscious indifference or reckless disregard for the safety of others. Reviewing the evidence, the court concluded that Smith's claims arose from CPS Energy's response to an emergency call or a reaction to an emergency situation. Therefore, the emergency exception applied and the trial court did not have subject matter jurisdiction over Smith's claims against CPS Energy. The court reversed the trial court's order denying CPS Energy's plea to the jurisdiction.

Economic Development: ***City of Lancaster v. White Rock Commercial, LLC*****, No. 05-17-00583-CV, 2018 WL 3968484 (Tex. App.—Dallas Aug. 20, 2018)**. This is an appeal by the City of Lancaster of a $4.7 million judgement rendered against it for breach of a Chapter 380 economic development agreement with White Rock Commercial, LLC, (White Rock), a real estate developer. The court of appeals affirmed, in part, and reversed and remanded, in part.

In 2007, White Rock found out about an 83-acre site in the city that the city wished to develop. The city was willing to provide economic incentives to promote the development. In August 2007, White Rock entered into two separate agreements that would provide funds to help develop the property: (1) an "Incentive Agreement" with the city's economic development corporation (EDC); and (2) an "Economic Agreement" ("380 Agreement") with the city. In both agreements, White Rock agreed to design and construct infrastructural improvements for a 1.4 million square-foot industrial park on the site. Such improvements were to be constructed according to the city's plans and specifications and were to include a new public regional storm drainage and detention system, a wastewater or sanitary sewer system, a water delivery system, off-site utility trunk connections, and streets. Both agreements made White Rock responsible for funding the "Project Costs" – the actual costs incurred by White Rock to construct the infrastructural improvements, plus a specified rate of interest – subject to reimbursement. Each agreement provided for a different method of reimbursement. The Incentive Agreement authorized four $450,000 payments from the EDC to White Rock, totaling $1.8 million, with the first payment to be made ten days after commencement of the project. To trigger the remaining payments, this agreement required White Rock to construct a "Qualified Building" – a building

or buildings on the project totaling at least 440,000 square feet – within thirty months of the city's final acceptance of the infrastructural improvements. White Rock would receive the remaining three payments according to a schedule, with the final payment on August 1, 2009. The 380 Agreement, implemented through an annual economic development grant, apportioned into twenty scheduled payments by the city, to begin on October 1 following the first year that any office or industrial building constructed on the property was issued a certificate of occupancy, and they were to continue for an additional 19 years.

The parties disagreed as to why there were two agreements. The city claimed that the EDC had insufficient funds to fully reimburse the projected costs budgeted for the project, which totaled in excess of $3 million. In the city's view, the 380 Agreement's purpose was to reimburse White Rock's expected costs that were in excess of the $1.8 million to be paid under the Incentive Agreement. White Rock claimed that the Incentive Agreement provided additional incentives above the amounts paid under the 380 Agreement.

White Rock completed the infrastructural improvements in June 2009. The city accepted the improvements nearly two months later. White Rock also completed a 442,000 square foot distribution center (the Qualified Building). The EDC paid White Rock the four $450,000 installment payments required by the Incentive Agreement. The city issued a temporary certificate of occupancy for the building in June 2012, but did not make any annual payments under the 380 Agreement. White Rock sold the building at a loss, and its lender took the undeveloped remainder of the property through a deed in lieu of a foreclosure transaction.

In June 2014, White Rock sued the city alleging that it breached the 380 Agreement and a motion for partial summary judgement arguing that the evidence established the city's liability for breach of contract and negated the city's affirmative defenses. The trial court granted White Rock's breach of contract claim except for the amount of the damages, if any, to be determined at a later date, and ruled that each of the city's affirmative defenses failed as a matter of law. The city subsequently filed a plea to the jurisdiction, claiming that it was immune from White Rock's breach of contract suit and that the 380 Agreement created a debt prohibited by the Texas Constitution. The court denied the plea. After a bench trial, the court awarded White Rock actual damages in the amount of $4.7 million, prejudgment interest in the amount of $413,252.69, court costs, and post judgment interest at a rate of 3.75%, compounded annually. The city appealed.

The court first reviewed the 380 Agreement, which was focused on construction of infrastructure, to determine if the agreement constituted a governmental function or a proprietary function of the city. Because "the functions expressly covered by the 380 Agreement are expressly identified in section 101.0215 [of TTCA] as governmental functions," the court determined that it would not apply the *Wasson II* [4-part] test." Instead, the court relied on the legislative language to conclude that the 380 Agreement was entered into for a governmental purpose. As a result, the 380 Agreement was subject to analysis under the waiver of immunity provisions of Chapter 271 of the Texas Local Government Code. The city asserted White Rock was already legally required to construct and dedicate the infrastructure; therefore, the city's assistance in financing the legal obligation was not a benefit, good, or service to the city. The court found that while the contract expressly stated it was expected to benefit the city and is expected to net $12.4 million in benefits, "this benefit to the City is too attenuated for a waiver."

However, the court found that the circumstances of this case demonstrated that White Rock's Agreement to construct the infrastructural improvements was itself a direct benefit to the city. Additionally, the city's agreement to pay White Rock for such construction was further evidence of a contract for services. Thus, immunity was waived under Section 271.152. Further, the court held that the 380 Agreement was not an unconstitutional debt because the constitutional provision authorizing Section 380 agreements specifically provided that 380 agreements not secured by a pledge of ad valorem taxes or financed by bonds was not a debt. The court also noted that the 380 Agreement did not include any language, such as "if," "provided that," or "on condition that," that would have created a condition precedent to performance. The court then analyzed the various points of error and concluded that the evidence supported the judgment against the city. However, the court found that the evidence did not support a claim by White Rock for insurance costs and the trial court erred in the pre-judgment and post-judgment interest calculations. The court affirmed the remainder of the judgment.*****

Summary Judgment Affidavits: *City of Granbury v. Thunderbolt Air, LLC*, No. 07-18-00027-CV, 2018 WL 3966443 (Tex. App.—Amarillo Aug. 17, 2018). Thunderbolt Air, LLC (Thunderbolt) was leasing space at the City of Granbury's airport. The lease stated the manner in which Thunderbolt was to renew the lease, including certain time parameters for notification of the intention to renew. The city believed that Thunderbolt failed to notify the city of the intent to renew in the time period dictated in the lease and informed Thunderbolt the lease would expire. Thunderbolt sued the city for declaratory judgement that the lease remained enforceable and sought temporary injunctive relief barring the city from removing Thunderbolt pending disposition of the suit. Thunderbolt moved for a traditional summary judgment. The city filed a cross-action (really a counterclaim) against Thunderbolt asking the lease be nullified because of breach. The trial court granted the motion for summary judgment and awarded attorney's fee to Thunderbolt.

The city appealed arguing: (1) the trial court did not file a conclusion of law supporting its decision to grant the summary judgment; and (2) the trial court erred in granting the summary judgment for various reasons, including that the supporting affidavits indicated affiant's knowledge of the facts were based upon "information and belief."

The court quickly overruled the city's first argument explaining that the Texas Supreme Court held, in *IKB Indus., Ltd. v. Pro-Line Corp*., 938 S.W.2d 440, 442 (Tex. 1997), that a party is not entitled to a finding of fact or conclusion of law following a summary judgment. Next, the court reviewed whether the trial court erred in granting the summary judgment. The court found that the trial court did err because the supporting affidavits were not valid since the affiant did not have personal knowledge of all the facts in either the original or amended affidavit. The affiant swore that the facts stated in the affidavit were within his "personal knowledge" or "based upon information and belief procured from Thunderbolt's records of regularly conducted business activity." A similar statement was made in the amended affidavit. That the affiant did not have personal knowledge of all the facts made both affidavits defective and incompetent summary judgment proof. *See Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984). It also left the reader to guess which facts were derived from personal knowledge and which were based on

affiant's belief. The court reversed the final summary judgment and remanded the cause back to the trial court.

Charter Amendment: *In re Silsbee Police Assoc*., No. 09-18-00322-CV, 2018 WL 4223257 (Tex. App.—Beaumont Sept. 5, 2018) (mem. op.). In this case, the Beaumont Court of Appeals denies a petition for writ of mandamus seeking to compel the City of Silsbee to place a proposed charter amendment on the November 2018 ballot.

Pursuant to Local Government Code Section 9.004, relators submitted a petition for a charter amendment to the city. At its August 20, 2018, meeting, the city council voted to exclude the proposed charter amendment from the November 6, 2018 ballot. Relators filed a petition of writ of mandamus asking the court to order the city to place the charter amendment on the November ballot. The city argues that the petition for writ of mandamus was filed too late for effective compliance and that the court may not order the requested relief.

Section 9.004(b) provides that the ordinance ordering the election on a proposed charter amendment "shall provide for the election to be held on the first authorized uniform election date prescribed by the Election Code[.]" The Election Code requires elections held on a uniform date be ordered not later than the 78th day before election day. Relators filed their writ of mandamus on August 23, 75 days before the uniform election date. Thus, the court concludes it may not grant the requested relief because the time has passed for ordering the proposed charter amendment to be placed on the November ballot. The petition is denied.

Texas Tort Claims Act: *Henry v. City of Midland*, No. 11-16-00265-CV, 2018 WL 4201461 (Tex. App.—Eastland Aug. 31, 2018) (mem. op.). This is a Texas Tort Claims Act (TTCA) vehicle collision case where the Eastland Court of Appeals upholds the granting of the city's plea to the jurisdiction based on lack of timely notice.

Henry sued the City of Midland asserting that "a manhole cover caught the underside" of his vehicle causing a single-vehicle accident. He pleaded that the manhole cover was tangible physical property but, in the alternative, that the manhole cover was a special defect or premises defect. The city filed a plea to the jurisdiction which the trial court granted.

The TTCA requires notice of a claim within six months and the City of Midland's charter requires written notice of claim within sixty days after the injury or damage is sustained. Henry asserted the city had the required elements of actual notice of the claim. "Knowledge that a death, injury, or property damage has occurred, standing alone, is not sufficient to put a governmental unit on actual notice for TTCA purposes." Whether a governmental unit has actual notice is a fact question when the evidence is disputed, but it is a question of law when the evidence is undisputed. Henry relies on a police accident report to establish notice. There is no mention in the police accident report that a manhole cover was a cause of the accident or that the city's maintenance of the manhole cover was a cause of the accident. Furthermore, the police accident report indicates that Henry was not injured as a result of the accident. That is insufficient to establish actual notice of fault or of the injury. The plea was properly granted.*

Employment: *Wernert v. City of Dublin*, No. 11-16-00104-CV, 2018 WL 4137472 (Tex. App.—Eastland Aug. 30, 2018). This is an employment discrimination case were the Eastland Court of Appeals affirms the granting of the city's dispositive motion.

Wernert was a police officer for the city who suffered a serious knee injury on the job when he slipped and fell on an icy street while directing traffic. The injuries were listed as permanent, preventing him from continuing patrol duties. However, Wernert was also an investigator and continued to perform those duties for two years. Subsequently, the police chief added patrol duties back into his job requirements. Wernert filed an Equal Employment Opportunity Commission/Texas Workforce Commission (EEOC/TWC) charge. Wernert was then required to exhaust his leave but was later terminated by a new chief when he could not return to work, including patrol. Wernert filed suit but alleged acts which occurred after his EEOC/TWC charge was filed. The city filed a summary judgment motion, asserting a lack of jurisdiction for failing to exhaust administrative remedies. The trial court granted the motion and Wernert appealed.

Each discrete act of discrimination requires administrative remedy compliance. Discrete discriminatory acts are not actionable if time-barred, and each discrete discriminatory act starts a new clock for filing charges alleging that act. The court analyzed the current state and federal law and whether Wernert was required to file a supplemental charge in order to preserve acts which occurred after the first charge. The only adverse actions taken prior to the first charge was a change in job duties, while the forced leave and termination occurred after his charge. Adopting the reasoning from the U.S. Fifth Circuit Court of Appeals, as expressed in *Simmons-Myers v. Caesars Entertainment Corp*., 515 Fed. Appx. 269, 273 (5th Cir. 2013), the Eastland Court of Appeals held Wernert's claims are precluded because he did not file an administrative charge for these discrete acts that occurred after his previous EEOC/TWC charge. Wernert was required to pursue administrative relief for each of these discrete acts even though they were related to the factual basis of his previous charge. And since the only acts for which he sought damages were the post-charge acts, the trial court properly granted the summary judgment.*****

Texas Tort Claims Act: *Camarena v. City of Weslaco*, No. 13-17-00243-CV, 2018 WL 4143764 (Tex. App.—Corpus Christi Aug. 30, 2018.) (mem. op.). In April 2015, Maria Camarena was injured after she drove her car off of West Northcross Avenue in the City of Weslaco, over approximately ten feet of dirt and grass, and into a canal. Camarena sued the city for negligence. The city pleaded that Camarena's claim was barred by the doctrine of governmental immunity, as the city did not own the canal, and even if it did, the canal constituted neither a premises nor a special defect. Camarena maintained that even if the city didn't own the canal, it still constituted a special defect and its close proximity to the road precluded the application of the governmental immunity bar. The trial court granted the city's plea to the jurisdiction, and Camarena appealed.

The dispositive question on appeal was whether or not the canal constituted a special defect. Under the Texas Tort Claims Act, a special defect includes "excavations or obstructions on highways, roads, or streets." In order for the court to determine the canal was a special defect, the court needed to consider—among other things—whether the canal presented an unexpected or unusual danger to the ordinary users of the roadway. Because Camarena admitted to traveling approximately ten feet off the roadway before driving into the canal, the court determined she

was not an ordinary user of the road under the special defect analysis prescribed by the Texas Tort Claims Act. Consequently, the canal could not constitute a special defect under the Texas Tort Claims Act. The court affirmed the trial court's order granting the city's plea to the jurisdiction.

Texas Tort Claims Act: *Davis v. City of Aransas Pass,* No. 13017000455-CV, 2018 WL 4140633 (Tex. App.—Corpus Christi Aug. 29, 2018.) (mem. op.). In September 2014, Johnny Lee Davis brought suit against the City of Aransas Pass, Aransas Pass Police Department, and three named police officers (collectively, the city) alleging libel and slander due to the publication of numerous false statements made by police officers alleging his involvement in the murder of a 16-year-old girl, Jenna Hernandez. In February 2017, Davis was convicted of soliciting the murder of Hernandez. Following the conviction, the city moved for no-evidence summary judgment, asserting governmental immunity and derived immunity and that Davis's claims were barred because the challenge was to the legality of his confinement and because the statements themselves were true. The trial court granted summary judgment in favor of the city and Davis appealed.

On appeal, Davis argued that the trial court erred in granting the city's motion for summary judgment. The city argued that summary judgment was appropriately granted because the city is immune from tort liability and immunity was not waived under the Texas Tort Claims Act. Because Davis was alleging claims for the intentional torts of defamation, libel, and intentional infliction of emotional distress, and because the Texas Tort Claims Act does not waive governmental immunity for intentional tort claims, the court concluded that the trial court did not err in granting the city's motion of summary judgment on the basis of governmental immunity.

Political Advertising: *In re Turner,* No. 14-18-00649-CV, 2018 WL 4037533 (Tex. App.—Houston [14th Dist.] Aug. 23, 2018). This is an original mandamus where the Fourteenth District Court of Appeals in Houston reversed a trial judge's order requiring the city to remove the video and transcript of the city's budget meeting from its website.

A Houston firefighter association (association) collected petitions to place a charter amendment on the ballot which addresses comparable compensation between the firefighters and police. The city council scheduled a council vote for August 8, 2018, to place the charter amendment on the ballot. Pursuant to the Texas Local Government Code, for a charter amendment to appear on the November 2018 general election ballot, the city must publish a fiscal impact in the paper several times. The first publication must occur, at the latest, by mid-October 2018. Relators' petition states that the city's Budget and Fiscal Affairs Committee scheduled a public meeting for July 26, 2018, in anticipation of the publication. Various city officials spoke at the meeting and the association's attorney was invited to speak. Afterwards a video was posted. Four days later, the association sought a temporary injunction to prevent release of the video asserting it violated the Election Code. A judge signed a temporary restraining order (TRO) prohibiting the city from displaying on city websites or other city-funded media platforms any audio, video, or transcribed versions of the July 26 meeting.

The association alleges the city violated Section 255.003 of the Election Code, which prohibits an officer or employee of a political subdivision from knowingly spending public funds for

political advertising. "Political Advertising" includes a communication supporting or opposing a measure that appears on an Internet website. The city's Budget and Fiscal Affairs Committee scheduled the July 26 public meeting to obtain information regarding the fiscal impact of the proposed charter amendment. The fiscal impact of the charter amendment is relevant to whether voters and councilmembers may oppose or support the charter amendment. The Fourteenth Court held it was not unreasonable or unexpected that statements tending to indicate support for, or opposition to, the charter amendment might be voiced at the meeting. However, according to Ethics Advisory Opinion No. 456, such public discussion generally does not violate Section 255.003 of the Election Code. Such section was not intended to inhibit discussion of matters pending before a governmental body. In such a situation, public funds were not being used for political advertising by making the meeting video publicly available, even though an incidental effect of posting the video on the city's website may be to re-publish statements supporting or opposing the charter amendment. As a result, the district court judge committed error, and mandamus was issued.*

Texas Tort Claims Act: *Molina v. City of Pasadena*, No. 14-17-00524-CV, 2018 WL 3977945 (Tex. App.—Houston [14th Dist.] Aug. 21, 2018) (mem. op.). This is a vehicle accident/Texas Tort Claims Act (TTCA) case where the Fourteenth District Court of Appeals affirmed the granting of the city's plea to the jurisdiction.

The city's inspector for the engineering department, Rendon, was driving a city vehicle on the way back from his lunch break. He stopped at the intersection, looked both ways, and saw Molina on the sidewalk twenty feet away. Rendon believed he had time to turn, confirmed there was no on-coming traffic from his left, and took his foot off the brake. The vehicle traveled approximately one foot before impacting Molina. When Rendon inquired, Molina stated he was fine, left the scene, and proceeded home. Molina later sued the city. The city filed a plea to the jurisdiction, which the trial court granted. Molina appealed.

It is the general rule that use of public streets or highways in going to or returning from one's place of employment is not within the scope of one's employment. The city admitted that while traveling to a job site, which Rendon was doing, was considered "on duty." When the vehicle involved in an accident was owned by the defendant and the driver was an employee of the defendant, however, a presumption arises that the driver was acting within the scope of his employment when the accident occurred. The court went through a burden-shifting analysis noting evidence that the employee was on a personal errand to eat at the time of the accident, such as Rendon, refutes an allegation that he was acting in the course and scope of his employment. The burden then shifts to the city to present other evidence that Rendon was in the course and scope of his employment. An employee who has turned aside, even briefly, for a personal errand is no longer in the scope of employment until he returns to "the path of duty." However, evidence that Rendon was returning to work from a personal errand at the time of the accident rebutted the presumption that he was acting in the course and scope. He had not returned to duty and the city's conclusory statement about him being "on duty" is not a legal determination. Because there is no probative evidence that raises a genuine issue of material fact as to whether Rendon was engaged in the city's business at the time of the accident, there was no dual purpose to Rendon's personal errand. As a result, the plea was properly granted.

August 2018

Note: Included cases are primarily from July 11, 2018 through August 10, 2018.

Attorneys Fees: *Propel Fin. Servs., LLC v. Perez*, No. 01-17-00682-CV, 2018 WL 3580935 (Tex. App.—Houston [1st Dist.] July 26, 2018) (mem. op.). Propel Financial Services, LLC (Propel) filed a property tax foreclosure suit to recover delinquent ad valorem taxes on property owned by Lupe Perez. The trial court referred the case to a tax master who recommended awarding delinquent taxes and interest to Propel, and recovery of release of lien fees, abstract fees, and late fees, but reduced Propel's attorney's fees to a percentage of the delinquent base tax, penalties, and interest. Propel filed a notice of appeal with the trial court challenging the tax master's recommendation concerning the attorney fees. The trial court held a hearing on the appeal and later asked for more proof from Propel about the attorney fees because the submitted proof was insufficient to meet the requirements in *Long v. Griffin*, 442 S.W.3d 253 (Tex. 2014), which requires the lodestar method to calculate attorney fees. Propel did not submit additional proof and the trial court issued a final judgment granting the foreclosure, but awarded no attorney fees and struck the award of release to lien fees, abstract fees, and late fees. Propel appealed contending that the trial court abused its discretion by (1) awarding no reasonable and necessary attorney's fees and expenses to Propel; (2) denying recovery of appellate attorney fee's to Propel; and (3) denying Propel recovery of release of the lien fees, abstract fees, and late fees. The First Court of Appeals reviewed all three issues under an abuse of discretion review.

The court explained that the recovery of attorney's fees by a litigant is only allowed if a statute or contract specifically provides for such recovery. In this case, Section 32.06(e-1)(5) of the Tax Code entitles tax lien "transferees" to collect fees expressly provided under Section 351.0221 of the Finance Code. Section 351.0021 of the Finance Code authorizes the recovery of "reasonable and necessary attorney's fees, recording fees and court cost for actions that are legally required to respond to a suit filed under Chapter 33, Tax Code or to perform a foreclosure, including fees required to be paid to an official and fees for an attorney ad litem." Under Section 351.0021, the court determined that Propel was entitled to recover its reasonable and necessary attorney's fees. Next, the court determined under which method of calculation Propel was to recover attorney's fees. Propel contended that the trial court erred in holding that the lodestar method was required in this case since this case was not a lodestar case either by law or elected by Propel. The lodestar method requires sufficient evidence of the services performed, who performed them and at what hourly rate, when they were performed and how much time the work required for the court to determined what is considered reasonable and necessary attorney's fees. Propel argued that it did not use the lodestar method in this case because it involved a combination of paralegal time, flat fees charges agreed to by Propel, expenses for certified mail, service of citation, filing fees, and other necessary charges. The court stated that though the lodestar method was a method to determine whether attorney's fees were reasonable and necessary, it was not the only method that governed recovery of attorney's fees in Texas. And since the record does not show that Propel chose that lodestar method, the trial court should have treated the case as a non-lodestar case and determined if the information that Propel filed with the trial court was sufficient.

Then, the court looked at the evidence provided by Propel concerning attorney's fees to see if it was sufficient to determine whether the attorney's fees were reasonable and necessary. The court considered the factors enumerated in *Arthur Andersen & Co. v. Perry Equipment Corp*., including: "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. *Arthur Andersen & Co. v. Perry Equipment Corp*., 945 S.W.2d 812, 818 (Tex. 1997). Taking these factors and looking at the evidence that Propel provided for the attorney's fees, the court determined Propel did provide sufficient evidence to determine what attorney's fees were reasonable and necessary and reversed the trial courts judgement and awarded Propel $7,683.06 in attorney's fees, as represented in their affidavit.

The court also reviewed Propel's claims for appellate attorney's fees and the recovery of the other fees. The court awarded appellate attorney's fees since Propel was successful in its appeal. Also, the court awarded the other fees since Propel was entitled to the fees and established its right to recovery of those fees. The trial court's judgment is reversed and judgment is rendered for Propel awarding attorney's fees, appellate attorney's fees, and other fees.

Defamation: *Elias v. Griffith*, No. 01-17-00333-CV, 2018 WL 3233587 (Tex. App.—Houston [1st Dist.] July 3, 2018) (mem. op.). This is a defamation case brought against individual city officials for acts performed within their course and scope of employment. The First District Court of Appeals held the individuals were entitled to the statutory immunity provided by Section 101.106(f) of the Texas Civil Practice and Remedies Code.

Elias owns a tow truck company. Elias sued First Assistant City Manager Griffith and the Chief of Police Brinkley for defamation, in their individual capacities, for statements made to the city council during a public meeting. The City of Sugarland implemented new procedures for the selection of five (5) tow truck companies to be placed on its non-consent tow truck rotation list. Brinkley manages the list and investigates complaints about companies. Griffith is responsible for overseeing various departments, including the police department. A lottery was held, and Elias was not selected. Elias called multiple officials complaining about the process and other companies. At the next public meeting, the city manager asked Griffith and Brinkley to make a presentation to city council. Griffith and Brinkley listed multiple citizen complaints filed against Elias and that Elias was reported to be misleading and deceptive. They addressed how they responded to Elias' complaints about the system and the other companies that were selected by the lottery. At one point, Griffith stated "…I have never seen a vendor use lies and threats to this degree to gain a personal financial benefit." Elias filed suit against Griffith and Brinkley, alleging a cause of action for slander per se. Griffith and Brinkley filed a motion to dismiss under Texas Civil Practice & Remedies Code Section 101.106(f) which requires dismissal of employees acting in their course and scope of employment and substitution of the city, which the

trial court granted. Elias appealed arguing he sued Griffith and Brinkley individually and not in their employed capacities.

The appellate court analyzed the history of Section 101.106 and its purpose. The court then analyzed "…whether Brinkley and Griffith conclusively proved that their conduct was within the general scope of their employment and whether Elias's suit could have been brought under the Tort Claims Act against the City." Section 101.001(5) of the Tort Claims Act defines "scope of employment" and the court injected Texas Supreme Court precedent. The Texas Supreme Court emphasized that the scope-of-employment analysis "calls for an objective assessment of whether the employee was doing her job when she committed an alleged tort, not her state of mind when she was doing it." *Laverie v. Wetherbe*, 517 S.W.3d 748, 753 (Tex. 2017). Here, Brinkley and Griffith were asked to advise city council of the conclusions reached following the police department's investigation of Elias's complaints. It was within the general scope of Brinkley's employment, as the administrative head overseeing the program. It is also within Griffith's general scope of employment, as first assistant city manager responsible for overseeing the police department and as one of the individuals involved in the meetings with Elias regarding his complaints, to report on the conclusions of those complaints. As a result, Brinkley and Griffith conclusively established their statements made during their presentation to city council, even if defamatory, were within the scope of their employment.

Next, the court held the only cause of action alleged was a tort. As the Texas Supreme Court previously noted, "because the Tort Claims Act is the only, albeit limited, avenue for common-law recovery against the government, all tort theories alleged against a governmental unit, whether it is sued alone or together with its employees, are assumed to be 'under [the Tort Claims Act]' for purposes of section 101.106." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 659 (Tex. 2008). The court noted Section 101.106 has previously been held constitutional. Brinkley and Griffith are therefore statutorily immune.*

Dual-Office Holding: *City of Forest Hill v. Benson*, No. 02-17-00346-CV, 2018 WL 3385675 (Tex. App.—Fort Worth July 12, 2018). This is a dual-office holding/statutory construction case where the Fort Worth Court of Appeals affirmed an order removing the official from the second position to which she was elected.

City of Forest Hill has a seven-member council. The city's public library is a library district established pursuant to Chapter 326 of the Local Government Code and the board of trustees is elected. At the same time as her candidacy for Place 3 on the city council, Benson ran for Place 5 on the board of trustees. Benson filed the city council application before she filed the library board application. The city did not prohibit Benson from running for both offices, her name subsequently appeared on the ballot as a candidate for both offices, and she was elected to both offices. She was sworn in first as a city council member and second as a library board trustee on the same day. The city asked and received an attorney general opinion that the offices were incompatible. The attorney general opined that by taking the oath for the second position (Place 5 library trustee) she automatically resigned her position on the city council. The city council "accepted" her resignation (which she disputed existed) and kicked her off the council. Benson sued and received a temporary injunction prohibiting enforcement of the city's acceptance and allowing her to remain on the council. The trial court also permanently enjoined the city from

interfering with Benson's occupation of Place 3 of the city council, awarded Benson attorney's fees, and issued findings of fact and conclusions of law. The city appealed.

The case boiled down to statutory construction between Texas Election Code Sections141.033–.034 and 201.025. Section 141.033 provides that the second application is invalid for an election (then arguably she could only have been elected to the first office) and Section 201.025 states the first office is vacated upon being qualified for the second. The city asserts it could not bring a Section 141.033 challenge because Section 141.034 provides that it must wait until after the first early voting ballot is cast. However, the time limits within Section 141.034 involve challenges to form, content, or procedure, none of which are present. By contrast, Section141.033 addresses the invalidity of an application that a person submits for a place on the ballot for an office that the person is "not permitted by law" to hold. As a result, Section141.033 applies. Section 201.025 applies only to a person who is a current officeholder when she accepts and qualifies for the second office. However, Benson was elected to the city council and library board offices on the same day, and she took the oath of office and qualified for both offices on the same day. The court held "construing the term 'officer' to include a person who only became an officer on the same day that she qualified for the 'other' office would be absurd—it cannot be presumed that Benson intended to resign her city council position on the very same day that she took the oath of office for that position." Like Section 141.034, Section 201.025 has no application under these facts.

The dissent essentially argued that nothing in Section 201.025 says you must already hold the position first and no actual "law" prohibited her from holding the position anyway. As a result, incompatibility standards should apply which are incorporated in Section 201.025. The majority countered by asserting the city did not brief incompatibility as a ground and the dissent's definition of the term "law" used is incorrect.*****

Ultra Vires: *Farr v. Arlington Indep. Sch. Dist.*, No. 02-17-00196-CV, 2018 WL 3468459 (Tex. App.—Fort Worth July 19, 2018) (mem. op.). In this asserted ultra vires case, the Fort Worth Court of Appeals affirmed the granting of the school district defendants' plea to the jurisdiction.

Plaintiffs consist of students, employees, and parents who asserted they were exposed to poor air quality at the school causing dizziness, nausea, and a host of other ailments. In addition to suing the school district, plaintiffs sued the individual board of trustees, the superintendent, and several private parties. They originally sued for negligence, gross negligence, and other claims, but after a host of court proceedings, the primary focus ended up centering on injunctive relief. The school district officials counterclaimed for attorney's fees. They filed a plea to the jurisdiction and motion to dismiss which the trial court granted. The plaintiffs appealed.

The court first held the plaintiffs did not bring a true ultra vires claim. The plaintiffs did not allege the individual school officials acted outside of their authority. Next, the court held the last live pleading omitted the claims against the officials in their official capacities. As a result, ultra vires injunctive relief is not applicable. Next, in the education context, attorney's fees can be viewed as sanctions. Under a sanctions analysis the strictures of the loadstar method of calculations is not applicable. The record demonstrates sufficient evidence to support the

sanction. Given that the officials retain absolute immunity from suit, a reasonable attorney should have known a suit against them was improper.*

Contractual Immunity: ***City of Westworth Village v. City of White Settlement,*** **No. 02-17-00211-CV, 2018 WL 3763908 (Tex. App.—Fort Worth Aug. 9, 2018)**. The City of Westworth Village (Westworth Village), the City of White Settlement (White Settlement) and Allegiance Commercial Development, LP, entered into a Local Government Code Chapter 380 economic development agreement that allowed a Wal-Mart and Sam's Club to build on a site that was 66% located in Westworth Village, where the stores would be built, and 34% located in White Settlement, where the parking lot would be constructed. Generally, the contract between the three participants had Westworth Village agreeing to make certain periodic payments to White Settlement through Allegiance by assignment, and then after 12 years, Westworth Village would pay White Settlement the payments directly. The term of the contract was 30 years, with a termination of the contract allowed only upon mutual written agreement of all parties to the agreement. However, after 12 years, Westworth Village notified White Settlement it was terminating the contract because of the "inordinate amount of its police and EMS resources" that it devoted to the Wal-Mart and Sam's Club without assistance from White Settlement. White Settlement sued for breach of contract.

Westworth Village filed a plea to the jurisdiction based on governmental immunity asserting it acted in its governmental capacity in the collection and distribution of sales taxes and redevelopment of property for economic development purposes. Westworth Village argued Section 271.152 of the Local Government Code, a statutory waiver of sovereign immunity, did not apply. White Settlement responded by arguing that Westworth Village had entered in to the contract in its proprietary, not governmental capacity, and that immunity "did not apply (1) because the agreement was not about tax collection per se but rather about periodic payments for infrastructure construction, the calculations for which were based on the amount of sales tax; and (2) because economic development is not generally considered a governmental function under Texas Torts Claim Act (TTCA)." Also, White Settlement argued that if the contract was considered governmental, then Westworth Village should be equitably estopped from denying the existence of the 380 agreement because Westworth Village received the full benefits of the agreement, without which the retail development would not have been possible. The trial court denied the plea of the jurisdiction and Westworth Village filed an interlocutory appeal arguing that the trial court erred by denying its plea to the jurisdiction when it showed as a matter of law that it was immune from suit under the doctrine of governmental immunity, that the Local Government Code Section 271.152 waiver did not apply, and that White Settlement's equitable estoppel argument was meaningless because it had never denied the agreement's existence.

The Second Court of Appeals de novo review begins with an explanation of the difference between governmental immunity and sovereign immunity. A city that enters into a contract in the performance of its governmental functions enjoys immunity, unless the immunity is specifically waived by the legislature. Any such waiver by the legislature must be clear and unambiguous. According to *Wasson Interests, Ltd v. City of Jacksonville (Wasson I)*, 489 S.W. 3d 427 (Tex. 2016), a court must first determine whether immunity exists and its boundaries. The Second Court of Appeals looked at the TTCA as guidance to determine if the Westworth Village contract was considered a governmental or proprietary function. Though the TTCA does list tax

collection as a governmental function, the court did not agree that the contract was concerning tax collection. It stated that the tax collection only came into play as the basis for calculation of the periodic payments due under the agreement. Nor did the court think the contract fell under community development or urban renewal under Chapter 373 and 374 of the Local Government Code. Therefore, the court looked at *Wasson Interests, Ltd. V. City of Jacksonville (Wasson II)*, No. 17-0198, 2018 WL 2449184 (Tex. June 1, 2018) analysis to determine if the 380 agreement was governmental or proprietary.

Wasson II set out a four-prong inquiry to determine if a function is governmental or proprietary: "(a) whether Westworth Village's act of entering into the contract was mandatory or discretionary; (b) whether the contract was primarily intended to benefit the general public or Westworth Village's residents; (c) whether Westworth Village acted on the state's behalf or its own behalf when it entered the contract; and (d) whether Westworth Village's act of entering into the contract was sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary." The court went through each of these prongs individually and determined that Westworth Village entering into this contract was purely discretionary since Chapter 380 of the Local Government Code does not mandate a city to enter into economic development agreements. It states that a city may take these actions. Next, the court determined that the contract was primarily intended to benefit Westworth Village's residents since the contract stated that the purpose was "to promote local economic development and to stimulate business and commercial activity" in Westworth Village and White Settlement. Even though the agreement had some economic benefit to the surrounding area and the state as a whole, the agreement was primarily to benefit their respective cities. Third, the court determined Westworth Village acted on its own behalf since there was no evidence in the record that Westworth Village took these actions as a branch or arm of the state government. Actually, the record indicates the opposite and that the contract was primarily for it own behalf. Lastly, the court determined that there was not sufficient evidence that this economic development related to a governmental function as to render the act governmental. The court stated that it depends on the fact of whether economic development is considered a governmental function for which immunity from suit would apply. It looked at various constitutional and statutory provisions and reviewed various court cases that predated *Wasson II*. Stating from *Wasson II* that true governmental functions encompass activities that are closely related to or necessary for the performance of the governmental activities designated by statute, and the fact that a city's proprietary actions "touches upon" a governmental function is insufficient to render a proprietary action governmental, the court determined that Westworth Village failed to provide sufficient jurisdictional facts to meet a summary judgment standard that the activity at issue was governmental, not proprietary in nature. Though the 380 agreement touched on taxation and planning, the agreement's primary purpose was to foster local economic development to the benefit of the cities' inhabitants rather than to the general public of the state. Therefore, the court ruled the trial court did not err in denying Westworth Village's plea to the jurisdiction and overruled Westworth Village's sole issue without reaching White Settlement's Chapter 271 and equitable estoppel arguments and remanded the case back to the trial court for further proceedings.

Breach of Contract: *Laredo Jet Center, LLC v. City of Laredo*, No. 04-17-00316-CV, 2018 WL 3551255 (Tex. App.—San Antonio July 25, 2018) (mem. op.). This is a fixed-based

operator (FBO) lease dispute in which the court of appeals affirmed-in-part and reversed-in-part a summary judgment motion issued by the trial court in favor of the city.

Laredo Jet Center, LLC, (Laredo Jet) was an FBO at the Laredo International Airport. In 2014, the city and Laredo Jet discussed a contract under which Laredo Jet would demolish an existing hangar and rebuild a larger hangar. Laredo Jet alleged that it told the city it needed a 40-year lease to secure financing and that the city's airport manager assured them such lease term would be acceptable. The city entered into a lease agreement for a term of three years. Under the 2014 lease, Laredo Jet agreed to complete replacing the hangar within three years. In 2015, Laredo Jet and the city entered into a second lease agreement for a term of 30 years, contingent upon Laredo Jet constructing the new hangar by August 1, 2017, as required by the 2014 lease. Laredo Jet asserted the city made numerous representations that the full 40-year term would eventually be incorporated. However, in 2016 Laredo Jet stopped hanger construction asserting its financiers would not provide payments until a 40-year lease was secured. The city refused to approve such term. Laredo Jet sued the city, alleging claims for breach of contract, promissory estoppel, and quantum meruit, among others. The city filed a traditional motion for summary judgment, which was granted. The trial court's summary judgment declared Laredo Jet breached a lease, declared the city validly terminated the lease, and ordered Laredo Jet to vacate the leased premises. The trial court also dismissed Laredo Jet's claims against the city for breach of contract, promissory estoppel, and quantum meruit. Laredo Jet appealed.

The court of appeals held that the justice of the peace court has exclusive jurisdiction for forcible entry and detainer cases, and as such, the trial court lacked jurisdiction to determine immediate possession rights. The court found that Laredo Jet did not expressly respond to the city's breach of contract and declaratory claims, and thus, Laredo Jet waived the ability to argue such claims on appeal. The court then determined that the city is immune from Laredo Jet's estoppel arguments. The court also held that the city failed to conclusively establish its entitlement to judgement as a matter of law on Laredo Jet's quantum meruit claim. The city did not challenge any of the elements of quantum meruit arguing that Laredo Jet could not recover in quantum meruit when an express contract existed. However, because an exception for "building or construction contracts" exists, the court reversed and remanded the quantum meruit claim.*

Texas Tort Claims Act: *VIA Metro. Transit Auth. v. Reynolds*, No. 04-18-00083-CV, 2018 WL 3440701 (Tex. App.—San Antonio July 18, 2018) (mem. op.). This case stems from an interlocutory appeal by VIA Metropolitan Transit Authority (VIA), in which VIA appeals the trial court's denial of its plea to the jurisdiction in a case involving a motor-vehicle accident.

Reynolds was injured when the VIA bus she was riding as a passenger rear-ended another vehicle. She sued VIA for negligence, alleging VIA owed its passengers a duty to exercise a high degree of care because it is a common carrier, and that her injuries were proximately caused by VIA's breach of duty. VIA filed a plea to the jurisdiction arguing that: (1) to the extent that Reynold's negligence claim was based on the "high degree of care" standard of care, the claim should be dismissed for lack of jurisdiction because VIA is immune from suit; (2) VIA was immune from suit because it is a governmental entity that exercises solely governmental functions as opposed to proprietary functions; and (3) immunity is not waived under the motor-vehicle exception under the Texas Tort Claims Act (TTCA) because that exception only waives

immunity from tort claims involving ordinary negligence as opposed to the "high degree of care" standard of care.

The motor-driven vehicle exception of the TTCA "waives immunity for personal injuries proximately cause by an employee's negligent operation or use of a motor-driven vehicle if the employee would be personally liable to the claimant under Texas law." The court noted that nowhere in the motor-driven vehicle exception are specific standards of care expressly mentioned, and thus, to determine whether VIA's immunity is waived, the court has to determine whether the bus driver would be liable. The court found that in cases involving common carriers, a motor vehicle operator would be liable if he or she failed to exercise a "high degree of care." Accordingly, the court held that the motor-driven vehicle exception is not limited to tort claims alleging only an ordinary standard of care; rather, the exception incorporates whatever standard of care, including a "high degree of care," may be applicable to the case.

Attorneys Fees: *State v. CPS Energy*, No. 04-18-00063-CV, 2018 WL 3440703 (Tex. App.—San Antonio July 18, 2018) (mem. op.). This case stems from an appeal of a trial court's order denying the State of Texas' (on behalf of the Texas Department of Transportation) plea to the jurisdiction and awarding CPS Energy attorneys' fees and expenses.

The State of Texas filed a petition to condemn two tracts of land, naming CPS Energy and another entity as defendants, and alleging that they were owners of the properties. The special commissioners appointed by the trial court made an award of the amount of damages the state was required to pay CPS Energy and the other owner for the condemnation. CPS Energy and the other owner filed objections to the award. Shortly thereafter, the state filed an amended petition dropping CPS Energy as a defendant. CPS Energy then filed a motion to recover its attorneys' fees and expenses pursuant to Section 21.0195 of the Property Code, which allows a landowner to recover reasonable and necessary attorneys' fees if the court dismissed a condemnation proceeding on the motion of TxDOT or as a result of TxDOT's failure to bring the proceeding properly. The state argued that CPS Energy could only recover attorneys' fees and expenses if the state dismissed the entire condemnation proceeding, not simply a party to that proceeding. The court of appeals upheld the trial court's holding finding that a landowner is entitled to recover fees and expenses when the condemning authority dismisses the landowner as a named defendant because only such holding would discourage the condemning authority from commencing and abandoning a condemnation proceeding against a given defendant.

Dangerous Dogs: *Washer v. City of Borger*, No. 07-16-00413-CV, 2018 WL 3637379 (Tex. App.—Amarillo July 31, 2018) (mem. op.). In this case the Amarillo Court of Appeals affirms the dismissal of the plaintiffs' claims challenging the constitutionality of an animal control ordinance and a dangerous dog determination preemption issue.

The City of Borger, a home-rule city, has an animal control ordinance and a dangerous dog determination ordinance adopted pursuant to Texas Health and Safety Code Section 822.0421. Borger's ordinances established an animal control authority to investigate dangerous animals (not just dogs), secure impoundment, if necessary, and provide a process for appeal. Appeals go to municipal court. The animal control authority's written determination that the animal is dangerous gives rise to a rebuttable presumption that the animal is a dangerous animal. Appeal

from the municipal court goes to a county court or county court at law. Washer sued to prevent the application of the ordinance against her and her dog. She obtained a temporary injunction, but on final hearing, the court dismissed her claims. She appealed, but due to the lack of a reporter's record, the court considered only those issues reviewable by reference to the clerk's record.

City regulations ancillary to and in harmony with the general scope and purpose of state law are not preempted. Further, Texas Health & Safety Code Section 822.047 allows a city to place additional regulations on the state law dangerous dog determination criteria. Using statutory construction principles, the court held the ordinance was not in conflict with state law or the constitution. The ordinance provides for the taking of sworn statements in addition to interviewing individuals, examining the animal, and reviewing other relevant information. Being more specific or providing additional information is not a contradiction. State law does not limit the investigation to sworn testimony. Further, state law is silent on whether a presumption exists of dangerousness after an authority makes a determination. As a result, the judgment is affirmed.*****

Criminal Trespass: *Castro v. State*, No. 08-16-00354-CR, 2018 WL 3629380 (Tex. App.—El Paso July 31, 2018). Castro was arrested for criminal trespass on private property of the City of El Paso and fined $200 by the trial court. He challenges the sufficiency of the evidence supporting his conviction.

Castro climbed on and took photographs of a 400-foot-long star made out of light bulbs and located on city property on the side of the Franklin Mountains. The evidence showed that Castro parked his car near a "no trespassing" sign and that there were multiple such signs on the property, including signs on the star itself. The evidence was sufficient to establish Castro had notice his entrance was forbidden because the signage was reasonably likely to come to the attention of intruders. The judgment of the trial court is affirmed.

Employment: *Jefferson Cty. v. Jackson*, No. 09-17-00197-CV, 2018 WL 3580858 (Tex. App.—Beaumont July 26, 2018). This is an interlocutory appeal from the denial of a plea to the jurisdiction in an employment suit where the Beaumont Court of Appeals reversed and dismissed the plaintiff's claims.

Jackson sued the county alleging the sheriff and Deputy Werner discriminated and retaliated against her after she failed to cooperate in an investigation against another county employee, April Swain. Werner was investigating whether Swain and an inmate had been involved in a sexual encounter at the jail in 2014. Jackson claimed that Deputy Werner approached her to determine whether Jackson had witnessed the alleged encounter. When she told Werner she did not see the incident, Werner allegedly then asked for a written statement claiming she had seen the incident while viewing a security monitor. Jackson refused and asserts she was later demoted, and then not given a lieutenant's position. Jackson later filed a complaint with the Equal Employment Opportunity Commission (EEOC) asserting retaliation and discrimination for failing to give the statement in violation of the Texas Commission on Human Rights Act (TCHRA). Six days after Jackson filed her EEOC claim, she sued the county under the Texas

Whistleblower Act. The county filed a plea to the jurisdiction which the trial court denied. The county appealed.

The county asserts Jackson failed to establish a causal connection between the failure to cooperate and the adverse actions. It claims Jackson was demoted following a disciplinary review board (board) hearing, which found that in May 2015, Jackson engaged in insubordinate conduct toward Lieutenant Hawkins, a superior officer. The court held the documents attached to the county's plea support the county's allegation that it demoted Jackson because Lieutenant Hawkins filed a grievance against Jackson that a board determined had merit. The investigation and the disciplinary proceedings involving Jackson consumed nearly the entirety of the six-month period during which Jackson was eligible to be considered for a promotion to lieutenant. Once produced, the burden shifted to Jackson to rebut with evidence of pretext, which she was unable to do. Under the TCHRA, Jackson asserts she participated in an investigation, so the anti-retaliation provisions apply. However, under the TCHRA exhaustion of remedies must occur before a trial court can acquire jurisdiction over a party's TCHRA claims. The court held Jackson exhausted her administrative remedies only for two of her claims, that the county demoted her then refused to promote her. But she failed to establish a causal connection. Further, as to Jackson's Texas Constitution claims, none of the evidence the parties asked the trial court to consider established that Jackson had been treated any differently than other, similarly situated, employees. The collective bargaining agreement did not provide a protected property interest in rank. Additionally, any "free speech" claims she brought relate only to her internal communications as part of her job and are not protected. Finally, since Jackson failed to follow the mandatory arbitration provision of the collective bargaining agreement, she cannot sue for breach. As a result, the plea should have been granted.*****

Civil Service: *Butler v. City of Big Spring*, No. 11-16-00247-CV, 2018 WL 3763813 (Tex. App.—Eastland Aug. 9, 2018). Fabian Scott Butler, a lieutenant in the Big Spring Fire Department, was indefinitely suspended after an incident in which he was allegedly rude and discourteous after being denied access to a correctional facility for failing to produce identification. Butler appealed his suspension to an independent hearing examiner. The hearing examiner found that Butler was negligent for not having his identification and was rude and derogatory, but determined that his past disciplinary record did not merit a termination. He cited to an arbitration treatise on progressive discipline to support his decision to reduce the discipline to a one-week suspension. The city appealed to the district court, arguing that the hearing examiner exceeded his authority by imposing principles of arbitral law by relying on the arbitration treatise. The court ultimately granted the city's motion for summary judgment. Butler appealed.

On appeal, Butler argued that the district court erred because the hearing examiner's references to the arbitration treatise were consistent with the fire department rules regarding progressive discipline. The court of appeals disagreed, primarily because the fire department rules expressly provide that a higher form of disciplinary action may be imposed whether or not a lesser form has previously been imposed. The hearing examiner imposed an interpretation of progressive discipline discussed in the treatise that differed from the existing fire department rules. Accordingly, the court overruled Butler's sole issue on the basis that the trial court properly

granted the city's motion for summary judgment because the hearing examiner exceeded his jurisdiction.

Texas Tort Claims Act: *City of Stafford v. Svadlenak*, No. 14-18-00089-CV, 2018 WL 3734021 (Tex. App.—Houston [14th Dist.] Aug. 7, 2018) (mem. op.). Joe Svadlenak asserted a premises liability claim under the Texas Tort Claims Act against the City of Stafford after injuring himself falling down the stairs at the Stafford Civic Center. At the time of his injury, Svadlenak was touring the facility with the city's recreation director, Susan Ricks. After Ricks walked down a small flight of stairs, Ricks attempted to walk down the same stairs but fell and was injured. According to Svadlenak, Ricks stated that the city had installed step lighting another auditorium and planned to do the same in the civic center. Ricks' affidavit stated that she was not aware the stairs were hazardous in any way. The court denied the city's plea to the jurisdiction, and the city appealed.

The city's argument on appeal was that the court erred in denying its plea to the jurisdiction because the city was not aware of a dangerous condition on its premises prior to the accident as required to waive immunity under the Texas Tort Claims Act. In looking at the evidence, the court concluded that the city had no actual knowledge of the dangerous condition at the time of the incident. Svadlenak presented no evidence to rebut Ricks' statement regarding prior incident, and the record contained no evidence indicating that anyone else previously fell down the stairs at issue. Svadlenak asserted that the city knew of the condition because of Ricks' statement in her affidavit about installing step lighting. However, the court held that this statement, at most, suggested that the city knew of an alternate design that would increase lighting on the stairs. This does not indicate that the city had actual knowledge of a dangerous condition. The court sustained the city's issue on appeal, reversed the trial court's order, and rendered a take-nothing judgment in favor of the city.

Sex Offender Residency Restrictions: *Texas Voices for Reason & Justice, Inc. v. City of Meadows Place*, No. 14-17-00473-CV, 2018 WL 3469086 (Tex. App.—Houston [14th Dist.] July 19, 2018) (mem. op.). This is a challenge to a sex-offender residency restriction ordinance (SORRO) which the Fourteenth Court of Appeals held is now moot given legislation effective September 1, 2017.

The City of Meadows Place's SORRO prohibits certain sex offenders from permanently or temporarily residing within 2,000 feet of any premises where children commonly gather. Plaintiff sued asking the trial court to declare the SORRO unconstitutional because the city, as a general-law city, had no authority to enact it. The city filed a plea to the jurisdiction, which the trial court granted. Plaintiff appealed.

After the dismissal, H.B. 1111 became effective (codified at Texas Local Government Code Section 341.906) which authorizes general-law cities to enact such ordinances. In response to H.B. 1111, the City of Meadows Place passed two ordinances to bring its SORRO into compliance with Section 341.906. A case is moot when the court's action on the merits cannot affect the parties' rights or interests. This includes while the case is on appeal. After the city came into compliance with Section 341.906 it possessed the ability to pass and enforce a

SORRO. Plaintiff's claims focus only on the validity of the ordinance. Therefore, the case has become moot.*

July 2018

Note: Included cases are from June 11, 2018 through July 10, 2018.

Preemption/Plastic Bag Regulations: *City of Laredo v. Laredo Merchants Assoc*., No. 16-0748, 2018 WL 3078112 (Tex. June 22, 2018). The Texas Supreme Court held the City's plastic/paper trash bag ban is preempted.

As part of a strategic plan to create a "trash-free" city, the City of Laredo adopted an ordinance to reduce litter from one-time-use plastic and paper bags. The ordinance makes it unlawful for any "commercial establishment" to provide or sell certain plastic or paper "checkout bags" to customers. The Laredo Merchants Association (Merchants) sued the city to declare the ordinance preempted by state law. The Solid Waste Disposal Act (Act), specifically Texas Health and Safety Code Section 361.0961, precludes a local government from prohibiting or restricting "the sale or use of a container or package" if the restraint is for "solid waste management purposes" not otherwise authorized by state law. The trial court granted the city's summary judgment motion, but a divided court of appeals reversed and rendered judgment for the Merchants. The city appealed.

A statutory limitation of local laws may be express or implied, but the legislature's intent to impose the limitation "must 'appear with unmistakable clarity.'" The Solid Waste Disposal Act's policy is to reduce municipal waste to the extent feasible. The Act's preemption of local control is narrow and specific, applying to ordinances that "prohibit or restrict, [1] for solid waste management purposes, [2] the sale or use of a container or package [3] in a manner not authorized by state law". The court held "solid waste management" refers to institutional controls imposed at any point in the solid waste stream, from generation of solid waste to disposal. The definition includes the systematic control of the generation of solid waste. The city's argument that the bags were not solid waste under the Act's definition because they had not yet been discarded as waste at the point of regulation was rejected. Further, the court held that a single-use paper or plastic bag used to hold retail goods and commodities for transportation clearly falls within the ordinary meaning of "container." Under the Act's immediate context, the words "container" and "package" are not accompanied by words modifying or restricting the terms. The Act is not concerned solely with discarded materials, but also includes regulations applicable to the production, retail sale, and distribution of new consumer goods. Finally, the court held the preemption provision applies to local regulation when the manner is not authorized by state law. Manner is how something can be done, not merely if it can be done. The Act removes a home-rule city's general power over solid waste, but provides limited authority back in certain situations not applicable here. The city's ordinance does not fall within a manner authorized by another state law. As a result, the Act preempts the city's ordinance.

Justice Guzman concurred, but wrote separately to emphasize the balance needed in such a situation. The city's ordinance had a valid environmental purpose. "Improperly discarded

plastics have become a scourge on the environment and an economic drain." Her opinion highlighted the damage caused by unchecked waste to animals, ranchers, and the agricultural industry. However, the city's ordinance listed only a moderate form of impact and had a direct financial impact on the merchants and non-local vendors. She noted a lack of uniform state-wide regulations creates concern and negative impacts, so some preemption is understandable and necessary. In the end, the balance of all competing interests is the purview of the legislative branch, not the judicial branch.*

Texas Citizens Participation Act: *State v. Harper*, No. 16-0647, 2018 WL 3207125 (Tex. June 29, 2018). This is a Texas Citizens Participation Act (TCPA) case where the Texas Supreme Court held a suit to remove a county official from elected office under Chapter 87 of the Texas Local Government Code (the removal statute) is a legal action under the TCPA. Sovereign immunity is also abrogated for certain types of attorney's fees under the TCPA. This is a 30-page opinion, so the summary is a bit long.

Paul Harper was elected to a position on the Somervell County Hospital District Board and allegedly tried to make good on his campaign promises of removing taxes and employees. In response, a county resident named George Best sought to remove Harper under the county removal statute. Best alleged that Harper violated the district's bylaws at a board meeting by moving to set the district's tax rate at zero. Best also alleged that Harper posted a blog that falsely accused the district's administrative employees of violating the law. Best argued these actions were enough to remove Harper for incompetency. The removal statute authorizes a citizen to file suit, but it also requires the county attorney to "represent the state" in any removal proceedings that take place. The Somervell county attorney opted to appear in this case as plaintiff on the state's behalf. The state adopted Best's allegations, and it added an allegation that Harper engaged in misconduct by violating the Texas Open Meetings Act by texting board members. Harper filed a motion to dismiss the case under the TCPA asserting the removal statute impedes the exercise of the right to petition and right of free speech. After conducting an evidentiary hearing, the trial court denied Harper's motion to dismiss. Harper appealed. The court of appeals reversed, holding that the TCPA applies to the state's removal action and that the state failed to establish a prima facie case for removal. In the interim, Harper lost the last election and no longer sits on the board. The Texas Supreme Court granted the state's petition for review.

The court first noted the plaintiffs' claims are not moot. While Harper argues mootness cannot be addressed because the record does not contain information he lost the election, a court must consider issues affecting its jurisdiction sua sponte. Here, the state filed a "status report" with the court of appeals that included an election canvass confirming that Harper lost his reelection bid. Harper does not dispute that he lost the election or that he no longer holds the position. The court then analyzed and held the attorney's fees issues and sanctions issues still remain, so the case is not moot. However, the court cautioned that such applies only if attorney's fees are ordered prior to the case being moot. The court of appeals ordered the trial court to award attorney's fees (since it is mandatory under the TCPA) prior to the election, so this particular case survives. And, since the attorney's fees are required by the TCPA to a prevailing party, the aspects of whether the TCPA applies remain live.

The state asserted a removal suit is not a "legal action" under the TCPA, because it is a specific statute seeking political relief which is controlling over the general TCPA. The term "legal action" is defined within the TCPA. Using rules of statutory construction, the court held a "remedy" is another word for "relief" and the TCPA authorizes relief as a legal action. As a result, the TCPA applies. Further, the court held the TCPA's dismissal provisions compliment, rather than contradict, the removal statute. The rule that a specific provision controls over a general provision applies only when the statutes at issue are ambiguous or irreconcilable. The court found no ambiguity or irreconcilable language after analysis.

Next, the court noted that the TCPA "does not apply to an enforcement action that is brought in the name of this state . . . by . . . a county attorney." However, the TCPA's purpose includes a very distinct intent to encourage participation in government to the maximum extent permitted by law. Enforcement action is not defined in the TCPA. Again, using rules of statutory construction, the court held the term "enforcement action" refers to a governmental attempt to enforce a substantive legal prohibition against unlawful conduct. Under this definition, a removal petition is not an "enforcement action" by itself or in all cases. Instead it is a procedural device, and as such a party cannot initiate a removal action to enforce the removal statute itself. When a removal action has its basis in unlawful conduct, the "enforcement action" exemption renders the TCPA inapplicable. However, when it is not unlawful conduct, it is not an enforcement action. Incompetency and drunkenness are both a basis for removal under the removal statute, but neither is against the law. "Best's incompetency claims are a transparent retaliation against Harper's quixotic political beliefs. … Harper's detractors may disagree with his politics, but no law requires elected officials to support the status quo upon arriving in office. Best's removal petition was a pretext for forcing Harper to cease acting on the beliefs that won him his office in the first place." "We are not fooled. We doubt anyone else is. Harper's refusal to capitulate to Best's demands does not render him incompetent." Even if a jury agreed that Harper was unfit for office, he would face no criminal or civil penalty other than removal itself. Therefore, Best's claims are not enforcement actions and the TCPA still applies.

However, the removal statute also allows removal for "official misconduct," which may include allegations or evidence that a public official has acted unlawfully. Best did not allege official misconduct against Harper, but the state did in the form of a Texas Open Meetings Act violation. This is sufficient to form the basis of an enforcement action. The court held Harper may benefit from the TCPA's expedited-dismissal provisions for the grounds that Best's initial removal petition raised, but not for the state's additional ground.

The state then argued the attorney's award and remand were improper against it given its immunity. The court held the state waived its immunity from liability as it did not raise it. The state only raised immunity from suit. The court then went through a myriad of arguments back and forth regarding immunity from suit. Ultimately, the court held "[b]ecause the state should not be suing to prevent its own citizens from participating in government—especially when it lacks even a prima facie case against them—and because when it does sue, it risks paying only attorney's fees (rather than damages or some other uncapped sum), abrogating the state's sovereign immunity in the TCPA context does not present any grave danger to the public fisc. … Because the state was not operating within sovereign immunity's bounds when it joined Best's suit, the TCPA allows Harper to recover costs against the state pursuant to the TCPA's terms."

The dissent argued the majority ignores the governing statute's language and undermines the court's well-established sovereign-immunity precedent. The dissent asserts the removal statute's application of incompetence and drunkenness applies only to remove an officer from his official duties. A county officer's "official duties" are substantive duties imposed by statutory law and therefore the entire case is an enforcement action exempt under the TCPA. The dissent took great issue with the court's abrogation of immunity from suit for attorney's fees.*

Public Information Act/Pensions: *City of Houston v. Houston Mun. Emps. Pension Sys.*, No. 17-0242, 2018 WL 2749728 (Tex. June 8, 2018). The City of Houston created several local government corporations to which it transferred some of its employees. Specifically at issue is the adoption of resolutions by the Houston Municipal Employees Pension System's Board of Trustees (the board) related to those employees, their status, and the city's obligation to contribute to the pension fund. Under the state statute applicable to Houston's board, the board has authority to interpret the statute and such interpretation is considered final. The system interpreted the term "employee" subject to the pension fund to include employees of several local government corporations, especially those where the corporation is controlled by city appointees and funded by the city (such as the pension system employees). The city refused to fund those individuals and the system sued under an ultra vires theory. It also sued for failure to provide information under the Texas Public Information Act (PIA).

The court first held that the statute provides the pension system can file suit on behalf of the board, therefore the system has standing. The court agreed with the city that the system was trying to use an ultra vires claim to enforce a contract where the end result is the payment of funds. However, the contract in this case was simply the mechanism used for the city to comply with the requirements of the statute. The city must still follow the statutory requirements for funding the pension plan, so the system can bring an ultra vires claim to compel compliance with the statute. However, the court interpreted the pleadings to read the system seeking prospective relief only. Strangely enough, the court held that the identity of the party is not relevant to the jurisdictional situation in the PIA portion of this case (city vs. public information officer) as a mandamus is proper against the entity under the PIA. However, the PIA is not applicable to the other defendants who are not the public information officer or the city. It also held that where the city has a right of access to the information (that of the other corporations), the information is subject to the PIA. Therefore jurisdiction is proper for the system's claims.

Texas Tort Claims Act: *City of Houston v. Johnson*, No. 01-17-00654-CV, 2018 WL 2925705 (Tex. App.—Houston [1st Dist.] June 12, 2018) (mem. op.). Shirley Johnson sued the City of Houston after she suffered injuries falling into an uncovered storm sewer drain. The city filed a plea to the jurisdiction, arguing immunity because it had no knowledge of the missing drain cover before the date of the accident. Johnson claimed she did not have to show that the city had actual knowledge of the missing drain cover but only constructive knowledge of the defect. The city did not respond to Johnson's argument and the trial court denied the city's plea.

On appeal, the city argued that the trial court erred in denying its plea because Johnson presented no evidence that the city should have known the storm drain was missing its cover. At trial, Johnson presented evidence that the city had not inspected the drain after its installation in 1983,

which violated the city's infrastructure inspection policy. The court determined that Johnson did not meet her burden of presenting constructive evidence that the city should have known that the cover was missing. The fact that the city didn't inspect the drain since 1983 only shows the possibility that the defect existed long enough for the city to have discovered it. Johnson's evidence did not show the length of time that the cover had been missing, as testimony from someone who observed the drain without its cover before the fall could have highlighted.

Because the city did not argue in the trial court that Johnson failed to present evidence that the city should have known about the missing cover, the appellate court determined that Johnson is entitled to a remand to attempt to cure the jurisdictional defect. The court reversed the trial court's order and remanded back for further proceedings.

Civil Service: *City of Austin Firefighters' & Police Officers' Civil Serv. Comm'n v. Casady*, No. 03-17-00763-CV, 2018 WL 3321192 (Tex. App.—Austin July 6, 2018) (mem. op.). This case stems from an interlocutory appeal by the City of Austin Firefighters' and Police Officers' Civil Service Commission, the City of Austin Firefighters' and Police Officers' Civil Service Director, Chief Brian Manley, and the City of Austin (collectively, city) challenging the district court's denial of the city's plea to the jurisdiction and granting Casady and the Austin Police Association's (collectively, association) claim to compel arbitration.

The association filed a grievance regarding the expiration of the eligibility list for promotion to the rank of police sergeant while candidates whose names remained on the list had not been promoted. The grievance complained that the exam for promotion to commander had not be formulated so that promotions to commander (and subsequent vacancies and promotions in lower ranks, including sergeant), had not occurred, thereby aggrieving the corporals over their intent to seek promotion to sergeant before the list expired. The association requested that the test for promotion to commander be held in time for a promotion list to commander to be created and filled in time for a vacancy to be created for lieutenant and subsequently for sergeant before the expiration of the eligibility list. Alternatively, the association requested a "pro forma or temporary promotion to commander, lieutenant, and sergeant in order to create the vacancies requested in accordance with past pattern and practice or a two-month extension of the eligibility list for promotion to sergeant." The city denied the grievance and refused to participate in arbitration asserting that: (1) while there were two commander vacancies at the time, there was no existing promotional eligibility list from which to fill those vacancies so that no "trickle-down promotions" could be lawfully be made;" (2) because there were no sergeant vacancies at the time, no promotions to sergeant could be lawfully made; (3) no past pattern of "pro forma" promotions existed and the prior instances involved formal action by the city council and were factually distinguishable from the instant request; and (4) extension of the expiration date of the eligibility list was not authorized by the meet and confer agreement and would require a negotiated contract amendment ratified by city council. The association sued the city seeking an order compelling the city to arbitrate the parties' dispute.

The city argued that the district court erred in denying its plea to the jurisdiction because governmental immunity – and official immunity as to the commission, the commission director, and Manley – deprived the district court of subject matter jurisdiction. The association asserted waiver of immunity under Section 143.306(c), which provides that a district court has full

jurisdiction "on the application of either party [to a meet and confer agreement] aggrieved by an act or omission of the other party related to a right, duty or obligation provided by the meet and confer agreement." For a suit to proceed against a governmental entity under a statute that waives governmental immunity, the court must first look to the terms of the act to determine the scope of its waiver and then consider the particular facts of the case to determine whether it comes within that scope. The city claimed that the association could not identify any violation of a "right, duty, or obligation," provided under the meet and confer agreement. The association asserted that the violation that brings the suit within the jurisdiction waiver of Chapter 143 is the city's refusal to arbitrate. The appellate court overturned the trial court's decision, determining that: (1) the refusal to arbitrate alone cannot constitute a violation of the meet and confer agreement; and (2) the association did not identify any provision in the meet and confer agreement that the city violated by not making any promotions to sergeant when there were no vacancies at the rank of sergeant.

Employment Wrongful Death: *City of Austin v. Lopez*, No. 03-18-00107-CV, 2018 WL 3235585 (Tex. App.—Austin July 3, 2018) (mem. op). This appeal stems from an order of the trial court denying the city's plea to the jurisdiction in a wrongful death case.

Membreno, twenty-six years old and a citizen of El Salvador, died in 2009 when he came into contact with one of the city's overhead power lines while working on a construction job. Membreno was never married to Maria Lopez, but she asserts that after his death she gave birth to Membreno's son in El Salvador where she lived. Lopez filed a wrongful death and survival action against the contractor who employed Membreno, the owner of the building under construction, and the building's property manager, asserting negligence, negligence per se, gross negligence and premises liability. Later, she amended her pleadings to add an electrical-utility contractor and the city as defendants, claiming that the city "failed to use reasonable care to safely operate and maintain the electric-distribution system and overhead distribution lines and poles." The city filed a plea to the jurisdiction challenging the minor child's standing to maintain suit pursuant to the Wrongful Death Statute (Texas Civil Practice & Remedies Code Section 71.004).

The city asserted that in order to have standing to sue under the Wrongful Death Statute, an illegitimate child must comply with the requirements of the Texas Family Code establishing a father-child relationship. However, the Texas Supreme Court has previously concluded that the requirements of legitimation under the Family Code should not be included into the Wrongful Death Statute. Additionally, the city asserted that there was no proof that the minor child was the decedent's biological son. The court found by providing, among other things, a DNA test performed on the decedent's brother showing a 99.8% chance that the minor child and the brother were nephew and uncle, Lopez had marshaled proof from which a fact finder could conclude that clear and convincing evidence showed that Maria's minor child was the son of the decedent. Lastly, the city asserted that Lopez did not have the capacity to assert a person-injury action pursuant to the Survival Act. The court, however, found that lack of capacity to sue, unlike standing, is not a jurisdictional defect. Accordingly, the court affirmed the trial court's order denying the city's plea to the jurisdiction.

Retaliation: *City of Austin v. Baker*, No. 03-16-00607-CV, 2018 WL 3060044 (Tex. App.—Austin June 21, 2018) (mem. op.). This appeal stems from an order of the trial court denying the city's plea to the jurisdiction and motion for summary judgement in an employment retaliation case.

In 2013, the city began restructuring its police department's organized crime division to address inefficiency and pervasive unprofessionalism. In the ensuing restructuring, Baker was transferred to another division due to his alleged reluctance to implement requested changes. While additional personnel changes were ongoing, Baker heard rumors that older employees and minorities were being disproportionately affected by the restructuring, and after reviewing the data, began to voice his concerns regarding age, race, and ethnic discrimination. His concerns were forwarded up the chain of command at subsequent meetings of the police department's leadership. Thereafter, Baker became the subject of two internal investigations, which resulted in the police department issuing him one or more written reprimands. Baker then applied to serve as assistant chief but was passed over twice in favor of other candidates. Baker alleged that before he voiced his concerns about possible discrimination, the police chief had personally encouraged him to apply for a position as assistant chief. The city asserts that the most qualified candidates for the positions were selected.

Baker filed a claim of retaliation with the Texas Workforce Commission, and upon receiving a permission-to-sue letter, sued the city under Section 21.055 of the Labor Code for retaliating against him for reporting possible discrimination. The city filed a combined plea to the jurisdiction and motion for traditional summary judgement, and a motion for no-evidence summary judgement, arguing that Baker did not allege a prima face case necessary to establish the trial court's jurisdiction over the retaliation claim. The trial court denied the motion and the city appealed.

To overcome the city's governmental immunity and establish jurisdiction, Baker had to generate a genuine issue of fact as to each element of his retaliation claim (i.e. did he engage in a protected activity; did he experience a material adverse employment action; and was there a causal link between the protected activity and the adverse action?). If Baker meets his burden, the city has to produce "evidence of a legitimate, nondiscriminatory reason for the disputed employment action." If the city's evidence is sufficient to rebut Baker's prima facie case, Baker must produce sufficient evidence of pretext and causation to survive the plea to the jurisdiction. The court found that: (1) Baker had engaged in a protected activity when he reported the possible discrimination; (2) the investigations negatively impacted his professional standing and ultimately factored into the police chief's decision not to select him as assistant chief; and (3) causation was established due to the proximity between his reporting possible discrimination and the adverse employment action. However, the court found that the city rebutted Baker's prima facie evidence of retaliation by showing that the internal investigations were conducted in accordance with the police department's policy and, with respect to the selection of the assistant chiefs, other candidates were equally or more qualified than Baker. The court, finding that there was a genuine question of fact as to whether Baker suffered retaliation for reporting possible discrimination, determined that it cannot disregard evidence "necessary to show context" in evaluating Baker's allegations of pretext. Accordingly, the court affirmed the trial court's order denying the city's plea to the jurisdiction.

Real Property: *Rio Grande City Consol. Indep. Sch. Dist. v. City of Rio Grande*, No. 04-17-00346-CV, 2018 WL 3129457 (Tex. App.—San Antonio June 27, 2018) (mem. op.). This appeal stems from an order of the trial court granting the city's plea to the jurisdiction/motion for summary judgment and dismissing all of the school district's claims against the city.

The school district claimed that it owned a 0.64-acre tract of land in the city, and sued the city for trespass to title and declaratory judgement. The United States intervened to preserve its interests in the tract of land. The city filed a joint plea to the jurisdiction and summary motion judgement alleging that the school district: (1) failed to establish that the city's immunity had been waived; (2) was not entitled to prevail on its trespass to try title claim because the school district was not the legal owner of the tract of land; and (3) could not prevail on its declaratory judgement claim because the dispute involved the determination of title to a well-defined parcel of land. Alternatively, the city argued that the affirmative defense of laches applied because it had acquired a valid leasehold to the real property. On the day of the hearing of the city's motion, the school district filed an amended petition, deleting the declaratory judgment claim and adding an unconstitutional takings claim. The trial court declined to consider the school district's newly-amended petition. The trial court granted the city's plea and motion for summary judgement and dismissed all of the school district's claims.

On appeal, the court concluded that the trial court did not err in dismissing the school district's trespass to try title claim because the trial court did not have jurisdiction to determine title to real property in which the United States claims an interest. Additionally, the court reversed the trial court's judgement disposing of the school district's takings claim against the city and remanded the case because a party may not be granted judgement as a matter of law on a cause of action not addressed in a summary judgement proceeding.

Texas Tort Claims Act: *San Antonio Indep. Sch. Dist. v. Hale,* No. 04-18-00102-CV, 2018 WL 3129436 (Tex. App.—San Antonio June 27, 2018) (mem. op.). This appeal stems from the trial court's denial of San Antonio Independent School District's (district) plea to the jurisdiction in a personal injury case.

Hale's son was riding on the bus when the rear exit door opened, and he fell out, sustaining a traumatic brain injury. Hale alleges the accident was caused by a defect in the rear exit door's latching mechanism, which caused the door to open while the school bus was in motion. In addition to suing the designers and manufacturers of the school bus, Hale sued the district alleging that the district's governmental immunity was waived under Section 101.021 of the Texas Tort Claims Act. The district filed a plea to the jurisdiction, which was denied. The district then appealed.

To fall under Section 101.021 waiver, the tortious actions must relate to a government employee's actual operation of a vehicle, rather than some other aspect of the employee's conduct. Hale did not allege that: (1) any affirmative acts or omissions by the bus driver or that the bus driver's actions or inaction caused her son's injury; or (2) the bus driver negligently or otherwise improperly operated or used the school bus. Rather, Hale alleged that the district, not the bus driver, was "negligent in failing to maintain an acceptable latch mechanism for the bus

and in delivering it over to the bus driver to operate and transport children in that negligently maintained condition." The court concluded that maintenance is not "operation or use" of the school bus that would waive immunity. As such, the plea should have been granted.*

Employment Contract: *City of Carrizo Springs v. Howard*, No. 04-18-00061-CV, 2018 WL 2943795 (Tex. App.—San Antonio June 13, 2018) (mem. op.). This case stems from an interlocutory appeal of the city's denial of a plea to the jurisdiction.

The city hired Howard as its city manager and entered into a two-year employment contract with him. The contract provided that Howard "accepts employment as the City Manager for a term commencing November 5, 2013, and ending December 31, 2015." Additionally, the contract provided that the city may, at its option, with notice to Howard, unilaterally terminate the contract. In the event of such termination, the city was required to pay Howard, as severance pay, all of the "aggregate salary and other compensation he would have earned" under the contract from the actual date of termination to the date the contract expired. About eight months into the two-year contact, the city terminated Howard's contact. Howard sued the city for breach of contract.

The city argued that its immunity from suit was not waived because the contract was not properly executed. The city asserted that because Howard's severance pay provision was not contemplated to be paid from the current revenues of the fiscal year 2013-2014, the contract constituted a debt under Article XI, Section 7 of the Texas Constitution. The city did not meet the tax and sinking fund requirements to validate the contract, and thus, the contract did not invoke waiver of immunity under Section 271.152 of the Local Government Code. The Texas Constitution prohibits a city from incurring a debt unless it meets certain tax and sinking fund requirements. However, a contract that runs for more than one year is a commitment only of current revenues, and so is not a debt if it reserves to the governing body the right to terminate at the end of each budget period. The court of appeals concludes that because the city had the right to unilaterally terminate Howard's contract before the end of each budget period, or at any other time, the contract did not create a debt. Accordingly, the court affirmed the trial court's decision, and held that the employment contract was not void.

Jury Charge: *City of San Antonio v. Aguero*, No. 04-17-00369-CV, 2018 WL 2943952 (Tex. App.—San Antonio June 13, 2018) (mem. op.). This appeal stems from a judgment entered based on a jury verdict awarding Aguero damages for injuries he sustained in an automobile accident. The sole issue was whether the trial court abused its discretion in refusing to charge the jury with determining Aguero's percentage of responsibility.

Raul Champion was a passenger in a vehicle being driven by Aguero when the vehicle was struck by a vehicle being driven by an employee of the city. Champion sued Aguero and the city for injuries he sustained. He alleged that Aguero was negligent based on driver inattention, failing to control his speed, and disregarding a red traffic signal, and that the city's employee was negligent based on driver inattention and failing to take adequate evasive action. The city filed an answer and included a section titled "contributory negligence." Aguero filed a cross-claim against the city for injuries he sustained alleging various negligent acts by the city's employee, including failing to yield the right of way. The city filed an original answer to the cross-claim,

asserting, among other defenses, that the accident was the sole and proximate cause of negligence by the other parties to the suit. Subsequently, Champion filed a motion to dismiss his claim against Aguero based on a settlement, and the court dismissed those claims. Aguero submitted his proposed jury charge which contained a question requiring the jury to assign a percentage of responsibility to the city and to Aguero. The city amended its answer to Champion's petition and Aguero's cross-claim asserting its right to have any damage award offset by the contributory negligence of Aguero and any previous settlements. At some point before the trial, the city and Champion settled Champion's claims against the city. Aguero filed a motion to strike the city's amended answer asserting that it was filed after the deadline set forth in the docket order for amending pleadings. The city argued that the docket control order was superseded when the trial setting was continued. After hearing arguments, the court granted Aguero's motion to strike. The case proceeded to a jury trial. At the charge conference, the trial court denied the city's request to submit a question requiring the jury to assign a percentage of responsibility to the city and to Aguero. Instead, the jury charge asked whether negligence of the city was a proximate cause of the accident. The jury answered affirmatively and awarded Aguero damages.

In any cause in which the jury is required to apportion the loss among the parties, the court shall submit a question or questions inquiring what percentage, if any, of the negligence or causation, as the case may be, that caused the occurrence or injury in question is attributable to each of the persons found to have been culpable. Texas follows a "fair notice" standard for pleading, which looks at whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant. Additionally, when a party fails to specifically except, courts should construe the pleadings liberally in favor of the pleader. The trial court focused exclusively on the city's answer to Aguero's cross-claim in which the city asserted "the accident was the sole proximate cause of negligence by the other parties to this suit." Because the city's answer referred only to "sole and proximate cause" and not to "contributory negligence," the trial court denied the proportionate responsibility question. However, the court should have considered the city's answer to Champion's claim as well. As the city's pleadings contained fair notice of allegations to support a proportionate responsibility question, the trial court abused its discretion in excluding such question from the jury charge. The trial court's judgment is reversed and remanded for a new trial.

Texas Whistleblower Act: *City of Dallas v. Worden*, No. 05-17-00490-CV, 2018 WL 3238138 (Tex. App.—Dallas July 3, 2018) (mem. op.). This is an interlocutory appeal from the trial court's partial denial of the city's plea to the jurisdiction, in which the city argued that the trial court lacked subject matter jurisdiction over Worden's suit under the Texas Whistleblower Act (Act).

Worden, a police officer, responded to a suspicious-persons call at a Wal-Mart Supercenter parking lot regarding a group of juveniles. Multiple officers arrived and separated various suspects. During the stop, Officer Nicholas Smith and Sergeant Fred Mears told Worden to take the handcuffs off of a juvenile they had detained. Worden was unaware at the time that Smith had been threatening to fight the juvenile or that Mears was mocking him. When Worden realized the antagonism, he again handcuffed the juvenile and placed him in the squad car. Worden reported the juvenile incident to his supervisor and other investigators. Months later,

Worden and other officers responded to a report of an active shooter in a vehicle. Video of the confrontation reportedly showed Worden "body-slamming" the suspect against the side of his car and inappropriate force. Worden was placed on paid administrative leave during the internal affairs investigation. Worden was later suspended for 10 days due to the juvenile incident and an additional 15 days due to the active-shooter incident. Worden appealed internally. His record was cleared for the juvenile incident and his suspension for the active-shooter incident was reduced. After returning to work, Worden was reassigned to the Communications Division. He then brought this case under the Act, based on the juvenile incident.

Under the Act, an employee may sue only for adverse employment actions. The test for adverseness under the Act is an objective one: the action taken "must be material, and thus likely to deter a reasonable, similarly situated employee from reporting a violation of the law." Worden alleged that the Communications Division had "a stigma attached to it," and that it was "for 'troubled' or 'problem' officers," but he offered nothing more than his personal opinion to support that judgment. A police officer's subjective preference for assignment is insufficient to prove a materially adverse personnel action. Worden further alleged that his assignment to the Department's Employee Development Program (EDP) was a retaliatory adverse action taken against him for reporting his concerns regarding the juvenile incident. Worden testified that the EDP has a "negative connotation to it" because it operates under the Internal Affairs Department and he believes the program is a remedial one. The record established that Worden was "boarded and identified as a candidate" for the EDP in June 2015, shortly after he returned to work from his suspension and was assigned to the Communications Division. However, Worden did not do anything under the EDP and was not required to. A year later, he was notified that because he had not had any further trouble, he did not need to be part of EDP. A host of other complaints were determined to be minimal issues which did not rise to the level of an adverse action. Finally, the court held Worden failed to establish a causal connection between any alleged actions and his reports. The court declined to apply a conduit theory of liability due to alleged animus from other officers. As a result, the plea should have been granted. The case was reversed and rendered in favor of the city.*****

Zoning: *Mbogo v. City of Dallas,* No. 05-17-00879-CV, 2018 WL 3198398 (Tex. App.—Dallas June 29, 2018) (mem. op.). This case stems from an appeal of the trial court's order granting the city's plea to the jurisdiction in a constitutional challenge to zoning laws. The court of appeals released its initial opinion on June 19, 2018, but vacated that judgment and issued a new opinion on June 29, 2018.

Mbogo leased land and opened a general repair shop on Ross Avenue in Dallas, Texas, in 1986. At that time, the city's zoning ordinances allowed automobile-related businesses on Ross Avenue. After performing a study which found automobile-repair shops were a concern in the area based on the connected roads and services in the area, the city amended its zoning ordinance in 1988 prohibiting such uses in the area. At that time, Mbogo was fully aware that continued use of the property as a repair shop was a "non-conforming" use." In 1991, Mbogo purchased the property, expanded and upgraded his repair shop, fully aware that the use was nonconforming. In 2005, the city again amended the zoning ordinance and codified specific provisions related to non-conforming uses and provided deadlines for nonconforming use properties to comply. A property owner could appeal to the board of adjustment (BOA) to extend the deadlines to comply

with the requirements. The BOA gave Mbogo a new compliance date of April 13, 2013. Mbogo then received a zoning change and special use permit (SUP) which expired in 2015. Mbogo applied for a new SUP in February 2016, which was denied. The city filed suit seeking a permanent injunction to prevent continued operation of the repair shop and sought fines of $1,000 per day. Mbogo counterclaimed and added various city officials to the suit. The city filed a plea to the jurisdiction, which was granted by the trial court. Mbogo appealed.

Mbogo argued that the city's ordinances, as applied to him, were unconstitutionally retroactive because they attach new legal consequences to his business that were legal when he opened his business but became illegal years later. A retroactive law is one that extends to matters that occurred in the past. Mbogo asserted that in 2005 and 2013 he had no notice the city would at some point make his use illegal. However, a law is not retroactive because it upsets expectations based in prior law. Further, there are strong policy arguments and a demonstrable public need for the fair and reasonable termination of nonconforming property uses. The city's 2005 ordinance change allowed the owner of a nonconforming use to apply for a later compliance date if the owner would not be able to recover his investment in the use by the designated conformance date. The ordinance did not change any use but prospectively altered a property owner's future use of the property. The 2013 ordinance likewise set a deadline for when it expired. As a result, the ordinances are not retroactive. Additionally, the court noted not all retroactive laws are unconstitutional. Here, any interest that Mbogo had in the use of his property was not "firmly vested." There is no bright-line rule and, generally speaking, an individual has no protected property interest in the continued use of his property for a particular purpose. The process provided likewise did not deprive Mbogo of due process or single him out in any respect. The city allowed Mbogo to run a business from 1991 through 2015 as either a nonconforming use or under a SUP; however, his use became illegal once his SUP expired. Mbogo's position under his takings argument was that any restriction on his desired use of the property resulted in an unconstitutional damage or destruction to his property. The court found that this was not the case as he had no vested right to perpetual, guaranteed use of his property in a specific way. As a result the plea was properly granted.*

Red Light Cameras: *City of Richardson v. Bowma*n, No. 05-16-01126-CV, 2018 WL 3135228 (Tex. App.—Dallas June 27, 2018). After receiving a notice of violation of the red light camera ordinance, Bowman filed suit to enjoin enforcement of the ordinance and for a declaration that the ordinance and enabling statute are unconstitutional. The trial court denied the city's partial plea to the jurisdiction and motion for judgment and granted Bowman's motion.

In 2005, the city entered into a contract with a red light camera operating company to install a red light camera system. Following the legislature's enactment of Chapter 707 of the Transportation Code in 2007 authorizing cities to adopt red light camera systems, the city adopted a red light camera ordinance. A red light camera recorded Bowman entering an intersection when the traffic signal was red, and he was notified of a registration hold on his vehicle for failing to pay the civil penalty associated with the violation. Bowman requested an administrative hearing as authorized by Chapter 707, that the hearing be before a jury, and that the hearing declare Chapter 707 unconstitutional. Before an administrative hearing was scheduled, Bowman filed suit for declaratory judgment and injunction against enforcement of the ordinance. Alternatively, he asserted that the city could not enforce the ordinance against him

because it failed to comply with sections of Chapter 707, which require the city to conduct an engineering study and present the study to a citizen's advisory committee before installing a red light camera.

When the legislature expressly or impliedly grants an administrative agency sole authority to make an initial determination in a matter, the agency has exclusive jurisdiction over the matter. If an agency has exclusive jurisdiction, a party must exhaust all administrative remedies before seeking judicial review of the agency's action. The mere claim that an administrative agency acted outside its authority does not authorize litigation before administrative remedies are exhausted, nor does failure to perfectly comply with all of the intricacies of the administrative process necessarily constitute extra-jurisdictional action by an agency. As such, the appellate court concluded that the city's failure to conduct a traffic engineering study and present it to the citizen's advisory committee did not exempt Bowman from exhausting his administrative remedies. Accordingly, the court vacated the denial of the partial plea to the jurisdiction, reversed the trial court's judgment, and rendered judgment dismissing Bowman's claim based on non-compliance with the enabling statute for want of jurisdiction and denying Bowman's claim for a declaration that the ordinance and enabling statute are unconstitutional.

Texas Tort Claims Act: *City of Dallas v. Duressa*, No. 05-17-01238-CV, 2018 WL 2949441 (Tex. App.—Dallas June 13, 2018) (mem. op.). This case stems from an appeal of the trial court's denial of the city's plea to the jurisdiction related to an ambulance accident claim.

Duressa was involved in a car accident and the city dispatched an ambulance driven by Officer Wyatt. Because Duressa was stable, the ambulance lights and siren were not activated while she was being transported to the hospital. Duressa's son also rode with her in the ambulance. The roadway was icy and the ambulance slid and collided with cars that were stopped at an intersection. Duressa sued under the Texas Tort Claims Act (Act). The city filed a plea to the jurisdiction asserting that the city was immune because Wyatt was performing discretionary actions and was entitled to official immunity. The trial court denied the plea and the city appealed.

Courts apply an objective standard to determine whether an officer has acted in good faith, balancing the need for the officer's actions with the risks those actions pose. In an emergency response situation, an officer acts in good faith if a reasonably prudent officer under the same or similar circumstances could have believed the need for the officer's actions outweighed a clear risk of harm to the public from his actions. There must be evidence addressing "what a reasonable officer could have believed under the circumstances" substantiated with facts showing the officer assessed each of the need/risk balancing factors. The needs and risk analysis, however, demonstrated the lights and sirens were not active and there was no immediate need for a rush. The affidavits do not set out facts explaining the seriousness of the accident, the extent of any injuries, or any other circumstances requiring urgent transport of the patient to the hospital. Similarly, the affidavits do not state facts showing Wyatt considered the availability of any possible alternative courses of action, but simply conclude that, because the officers had been dispatched through the 9-1-1 system and were expected to respond urgently to the scene. Because a material fact issue remains as to whether Wyatt acted in good faith the trial court properly denied the plea.

Texas Tort Claims Act: *City of Corpus Christi v. Resendez*, No. 13-18-00090-CV, 2018 WL 3151572 (Tex. App.—Corpus Christi June 28, 2018) (mem. op.). In May 2015, Resendez and her daughter were passengers in a vehicle that collided with a City of Corpus Christi garbage truck. Nearly one year later, in May 2016, Resendez sent a formal notice of her claim to the city, claiming that the collision was proximately caused by the negligence of the garbage truck driver. Resendez later filed suit individually and as next friend of her daughter, Esmerelda Ramirez.

The city filed a plea to the jurisdiction, alleging that the formal notice was not filed within six months of the collision as required under the Texas Tort Claims Act. Further, the city asserted that while actual notice may serve as a substitute for formal notice, the city had no actual awareness that its employee caused the accident and that the driver of the other vehicle was solely to blame. The city submitted the police report as evidence, which attributed fault for the collision exclusively to the driver of the other vehicle. The trial court granted the city's plea to the jurisdiction with regard to Resendez individually, but denied the city's plea with respect to Resendez as next friend of Ramirez. The city appealed.

On appeal the city contends that: (1) Resendez failed to provide a notice of claim to the city within six months of the collision, as required by the Texas Tort Claims Act; and (2) the lack of notice is not excused because the city had no actual awareness that its employee was at fault in causing the collision. The primary question for the court was whether the city was subjectively aware of its responsibility for Ramirez's injury. The sole evidence before the court was the police report filed by the city, which attributes fault solely to the driver of the vehicle that collided with the city garbage truck. Nothing in the report apprised the city that its employee was in any way responsible for the collision. Because the only relevant evidence in the record (the police report) provided that the city employee was not at fault for the collision, the city did not have actual notice of its fault. The court sustained the city's issues, reversed the trial court's denial of the city's plea, and rendered judgment dismissing the case for lack of subject matter jurisdiction.

Texas Tort Claims Act: *City of Weslaco v. Trejo*, No. 13-18-00024-CV, 2018 WL 3062575 (Tex. App.—Corpus Christi June 21, 2018) (mem. op.). This is an interlocutory appeal from the denial of the city's plea to the jurisdiction in a Texas Tort Claims Act case where the Thirteenth Court of Appeals reversed and remanded the case.

The Trejos began to develop land into a residential subdivision. The Trejos hired Rio Delta Engineering to develop plans and designs for the subdivision's infrastructure. Before lots could be sold, essential services such as water and sewer would have to be designed, built, and approved by the city. The city elected to combine the sewer and water plans of the Trejos as well as another client of Rio Delta, the Apostolic Church. The Trejos alleged the city delayed the sewer extension unreasonably, costing them the ability to timely sell lots. The Trejos filed suit alleging that the city was negligent in managing the sewer construction project, which "involved the use of motorized vehicles." The city filed a plea to the jurisdiction, which was denied. The city appealed.

Because the legislature has deemed sanitary and storm sewers to be a governmental function, immunity applies to the design allegations. The Trejos did not establish a waiver for such a claim. No waiver exists for negligent training of personnel or supervisors. As to the claims for negligent operation of bulldozers, there must be a causal nexus between the operation or use of the motor-driven vehicle or equipment and a plaintiff's property damage. This causal nexus is not satisfied by the mere involvement of vehicles or equipment, nor by a use that "does no more than furnish the condition that makes the injury possible." The Trejos "have drawn a thin thread of causation across the span of many years and several intermediary steps—the use of equipment led to the design flaws, which led to problems with the sewer, which led to construction delays, which led to the Trejos' inability to sell houses in 2008, which led to the project's insolvency in 2009, which led to the bank's foreclosure—in an effort to link the use of motorized equipment to the underlying harm of foreclosure." Such is too tenuous to be a causal link. However, the court held the Trejos should be given the opportunity to amend so remanded the case.*

Vested Rights: *Village of Tiki Island v. Premier Tierra Holdings, Inc*., No. 14-18-00014-CV, 2018 WL 3352235 (Tex. App.—Houston [14th Dist.] July 10, 2018). Premier Tierra Holdings, Inc. (Premier) purchased property in early 2009 and sought to develop or sell the property for a mixed-use marina development project to include residences and elevated dry boat storage. On April 22, 2010, Premier submitted a plat application to the city reflecting the project's plan of development. At that time, the city had no formal land use regulations – no subdivision ordinance, zoning ordinances or any comprehensive land use plan. Five days later, the city approved a new zoning ordinance, which precluded dry boat storage and apartment classifications on the property. After submitting several plats, which were denied, Premier ultimately filed suit requesting a declaratory judgment in its rights in the project and alleging a takings claim. At trial, the city claimed that the denial was based on existing regulations, rather than the subsequently enacted zoning ordinance, and therefore no justiciable controversy existed regarding the application of the vested rights statute in Chapter 245 of the Local Government Code. The trial court denied the city's plea to the jurisdiction, and the city appealed.

On appeal, the city contended that Premier did not plead a claim to which Local Government Code Chapter 245 applies because Premier alleged that the city used the subsequently enacted zoning ordinance to interfere with Premier's vested rights. The city claims that it denied the plat applications based on a preexisting "general plan" at the time, which is permissible under Chapter 245. According to the court, the city did not identify any preexisting general plan or existing regulations that were applied to the project, nor did the city make any attempt to explain a vague reference to a denial based on a general plan that is reflected in the city's existing streets and bridges. The court was unaware of any authority authorizing a general law city to rely on an unwritten general plan that is immune from review to deny a permit applicant's vested rights in a project. The court found that a dispute exists concerning the primary jurisdictional fact as to whether the city properly denied Premier's plat based on regulations that preexisted the initial plat applications or if the city refused to recognize Premier's vested rights in the project by denying the plat applications based on subsequently enacted ordinances. The court rejected the city's argument that Premier did not plead a claim to which Chapter 245 applies.

In its second issue, the city claims that the trial court erred in denying their plea because Premier failed to plead a viable regulatory takings claim. Construing Premier's pleadings liberally in

favor of jurisdiction, the court concluded that Premier's petition adequately alleges that a taking occurred through regulatory action that unreasonably interfered with Premier's right to use and enjoy its property. Further, Premier adequately pleaded that it had a reasonable investment-backed expectation to develop the property as a marina with elevated dry boat storage and the city interfered with those expectations by denying Premier's vested rights based on items irrelevant to plat applications or ordinances adopted after Premier's rights vested. The court overruled the city's issues and affirmed the trial court's order denying the city's plea to the jurisdiction.

June 2020

Note: Included cases are from May 11, 2018 through June 10, 2018.

Governmental Immunity: *Wasson Interests, Ltd. v. City of Jacksonville*, No. 17-0198, 2018 WL 2449184 (Tex. June 1, 2018). On June 1, the Texas Supreme Court handed down its second opinion in the *Wasson v. City of Jacksonville* (*Wasson II*) case. The court held that the city's contractual immunity was waived, highlighting the court's willingness to expose cities to ever-greater liability. In fact, the Texas Supreme Court's erosion of governmental immunity, without a clear mandate from the Texas Legislature, may be unprecedented in our state's history.

The case involved a 99-year lease between the City of Jacksonville and Wasson Interests, Ltd. (WIL) for lakefront property owned by the city. The lease contained a provision prohibiting commercial activity on the lots. (The city's zoning ordinance expressly defines impermissible commercial activity.)

WIL rented the leased property to individuals for terms of a week or less, which is considered an impermissible commercial activity under the city's zoning ordinance. The city sent eviction notices to WIL based on the continued commercial use of the property.
WIL filed suit against the city, and the case went all the way to the Texas Supreme Court. The court struck its first blow against cities in its initial opinion (*Wasson I*) by holding that the governmental-proprietary distinction found in the Texas Tort Claims Act applies to contractual claims against a city. A city is immune from liability for performing a "governmental function," but can be subject to damages for a "proprietary function." (Governmental functions are things like police and fire service, utility service, zoning, etc. Proprietary functions are more akin to an action typically preformed by a private entity.)

The Texas Supreme Court sent the *Wasson* case back to the lower court to determine whether the City of Jacksonville was engaged in a governmental or proprietary function when it leased the lakefront property. The city won at the Tyler Court of Appeals, and WIL appealed. That's when the Texas Supreme Court struck its second blow against city legal immunity. Overturning the Tyler Court of Appeals, the Texas Supreme Court's *Wasson II* opinion holds that the City of Jacksonville was performing a proprietary function when it leased its lakefront property (i.e., held that the city's contractual immunity was waived). Thus, WIL's suit against the city for breach of the lease agreement may proceed.

Unemployment Compensation/Family Medical Leave Act: *Texas Workforce Comm'n v. Wichita Cty.,* No. 17–0130, 2018 WL 2375140 (Tex. May 25, 2018). The question in this case arises at the intersection of the Texas Unemployment Compensation Act (Act) and the Family Medical Leave Act (FMLA).

On August 16, 2011, while employed by Wichita County as an assistant emergency management coordinator, White went on FMLA leave for severe anxiety and depression. After her paid leave ran out on August 19, she switched to unpaid leave, during which time the county continued to pay her health insurance premiums under the FMLA. White returned to work in November 2011, after the county made accommodations in light of her new medical restrictions.

In October, while on leave, White filed a claim for unemployment benefits with the Texas Workforce Commission. The county contested her claim and argued that, since White remained a county employee, she was not "unemployed" and thus, did not qualify for benefits. The commission dismissed the county's argument, and determined that White did qualify as "unemployed." The county appealed, arguing that White "never voluntarily left work, was never fired, was never laid off, and never left her employment." In response, the commission affirmed its decision, stating that White was not disqualified from receiving benefits and that the county was required to reimburse the commission for any benefits it paid to White.

The county ultimately filed a petition for judicial review in district court. Both parties filed cross-motions for summary judgment. The trial court denied the commission's motions, granted the county's motion, and reversed the commission's earlier decision. The court of appeals affirmed, concluding that "it would be 'absurd' for an individual to be entitled to unemployment benefits during FMLA leave." The Texas Supreme Court granted the commission's subsequent petition for review.

The Texas Supreme Court focused on the "unambiguous" language of the Texas Unemployment Act, citing the Act's intention to benefit people who were unemployed. The court determined that the case centered on an interpretation of the Act regarding whether an individual qualifies as "unemployed" under the Act while taking unpaid leave from her job under the FMLA. The Act requires that, in addition to being unemployed, an individual must be "eligible" and they must not otherwise be excepted or disqualified.

In this particular case, the employee's eligibility was not contested, and there were no exceptions or other disqualifications. Thus, the issue turned on whether the employee fit the necessary definition of "unemployed" as required by the Act. If an employee is considered "unemployed," they would not automatically qualify for unemployment benefits under the FMLA based on their status, but they would not be disqualified because of a lack of a formal severance of the employee-employer relationship.

The commission argued that White was "unemployed" since she was not "performing services for wages." The county argued that "unemployment" should be given its ordinary meaning – a complete and total severance of the employee-employer relationship. According to the county, since there was still a relationship between the employee and her employer, she did not qualify as "unemployed," even though she was on unpaid leave.

The Texas Supreme Court agreed with the commission's argument, stating that, despite the plain meaning of the term "unemployed," the explicit definition of the term in the Act itself superseded any plain meaning. Specifically, the Act outlines that an individual may qualify for benefits if they can be "considered unemployed" and does not require that they actually be unemployed.

In another point, the county argued that such an interpretation renders other sections of the Act, wherein an individual can apply for FMLA leave, voluntarily leave their job, and still receive benefits, "meaningless." The court rejected this argument, concluding instead that the county's interpretation would render another section of the Act (Section 201.09(d)) as redundant. There, the legislature clarified that an individual would not be considered unemployed if the employer reduced their hours as a result of misconduct, even though the reduction would otherwise qualify them for that descriptor. Thus, the court concluded that Section 201.09(d) would serve no purpose if severance of the employer-employee relationship were required.

In the second part of the opinion, the court began by noting that it can only disregard a statute with unambiguous language if it produces an "absurd" result, as per the conclusion reached by the court of appeals. The court of appeals determined that, under its interpretation of the Act, an individual would be entitled to both FMLA protection and unemployment benefits, an "absurd result." The Texas Supreme Court disagreed with this characterization, again emphasizing that the question in the case is not whether an individual is entitled to unemployment benefits while on FMLA leave, but whether that individual fits the Act's definition of "unemployed." Again, the court pointed to other criteria an individual must fulfill to be considered for unemployment benefits, which protect against the idea of "entitlement."

Finally, the court addressed a third argument the county made in its initial summary judgment motion, even though the point was not argued in the court of appeals or before the Texas Supreme Court. The county challenged the commission's conclusion that the commission would bill the county for benefits paid to the employee. Even though a county must generally reimburse the commission for benefits properly paid to county employees, it argued that such reimbursement is improper where the benefits are paid to an employee who left work due to a medically-verified illness. The court concluded that the basis for the county's argument, a provision in the Act detailing an exception to payment, was only applicable to contributory employers. The county, a reimbursing employer, was ineligible to receive the exception. Thus, the court dismissed the argument.

Ultimately, the Texas Supreme Court held that the definition of "unemployed" in the Texas Unemployment Act does not require severance of the employer-employee relationship. Thus, the judgment was reversed in favor of the commission.

Short-Term Rentals: *Tarr v. Timberwood Park Owners Assoc., Inc*., No. 16-1005, 2018 WL 2372594 (Tex. May 25, 2018). Kenneth Tarr (Tarr), owner of a house in Timberwood Park, was renting his house as a short-term rental. He rented the entire house for various amount of time between one to seven days. He advertised on a short-term rental website and paid state and local hotel occupancy tax. The Timberwood Park Owners Association (Association) notified Tarr that

he was in violation of the residential purpose covenant and the single-family-residence covenant of the deed restrictions. Because of the temporary nature of the leases, the association determined short-term rentals did not adhere to the "single family residence" restriction, and rendered the tract a commercial rental property. The Association notified Tarr of the violations, and stated that he would remain in violation until he removed the online short-term rental advertising of his home and no longer used it for commercial purposes. Also, Tarr would be fined $25 per day. Tarr continued to rent his house and the Association continued to fine him. Tarr appealed the fines to the Association's board, but it was denied.

Tarr sued the Association in trial court seeking a declaration that the deed restrictions neither impose a minimum duration on occupancy or leasing nor permit the Association to police home-rental advertisements or impose fines. Both parties filed summary judgments. The trial court granted the Association's summary judgment and denied Tarr's summary judgment, concluding that Tarr operated a business on his residential lot and engaged in "multi-family" short-term rentals in violation of the unambiguous deed restriction. Tarr appealed to the court of appeals which affirmed the trial court by holding that the deed restrictions prevented Tarr from leasing the home for short periods of time to individuals who did not possess an intent to remain in the house.

The Texas Supreme Court did a de novo review of the denial of Tarr's summary judgment. The court, after discussing the various laws concerning interpreting restrictive covenants, found that none of these laws pertained to the current situation since the covenants at issue unambiguously failed to address the property being used as a short-term rental. The court then looked at the Association's argument concerning a single family, residential-use restriction on Tarr's property. The court found the argument combined two separate covenants, which it reviewed individually. The first covenant concerned the single-family restriction covenant which stated that only a single-family residence could be built on the property with specific structural requirements. The court stated that this covenant was a structural restriction only dealing with the type of structure that can be built on the property. It did not limit the activity that can permissibly take place in that structure.

Next, the court analyzed the "residential purpose" versus "business purpose" covenant. The court discussed the Association's argument that the transient nature of short-term rentals made the use of the property a business. The court stated that "residential purpose" concerns the way the property is used and that it should be used for living purpose as distinguished from business or commercial purposes. Since the covenants do not address the use of homes for leasing purposes, as vacation homes, short-term rentals, or minimum-occupancy durations, the court did not add these restrictions to the definition of "residential purpose." Instead, the court used the common definition for "residential purpose" and "business purpose" since the covenant did not have a definition for either. Using the common definitions, the court determined that so long as the people that Tarr rented his property to continued to use the property for residential purposes, no matter how long they occupied the property, neither the occupant's on-property activities nor Tarr's off-property activities would violate the restrictive covenant, and that Tarr's use of the property was not a commercial use.

The Texas Supreme Court reversed and remanded the case back to the trial court.

Tort Claims Act: *City of Fort Worth v. Deal*, No. 02-17-00413-CV, 2018 WL 2440387 (Tex. App.—Fort Worth May 31, 2018).This is a Texas Tort Claims Act (TTCA) case where the Fort Worth Court of Appeals reversed the denial of the city's plea to the jurisdiction and dismissed the plaintiff's claims.

Officer Shelton observed plaintiff's son, Lange, speeding and initiated pursuit. Officer Shelton's in-car video camera recorded the pursuit and shows Lange dangerously speeding through residential areas and violating numerous traffic laws. Lange did not yield or pullover. At some point at least one police officer stopped to deploy a tire-deflation device (TDD) or "Stop Stick"—a device designed to puncture a vehicle's tires when they contact the embedded steel spikes—but Lange passed by before the officer could get into position. Less than six minutes later, Lange lost control of his vehicle and struck a tree. He was ejected from the vehicle and died. Deal sued the city, which filed a plea to the jurisdiction. The trial court denied the plea and the city appealed.

Deal claimed that the unknown police officer had deployed the TDD negligently, that the tires were damaged, and that is what caused Lange to lose control. The city asserts Deal's negligent-deployment claim was barred by the TTCA's intentional-tort exception. Texas has recognized common law battery claims for more than a century. Actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body. Lange had such a close connection with his vehicle that the indirect, offensive contact between the TDD and the vehicle was sufficient to constitute contact with Lange's person. Taking the plaintiff's pleadings as true, the unknown police officer's alleged negligent decisions about where, when, and how to deploy the TDD here were all subsumed in, and not distinct from, the commission of the battery. Consequently, Deal's negligence claims arise out of the battery and are subject to the TTCA's intentional tort exception. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2). The plaintiff's claims are dismissed and judgment rendered for the city.*

Subdivision Regulations: *City of Fort Worth v. Alvarez*, No. 02-17-00091-CV, 2018 WL 2248481 (Tex. App.—Fort Worth May 17, 2018) (mem. op.). Homeowners of the Newark Ranch Subdivision (homeowners) objected to the connection of a street in their subdivision to a subdivision development that might be partially within the extraterritorial jurisdiction (ETJ) of the City of Fort Worth. The city filed a partial plea to the jurisdiction on some of the homeowners' claims in trial court arguing that the claims were not yet ripe because the homeowners' lawsuit centered around the preliminary plat of the new subdivision and not the final plat. The trial court denied the city's plea to the jurisdiction, and accelerated an interlocutory appeal to the court of appeals.

The Fort Worth Court of Appeals reviewed the city's ripeness issue in relation to the denial of its partial plea to the jurisdiction. The city argues that the trial court erred because the subject of the litigation is a preliminary plat, not a final plat which makes the homeowners' claims not ripe because the claims involve surveying and validating property interests for future streets, which will occur during the final platting process. In response, the homeowners argued the city's planning commission did not have jurisdiction over the land at issue such that the preliminary

plat should be vacated or amended to exclude that land and that they had exhausted their administrative remedies at the point that the planning commission approved the preliminary plat. Ripeness, an element of subject matter jurisdiction, pertains to a court's power to render the particular relief requested. A case is not ripe when its resolution depends upon contingent or hypothetical facts or upon events that have not yet come to pass. A declaratory judgment action is also subject to a ripeness review and are considered premature if governmental proceeding remain pending that will affect the parties' respective rights. In this case, the court of appeals looked at the city's partial plea concerning the taking element of the homeowners' claims based on the preliminary plat. The court sustained this portion of the city's sole issue by stating that since the preliminary plat did not transfer any actual ownership interests from anyone to anyone else and imposed no restrictions on the homeowners, no regulatory taking had occurred. Also, declaratory relief was not ripe since the developer had not dedicated anything to the city and therefore further governmental and nongovernmental action needed to be taken by the developer before the city had interest concerning boundary lines, easements, public right-of-ways, title, abandonment or adverse possession.

Next, the court reviewed the homeowners' request to void the planning commission's approval of the preliminary plat, which turns on the property's location inside or outside of the city's ETJ. Looking at the relevant evidence submitted by the parties and looking at all the evidence favorable to the homeowners, the court found that the trial court did not err by denying this portion of the city's plea since the city did not provide any evidence to contradict the homeowners' allegations concerning the disputed property being outside the city's ETJ. Therefore, the court overruled this portion of the city's sole issue and remanded the case to the trial court for further proceedings.

Unemployment Benefits: *Nkansah v. Texas Workforce Comm'n*, No. 05-17-00281-CV, 2018 WL 2749765 (Tex. App.—Dallas May 31, 2018) (mem. op.). This case stems from an appeal of a trial court's ruling denying Nkansah's request for unemployment benefits.

When the Texas Workforce Commission (commission) denied Nkansah's request for unemployment benefits, Nkansah appealed the decision to the trial court. The trial court granted the Texas Workforce Commission's and City of Dallas' joint motion for summary judgment. Nkansah then appealed this decision to the court of appeals, asserting that summary judgment in favor of the commission and the city was improper because substantial evidence did not support the commission's decision that his discharge was due to misconduct related to work.

Upon a de novo review of the summary judgement evidence, the court of appeals concluded that Nkansah did not satisfy his burden to demonstrate the commission's decision was unsupported by substantial evidence. The court of appeals determined that: (1) in reviewing the commission's decision regarding unemployment compensation, a trial court reviews the decision by trial de novo to determine whether substantial evidence support's the Commission's ruling; (2) the commission's unemployment compensation decisions are presumed valid, and the party seeking to set aside such a decision bears the burden to show that the decision was not supported by substantial evidence; and (3) a trial court may set aside a commission decision only if it concludes that the decision was made without regard to the law or the facts and therefore was unreasonable, arbitrary or capricious.

Nkansah also asserted that the trial court's failure to rule on his motion for default judgment against the city unfairly allowed the city to file its answer. The court held that the trial court's twelve-day delay in ruling on Nkansah's motion was reasonable, and that the filing of the city's answer rendered Nkansah's complaint moot.

Nkansah also argued that the trial court erroneously failed to take action on his motion for summary judgement even though he filed his motion before the commission and city filed their joint motion for summary judgment. The court found that the trial court did not err in declining to take action on Nkansah's motion for summary judgement because he did not notice his motion for hearing or submission as is required by rule 166a of the rules of civil procedure.

Attorney's Fees: *Anderton v. City of Cedar Hill*, No. 05-17-00138-CV, 2018 WL 2382123 (Tex. App.—Dallas May 25, 2018). The Dallas Court of Appeals affirmed-in-part and reversed-in-part a judgment for the City of Cedar Hill in a case involving a non-conforming use in a specific zoning district.

This case went up and down the appellate ladder twice. The Andertons purchased an existing landscaping and building materials business—a commercial rather than local retail business—that operated on Lots 5 and 6, at about the time the city rezoned the area to a retail zone. The Andertons requested a zoning change to make their legal non-conforming use a legal conforming use, which the city denied. Several years later the city filed a declaratory petition and sought civil penalties against the Andertons prohibiting them from operating the existing business on the lots. The Andertons counterclaimed under Chapter 245 of the Texas Local Government Code for vested rights and inverse condemnation. Both parties moved for summary judgment. The trial court granted the city's summary judgment motions and denied the Andertons' motions. The Andertons appealed the first time and won a partial remand. However, afterwards, the city passed two zoning amendments making the use of the lots lawful. The city sought attorney's fees for the claims it won in the first appeal and filed a plea to the jurisdiction on the Andertons' remaining counterclaims. The trial court denied the plea and the attorney's fee issue went to trial. The trial court later entered a final judgment on remand, dismissing the Andertons' claims for non-conforming use rights in Lots 5 and 6 as moot and awarding the city its attorney's fees. The Andertons appealed.

The court first held at the time it rendered judgment (given the zoning amendments), the trial court had no practical ability to alter the legal relationship between the parties. As a result, the Andertons' claim as to the non-conforming use status was moot and the trial court was obliged to dismiss barring some valid exception. There are two exceptions that confer jurisdiction regardless of mootness: (1) the issue is capable of repetition, yet evading review; and (2) the collateral consequences doctrine. The record did not reflect any evidence indicating the city was likely to rezone the property back to retail only, so the first exception did not apply. The court found that theoretical possibility is not sufficient to satisfy the test.

The "collateral consequences" doctrine applies to a narrow set of circumstances – when vacating the underlying judgment will not cure the adverse consequences suffered by the party seeking to appeal that judgment. The Andertons, however, did not argue, and the record did not reflect, any

concrete disadvantages or disabilities that would persist should their claim be dismissed as moot. So, the court affirmed the trial court's judgement as to the Andertons' counterclaims.

As to the award of attorney's fees, the court found that the Uniform Declaratory Judgements Act does not condition the entitlement to attorney's fees on prevailing party status. The trial court's findings of fact and conclusions of law affirmatively indicated that the trial court awarded the city its attorney's fees as "equitable and just based on the claims asserted in this case, the objectives sought by the parties and the outcome of this case" and not as a "prevailing party." However, not withstanding, the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees. As in cases involving only a modicum of success in the context of the prevailing party statute, even fees supported by uncontradicted testimony may be "unreasonable" in light of the amount involved, the results obtained, and in the absence of evidence that such fees were warranted due to circumstances unique to the case. After going through the win/loss points and going through each lot in the case, the appellate court held the trial court abused its discretion in awarding attorney's fees.*

Civil Procedure: *Sims v. City of Madisonville*, No. 08-15-00113-CV, 2018 WL 2752714 (Tex. App.—El Paso June 8, 2018). In this case, the El Paso Court of Appeals dismisses a Texas Whistleblower Act (Act) for lack of jurisdiction.

Sims sued the City of Madisonville alleging a violation of the Act. The city filed a plea to the jurisdiction asserting that Sims did not timely file his notice of appeal.

A trial court retains plenary power over a final judgment for at least 30 days after signing that judgment. This period is extended if a party timely files a motion seeking a substantive change in the judgment (e.g., a motion for a new trial). Sims filed no such motion.

An exception exists under Rule 306a(4) when a party doesn't receive notice or have actual knowledge of the signed judgment within 20 days after it is signed. To establish the exception, the party must comply with Rule 306a(5) and prove: (1) the date the party received notice or had actual knowledge; and (2) that the date was more than 20 but less than 91 days after the judgment was signed. The Texas Supreme Court has held that a Rule 306a(5) motion may be filed at any time within the trial court's plenary power "measured from the date determined under Rule 306a(4)."

Sims filed his Rule 306a(5) motion within the required period, but did not secure a hearing or ruling until March 12, 2015, one day late (one day after the trial court's plenary power had expired). Thus, the trial court's order on his Rule306a(5) motion was void. In the absence of a valid Rule 306a(5) order, Sims notice of appeal was due on December 31, 2014. Sims didn't file his notice of appeal until March 12, 2015, so the case is dismissed for lack of jurisdiction.

Economic Development: *City of Magnolia v. Smedley*, No. 09-15-00334-CV, 2018 WL 2246533 (Tex. App.—Beaumont May 17, 2018) (mem. op.). This matter was remanded by the Texas Supreme Court, which reversed part of the Beaumont Court of Appeal's previous judgment. The Beaumont Court of Appeals confined its discussion in this case to the arguments

raised by the Magnolia 4A and 4B Economic Development Corporations (EDCs) because its ruling as to the city was not reversed or remanded.

Smedley sued the city, the EDCs, and other entities alleging that the defendants caused Smedley's property to flood and retain standing water, causing damages. The EDCs argue the trial court erred in refusing to grant their summary judgment.

In the motion for summary judgment, the EDCs argue that they are not proper defendants for Smedley's claims under Section 11.086 of the Water Code or his takings claims. The Beaumont Court of Appeals agreed with the EDCs, holding that: (1) Smedley lacked standing to bring a claim under Section 11.086 of the Water Code because the EDCs do not own or control any of the relevant property; and (2) because the EDCs lack the power of eminent domain, as a matter of law, the EDCs cannot be subject to a suit under Article I, Section 17(a) of the Texas Constitution (a takings claim).

The Beaumont Court of Appeals would have reversed and rendered judgment for the EDCs but for some additional language in the trial court's order providing that Smedley may amend his petition to add claims "for prospective relief (declaratory or injunctive relief to require compliance with statutory or constitutional provisions) against appropriate persons in their official capacity." Neither the city nor the EDCs complained about this language on appeal. Thus, the case is reversed to the extent the trial court denied the EDC's motion for summary judgment regarding the Water Code and takings claims, and is remanded solely with respect to the additional language in the trial court's order giving Smedley the opportunity to amend his petition.

Zoning: *Vogler v. City of Lamesa*, No. 11-16-00168-CV, 2018 WL 2348498 (Tex. App.—Eastland May 24, 2018) (mem. op.). The Eastland Court of Appeals affirmed the City of Lamesa Board of Adjustment's grant of a setback variance for a carport.

Vara sought and received a setback variance from the City of Lamesa Board of Adjustment (BOA) in order to build a carport in order to protect her antique cars. A neighbor (Vogler) opposed the variance. Vogler sued under Chapter 211 of the Texas Local Government Code to undo the variance. The trial court affirmed the BOA's grant of the variance and Vogler appealed.

The trial court sits only as a court of review, and it may consider only the legality of the BOA's decision. Vogler bears the burden to establish that the BOA's action was illegal, and she must do so by a very clear showing that the BOA abused its discretion by acting arbitrarily and unreasonably or without reference to any guiding rules or principles. Vogler first asserts the variance amounted to a rezoning; however, the BOA granted an area variance, not a use variance. Next, the record reveals that the location of Vara's property makes it a prime target for "destruction or damage by the local . . . students . . . who might lob rocks and bottles and cans and whatnot at them." Such a condition appears to be unique to Vara's property. That Vara owns antique cars does not make the unique condition of the property a self-imposed hardship. As a result, the BOA was within its powers and discretion to grant the variance and Vogler failed to meet her burden.*

Tort Claims Act: *City of Edinburg v. GNJ Realty Invs. LLC*, No. 13-17-00290-CV, 2018 WL 2731907 (Tex. App.—Corpus Christi June 7, 2018) (mem. op.). This is an interlocutory appeal in a Texas Tort Claims Act/sewage backup case involving alleged negligent operation of a motor-driven lift pump. The Thirteenth Court of Appeals reversed and rendered an opinion in favor of the city.

GNJ Realty Investments, LLC (GNJ) brought a negligence claim against the City of Edinburg for sewage backup and property damage allegedly caused by a city-owned faulty motor-driven lift pump. GNJ leased a building to RGV Footcare. On February 2, 2014, a RGV Footcare employee saw standing water in almost every room of the building's floors. She called a plumber soon after and called the city the next day. GNJ asserted negligence because it felt the city failed to use reasonable care in the service and maintenance of the motor-driven equipment used in the sanitation system. It asserted the flooding was system backup and arose from this failure. The wastewater supervisor for the city testified that upon personal inspection, the manhole that gave sewer service to GNJ's building showed no evidence that anything the city owned caused this incident. He further testified that if a lift pump was faulty, certain alarms and logs would have been generated by the system. No such alarms or logs were created on that day, although a short was logged as occurring the following day. The city filed a plea to the jurisdiction which the trial court denied. The city appealed.

The court of appeals held no evidence in the record indicated the pump was faulty and was directly linked to the flooding of GNJ's building. As stated by the Texas Supreme Court many times "arises from" must have a nexus between the operation and/or maintenance of the equipment and the damage sustained. The connection must be considerably more than just the involvement of property. The trial court was not presented with any evidence that any of the pumps at the relevant lift station were clogged—fully or partially—on February 3, 2014. Moreover, that a pump "shorted out" the day after RGV Footcare experienced the water back up is alone not evidence that it was malfunctioning the day before. Given the record, the court reversed the trial court's order and rendered judgment for the city. GNJ's claim was dismissed.*

Annexation: *City of Brownsville v. City of Port Isabel*, No. 13-16-00498-CV, 2018 WL 2372510 (Tex. App.—Corpus Christi May 24, 2018) (mem. op.). The question in this case is whether the City of Port Isabel and the City of Laguna Vista (cities) have standing to challenge annexations by the City of Brownsville, and if so, on what grounds. The City of Brownsville passed several ordinances annexing territory within its two-mile extraterritorial jurisdiction. The cities claimed that the ordinances were invalid because the City of Brownsville's city council failed to comply with certain statutory procedures related to notice and hearing requirements. The cities also argued, from a substantive standpoint, that the property descriptions of the annexed areas do not close and illegally encroach upon the cities' respective extraterritorial jurisdictions (ETJs). The City of Brownsville filed a motion for summary judgment arguing that the cities lacked standing to challenge the procedure and substance of the ordinances because the annexations did not burden the cities and the cities stood to gain nothing if the ordinances were to be invalidated. The trial court denied the motion, and City of Brownsville appealed.

On appeal, the City of Brownsville argued that the trial court erred in denying its motion for summary judgment because the cities lack standing to challenge both the procedure and

substance of the annexation ordinances. The court held that—as a matter of law—the cities lacked standing to procedurally challenge the annexations because of existing case law stating that only the state can challenge annexations for procedural irregularities through a quo warranto suit. *See Alexander Oil Co. v. City of Seguin*, 825 S.W.2d 434, 439 (Tex. 1991). The trial court erred when it found otherwise.

On substance, however, the court upheld the trial court's denial of the City of Brownsville's motion for summary judgment. In response to the motion for summary judgment, a land surveyor testified that specific annexations did contain property descriptions that did not close. Consequently, the court held that there is at least a fact issue regarding whether the open-ended nature of the annexations burden the cities by encroaching upon their respective ETJs. The court affirmed the trial court's judgment with respect to the cities' substance-based challenges.

Zoning: *Murphy v. City of Galveston*, No. 14-17-00063-CV, 2018 WL 2701983 (Tex. App.—Houston [14th Dist.] June 5, 2018). 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 their non-conforming status. Pursuant to Section 29-11(a)(4) of the city zoning ordinance, the property owners had three options: (1) appeal the revocation decision to the board of adjustment; (2) submit an application for a specific use permit; or (3) both. Property owners submitted a SUP application to the city, and city staff recommended approval. 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 plea to the jurisdiction, arguing that the property owners failed to exhaust their administrative remedies by refusing to take an administrative appeal to the board of adjustment. The trial court granted the city's plea, and the property owners appealed.

The exhaustion rule requires that plaintiffs pursue all available remedies within the administrative process before seeking judicial relief. With regard to zoning matters, "administrative remedies available under section 211 of the Local Government Code generally must be exhausted before a party may seek judicial review of a determination made by an administrative official." *Lazarides v. Farris*, 367 S.W.3d 788, 798 (Tex. App.—Houston [14th Dist.] 2012, no pet.). In this case, the property owners argued that a fact issue involving the doctrines of estoppel and business compulsion precluded the application of the exhaustion rule. The court disagreed with the property owners.

On the estoppel issue, the property owners argued that the city's failure to inform them that they had the right to appeal the revocation of the property's non-conforming status to the board of adjustment estopped the city from enforcing its zoning ordinance. However, the property owners did not cite any authority that requires city officials to inform property owners about applicable zoning standards or how to appeal decisions under those standards. Further, the court recognized its prior holding that those residing in or having business dealings with a city are presumed to know its ordinances. Further, the property owners failed to provide evidence that estoppel was the only available remedy or that the city received any direct benefit in connection with its decision to revoke the property's non-conforming status.

On the business compulsion argument, the property owners claimed that the city's actions in concealing their right to appeal the revocation decision to the board of adjustment while at the same time coercing the owners to make costly repairs amounted to business compulsion. The court quickly dismissed the property owners' business compulsion argument on the grounds that the property owners failed to preserve the argument because they did not raise business compulsion in their initial response. The court held that trial court did not err in granting the city's plea to the jurisdiction.

May 2018

Note: Included cases are from April 11, 2018 through May 10, 2018.

Torts Claim Act: *Fort Worth Transp. Auth. v Rodriquez,* No.16-0542, 2018 WL 1976712 (Tex. April 27, 2018). This is a statutory-construction case on the damages-cap and election-of-remedies under the Texas Tort Claims Act (TTCA).

After Peterson, a pedestrian, was struck and killed by a public bus in Fort Worth, her daughter, Rodriguez, sued the Fort Worth Transportation Authority (FWTA), its two independent contractors (MTA and MTI), and the bus driver (Vaughn) under the TTCA. Rodriguez pled a single count of negligence against all defendants collectively. FWTA is a regional transportation authority, a governmental unit under the Transportation Code, and performs governmental functions. Rodriguez asserted FWTA, MTA, and MTI were engaged in a joint venture and vicariously liable for each other's actions, but Vaughn is only employed by the independent contractor, so cannot take advantage of the election of remedies under Section 101.106 of the TTCA. The trial court denied Rodriguez's motion and granted summary judgment in favor of the defendants, ruling that FWTA, MTI, and MTA should be treated as a single governmental unit under the TTCA, limiting Rodriguez's claim to a maximum recovery of $100,000.

The court of appeals reversed in part, holding that FWTA, MTI, and MTA were separate entities—each subject to a separate $100,000 damages cap, for a total of $300,000—and that Vaughn, an employee of MTI, was not an employee of a governmental unit and therefore was subject to unlimited personal liability. The Texas Supreme Court granted the petition for review.

Texas Transportation Code Section 452.056(d) provides that an independent contractor of a transportation authority, while not a governmental entity, is liable for damages only to the extent that the authority or entity would be liable if the authority or entity itself were performing the function. The court first analyzed the damage cap language and held the TTCA does not allow the imposition of liability above $100,000 for a single person. The fact that FWTA delegated its transportation-related governmental functions to independent contractors, as it is statutorily authorized to do, does not somehow expand the potential liability arising from those governmental functions. Next, the court analyzed Section 452.056. Since an authority is only allowed to perform governmental functions, but is allowed to contract for the performance of those functions under the statute, the contractor, by extension, is performing governmental functions. That does not grant the contractors immunity, but does limit their liability in the performance of those functions. Likewise, if Vaughn had been employed directly by FWTA, she would be entitled to protection under the TTCA's election-of-remedies provision. That MTI

provided Vaughn's services to FWTA makes no difference. She is permitted to take advantage of Section 101.106. Finally, the Court held the defendants were not entitled to attorney's fees.

The dissent focused on the fact that Section 452.056 does not list independent contractors as governmental units. As a result, Justice Johnson believes that while the caps apply, they are not cumulative and Rodriguez should be entitled to $100,000 from each defendant.*

Land Use: *Schmitz v. Denton Cty. Cowboy Church,* No. 02-16-00114-CV, 2018 WL 2144141 (Tex. App.—Fort Worth May 10, 2018) (mem. op.). In 2014, the Denton County Cowboy Church (church) purchased property zoned single family residential under the Town of Ponder's zoning ordinance. The church's property is adjacent to the plaintiffs' property. According to Town of Ponder's comprehensive plan, the plaintiffs' properties are designated for future low-density residential zoning. In 2015, the church began construction of an arena. The town issued a building permit for an open arena. Plaintiffs sued the church and town, seeking injunctions prohibiting the church from continuing construction. They also brought claims under Section 1983 for due process, takings, and equal protection violations. At this time, the town voted to amend the zoning code and issued a special use permit ("SUP") to the church, but did not pass an ordinance. The town and church filed a plea to the jurisdiction, which the trial court granted. The plaintiffs appealed.

The Second Court of Appeals issued an opinion and judgment in this appeal on August 31, 2017. On a motion of rehearing filed by Appellants Peter Schmitz, Sean Pollock, Larry La Duke, and Becky LaDuke and Appellee Denton County Cowboy Church, the court granted both motions for rehearing, withdrew its August 31, 2017 opinion and judgment, and issued a rehearing opinion without rebriefing or further argument.

The court was asked whether the trial court abused its discretion by denying the appellants'' request for a temporary injunction or erred by granting the plea of jurisdiction filed by the church and the town in the context of appellants'' suit for declaratory judgment, injunctive relief, civil-rights violations, and nuisance injuries arising from the town's facilitation of and the church's activities at its current and future rodeo arenas. The court did a de novo review and reviewed appellant's claims against the town and the church separately.

The court reviewed appellant's four claims against the town: (1) Uniform Declaratory Judgment Act; (2) 42 U.S.C.A. § 1983; (3) private-nuisance injuries; and (4) permanent injunctive relief. The court determined that the trial court did not err by dismissing the majority of the appellants' UDJA request because the appellants challenged the town's actions contrary to its ordinances instead of the validity of the ordinance. In doing this, the town's governmental immunity was not waived under the UDJA. Also, the appellants argued that the town implicitly waived its own immunity under the UDJA by implicitly waiving it by ordinance. The court stated that governmental immunity was not waived because the ordinance did not constitute a clear and unambiguous waiver of the town's immunity. However, the appellants' argument concerning violation of the Open Meetings Act (OMA) did have a limited waiver of immunity and conferred subject-matter jurisdiction on the trial court. Therefore, the trial court did err by granting the town's plea to the jurisdiction regarding declaratory requests based on the violation of the OMA, on the violations of the town's ordinance enacted under the OMA and dismissing the appellants'

attorneys-fee claims arising from their OMA-based, UDJA claim. Also, the court's review of the UDJA claims concerning the clear and unambiguous waiver of governmental immunity applied to the appellants' private-nuisance injuries claim. The court found that appellants did not affirmatively demonstrate that the trial court had jurisdiction over this claim and, therefore, the trial court did not err by granting the town's plea directed to the private-nuisance injuries claim.

Under the Section 1983 claim, appellants' claimed the town violated their civil rights by failing to ensure appellants' due-process rights were protected, committed a taking of property without just compensation, and engaged in impermissible spot zoning. Appellants had the burden to present jurisdictional facts to sufficiently establish that their taking claims were viable in order for the town's governmental immunity to be waived. However, a governmental unit's refusal or failure to enforce its own regulations or ordinances is not considered a viable takings claim. The appellants challenged the manner in which the town enforced its ordinance, instead of failure to enforce its ordinance. Therefore, the Appellants failed to allege a viable takings claim that would waive the town's immunity and the trial court did not err by granting the town's plea on this argument and the dismissal of attorney-fee claims.

The court determined that the appellants' also failed to affirmatively demonstrate the trial court's jurisdiction to their permanent injunctive relief claim when it dealt with the town's alleged violations of or failures to enforce its zoning ordinance. The waiver of governmental immunity for this claim is based on allegations of the governmental officials violating the law or exceeding their powers, not failure to enforce their ordinance. However, the appellants' permanent injunctive claims when it came to the alleged violation of the OMA did statutorily waive the town's governmental immunity since the town did not follow its notice provisions in its zoning ordinance.
Also, the town's argument that the Religious Land Use and Institutionalized Persons Act (RLUIPA) mandated that it allow construction and operation of the arena and divested the trial court of jurisdiction over the appellants' remaining claims was not effective because RLUIPA is not equivalent to governmental immunity. The court stated that the RLUIPA was not appropriately raised in a plea to the jurisdiction. The RLUIPA is a defensive tool, not an immunity from governmental activity regarding religious institutions.

Next, the court reviewed the church's arguments concerning standing for the appellants' claims for declaratory and injunctive relief and nuisance injuries. The court determined that the appellants did not have standing concerning their claims of declaratory and injunctive relief because the church was not the entity with the power to enforce the town's zoning ordinances. Only the town was allowed to enforce its zoning ordinance based on the power given to the town by the legislature in Chapter 211 of the Local Government Code. The trial court did not err by granting the church's plea to the jurisdiction concerning these claims.

As for standing in regard to the private nuisance claims, the appellants had to show that the violation of a zoning ordinance would cause them to suffer damages or injury beyond that would be suffered by the general public and that the damages or injuries are concrete and particularized, and actual or imminent. Of the appellants, the court found that only Mr. Schmitz was able to produce evidence of a particularized, imminent injury, while the other appellants were not.

Therefore, the trial court erred in in granting the church's plea directed at Mr. Schmitz's claim, but not at the other appellants' private-nuisance claim.

Finally, the court reviewed the appellants' argument that the trial court erred by denying their request for a temporary injunction against the town and the church. To obtain a temporary injunction, the appellants must plead and prove: (1) a viable cause of action; (2) a probable right to the relief sought; and (3) that a probable, imminent, and irreparable injury will occur prior to the final judgment. For the trial court's denial to be considered an error, the trial court would have to abuse its discretion. After reviewing the court record, the court determined that the trial court did not abuse its discretion in denying the temporary injunction since it could not conclude that the trial court clearly abused its discretion.

In conclusion, the court affirmed in part and reversed in part the trial court's order and remanded limited portions of the case to the trial court for further, consistent proceedings.

Governmental Immunity: *City of San Saba v. Higginbotham*, No. 03-17-00408-CV, 2018 WL 2016463 (Tex. App.—Austin May 1, 2018) (mem. op.). This is an immunity case where the Austin Court of Appeals reverses the trial court's order in part and renders judgment dismissing a breach of contract claim against the city.

The Higginbothams brought tort claims against the city and San Saba Pecan, LP, (company) after sewage backed up into their house. They alleged that the incident occurred because the company dumped pecan shells and residue into the public sewer system, and the city was aware of and allowed this to occur. All three parties eventually entered into a settlement agreement to equally split the cost of repairing the Higginbotham's property in return for the Higginbotham's promise to release the defendants from all liability if they were satisfied with the repairs. The city then filed a plea to the jurisdiction requesting the suit be dismissed. The Higginbothams amended their claims, arguing the city committed anticipatory breach of the settlement agreement by filing the plea. The trial court granted the city's plea as to the tort claim but denied the plea as to the breach of contract claim, concluding that the city was acting in a proprietary function.

The city appealed the trial court's denial of its plea on the contract claim, arguing the relevant action to consider is the operation of the sewer system. The Higginbotham's argue the relevant action to consider is entering the agreement.

The Texas Supreme Court has held that a governmental entity does have immunity from suit for a breach of a settlement agreement when it is immune from the underlying lawsuit. In light of that case law, the Austin Court of Appeals court concludes the operation of the sewer system is a governmental function and the city is immune from suit (absent some waiver). Entering into the agreement did not negate the city's immunity. The trial court's order denying the city's plea to the jurisdiction is reversed.

Extraterritorial Jurisdiction: *Collin Cty. v. City of McKinney*, No. 05-17-00546-CV, 2018 WL 2147926 (Tex. App.—Dallas May 10, 2018). In this statutory construction case, the Dallas Court of Appeals held City of McKinney lacks authority to enforce its building codes in its extraterritorial jurisdiction (ETJ), but it has authority to require a landowner to plat its property.

The city and Collin County previously entered into an agreement designating the city as the exclusive authority for platting and related permits. Custer Storage Center, LLC (Custer) owns land located in the county and within the city's ETJ and uses the property for a self-storage business. During construction, the city demanded Custer plat the property and obtain city building permits. When Custer refused, the city sought a declaratory judgment and injunction. All parties (city, county and Custer) filed summary judgment motions. The trial court concluded that the city's and county's respective authority to enforce platting and building permit requirements for property in the city's ETJ is determined based on whether a property is subdivided and held the city could only require building permits if the property is subdivided.

The Dallas Court of Appeals analyzed the Texas Supreme Court's opinion in *Town of Lakewood Village v. Bizios*, 493 S.W.3d 527 (Tex. 2016) and held that while a home-rule municipality has authority under the Texas Constitution within its borders, it requires express authority to regulate in the ETJ. The need for express authority applies to every city, regardless of type. Since no express authority allows extending building codes into the ETJ, the city cannot require building permits. However, the Texas Local Government Code does expressly authorize a city and county to designate the city as the exclusive authority for plat and subdivision regulations. That does not allow tagging the building codes onto the plat or subdivision ordinances. However, Custer's construction plans clearly trigger a requirement for platting, which they did not perform. Since the court significantly modified the judgment, it remanded back to the trial court to determine the issue of attorney's fees.*

Extraterritorial Jurisdiction: *City of Justin v. Town of Northlake*, No. 06-17-00054-CV, 2018 WL 2027163 (Tex. App.—Texarkana May 7, 2018) (mem. op). In this extraterritorial jurisdiction (ETJ) case, the Town of Northlake (Northlake) filed suit against the City of Justin (Justin) asking for, among other things: (1) a declaratory judgment: (a) that a 1997 "Joint Resolution and Agreement" (1997 Agreement) between Fort Worth and Northlake relating to both municipalities' ETJ was legal and valid; (b) that the resulting ETJ boundaries were legal and valid; (c) that a certain Justin ordinance that added property to its ETJ was void ab initio and invalid; and (2) a permanent injunction regarding Justin's development of the disputed property. Justin counterclaimed asking for a declaratory judgment: (1) that the 1997 Agreement between Fort Worth and Northlake was void ab initio; and (2) that Northlake's resolution purporting to transfer the disputed property into Northlake's ETJ was void ab initio and invalid. Both parties filed summary judgment motions, and the trial court granted the motion filed by Northlake.

Justin appealed contending that the trial court erred in granting Northlake's motion for summary judgment and denying its motion for summary judgment. Justin also argues that because the trial court erred in granting Northlake's motion for summary judgment, it also erred in awarding attorney fees in favor of Northlake.

The appellate court concludes that while former Local Government Code Section 43.021 gave home rule cities (like Fort Worth) authority to exchange areas with other cities, it did not address the authority of a general law city (like Northlake) to adjust its boundaries or exchange its ETJ. As for Justin's argument that the exchange impermissibly expanded Northlake's ETJ beyond the one-half mile provided in Section 42.021, the court concludes that Northlake provided no

evidence that the area Fort Worth exchanged was within the one-half mile area. Because Northlake failed to establish that it was entitled to judgment as a matter of law, the trial court judgment is reversed and the case is remanded.

Governmental Immunity: *Tabrizi v. City of Austin*, No. 08-16-00209-CV, 2018 WL 1940556 (Tex. App.—El Paso Apr. 25, 2018). In this case, the El Paso Court of Appeals affirms the judgment of the trial court.

The case arises from a dispute between the Tabrizis and the City of Austin regarding the city's denial of a plat application (because of certain environmental rules) and a subsequent denial of a plat exemption. The Tabrizis: (1) filed a declaratory judgment action against the city to construe several of its ordinances; and (2) sued several city officials claiming they acted ultra vires by misapplying the city ordinances. The trial court dismissed both claims on a plea to the jurisdiction. The Tabrizis appealed.

As to the first claim, the city argues that the Tabrizis' petition asks the court to construe several ordinances and not invalidate them. The appellate court agrees and concludes that governmental immunity precludes the declaratory judgment against the city to construe its ordinances. Noting this holding is somewhat academic because the court must construe the ordinances to determine if the ultra vires claims are valid, the court then turns to the ultra vires claims.

The Tabrizis claim that city officials acted ultra vires in applying certain environmental rules to platting applications. After construing the city's ordinances, the court overrules the claims. The court then considers whether the officials acted ultra vires in denying the Tabrizis an exemption from the subdivision platting requirement. The Tabrizis argued that, under the city's ordinance, a property is exempt from platting if it: (1) is five acres or less; (2) existed in its current configuration on January 1, 1995; (3) was receiving utility services on January 1, 1995, as authorized under the rules of a utility provider; (4) is located on an existing street; and (5) complies with the requirements for roadway frontage. At issue is whether the property received utility service. The Tabrizis argued that the curb and gutter drainage facilities qualified the lot. Though not defined in the ordinance, the city argued "utility service" is limited to electric, water, wastewater, or gas service hook-ups. The court concludes that under a common dictionary definition, a street gutter that redirects water would not intuitively qualify as a utility service provided to a property. The court then finds that, even assuming the officials had some discretion to define the term "utility service", the Tabrizis have not shown the officials' interpretation conflicts with the ordinary meaning of "utility service." This claim is overruled.

Finally, the appellate court agrees that the trial court did not err in denying the Tabrizis leave to amend. The judgment is affirmed.

Governmental Immunity: *Texas Mun. League Intergovernmental Risk Pool v. City of Abilene*, No. 11-17-00253-CV, 2018 WL 2142753 (Tex. App.—Eastland May 10, 2018). The City of Abilene purchased real and personal property insurance from the Texas Municipal League Intergovernmental Risk Pool (TML IRP) to cover over 400 structures located in Abilene. Following a June 2014 wind and hail storm, TML IRP evaluated the claim and ultimately paid the city a total of $6,948,132.78 for damages caused by the storm. In June 2016, the city

submitted an additional Proof of Loss for damages amounting to $19,960,422.33. When the property wasn't appraised, the city filed a breach of contract suit against TML IRP, arguing that TML IRP failed to properly investigate and evaluate the damage caused by the storm. The city filed an amended petition seeking damages under Texas Local Government Code Section 271.153 and sought to compel TML IRP to participate in the appraisal process to determine the amount of the city's damages. TML IRP claimed that Local Government Code Section 271.152 did not waive immunity for a claim of specific performance related to the appraisal. The trial court denied TML IRP's plea to the jurisdiction and granted the city's motion to compel appraisal and abate the case. TML IRP appealed.

On appeal, the dispute focused on whether the Texas Local Government Contract Claims Act (Local Government Code Sections 271.151-.160) waives TML IRP's governmental immunity for the city's request for the trial court's enforcement of the appraisal provision in the property coverage document. TML IRP asserted that the city's request is a remedy that is not permitted, as specific performance is not authorized by Local Government Code Section 271.153. The city contended that the appraisal provision is a contractual adjudication procedure that is enforceable under Section 271.154 of the Local Government Code.

The court held that the city's request for enforcement of the appraisal provision in the property coverage document is not a claim for specific performance. In the context of an insurance contract, appraisal is not sought in equity as a substitute for inadequate monetary damages, but rather is a procedural vehicle provided by the contract to determine the amount of loss. The court concluded that the appraisal provision constituted an alternative dispute resolution procedure because it settles a dispute regarding the amount of damages by means other than litigation. The appraisal provision was therefore an adjudication procedure under Local Government Code Section 271.154, and the request to compel appraisal was not considered a claim for specific performance, as argued by TML IRP. The court affirmed the trial court's order denying TML IRP's plea to the jurisdiction.

Civil Service: *Dunbar v. City of Houston*, No. 14-17-00156-CV, 2018 WL 1803233 (Tex. App.—Houston [14th Dist.] Apr. 17, 2018). Steven Dunbar, a senior captain with the Houston Fire Department, sustained an injury in 2012 and was placed on temporary-duty status. The department's rules provide that a firefighter is required to submit a physician-completed medical questionnaire every 90 days while on temporary-duty status. On April 4, 2014, an assistant fire chief ordered Dunbar to submit a medical questionnaire. Dunbar responded that he had sent his medical documentation to a physician, but the physician refused to take his case. The assistant fire chief once again ordered a questionnaire on August 27, 2014. Once again, Dunbar failed to comply. A member of the department's risk management office submitted a memorandum on October 14, 2014, reporting Dunbar's failure to comply with the order. Dunbar was suspended for noncompliance with a superior's order on April 8, 2015.

Dunbar filed a civil suit against the city and civil service commission to set aside the suspension. Dunbar's primary argument was that he was suspended more than 180 days after the city knew or should have known of the infraction in contravention of Local Government Code Section 143.117(b): "[T]he department head may not suspend a fire fighter or police officer later than the 180th day after the date the department discovers or becomes aware of the civil service rule

violation." Both Dunbar and the city moved for traditional summary judgment. The trial court denied Dunbar's motion for summary judgment and granted the city's summary judgment motion. Dunbar appealed.

On appeal, Dunbar claims that his suspension was void as untimely based on Local Government Code Sections 143.117(b) and 143.117(d)(2). Because the department knew of his failure to return a completed medical questionnaire as early as April 23, 2014, and didn't suspend him until April 8, 2015, Dunbar argued that the suspension was void. The city, meanwhile, argued that the date when the department discovered or became aware of a violation is when staff services received a verified complaint pursuant to Local Government Code Section 143.123. The court found the city's argument under Section 143.123 unpersuasive, as the statute does not require a "verification" under the fact pattern at issue in the case. The verified complaint issued in October 2014 didn't "restart the clock" on the 180-day window for imposing a suspension. According to the court, the city knew of Dunbar's violation in April 2014.

Because the evidence conclusively established that Dunbar's suspension was imposed more than 180 days after the department discovered or became aware of his failure to submit a medical questionnaire as required by department rules, the suspension was void. The court rendered judgment in Dunbar's favor and ordered the records of the disciplinary action expunged from each file maintained by the department (other than any internal investigatory file or records maintained by an internal investigative division) in accordance with Local Government Code Section 143.1214.

April 2018

Note: Included cases are from March 11, 2018 through April 10, 2018.

Employment: *Alamo Heights Indep. Sch. Dist. v. Clark*, No. 16-0244, 2018 WL 1692367 (Tex. April 6, 2018). This is a workplace same-sex discrimination, harassment and retaliation case where the Texas Supreme Court held that while the actions complained of were vulgar, they were not motivated by an illegal purpose. Warning, this is a 66-page majority opinion. So, the summary is a bit long.

The Alamo Heights Independent School District (AHISD) employed Catherine Clark as a coach. Clark asserts her fellow female coach, Monterrubio, began sexually harassing her by making continuous comments about her body. Clark filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). The principal placed Clark on an intervention plan. Monterrubio was transferred to another campus. However, Clark was ultimately terminated and filed suit. AHISD filed a plea to the jurisdiction which was denied. At the intermediate court of appeals, the panel held the high frequency of the non-severe comments nevertheless created a hostile environment centered around Clark's gender and affirmed. The Texas Supreme Court granted review.

The facts take up a large section of the opinion. However, the key factual points of note are that Monterrubio would often comment about Clark's boobs and appearance. Monterrubio would also

comment about her own sex life to male and female employees, including sexual escapades involving three men in three nights. She would send vulgar cartoons intended to be humorous. The court noted the multitude of other events were not sexual in nature, but were merely rude or crass. Monterrubio's behavior was the same whether it was addressed to a male, female, parent, teach or student. AHISD investigated Clark's complaints each time, either at the campus level or district level. At one point, the district did transfer Monterrubio to a different campus. However, Clark continued to have personality conflicts with other employees and her performance was continuously documented as being low. AHISD eventually terminated Clark.

The court went through a very detailed analysis of same-sex harassment standards under Title VII and the Texas Commission on Human Rights Act (TCHRA). Citing the seminal case of *Oncale v. Sundowner Offshore Services, Inc*., the U.S. Supreme Court held Title VII's protection against workplace discrimination "because of . . . sex" applies to harassment between members of the same gender. The court recognized same-sex discrimination cases are more complicated because of their nature. In addition to sexual desire, the court noted a same-sex case can be established by showing general hostility to a particular gender in the workplace or direct comparative evidence of treatment of both sexes. However, all of the methods require conduct to have more than offensive sexual connotations, but to be discriminatory because of the gender.

The court stressed and restressed that the context of the workplace and the individual acts is critical to an analysis of the sexual desire method. Clark never alleged, and no evidence established, Monterrubio was homosexual and none of the contexts demonstrate any sexual desire towards Clark, so the sexual desire method was disposed of. Next, the court noted there was no evidence of a general hostility towards women. None of the record "even hints" that Monterrubio's behavior, characterized as mistreatment of men and women alike, evinces hostility towards women in the workplace. Finally, the court noted there was no evidence of a comparative discrimination. The court held comments about gender-specific anatomy, alone, does not create an inference of harassment. Clark made over 100 wide-ranging complaints about Monterrubio and only a handful were about gender-specific anatomy. Focusing "only on gender-specific anatomy and ignoring motivation is legally unsound and is a misreading of *Oncale*." Regardless of how it might apply in opposite-sex cases, a standard that considers only the sex-specific nature of harassing conduct without regard to motivation is clearly wrong in same-sex cases. Motivation, informed by context, is the essential inquiry. Under the retaliation claim, the court held that permitting a retaliation case, predicated on a but-for analysis, to proceed to trial when the prima facie case has been rebutted and no fact issue on causation exists "defies logic." To qualify as a protected activity, complaining of harassment is not enough. The complainer must show some indication gender is the motive. Therefore, none of Clark's internal complaints constitute protected activity. However, the EEOC complaint does qualify as protected. The TCHRA does not protect employees from all forms of retaliation, only those actions which are materially adverse. The only actions taken against Clark which qualified was placing her on an intervention plan and the eventual termination. However, Clark failed to establish causal link between either of these actions and her EEOC complaint. Eight months elapsed between the EEO charge and recommendation for termination. Such is too long in this situation. Further, nothing shows the stated reasons for Clark's termination were false. It is undisputed Clark failed to follow lesson plans, failed to maintain student grades properly, and had low performance reviews. An employer is not forbidden from addressing performance issues involving employees

who have engaged in protected activity, including following through on known pre-existing issues. As the jurisdictional analysis for the plea requires a full analysis of the factual issues, and Clark failed to carry her burden, the plea should have been granted.

The majority's opinion spends the last several pages responding to the dissent's analysis, calling the legal theories flawed and the listing of facts a distortion. The court held the purported harassment is "repugnant and unacceptable in a civilized society. But we cannot step beyond the words of the statute . . . . " Plaintiff's claims were therefore dismissed.*

Texas Tort Claims Act: *City of San Antonio v. Tenorio*, No. 16-0356, 2018 WL 1441791 (Tex. March 23, 2018). An officer of the San Antonio Police Department (SAPD) was involved in a high speed pursuit wherein the fleeing suspect entered a freeway going the wrong way. Once the suspect entered the freeway, SAPD stopped pursuit. The suspect continued driving and struck another vehicle. Tenorio, an occupant of that vehicle, sued the city. The city filed a plea to the jurisdiction asserting it failed to receive notice under the city's charter, which requires written notice of a claim within ninety days after the injuries or damages were sustained. The trial court denied the plea and the Fourth Court of Appeals affirmed. The City of San Antonio filed an interlocutory appeal with the Texas Supreme Court.

The city argued that the Fourth Court of Appeals applied an erroneous standard. The city maintains that the correct standard is whether it was subjectively aware that some fault on its part caused the collision, not whether it was subjectively aware that it simply played a role in producing or contributing to it. The city maintains that the crash report listing "fleeing or evading police" as a contributing factor to the collision does not raise a fact issue as to whether the city was at fault in causing it.

Tenorio responded that the court of appeals used the proper standard. In her view, the appeals court used the phrase "played a role" to point out that fault is not synonymous with liability in the context of determining actual notice but to imply some responsibility for the injuries claimed. She also argued that the city confused fault with complete liability, meaning that the duty improperly views fault in this context as referencing the city being exclusively at fault. Lastly, Tenorio argued that the court of appeals correctly held that because the crash report listed "fleeing or evading police" as a contributing factor to the collision, there was a fact issue as to whether the city had subjective awareness of its fault.

The Texas Tort Claims Act (TTCA) requires written notice not later than six months after the day that the incident giving rise to the claim occurred with additional notice requirements that can be applied by a city ordinance or charter. However, written notice is not required if the city has actual notice. To have actual notice, a governmental unit must have the same knowledge it is entitled to receive under the written notice provisions of the TTCA. Actual notice is a fact question when the evidence is disputed, but it is a question of law when the evidence is undisputed. Also, if a governmental unit investigates an accident, whether the information acquired through its investigation meets the actual notice requirements of the TTCA depends upon the particular facts of the case.

The Texas Supreme Court reviewed the information presented by the city which included the SAPD's investigative report concerning the pursuit and witnesses statements at the time. The court focused on the part of the report and witness statements about the SAPD calling off the pursuit once the suspect drove the wrong way on to the freeway. The court found that though Tenario correctly asserted that the city did not believe that its employees were negligent in this case, this does not make the city subjectively aware of its fault in causing the crash and Tenario's injuries. Therefore, the city did not have actual notice under the TTCA and governmental immunity does apply. The court granted the petition for review, and without hearing oral argument, reversed the judgment of the court of appeals and rendered a judgment dismissing the cause for want of jurisdiction.

Economic Development/Election Contest: *Betrand v. Holland,* No. 01-16-00946-CV, 2018 WL 1720742 (Tex. App.—Houston [1st Dist.] Apr. 10, 2018) (mem. op.). The City of Friendswood held a special election on May 7, 2016, to authorize a Type B economic development sales and use tax to fund local economic development. The measure passed. Appellants/contestants filed suit challenging the validity of the election arguing that: (1) the ballot language was misleading in that it "did not expressly notify voters that approving the ballot item would approve the formation of a[n] [economic development] corporation which would have separate administrative costs and could have separate staff than the City and the collected taxes would pay for such corporation and overhead versus taxes being directly used for improvements"; and (2) a specific precinct was omitted from the ordinance calling the election. Both parties filed a motion for summary judgment. The trial court granted summary judgement for the city and dismissed the election contest. The contestants appealed.

First, the contestants argued that the ballot was not sufficient because Section 505.251 of the Local Government Code requires voters to approve a sales and use tax "to be used for the benefit of a corporation." Contestants contend that the city's failure to specify on the ballot that the tax would be used for the benefit of a corporation did not capture the "measure's essence" because it omitted the crucial details about how their votes would provide the necessary statutory authorization to levy a sales and use tax to benefit an economic development corporation. The issue that has to be addressed to determine the sufficiency of a ballot is whether the ballot "sufficiently submits the question . . . with such definiteness and certainty that the voters are not misled." *Dacus v. Parker*, 466 S.W.3d 820, 826 (Tex. 2015). Not every detail needs to be on the ballot, and short, general descriptions are often acceptable, but the ballot must identify the measure by its chief features, showing its character and purpose. *Id*. The test to determine inadequacy is whether the ballot language: (1) affirmatively misrepresents the measure's character and purpose or its chief features; or (2) misleads the voters by omitting certain chief features that reflect its character and purpose. *Id*. at 826.

The First Court of Appeals concluded that the ballot wording was sufficient under *Dacus* because it stated that it would adopt a Type B sales and use tax; the tax would be under Chapter 505 of the Local Government Code that specifically deals with Type B economic development corporations; and that it would "promote new or expanded business enterprises in the downtown area ... including but not limited to ... maintenance and operations expenses". The ballot identified the general purpose of the measure, and it substantially submitted the measure to the

voters with sufficient definiteness and certainty, without misrepresenting or omitting "chief features that reflect its character and purpose."

The court next addressed contestants argument that the city "failed to identify one of its precincts in the ordinances calling the election" in violation of Section 42.061(a) of the Texas Election Code. Section 42.061(a) of the Texas Election Code provides "[t]he governing body of a political subdivision other than a county shall establish the election precincts for elections ordered by an authority of the political subdivision." "The precincts may be established before each election or, once established, remain established until changed, at the governing body's discretion." TEX. ELEC. CODE § 42.061(b). The court found the contestants were misinterpreting the Election Code. It does not require any particular ordinance relating to an election to list the precincts eligible to vote, nor does it mandate that the way to "establish precincts" is to list them in all ordinances related to an election. So long as the city has established elections precincts before each election or in the past, Section 42.061 is satisfied. The court overruled this argument and affirmed the trial court's judgment.

Public Information Act: *Ramirez v. Wells*, No. 01-17-00262-CV, 2018 WL 1474201 (Tex. App.—Houston [1st Dist.] Mar. 27, 2018) (mem. op.). This is a Texas Public Information Act (PIA) suit where the First District Court of Appeals in Houston affirmed the trial court judgment in favor of the court administration defendants.

Ramirez was removed from the eligibility list to receive criminal court appointments in the Harris County Criminal Courts at Law, after having been on the list for some time. Ramirez filed a PIA request to see all records related to his removal. Ed Wells, the court manager, informed him the judiciary is exempt from the PIA and the rules of judicial administration protect release of internal deliberations of the court. The question under Rule 12 is whether the documents are court administrative files versus judicial records. Ramirez appealed to the Office of Court Administration (OCA), arguing that the decision to remove him from the list was an administrative decision, and thus, the information he requested did not constitute judicial records. The OCA agreed they were administrative, but determined it only had authority over judicial records so could not grant Ramirez any relief. Ramirez filed a petition for writ of mandamus under the PIA to compel release of the records. After opposing summary judgments, the trial court granted Wells' motion for summary judgment. Ramirez appealed.

Under the PIA, the judiciary is specifically excluded in the PIA's definition of "governmental body." Access to information collected, assembled, or maintained by or for the judiciary is governed by the rules adopted by the Supreme Court of Texas or by other applicable laws and rules. The record demonstrated that regardless of whether the records were "judicial" or "administrative" they qualify as "information produced, maintained, or assembled by the judiciary." Access is therefore not governed by the PIA. Since Ramirez' petition only seeks mandamus under the PIA, the trial court properly denied his summary judgment.*****

Concealed Handguns: *Holcomb v. Waller Cty.*, No. 01-16-01005-CV, 2018 WL 1321132 (Tex. App.—Houston [1st Dist.] Mar. 15, 2018). This is a concealed handgun/courthouse civil suit where the First District Court of Appeals reversed a declaratory judgment for the county.

The Waller County Courthouse houses civil and criminal courts as well as county offices. Outside, the county has a sign, pursuant to Penal Code Section 30.06, indicating it is a criminal violation for a concealed handgun license holder to enter the courthouse carrying a concealed handgun. Holcomb, a license holder, followed the procedure in Texas Government Code Section 411.209(a), to put the county on notice that he believed the sign was used improperly since it prohibited carrying a handgun in all areas of the courthouse, not just areas accessible to the courts. In response Waller County sued Holcomb seeking a declaratory judgment his interpretation of the statute was incorrect. The trial court denied Holcomb's plea to the jurisdiction and granted the county's requested relief. Holcomb appealed.

Holcomb's letter to the county providing notice of an ostensible violation of Section 411.209(a) is the basis for the county's suit against him. As a matter of law, however, writing a letter to a political subdivision to complain about perceived unlawful action does not create subject-matter jurisdiction. Holcomb had a statutory right to notify the county of his contention. Even in the absence of a statute, he had a constitutional right to complain. Holcomb's letter therefore does not constitute a redressable wrong. Further, no harm has befallen the county due simply to the letter. Since the Texas attorney general has the exclusive right to seek enforcement, any legal dispute over the lawfulness of the county's signage would be between the county and the attorney general, not Holcomb. Waller County effectively sought and obtained a declaratory judgment in its favor as to its disagreement with the attorney general without making that office a party. Because only the attorney general has the authority to decide whether a suit for violation of Section 411.209(a) is warranted, the attorney general was a necessary party and the judgment rendered was an impermissible advisory opinion. Finally, since the county utilized the suit to impact Holcomb's statutory and constitutional right to complain about perceived unlawful action, its actions entitled Holcomb to attorney's fees under the Citizens Participation Act (CPA). The declaratory judgment of the trial court is reversed, and the case is remanded for the sole purpose of awarding Holcomb attorney's fees.

Justice Jennings concurred regarding the lack of subject-matter jurisdiction for the county to sue Holcomb. However, he dissented as to the remand, noting that if no jurisdiction exists, the trial court could not grant the motion to dismiss under the CPA. It would be improper for the trial court to award attorney's fees in such a case.*

Age/Sex Discrimination: *City of Granbury v. Willsey*, No. 02-17-00343-CV, 2018 WL 1324774 (Tex. App.—Fort Worth Mar. 15, 2018) (mem. op.). This is an age/sex discrimination and retaliation case where the Fort Worth Court of Appeals affirmed-in-part and reversed-in-part the order denying the city's plea to the jurisdiction.

Willsey worked for the city for over seventeen years, including nine years as a police officer and almost nine years as a public works inspector. In 2016, the city eliminated her inspector position but reassigned her to be a permit clerk. Three days after she inquired as to how long before her retirement would vest, the city terminated her. The city asserts the inspector and the permit clerk position were eliminated and absorbed into the existing number of employees. The city filed a combined answer/plea to the jurisdiction. The trial court denied the plea. The city appealed.

The court went through a detailed point-by-point prima facie analysis. To be successful in an age discrimination claim, a plaintiff must plead that she was either: (1) replaced by someone outside the protected class; (2) replaced by someone younger; or (3) otherwise discharged because of her age. Willsey did not plea or establish she was qualified for the inspector position, only that she was eliminated. Simply because she was an inspector for nine years does not equate to her continued qualifications for the position. The same goes for her sex discrimination claims. Under the retaliation claims, Willsey asserts that the city pursued her after her termination by "making up false accusations against her and seeking criminal charges against her" for stealing records, interfering with her future employment. However, the court responded "[e]ven construing Willsey's pleadings liberally in her favor, we are left to guess what the protected activity is that Willsey participated in prior to her termination that the final decisionmaker for the city was aware of and the causal link between that protected activity and her termination."

The court then analyzed whether the lack of pleading sufficiency could be cured by allowing her the ability to amend. Because this is a reduction-in-force case rather than a true replacement case, and the city's arguments focus on a replacement case, it has not established an amendment would be futile. As a result, the case was remanded to allow the trial court to allow an amendment after some level of discovery has occurred.*****

Signs: *National Media Corp. v. City of Austin*, No. 03-16-00839-CV, 2018 WL 1440454 (Tex. App.—Austin Mar. 23, 2018) (mem. op.). The dispute began in 2009 when National Media acquired the sign rights, relocation rights, interests and entitlements in an off-premise advertising display located on real estate owned by a third party, Anchor Equities, Ltd.. Soon after, National Media filed an application with the City of Austin to register the sign as a "non-conforming off-premise sign." Current city ordinances prohibit off-premise signs in all districts, "[u]nless the accountable official determines that the sign is a nonconforming sign."

On November 19, 2009, the city issued "notices of violation" to both National Media and Anchor Equities, and issued a "notice of denial of registration" to National Media. These were issued based on the findings of a city investigation. The investigation found the sign had been dismantled in 2003, with the exception of three support poles. In 2009, National Media built a new sign in its place. Because the sign was dismantled more than five years before reconstruction work began and no permit was obtained, the new sign was in violation of the city's sign code. National Media filed a lawsuit against the city seeking declaratory relief under the Uniform Declaratory Judgments Act (UDJA) and a determination that it was entitled to register the sign. The city filed three pleas to the jurisdiction, each of which was denied by the trial court.

In 2011, after the city's third plea to the jurisdiction had been denied by the trial court, the city issued a formal "use determination" to National Media that determined the construction, installation, or maintenance of an off-premises sign at the site does not qualify as a non-conforming use under the city's zoning code. National Media appealed to the city's board of adjustment, which upheld the city's determination. In response, National Media added to its pleadings a request for judicial review of the board's decision.

Both parties filed cross-motions for summary judgment. The trial court dismissed all of National Media's claims and found that the board's ruling in favor of the city was improper and illegal because it misapplied zoning codes. While that appeal was pending before the court, a third-party contractor employed by National Media razed the sign in connection with the construction of apartments on the site.

National Media requested declarations by the court that it was entitled to relocate the sign, and that by denying its right to do so, the city was acting unlawfully. In addition, they asserted a takings claim. The trial court granted National Media's motions for partial summary judgment, later conducting a bench trial on damages and rendering a final judgment.

Both parties appealed this final judgment. In cross-appeals, the parties dispute the trial court's decision to deny the city's plea to the jurisdiction and the final judgment awarding National Media Corporation declaratory relief and damages for their regulatory-taking claim.

The city's plea challenged the trial court's authority to determine that National Media was entitled to register and relocate the sign and that the restrictions imposed by the city constituted a regulatory taking under state and federal law. National Media alleged neither a physical taking of its property by the city nor did it challenge the constitutionality of its sign ordinance. Rather, National Media argued that the city illegally applied and enforced its zoning ordinances. This effectuated a total regulatory taking of its property interest in the sign. The court ruled that National Media's claims did not trigger a waiver of immunity, citing the absence of a properly pled takings claim and the plaintiffs' failure to challenge property-use restrictions.

To have a property interest in a governmental benefit such as a permit, a person must have more than a unilateral expectation of that benefit. National Media's expectation of a permit is not a protected property interest, and the receipt of a permit is not a matter of right. National Media does not dispute its violation of registration requirements, one of which was the requirement that National Media register its sign with the city by August 21, 1999, or within 180 days after their purchase. According to the city's ordinance, a "sign owner may not replace or relocate the sign if it is dismantled before an application for a permit authorizing the replacement or relocation is filed." Unless properly registered, such determinations are within the province of the city.

The court reversed the trial court's denial of the city's plea to the jurisdiction, and granted the city's plea to the jurisdiction while dismissing all of National Media's claims.

Texas Tort Claims Act: *Ramos v. City of Laredo*, No. 04-17-00099-CV, 2018 WL 1511875 (Tex. App.—San Antonio Mar. 28, 2018). This is a Texas Tort Claims Act (TTCA) case where the San Antonio Court of Appeals reversed a jury verdict and rendered judgment against the city.

While Ramos, a motorcyclist, was making a left-hand turn into the park he was struck by another motorcycle with flashing lights attempting to exit the park in the wrong lane driven by an individual Ramos asserted was named Guerra. Guerra is a police officer with the City of Laredo. Ramos sued the city and Guerra. The city claimed that Guerra was on leave on the date of the accident, was not involved in the accident, and was not acting in the course and scope of his employment at the time of the accident. But the city also asserted Guerra must be dismissed

under Section 101.106(e) of the TTCA. In response to the city's plea to the jurisdiction and motion to dismiss, Ramos non-suited Guerra with prejudice. Guerra testified he was at home, asleep, at the time of the accident. At trial, over Ramos' objections, the court submitted a question to the jury on whether Guerra was acting within the course and scope of employment. The jury returned a verdict Guerra was negligent and liable but was not acting within the course and scope of his employment. Ramos appealed the verdict.

Section 101.106(e) of the TTCA is titled "Election of Remedies" and provides that when a claimant files suit "under this chapter" against both a governmental unit and its employee, the employee shall immediately be dismissed from the suit upon the filing of a motion to dismiss by the governmental unit. By filing a Section 101.106(e) motion to dismiss, a governmental unit "effectively confirms the employee was acting within the scope of employment and that the government, not the employee, is the proper party." Thus, when the city requested that Guerra be dismissed pursuant to Section 101.106(e), the city confirmed Ramos's allegation that Guerra was acting in the scope of employment at the time of the accident and agreed to vicariously defend its employee. Because of the election by the city to be held responsible for its employee in its plea, the court held the city was bound to its judicial admission that Guerra was acting in the scope of employment at the time of the accident.

Justice Barnard wrote separately only to emphasize that the Fourth Court prognosticated this type of argument in 2011 and cautioned entities not to shift arguments mid-stream trying to avoid liability. Either the employee is not in the course and scope and no dismissal under Section 101.106(e) applies, or they are in the course and scope and Section 101.106(e) requires a dismissal.*

Zoning: *Electro Sales & Svs., Inc. v. City of Terrell Hills*, No. 04-17-00077-CV, 2018 WL 1309709 (Tex. App.—San Antonio Mar. 14, 2018) (mem. op.). The dispute began when Electro Sales and Services, Inc. (Electro) bought a strip center consisting of three rental spaces in a single building from Billy and Gin Wei Eng. The strip center had been rezoned from commercial to semi-commercial use in the 1960s. The City of Terrell Hills grandfathered nonconforming commercial use of the suites and allowed the use to continue, unless vacant for more than six months. The middle suite had been vacant for more than six months prior to Electro's purchase of the strip center. The Engs claim they had informed Electro that the middle suite had lost its nonconforming use rights prior to the sale of the strip center. Elctro disputes this claim.

Electro sent an application to the city to rezone the strip center from semi-commercial to commercial. The city considered the application but, ultimately, denied it. During this time period, the city council amended its ordinance to allow for the issuance of special use permits. The amended provisions contained an application process and procedures for considering special use permit applications. Such applications were required to be accompanied by a site plan and meet other specific requirements. Electro then sent the city a second rezoning request for a special use permit for a barber shop but failed to submit the required site plan, so the permit was denied.

Another similar business was granted a special use permit by the city. This prompted Electro to file suit against the city and the Engs. They alleged regulatory taking and declaratory judgment claims against the city, and alleged fraud, negligent misrepresentation, and statutory fraud claims against the Engs.

The city moved for summary judgment, asserting traditional and no-evidence grounds. In its summary judgment motion to the trial court, the city challenged the trial court's jurisdiction to consider Electro's regulatory takings claim on three grounds. The city argued that because its immunity was not waived and Electro had not alleged a viable claim, the trial court lacked jurisdiction to consider the regulatory taking claim. Electro argued that the city's denial of their rezoning request denied them all economically viable use of the middle suite or unreasonably interfered with their rights to use and enjoy the property. The trial court granted the city's motion. The claims against the city were severed into a separate cause, making the order final and appealable. Electro appealed.

The court of appeals noted that it was undisputed that Electro continued to receive income from the rental of the two end suites, and Electro produced no evidence that the strip center was rendered valueless by the city's denial of the rezoning request. Thus, the court concluded that the zoning of the strip center could not have interfered with Electro's investment-backed expectations because the zoning was in existence when Electro purchased the property. The court further concluded that the city's denial of Electro's rezoning request could not qualify as a physical taking, given the failure to produce any evidence to substantiate this claim. Finally, the court affirmed the trial court's ruling, recognizing its jurisdiction to render judgment in the matter of the city's no-evidence motion for summary judgment on the regulatory claim.

Public Information Act: *Miller v. Gregg Cty.*, No. 06-17-00091-CV, 2018 WL 1386264 (Tex. App.— Texarkana Mar. 20, 2018). This is a Public Information Act (PIA) lawsuit in which the Texarkana Court of Appeals flipped back and forth between sections of the Texas Government Code before modifying the trial court's order regarding release of certain records held by Gregg County.

Miller sought a PIA request to allegedly "expose the depth and degree of the intimate relationships" between City of East Mountain Police Department officers and deputies of the Gregg County Sheriff's Office. Miller filed a suit under the PIA seeking a writ of mandamus in County Court at Law #2 to compel Gregg County to disclose certain police phone log information. The county filed a plea to the jurisdiction, which was granted. Miller appealed.

The PIA provides that "A suit filed by a requestor under this section must be filed in a district court for the county in which the main offices of the governmental body are located." TEX. GOV'T CODE § 552.321(b). "District courts are always the courts of exclusive original jurisdiction for mandamus proceedings unless the constitution or a law confers such jurisdiction on another tribunal." Miller asserts Section 25.0003(a) of the Texas Government Code states "In addition to other jurisdiction provided by law, a statutory county court exercising civil jurisdiction concurrent with the constitutional jurisdiction of the county court has concurrent jurisdiction with the district court in: (1) civil cases in which the matter in controversy exceeds $500 but does not exceed $200,000, excluding interest, statutory or punitive damages and

penalties, and attorney's fees and costs, as alleged on the face of the petition . . . ." However, the Texas Legislature expressly amended the PIA in 1999 and added the requirement that a suit be brought in district court. The court of appeals held this created a "condition precedent" to bringing a PIA mandamus action under Government Code Section 311.016(3). The court of appeals stated the question then becomes whether Section 552.321(b) trumps other sections of the Government Code. After a statutory construction analysis, the Texarkana Court of Appeals held Section 552.321(b) does not deprive a county court at law of its jurisdiction under Section 25.0003(a). That being said, the court then analyzed the evidence submitted and the extent to which the county searched for responsive phone records requested. The county presented uncontroverted evidence that no responsive documents exist. As a result, the trial court properly granted the plea, but based on the challenge to jurisdictional facts, not the jurisdiction of a county court at law. The court then modified the judgement, taking out references to dismissal of claims for declaratory and injunctive relief, which were not present in Miller's prayer for relief.*****

Civil Service: *City of Amarillo v. Nurek*, No. 07-17-00120-CV, 2018 WL 1415406 (Tex. App.—Amarillo Mar. 21, 2018). This is a civil service lawsuit where the Amarillo Court of Appeals reversed-in-part the denial of the city's plea to the jurisdiction.

In Amarillo, firefighter positions have civil service protection and firefighters are contained within the Fire Suppression Department. However, positions in the City of Amarillo Fire Marshall's Office (FMO) have traditionally been treated outside the protection. Nurek and Stennett were the highest scoring individuals on the promotional exams for positions of an Investigator I (equivalent rank of lieutenant) and Investigator II (equivalent rank of captain) within the FMO. When they were not offered the positions, they sued to declare the positions subject to civil service protection (and therefore eligible for placement via promotional exam). They also sought instatement in the positions and backpay. The city filed a plea to the jurisdiction which was denied. The city appealed.

Immunity bars a declaratory judgment action seeking a declaration of the government's liability for money damages. However, that only addresses the plaintiffs' claim for backpay. The court held jurisdiction exists for the trial court to examine the city's failure to classify firefighter positions within the FMO as civil service positions. Under Section 180.006 of the Texas Local Government Code, immunity is waived "for claims to recover monetary benefits that are authorized by a provision of…" the Civil Service Act. However, the claims asserted do not specify the sections which would authorize the payment in the plaintiffs' pleadings. "While appellees may prove to be right regarding appellants' erroneous classification of FMO positions outside of the civil service, it is clear that appellees have not affirmatively pled facts demonstrating that their claims for monetary benefits are authorized by a provision of the Civil Service Act." Further, the pleadings do not differentiate between acts of the city and any alleged ultra vires acts of individual officials. Nothing indicates where the city manager is responsible for civil service job classification. The failure to allege sufficient jurisdictional facts to demonstrate the trial court's jurisdiction gives rise to a right to amend the pleadings, unless the jurisdictional defect may not be cured by repleading. As a result, part of the plea should have been granted and part was proper to deny, but amended pleadings should be ordered.*****

Employment: *Schovanec v. Assadi-Porter*, No. 07-17-00426-CV, 2018 WL 1404494 (Tex. App.—Amarillo Mar. 20, 2018) (mem. op.). This is a due process in employment case where the Amarillo Court of Appeals reversed the denial of Texas Tech University's plea to the jurisdiction and dismissed the case.

Assadi-Porter was on a twelve-month, non-tenure track as an associate professor at Texas Tech University. She received a notice of termination at one point and was told she could grieve the termination. She asserts she relied upon the advice of human resource personnel and met with her supervisors to contest the termination. By the time she formally grieved the termination, the university deemed her grievance untimely. She sued the university and its president asserting due process violations. The university and president filed a plea to the jurisdiction, which was denied. They appealed.

A two-part test applies to due process claims: (1) does the plaintiff have a recognized liberty or property interest; and 2) if so, what process is due. In the employment context, a recognized property interest exists when an employee can only be dismissed for cause. Under Texas law, an employment relationship is presumed to be at-will, and an employer may terminate at-will employees "for good cause, for bad cause, or no cause." An at-will employment relationship creates no property interest in continued employment. A faculty member's employment is subject to her contract and the school's operational policies. The university's policies state that for non-tenure professors, they can either be terminated for cause prior to the expiration of a term or non-renewed at the close of a term. However, the court held the policies must not be read in isolation and the next policy in the manual states the dismissal provision applies only to non-tenured faculty who have served more than six years. Assadi-Porter served for less than two. As a result, since no specific contract or policy adoption applies to Assadi-Porter; she is presumed to be an at-will employee and has no property interest in continued employment.*****

Contractual Immunity: *Castle v. City of Victoria*, No. 13-17-00013-CV, 2018 WL 1755816 (Tex. App.—Corpus Christi Apr. 12, 2018) (mem. op.). In 2008, Kenneth Castle and the City of Victoria entered into a contract for the transfer of Castle's water rights associated with property he owned along the Guadalupe River to the city. The city executed a leaseback provision in the contact and a separate lease agreement whereby Castle could divert 108 acre feet of water for irrigation use for 15 years in exchange for annual payments by Castle. In 2015, the Texas Commission on Environmental Quality (TCEQ) notified Castle that he never had the right to legally pump water under the lease provisions because TCEQ had not been notified and because the city had amended the certificate of adjudication from the state and used all the water allotment given under the certificate. Castle sued the city for breach of contract and fraud. The city claimed governmental immunity under a plea to the jurisdiction, which was granted by the trial court.

On appeal, Castle alleged that because the city was acting in proprietary fashion, governmental immunity does not apply. In reviewing the governmental-proprietary distinction in the Texas Tort Claims Act, the court determined that the provisions of the water rights contract would fall into the "waterworks" category of the Texas Tort Claims Act in Texas Civil Practice and Remedies Code Section 101.0215(a)(11). Therefore, Castle's claims involved the city's governmental functions.

Castle argued that even if his claims involved governmental functions, the water being leased back to him by the city is a good, not a real estate right, and immunity is therefore waived under Local Government Code Section 271.152. The court found that even if the water leased back to Castle could be considered a good or service, Castle requested damages for "loss of use, lost profits, lost earnings, lost earning capacity, injury to real or personal property, and damages to crops and livestock." The requested relief is not recoverable under Local Government Code Section 271.153 for a balance due and owing, for additional work, or for any other amount that would fall within the statutory scheme. The court concluded that the city did not waive its governmental immunity for the claims raised by Castle because the contract between Castle and the city did not fall under the provisions of Chapter 271 of the Local Government Code, and affirmed the trial court's ruling on the city's plea to the jurisdiction.

March 2018

Note: Included cases are from February 11, 2018 through March 10, 2018.

Tort Claims Act: *City of Killeen v. Worsdale*, No. 03-17-00640-CV, 2018 WL 1077242 (Tex. App.—Austin Feb. 28, 2018) (mem. op.). In this interlocutory appeal, the City of Killeen appealed the trial court's denial of its plea to the jurisdiction of Joy Worsdale's wrongful-death claim under the Texas Tort Claims Act (TTCA). The lawsuit stems from a motorcycle accident involving Scott Worsdale. The motorcycle collided with a large dirt mound "obstructing the full width" of the roadway. Worsdale and his passenger were seriously injured and later died from the injuries sustained. The City of Killeen Police Department (KPD) arrived on scene shortly after the accident and began investigating. The report by the KPD indicated that officers had conversations concerning who owned the road and was responsible for the maintenance. The report did not, though, make any conclusions about fault.

Appellees' petition alleged that the dirt mound was a special defect on the city's property that the city knew or should have known about. The petition also argued the city had a duty to make the premises safe by eliminating the risk of harm, and it failed to do so. The city's plea to the jurisdiction asserted that: (1) appellees did not provide the city with the required, written statutory notice of their claims within six months of the accident; and (2) the city did not have "actual notice" of appellees' claims within that same period. The trial court denied the plea, and the city appealed.

Appellees conceded that they did not provide written notice of their claim under the TTCA to the city within six months. Instead, they argued that the city had notice of their claims under Texas Civil Practices and Remedies Code Section 101.101(c): "The notice requirements provided or ratified and approved by Subsections (a) and (b) do not apply if the governmental unit has actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged." The Austin Court of Appeals found the facts in this case similar to those in *City of Dallas v. Carbajal*. In that case, the court held that "although the report described what apparently caused the accident (i.e. missing barricades), it 'did not even imply, let alone expressly state, that the City was at fault' and was no more than a 'routine safety investigation, which is insufficient to provide actual notice.'" The court concluded that the evidence did not

demonstrate a *subjective awareness* by the city of its fault, as alleged. The court reversed the trial court and rendered judgment in favor of the City of Killeen.

Public Information Act: *Rines v. City of Carrollton*, No. 05-15-01321-CV, 2018 WL 833367 (Tex. App.—Dallas Feb. 13, 2018) (mem. op.). Mark Rines made a request under the Texas Public Information Act (PIA) to the City of Carrollton for the civil service files of fourteen current or former police officers. The city provided Rines with a cost estimate for the records, and he paid that amount to the city. While processing the request, the city decided to seek an attorney general's ruling as to whether information was subject to the PIA requirements. While waiting on the ruling, the city provided other requested information and reduced the amounts charged for production, refunding a portion to Rines. The city received rulings from the attorney general and provided Rines with information pursuant to those rulings. Rines then filed a complaint with the attorney general alleging that the city acted in bad faith in providing its initial cost estimates, and thus, Rines was entitled to "three times the amount of the overcharge" pursuant to Government Code § 552.269(b). Shortly thereafter, Rines filed a complaint with the attorney general that the city did not properly comply with PIA requests. The attorney general conducted an investigation, which resulted in a final determination that the city did fail to deliver to Rines "all the material he requested that was required to be public." Rines then filed suit against the city, alleging violations of the PIA.

The city filed a plea to the jurisdiction and motion to dismiss in which it asserted that Rines' requested relief fell into one of three categories: (1) requested government action; (2) retrospective monetary relief; and (3) city's production of documents. Further, the city argued:

(1) "[appellant] cannot compel the City to perform activities that are not required by statute, regulation, ordinance, or common law";

(2) "monetary relief sought as compensation for conduct occurring before the requested injunction is retrospective in nature" and therefore barred by sovereign immunity; and

(3) "the balance of [Rines'] requested injunctive relief has been made moot" because the city has made "full and complete disclosure of records in its custody that respond to [his PIA] requests" and has "provided evidentiary support that it has disclosed all responsive information it has in its custody."

In response, Rines filed a document that he titled "Objections to Defendant's Answer," in which, he requested in camera review and discovery regarding city files and documents. At the hearing on the city's plea to the jurisdiction and motion to dismiss, several city officials testified describing their responsibilities and how they conducted the search for records. They also testified that the city has no information responsive to Rines' requests that was not given to him. Following the hearing, the trial court granted the city's plea to the jurisdiction. Following a motion for sanctions and accompanying hearing denying the sanctions, Rines appealed listing fifteen issues. In his fifteen claims, Rines argued the trial court violated provisions of the Texas Civil Practices and Remedies Code and that testimony in the trial court was inadequate. Rines also raised several issues that he failed to raise in the trial court. The Dallas Court of Appeals analyzed each issue thoroughly before deciding against Rines on all fifteen issues and affirming the trial court's order.

Tort Claims Act: *Texas Dep't of Criminal Justice v. Cisneros*, No. 09-17-00161-CV, 2018 WL 1095533 (Tex. App.—Beaumont March 1, 2018) (mem. op.). This is an interlocutory appeal from the denial of a plea to the jurisdiction in a Texas Tort Claims Act (TTCA) case, where the Beaumont Court of Appeals reversed the denial and ruled in favor of the Texas Department of Criminal Justice (TDCJ).

Cisneros was injured in an accident involving a commercial grade woodworking power saw while incarcerated by the TDCJ. While Cisneros was cleaning the saw with an air hose while it was turned off, another incarcerated individual turned the power on. Cisneros lost his right hand and fingers. He sued the TDCJ for negligence. The TDCJ filed a plea to the jurisdiction, which was denied. It appealed.

The TDCJ asserted Cisneros failed to file a notice of claim within the statutory time period. Cisneros asserts the TDCJ had actual notice of his claim and therefore, formal statutory written notice is not needed. To have such actual knowledge, the governmental unit must have: (1) knowledge of a death, injury, or property damage; (2) subjective awareness of the governmental unit's alleged fault producing or contributing to the death, injury, or property damage; and (3) knowledge of the identity of the parties involved. Subjective awareness is required because if a governmental entity is not aware of its fault, it does not have the same incentive to gather the information the statute is designed to provide. Fault, as it pertains to actual notice, is not synonymous with liability; rather, it implies responsibility for the injury claimed.

Cisneros asserts that because the guards were called and an incident report was created, TDCJ had actual notice of his claim. However, the report indicated Cisneros acted negligently by failing to follow protocols requiring a supervisor to lock out the machine. The investigation reports do not show TDCJ's fault. The fact that TDCJ investigated Cisneros's accident does not constitute subjective awareness. No other evidence existed within the record indicating TDCJ had knowledge of some fault of its own. As a result, the plea should have been granted.*

Contractual Immunity: *Diaz v. City of Elsa*, No. 13-16-00577-CV, 2018 WL 1192623 (Tex. App.—Corpus Christi March 8, 2018) (mem. op.). In 2010, Jesse Diaz, a warrant officer with the City of Elsa, was offered and subsequently accepted the position of interim police chief. The city manager sent a letter on official city letterhead confirming Diaz's appointment as interim police chief and providing that if Diaz was not ultimately selected as the permanent chief, he would assume his former position as warrants officer. In 2011, a new city manager submitted a memorandum removing Diaz as interim police chief and terminating his employment with the city. Diaz sued, arguing that he and the city entered into an employment agreement in the form of the initial city manager's letter, and that the city breached the agreement resulting in damages. The trial court granted the city's plea to the jurisdiction on the grounds that the city was immune from suit and no valid waiver of immunity existed.

On appeal, Diaz argued that the trial court erred by granting the city's plea to the jurisdiction, as Local Government Code Section 271.152 waives immunity for purposes of adjudicating a claim for breach of contract. The primary issue on appeal was whether Diaz could establish that the initial city manager's letter was a contract subject to Section 271.152's waiver of immunity. Ultimately, the court determined that the city manager's letter meets each of the five elements

required by Section 271.151(2) and was a unilateral employment contract that falls within the scope of the statute's waiver of immunity. The court reversed the trial court and remanded for further proceedings.

February 2018

Note: Included cases are from January 11, 2018 through February 10, 2018.

Utility Relocation Cost: *City of Richardson v. Oncor Elec. Delivery Co. LLC*, No. 15-1008, 2018 WL 663159 (Tex. Feb. 2, 2018). This case involves a dispute between a city and a utility over who must pay relocation costs to accommodate changes to public rights-of-way.

The City of Richardson negotiated a franchise agreement with Oncor Electric Delivery Company (Oncor) requiring Oncor to bear the costs of relocating its equipment and facilities to accommodate changes to public rights-of-way. Richardson later approved the widening of thirty-two public alleys. Oncor refused to pay for the relocation. While the relocation dispute was pending, Oncor filed an unrelated case with the Public Utility Commission (PUC), seeking to alter its rates. That dispute was resolved by settlement, but the settlement included the city passing a tariff ordinance. The court had to decide whether a pro-forma provision in a tariff, which sets the rates and terms for a utility's relationship with its retail customers trumps a prior franchise agreement, which reflects the common law rule requiring utilities to pay public right-of-way relocation costs.
By nature, a franchise agreement represents the unique conditions a city requires of a utility in exchange for the utility's right to operate within the city. Here, the franchise contract incorporated a conventional right-of-way ordinance (ROW Ordinance) requiring the utility, upon written notice from the city, to remove or relocate "at its own expense" any facilities placed in public rights-of-way. The ROW Ordinance is typical of others throughout Texas. "Tariff" is defined as "the schedule of a utility . . . containing all rates and charges stated separately by type of service, the rules and regulations of the utility, and any contracts that affect rates, charges, terms or conditions of service." 16 Tex. Admin. Code §25.5(131). A tariff filed with the PUC governs a utility's relationship with its customers, and it is given the force and effect of law until suspended or set aside. However, the PUC's rules also contain a "pro-forma tariff," the provisions of which must be incorporated exactly as written into each utility's tariff. The city and Oncor sued each other over payment of the relocation costs, each citing the differences between the ROW Ordinance/Franchise Contract and pro-forma tariff. The trial court granted the city's motion for summary judgment, but the court of appeals reversed and rendered judgment for Oncor.

Under the common law, a utility's right to use a city's public rights-of-way is permissive and is subordinate to the public use of such rights-of-way. The Texas Supreme Court has traced this principal back at least as far as 1913. The Texas Utilities Code mirrors the common law, but specifically apply to "streets." Oncor argues that the legislature's use of "street" and not "alley" is significant and precludes these statutes from applying to alleys. Under statutory construction principles, every word included and excluded by the legislature has significance. Looking to the statutory scheme, the court found particularly relevant the legislature's recognition of the broad

authority afforded to home-rule cities. As a home-rule city, the City of Richardson has "exclusive original jurisdiction over the rates, operations, and services of an electric utility in areas in the municipality." Furthermore, the court held that in the context of home-rule cities, the recognition of a specific power does not imply that the other powers are forbidden. The legislature did not intend to strip municipalities of their common law right to require utilities to bear relocation costs. The language in the tariff does not unmistakably address the relocation costs. The tariff addresses Oncor's relationship with end-users, which, in this case, does not include the city. As a result, the city retains the power to address costs through its ROW Ordinance and its franchise contract. The court reversed the judgment of the court of appeals and reinstated the judgment of the trial court.*

Whistleblower: *Metropolitan Transit Auth. v. Williams*, No. 01-17-00724-CV, 2018 WL 541932 (Tex. App.—Houston [1st Dist.] Jan. 25, 2018) (mem. op.). This is a Texas Whistleblower Act suit where the First District Court of Appeals in Houston reversed the denial of the employer's plea to the jurisdiction and rendered judgment for the metropolitan transit authority (Metro).

Williams was a track maintainer for Metro. Williams complained to Metro's compliance officer asserting a hostile work environment by his supervisor, Ratcliff. Williams alleged Ratcliff instructed him to "snitch" on anyone or anything going wrong on the track and that when Williams expressed reservations Ratcliff became hostile. Later an incident occurred between Williams and another Metro employee, Fred Burton. Burton reported the incident to the Metro police the next day. Burton asserted Williams began to curse at him, calling him a derogatory name for a black person, and threatening to fight him off Metro property. Three other people were witnesses to the incident, including Ratcliff. Williams wrote a response to the incident but asserts Burton's accusations were retaliation for Williams' complaint against Ratcliff. Police charged Williams with assault by threat and Metro terminated Williams. On an aside, after Williams was terminated, another employee reported Ratcliff and Burton for theft of Metro property and Williams cooperated with the investigation. Williams filed suit under the Texas Whistleblower Act. Metro filed a plea to the jurisdiction which the trial court denied. Metro appealed.

"Snitch" means to report on someone else. Williams' attempt to change the meaning is unsupported in the text of his report. In the context of the entire passage, Ratcliff asking Williams to be his eyes and ears on the track conveys the idea that Williams would watch what other people were doing and report to Ratcliff. Nothing in this passage indicates that Ratcliff was engaged in any criminal activity and seeking Williams's help in the process. Simply because Williams was later charged with a crime by another employee does not mean Williams was retaliated against for his report to the compliance officer. Metro produced evidence that another employee reported the criminal acts of Ratcliff and Burton after Williams was fired. Metro's evidence established that an officer was assigned to investigate the allegations and that the first time the officer spoke to Williams was after he had been terminated. Metro could, therefore, not retaliate against him because of anything he provided the officer.*

Employment Law: *Town of Shady Shores v. Swanson*, No. 02-15-00338-CV, 2018 WL 472902 (Tex. App.—Fort Worth Jan. 18, 2018). The Town of Shady Shores City Council

terminated Swanson, who served as city secretary, for lack of confidence at a special meeting on February 24, 2014. Swanson sued the town originally under the Texas Whistleblower Act for wrongful termination because she reported the destruction of a tape recording of a meeting of the town's investment committee. She also brought a common law claim for wrongful discharge under *Sabine Pilot*. In response to the suit, the town filed a plea to the jurisdiction asserting governmental immunity for both claims. Swanson then amended her petition to add a claim of violation of her free speech rights under the Texas Constitution, declaratory relief based on town's alleged violation of the Texas Open Meetings Act (TOMA), and of her right under the "due course" provision of Article I, Section 19 of the Texas Constitution. Swanson did not allege separate and distinct claims for violations of TOMA or the Texas Constitution; rather she alleges that the town committed violation of these provisions in support of her standalone claim for a declaratory judgment.

Before the trial court ruled on the town's plea to the jurisdiction, the town filed a motion for traditional summary judgment and a separate motion for no-evidence summary judgment that challenged the trial court's jurisdiction of Swanson's additional claims. The town asserted that it was entitled to governmental immunity on Swanson's declaratory judgment claims because she had no evidence that she was entitled to declaratory relief in its no-evidence motion. In the traditional summary judgment, the town asserted that it was entitled to summary judgment on Swanson's declaratory judgment claims because the claims did not fall within the scope of permissible declaratory judgment actions against governmental entities. In her summary judgment response, Swanson argued the town was not entitled to a no-evidence summary judgment because it bore the burden of proof on establishing governmental immunity and that genuine issues of material fact precluded the traditional summary judgment. The trial court granted the town's plea to the jurisdiction as to Swanson's Whistleblower and *Sabine Pilot* claims and dismissed them. However, the trial court denied the town's summary judgment motions. The town filed an interlocutory appeal challenging the denial of the motions of summary judgment and raised six issues challenging the trial court's jurisdiction and the trial court's determination of Swanson's objection to the town's no-evidence summary judgment motion.

The Fort Worth Court of Appeals quickly dispatched with the town's first issue that the trial court had no jurisdiction over Swanson's TOMA claims, stating that the town did not raise a jurisdictional, government immunity ground on this issue, but raised a traditional summary judgment ground which appellate courts do not have jurisdiction to hear the denial of. Also, while Swanson asserted grounds for declaratory relief based on TOMA violations, she did not assert a separate, standalone claim under the TOMA and without that distinct claim the court overruled the town's first issue for lack of jurisdiction.

The court also dispatched with the town's second issue. The town asserted that Swanson presented no viable claim for relief under "due course" provision in Article I, Section 19 of the Texas Constitution. It argued that Swanson had no evidence that she was denied any right to confront her accusers and address the council before a council meeting, no constitutional right to appeal the termination decision, and she was provided with notice and an opportunity to be heard. However, the court stated that since Swanson only raised these constitutional issues as

part of her Uniform Declaratory Judgment Act (UDJA) claim and not as standalone claim, the court did not have jurisdiction and overruled the second issue.

The town's third issue concerned Swanson's UDJA claims. First, the town argued Swanson provided no evidence in response to its no-evidence summary judgment motions and the trial court erred by denying it a no-evidence summary judgment as to Swanson's declaratory claims. However, the court stated that the town had to first produce evidence negating jurisdiction before Swanson had any burden to produce jurisdictional evidence. A governmental entity cannot file a no-evidence motion for summary judgment on governmental immunity grounds to altogether avoid the jurisdictional burden that it would have to demonstrate when asserting a plea to the jurisdiction. So, the court found that the trial court did not err in denying the town's no-evidence summary judgment and overruled part of the town's third issue.

Second, the town argued that it is immune from Swanson's UDJA claims because she does not fit within the category of person entitled to relief under the UDJA. However, the court disagreed with the town by stating that Swanson easily qualified as an interested person seeking to stop, prevent, and reverse violations of the TOMA and therefore a person seeking to obtain a declaration of rights, status, or other legal relations under the UDJA. Then, the town argued that the UDJA does not waive governmental immunity when plaintiff seeks declaration of her rights under a statute or other law. The court explained a plaintiff who sues a governmental entity under the UDJA must allege a waiver of immunity from some other source. The TOMA did provide the waiver of immunity for some of Swanson's UDJA claims, but the TOMA is a limited waiver for an interested person bringing an action by mandamus or injunction to stop, prevent or reverse a violation or to find an action voidable. Since Swanson seeks a declaration that the town violated the TOMA when terminating her, that the termination was void under the TOMA and seeking injunctive relief, the TOMA does waive governmental immunity for these claims. The court overrules the third issue to these claims.

Third, the remaining requested declaratory relief by Swanson that the town violated the TOMA in certain ways does not have a waiver under the TOMA. Therefore, the trial court should have dismissed Swanson's TOMA-based UDJA claims for lack of jurisdiction to the extent she seeks relief beyond injunctive or mandamus relief and a declaration that the town's termination of her employment was void. This part of the town's third issue was sustained. Lastly, the court found that Swanson did not allege viable constitution–based UDJA claims. The court did an analysis of whether Swanson had a liberty interest because of her performance review, and if she had a property interest in her employment. The court determined that she did not have a liberty interest since the performance agreement did not have an adverse effect on her reputation. Also, Swanson did not have a property interest in her job since she was not under a contract nor did statutes or the employee handbook give such an interest. Therefore, the court sustained the town's third issue challenging the trial court's jurisdiction over Swanson's constitution-based UDJA claims.

The town's fourth issue argued that it was entitled to governmental immunity from Swanson's free speech claim under the Texas Constitution. The court explained that it did not have jurisdiction over part of the fourth issue because of the town having to negate jurisdictional claims first before the burden shifts when it comes to a no-evidence summary judgment. Also,

the court could not review the traditional summary judgment because the town did not have the ability to appeal the trial court's denial of its motion as to the free speech claim, but must consider the jurisdictional argument the town made. The court analyzed Swanson's free speech rights when it comes to her being a public employee and whether she was speaking as a public employee or a citizen when speaking about the town records being destroyed. Generally, when a public employee makes statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications form employer discipline. But, a public employee discussing her job duties might be considered citizen speech if the employee is discussing this issue to persons outside the work place in addition to raising them up the chain of command at her workplace. The court used this analysis and determined that Swanson was speaking as a public employee and not a citizen when making reports about the destruction of the records. She only reported the destruction of the town's record to the people within the chain of command such as council members, mayor, and the town attorney. Since Swanson did not have a viable constitutional claim, the trial court had no jurisdiction over her claim. Also, Swanson did not have First Amendment protection when she spoke about the mayor intending to call her into the meeting under false pretenses. For the First Amendment to be invoked, the matter had to be related to a matter of public concern. Though the termination of a city secretary is a matter of public concern according to the statutes, the statute has given no such indication for the kind of circumstances alleged by Swanson. Therefore, the trial court did not have jurisdiction and the fourth issue is sustained.

Last of all, the town's fifth and sixth issues argues that it properly identified the grounds for its no-evidence motion for summary judgment and that governmental immunity is properly raised in a no-evidence motion for summary judgment. These issues address Swanson's trail court objection to the no-evidence summary judgment. The court held that a governmental entity may not raise immunity in a no-evidence summary judgment motion based and therefore both issues are overruled.

Tort Claims: ***Tarrant Cty. v. Carter-Jones,*** **No. 02-17-00177-CV, 2018 WL 547588 (Tex. App.—Fort Worth Jan. 25, 2018) (mem. op.)**. This is a premise defect/Texas Tort Claims Act (TTCA) case where the Fort Worth Court of Appeals reversed the denial of a plea to the jurisdiction and rendered judgment for the county.

Marks, a courthouse worker, noticed a puddle of water in front of a restroom, which is in an alcove separate from the hallway. The puddle was confined, was approximately two feet in diameter, and was not expanding. She reported it to maintenance. About an hour later, Carter-Jones slipped and fell on water located in the hallway. Carter-Jones sued the county under a premise defect theory. The county filed a plea to the jurisdiction, which was denied. The county appealed.

Merely referring to the TTCA in a petition does not establish a waiver of immunity. Courts must consider the factual allegations and/or evidence. The court first noted Carter-Jones did not plead and, therefore, did not establish personal property was involved for waiver purposes. Carter-Jones and the county disagree about what the known "dangerous condition" in this case actually was under a premise defect theory. Carter-Jones asserts the water on the alcove floor that later spread to the hallway created an unreasonable risk of harm. The county asserts it must have

known of the water in the hallway which caused the fall for a waiver to exist. The county's evidence established that it did not have actual knowledge of the water in the hallway. Its evidence asserts the facilities-management department would have responded to a water leak or hazard in the corrections-center hallway more quickly than water in front of a closed bathroom in an alcove with no traffic. "Actual knowledge" requires knowing that "the dangerous condition existed at the time of the accident, as opposed to constructive knowledge which can be established by facts or inferences that a dangerous condition could develop over time." No evidence exists the county had actual knowledge water was in the hallway. While Carter-Jones's conclusory pleadings state the county had actual knowledge, the evidence established otherwise, with no contravention. As a result, the plea should have been granted.*

Public Purpose: *Tarrant Appraisal Dist. v. Tarrant Reg'l Water Dist.*, No. 02-17-00042-CV, 2018 WL 547777 (Tex. App.—Fort Worth Jan. 25, 2018). The Tarrant Appraisal District (TAD) asserted part of the property owned by the Tarrant Regional Water District (TRWD) was not "used for public purposes" and therefore was not tax exempt. The Fort Worth Court of Appeals affirmed the order dismissing TAD's suit. [This is a 37 page opinion, but has excellent language on "public purpose" definitions applicable to governmental entities. Sorry, but long opinion equals long summary in comparison.]

TRWD acquired property in connection with a federal control project. Undertaken in concert with the United States Army Corps of Engineers, the program's purpose was to control flooding on the Clear Fork Trinity River. A portion of the property was not used directly for flood control but was used for public trails, common areas, and river access. In an effort to counteract a lack of use outside of certain areas along the trails and "to encourage development of river-facing businesses on TRWD's property and adjoining properties," TRWD determined it would improve and lease to chef Tim Love's River Shack, LLC, property to run a restaurant on the river front. River Shack pays TRWD rent based on a percentage of its annual sales and "[a]ll income received by TRWD from the [lease] is deposited into the general fund of TRWD and used exclusively for [] TRWD's public purposes." TAD asserted the property was not exempt from taxation. TRWD followed the procedures in the Tax Code to challenge the decision, ending in district court. TRWD filed a motion for summary judgment which the trial court granted. TAD appealed.

TRWD is a governmental entity created under statute. TRWD is authorized to make and enforce reasonable rules that are necessary to accomplish TRWD's "authorized purposes," which include (i) regulating "all recreational and business privileges on any . . . body of land . . . owned . . . by the district," (ii) promoting "state or local economic development," and (iii) stimulating "business and commercial activity in the district." TRWD is further permitted to provide for or participate in the acquisition, construction, development, operation, or maintenance of recreational facilities intended to promote economic development. TAD contends the Tax Code should control over the TRWD authorization statutes and applies only when public property is used exclusively for the use and benefit of the public. TRWD asserts its creation is dictated by the Texas Constitution and it serves a public purpose as a matter of law. Interestingly, the court, after going through a detailed analysis of the Texas Constitution, statutory construction principles, and the Tax Code, held the Tax Code controls, but the property is exempt as a matter of law.

The court ends up holding unconstitutional, as a local law, a portion of the uncodified statute authorizing TRWD's creation and authority. The result being the Tax Code controls for purposes of determining the exemption. Under Section 11.11(a) of the Texas Tax Code, a property is exempt from taxation if it is used for a public purpose. The court declined to adopt TAD's interpretation that it must be used "exclusively" for public purposes with no simultaneous use benefiting an individual private business. The court compared other statutes and constitutional provisions where the legislature expressly inserted "exclusive-use" language. TAD's argument "has no basis in the text" of either the Tax Code or its constitutional counterpart for exclusivity. Whether property is used for public purposes is a highly fact-specific question that must be answered on a case-by-case basis. The court held "[c]ontrary to TAD's overly-narrow characterization, the Property is not some run-of-the-mill strip mall that TRWD developed merely for retail purposes. River Shack no doubt operates a business for profit, but that is only one facet of a larger project that, at its core, unquestionably has a public purpose." TRWD entered into the lease with River Shack "to encourage development of river-facing businesses on TRWD's property and adjoining properties." The property "was intended and designed as a trail amenity to provide the public with recreational enhancements ancillary to the public's use of the Trinity Trails system." Thus, the evidence conclusively demonstrates, TRWD leased the property to River Shack in connection with its optimistic plan to develop it for economic and recreational purposes. With its pavilion, common areas, and location adjacent to the Trinity Trails, and developed and leased for economic and recreational purposes, the property is used for public purposes as a matter of law.*****

Administrative Procedure Act: *Fisher v. Public Util. Comm'n*, No. 03-16-00540-CV, 2018 WL 454730 *(*Tex. App.—Austin Jan. 11, 2018). In November 2013, the City of Georgetown and the Chisholm Trail Special Utility District (Chisholm) submitted an application with the Public Utilities Commission (PUC) to transfer Chisholm's certificated water-service area to the City of Georgetown. The State Office of Administrative Hearings (SOAH) held a contested-case hearing on the matter. The administrative law judge provided a proposal for decision to the PUC, which was considered at an open meeting held in December 2015. The appellants presented oral argument at the meeting, but ultimately the PUC issued a final order approving the transfer application. The appellants received notice of the PUC's order on January 15, 2016, and filed a motion for rehearing on February 5, 2016. After the PUC took no action on the motion for rehearing, the appellants brought suit for judicial review. The PUC responded with a plea to the jurisdiction, asserting that appellants' failure to timely file a motion for rehearing with the PUC deprived the trial court of jurisdiction over the matter. The trial court agreed and granted the plea, dismissing appellants' suit.

Appellants challenged the trial court's judgment over two specific issues: (1) their motion for rehearing was timely because the Texas Legislature's 2015 amendments to the Administrative Procedure Act (APA) extended the deadline to file a motion for rehearing from 20 to 25 days; and (2) they were not required to file a motion for rehearing because the PUC lacked jurisdiction over the transfer application.

The court looked at the 2015 amendments to the APA and found that, in the amendments, the legislature specified that the changes to the deadline apply only to an administrative hearing that is set on or after September 1, 2015. The SOAH judge set the underlying administrative hearing

for July 20, 2015. The court concluded that because the administrative hearing was set before September 1, 2015, the APA's 20-day deadline for motions for rehearing applied, not the newly enacted 25-day deadline.
Appellants also argued that the phrase "administrative hearing" did not just apply to the SOAH hearing. Instead, the phrase included all matters up to and including the agency final order or decision. The court noted that the phrase "administrative hearing" is not defined by the APA. The court cited a number of cases and SOAH's enabling legislation in concluding that "administrative hearing" means the evidentiary hearing held before a SOAH administrative law judge. Thus, the court overruled appellants' first issue.

The court quickly disposed of appellants' second argument stating that the court had already reviewed and rejected the argument in *Chisholm Trail SUD Stakeholders Group v. Chisholm Trail Special Utility District*, in which appellants were intervenors. The court affirmed the trial court's judgment.

Performance Bond: *City of Wolfe City v. American Safety Cas. Ins. Co.*, No. 06-17-00075-CV, 2018 WL 792108 (Tex. App.—Texarkana Feb. 9, 2018). In December 2011, the City of Wolfe City entered into a contract with Mckinney and McMillen, LLC (M&M) to enhance its water distribution and treatment system. American Safety Casualty Insurance Company (American Safety) issued a performance bond in favor of the city for the total value of the contract with M&M. In March 2013, the city engineer signed a certificate of substantial completion. Attached to the certificate was a pre-final inspection punch list of items that needed to be corrected or completed within 30 days. Shortly after the certificate was issued, the city began experiencing significant problems with the installed system. The city worked with M&M in an attempt to resolve the ongoing problems but was unsuccessful. On November 4, 2013, the city contacted American Safety to trigger its performance bond requirements. The city then filed suit in March 2014. American Safety filed both traditional and no-evidence motions for summary judgment. The trial court granted both motions, and the city appealed.

The Texarkana Court of Appeals noted that under the terms of its bond, American Safety bound itself to perform M&M's contract with the city if M&M failed to do so. The bond specifically incorporated the terms of the contract, and American Safety is liable to the city if M&M breached the contract. The court looked at the specific terms of the contract in question and determined that M&M was obligated to repair or replace any defects in the work discovered within one year after substantial completion of the project. When viewed in the light most favorable to the city, as required, the court concluded that the summary judgment evidence produced by the city was more than a scintilla of probative evidence. Thus, the trial court erred in granting American Safety's no-evidence motion for summary judgment.

The court next looked at American Safety's traditional motion for summary judgment. American Safety argued that it was entitled to rely on the certificate of substantial completion. Specifically, the issuance of the certificate discharged American Safety's duty under the performance bond. The court states that "Texas courts have long held that a surety's liability under a performance bond issued to secure performance of a construction contract is determined by examining the underlying contract." The court cites a number of cases and points out that none of the cases held that the issuance of a certificate of substantial completion would discharge the surety of liability

on a performance bond. The court concluded that the contract required a fully functioning system, and a certificate of substantial completion did not release M&M from that duty. Thus, American Safety would still be liable under the performance bond, which incorporated the contract provisions. The court reversed the judgment of the trial court and remanded the case back to the trial court.

Whistleblower: *City of Hereford v. Frausto*, No. 07-17-00400-CV, 2018 WL 445657 (Tex. App.—Amarillo Jan. 16, 2018) (mem. op.). This is a case where the Amarillo Court of Appeals affirms the trial court's order denying the city's plea to the jurisdiction.

Frausto was employed with the City of Hereford. Following an initial investigation by local police, he was tasked with investigating a dog complaint. Frausto ultimately forwarded the matter to the municipal court judge who set the matter for hearing to determine whether the dog was a "dangerous dog" under state law. The city attorney became aware of the hearing, reviewed the reports, and decided to cancel the hearing. Frausto believed this to be illegal and reported it to the local police chief. Several weeks later, Frausto was terminated. He sued the city arguing a violation of the Texas Whistleblower Act (Act). The city filed a plea to the jurisdiction which was denied. The city appealed.

The Act, at Section 554.002 of the Government Code, provides that a local government may not suspend or terminate an employee "who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." The city argues that Frausto didn't satisfy the good faith component of the Act. Reading the allegations in the live pleading in a light most favorable to Frausto, the court concludes that a question of fact exists regarding whether Frausto's belief about the city attorney violating the law was held in good faith. The trial court's order is affirmed.

Governmental Immunity: *Davis v. City of Lubbock*, No. 07-16-00080-CV, 2018 WL 736344 (Tex. App.—Amarillo Feb. 6, 2018) (mem. op.). This is an immunity case where the Amarillo Court of Appeals affirms the trial court's order sustaining the city's plea to the jurisdiction and dismissing the case.

The City of Lubbock holds a permit from the Texas Commission on Environmental Quality (TCEQ) to pump effluent from its wastewater system to a site used for crop irrigation. By the terms of the TCEQ permit, the city must conduct grazing and harvesting activities on the irrigated land according to an approved crop management plan. One crop grown and harvested by the city on the site is Tricticale, harvested by bailing into hay. Though not required by the TCEQ permit, the city sells some of the hay to the public. Davis purchased some of the hay and fed it to her horses. Two of her horses subsequently died and a third was disabled.

Davis sued the city arguing the employees had baled the hay in a way that led to the presence of bacteria and failed to exercise ordinary care in harvesting the hay. She also alleged the employees negligently failed to test the hay for bacteria before selling it and that the harvesting was performed by use of motor-driven equipment. The city filed a plea to the jurisdiction, asserting the activity was a governmental function for which its immunity from suit was not waived. The trial court sustained the city's plea to the jurisdiction and Davis appealed.

The Amarillo Court of Appeals concludes that the sale of the baled hay is sufficiently related to the performance of the city's TCEQ-permitted activities as to come within the governmental functions authorized by the permit and the city is immune from suit. The court also finds that the facts do not show Davis sustained any damage arising from the city's use of a vehicle or motor-driven equipment. Thus, the court overrules her second issue regarding whether the city's immunity was waived under the Tort Claims Act. The trial court's order is affirmed.

Open Meetings: *State v. Doyal*, No. 09-17-00123-CR, 2018 WL 761011 (Tex. App.—Beaumont Feb. 7, 2018). In this case, the state appeals the trial court's dismissal of an indictment alleging Doyal, as a member of the Montgomery County Commissioner's Court, violated Section 551.143 of the Texas Open Meetings Act (TOMA) by knowingly conspiring to circumvent the TOMA by meeting in a number less than a quorum. Doyal filed a motion to dismiss asserting that Section 551.143 is facially unconstitutional because it violates the First Amendment, and is overbroad, vague, and confusing. The trial court dismissed the indictment and the state appeals.

The state argues the trial court erred by dismissing the indictment on the ground that: (1) the statute is facially unconstitutionally vague and ambiguous; and (2) the statute facially violates the First Amendment and is overbroad.

The Beaumont Court of Appeals concludes that Section 551.143 is directed at conduct, not speech, and thus, rejects that strict scrutiny must be applied in reviewing the section. That means the court presumes the statute is valid and that the legislature did not act arbitrarily or unreasonably in enacting it. The Beaumont Court of Appeals applies the plain meaning to the terms "conspire," "circumvent," and "secret." The court then finds that the attorney's general's reasoning that use of the term "deliberation" in Section 551.143 is not vague but consistent with the definition of the term in Section 551.001 "because meeting in numbers less than a quorum describes a method of forming a quorum, and a quorum formed this way may hold deliberations like any other quorum."

In sum, the court concludes that Section 551.143 describes the criminal offense with sufficient specificity that ordinary people can understand the prohibited conduct, that the statute provides reasonable notice of the prohibited conduct, and that the statute is reasonably related to the state's legitimate interest in assuring transparency in public proceedings. Doyal does not meet his burden to prove the statute is unconstitutionally vague and overbroad. The Beaumont Court of Appeals reverses the trial court order and remands the cause back to the trial court for further proceedings.

For the reasons set out above, the Beaumont Court of Appeals also reverses the orders dismissing the indictments against two related defendants. See *State v. Riley*, No. 09-17-00124-CR, 2018 WL 757037 (Tex. App.—Beaumont Feb. 7, 2018); *State v. Davenport*, No. 09-17-00125-CR, 2018 WL 753357 (Tex. App.—Beaumont Feb. 7, 2018).

Tort Claims: *Delameter v. Beaumont Indep. Sch. Dist.*, No. 09–17–00045–CV, 2018 WL 651268 (Tex. App.—Beaumont Feb. 1, 2018) (mem. op.). This is a wrongful death/Texas Tort

Claims Act case where the Beaumont Court of Appeals affirmed the granting of the school district's plea to the jurisdiction.

A disabled/wheelchair bound child was receiving therapy while attending school in the Beaumont Independent School District (BISD). The bus BISD used to pick up the child had both a driver and an attendant. After his chair was placed on the bus, it was locked in place. The duties of the District's employees required them to lift the chair onto the bus, to lock the chair in place, and to monitor the child's condition on the way to school. During transport the child became unresponsive. The driver and attendant stopped the bus and called BISD headquarters. They did not drive the bus to any emergency room, but awaited the arrival of an ambulance consistent with District policies. Unfortunately, the child died. The family brought suit against BISD asserting the bus was driven in a negligent manner causing the child to become nonresponsive. The District filed a plea to the jurisdiction, which was granted. The family appealed.

According to the Delameters, the bus's movement eventually caused the restraints to tighten around the child causing him to lose consciousness. The Delameters also argued that stopping the school bus and waiting for an ambulance when the driver could have made it to a nearby hospital involved the use or the operation of the bus. However, after analyzing the evidence submitted, the court held nothing indicated the driver drove the bus at an unsafe speed or that he engaged in any unsafe maneuvers. Even though the Plaintiff's evidence suggests that the child's harness may have required adjustment, this statement amounts to no evidence to show that the harness injured or caused his death. Further, the failure to drive the bus to the hospital is a non-use of property, which does not waive immunity. As a result, the plea was property granted.*

Governmental Immunity: *City of Hidalgo v. Hodge*, No. 13-16-00695-CV, 2018 WL 460808 (Tex. App.—Corpus Christi Jan. 18, 2018) (mem. op.). Mary Hodge was injured at a concert event after stepping into a hole. She sued the City of Hidalgo under a premises liability theory. The city filed a plea to the jurisdiction claiming immunity, which was denied by the trial court.

On appeal, the city argued that it did not have the duty to treat Hodge as an invitee for purposes of the provision of Texas Tort Claims Act waiving city immunity because Hodge could not show that the city had possession or control of the premises, because she did not pay the city to enter the premises, and because the hole was not a special defect. With regard to the city controlling the premises, the city contended that it leased the premises to the Borderfest Association and therefore did not control the premises when Hodge fell. However, the court concluded that not only did no written agreement exist leasing the premises to Borderfest, but Hodge introduced evidence demonstrating the city's involvement in the actual operation of the event. The court concluded that Hodge's evidence sufficiently established as a matter of law that the city had control of the premises at the time Hodge fell.

The city also contended that because Hodge paid an entrance fee to Borderfest, as opposed to the city, that she was not an invitee under Texas Civil Practice and Remedies Code Sec. 101.022(a) and instead was a licensee. The court held that no authority allows Hodge to be treated as a licensee just because Borderfest, and not the city, received the entry fee for use of the premises.

According to the court, the relevant question was whether Hodge paid for entry onto the premises and not whether the city received the payment.

On the question of whether the city had actual or constructive knowledge of the defect (using invitee status) the court found that adequate evidence was presented that city employees inspected the ground around the bleachers, that the hole was man-made, and that the city was solely responsible for setting up the bleachers and maintaining the grounds. The court overruled the city's issues on appeal and affirmed the trial court's judgment.

January 2018

Note: Included cases are from December 11, 2017 through January 10, 2018.

SORRO: *City of Krum v. Rice*, No. 17-0081, 2017 WL 6390973 (Tex. Dec. 15, 2017). In 2014, Rice pled guilty to sexual assault of a fourteen-year-old. Rice agreed to deferred adjudication, the terms of which barred him from going "within 1,000 feet of a premise where children commonly gather, including a . . . playground" until 2024.
Rice also had to register as a sex offender. At the time, the City of Krum had in place a sex offender residency restriction ordinance (SORRO) prohibiting registered sex offenders who had committed violations involving minors under the age of sixteen from residing "within 2,000 feet of any premises where children commonly gather."

Rice challenged the city's ordinance, alleging that general law cities had no statutory authority to enact a SORRO. The city filed a plea to the jurisdiction, arguing that Rice lacked standing to sue. The trial court denied the city's plea, and the city filed an interlocutory appeal.

At the Second Court of Appeals, the city continued to argue Rice's lack of standing, stating that his claimed injury was not traceable to the city or the SORRO because the terms of his community supervision already prevented him from living at his parents' house. The city also argued the trial court lacked jurisdiction to hear Rice's civil challenge to the SORRO, which the city contended was a penal ordinance. The divided court of appeals affirmed the trial court's order denying the city's plea to the jurisdiction and held that Rice had standing because the restriction in the SORRO was broader than that of Rice's community supervision. Also, the court of appeals, concluded that Rice's alleged general desire to live somewhere in the city that violated the SORRO was enough to establish an injury, and the SORRO is interpreted as a civil or regulatory ordinance in its intent and effect, despite its penal language.

The city filed a petition for review in the Texas Supreme Court reiterating its jurisdictional arguments. However, while the lawsuit was pending, the Texas Legislature passed House Bill 1111 (codified at Local Government Code § 341.906), which expressly authorizes general-law cities to prohibit registered sex offenders from going near "child safety zones"; caps the distance of any SORRO at 1,000 feet; and requires an exemption for persons who established residence within a restricted zone before the effective date of the relevant ordinance. The bill's effective date was September 1, 2017. After the bill's effective date, the city passed an amended SORRO.

The amended ordinance prohibits registered sex offenders from living within 1,000 feet of a "child safety zone."

The Texas Supreme Court held that Rice's challenge to the SORRO is moot in light of H.B. 1111 because the bill clearly empowers general law cities to enact ordinances that limit the movements of sex offenders, like the city's amended SORRO. Also, the court stated the alleged basis for Rice's interest no longer existed and is moot since any ruling by the court about the SORRO's validity would have no effect on Rice's right because the community-supervision restriction would still be in place. The court granted the city's petition for review, vacated the judgments of the court of appeals and the trial court, and dismissed the case for lack of jurisdiction.

Workers' Compensation: *State Office of Risk Mgmt. v. Martinez*, No. 16-0337, 2017 WL 6391426 (Tex. Dec. 15, 2017). In 2001, Martinez, a caseworker for Texas Department of Family and Protective Services (DFPS), was working from home on a Saturday at her kitchen table in preparation for the next week's hearings when she got up, slipped in her kitchen and fell. She broke her shoulder and hit her head in the fall. Martinez filed for workers' compensation with the State Office of Risk Management (SORM). SORM denied her claim on the grounds that she was not injured in the course and scope of her employment, was not engaged in the furtherance of her employer's business at the time of the injury, and did not establish a causal connection between her injuries and her employment.

Martinez requested a benefit review conference to dispute the coverage denial. The Texas Workers' Compensation Commission (TWCC) conducted the conference. SORM argued that Martinez's injuries were not compensable because she did not obtain permission to work at home, which is a violation DFPS overtime policy. The benefit review officer's report listed two "disputed issue[s]" that remained unresolved when the conference concluded: "Did [Martinez] sustain a compensable injury on June 9, 2001?" and "Did [Martinez] sustain disability as the result of the June 9, 2001, claimed injury, and if so, for what period(s)?" The case proceeded to a contested case hearing. SORM reasserted it original argument, but the hearing officer was not persuaded and ruled Martinez was "furthering the business and affairs" of DFPS when she fell, but concluded that her injury "did not arise out of nor [occur] in the course and scope of her employment" and she did not sustain a compensable injury. Martinez appealed to the TWCC's Appeals Panel which reversed the hearing officer's decision and rendered a decision that Martinez did sustain a compensable injury and supported the finding of the hearing officer that she had authority to work from home in spite of DFPS's overtime policy.

SORM appealed to district court arguing the appeal panel's decision was "contrary to the law and facts." Both parties filed for summary judgment. SORM did not argue the grounds it did in the administrative phases (violations of DFPS overtime policy). Instead, SORM argued that Martinez violated a statute by working from home. The trial court denied Martinez's motions for summary judgment and granted SORM's motion. Also, Martinez appealed the trial court's ruling that she did not suffer a compensable injury to the court of appeals. However, the court of appeals held that the Labor Code barred the trial court from exercising jurisdiction over SORM's motion because the Labor Code limited the trial court's review of the appeal panel's decision to

"issues decided by the appeals panel and on which the judicial review is sought" which did not include SORM's violation of statute argument.

Martinez also appealed the trial court's denial of her summary judgment motion stating the SORM waived judicial review of the compensability of her injuries by failing to bring before the appeals panel all of the factual findings that the hearing officer made during the contested case hearing. The court of appeals did not agree stating that using the hearing officer's finding to argue the hearing officer determined that Martinez sustained a compensable injury is contrary to the hearing officer's finding that her injury did not rise in course and scope of her employment and did not sustain a compensable injury. The court of appeals reversed the grant of SORM's summary judgment, affirmed the denial of Martinez's summary judgment, and remand to trial court. Both parties filed petitions for review with the Texas Supreme Court.

The Texas Supreme Court had to consider what the meaning of "issue" was in Title 5 of the Labor Code in order to review this case. The court did a review of the Labor Code by reviewing the different sections that used the word "issue" and those sections that did not use the word "issue," but where it could be implied. Specifically, the court reviewed Section 410.301(a) which does not use the word "issue" but discusses "a final decision of the appeals panel regarding compensability or eligibility for or the amount of income or death benefits." The court determined that since there is no explicit definition, it had to assume the legislature intended the phrase "a final decision of the appeals panel regarding compensability or eligibility" to "describe" the "issues" on which the trial court may render a judgment.

Going through the administrative process and discussing how the parties defined "issue," the court determined that the parties were disputing the same two issues throughout the administrative process: "Did [Martinez] sustain a compensable injury…?" and "Did [Martinez] sustain a disability…?". The different grounds that SORM argued were arguments, not issues, and SORM was free to raise them at any time. The court remanded the case back to the court of appeals for that court to consider the merits of Martinez's statutory argument and or further proceeding consistent with this opinion.

As for Martinez's cross-petition's first issue concerning the hearing officer's finding, the court agreed with the intermediate court of appeals that Martinez is not free to pick and choose among the hearing officer's finding of facts and have the court draw a conclusion contrary to the report's finding of facts. Then, the court looked at Martinez's cross-petition's second issue concerning SORM not challenging the hearing officer's finding that established compensability and, therefore, SORM cannot seek judicial review on that aspect. The court stated that the Labor Code makes it clear that a hearing officer's incorrect finding of facts are "errors," not issues and that a party does not need to appeal every finding related to an issue in order to preserve the issue for judicial review. Since the trial court does a de novo trial on the issues decided by the appeals panel, the trial court is not required to defer to the hearing officer's factual findings. Thus, a party's failure to challenge a factual finding does not preclude a trial court from reviewing the issue that the findings purportedly supported. In conclusion, the court affirmed the intermediate court of appeals' decision to uphold the trial court's denial of Martinez's motion for summary judgment.

Tort Claims Act: *University of Tex. Health Sci. Ctr. v. Rios*, No. 16-0836, 2017 WL 6396028 (Tex. Dec. 15, 2017). This is a Texas Tort Claims Act (TTCA) case involving Section 101.106(e) where the plaintiff sued both the entity and employees. The Texas Supreme Court held the employee's right to "immediate dismissal" is triggered upon the filing of the motion to dismiss, regardless of subsequent pleading amendments.

Dr. Rios was a first-year resident whose relationship with the faculty physicians became strained. Rios sued the university along with faculty physicians Drs. Fuentes, Patel, Smalling, and four others (the "doctors"). The attorney general answered for the defendants and moved to dismiss the doctors under Section 101.106(e). Before the court ruled, Rios amended his petition and dropped his tort claims against the university, leaving only the doctors. He kept his claims against the university for breach of contract. The trial court dismissed the contract claims but denied the motion as to the doctors. The university (since it filed the motion) appealed on behalf of the doctors. The court of appeals affirmed and the university sought a petition with the Texas Supreme Court.

The Texas Supreme Court first held an entity's immunity is not waived for the acts of an independent contractor under the TTCA. Rios alleged as fact that the university acted "through" the doctors in tortuously interfering with his employment relationships. To establish a waiver, such actions must be done by an "employee" else there is no waiver. Assuming Rios intended to plead a viable claim, his allegation was a judicial admission. Further, the factual allegations in the pleadings are those of employees, not contractors. The subjective intent of the individual acting is not relevant to the determination of whether they are employees; the connection between their job duties and allegedly tortious conduct is what controls and it is an objective analysis. As a result, Rios sued the doctors as "employees" of the university, so Section 101.106(e) is applicable. Section 101.106 requires a plaintiff to decide on a theory of tort liability before suit is even filed. A plaintiff must decide at the outset who to sue. The decision is "an irrevocable election at the time suit is filed." The court recognized that under Texas Civil Rule of Procedure 65, an "amended" pleading replaces the original as if it did not exist. However, it is the filing of the motion to dismiss, not its specific content, which triggers the right to dismissal and Rule 65 does not nullify that. Additionally, when a rule of procedure (i.e. Rule 65) conflicts with a statute (Section 101.106), the statute controls. As a result, the doctors were entitled to be dismissed at the moment the university filed its motion.*

Condemnation: *Pizza Hut of Am., L.L.C. v. Houston Cmty. Coll. Sys.*, No. 01-17-00101-CV, 2017 WL 6459550 (Tex. App.—Houston [1st Dist.] Dec. 19, 2017) (mem. op.). This is a condemnation suit where the central issue is a tenant's standing in a condemnation suit and claim for a pro rata share of the award. The First Court of Appeals held the tenant had no standing.

Pizza Hut was a tenant of the Woodridge Plaza Shopping Center when the Houston Community College System (HCCS) condemned the property. As part of the condemnation proceedings, a condemnation award of $427,100 was designated to be paid to all of Woodridge Plaza's tenants, and Pizza Hut sought $7,100 as its pro rata share. The trial court concluded, based on language in Pizza Hut's lease, it had no standing and was not entitled to any of the award. Pizza Hut appealed.

The Pizza Hut lease with the prior owners had a condemnation clause noting "[t]he Condemnation Award shall belong to the Landlord, however, Tenant shall be entitled to the Unamortized Cost of Tenant Improvements, plus Tenant's relocation expenses as determined by the condemning entity or court of law." After condemnation, Pizza Hut continued operating its business at the Woodridge Plaza location—using its established equipment and improvements—at a profit and without interruption of physical impairment by the condemnation. In April 2016, while the condemnation proceedings were still pending, Pizza Hut sold all ninety of its Houston locations, including the Woodridge Plaza location. The sale price included improvements to the Woodridge Plaza location but not the leasehold interest. A lessee generally has standing in condemnation proceedings and is entitled to share in a condemnation award when part of its leasehold interest is lost by condemnation. However, a tenant may waive this right in the lease or elsewhere. By the definition in the lease, Pizza Hutt suffered no impairment. The court rejected Pizza Hutt's argument that the uncertainty created by the condemnation constituted an impairment. It operated with no change in profit and did not establish the "uncertainty" had any impact on its operation. As a result, it lacked standing to sustain a claim against HCCS.*****

Tort Claims Act: *The City of The Colony v. Rygh*, No. 02-17-00080-CV, 2017 WL 6377435 (Tex. App.—Fort Worth Dec. 14, 2017) (mem. op.). This is a Texas Tort Claims Act (TTCA), negligent operation of motor-driven equipment case where the Fort Worth Court of Appeals reversed the denial of the city's plea to the jurisdiction and dismissed the plaintiff's claims.

The Rygh's home was flooded when raw sewage backed up into their home. Prior that morning, Rygh's neighbor, Harper, advised the city a pipe outside his home was expelling sewage into this yard. City repair crews arrived and determined a blockage was causing the backup witnessed by Harper. The city used a "vac" truck to clear the line. The truck is powered by the engine of the truck and uses a nozzle to break the blockage. The truck uses pressurized water which is propelled downstream out of the back of the nozzle[,] which propels [the nozzle] upstream toward the blockage. When used, the nozzle broke the blockage causing the sewage to immediately begin flowing downstream away from the residences. The Ryghs later sued the city, alleging that its employees' negligent use of the truck to break through the blockage in the sewer main had caused the sewage to back up into their residence. The trial court denied the city's plea to the jurisdiction and the city appealed.

The Texas Supreme Court has repeatedly clarified that the phrase "arises from" requires a nexus between the operation or use of the motor-driven vehicle and the plaintiff's personal injuries and property damage. As the uncontroverted evidence established, no water was sent upstream toward the residences. Employees were monitoring the sewage levels upstream and noted no sewage reversed course when the nozzle was deployed. Only a physical object was thrust upward into the line 20 or so feet to break the blockage. The nexus requires more than mere involvement of property; the vehicle's operation or use must have actually caused the injury. Further, the timing in the different affidavits does not conflict as the Ryghs' affidavit asserted their home flooded at approximately 7:45 a.m. and the city's crew did not arrive at the location until after 8:00 a.m. The jurisdictional evidence conclusively establishes that the property damage sustained by the Ryghs did not arise from the city's use of the truck. Finally, no waiver of immunity exists for the claims the city failed to notify the Ryghs of work on the sewer line. The plea should have been granted.*****

Tort Claims Act: *Clegg v. City of Fort Worth*, No. 02-17-00040-CV, 2017 WL 6377433 (Tex. App.—Fort Worth Dec. 14, 2017) (mem. op.). This is a Texas Tort Claims Act (TTCA) vehicle accident case where the Fort Worth Court of Appeals affirmed the granting of the city's plea to the jurisdiction.

Madrigal's car collided with Howell's car when Madrigal ran a red light. Clegg was a passenger in Madrigal's car who suffered injuries. Fort Worth Police Officer Olimpo Hernandez witnessed the accident. He wrote a crash report stating he observed multiple containers of beer inside Madrigal's car, Madrigal smelled of alcohol, had a blood-alcohol level of .10, and was arrested. Clegg filed suit against the city and Hernandez asserting they failed to regulate traffic through the use of his patrol vehicle. In a separate suit, Clegg sued Madrigal. Hernandez was dismissed pursuant to Section 101.106(e). The city then filed a plea to the jurisdiction asserting the police department was not a jural entity and Clegg's injuries were not caused by the operation of Hernandez' vehicle. The trial court granted the city's plea and issued findings of fact and conclusions of law. Clegg appealed.

Characterizing Clegg's briefing as a "garbled morass," the court held it was not required to guess at what causes of action he was trying to advance but would attempt to decipher them based on the pleadings. However, under Section 101.055, the TTCA unequivocally does not apply to a claim arising "from the failure to provide or the method of providing police or fire protection." Such is the heart of what Clegg is alleging. Further, no negligent act of Hernandez caused the accident. "[T]he (vehicle)'s use must have actually caused the injury." That is not the case here. Therefore, no waiver of immunity exists. Moreover, the Texas Supreme Court "has never held that non-use of property can support a claim under the [TTCA]." The plea was properly granted.*****

Governmental Immunity/Declaratory Judgment: *Luttrell v. El Paso Cty*., No. 08-16-00090-CV, 2017 WL 6506402 (Tex. App.—El Paso Dec. 20, 2017). There is no way to categorize this case in a single sentence. In the thirty-nine page opinion, the El Paso Court of Appeals addressed a challenge to El Paso County's use of a special assignment judge who would issue and handle all contempt proceedings when a juror would fail to appear for duty. Long opinion means long summary—sorry. The court held the county retained immunity based on the pleadings but the plaintiff should be afforded the opportunity to amend. The case was remanded. For government attorneys or those suing governments, this opinion provides a good basis and starting point for various immunity issues and Uniform Declaratory Judgment Act (UDJA) claims.

Appellants filed a lawsuit on behalf of themselves and others, naming Judge Woodard and El Paso County, requesting a declaration that their contempt judgments were void for lack of jurisdiction and that Judge Woodard imposed court costs and fees in an "illegal" manner. Apparently, when a juror failed to respond to a jury summons in a particular court in El Paso County, that court would either "refer" or "transfer" the matter to Judge Woodard for the purpose of allowing him to conduct contempt proceedings against the recalcitrant juror. The collective jurors sought to have their court costs and fees removed and the process stopped. The case has many implications and court performed various analyses of statutes discussing the power of the courts and the counties. By the time the case hit the court of appeals, Judge Woodard had been

dismissed under judicial immunity and the only issue was the immunity of the county. The county filed a plea to the jurisdiction, which the trial court granted. The collective jurors appealed.

The court began with a history of governmental immunity and transitioned into immunity in declaratory judgment proceedings. The court cited various cases, noting the UDJA only waives immunity if the validity of a statute (or ordinance) is in play. The appellants failed to identify a statute being challenged. Their pleadings "reveal that the true nature of their claims center on their belief that the actions of Judge Woodard and/or the County violated existing law, i.e., that they were held in contempt in violation of their due process rights, and that they were accessed illegal court costs and fees…." Such claims cannot be brought under the UDJA. Additionally, the UDJA may not typically be used to collaterally attack, modify, or interpret a prior court judgment. The contempt proceedings were declared to be criminal in nature, not civil. Civil courts may only exercise "equity jurisdiction" in cases involving criminal proceedings in a "narrow" set of circumstances, which are not present here. The UDJA is the wrong vehicle for making a challenge to the validity of a criminal contempt judgment. There is a line of cases stating the UDJA can be used to collaterally attack void judgments. The proper method to collaterally attack a criminal contempt judgment as being void is through either a petition for a writ of habeas corpus when the contemnor has been subjected to jail time, or a petition for a writ of mandamus when, as here, the contemnor is subjected only to a fine. Such are exclusive mechanisms.

Appellants also sought the recovery of the fines, fees, and costs, which they believe Judge Woodard wrongfully imposed. However, appellants' request for a "refund" cannot be brought in a UDJA proceeding in the absence of legislative permission. When fees are paid in the context of a judicial proceeding, the aggrieved party may challenge the imposition of those fees (illegal or otherwise) in the context of those proceedings, thus satisfying the requirements of due process. When a party pays an illegal tax or fee "under duress" in an administrative matter they may challenge it, but these were judicial proceedings. In a judicial proceeding, once a defendant pays the fee, it is voluntarily given. To avoid paying the fee, the defendant must challenge it in the proceedings or utilize another system established for the challenge. Appellants had other means of challenging the validity of the costs and fees imposed on them. They could have challenged it in the proceedings, filed a mandamus, or brought claims under article 103.008 of the Texas Code of Criminal Procedure, which provides a separate statutory remedy to correct erroneous or unsupportable court costs. They failed to do so. As to appellants attempted ultra vires claim, they only named the county. Such claims must be brought against an official. Additionally, claims of judicial court action versus county administrative action, falls outside the scope of any takings claims under the Texas Constitution. As to the appellants Section 1983 claims, a judge has judicial immunity from a lawsuit brought under Section 1983 and, therefore, cannot be named as the "person" who violated the plaintiff's constitutional rights, when the lawsuit is based on the judge's judicial actions. A county may only be held liable in a Section 1983 case if the plaintiffs are able to demonstrate that the county had an "official policy or custom" that caused them to be subjected to a denial of a constitutional right. Appellants have not alleged in their current pleadings that the county had any policy or custom that deprived them of their federal constitutional rights and only allege Judge Woodard acted without authority. There is nothing in the pleadings or the record to suggest that Judge Woodard was executing any county

policies and, to the contrary, everything points to him acting in his judicial capacity (for which he is immune from suit). Finally, the court noted that while the panel "expresses no opinion" as to whether the appellants can successfully amend, they recognized they should be given the opportunity. The court ends by stating "[w]e do caution Appellants, however, that any amendment to their pleadings must focus on the liability of the County as the only remaining party in the proceeding, with the recognition that Judge Woodard is no longer a party to the proceedings, and expressly explain what actions the County took that would render them liable to Appellants." The case was then remanded.*****

Governmental Immunity: *City of Beaumont v. Interflow Factors Corp.*, No. 09-17-00284-CV, 2017 WL 6521345 (Tex. App.—Beaumont Dec. 21, 2017) (mem. op.). This is an interlocutory appeal from the denial of a plea to the jurisdiction in a contract dispute claim. The Beaumont Court of Appeals affirmed the denial.

Interflow Factors Corporation (Interflow) sued the city and a contractor named Barnett alleging the city waived immunity by contracting with Barnett to perform landscaping services. Barnett hired Interflow to deal with her invoices and assigned the right to the collected payments on the present and future accounts. The city was provided notice of the assignment. The city allegedly began submitting payments to Interflow for the work performed by Barnett. However, Interflow alleged that, at Barnett's request, the city directly paid Barnett for four invoices that totaled $11,847.00. According to Interflow, because the city had received notice of the assignment, the city's payments to Barnett did not discharge the city's liability to Interflow pursuant to the invoices. The city filed a plea to the jurisdiction, which the trial court denied. The city appealed.

The first issue addressed by the court was that the city did not have a contract with Interflow, only Barnett. Therefore, the waiver of immunity under Texas Local Government Code Section 271.152 came into question as it relates to assignments. The court performed a mild analysis of the language, and citing to *First-Citizens Bank & Trust Co*., 318 S.W.3d 560 (Tex. App.—Austin 2010, no pet.), held the statute does not limit who can collect under the contract. An assignee steps into the shoes of the assignor. Therefore, as long as the contractor would have a right to seek payment, so does the assignee. The court held immunity was therefore waived. [Comment: the court analyzed the issue of Barnett no longer having the right to seek payment since she was already paid, as that was, apparently, considered a merits-based argument which was not necessary to analyze for jurisdictional purposes.]*****

Criminal Trespass: *Hudson v. State*, No. 09-17-00092-CR, 2017 WL 6559183 (Tex. App.—Beaumont Dec. 20, 2017) (mem. op.) (not designated for publication). This is a case where the Beaumont Court of Appeals affirms the trial court's conviction of criminal trespass.

On September 7, 2016, after consulting with and receiving permission from the city manager, the city librarian requested a trespass warning against Hudson for making a disturbance at the library. Hudson was issued a verbal trespass warning by Detective Steele. On September 13, 2016, the librarian reported that Hudson had returned to the library in violation of the trespass warning. Officer Medina arrested Hudson for criminal trespass.

Hudson complains that: (1) he was deprived of due process because the city library's trespass policy was unconstitutionally vague and violates due process; (2) the criminal trespass statute is unconstitutional on its face and as applied because it violated his First and Fourteenth Amendment rights; and (3) the evidence is insufficient to sustain his conviction.

In regard to the due process claim, Hudson had the burden to establish that there was no procedure in place to challenge the decision to ban him from the library. In the absence of any evidence regarding the city's process to challenge a decision by the city manager, issue one is overruled. As to his second issue, the court determines the forum analysis applicable to the library, concluding that it is "public property which is not by tradition or designation a forum for public communication." In addition to time, place and manner regulations, the state may reserve the forum for its intended purposes so long as the regulation on speech is reasonable and not an effort to suppress expression merely because of the speaker's views. In reaching its conclusion about the forum analysis applicable to the library, the court notes that just because Hudson used the internet in the library this did not create a designated public forum. Hudson concedes that he wasn't visiting the library for expressive purposes, but argues his First Amendments rights were violated because he was banned. The jury heard testimony that Hudson was banned because he created a disturbance not because of his speech. The court overrules the second issue, stating that the constitution does not forbid a state to control the use of its property for its own lawful nondiscriminatory purpose. Moreover, one element of criminal trespass is proving that the entity in possession of the property warned the defendant that he could not return to the property so the defendant doesn't have to speculate about what aspect of his conduct the statute proscribes. The record does not support the argument that the criminal trespass statute is unconstitutional as applied. As to the third issue, the court concludes that, based on the evidence presented, a rational juror could have found the essential elements of the offense of criminal trespass beyond a reasonable doubt.

Disannexation: *Hall v. City of Bryan*, No. 10-16-00044-CV, 2018 WL 327142 (Tex. App.—Waco Jan. 3, 2018) (mem. op.). This is a disannexation lawsuit where the Waco Court of Appeals affirmed the trial court's summary judgment motion dismissing the plaintiff's claims for disannexation.

This is the third lawsuit (fourth appeal) brought by Hall in order to disannex property which was annexed by the city back in 1999. The procedural history entails various trips to the Waco Court of Appeals. In 1999, the city annexed a strip of land leading up to the city's airport, one section belonging to Hall. Hall initially sued for disannexation in 2004 asserting the city failed to follow the annexation service plan. That suit was unsuccessful. She sued again in 2010 and was unsuccessful. She sued again in 2012. Each time Hall attempted different grounds and claims seeking disannexation. In the present case (Hall III), the city filed a plea to the jurisdiction which the trial court granted and Hall appealed. The Waco Court of Appeals affirmed in part and reversed in part, holding that the court had jurisdiction to hear the claims that the city failed to provide proper police patrols under the annexation plan created in 1999. All other claims were dismissed. The case was remanded for the police patrol claim and Hall amended her petition again trying to reinject the dismissed claims. The city filed a motion for summary judgment as to all claims, which the trial court granted. Hall appealed.

The Waco Court of Appeals first examined whether Hall's amended petition after remand raised new claims or if they simply recast the claims already dismissed. The court determined she simply re-labeled claims that the city failed to provide sanitary sewers, fire suppression with hydrants, or a water line capable of supporting fire hydrants. Under the law of the case doctrine, the court would not revisit such claims and they remain dismissed. As to the police patrol claims, the city first asserted the claims were barred by res judicata since Hall raised or could have raised the same claims in Hall I. Hall's twist on the police patrol claim is that even if the city provided police patrols, it did not provide them "in good faith" under Chapter 43 of the Local Government Code. The court analyzed the evidence submitted in the city's summary judgment and noted Hall expressly agreed that in her 2004 petition, she was complaining that the city was not conducting routine and preventative police patrols. Further, she agreed that, in anticipation of supporting her petition for disannexation in 2004, she had recorded 130 hours of video purportedly showing no routine patrols on a street in the annexed area. This is some of the same video evidence she contends supports her claims in her 2014 petition. Regardless of whether the specific claim of no regular or routine preventative police patrols was actually pursued in the 2004 petition for disannexation, Hall knew the claim was present in 2004 and could have raised it. Under the principle of res judicata, such claims are precluded in the present case. The judgment of the trial court is affirmed.*

Street Abandonment: ***The Jesus Christ Open Altar Church, LLC v. City of Hawkins*****, No. 12-17-00090-CV, 2017 WL 6523088 (Tex. App.—Tyler Dec. 21, 2017) (mem. op.).** This is a property dispute case in which the Twelfth Court of Appeals affirmed the trial court's declaratory judgment regarding the city's control over it right-of-way.

The city filed a declaratory judgment action against the church regarding whether a plat recorded in 1909 dedicated fee simple ownership or any easements for roads to the city as well as whether the city had abandoned the roadway. Apparently, the city executed an "abandonment" deed in 1994 and questions arose regarding the scope of the abandonment. After a hearing, the trial court defined the scope of the property at issue. It further held the 1909 plat conveyed easements in and to the streets and alleys of the city, and the city holds an easement over the property at issue. Also, the court determined that the city has not conveyed or abandoned its easement. The church, which was claiming ownership of the property, appealed.

Once a road is dedicated to public use, that road remains subject to that use unless it is abandoned. The purpose of a public road, particularly one of local character, is to provide access to property abutting upon it, as well as a thoroughfare between distant points. To show common law abandonment, one must show intent to abandon and acts of relinquishment. The testimony showed that the named street (i.e. Ash Street) was not built on the land where the 1909 plat shows it to be. The city has not used its easement across the disputed tract of land and has no plans to use it. However, there is no evidence of an express intention to abandon the city's easement. There is no evidence that it would be impossible or highly improbable to build a street on the disputed property or that the object of the easement wholly fails. Although it was established more than 100 years ago and no street has been built, mere nonuse of the easement does not amount to abandonment. In early 1994, English Funeral Home, which at the time owned the church property at issue, petitioned the city to abandon certain unused streets and alleys, referencing the original 1909 plat. The city did expressly abandon certain streets under the

request and referenced them by block number. The record includes deeds showing the chain of title of the church property from 1993 until the church's 2015 purchase. Utilizing incorporation by reference, the court determined the church's assertion of the location of the easements and scope contradicts the deeds. The trial court's determination that the church property is south of the abandoned easement, and not included in it, is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Judgment was affirmed in favor of the city.*

Annexation: *In re City of Pearland,* No. 14-17-00921-CV, 2018 WL 344036 (Tex. App.—Houston [14th Dist.] Jan. 9, 2018) (supp. mem. op.). The Fourteenth Court of Appeals in Houston granted the city's petition for mandamus compelling a trial court to lift its temporary restraining order issued in an annexation lawsuit.

Senate Bill 6, which requires certain cities to obtain consent by a majority of the property owners in an area before it can annex, went into effect December 1, 2017. The City of Pearland attempted to annex an area prior to the bill's effective date. On November 20, plaintiffs filed their First Amended Petition, which alleged (among other things) that the city, in the annexation process, had failed to comply with certain provisions of the Texas Open Meetings Act. Plaintiffs requested a temporary restraining order restraining the city from considering the annexation ordinance, which the trial court granted and set an injunction hearing for December 4, 2017. Pressed for time, the city filed a mandamus and request for emergency relief in the court of appeals. The court issued an order for the trial court to remove the restraining order on November 27 but, filed this supplemental brief explaining its legal reasons.

Under Government Code Section 551.142(a), a property owner, whose property has been annexed, has standing to challenge the validity of and enjoin an annexation ordinance based on violations of the Open Meetings Act. Therefore, if the city did violate the Texas Open Meetings Act, the property owners have a legal remedy to challenge the annexation (after it occurs) for violations of the Act. The purpose of a TRO is to preserve the status quo. By restraining the city's actions and setting a hearing after the deadline, the district court essentially had made a final, non-appealable adjudication affecting the city. That is not maintaining the status quo but issuing a ruling on the merits.

December 2017

Note: Included cases are from November 11, 2017 through December 10, 2017.

Governmental Immunity: *City of San Antonio v. Torres,* No. 04-17-00309-CV, 2017 WL 5472537 (Tex. App.—San Antonio Nov. 15, 2017) (mem. op.). This case involves a collision between a City of San Antonio police vehicle and a truck containing passengers Patrick Torres and Johnnie Dears (collectively referred to as Torres).

Torres' truck was struck by a city police vehicle being operated without emergency lights or sirens activated. The police officer failed to heed the stop sign at an intersection, resulting in the collision. Torres sued the city for personal injury damages, alleging that the officer negligently caused the collision. The city filed a plea to the jurisdiction asserting its governmental immunity.

The city argued that the officer was responding to an emergency situation, his actions were in compliance with the applicable statute and ordinances, and he did not act with conscious indifference or reckless disregard for the safety of others. The trial court denied the city's plea to the jurisdiction, and the city filed this interlocutory appeal.

In its appeal, the city argues: (1) Torres failed to plead facts demonstrating jurisdiction exists; (2) the city presented sufficient evidence to support its plea that the officer was in compliance with the applicable statute and ordinances and did not act with conscious indifference or reckless disregard for the safety of others; and (3) Torres failed to present evidence raising a fact issue regarding the jurisdictional facts.

The court of appeals analyzed the city's three arguments, concluding that Torres did state a claim against the city arising from the employee's driving with reckless disregard for the safety of others. The court pointed out that the Third Amended Petition alleged that the officer "drove inattentively, failed to keep a proper lookout, failed to control his speed, failed to heed a stop sign, and failed to operate his vehicle with appropriate regard for the safety of others." Because the court must liberally construe the pleadings, the court concluded that Torres did state a claim.

The city provided an affidavit from the officer on the evidence, along with a deposition and the incident crash information. The court pointed out that the city did not present evidence that the officer "looked for oncoming traffic at the intersection or that he took any other action to determine whether slowing down was necessary to protect the safety of others." Without this evidence, the court concluded that the city's evidence was insufficient to establish that the officer complied with the law and ordinances applicable to an emergency situation. The court also concluded that the evidence presented contained no facts demonstrating the officer identified or considered any possible risks to the safety of others. Taken together, the city's evidence failed to establish the applicability of the emergency exception to waiver of immunity in Section 101.055(2) of the Texas Tort Claims Act.

The court held that when viewing the evidence presented in the light most favorable to Torres, there is a material fact question as to whether the officer acted recklessly or with conscious disregard for the safety of others. Thus, the court affirmed the trial court's order denying the city's plea to the jurisdiction.

Takings: *Rodriguez v. City of Fort Worth*, No. 07-16-00037-CV (Tex. App.—Amarillo Dec. 8, 2017) (mem. op.).This is a takings/condemnation and Texas Tort Claims Act (TTCA) case where the Fort Worth Court of Appeals affirmed the granting of the city's plea to the jurisdiction.

Prior to Rodriguez's ownership of a residential structure, the City of Fort Worth's Building Standards Commission found it to be substandard and hazardous to public health. A copy of the order was mailed to the then owner and filed in the deed records of Tarrant County on October 19, 2012. Rodriguez purchased the property on December 12, 2012, without personal knowledge of the commission's order but, the court found Rodriguez possessed constructive knowledge due to the filing in the deed records. The property was demolished on June 28, 2013, by a contractor hired by the city. Rodriguez brought suit, alleging the city intentionally destroyed the building (a

takings) or negligently destroyed it under the TTCA. The city filed a plea to the jurisdiction which the trial court granted. Rodriguez appealed.

As to Rodriguez' TTCA claim, nothing in the record shows city employees were involved with the demolition by "operating" or "using" motor-driven vehicles or equipment or by exercising any control over the independent contractor or its employees. No city-owned motor-driven vehicles or equipment were used in the demolition. As a result, the city has not waived its immunity under the TTCA.

As to Rodriguez' takings claim, Rodriguez did not allege any facts demonstrating that demolition of his property was for public use. The improvements on the property were found to be substandard and hazardous to public health; however, the owner was given the opportunity to bring those improvements up to code in order to prevent their demolition. When the owner failed to comply, the city removed the public health hazard. As such, Rodriguez' claims do not allege a constitutional takings.

Rodriguez also asserted he requested leave to amend his pleadings and was denied. However, Rodriguez was given and took advantage of two prior amendments to address the city's plea and supplemental plea. Because Rodriguez had a reasonable opportunity to amend he cannot now complain about being deprived of an opportunity to amend. Furthermore, even if Rodriguez were afforded an opportunity to amend, his live pleading indicates incurable defects – specifically, the use of an independent contractor of the tort claims and lack of a public purpose for takings. As a result, the plea was properly granted.*****

November 2018

Note: Included cases are from October 11, 2017 through November 10, 2017.

Interlocutory Jurisdiction: *City of Magnolia 4A Econ. Dev. Corp. v. Smedley*, No. 16-0718, 2017 WL 4848580 (Tex. Oct. 27, 2017). This is a flooding case, however, the issue for the Supreme Court is a litigation procedure issue. The court of appeals held that it did not have interlocutory jurisdiction over claims which were re-raised in a subsequent motion. However, the Texas Supreme Court held the intermediary courts have interlocutory jurisdiction separately for each motion filed.

The underlying claims involved Smedley suing the city, the city's 4A and 4B economic development corporations (EDCs), and contracted entities alleging that the defendants caused Smedley's property to flood and retain standing water, causing damages after they facilitated a Chicken Express going onto the lot next to his. The city was dismissed based on its plea to the jurisdiction. However, the EDCs filed their own pleas/Rule 91a motions which were partially denied. The EDCs later filed summary judgment motions, which were likewise denied. When the EDCs attempted to take an interlocutory appeal of the denial of the motion for summary judgment (MSJ), the court of appeals stated the grounds were identical to those raised in the pleas. Therefore, the court lacked interlocutory appeal jurisdiction under Texas Civil Practice

and Remedies Code Section 51.014. The EDCs filed a petition for review which the Texas Supreme Court granted.

The crucial question is whether the twenty-day period to bring an interlocutory appeal ran from the trial court's denial of the plea/91a motion or the date of denial of the MSJ. *See* TEX. R. APP. P. 26.1(b) (providing that a timely interlocutory appeal must be filed within twenty days after the challenged order was signed). The court of appeals held the proper trigger date was the denial of the plea. The Texas Supreme Court, citing its own prior precedence, noted that if an amended plea was merely a motion to reconsider, then the twenty-day clock did not reset. *City of Houston v. Estate of Jones*, 388 S.W.3d 663 (Tex. 2012). The court noted it was compelling that the original plea was a pleadings challenge only and the later motion was an evidence-based motion. The EDCs asserted that, in light of the discovered evidence, there was no evidence as to the claims under the Water Code or Takings Clause, and that there was affirmative evidence the EDCs did not own or control the lot, preventing them from being able to provide injunctive relief. The court cautioned that the procedural mechanism, alone, is not dispositive and a court must analyze the substance of the motions. However, after doing so, the court held the EDCs' MSJ cannot be considered a mere motion for reconsideration of the initial plea. As the MSJ was a distinct motion from the plea, the court of appeals had interlocutory jurisdiction to hear the appeal. It remanded the case back to the court of appeals for analysis.*****

Condemnation: *State v. Speedway Grapevine I, LLC*, No. 02-16-00144-CV, 2017 WL 4683831 (Tex. App.—Fort Worth Oct. 19, 2017). This is a condemnation case where the Fort Worth Court of Appeals affirmed the jury verdict condemnation award, including the admission of valuation evidence by the owner's representative.

Speedway owned real property which included a car wash and an Express Lube on a specific lot. In connection with a road-widening improvement project, the State of Texas condemned a portion of the frontage. Speedway asserted the condemnation affected the ability to operate the two businesses. The state appealed the commissioner's award, but the jury awarded more than the commissioner's award. The state's expert opined Speedway's remainder property had sustained damages in the amount of $0, excluding a total cost to cure of $105,826.00. Adding the value of the part condemned ($159,789.00), it opined Speedway was entitled to total compensation in the amount of $265,615.00. Speedway's experts opined the remainder property suffered a total damage of $2,609,420.00. Adding the value of the part condemned to that figure, Speedway asserted it was entitled to compensation in the total amount of $2,748,822.00. After a jury trial, the jury found the part condemned had a market value of $92,190.00 and that Speedway's remainder property was damaged in the amount of $4,401,028.00. The state appealed.

The state first objected to Speedway's appraisal expert, McRoberts, arguing he speculated on post-condemnation nonconforming treatment; that Texas law did not recognize his income approach; and that he had improperly relied upon noncompensable impairment of access. The trial court excluded McRoberts' income approach, but not his cost approach. It also permitted him to testify regarding internal traffic circulation difficulties, unsafe access, and nonconformance with zoning regulations. Mr. High, Speedway's representative as the owner, testified about his experience in the car wash industry; the reasons why Speedway located the car

wash where it did; the market value of the whole property; problems with a cure plan devised for the state; and the viability of the car wash after the condemnation. The state acknowledges that a property owner may testify to the value of his property, as High did here, but it argued the owner's valuation testimony must still meet the same requirements as any other opinion evidence. The court rejected this argument in part. The Property Owner Rule "is an exception to the requirement that a witness must otherwise establish his qualifications to express an opinion on land values." Based on the presumptions that an owner is familiar with his property and will know its value, the rule accepts that a property owner is qualified to testify. However, qualification is not the same as the basis of the opinion. The property owner "must [still] provide the factual basis on which his opinion rests." But, the burden is not difficult or complex. "Evidence of price paid, nearby sales, tax valuations, appraisals, online resources, and any other relevant factors may be offered to support the claim." High's testimony covered a range of topics that, taken together, provided some probative evidence to factually support his valuation opinion. Such included his great level of experience in, and knowledge about, the car wash industry and the effects of such property reductions. The testimony was properly admitted. McRoberts testified that the condemnation had affected the property's functionality so greatly that the property had experienced a change in its highest and best use to something like a small veterinary clinic or an office. McRoberts did not base his opinions on only his word, or on mere conjecture; he based it on the issues that began affecting Speedway's property only after the condemnation—unsafe access, internal circulation, and zoning nonconformities. McRoberts thus provided a reasoned basis to support his damage opinions, reinforced by well-established case law, logic, and mathematics. The court held "[b]oiled down, the State's argument is nothing more than an evidentiary sufficiency challenge improperly masquerading as an expert opinion admissibility issue. When the highest and best use of property is disputed, the jury is responsible for deciding which use is appropriate when it determines market value." Sufficient evidence exists in the record to support the jury's verdict. As a result, the verdict is affirmed.*****

Torts Claim Act: *City of Bedford v. Smith*, No. 02-16-00436-CV, 2017 WL 4542858 (Tex. App.—Fort Worth Oct. 12, 2017) (mem. op.). This is a Texas Tort Claims Act (TTCA) case involving a pedestrian falling into a manhole where the Fort Worth Court of Appeals affirmed in part and reversed in part the denial of the city's plea to the jurisdiction.

Smith alleges she was walking across the grass to reach her apartment when she stepped onto a manhole lid which flipped open. Smith fell into the manhole and was injured. Smith sued the city. The city filed a plea to the jurisdiction. The trial court denied the plea and Smith appealed.

Even though the trial court denied the plea, its order specifically held the manhole was not a special defect. The court performed a cursory analysis citing its own recent precedent and agreed it was not a special defect as it was not excavation-like in nature. Additionally, since Smith did not challenge that finding in the appeal, the plea should have been granted as to the special defect claims. As to the premise defect claims, the court simply stated the pleadings do not support a claim for premise defect. Smith also alleged a general negligence claim. However, Smith did not plead sufficient facts to establish a negligence claim for the negligent condition or use of tangible personal property. But, the trial court was within its discretion to provide Smith an opportunity to amend her pleadings since the city's evidence and the pleadings did not affirmatively negate an incurable jurisdictional defect. The trial court also has discretion to postpone its consideration of

a jurisdictional plea so that the plaintiff has sufficient opportunity to produce evidence that might raise a fact issue. The city filed its plea and held a hearing two weeks after filing an answer, so no time for discovery had elapsed. And while the court cautioned that a trial court is to make a finding on jurisdiction as soon as practical, it could not say, with the record before it, that the trial court abused its discretion in this case. As a result, the plea was properly denied without prejudice to allow Smith an opportunity to replead and produce evidence.*

Water Utilities: ***Mountain Peak Special Util. Dist. v. Public Util. Comm'n of Texas*****, No. 03-16-00796-CV, 2017 WL 5078034 (Tex. App.—Austin Nov. 2, 2017) (mem. op.)**. The Public Utility Commission of Texas (PUC) granted the City of Midlothian's petition for expedited release of a portion of property it owned from the certificated service area of Mountain Peak Special Utility District (Mountain Peak). In Mountain Peak's suit for judicial review of the release, Mountain Peak contended that the PUC erred in granting the city's petition for decertification because the statutory requirements of Texas Water Code Section 13.254(a-5) were not met. Specifically, Mountain Peak argued that the property the city sought to have decertified was receiving water service from Mountain Peak and, thus, was not eligible for expedited release under Chapter 13 of the Water Code. In addition, Mountain Peak asserted that the PUC's approval should be set aside because federal law 7 U.S.C. § 1926(b) preempted the decertification. After a hearing, the district court affirmed the PUC's order granting the city's petition for decertification. Mountain Peak appealed.

The court recognized that the determination of whether a tract of land is receiving water service is a fact-based inquiry requiring the PUC to consider whether the utility has facilities committed to providing water to the particular tract in furtherance of its obligation to provide water to the tract pursuant to its certificate of convenience and necessity (CCN). The court of appeals found the city's affidavits regarding water service compelling and concluded that the evidence provided a reasonable basis for the PUC's finding. The mere existence of water lines on or near property was not enough to mean that the property was "receiving water service."

The Austin Court of Appeals relied on its decision in *Creedmoor-Maha Water Supply Corp. v. Texas Comm'n on Envtl. Quality,* 307 S.W.3d 505 (Tex. App.—Austin 2010, no pet.). In that case, the court determined that in the context of a plea to the jurisdiction, uncontroverted record evidence that the utility "lacked both the infrastructure and water to serve" the development negated any allegations in the water supply corporation's petition that it had provided or made service available. *Creedmoor-Maha*, 307 S.W.3d at 523. In this case, the court recognized that there was disputed evidence on that issue. Because the court must presume that the trial court resolved any disputed facts in favor of its judgment, the court affirmed the trial court's conclusion that 7 U.S.C. § 1926(b) did not preempt the PUC's order. Thus, the court affirmed the district court's judgment affirming the PUC's order.

Zoning: ***Risoli v. Board of Adjustment of the City of Wimberley*****, No. 03-17-00385-CV, 2017 WL 4766724 (Tex. App.—Austin Oct. 20, 2017) (mem. op.)**. This is a board of adjustment appeal in which the Austin Court of Appeals remanded the property owner's claims back to the trial court.

Risoli sued the Board of Adjustment of the City of Wimberley (BOA or city) alleging it had improperly revoked the "grandfathered use status" of Risoli's property, barring her from using it as a short-term rental facility. The city filed a plea to the jurisdiction, which included an argument that she missed the filing deadline. The trial court granted the plea, and Risoli appealed.

A person aggrieved by a board of adjustment's decision may seek judicial review by presenting a petition "within 10 days after the date the decision is filed in the board's office." TEX. LOC. GOV'T CODE § 211.011(b). The filing date is jurisdictional. The controlling question is whether the city administrator's letter was the BOA's "decision" that was "filed in [its] office" and triggered the deadline.

The BOA held a meeting on September 6, 2016, regarding Risoli's appeal of the city administrator's decision to revoke her property's grandfathered use. On September 14, the city administrator wrote a letter to Risoli stating the BOA unanimously voted to uphold the determination and that she must immediately cease all such activities. The letter was emailed to Risoli on September 16, and then again on October 18. Risoli filed her petition November 17 but argued the BOA's minutes had not yet been approved and, therefore, no decision was "filed in the board's office." The city argued the letter was filed at city hall, which is the office where the BOA's records are kept and maintained. However, the BOA did not submit any evidence to the court to back-up or establish these facts. The BOA did not define what constituted its "decision" and had not adopted protocols defining where its office is located or what it means for a decision to be filed. Given the absence of evidence, mere argument in pleadings is insufficient to factually support the motion. The order dismissing Risoli's claims was reversed and the case was remanded back to the trial court.*

Appellate Procedure: *EMF Swiss Avenue, LLC v. Peak's Addition Home Owner's Assoc.*, No. 05-17-01112-CV, 2017 WL 5150954 (Tex. App.—Dallas Nov. 7, 2017) (mem. op.). This case involves the underlying proceeding in which Peak's Addition Homeowner's Association (HOA) appealed the City of Dallas Board of Adjustment's (BOA) determination that a building permit was properly issued for construction on property owned by EMF. The judgment in the underlying proceeding was declaratory in nature. Specifically, the judgment grants summary judgment for the HOA and reverses the BOA's decision upholding the building official's decision to issue a building permit. The issue in this particular case was whether that judgment constitutes a judgment for something other than money or an interest in real property such that the trial court was required to set security pursuant to Rule 24.2(a)(3) of the Texas Rules of Appellate Procedure.

The court relied on the determination in *Haedge v. Central Texas Cattleman's Association* that a "judgment that affirmed a private association's decision stripping certain shareholders of their shared and accompanying right to graze heads of cattle on certain land could be superseded and the amount of security was to be determined under rule 24.2(a)(3)." No. 07-15-00368-CV, 2016 WL 836084, at *1 (Tex. App.—Amarillo 2016) (per curiam). The Dallas Court of Appeals concluded that the judgment at issue in this case was analogous to the judgment in *Haedge*, because the judgment was entered for something other than money or an interest in real property. Both judgments adversely affected the property rights of appellants. Thus, they should be

permitted to be superseded under Rule 24.2(a)(3). The court grants EMF's motion, vacates the trial court's order denying EMF's motion, and remands the case to the trial court to set supersedeas security.

Derivative Immunity: *Brown v. Waco Transit Sys.*, No. 07-16-00258-CV, 2017 WL 4872801 (Tex. App.—Amarillo Oct. 27, 2017) (mem. op.). The Amarillo Court of Appeals reversed an order granting a plea to the jurisdiction by the Waco Transit System, Inc. (WTSI).

Brown alleges he suffered personal injuries while riding a bus operated by WTSI. Specifically, during Brown's ride the door fell open, striking him on the head and causing injury. Brown sued WTSI, but his petition was contradictory alleging in some portions that WTSI is a non-profit doing business with Texas, but in other portions alleging it is a governmental entity. WTSI filed a plea to the jurisdiction alleging it is immune from suit under governmental immunity because it is the "agent" of the City of Waco. WTSI alleged it contracted with the City of Waco to perform governmental functions, entitling it to derivative immunity. The trial court granted the plea and Brown appealed.

A private entity generally is not entitled to claim governmental immunity unless "'its actions were actions of the government, 'executed subject to the control of' the governmental entity." Specifically, "[i]f the contractor or agent lacked discretion, its actions were the actions of the governmental unit; if it had discretion, then it may be sued like any other private actor…. " The contract shows merely that the city and WTSI agreed to the appointment of WTSI as the city's agent for the limited purpose of operating the city's bus system. Under the contract, while the city agreed to "provide" the buses, WTSI is the employer of the transit system employees, including the drivers and mechanics. The parties' agreement thus does not give the city control over the details of the operation or use of the buses, and the record contains no evidence that the work was performed in a manner giving the city such control. WTSI's ability to assert the city's governmental immunity depends on proof its actions were those of the city, and that it exercised no discretion in its activities. Factual evidence may later prove differently, but for plea purposes, WTSI did not show it is entitled to share the city's governmental immunity. The order granting the plea was reversed.*****

Constitutionality of Ordinance: *Noble v. State*, No. 07-16-00105-CR, 2017 WL 4785327 (Tex. App.—Amarillo Oct. 18, 2017) (mem. op.). In this case, the Amarillo Court of Appeals affirms Noble's criminal conviction.

The City of Amarillo has an ordinance that prohibits "sudden vehicle speed or acceleration" which produces noise, smoking tires, or causes one or more tires to lose contact with the surface of the street. Noble was stopped for violating the ordinance. The stop resulted in a search of the vehicle leading to the discovery of methamphetamine. Noble was arrested without a warrant.

On appeal, Noble argued, among other things, that the city ordinance was unconstitutionally vague because it: (1) failed to provide sufficient notice to give a person of ordinary intelligence notice that his conduct was prohibited; and (2) failed to provide sufficient notice to law enforcement personnel to prevent arbitrary and erratic enforcement. Noble relied on *Meisner v. State*, 907 S.W.2d 664 (Tex. App.—Waco 1995, no pet.) to attack the noise element of the

ordinance. The court distinguished this case from *Meisner*, concluding that it is not the noise that is prohibited by the city ordinance (as was the case in *Meisner*) but the *conduct* of sudden acceleration that produces noise. The police officer testified that Noble was stopped because the officer observed the car accelerate with a "sudden burst of speed" that caused the tires to burn and spin and the end of the vehicle to slide. Noble was not arbitrarily stopped because his vehicle made noise. The court concluded the ordinance is not unconstitutionally vague; both issues are overruled.

Constitutionality of Ordinance: *Spaeth v. State*, No. 07-15-00395-CR, 2017 WL 4785326 (Tex. App.—Amarillo Oct. 18, 2017) (mem. op.). The Amarillo Court of Appeals affirms Spaeth's criminal conviction.

The City of Amarillo has adopted ordinances that prohibit U-turns in certain areas of the city. Spaeth was stopped for making a U-turn in a "business district." The stop resulted in a search of the vehicle leading to the discovery of marihuana. Spaeth was arrested.

Spaeth argues the term "business district" in the city ordinances is unconstitutionally vague because it could mean two different things. First, he argues the term is synonymous with "central business district". Second, he argues the term could refer to various undefined areas of the city. Applying the rule of statutory construction that a court does not interpret a statue to render any part meaningless or superfluous, the court concluded that the term business district and central business district are not synonymous. The court then noted that an undefined term does not make a statute vague but requires use of the term's plain and ordinary meaning. The intersection where Spaeth made the U-turn fits within the plain and ordinary meaning of the term "business district" (the intersection is zoned "light commercial" and has businesses on two of the four corners and the other two corners are commercial lots). Spaeth was lawfully stopped and his issue is overruled.

Expungement: *Burke v. State*, No. 09-16-00091-CV, 2017 WL 5179499 (Tex. App.—Beaumont Nov. 9, 2017) (mem. op.). The Beaumont Court of Appeals affirms the trial court's decision that a former peace officer waived his right to file a petition seeking to expunge his records.

In July 2009, Burke (a peace officer at the time) was indicted for official oppression. In 2014, Burke reached an agreement with the state enjoining him from working as a peace officer in the State of Texas until December 2024 in exchange for a dismissal of the case. The Agreed Order provides that Burke "waives all rights to file any motion to modify or dissolve this injunction." In a separate order dismissing the case, the state alleged that it no longer wished to prosecute because of the permanent injunction. About six months after agreeing to the permanent injunction, Burke filed a petition seeking to expunge any and all records arising out of the charges. The City of Beaumont and Jefferson County opposed Burke's request. The city argued Burke had waived his right to expunge because he agreed that he would not seek to modify or dissolve the injunction. The trial court denied Burke's petition for expunction. Burke appealed, arguing that he qualified to have the records expunged and that the Agreed Order was legally unenforceable.

As to his first argument, the Beaumont Court of Appeals holds that the Agreed Order functions like a pre-trial diversion agreement or a negotiated plea agreement, which are similar to contracts. Because Burke's petition to expunge would necessarily result in the destruction of the Agreed Order, the court concludes that the trial court was authorized to deny the petition.

The Beaumont Court of Appeals then concludes Burke's arguments that the Agreed Order are unenforceable are without merit. Even if the Agreed Order couldn't function as a final judgment (an issue the appellate court does not decide), the agreement Burke made with the state is enforceable through a new suit alleging Burke was in violation of the agreement with the state. The trial court's order is affirmed, it did not abuse its discretion in concluding that Burke waived his right to file a petition seeking to expunge the records.

Employment: *In re City of Beaumont*, No. 09-17-00304-CV, 2017 WL 5179785 (Tex. App.—Beaumont Nov. 9, 2017) (mem. op.). In this case, the Beaumont Court of Appeals conditionally grants the city's mandamus petition as to the trial court's role in reviewing the decision made by an independent hearing examiner in an employment dispute between the City of Beaumont and one of its firefighters.

James Matthews was a firefighter for the City of Beaumont until 2008 when he was indefinitely suspended. He had the right to either appeal the decision to the city's civil service commission or to an independent third-party hearing examiner. TEX. LOC. GOV'T CODE §§ 143.053, 143.057. In 2011, the Beaumont Court of Appeals overturned the first hearing examiner's decision. In August 2012, a second hearing examiner dismissed Matthews' challenge. Thereafter, Matthews sued the city in district court, challenging the validity of that decision. In July 2017, nearly five years after Matthews appealed the second hearing examiner's decision to the district court, Matthews asked the trial court to allow him to litigate the matter before the civil service commission instead of a hearing examiner. Relying heavily on *City of DeSoto v. White*, 288 S.W.3d 389 (Tex. 2009), Matthews argues the city's 2008 notice to him about his right to appeal was deficient. The trial court entered an order allowing Matthews to re-litigate the dispute before the city's civil service commission. The city brings this mandamus proceeding arguing that: (1) the trial court abused its discretion by incorrectly applying the law; and (2) a regular appeal following a final decision before the civil service commission would be insufficient to remedy the trial court's alleged error.

The Beaumont Court of Appeals concludes that there is evidence that Matthews knew his rights under the law in 2008 and certainly by 2011. Thus, this case is distinguishable from *White* and Matthews waived any claim to seek a change in forums. In addition, the court notes that: (1) the Local Government Code does not provide a remedy if a city issues a notice that does not contain the information required in Local Government Code Section 143.057(a); and (2) the law presumes individuals are fully aware of their statutory rights. The trial court abused its discretion by misapplying the law in this case.

The Beaumont Court also concludes that the benefits of issuing the writ outweigh any detriment. The city lacks an adequate remedy by appeal. The city's mandamus petition is conditionally granted and the trial court is directed to vacate its order.

Red Light Cameras: *Hunt v. City of Diboll*, No. 12-17-00001-CV, 2017 WL 5167554 (Tex. App.—Tyler Nov. 8, 2017). Paul Hunt and ADE-WIFCO Steel Products, Inc. (collectively, appellants) both received notices of infractions for red light violations captured by red light cameras in 2015. Appellants sued the City of Diboll pursuant to the Uniform Declaratory Judgment Act challenging the validity of two city ordinances dealing with red light cameras that, at that point, had not been published in the city newspaper. Appellants also sought a declaratory judgment that three city officials acted ultra vires by installing red light camera systems and collecting red light camera penalties. The trial court granted the city's pleas to the jurisdiction and dismissed all claims against the city and city officials.

On appeal, the court first addresses appellants' claim that the city's initial red light camera ordinance is unconstitutional because it deprives them of their presumption of innocence and other constitutional protections. The city argues that appellants were not charged with any criminal offense, only a civil penalty, and must challenge the constitutionality of the ordinance in criminal court. The Tyler Court of Appeals agreed with the city on this point. The alleged harm flowed directly from the city's enforcement of its ordinance, making appellant's claim an impermissible attempt to obtain a naked declaration of the ordinance's unconstitutionality. In other words, appellants made no showing that enforcement of the ordinance caused irreparable injury to personal or property rights.

Next, the court addresses whether appellants failed to exhaust their administrative remedies. While Chapter 707 of the Transportation Code creates a pervasive regulatory scheme to handle claims arising out of the use of red light camera systems, because the city did not publish its red light camera ordinance as required by city charter, the court held that appellants were not obligated to exhaust their administrative remedies. The court analyzed the language in the city's charter and concluded that the city did not publish the ordinance in accordance with its charter. The ordinance was not effective at the time appellants were assessed the red light penalties, so appellants were not required to exhaust their administrative remedies. The city also argued that its later publication of the ordinance in 2016 rendered appellants' claims moot. The court disagreed because the penalties were assessed prior to the city's publication of the ordinance.

On the issue of the ultra vires claims against the city officials, the court stated that the only available remedy in an ultra vires suit is prospective, as measured from the date of an injunction. In this case, the pleadings seek reimbursement of penalties paid in the past, a remedy that would not be available in an ultra vires suit. Therefore, the court held that the trial court did not err in granting the city's plea to the jurisdiction on appellants' ultra vires claims for relief.

Open Meetings Act: *City of Donna v. Ramirez*, No. 13-16-00619-CV, 2017 WL 5184533 (Tex. App.—Corpus Christi Nov. 9, 2017). Oscar Ramirez, a former city manager in the City of Donna, brought causes of action against the City of Donna under the Texas Open Meetings Act and the Texas Whistleblower Act after being terminated. He alleged he was terminated after he reported to the police chief and a municipal judge that city officials ordered him to waive or discount certain city fees or charges for city services. He also alleged the city's agenda giving notice of Ramirez's termination violated the Texas Open Meetings Act's notice provision because the word "cancelled" was written on the agenda notice posted near the front door at city

hall, and the city conducted the meeting anyway. The trial court denied the city's plea to the jurisdiction and the city appealed.

On appeal, the city argued that Ramirez failed to identify a violation of any provision of the Texas Open Meetings Act, and that Ramirez did not have standing to complain of a violation under the Act because he was present at the meeting and therefore didn't suffer any injury. On the standing issue, the court held that because the Act allows an "interested person" to bring an action to correct a violation of the Act, a plaintiff need to only show that he shares the general public's interest in ensuring that the protections of the Act are enforced.

The substantive issue regarding the Texas Open Meetings Act before the court was whether the presence of the word "cancelled" prominently displayed on the agenda demonstrates a violation of the Act, even if other required notices did not indicate the meeting was cancelled, if the city council continued with the meeting. The court held that viewing the agenda notice in its entirety would lead a member of the general public to conclude that the city council would not be holding a meeting at the time indicated to discuss any matter. The meeting notice did the opposite of informing the general public that a meeting would be held. As a result, the court concluded that Ramirez has presented facts supporting a violation of the Act, specifically Section 551.041's requirement that a governmental body "give written notice of the date, hour, place, and subject of each meeting held by the governmental body."

The city also argued on appeal that Ramirez failed to identify a violation of the Texas Whistleblower Act. The court disagreed, holding that Ramirez presented evidence in good faith that elected city officials had ordered him to waive or discount certain bills and charges for city services. Such actions, if true, could potentially violate Article III, Section 52 of the Texas Constitution and Section 39.02 of the Penal Code. The court affirmed the trial court's order denying the city's plea to the jurisdiction.

Tort Claims Act: *City of Edinburg v. Balli*, No. 13-17-00183, 2017 WL 5184495 (Tex. App.—Corpus Christi Nov. 9, 2017) (mem. op.). Melinda Balli sued the City of Edinburg after she was struck by a vehicle as she used a crosswalk near the Hidalgo County Courthouse. The pedestrian traffic light displayed a "walk" signal for pedestrians at the same time the vehicle traffic light at the intersection displayed a green left-turn arrow. According to her petition, the city was aware of the problem with the traffic signals due to a similar collision on January 17, 2012. She alleged that the city's negligent acts and omissions were a proximate cause of the collision and of her resulting injuries. The city filed a plea to the jurisdiction arguing that the traffic lights were not malfunctioning so as to cause a waiver of immunity under the Texas Tort Claims Act. The traffic signals were working exactly as intended by the Texas Department of Transportation, which designed the traffic lights to simultaneously display "walk" and left-turn signals. The trial court denied the city's plea to the jurisdiction, and the city appealed.

On appeal, the city argued that it retained immunity because the traffic lights were functioning as intended and therefore didn't constitute a wrongful condition of real property and because Balli complains of a discretionary decision concerning design of the roadway. The city claimed that it assumed responsibility for the traffic lights in 2012 and had not changed the lights' programming since that time. As a result, the traffic lights did not qualify as a wrongful condition of real

property for which immunity would be waived. The city included with its plea its agreement with the Texas Department of Transportation regarding the lights as well as affidavits and deposition transcripts showing the city had not altered the lights' design and programming. Based on these transcripts, the city carried its initial burden by negating the "condition" component of Balli's proposed waiver of immunity. The burden therefore shifted to Balli to introduce evidence supporting the existence of a fact issue. Balli argues that there was a conflict between the "walk" signal and the protected left-turn signal. But according to the court, this evidence simply attacks the wisdom of the discretionary design choices of the city for which immunity is not waived. The court sustained the city's issue.

Texas Tort Claims Act: *City of Houston v. Gutkowski*, No.14-17-00234-CV, 2017 WL 4679287 (Tex. App.—Houston [14th Dist.] Oct. 17, 2017). This is an interlocutory appeal from the denial of a plea to the jurisdiction involving a Texas Tort Claims Act (TTCA) claim. The Fourteenth Court of Appeals reversed the denial and dismissed the plaintiff's claims.

Patricia Gutkowski fell out of bed and was unable to move. Her family called 9-1-1 which dispatched City of Houston firefighters to the scene. Upon arrival, the family of Patricia Gutkowski alleged firefighter personnel did not have a portable lifting device, lift board, or lift sling. As a result, they were unable to place Gutkowski in a proper position for lifting resulting in an injury and laceration to her leg. The laceration caused significant blood loss which allegedly caused a heart attack later that day. The Gutkowski family sued the city, which filed a plea to the jurisdiction. The trial court denied the plea and the city appealed.

The court first analyzed the pleadings and evidence and determined the Gutkowski family's claim relating to property lacking an integral safety component was actually a claim for the non-use of personal property in disguise. While the Gutkowski family alleged the emergency service vehicle was tangible personal property lacking an integral safety component of a lifting device, they did not allege the vehicle was improperly used. They only alleged it did not have something firefighter personnel should have used in the bedroom. Further, the integral safety component doctrine is limited to and turns on the governmental entity negligently providing personal property missing an integral safety component, not the non-use of certain medical equipment over others. Further, the allegation that firefighter personnel negligently wrapped the laceration with tangible supplies is insufficient to trigger a waiver of immunity. It is not enough that some property is involved; the use of that property must have actually caused the injury. Here, that is not the case. As a result, the plea should have been granted.*****

October 2017

Note: Included cases are from September 11, 2017 through October 10, 2017.

Tort Claims Act: *City of San Antonio v. Mendoza*, No. 04-17-00168-CV, 2017 WL 4014617 (Tex. App.—San Antonio Sept. 13, 2017) (mem. op.). This is a Texas Tort Claims Act (TTCA) case involving the alleged negligent operation or use of a motor vehicle. The San Antonio Court of Appeals affirmed the trial court's denial of the city's plea to the jurisdiction.

Officer Gonzales, an on-duty San Antonio City Park Police Officer rear-ended a van driven by Carlos Mendoza. Gonzales's supervisor, Fidencio Herrera, arrived at the scene to investigate and spoke to Gonzales and Mendoza. Herrera prepared investigative reports concerning the accident. Over a year later, Mendoza sued under the TTCA and alleged the city was provided actual notice of its fault in the accident. The city filed a plea to the jurisdiction which was denied. The city appealed.

The sole issue on appeal was whether the city had actual notice that Mendoza was injured as a result of the accident. It was undisputed the reports satisfied all other requirements of the actual notice provisions. Mendoza did not request medical attention at the scene. To establish knowledge of an injury, it is not necessary that the governmental unit be absolutely certain of the nature and extent of the injury. At the scene, Gonzales asked Mendoza if he was "ok" and Mendoza responded, "I got a slight pain" and began rubbing his back and stretching down. Gonzales did not reference the comment in his reports. Neither did Herrera. The city argued either Gonzales did not hear Mendoza or interpreted them to mean he was not injured. However, the court held, under the standard of review, it must presume the facts which support the trial court order, which was a denial. The city next argued Mendoza's statements were "too vague and indefinite" to provide the city with actual notice of his alleged injuries. However, Mendoza did more than simply state he had a slight pain; he rubbed his back and stretched downward to stretch his back. As a result, there was evidence to support the trial court's implied finding that the city had knowledge of Mendoza's injury, requiring a denial of the plea.*****

Tort Claims Act: *City of Dallas v. Papierski,* No. 05-17-00157-CV, 2017 WL 4349174 (Tex. App.—Dallas Oct. 2, 2017) (mem. op.). This is a Texas Tort Claims Act (TTCA) case and interlocutory appeal from the denial of the city's plea to the jurisdiction. The Dallas Court of Appeals reversed and rendered in favor of the city.

The Dallas Convention Center hosted a cheerleading competition where Leslie Papierski attended with her daughter. While walking down a ramp in the arena, Papierski slipped and fell on a small puddle of water. At approximately the same time and location, another person slipped and fell while walking up the ramp. The incidents were reported to the convention center. The reports stated, "building was undergoing water penetration repairs; however, no penetration had ever occurred previously in this area before." A subsequent search of incident reports revealed no reports of past roof leaks or injuries in the area. Papierski sued under a premise defect theory and the city filed a plea to the jurisdiction. The trial court denied the plea and the city appealed.

The Fifth District Court of Appeals first held objections to hearsay, best evidence, self-serving statements, and unsubstantiated opinions are considered defects in form which require a formal ruling from the judge. Since the plaintiff did not obtain a ruling, those objections to the city's evidence are waived. Additionally, the affidavits challenged state the affiants are "personally acquainted" with the facts through convention center operations and procedures, which meets the personal knowledge requirement. Next, under invitee status which requires actual knowledge for liability, such knowledge on the part of a governmental entity requires knowledge that the dangerous condition existed at the time of the accident. Awareness of a potential problem is not actual knowledge. The city established it did an exhaustive search for records of prior incidents of leakage in that location and were unable to locate any. Simply because the facility was having

roof repairs due to leaks in other halls or areas does not mean the city had knowledge a leak created a dangerous condition at this specific location. No repair was occurring over the accident ramp. Additionally, even though some cases hold a condition which exists for a long enough period of time can attribute liability, no evidence exists in the record indicating how long the water was on the ramp. As a result, no fact question exists as to knowledge and the plea should have been granted.*****

Tort Claims Act: *City of Midland v. Bunch*, No. 11-16-00276-CV, 2017 WL 4440276 (Tex. App.—Eastland Sept. 29, 2017) (mem. op.). This is a Texas Tort Claims Act/Recreational Use case where the Eastland Court of Appeals reversed in part and affirmed in part a trial court order denying the city's plea to the jurisdiction.

Bunch alleges he paid for entry to the Washington Aquatic Center swimming pool run by the city. After he sat down on a bench, the bench broke causing him to fall backwards to the ground, sustaining injuries. Bunch sued and alleged the city knew the bench needed to be replaced and did not warn him it was rusted. He sued for premise defects and gross negligence asserting he was simply sitting on a bench to watch his son and was not engaged in recreation. The city filed a plea to the jurisdiction which the trial court denied. The city appealed.

Under the recreational use statute "if a person enters premises owned, operated, or maintained by a governmental unit and engages in recreation on those premises, the governmental unit does not owe to the person a greater degree of care than is owed to a trespasser on the premises." TEX. CIV. PRAC. & REM. CODE § 75.002(f). The court went through various dictionary definitions examining this subsection and determined Bunch entered the premises and was engaged in "recreation" at the time of his injury. He did not plead he was "spectating" nor did he plead he was parenting. So he did not plead a proper claim for ordinary negligence. However, he did amend his pleadings and properly allege gross negligence. He alleged that the city was "actually, subjectively aware of the risk involved" due to the rusted bench it knew needed to be replaced "but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others, which constitutes malice." As a result, the plea should have been granted to the ordinary negligence claims but was properly denied as to the gross negligence claims.

September 2017

Note: Included cases are from August 11, 2017 through September 10, 2017.

Interlocutory Appeal/Mootness: *City of Sealy v. Town Park Ctr.*, No. 01-17-00127-CV, 2017 WL 3634025 (Tex. App.—Houston [1st Dist.] Aug. 24, 2017) (mem. op.). This is an opinion where the court held the appeal is moot, but where the city asserted mootness was not applicable due to a refiling.

Town Park Center sued the City of Sealy in the first lawsuit, but such claims ultimately were dismissed, without prejudice. Town Park then filed a second lawsuit against the city and the city's mayor, manager, and engineer. While the claims are not in this opinion, the appellate record indicates the claims were for breach of contract, declaratory relief, and injunctive relief regarding an economic development agreement (the same agreement in the first lawsuit). The

city defendants filed a plea to the jurisdiction. The trial court granted the plea as to the city, but denied as to the officials. The mayor and city manager filed an interlocutory appeal staying all lower court proceedings, but Town Park requested it be lifted in order to non-suit. After a non-suit, without prejudice was filed, Town Park filed a third lawsuit against the city, mayor, city manager, and finance director regarding the same agreement. Town Park then filed a motion in this appeal to declare the appeal moot. The city defendants opposed the dismissal arguing the claims were not moot given the live controversy upon which Town Park filed its third suit.

The city asserted the order granting the plea as to the city in the second lawsuit, which Town Park did not appeal, precludes joining the city in the third lawsuit. However, Town Park was not required to appeal the interlocutory order dismissing the city in the second lawsuit (the current appeal) since it had the option to wait until a final judgment was entered. Utilizing this process does not extend the appellant court's jurisdiction to hear a moot claim. Plaintiffs have a general right to non-suit their claims even if interlocutory appeals are pending. As a result, the interlocutory appeal in the second lawsuit has become moot and is dismissed. [Comment: the court noted in footnote #2, that the final judgment for the second lawsuit may become final due to the non-suit and such is a dismissal with prejudice for claims dismissed prior to the non-suit. However, that argument was not before them and is properly raised in the third lawsuit as to the city.]*

Plea to the Jurisdiction/Negligence: *City of Houston v. Nicolai*, No. 01-16-00184-CV, 2017 WL 3634279 (Tex. App.—Houston [1st Dist.] Aug. 24, 2017). This is an interlocutory appeal where the First District Court of Appeals affirmed the denial of the City's plea to the jurisdiction in this wrongful death case.

City of Houston police officer R. Gonzales handcuffed Caroline Nicolai and placed her in the back seat of a patrol car. While transporting Nicolai, Gonzales' vehicle was struck by a vehicle driven by Moser (who was later determined to be intoxicated). The impact ejected Nicolai who ultimately died from her injuries. Apparently, Nicolai was not restrained by a seat belt. The Nicolai family sued the city, which filed a plea to the jurisdiction. The trial court denied the plea and the city appealed.

The city's plea did not challenge any jurisdictional facts and relied upon the pleadings taken as true. The city asserted the pleadings did not allege the negligent use of a motor vehicle but alleged the non-use of tangible personal property (i.e. seatbelt). For a vehicle "use" the employee must be actively using the vehicle at the time of the injury, and using the vehicle as a vehicle and not some unintended purpose. Both are present here. The "arising from" language requires a nexus which is something more than actual cause but less than proximate cause. Officer Gonzales was not simply failing to use the seatbelts; she was driving the car while failing to use the seatbelts. It was foreseeable to the court that if someone is not wearing a seatbelt while the car is being driven, an accident could cause the individual to be injured or killed. Since proximate cause is ultimately a fact question, the court held evidence exists to create the question for the jury, precluding the plea. The city argued, in the alternative, that Moser's conduct was intentional under the law and therefore the city is not liable for intentional torts. However, regardless of whether Moser's actions were intentional or not, the claims involve distinct and different negligence claims committed by Officer Gonzales. For the exception to apply, the

intentional tortfeasor must be the governmental employee whose conduct is the subject of the claim. There is no allegation in this case that Officer Gonzales acted intentionally in regard to failing to secure the decedent in a seat belt.

The city next argues waiver under the Texas Tort Claims Act does not apply for negligently providing police protection under Texas Civil Practice and Remedies Code Section 101.055(3). The purpose of the exception is to "avoid judicial review of the discretionary policy decisions that governments must make in deciding how much, if any," protection to provide. However, a negligent implementation of policy can subject the entity to liability. The city disciplined Gonzales for failing to follow policy and secure the detainee with a seatbelt. As a result, the plea was properly denied.*

Retaliation/Disparate-Treatment: *Metropolitan Transit Auth. v. Ridley*, No. 01-17-00081-CV, 2017 WL 3910160 (Tex. App.—Houston [1st Dist.] Sept. 7, 2017.). Zelma Ridley (Ridley), an African-American female, was an employee of Metropolitan Transit Authority of Harris County (Metro) from May 2008 until she retired in December 2014. During her employment, Ridley stated that she was continuously harassed because of her race. In April 2013, she was placed on a personal improvement plan (PIP) for "communication issues" which Ridley's immediate boss thought was because of Ridley's race and gender. Ridley filed a formal charge of discrimination with the Metro's EEO office in September of 2013 complaining of race, gender, and age discrimination which did not give her a satisfying result. In November 2013, Ridley filed a Charge of Discrimination with the Equal Employment Commission (EEOC), but did not receive a final decision. After some medical concerns and a recommendation from her doctor, Ridley retired in December 2014, but she asserted she was constructively discharged because "no reasonable person would have continued to work under the conditions being imposed by METRO."
Ridley sued Metro, alleging disparate-treatment, discrimination, and retaliatory conduct leading to constructive discharge. The trial court denied Metro's plea to the jurisdiction and Metro brought this interlocutory appeal stating the trial court lacked subject-matter jurisdiction since Ridley did not establish a prima facie case on any of her claims.

As to the issue of subject matter jurisdiction, the appellate court first reviewed Ridley's retaliation claims brought under the Texas Commission of Human Rights Act (TCHRA). Ridley contended that: (1) she was subjected to a hostile work environment because she complained about discrimination; and (2) the hostile work environment became so intolerable that a reasonable person would have felt compelled to resign which amounted to a constructive discharge. To establish retaliation, the employee must make a prima facie case of discrimination by showing: (1) she participated in a protected activity; (2) her employer took an adverse employment action against her; and (3) a causal connection existed between her protected activity and the adverse employment action. Metro claimed Ridley did not prove any of the elements of retaliation.

The court determined that Ridley did participate in a protected activity when she complained about the PIP in April 2013 and the other complaints that she made afterwards. However, the court did not find that Ridley proved there was a causal connection between the protected activity and alleged constructive discharge. The court concluded she did not show circumstantial

evidence sufficient to show the casual link. This evidence could be: (1) failure to follow the usual policy and procedure in carrying out the challenged employment; (2) discriminatory treatment in comparison to similarly situated employees; (3) knowledge of the discrimination charge or suit by those making the adverse employment decision; (4) evidence that the stated reason for the adverse employment decision was false; and (5) the temporal proximity between the employee's conduct and discharge. The court applied these factors to the evidence presented in Ridley's pleading and did not find the evidence to show a causal link. Some of the evidence involved incidents that happened before the protected activity and other evidence showed a continuation of actions taken before she complained. The incidents that Ridley asserts were worse after the protected activity coincided with a change in supervisors and not because she reported discrimination. Therefore, the court found that Ridley did not establish a prima facie case of retaliation and sustained Metro's third issue concerning no causal connection and did not need to reach Metro's first issue concerning no adverse employment action or second issue concerning no constructive discharge.

Next, the court reviewed Ridley's disparate treatment claim which was based on her being passed up for an interim position. To prove disparate treatment, the plaintiff must show that she: (1) is a member of a protected class; (2) was qualified for the employment position at issue; (3) was subject to an adverse employment action; and (4) was treated less favorably than similarly situated members outside the protective class. After reviewing Ridley's evidence, the court determined that the evidence fell short of a prima facie claim. Though Ridley provides information about her qualifications, she did not provide any information concerning the person who received the interim position to show she had superior qualification. Nor did Ridley show that her PIP was for any purpose other than professional development. The court sustained Metro's fourth issue, vacated the trial court's order and dismissed this appeal for lack of jurisdiction.

Ultra Vires/Zoning: *Schmitz v. Denton Cty. Cowboy Church*, No. 02-16-00114-CV, 2017 WL 3821886 (Tex. App.—Fort Worth Aug. 31, 2017). This is an appeal from a final judgment against the plaintiffs who attempted to force the Town of Ponder to enforce its zoning laws against other property owners. The Fort Worth Court of Appeals affirmed the dismissal of the town. However, the court reversed the dismissal of the other property owner.

In 2014, the Denton County Cowboy Church (church) purchased property zoned single family residential under the Town of Ponder's zoning ordinance. The church's property is adjacent to the plaintiffs' property. According to the town's comprehensive plan, the plaintiffs' properties are designated for future low-density residential zoning. In 2015, the church began construction of an arena. The town issued a building permit for an open arena. Plaintiffs sued the church and town, seeking injunctions prohibiting the church from continuing construction. They also brought claims under Section 1983 for due process, takings, and equal protection violations. At this time, the town voted to amend the zoning code and issued a special use permit (SUP) to the church, but did not pass an ordinance. The town (and church) filed a plea to the jurisdiction, which the trial court granted. The plaintiffs appealed.

The Uniform Declaratory Judgment Act (UDJA) does not waive immunity of a governmental entity. The proper defendant in an ultra vires action is the official who allegedly acted without

authority, not the governmental entity itself. The plaintiffs did not sue any officials. The UDJA waives governmental immunity against claims that an ordinance, or an amendment to an ordinance, is invalid. Plaintiffs claim they are challenging the amended ordinance so have jurisdiction. However, the record shows the town did not amend its zoning ordinance; it merely voted on motions to change the zoning classification. Open motions and votes are not ordinances and here the zoning ordinance was not changed. The town's vote to grant an SUP was not made by ordinance, but did not have to be. Plaintiffs, therefore, are not able to challenge a non-existent ordinance and cannot show a waiver of immunity. The court also held that since the Texas Open Meetings Act and notice allegations also stem from the challenge to a non-existent ordinance, they likewise were properly dismissed.

The plaintiffs next assert the town waived immunity by its own ordinance. However, the court held that even if the town had the authority to waive its own immunity, the language in their ordinance is not a clear and unambiguous waiver of immunity. It authorized a property owner to sue an offending property owner, not the town.

As to the Section 1983 analysis, claims based upon a government entity's refusal or failure to enforce its own regulations do not equate to such claims. The court held repleading would not change the lack of jurisdiction. The town's plea was properly granted. However, the trial court erred by dismissing the church.*

Special Defect: *City of Arlington v. S.C.*, No. 02-17-00002-CV, 2017 WL 3910992 (Tex. App.—Fort Worth Sept. 7, 2017) (mem. op.). This is an interlocutory appeal involving a jurisdictional challenge in a special defect case. The Fort Worth Court of Appeals, acknowledging the case law is murky, held that a misplaced manhole cover was not a special defect.

S.C. and her family were moving into a neighborhood in 2015 when she stepped on a manhole cover which was the wrong size for its opening. She fell into the hole, injuring her pubic bone and groin, and spent six days in the hospital. She sued the city under both a special defect and, alternatively, premise defect theory. Her minor children plead bystander injuries. The city filed a partial summary judgment only as to the special defect claim, which the trial court denied. The city appealed.

The Fort Worth Court of Appeals panel admitted the case law was inconsistent. The Texas Supreme Court lists a special defect as the same "kind or class" as an "excavation or obstruction" to ordinary users on or near a roadway. The court listed a series of cases finding a defective cover over a hole satisfies the excavation "class or kind" test; however, the plaintiffs in those cases lost because the defect was too far from the roadway to count. The court held to qualify an "excavation- or obstruction-like condition [must] be, if not in the roadway itself, at least awfully close—near enough for the ordinary roadway user to encounter it." Achieving ordinary-user status requires "that someone be on or in close proximity to a roadway, doing the normal things that one might expect to do on or near a roadway, whether in some sort of vehicle or on foot." The court noted its prior circuit opinions have listed a distinction between an open excavation as being the cause of an injury and a defectively covered excavation as being the cause, although such an analysis is not always required. It noted that Texas Supreme Court precedent requires it

to interpret a waiver of immunity narrowly. While the panel listed that hypothetical aspects might qualify, the individual facts of this case, the circuit's prior opinions, and direction from the Texas Supreme Court require it to hold the manhole issue is not a special defect. It reversed the denial, but remanded for trial as a premise defect case.*****

Governmental Immunity: *West Travis Cty. Pub. Util. Agency v. Travis Cty. Mun. Util. Dist. No. 12*, No. 03-16-00880-CV, 2017 WL 3902625 (Tex. App.—Austin Aug. 29, 2017). In this appeal, the Austin Court of Appeals looked at whether the legislature's waiver of immunity in Local Government Code Chapter 271 extends to legal claims arising from a wholesale water-services contract.

The Lower Colorado River Authority (LCRA) and Travis County Municipal Utility District No. 12 (MUD) entered into a contract in which LCRA was to provide raw water to the MUD. A year later, the LCRA and MUD entered into a second contract, which LCRA later assigned to West Travis County Public Utility Agency (Agency), for wholesale services for the treatment of raw water. This agreement required the MUD to pay: (1) a flat monthly charge, (2) a volumetric rate (based on the amount measured by the "Master Meter" the MUD was required to install), and (3) a connection fee for each new retail water customer the MUD acquired. This services contract was to be for the same term as the raw water contract: 40 years. The services contract provided that the agreement became effective only after the LCRA accepted the Master Meter that the MUD installed.

The MUD filed this lawsuit against the Agency contending that the Agency breached the services contract by charging the MUD excessive fees and rates that were not authorized by the services contract. The MUD pleaded that the Agency's immunity was waived because of the MUD's agreement to provide "Services" to the Agency in the form of the installation and conveyance of the Master Meter. The Agency filed a plea to the jurisdiction, which the trial court denied. Thus, the Agency appealed.

The court of appeals acknowledges that the Agency is a governmental entity of the State of Texas that is immune from suit unless its immunity is waived. Then, the court looks at the requirements of the immunity waiver of Chapter 271. In order for immunity to be waived there must be: (1) a written contract, (2) stating the essential terms of, (3) an agreement for providing goods or services to a local governmental entity, and (4) that is properly executed on behalf of the local governmental entity. The parties did not dispute that the agreement met the first and fourth requirements. The court concludes that the Agency had no contractual right to receive any service from the MUD. Instead, the "service" of the Master Meter installation was a condition precedent to the contract's formation.

Because the services agreement did not meet the requirements of the Chapter 271 waiver of immunity, the Agency's immunity was not waived. The court of appeals reversed the trial court's decision and rendered judgment in favor of the Agency, dismissing the MUD's claims.

Tort Claims Act: *City of San Antonio v. Reyes,* No. 04-16-00748-CV, 2017 WL 3701772 (Tex. App.—San Antonio Aug. 23, 2017) (mem. op.). This is a Texas Tort Claims Act vehicle

accident case where the San Antonio Court of Appeals held the City of San Antonio was immune.

San Antonio Police Officer Ayars was in an automobile accident with the plaintiffs' vehicle while responding to a "city-wide emergency tone that an officer needed assistance." Officer Ayars proceeded through an intersection while in route resulting in the collision. Plaintiffs sued the city under the Texas Tort Claims Act for damages. The city filed a plea to the jurisdiction which was denied. The city appealed.

Under the emergency exception doctrine, the city retains its immunity from suit on a claim arising from the action of an employee while responding to an emergency call. Nonetheless, an employee responding to such emergency can still cause liability to attach if their actions are reckless. The plaintiffs did not provide counter evidence to the city's plea and Ayer's affidavit. The undisputed evidence establishes Officer Ayers was responding to an emergency. When he approached the intersection, he slowed, observed the situation, and proceeded through. Assuming, as plaintiffs allege, the light facing Officer Ayers was red, he was authorized to proceed through the intersection in an emergency situation. Plaintiffs presented no evidence the actions were reckless. The plaintiffs make an alternative argument that the city waived the "emergency exception" defense because it waited eleven months before raising it. However, no support exists for the position. Plaintiffs did not request additional discovery or continuances. The city retains immunity and the plea should have been granted.*

Collective Bargaining: *City of San Antonio v. San Antonio Firefighters' Assoc.*, No. 04-15-00819-CV, 2017 WL 3701778 (Tex. App.—San Antonio Aug. 23, 2017). This is a permissive appeal, which was allowed by the court, where the city requested the court of appeals review the denial of its motion for summary judgment seeking to hold the "evergreen" clause of its collective bargaining contract void as an unconstitutional debt. The court determined the clause was not an unconstitutional debt.

The city and firefighter union entered into a multi-year collective bargaining agreement. Because the contracts require council and union member approval, which takes time, the contracts contained "evergreen" clauses, which state the effective contract would continue in effect until a specified future date unless first replaced by a successor agreement or terminated by mutual agreement. At the time of suit, the union and the city had not adopted a successor agreement or terminated the current collective bargaining agreement (CBA). The city sought a declaration the clause was void as an unconstitutional debt or, in the alternative, as against public policy. The trial court denied the city's summary judgment motion, which prompted this permissive appeal.

Article XI, Section 5 and Section 7 of the Texas Constitution prohibit debts by a city unless a sinking fund with revenue tax commitments are in place. The drafters intended to require local governments to operate on a cash basis and to limit their ability to pledge future revenues for current debts. The court analyzed the term "debt" as referenced in the Texas Constitution. After analyzing case law, the court held a "debt" for constitutional purposes is a pecuniary obligation which cannot be satisfied out of current revenues for the year or savings. A contract can avoid constitutional infirmity if it is conditioned on a yearly appropriation of funds. However, this

CBA does not contain such a provision. The city asserts "[w]hen the CBA was created in 2011, an absolute debt was created at once with only the time of payment being postponed." The amount of the "debt" is presumably the total expense of complying with the contract, including the value of all the wages and benefits estimated to be due from 2011 through 2024. According to the union, employee wages and benefits are not "debts" within the meaning of the Texas Constitution because no amount will be owed for a future year's wages and benefits until work is performed by fire fighters and an obligation to pay them is incurred. The CBA sets a schedule of payments for when work is performed but is not a contract for employment. In order to succeed in its claims, the city must establish either that the entire CBA constitutes a debt or that non-severable obligations imposed by the CBA are unconstitutional debt, rendering the CBA void in its entirety. Conversely, if there are any severable provisions of the CBA that are not void for violating Sections 5 and 7 of Article XI of the Texas Constitution, the entire CBA is not void and the trial court properly denied the motion for summary judgment. After a very long analysis of different provisions of the contract, the court held the contract does not create a debt. The actual amount the city will owe in a given year for operating expenses depends on the number and classification of employees. The contract does not expressly obligate the city to pay wages and benefits and does not contain any minimum staffing or funding requirements. As a result, the trial court properly denied the motion.*

Governmental Immunity: *City of Pearsall v. Tobias*, No. 04-16-00815-CV, 2017 WL 3495137 (Tex. App.—San Antonio Aug. 16, 2017). The City of Pearsall entered into a two-year contract with Robert Tobias to serve as city manager. The contract provided for a cash payment of one year's salary if Tobias was involuntarily terminated or suspended by the city council for any reason. The agreement also required Tobias to live within the City of Pearsall but provided a grace period of six months. After five-and-a-half months, the council voted to terminate Tobias's employment without severance pay. The city stated that Tobias's failure to move to the City of Pearsall was the reason for termination. Tobias filed suit against the city alleging breach of contract. The trial court denied the city's plea to the jurisdiction, and the city appealed.

The city argues that it is immune from the breach of contract claim because: (1) the contract does not contain the essential terms of the agreement; (2) the contract does not provide for goods or services; (3) the contract was not properly executed; and (4) the damages Tobias seeks are not due and owed under the contract. Tobias filed a cross-appeal arguing: (1) the City of Pearsall waived its right to appeal by failing to timely file a notice of appeal; and (2) the trial court erred in concluding Tobias failed to sufficiently allege the City of Pearsall waived immunity for attorney's fees.

The court of appeals noted that the trial court rendered a decision on October 31, 2016; however, the only signed written order in the appellate record was signed on December 5, 2016. As a result, the City of Pearsall's notice was due 20 dates after *that* date. Because the city filed its notice of appeal on December 5, 2016, the city did not waive its right to appeal.

The court then analyzes the Chapter 271 waiver of immunity requirements. The court concludes that the contract did provide the essential terms required by Section 271.151 of the Local Government Code. Specifically, the court provides that the agreement states the salary and how it was to be paid to Tobias, the number of work hours, and the requirement that the city evaluate

Tobias's performance. Additionally, the court provides that services include what an employee provides his employer by his efforts. Thus, the contract required Tobias to provide his services to the city. The court also determines that the contract was properly executed. The court was not convinced by the city's argument that the contractual provision providing a grace period for the city manager to move into the city conflicted with the city's charter provision requiring the city manager to live within the city. Thus, the contract was properly executed. Lastly, the court determines that the severance pay in the termination agreement was "due and owed" under the contract. In doing so, the court rejects the city's argument that the five-and-a-half months salary that Tobias received while employed by the city was all that was "due and owed" under the contract.

The court of appeals affirmed the trial court's order denying the city's plea to the jurisdiction and remanded the case to the trial court on the question of attorney's fees.

Premise Liability: *Morgan v. City of Terrell*, No. 05-16-00554-CV, 2017 WL 3484516 (Tex. App.—Dallas Aug. 15, 2017) (mem. op.). This is a premise liability/negligent policy implementation case where the Dallas Court of Appeals affirmed the granting of the city's plea to the jurisdiction.

Morgan sued the city alleging that an unmarked sidewalk ledge constituted a dangerous condition causing her to fall. The city filed a plea to the jurisdiction asserting the alleged "dangerous condition" was actually the design of the walkway, which is a discretionary function. Morgan asserted the design was negligently implemented. The trial court granted the plea, and Morgan appealed.

It is well settled that the design of a public work, such as a roadway, involves many policy decisions, and is a discretionary function. Likewise, the type of safety features to install on a public work is a discretionary function. While immunity can be waived if the claim is for the negligent implementation of the decision, such waiver must be tied to the execution and not the discretionary formation. Morgan claimed the city's ordinances created a nondiscretionary duty to make the sidewalks safe. However, Morgan did not include the ordinances in the record and did not request the court take judicial notice of the ordinances. Morgan has included in her brief "only the language of portions of provisions she has plucked from the Ordinance[s]." As a result, the court held the issues involving the ordinances were not properly before it. However, even if it were, the selective provisions do not support Morgan's position. The building code section states sidewalks "shall be set at a grade to provide for a certain slope range or as directed by the city engineer." The court felt this language made clear the city made a policy decision to retain discretion to alter the specifications of sidewalks when needed. Further, under the Neighborhood Integrity Code, whenever a sidewalk becomes dangerous, it is a public nuisance. However, those provisions state the chief building official "may" act to remedy the nuisance, but leaves the official with discretion to abate or not abate. As a result, nothing relating to a negligent implementation exists and everything points to the discretionary actions of the city. The plea was properly granted.*

Governmental Immunity: *City of Tyler v. Owens*, No. 12-16-00128-CV, 2017 WL 3499949 (Tex. App.—Tyler Aug. 16, 2017) (mem. op.). On February 10, 2017, the City of Tyler issued

a construction permit to a property owner to build a boathouse and pier on property leased by the city to the property owner on Lake Tyler. Two other neighboring property owners, Owens and Terry ("Owens") filed suit against the city, seeking to enjoin the construction of the boathouse, along with actual and exemplary damages, a declaratory judgment, injunctive relief, and attorney's fees. The trial court granted a temporary restraining order against the city and the property owner, stopping the construction of the boathouse and pier. The city appealed.

On appeal, the primary issue is related to whether the city performed a governmental function in determining the location of the boathouse and issuing the construction permit. Owens contended that the city's act in subdividing and leasing the lakefront residential lots was a proprietary function, citing pre-Texas Tort Claims Act cases holding that under the common law, a city leasing its property acts in a proprietary capacity. The court specifically looked at whether the relocation of the pier and boathouse plans as part of the permit application, the issuance of the permit, and the construction authorized by the permit were governmental or proprietary functions. Looking at the Tort Claims Act, the court determined that those decisions are part of the city's engineering and planning functions, exercised through its building codes and inspection process, on its reservoir as part of the city's waterworks. Therefore, the city was entitled to governmental immunity absent a legislative waiver.

Owens contended that Local Government Code Chapter 271 is a legislative waiver of governmental immunity that applies to the lease at issue in this case. The court held that the relevant provisions of the city's lease of property to all property owners involved are not "services" as that term is used in Chapter 271 of the Local Government Code, as the leases do not require the city to pay for services, which is a factor weighing against waiver of immunity. Instead, the applicable provisions of the lease represent obligations imposed on the lessees arising only in the event that a contingency occurs related to environmental contamination on the property. The benefits to the city are too attenuated to constitute a waiver of its governmental immunity. The appellate court reversed the order of the trial court and rendered judgment that the city be dismissed from the suit.

Land Acquisition: *Trevino v. City of Pearland*, No. 14-16-00298-CV, 2017 WL 3666333 (Tex. App.—Houston [14th Dist.] Aug. 24, 2017). The City of Pearland and Frank and Sidelia Trevino entered into a purchase agreement for the city to purchase real property from the Trevinos for a roadway expansion. The agreement contained a sentence stating that the city would provide relocation assistance per a specific letter. Ultimately, a dispute arose related to the amount the city agreed to pay the Trevinos for relocation assistance. The city asserted that it owed the Trevinos, at most, $84,235 for relocation. Meanwhile, the Trevinos claimed the city owed them between $121,235 and $125,935 in relocation assistance payments. The trial court signed a final judgment declaring that the city and the Trevinos entered into a valid and enforceable contract and that the city was contractually obligated to pay the Trevinos $84,235 in relocation assistance. The court also awarded the city $62,010 in attorney's fees under the Declaratory Judgments Act. The Trevinos appealed.

In their first three issues, the Trevinos claimed that the trial court erred by not awarding them attorney's fees, prejudgment interest, and costs because the Trevinos were actually the prevailing party at the jury trial on liability. The court held that because the city sought a declaration that it

was contractually obligated to pay the Trevinos *no more* than $84,235 for relocation expense, that the possibility was left open for the city to pay less than that amount. Because the jury found the city owed $84,235, the court held the jury did not find in the city's favor. Consequently, the Trevinos should be considered the prevailing party, and the trial court did err in not awarding the Trevinos attorneys fees, prejudgment interest, and costs. Further, the court reversed the attorney's fee awards in favor of the city and remanded for the trial court to determine whether it is equitable and just to award the city attorney's fees under the Declaratory Judgments Act.

Taxpayer Standing: *Turner v. Robinson,* No.14-16-00393-CV, 2017 WL 3581636 (Tex. App.—Houston [14th Dist.] Aug. 17, 2017). The Fourteenth Court of Appeals in Houston determined the plaintiffs had taxpayer standing to challenge two propositions filed in the 2004 elections and to bring *ultra vires* claims against the mayor's office.

This opinion is one in a long series of opinions and cases involving the same or similar parties. Plaintiffs sued the City of Houston and the mayor, in his official capacity, for declaratory and injunctive relief (including *ultra vires* claims) involving Proposition 1 (limiting annual increases in property taxes and utility rates) and Proposition 2 (amending the city charter and requiring voter approval for increase which go beyond inflation and population rates). In the 2004 election, both propositions passed. After the election, for two independent reasons, the city determined Proposition 1 is legally binding and Proposition 2 would not be enforced. Proposition 1 had a supremacy clause over any other propositions if it received more popular votes. Further, the charter stated any proposition which receives the higher votes prevails. Various suits followed resulting in several appellate opinions already. In this matter, the plaintiffs filed actions regarding the validity of Proposition 2 and the city's future compliance with both propositions. The city filed a plea to the jurisdiction which was denied. The city appealed.

Standing is a constitutional prerequisite to maintaining suit. Taxpayer standing requires: (1) that the plaintiff is a taxpayer; and (2) that public funds are being expended on the allegedly illegal activity. Plaintiffs did not sue to recoup funds but to prevent future expenditures on alleged unauthorized activities. As a result, they have taxpayer standing. The plaintiffs do not allege the mayor failed to perform a ministerial act, but instead assert he acted without legal authority. Such is a proper *ultra vires* claim. And while the plaintiffs focus on the legal authority of the propositions, their pleadings also seek a declaration as to their validity. As a result, they are proper for declaratory judgment.

August 2017

Note: Included cases are from July 11, 2017 through August 10, 2017.

Governmental Immunity/Torts Claim Act: *City of Houston v. Southwestern Bell Tel. Co.*, No. 01-16-00734-CV, 2017 WL 3262131 (Tex. App.— Houston [1st Dist.] Aug. 1, 2017) (mem. op.). The City of Houston learned about a water main break in the city on March 1, 2013. The city posted notice of its intent to repair the water main with repairs starting the next day. Three city employees went to the location of the water main break to make repairs. There was a utility pole near the excavation site with a sign warning of the presence of underground cables and displayed the AT&T logo (used by Southwestern Bell) along with the universal sign for "do

not dig." The city employees did see and walked by the sign on the utility pole, but did not read it. The employees used a concrete breaker to break up the street in the area where the repairs would be made. Then, they used a backhoe to excavate the area. Two of the city employees tested the ground for utility lines with probing rods and watched the excavation to make sure that the backhoe did not hit anything. During this time, Southwestern Bell Telephone Company (SBC) suffered damage to its hard-clay duct run and cable that was in the area of the water main repair.

Once the damage was repaired, SBC sued the city for negligence arguing: (1) the city failed to provide 48 hours notice to SBC before excavating, which is required by the Texas Utilities Code; (2) the city employees had a duty to look for signs of and locate underground utilities at the excavation site before and during the excavation process; (3) SBC's aerial cable was attached to the nearby utility pole, and therefore near the excavation site; and (4) the city's employees were aware of and walked past, but did not read, the warning sign on the utility pole. SBC requested instructions be included that quoted two statutes regarding the notice requirement under the Texas Utility Code. Houston objected, but the trial court overruled the objection and included it in the jury charge.

At trial, the jury found the city negligent and awarded damages. The city appealed and argued: (1) the trial court lacked subject-matter jurisdiction over the negligence claim based on governmental immunity; and (2) the trial court abused its discretion by including instructions that allowed the jury to determine liability on grounds for which immunity had not been waived.

The intermediate appellate court first reviewed the governmental immunity argument which included a challenge of the trial court's subject-matter jurisdiction over SBC's negligence claim and a challenge of the trial court's subject-matter jurisdiction based on governmental immunity. The court did a *de novo* review since the challenge of a trial court's subject-matter jurisdiction is a question of law. Governmental immunity of suit defeats a trial court's subject matter jurisdiction. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The city argued that SBC did not present sufficient evidence to prove that the city's employees were negligent in their operation of the backhoe which caused the damage. In order to make a claim of negligence under the Texas Torts Claim Act (TTCA), SBC was required to establish that its damages arose from the city's employees' negligent operation of motor-driven equipment. If the evidence presented was legally sufficient to support common law negligence and the TTCA, then the jury's verdict was proper. However, if the evidence was legally insufficient, the trial court lacked subject-matter jurisdiction. The appellate court reviewed the evidence and testimony presented at trial and viewing the evidence in the light most favorable to the verdict, the court determined that the jury could reasonably have found that the city breached its duty to make reasonable inquiry as to the location of, and to avoid striking, underground utility since the city's employees did not read the warning sign on the utility pole next to the excavation and did not look or probe for any other underground utility lines other than the city's utility lines.

Also, the court looked at proximate cause of the damage which requires proof of both cause in fact and foreseeability. *W. Invs., Inc. v. Urena*, 162 S.W. 3d 547, 551 (Tex. 2005). The court reviewed SBC's evidence of proximate cause of the damage to the clay duct. SBC stated that

damage to the clay duct could only be done by a back hoe since the duct was as hard as concrete and a shovel could not make the damage that caused the air-pressure warning system to be triggered. Also, the city's employees knew that some underground utilities might not be marked and could expect multiple underground utilities in the right of way or the road. Based on the evidence, the court held the evidence presented supported the proximate cause of the damages and that there is evidence supporting the waiver of city's governmental immunity. Therefore, the court held the evidence was legally and factually sufficient to support the jury's verdict that the city was negligent and overruled the city's first two issues.

Last, the appellate court reviewed the city's argument concerning the trial court's abuse of discretion by including instructions in the jury charge that allowed the jury to determine liability on grounds for which immunity had not been waived. In order for the court to determine that the trial court abused its discretion, the court had to determine that the trial court acted arbitrarily and unreasonably, without reference to guiding principles, or that it misapplied the law to the established facts of the case. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991). Also, when an incorrect jury instruction is given, the court can only reverse if the instruction "was reasonably calculated to and probably did cause the rendition of an improper judgment." *Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753, 757 (Tex. 2006)(quoting *Reinhart v. Young*, 906 S.W.2d 471, 473 (Tex. 1995)); *see also* Tex. R. App. P. 44.1(a)(1).

The court examined the entire record to evaluate whether the instruction probably caused the rendition of an improper verdict. The court looked at the inclusion of Texas Utility Code Sections 251.151(a) and 251.152(A)-(B) after the first question of the jury charge. Because of the inclusion of the statutes and the placement of statutes in the jury charge, the appellate court thought it indicated that the trial court permitted the jury to find the city liable for negligence based on failure to comply with the Utility Code instead of the operation of the equipment. The Texas Supreme Court has held that "the tortious act alleged must be related to the defendant's operation of the [equipment] rather than to some other aspect of the defendant's conduct." *Ryder Integrated Logistics, Inc. v. Fayette Cty.*, 453 S.W.3d 922, 929 (Tex. 2015). Since the city did not waive its liability for any failure to provide proper notice under the Utility Code, the finding that the city was negligent for failing to give adequate notice, would not waive the city's governmental immunity. Therefore, the court held that the inclusion of the statutory excerpts in the jury charge was in error and harmful to the city since the jury could have found the city liable on the grounds for which the city's sovereign immunity was not waived. The court reversed the trial court's judgment on negligence and remanded the case for a new trial.

Governmental Immunity: *City of Bedford v. Apartment Assoc. of Tarrant Cty., Inc*., No. 02-16-00356-CV, 2017 WL 3429143 (Tex. App.—Fort Worth Aug. 10, 2017) (mem. op.). The Apartment Association of Tarrant County, Inc. (AATC) is a trade association whose members include multifamily-property owners in Bedford, Texas. In April 2016, AATC sued the City of Bedford for declaratory and injunctive relief, alleging that three city ordinances, two current and one repealed, regulating multifamily properties in the city were unconstitutional. The AATC is representing and advocating for its members' interests by seeking to protect them from what it alleges as excessive fees, too-frequent inspections, and unlawful taxes imposed by the city. The AATC sought: (1) a declaration that the fees assessed under all three ordinances were unreasonable and violated the multifamily-property owners' substantive-due-process rights under

the Texas Constitution and constituted an impermissible occupation tax under the Texas Constitution; (2) a declaration that multifamily–property owners who paid fees under the repealed ordinance were entitled to a refund; (3) an injunction against the city from enforcing the current ordinances and from spending any illegal fees it collected under the repealed ordinance; and (4) attorney's fees under Chapter 37 of the Civil and Practice Remedies Code.

The city filed a plea to the jurisdiction and later filed a summary judgment motion and a brief in support of the plea to the jurisdiction. The city argued that its governmental immunity had not been waived because: (1) the AATC lacked standing to pursue its claims on behalf of its members; (2) the declaratory-judgments act (Act) does not waive the city's immunity with respect to the AATC's refund claim because it was really a request for money damages; (3) declaratory relief was inappropriate because the AATC had not alleged any actual harm and instead sought an impermissible advisory ruling; (4) the AATC had not plead any facts to support a claim for injunctive relief against the city; and (5) the AATC could not recover attorney's fees under Chapter 37 because it had not pleaded a proper claim for relief. The trial court, after a nonevidentiary hearing, denied the city's plea to the jurisdiction.

The court of appeals did a *de novo* review since the challenge of a trial court's subject-matter jurisdiction is a question of law. Governmental immunity of suit defeats a trial court's subject matter jurisdiction. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The city presented seven issues.

The appellate court decided to address the seventh issue first because it dealt with standing which is a component of subject-matter jurisdiction and must be established to maintain a lawsuit. *See Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444-46 (Tex. 1993). An association has standing to sue on its members' behalf when: (1) its members would otherwise have standing to sue in their own rights; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires each of the individual members' participation in the lawsuit. *Big Rock Investors Ass'n v. Big Rock Petroleum, Inc*., 409 S.W.3d 845, 848 (Tex. App.— Fort Worth 2013, pet. denied). The court and the city agreed there was no dispute about the first two components of the associational-standing test, but the city claimed the AATC could not meet the third prong of the test. The city argued that if the AATC was seeking money damages on its members' behalf, then it did not have standing. An association cannot seek money damages on behalf of its members, since doing so would require each individual member to participate in the lawsuit to establish its own damages. *Id*. at 849. However, associations can seek declaratory relief, injunctive relief, or some other type of prospective equitable relief on its' members behalf. *Id*. at 850. In doing so, the association was seeking remedies that can benefit all of its members and thus would have standing. The court stated that AATC had plead claims for declaratory relief that benefitted its members in trying to get the ordinance determined invalid and that the multifamily-property owners in Bedford are entitled to a refund of excessive fees, and injunctive relief in preventing the city from acting under the ordinances. AATC did not seek money damages on behalf of its members which would have required individual participation. Therefore, the court determined that AATC did have standing and could raise the claims brought in this suit.

Next, the court addressed the AATC's declaratory-judgment claims. The first claim argued by the city was that the trial court erred when it denied the city's plea to the jurisdiction because the city had not waived its immunity where the AATC failed to allege facts demonstrating a valid constitutional claim. The court stated that AATC did demonstrate subject-matter jurisdiction over the ATTC's declaratory claims by challenging the validity of the ordinance and the reasonableness of the fees that were being charged by the city. Also, the city argued that the AATC had to have the ability to prove its case as a prerequisite to invoking the declaratory judgment act's governmental-immunity waiver. The court stated that Act does not require the plaintiff to prove liability as a condition for governmental-immunity waiver; therefore, it did not need to evaluate the AATC's claims' merit and overruled the city's first issue.

The city's second, third and fourth issues challenged the court's jurisdiction over the AATC's declaratory-judgment claims regarding the repealed ordinance. The city argued as its second claim that because the ordinance was repealed, immunity is not waived under the Act and that the AATC is seeking an improper advisory ruling. Also, the city argued that immunity was not waived because the AATC pleaded this declaratory-judgment claim solely to recover money damages. The court determined that the city's argument concerning the AATC's claim was not a justiciable controversy, but was really a mootness argument in that the ordinance has been repealed. The mootness doctrine dictates that courts avoid rendering advisory opinions by only deciding issues that present a "live" controversy at the time of the decision. *Young v. Young*, 168 S.W.3d 412, 416 (Tex. App.—Dallas 2005, no pet.). The repeal of the ordinance did not moot the AATC's claim, but it removed the AATC from having to have the repealed ordinance declared void. However, the repeal of the ordinance did not remedy any harm the ordinance might have caused the AATC's members. The court concluded that the AATC's claims were not moot. The court also stated that the city's argument concerning an advisory opinion because the AATC's is seeking money damages and speculating that any declaration that the AATC's members are entitled to refunds will create a controversy since all members will go to the courthouse to seek a refund was merely hypothetical and any individual multifamily-property owner's right to a refund is for a later date. The court overruled the second issue.

The city's third issue was that the immunity waiver under the Act is limited to claims challenging the validity of ordinances currently in effect. However, the court stated that the Act does not limit the immunity waiver to only current ordinances, therefore, the third issue is overruled.

The city's fourth issue was that the AATC's cannot disguise a money damage claim as a declaratory-judgment claim requesting its members are entitled to a refund of excess fees under the repealed ordinance in order to circumvent governmental immunity. However, governmental immunity will not defeat a claim for declaratory or injunctive relief seeking the refund of illegally collected taxes or fees if the plaintiff alleges that the payment were made as a result of fraud, mutual mistake of fact, or duress, whether express or implied. *See Gatesco, Inc. v. City of Rosenberg*, 312 S.W.3d 140, 144 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The court looked over the AATC's pleading liberally and determined that AATC did not adequately plead facts necessary to invoke the trial court's jurisdiction under this doctrine because it did not allege its members paid fees under business compulsion, duress, implied duress, fraud, or mutual mistake of fact. Therefore, the court sustained the fourth issue. However, the court also stated

that the insufficiency in AATC's pleading concerning the refund claim was not an incurable jurisdictional defect and AATC should be afforded the opportunity to amend its pleadings.

As to the fifth issue, the city argued that the trial court erred by denying its plea to the jurisdiction with respect to the AATC's claim for injunctive relief because there is no immunity waiver for such claims against a municipality. Governmental entities retain immunity from claims for injunctive relief based on allegations that government officials have violated the law or have failed to perform a ministerial act and these claims must be brought against the responsible government actors in their official capacities. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372-73 (Tex. 2009). The court stated that since AATC was challenging the validity of the ordinance rather than complaining that city officials illegally acted or failed to act, the ultra vires exception does not apply, and the city in not immune from AATC's suit. The court overruled the city's fifth issue.

The city's sixth issue argued that the trial court did not have jurisdiction to award AATC attorney's fees because the AATC did not plead a valid declaratory-judgment claim against the city. The court overruled the sixth issue concluding that other than the AATC's refund claim, the city's immunity from suit with respect o AATC's declaratory-judgment claims had been waived. Therefore, the city was not immune from a claim for attorney's fees.

Overall, the court reversed the trial court's order denying the city's plea to the jurisdiction when it came to the AATC's refund claim, but ordered the trial court to allow AATC to amend its pleading on that claim, and affirmed the remainder to the trial court's order.

Civil Service: *Hopkins v. City of Austin*, No. 03-16-00148-CV, 2017 WL 3044541 (Tex. App.—Austin July 13, 2017) (mem. op.). The Austin Police Department indefinitely suspended Jermaine Hopkins from his duties as a police officer for violations of the City of Austin's civil service rules. Hopkins appealed his suspension to a hearing examiner, who denied the appeal. Then, Hopkins filed suit alleging that the hearing examiner's order was procured by fraud and other unlawful means. The district court granted the city's plea to the jurisdiction and dismissed Hopkin's suit. He appealed.

Hopkins argued that the hearing examiner exceeded his jurisdiction by: (1) affirming Hopkins' suspension for insubordination because his acts were in compliance with his rights under the Texas Public Information Act and the Civil Rights Act; and (2) considering evidence outside the Civil Service Act's 180-day deadline. The appellate court concluded that Hopkins failed to affirmatively allege facts that would invoke the district court's jurisdiction and affirmed the district court's order dismissing Hopkins's claims.

Board of Adjustment: *Five Aces/SA, Ltd. v. River Road Neighborhood Assoc.*, No. 04-16-00781-CV, 2017 WL 2960399 (Tex. App.—San Antonio July 12, 2017).This appeal involves a piece of property purchased by Reilly Brothers Property Co. (Reilly) in a historical district of San Antonio that is part of the River Road Neighborhood Association (RRNA). Reilly filed an application to demolish the residence on the property and build a six-unit apartment complex. The City of San Antonio's Historic Preservation Officer (HPO) denied the request for failure to comply with the city's uniform development code. Reilly appealed the decision to the City of

San Antonio Board of Adjustment (BOA), and the BOA upheld the officer's determination. A court later also upheld the BOA's decision. A year later, Reilly filed a new application seeking approval to renovate the existing structure and add six apartment units. The HPO recommended approval of the project. However, the RRNA appealed the decision asserting that the project amounted to a demolition. The BOA affirmed the issuance of the certificate of appropriateness. The RRNA then sought judicial review. The trial court granted the RRNA's motion for summary judgment, reversing the BOA's decision. Reilly and the BOA appealed the trial court's judgment.

Reilly and the BOA argued that the trial court erred in reversing approval for the project because it was reviewed and approved as an "alteration, restoration and/or rehabilitation," which may include removal of later parts added to the historic structure. The court of appeals noted that the HPO and BOA applied the sections of the uniform development code dealing with "rehabilitation" and "new construction." The court looked at the statutory language of the uniform development code and acknowledged that the BOA's interpretation of those provisions is entitled to deference. The court was persuaded by both the BOA's analysis, as well as the written findings of the HPO in concluding that the certificate of appropriateness was properly issued. Thus, the court reversed the trial court's judgment and rendered judgment instructing the BOA to issue the certificate of appropriateness for the project.

Pension: *City of Dallas v. Martin*, No. 05-16-01227-CV, 2017 WL 3275527 (Tex. App.—Dallas July 25, 2017) (mem. op.). The City of Dallas, as well as certain named councilmembers, filed interlocutory appeals from orders denying their jurisdictional challenges in two lawsuits that current and former police, fire, and rescue officers filed against the city regarding the pension system. The court of appeals provided the factual and procedural background of the ongoing pension system litigation against the City of Dallas. The city and city officials argued that the trial court erred in denying their motions for summary judgment, as there is no essential term of the alleged contract that the city could have breached and no associated damages within the waiver in Chapter 271 of the Local Government Code.

The court of appeals analyzed the waiver of immunity provisions in Local Government Code Chapter 271. The court then concluded that the police, fire, and rescue officers alleged a unilateral contract that falls within Section 271.152's waiver of immunity. Additionally, the court concluded that the officers were seeking to require the city officials to make payments that will become due in the future, not past due sums. Thus, the pension system's claims do not constitute retrospective requests. The court affirmed the trial court's orders denying summary judgment and pleas to the jurisdiction.

Takings: *KMS Retail Rowlett, L.P. v. City of Rowlett,* No. 05-16-00402-CV, 2017 WL 3048477 (Tex. App.—Dallas July 19, 2017) (mem. op.). At issue in this case is the validity of the City of Rowlett's taking of KMS Retail's private road easement to convert it to a public roadway. KMS constructed a private road along the southern border of its property. However, the private road only extended to part of its commercial development. The City of Rowlett entered into an economic development agreement with another company, Briarwood, to develop land nearby that required access to a road. Briarwood was unable to reach an agreement with KMS for permission to use the easement so the city sought to condemn the part of the private

road easement on KMS's tract to convert it into a public roadway. The city filed its condemnation petition, and the special commissioners awarded KMS damages of $31,662 for the taking. KMS objected to the award and moved to dismiss the action alleging that the taking was not necessary for a public use. The trial court ultimately ruled in the city's favor awarding KMS the damages of $31,662. KMS appealed this decision.

The court of appeals recognized that cities must show that they intend to put the property condemned to public use and that the condemnation must be necessary to advance or achieve that public use. In its analysis, the court points out that the "mere fact that a particular individual, group, or enterprise may benefit will not deprive the use of its public character." The court noted that the city passed a formal resolution stating "a public necessity exists for the welfare of the City and its citizens and it is in the public interest" for the city to acquire the private road easement for the public purpose of acquiring a right of way for construction, maintenance, and operation of a public street. The court was also persuaded by the city staff report on the benefits of the road construction. Thus, the court of appeals concluded that the summary judgment evidence established that the condemnation was necessary for a public use.

Additionally, the court looked at Section 2206.001(b) of the Government Code, which prohibits a governmental entity from using eminent domain for economic development purposes. The court recognized that in *City of Austin v. Whittington*, the Supreme Court of Texas acknowledged that the prohibitions of Section 2206.001(b) would not invalidate a taking for a purpose that falls within one of the statutory exceptions listed in Section 2206.001(c). Because KMS failed to provide any evidence that the city's taking did not constitute a "legitimate transportation project," as permitted by subsection (c), the court concluded that the city's taking did not violate Section 2206.001 of the Government Code. Thus, the court affirmed the trial court's summary judgment in favor of the city.

Lease of City Property: *EP Hotel Partners, L.P. v. City of El Paso*, No. 08-16-00031-CV, 2017 WL 3326819 (Tex. App.—El Paso Aug. 4, 2017). In this case, the Eighth Court of Appeals affirmed the trial court's granting of summary judgment in favor the city.

Hotel operators located near the El Paso International Airport ("operators") filed suit claiming that the city violated the city charter by entering a lease with EP Vida for the construction and operation of a new hotel and retail center on city property located near the operators' hotels. The city considered the long-vacant parcel of land at issue to be blighted; the lease with EP Vida contained certain incentives in the form of rent abatement during the initial years of the lease. However, over the life of the 40-year lease, the city anticipated it would receive more than fair market value rent for the property. Regardless, the operators argued that the lease violated the "reasonable fee" provision of the city charter which provided as follows: "Any ordinance providing for the conveyance, lease, or grant of a franchise regarding the property of the City shall provide for payment to the City of a reasonable fee . . . . " The city and EP Vida file a joint no-evidence motion for summary judgment, seeking dismissal of the operators' claims, arguing the operators had no evidence that the lease violated the city charter.

The term "reasonable fee" is not defined in the city charter and the city had no written policy defining the term; thus, the court used general rules of statutory construction to conclude that the

charter required the imposition of a fair or moderate fee and prohibited the city from leasing property for fees that are "grossly inadequate" or so excessively low as to shock the conscience, that are made in bad faith, or made for a fraudulent purpose. The appellate court concluded that just because the city might use different rate structures in its leases does not mean the EP Vida lease was made without "rational or reasonable basis" or that the rent was grossly inadequate.

The appellate court also concluded that the operators' claims that the EP Vida lease was below fair market rent were conclusory in nature. The operators presented no evidence that the city's calculation of the anticipated rent was in error, that the city faced an unreasonable risk of not recouping losses they might suffer in the first years of the lease due to the incentives, or that the decision to include rental abatement was an imprudent or unacceptable method of calculating rent in a commercial lease. Instead, the summary judgment evidence showed that the city had structured leases in a variety of ways and had offered rental abatement to other airport hotels.

The operators also argued there was evidence that the city council did not fully understand (had not been presented with) the details of the EP Vida lease and how it might differ from previous leases. The court concluded that what the city council knew or did not know had no bearing on the validity of the lease and whether it contained a reasonable fee. And acting without full knowledge would not render city council actions "ultra vires" (without legal authority). Moreover, the claims were purely speculative since the summary judgment evidence showed the city council was provided with all of the lease terms. The operators' claims were overruled and the trial court's entry of summary judgment affirmed.

Premises Liability: *Lucker v. Texas Dep't of Transp.*, No. 13-16-00380-CV, 2017 WL 3304178 (Tex. App.—Corpus Christi Aug. 3, 2017) (mem. op.). This is a premise liability case where the Thirteenth Court of Appeals affirmed the granting of a jury verdict in favor of the Texas Department of Transportation (TxDOT).

TxDOT received information water was likely to flood a number of roads in Lee County and dispatched employees to assist. Throughout the day, the assistant maintenance supervisor, Meinke, put out a number of signs at different locations. One sign was a large temporary "Watch For Water On Road" sign, which also displayed two flags on FM 1624 near a culvert referred to as the "bridge." The sign was placed next to a smaller, permanent sign, with the same message. These signs were located about 2,500 feet from the bridge. Meinke testified that a car traveling at 60 miles per hour would reach the water in about thirty seconds after passing the two signs on that day. Because the water was rising rapidly, at 7:15 p.m. Meinke ordered that barricades and road closed signs be brought to both sides of the bridge after a visual inspection. However, these did not arrive until after the incident. Meinke left the site to warn nearby oil workers of the danger and rising water. Upon returning to the bridge a short time later, he viewed Sally Lucker's vehicle floating in the water. She died. Lucker's husband sued TxDOT and the case went to a jury trial. The jury returned a verdict for TxDOT and Lucker appealed.

Over the objection of Lucker, the trial court submitted to the jury a charge containing two questions concerning the emergency exception in the Texas Tort Claims Act. Essentially, the first question asked the jury if TxDOT was reacting to a flooding emergency and the second was whether the death was proximately caused by the conscious indifference or reckless disregard of

the safety of others on the part of TxDOT. The jury answered in favor of TxDOT for these questions. The jury did find TxDOT 51% responsible for the accident and Lucker 49% responsible. TxDOT moved for entry of a take nothing judgment which the trial court granted. The Thirteenth Court of Appeals notes the language within the judgment clearly indicates the trial court considered not only the findings of the jury, but arguments of counsel and filings with the court. TxDOT submitted arguments regarding premise liability which were not substantiated with evidence during trial to which Lucker's attorney did not respond. However, the trial court did not specify its grounds for granting the motion. The appellate court specifically noted it could not tell if the trial court found the emergency exception to apply or if the trial court found that there was no evidence on one or more of the elements of Lucker's premise liability claim. Because Lucker briefed only the emergency exception arguments and not the lack of evidence on premise defects, he waived such argument. As a result, the judgment of the trial court must be affirmed.*****

Arbitration: *IOC Co., L.L.C. v. City of Edinburg*, No. 13-16-00117-CV, 2017 WL 3084293 (Tex. App.—Corpus Christi July 20, 2017) (mem. op.). IOC and the City of Edinburg entered into two separate agreements regarding engineering and paving for two city streets. Disputes arose related to each of the projects, and the matters were consolidated and arbitrated by the same arbitrator pursuant to the agreements. The arbitrator found that the city materially breached both agreements and was liable to IOC for damages. The city filed a petition and application to vacate the arbitration award with the trial court and prevailed. IOC appealed.

On appeal, IOC argued that the Texas Arbitration Act (Civil Practice and Remedies Code Section 171.088) should have prevented the trial court from granting the city's motion to vacate the arbitration award. Section 171.088(a)(1) of the Civil Practice and Remedies Code authorizes the trial court to vacate an award if "the award was obtained by corruption, fraud, or other undue means." The court primarily examined whether the award was obtained by "undue means." After reviewing the record, the court of appeals found that the city failed to meet its burden to establish that IOC obtained its award based on undue means, which would amount to immoral, illegal, or bad faith conduct. Even if the arbitrator made minor errors or misapplied the relevant state statute to the facts of the case, a mistake of law is not enough to amount to undue means. Further, Section 171.088(a)(3)(A) provides that the trial court may vacate an award if the arbitrator exceeded his or her powers. Because in this case the record showed that both contracts gave the arbitrator wide and full authority to decide any and all controversies, claims, or disputes, the court held that IOC's breach of contract claims were properly before the arbitrator.

The court reversed the trial court's orders and rendered judgment granting IOC's motion to confirm the arbitration award.

July 2017

Note: Included cases are from June 11, 2017 through July 10, 2017.

Same-Sex Marriage Employment Benefits: *Pidgeon v. Turner,* No. 15-0688, 2017 WL 2829350 (Tex. June 30, 2017). Jack Pidgeon and Larry Hicks (Pidgeon) sued the City of Houston and former mayor when the former mayor sent a directive to the city's human resource

director directing that benefits be afforded to same-sex spouses of city employees that are legally married in another jurisdiction based on the ruling in *United States v. Windsor*,133 S.Ct. 2675, 2689 (2013). Pidgeon, a tax-payer and qualified voter, argued the city was expending public funds on an illegal activity by allowing same-sex spouses to receive city benefits because the Texas Constitution, Texas Family Code (the Defense of Marriage Act or DOMA), and city charter provide that marriage is between a man and a woman.

The case was on interlocutory appeal to the Fourteenth Court of Appeals (COA) when the United States Supreme Court ruled in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), which held that states may not exclude same-sex couples from civil marriages. After *Obergefell*, the COA reversed the temporary injunction that the trial court had imposed while the case was on interlocutory appeal and remanded the case back to trial court for further proceedings. The COA decision was appealed to the Texas Supreme Court (court).

The court first explained its jurisdiction over interlocutory appeals. It is only able to review such a decision if: (1) one or more justices dissented; or (2) the court of appeals holds a different opinion than prior decisions of another court of appeals or the Texas Supreme Court. The court ultimately concluded that it did have jurisdiction here.

The court went through Pidgeon's substantive arguments one at a time. First, was the use of the *De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015), case. Pidgeon argued that by instructing the trial court to conduct further proceedings "consistent with" *De Leon*, the COAs' opinion could be misread to mean that *De Leon* is binding on the trial court. The court stated that *De Leon* was not binding on the trial court and that the COA should not have instructed the trial court to conduct further proceeding consistent with the case. However, the Court stated that the trial court should consider *De Leon* when resolving this case in that it could potentially affect the relief the trial court might provide on remand.

Pidgeon's second argument was that by the COA reversing the trial court's temporary injunction instead of vacating or dissolving it, the judgment might be taken to have a *res-judicata* effect prohibiting Pidgeon from seeking or obtaining the same or similar relief on remand. The court stated that Pidgeon is not precluded from seeking the same or similar relief because, even though Texas appellate courts have held that the dissolution of a temporary injunction bars a second application for such relief, a change in the circumstances since the first application does not bar a second application. A change in the law, such as the *Obergefell* case, would be considered a change in the circumstances. Therefore, the trial court must consider Pidgeon's and the city's arguments regarding the effect of *Obergefell* on Pidgeon's claim and may grant whatever relief is then appropriate.

Pidgeon's next argument was that the COA should have affirmed the temporary injunction to the extent that the injunction required the city to "claw back" tax dollars it expended on benefits for same-sex spouses prior to *Obergefell*. The court found Pidgeon's and the city's arguments compelling on this issue, but found two things prevented them from making a decision on this issue. First, Pidgeon did not request an injunction requiring the city to claw back benefits that were provided before *Obergefell*. Second, the trial court never granted such an injunction. The temporary injunction in this case was to prohibit the city from furnishing benefits to a person

who was married in other jurisdictions to city employees of the same-sex. It was to preserve the status quo. The court could not conclude that the COA erred by failing to preserve an injunction that never had a claw back provision. Also, the court could not express an opinion on whether Pidgeon had standing to seek such an injunction, but agreed with Pidgeon that the COA opinion and judgment do not prohibit Pidgeon from seeking such an injunction on any other relief on remand.

Lastly, Pidgeon urged the court to instruct the trial court to narrowly construe and not expand *Obergefell* on remand. The city agrees that the case should be remanded, but contends that Pidgeon lacks standing to challenge the mayor's directive under *Obergefell* and rejects that Texas courts can narrowly construe *Obergefell*. The court concluded that the parties are entitled to a full and fair opportunity to litigate their positions on remand, but refused to instruct the trial court on how to construe *Obergefell*. The court also addressed amicus briefs asking the court to make a decision on the merits of this case on this interlocutory appeal. The court declined to do so, since the parties have not actually had a full and fair opportunity to litigate their positions.

The court also addressed the city's and mayor's interlocutory appeals from the trial court's orders denying their pleas to the jurisdiction based on governmental immunity. Both pleas were denied before *Obergefell*. *Obergefell* might be crucial to deciding if the mayor, in her official capacity, was acting without legal authority (*ultra-vires*). Governmental immunity does not bar *ultra-vires* claims. The city is not a proper party for *ultra-vires* claims. The city also claims that Pidgeon failed to plead or establish any waiver of the city's immunity. The court stated that, on remand, Pidgeon will have the opportunity to replead his claims against the city and the city will have the opportunity to file a new plea to the jurisdiction as to any such claims.

Torts Claim Act: *Martinez v. Harris Cty.*, No. 01-16-00140-CV, 2017 WL 2560985, (Tex. App.—Houston [1st Dist.] June 13, 2017). This is a Texas Tort Claims Act/police chase case where the First District Court of Appeals affirmed the dismissal of the plaintiffs' claims.

Harris County Deputy Constable Johnson was on patrol when he encountered a high-speed police pursuit in progress. The chase was originally initiated by a City of Houston Police Department motorcycle officer, which Johnson observed in pursuit of a Dodge Caliber. Because the county and the city used different radio systems, Johnson could not communicate with the motorcycle officer directly. However, Johnson took the lead in the pursuit, in compliance with the Harris County guidelines which provided that a constable in a cruiser generally should take over any pursuit initiated by a law-enforcement officer on a motorcycle. While Johnson was unaware of what had caused the initiation of the pursuit, he was able to observe objective factors indicating the fleeing driver apparently was committing the felony offense of evading arrest or detention. The record also reflected Johnson observed the fleeing driver posed a danger to the general public at various points, which the court outlined in the opinion. The record also reflected Johnson continually reevaluated the need to pursue the fleeing driver and the risks involved throughout the pursuit. When Johnson attempted to follow the suspect as he made an unexpected turn, Johnson struck Martinez's car causing injuries to her and her children. They sued the county for the injuries. The county filed a motion for summary judgment, which the trial court granted. The plaintiffs appealed.

The county's immunity turned on the good faith actions of Johnson. The Texas Tort Claims Act waives immunity for negligent acts of an employee when using a motor-driven vehicle in the scope of employment, so long as the employee would be liable personally. If Johnson is entitled to official immunity he would not be personally liable. Good faith is measured against a standard of objective reasonableness. The employee's subjective state of mind or motive is irrelevant. The test is whether a reasonably prudent officer in like circumstances could have believed that the need for the officer's actions outweighed a clear risk of harm to the public. The court focused on the fact that the analysis is limited to known risks, not risks discovered later. It is akin to the standard of review for abuse of discretion; only those who are plainly incompetent or knowingly violate the law lack the good faith necessary to be shielded by official immunity. The court went into the specifics in the record regarding Johnson's evaluations, what he saw, what a typical officer's thoughts processes would be, and the detail of the analysis. This included affidavits from Johnson as well as other law enforcement officials and experts. Johnson's affidavit described risks he observed and his efforts to mitigate them. Johnson did not initiate pursuit but joined an existing one. His decision to join or not join does not alter the risk factors in the beginning. In fact, by joining the pursuit and taking lead, Johnson, who was in a cruiser, mitigated the risk to the motorcycle officer who was in a more vulnerable position. The fact Johnson did not know the purpose of the pursuit, or was unaware the motorcycle officer discontinued the pursuit moments before the collision is immaterial. Facts outside of the officer's knowledge are not relevant to an evaluation of his good faith. Law enforcement officers frequently must make quick decisions based on limited information. Confronted with a high-speed chase involving a vulnerable motorcycle officer, Johnson made the decision to join the pursuit within a few seconds, and his decision to do so was consistent with his employer's policy. His multiple decisions to continue pursuit were supported at different points in the record. As a result, the county conclusively established a reasonable officer, in similar circumstances, could have believed the actions taken were proper. Johnson is entitled to official immunity thereby entitling the county to dismissal. The remaining portion of the opinion addresses issues raised by the dissent.

Justice Higley dissented. While conceding Johnson's original decision to join the pursuit may have been justified, the lack of knowledge regarding the purpose of the pursuit, in her mind, should have caused an uninformed officer to discontinue. In her opinion, the decision to continue without sufficient knowledge negates good faith.*

Sovereign Immunity: *Sarigollu v. City of Arlington*, No. 02-16-00413-CV, 2017 WL 2687537 (Tex. App.—Fort Worth June 22, 2017) (mem. op.). Sarigollu sued the City of Arlington for negligence, exemplary damages for gross negligence, and intention infliction of mental distress from the "misleading 'claims' process used by" the city for a sewage leak in Sarigollu's home because of a blockage in the city's sewer system. At the trial court, the city filed a motion for partial summary judgement on the exemplary damages claim asserting that it had immunity. The city also filed a motion for summary judgment on Sarigollu's negligence claims, alleging that the trial court did not have jurisdiction because none of the claims fell within the waiver of governmental immunity under Section 101.021 of the Texas Tort Claims Act (TTCA). The trial court granted the city's summary judgment, holding it did not have jurisdiction in this case because the city had immunity for its performance of governmental functions based on the TTCA and there was no waiver of immunity. Sarigollu appealed.

The court of appeals reviewed the law concerning pleas to the jurisdiction and immunity of cities. The court stated that the plaintiff has the burden of alleging facts that affirmatively demonstrate that the trial court has subject matter jurisdiction. The plaintiff has to allege facts that affirmatively demonstrate that the legislature has waived immunity for the claims brought in a case where the governmental entity has immunity from suit. Also, the court stated that a city is liable for torts arising from the exercise of a proprietary function, but it is generally immune from suit and from liability for torts arising from the exercise of its governmental functions, except for the limited waiver provided by the TTCA. Section 101.0215 of the Texas Civil Practice and Remedies sets out a nonexclusive list of governmental functions.

In this case, Sarigollu argued that the trial court erred in granting the city's motion for summary judgment in his negligence claims because TTCA Section 101.0215 makes a city liable for damages arising from its governmental functions, including health and sanitation services, sanitary and storm sewers, and water and sewer service. The city countered that the statute's use of the phrase "under this chapter" in Section 101.0215 is not a waiver of immunity; rather, the language indicates that, before a city may be liable for the performance of a governmental function listed in the section, the plaintiff must still establish a waiver of immunity under Section 101.021 of the TTCA. The court applied the plain language of the statute and agreed with the City of Arlington that a city is liable for it performance of governmental function listed in Section 101.0215 only if the TTCA otherwise waives immunity.

The court stated that there was no disagreement between the parties that the city was performing a governmental function. But, the court did not believe that Sarigollu alleged facts necessary to prove the trial court erred. First, the court took up Sarigollu's allegation that the city failed to: perform proper and timely inspection of the sewer system in his neighborhood, keep proper maps or diagrams of the sewer system so the problem could be quickly discovered, and properly train city employees. The court stated that the TTCA waives immunity for premise defect claims only "if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Texas Civil Practice and Remedies Code Section 101.012(2) and these claims did not allege an injury from the condition or use of real property necessary to prove a premise defect under the TTCA.

Second, the court held that Sarigollu's allegation that the city's failure to maintain the sewer system was negligence which caused his damages was not proven because the failure to maintain property is not itself a dangerous condition. At the most, the court said that the failure to maintain could furnish a condition that makes injury possible.

Last was Sarigollu's allegation that the city failed to locate and repair the blockage in a timely manner. The court, reading Sarigollu's pleading "very liberally", did not agree that the city had a duty as a licensee to warn him of the sewer blockage and make the supposed dangerous condition reasonably safe because the city did not cause the blockage or know of the blockage. The city had no knowledge of the blockage until Sarigollu called about the sewage back up. Therefore, the court affirmed the trial court's granting of the city's motion for summary judgment and dismissed Sarigollu's claims for lack of jurisdiction.

Governmental Immunity/Open Meetings: *City of New Braunfels v. Carowest Land, Ltd.*, No. 03-16-00249-CV, 2017 WL 2857142 (Tex. App.—Austin June 29, 2017). In this appeal, the City of New Braunfels challenged the trial court's subject matter jurisdiction over the claims by Carowest Land Limited (Carowest).

This case involves the City of New Braunfels' awarding of a contract to Yantis Company to serve as the contractor on a flood-control project. It is among a series of cases between Carowest, the city, and Yantis. The City of New Braunfels entered into a Rule 11 agreement with Yantis as part of the 2010 lawsuit brought by Carowest against the city and Yantis. The agreement provided that Yantis would fully release the city from Yantis' asserted delay claim, but if the contract was not awarded to Yantis at the council meeting to be held that night, then the offer would be withdrawn.

During the council meeting, the city council went into a closed meeting immediately prior to consideration of the award of the contract without announcing the statutory basis for the meeting. After the closed meeting concluded, the mayor stated that the council went into executive session under "Item C, deliberate pending/contemplated litigation, settlement offers, and matters concerning privileged and unprivileged client information." The city council then discussed the award of the contract and voted to award the contract to Yantis. The city provided a copy of the Rule 11 agreement to Carowest, who then filed amended pleadings to include declarations that the contract was void based on the city's violation of the Texas Open Meetings Act (TOMA) and competitive bidding requirements. The trial court granted a directed verdict on Carowest's declaratory judgment claim related to the city's TOMA violation, and the jury found that the city failed to award the contract to the lowest bidder. The jury also found that the agenda for the meeting did not provide "full and adequate notice that the City Council would be considering the Carowest/Yantis suit." The City of New Braunfels appealed.

The city argued that Carowest's claims against the city are barred by governmental immunity and, thus, the trial court lacked subject matter jurisdiction. The Austin Court of Appeals cited *Zachry Constr. Corp. v. Port of Houston Authority*, in noting that the types of relief expressly made available by statue operate as the boundaries for a statute's waiver of immunity. Because Section 551.142 of TOMA and Section 252.061 of the Texas Local Government Code set the boundaries of their waivers of immunity (injunctive and mandamus relief), the declaratory relief that Carowest sought is barred by governmental immunity.

The court held that the trial court did not have subject matter jurisdiction of Carowest's declaratory judgment act claims, so the court vacated the trial court's judgment. Because the prevailing parties changed on appeals, the court remanded the issue of attorney's fees and costs to the trial court for reconsideration.

Dangerous Dogs: *Wrencher v. State*, No. 03-15-00438-CV, 2017 WL 2628068 (Tex. App.—Austin June 16, 2017) (mem. op.). This case involves jurisdiction for a civil appeal from municipal court which pinpoints statutory problems existing with certain appeals in certain counties. This issue is part of the reason behind H.B. 4147, which becomes effective September 1, 2017.

Wrencher's dog "Skip" was declared a dangerous dog by the City of Austin Municipal Court and Wrencher attempted to appeal to county court. Texas Health and Safety Code Sections 822.0421(b) and 822.0423(d) authorize an appeal from a "dangerous dog" determination and provide that the owner of the claimed dangerous dog may appeal in the manner provided for the appeal of other cases from the municipal court. Texas Government Code Section 30.00014(a) provides a "defendant" has the right to appeal a "judgment or conviction" to county court. The County Court #8 dismissed the appeal for lack of jurisdiction either adopting the state's argument that the section only applied to criminal matters or that no defendant was present. Wrencher appealed.

A line of prior cases, starting with *In re Loban*, held that when a county did not have a county court at law which had civil jurisdiction, no jurisdiction existed for any dangerous dog appeals. However, the Third Court of Appeals held in this case that while County Court #8 was directed to give preference to criminal cases, its creation, like all other county courts at law in Travis County, was statutorily granted civil jurisdiction. [Comment: not all counties have county courts at law with joint civil or criminal jurisdiction. Some only have criminal jurisdiction.] Under Section 30.00014, the appellate court concluded that a "defendant" is a person against whom a civil or criminal action is brought, noting the Section also refers to a "judgment or conviction", supporting the conclusion that a person is to appeal a civil judgment to county court. As a result, Wrencher has the ability to appeal the dangerous dog determination to County Court #8.

And while not discussed in the opinion, be aware, H.B. 4147 changes Section 30.00014(a) by adding the following: "If a county does not have a county court at law under Chapter 25, the county court has jurisdiction of any appeal." This has the effect of providing that constitutional county courts have jurisdiction if no statutorily created county courts are present in the county. It does not appear to address the situation where a county court at law exists, but the courts have only criminal jurisdiction.*

Tort Claims: *City of El Paso v. Viel*, No. 08-16-00177-CV, 2017 WL 2823901 (Tex. App.—El Paso June 30, 2017). This is an accelerated interlocutory appeal filed by the city from the trial court's denial of the city's plea to the jurisdiction.

Viel filed suit against the city due to injuries he sustained when an overhead rolling service door collapsed on him while he was working for an air cargo business that leased a portion of a cargo warehouse owned by the city on its airport property. The city argued that because it was engaged in a governmental function in leasing the warehouse, all of Viel's claims had to comply with the requirements of the Texas Tort Claims Act (Act); that Viel didn't comply with pre-suit notice requirements of the Act; that Viel failed to establish a premises defect claim or a tangible personal property claim under the Act; that all claims filed outside the Act were barred by immunity; and that exemplary damages are not permitted under the Act.

The appellate court agreed that the city was engaged in a governmental function in leasing the cargo warehouse, as statutorily permitted under Transportation Code Section 22.021(a)(1). Thus, the city retained immunity except to the extent waived by the Act.

As to the pre-suit notice claim, the court concluded that the evidence raised a factual issue as to whether the city had subjective awareness of its fault contributing or producing the injury thus, excusing Viel from providing formal notice.

The court ultimately affirmed the trial court's order denying the plea to the jurisdiction on all other claims except the premises defect claim. As to that claim, the appellate court found that the evidence raised a factual dispute as to whether the city retained control over repair and maintenance of the door, and that a fact question remained on the issue of the city's liability for a premises defect. Thus, the trial court's order was affirmed and the case remanded to the trial court for further proceedings on that claim.

Red Light Cameras: *City of Willis v. Garcia*, No. 09-16-00164-CV, 2017 WL 2871414 (Tex. App.—Beaumont July 6, 2017). This is an accelerated appeal of an interlocutory trial court order denying the city's plea to the jurisdiction where the Ninth Court of Appeals reverses and renders judgment for the city.

Garcia sued the city on behalf of himself and "others similarly situated" who have paid a civil penalty under the city's red light camera ordinance; other individual plaintiffs subsequently joined the suit. Plaintiffs challenged the constitutionality of the state red light law (Transportation Code Chapter 707 and Government Code Section 29.003(g)) and the validity of the ordinance (plaintiffs argued the city failed to comply with Chapter 707 because it didn't conduct a traffic engineering study before installing the cameras).

As required by Chapter 707 the city's ordinance provides for an administrative adjudication procedure to contest the imposition of a civil penalty. None of the plaintiffs initiated the administrative process. The city filed a plea to the jurisdiction which was denied by the trial court.

The city appealed, arguing that plaintiffs failed to exhaust their administrative remedies and that their claims are barred by governmental immunity.

Agreeing with *Edwards v. City of Tomball*, 343 S.W.3d 213 (Tex. App.—Houston [14th] 2011, no pet.), the appellate court held that a city that sets up a Chapter 707 red light enforcement program must establish an exclusive administrative procedure to handle disputes related to the program. And even if the city failed to conduct a traffic engineering study before installing the cameras, such an irregularity does not allow a party to completely circumvent or ignore the administrative procedures. And after disposing of several of plaintiffs other arguments, the court explained that exhaustion of remedies can even be required before raising constitutional claims where, as here, the legislature has provided in the governing statute that the administrative remedies are the exclusive means for remedying issues related to the scheme.

The trial court's order is reversed. The appellate court doesn't address plaintiffs' arguments as to the constitutionality of the state law or the validity of the city red light camera ordinance.

Collective Bargaining: *Jefferson Cty. v. Stines*, No. 09-16-00058-CV, 2017 WL 2698094 (Tex. App.—Beaumont June 22, 2017).This is a collective bargaining case to compel arbitration where the Beaumont Court of Appeals reversed the denial of Jefferson County's plea to the jurisdiction and dismissed the case. Warning, if you want to read this opinion, it's 74 pages long, including the dissent. However, it provides an in-depth analysis of Chapter 174 language regarding contracting power, "police department" and governmental immunity. So the summary is also very long.

The Jefferson County Deputy Constables Association (association), Jefferson County (county) and various constable precincts entered into a collective bargaining agreement (agreement) set to end in September 2014. Article 25 of the Agreement governs disciplinary actions taken by the constable against deputy constables. Stines, a former deputy constable, filed suit against the county after he was later terminated. Stines attempted to compel binding arbitration. The county refused. Stines sought a declaratory judgment and mandamus action to compel arbitration. The county filed a plea to the jurisdiction which the trial court denied. At the same time, the trial court granted Stines's motion for summary judgment and ordered arbitration. The county appealed.

The court first noted that a trial court's prejudgment letter (which occurred in this case) is not necessarily competent evidence of the basis for its judgment. However, the trial court in the present case did not enter formal findings of fact and conclusions of law specifically relating to its ruling on the county's plea to the jurisdiction so did not disclaim the basis set forth in the letter ruling. As a result, it will hold the trial court to the basis of the judgment spelled out in the letter.

Next, the court held a governmental entity such as the county retains immunity from suit even after entering into a contract, absent a statutory waiver. The Uniform Declaratory Judgment Act (UDJA) is not a blanket waiver of immunity. Claims, including those for declaratory judgment, that seek to establish a contract's validity, to enforce performance under a contract, or to impose contractual liabilities are claims that attempt to control state action by imposing liability on the entity. Such claims are barred by governmental immunity. Stines's UDJA claims "as to the applicability of Chapter 174 of the [Texas Local Government Code] to deputy constables" are actually claims for a declaration of the parties' contractual rights and obligations under the agreement. They are therefore barred. Likewise, Stines's mandamus claim seeks to compel the county to perform its alleged contractual obligations and are barred.

Chapter 174 of the Texas Local Government Code, titled the Fire and Police Employee Relations Act (FPERA), waives immunity for proper claims brought within its scope. As a general rule, "Texas law prohibits a state political subdivision from collective bargaining with public employees" unless there is express statutory authority. So the question becomes whether FPERA encompasses the constables. The FPERA specifically permits "fire fighters, police officers, or both . . . to organize and bargain collectively with their public employer . . ." upon the adoption of the FPERA by a political subdivision. For a claim to be brought under Section 174.251 of FPERA, it must, among other things, be asserted by

"a party aggrieved by an act or omission of the other party that relates to the rights or duties under [the FPERA.]"

The county asserts constables are not "police officers" under the definition of FPERA. The FPERA defines the term "police officer" to mean "a paid employee who is sworn, certified, and full-time, and who regularly serves in a professional law enforcement capacity in the police department of a political subdivision." There is a current split in the Texas circuits as to whether constables are a "police department" of a political subdivision. Most courts acknowledge that a sheriff's office is a "police department" as the wording notes a single entity with a department of enforcement. However, as to constables' offices, the San Antonio Court of Appeals says they are not a "police department" and the Corpus Christi Court of Appeals says they are. After an extremely lengthy statutory construction analysis, the court held the phrase "the police department of a political subdivision" refers only to the department of law enforcement officers of a political subdivision who provide "essential and emergency" services to the public and whose absence due to strikes, lockouts, work stoppages, or slowdowns would cause injury to "the health, safety, and welfare of the public." The sheriff's department is the department charged with such duties and obligations and is a "police department" but a constable's office is not. While constables are law enforcement individuals, the court finds the county constable's office is not a department of a county that provides the critical, emergency services to the public that are contemplated by the FPERA. Given the statutory duties of a constable's office, in comparison with the sheriff's department, a strike of the constable's would not pose a health and safety hazard to the general public. Stines's claims under FPERA are therefore barred by governmental immunity.

The court recognized that its holding essentially means the county entered into a contract it was not legally allowed to sign. But that does not waive immunity. Even if the language in the agreement on which Stines relied could properly be construed as an agreement between the parties to waive the county's immunity from suit, it does not constitute a waiver of immunity by the legislature. Only the legislature, not contracting parties, may waive immunity. Therefore, the court declined to recognize the "waiver-by-conduct" exception to immunity from suit. However, even if that were not the case, and jurisdiction existed, Subchapter E's arbitration provisions of FPERA apply only to arbitration for collective bargaining impasses; they do not apply to arbitration of disputes pursuant to the contractual terms of a fully-negotiated collective bargaining agreement. As a result, Stines would still lose as the arbitration provision does not apply to termination disputes.

Justice Johnson dissented. She believes constables' offices do qualify as a "police department" of the county and are entitled to collectively bargain. She asserts the majority opinion focused on the statutory duties and did not examine the record to determine if the constables factually performed such duties. She also disagreed with the lengthy statutory construction analysis.*

Forcible Detainer: *Lewis v. City of Conroe*, No. 13-15-00464-CV, 2017 WL 2608292 (Tex. App.—Corpus Christi June 15, 2017) (mem. op.). When the city purchased a property from a school district it discovered the house was occupied by the Lewis family. The Lewis family

asserted they obtained a property interest through adverse possession. They settled with an agreement that the city would lease the property to the family for a specified time then provide an offer to purchase to the Lewis' family at the end of the lease. The Lewis family did not comply with their lease agreement and the city filed a forcible entry and detainer eviction suit. The court ruled for the city and the Lewis family appealed.

The family asserted the city failed to establish the elements for eviction. However, the court noted they failed to properly brief and list record references in their appellate briefs. The court refused to consider their arguments due to a lack of proper briefing. As a result, the eviction was upheld.*

Eminent Domain: *State v. Luby's Fuddruckers Restaurants, LLC*, No. 13-16-00173-CV, 2017 WL 2608296 (Tex. App—Corpus Christi June 15, 2017) (mem. op.). The State of Texas filed this condemnation suit to take a strip of the cafeteria's parking lot for purposes of a project to widen U.S. 290. Both parties agreed that the taking also rendered the cafeteria incapable of operating in its current form; with a substantial amount of parking gone, the cafeteria could not comply with a Houston parking ordinance. The cafeteria further contended that the parking situation was inadequate to meet customer demand and would also breach a restriction in the cafeteria's deed which set minimum parking requirements. The special commissioner's court awarded $1,795,853 and both parties appealed. The State asserted the cafeteria could not obtain lost profits but the court order overruled the objection. Both parties objected to the jury charge for different reasons. A jury returned an award of $1,334,183, which was the amount proposed by the State and its experts. Separately, the jury also awarded $480,000 for lost profits, which was the amount proposed by the cafeteria.

If a governmental entity condemns only part of a tract, adequate compensation is required for both the part taken and any resulting damage to the remainder, but not all types of damages are compensable. Texas law allows income from a business operated on the property to be considered in a condemnation proceeding in two situations: (1) when the taking, damaging, or destruction of property causes a material and substantial interference with access to one's property, lost profits may be awarded as damages; and (2) when only a part of the land has been taken, evidence relating to lost profits is admissible, not as a separate item of damage, but as a means of demonstrating the taking's effect on the market value of the remaining land and improvements. The State argued since this was a full taking, instead of a partial taking, the lost profit analysis was inapplicable. A property's ability to foster profit is "an inherent factor [in comparable sales approach] because a willing buyer will normally pay more for a tract containing a profitable enterprise than for a similar tract containing an unprofitable enterprise. Thus, '[t]he ability of a business to make a profit is reflected in its market value.'" Because "the profitability of [the] restaurant was a factor in arriving at the 'market value' of the property, it cannot also recover for lost profits." The court reversed the jury award for lost profits. The cafeteria's challenges to the jury charge were not sustained. Not all statements of law belong in a jury charge and broad statements are preferred to avoid improper comments on the weight of the evidence.

<u>June 2017</u>

Note: Included cases are from May 11, 2017 through June 10, 2017.

Nuisance/Statute of Limitations: *Town of Dish v. Atmos Energy Corp.*, No. 15-0613, 2017 WL 2200342 (Tex. May 19, 2017). The Town of Dish and various residents (Dish) sued Atmos Energy Corporation, Enbridge Gathering L.P., Energy Transfer Fuel, L.P., Enterprise Texas Pipeline, L.L.C., and Texas Midstream Gas Services, L.L.C. (energy defendants) for nuisance, trespass, and decrease in property value because of the noise and odor emanating from a facility that had four natural-gas compressor stations and a metering station (Ponder station) just outside of the town of Dish. Dish began complaining as early as 2006 about the noise and odor, but did not actually sue until 2011 when the Ponder station was completed. The trial court granted various motions that ultimately dismissed the claims. DISH appealed. The Amarillo Court of Appeals reversed the trial court on limitations, holding that the energy companies failed to prove as a matter of law that Dish's claims accrued before February 28, 2009.

The Texas Supreme Court reversed the court of appeals and reinstated the trial court's take-nothing judgment because the statute of limitations had lapsed. The court first addressed Enterprise's argument that its metering facility did not contribute to the Ponder station's alleged noise and odor. The court stated that Enterprise presented evidence showing its facilities are fundamentally different from the other energy defendants, and that a metering station cannot be a source of the Dish's complaints. Since Dish did not present any evidence to rebut Enterprise's contentions it was not one of the alleged offenders, the trial court properly granted Enterprise's summary judgment motion.

Then the Court addressed the statute of limitations argument. The statute of limitations in a nuisance claim is two years. Dish sued on February 28, 2011. Therefore, Dish's alleged claims must have accrued no earlier than February 28, 2009. A cause of action accrues "when a wrongful act causes a legal injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur." *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003). The court reviewed the history of Dish concerning and bringing the issue of the noise and odor to the energy defendants including a town meeting in 2006, an investigation by the Texas Commission on Environmental Quality in April 2008, and the Wolf Eagle Report (report) that informed Dish of the presence of a high concentration of carcinogenic and neurotoxin compounds in the ambient air near and/or on residential properties. Though Dish stated that until the issuance of the report, they did not feel the noise and odor had reached the level of nuisance and trespass, Dish felt that the nature of these substances was inherently undiscoverable until after years of vociferous complaints. The court did not agree stating that "an accrual date must be based on objective evidence, not bare, subjective attestations[,]" and the report showed Dish what they were already on notice of their claims well before they received the report. Therefore, the energy defendants proved that any legal injury suffered by Dish had commenced at the latest, in May 2008, and since there was no objective evidence showing that the complained-of condition worsened in the summer of 2009, the statute of limitations had accrued more than two years before Dish sued.

Employment Law: *Green v. Dallas Cty. Schs.*, No. 16-0214, 2017 WL 1968829 (Tex. May 12, 2017). The Texas Supreme Court reversed the court of appeals opinion and sustained the trial

court judgment holding a school employee established he was terminated because of his disability.

Paul Green worked as a bus monitor for Dallas County Schools (DCS), transporting children with special needs. When hired he listed he had a congestive heart failure but was on medication. This apparently did not pose a problem for the school. However, a few years later he began taking another set of drugs. While on a route, he asked the driver to stop so he could use the bathroom. The driver did not stop but told him to wait until a better time during the route. However, Green involuntarily urinated in his pants. The driver reported the incident to his supervisor. Green was terminated for engaging in unprofessional conduct while on the bus. Green sued for disability discrimination. After a six-day trial, a jury returned a verdict in favor of Green. At the intermediary court of appeals, the court held no evidence existed he was terminated because of his congestive heart failure. Green appealed asserting the disability was urinary incontinence.

Under the Texas Labor Code, a disability includes any "physical impairment that substantially limits at least one major life activity." TEX. LABOR CODE § 21.002(6). A "major life activity" includes "the operation of a major bodily function, including . . . functions of the . . . bladder." Green had a disability. The trial court left it to the jury to decide what that disability was. Specifically, the charge explained that Green claimed that DCS "terminated his employment because of his disabilities, the side effects of his disabilities, and/or the side effects of the medications he takes to treat his disabilities." And while DCS disputed his disability was a motive for the termination, it expressly agreed he was terminated for urinating on the bus. DCS did not seek an instruction that the only disability was the congestive heart failure and, as already noted, such an instruction would have been incorrect. As worded, the jury charge did not forbid the jury from finding that Green's urinary incontinence was itself a disability. At least three bus drivers testified they knew Green had urinary incontinence but believed it was due to the medication he was taking. Since no one disputes that DCS fired Green because of his urinary incontinence, the jury verdict must be upheld.*

Unemployment Compensation: *Harris Cty. Appraisal Dist. v. Texas Workforce Comm'n*, No. 16-0346, 2017 WL 2023616 (Tex. May 12, 2017). The Texas Supreme Court held appraisal review board members can be "employees" for purposes of the Texas Unemployment Compensation Act.

The Harris County Appraisal District (HCAD) is statutorily tasked with appraising property for ad valorem property taxes. Appeals of an HCAD appraisal go to the Appraisal Review Board (board), which is an administrative entity with statutory authority to modify property appraisal valuations. Members of the board are appointed to two-year terms by the local administrative law judge. The board members are paid by the hour for the time they work, which is determined by how many people contest their appraisals. Several members of the board served the maximum terms then filed for unemployment benefits with the Texas Workforce Commission (TWC). HCAD challenged the filing. TWC determined the members were employees entitled to benefits, the trial court disagreed and set the TWC order aside, but the court of appeals reversed. It held the employment analysis is a factual one entailing a twenty-factor test derived from the common law and adopted by the TWC centering on control and direction. HCAD appealed.

A trial court reviews the TWC's decision regarding unemployment benefits by trial de novo to determine whether substantial evidence supports the TWC's ruling. Under the Texas Unemployment Compensation Act (TUCA), a presumption of employment arises upon a showing that an individual is paid for performing services. This presumption is rebutted only if the alleged employer carries its burden of showing that the individual's service is "free from control or direction under the contract and in fact." Notably, control of the content of a worker's decision is not a necessary element in establishing employment status. Thus, board members are not precluded from meeting the definition of "employment" simply because they exercise independent judgment and HCAD cannot change their decision. HCAD further argues that the Tax Code prevails over the Labor Code because it is the more specific statute and directly addresses appraisal review board members rather than employees in general. It also prohibits board members from communicating or being normal employees of HCAD. The court drew an analogy from the *Colorado County v. Staff* decision (Chapter 614 does not require a victim to be the one writing a complaint against a police officer before disciplinary action is allowed). It held that while similar words may be used in different statutes, they are not identical and the statutes have different purposes. It is the purpose which controls. The Tax Code simply governs who can serve on an appraisal review board, not what "employment" means for purposes of TUCA. The relevant question under TUCA is whether there is an employment relationship. Because the Tax Code lacks a definition of "employment" or "employee" and serves a different purpose than TUCA, the Tax Code's references to the term "employee" do not control TUCA's determination of employment status. The court then went through the twenty factors. It ultimately determined substantial evidence existed to support a finding HCAD maintained enough control for the members to be considered employees under the TUCA. Additionally, the court rejected HCAD's argument the members qualified as members of the judiciary to warrant the TUCA exception for judges.*****

Sex Offender Residency Restriction Ordinance: *City of Westworth Village v. Texas Voices for Reason & Justice, Inc*., No. 02-16-00106-CV, 2017 WL 2178870 (Tex. App.—Fort Worth May 18, 2017). This is an appeal from the denial of a plea to the jurisdiction. The underlying case involves an association attempting to hold a city ordinance invalid.

The city adopted an ordinance prohibiting any person required to register as a sex offender from establishing a residence within 1,000 feet of any location where children commonly gather. A violation of the ordinance constitutes a misdemeanor. The plaintiff, a Texas nonprofit corporation known as the Texas Voices for Reason and Justice, Inc. (TVRJ), sued the city on behalf of its members, claiming the ordinance violates the state constitution. The city filed a plea to the jurisdiction which was denied. The city appealed.

Texas law provides that in certain circumstances, an association may have standing to sue on behalf of its members. However, no Texas court has addressed the precise question of what analysis applies to determine whether an organization has members for purposes of associational standing. Borrowing from federal case law, the court held the question turns on whether the organization is a traditional voluntary membership organization. If it is then no further inquiry into the issue of membership is necessary. If not, the association must establish it is the functional equivalent of a traditional voluntary membership organization. TVRJ's certificate of

formation affirmatively reflects that it was formed as a Texas nonprofit corporation that would have no members. Therefore, the certificate of formation conclusively proves that no person had membership rights at the time it filed this suit. The burden rests with TVRJ to establish it is the functional equivalent of a traditional membership organization. An organization is a functional equivalent if: (1) it serves a specialized segment of the community; (2) its constituents possess all of the "indicia of membership" in an organization; and (3) its fortunes are closely tied to those of its constituency. The evidence TVRJ provided are its amended bylaws and an affidavit of its purpose. TVRJ's general members do not have any direct influence or control over who serves as a TVRJ director. TVRJ's general members are not required to contribute financially to the organization; rather, any financial contributions they make are purely voluntary. The court analyzed the evidence and the involvement of the general members and determined they possessed none of the indicia of membership. As a result, the association has no standing to challenge the city's ordinance. Given that conclusion, no amendments to the pleadings can cure this defect. The court reversed the denial, granted the plea, and rendered judgment for the city.*****

Takings: *City of Rollingwood v. Brainard,* No. 03-17-00077-CV, 2017 WL 2417388 (Tex. App—Austin May 31, 2017) (mem. op.). In this flooding/takings case, the Third Court of Appeals affirmed the denial of the City of Rollingwood's plea to the jurisdiction.

As part of a condition for approval of a plat application, the city required John Andrews to dedicate a drainage easement on his property and install a "flume" to convey storm water down an adjoining street, Pickwick Lane. Before the city approved the application, Andrews sold part of his property to the Brainards. The Brainards' property is situated downhill from what remained of the Andrews property and from Pickwick Lane. The city approved Andrews' application with respect to the remaining Andrews' property. The Preheims then purchased the Andrews lot uphill from the Brainards. The Preheims' plans to build a large house would increase the impervious cover. The Preheims' engineers called for the construction of a detention pond to hold the excess runoff, which the city approved. The Brainards allege that after the construction of the Preheims' system their yard frequently flooded and became unfit for their desired purposes. The Brainards sued the city for a takings (inverse condemnation) and nuisance. The city filed a plea to the jurisdiction, which the trial court denied.

While the city asserted it took no affirmative action other than approving a permit (which cannot attribute liability by itself), the Brainards alleged the city and Preheims colluded in a conspiracy to intentionally divert water onto the Brainards' property. According to the city, the record demonstrated it relied on engineers' reports when it granted the Preheims' permit applications. The city contends the reports show the detention pond would prevent flooding, not cause it. However, the Brainards submitted an affidavit from an engineer stating the report actually indicated the runoff would impact the Brainards. He then discussed another engineering report the Preheims submitted to the city in October 2012 indicating the broken/altered curbs would cause a drainage impact. In other words, the Brainards created a fact question as to the city's intent and knowledge as to causing the flooding. Further, there is evidence that the city actually altered the curb to allow more water to flow out of Pickwick Lane to the Brainards' property. They concluded alleviating street flooding is a "benefit" qualifying as a public use under a takings analysis. As a result, the plea was properly denied.*****

Governmental Immunity: *Becky, Ltd. v. City of Cedar Park*, No. 03-15-00259-CV, 2017 WL 2224527 (Tex. App.—Austin May 19, 2017) (mem. op.). Becky, Ltd. (Becky) owns a landlocked tract of land in the City of Cedar Park; Milestone sought to develop an adjacent lot. The city entered into a unified development agreement with Milestone which included a dedicated and partial construction of a right-of-way roadway extension. Becky brought suit in May 2014 against Milestone, the city, and the city council members challenging the validity of the agreement. The city defendants filed pleas to the jurisdiction which the trial court granted. Becky appealed.

Becky asserts that pursuant to local ordinance, the city and its council members "waived" Milestone's obligation to comply with the city's subdivision ordinance and circumvented the planning and zoning commission (P&Z) and its ability to grant variances for plat approval. Becky seeks a declaration that this alleged ultra vires act renders the agreement void. However, the agreement concerns the public right-of-way extension and does not directly address the platting process for Milestone's planned development. The terms state that the approval of the construction plans for Phase 1 of the right-of-way was not a condition precedent to Milestone proceeding with its construction of the subdivision development. The ordinances have an express exception for acquisition of public right-of-way. After utilizing statutory construction principles to define "acquisition" the court held the agreement falls squarely within the exceptions listed in the ordinances. The ordinances also do not restrict public improvement decisions to the P&Z only and the commission acts only as an advisory board to the city council. Additionally, none of Becky's "declarations" for relief involve the validity of an ordinance, so immunity is not waived under the Uniform Declaratory Judgment Act.*****

Vested Rights: *Draper v. Guernsey*, No. 03-16-00745-CV, 2017 WL 2224540 (Tex. App—Austin May 18, 2017) (mem. op.). In 1985, Travis County approved a site-development permit for a three-story office development on real property currently owned by Draper. In 2011, Draper filed what he termed a Chapter 245 determination seeking to develop the property with an exemption from the City of Austin's current development regulations based on a plat recorded in 1872 and the 1985 Travis County permit. The city denied the application. Draper filed suit seeking a declaration he possessed a vested right under chapter 245 of the Local Government Code to develop the property under regulations in effect in 1985. His petition also sought damages for allegations of fraudulent misrepresentation, perjury, breach of contract, and a host of other claims. The trial court granted the city's summary judgment motion and Draper appealed.

Under Chapter 245 of the Local Government Code, once an application for the first permit required to complete a property-development project is filed with a regulatory agency, the agency's regulations applicable to the project are effectively "frozen" as they would relate to that project. However, an application filed with one agency does not provide "fair notice" to a different agency and is thus not sufficient to establish vested rights from the second agency's regulations. Filing an application for a permit with Travis County prior to annexation did not entitle him to Chapter 245 rights with respect to city's requirements after the property was annexed. As a result, his vested rights claims fail. To avoid this, Draper argued Texas Local Government Code Section 43.002 states a city may not, after annexing an area, prohibit a person from continuing to use land in a manner previously authorized prior to annexation. According to

Draper, this requires his vested rights to be recognized. However, Section 43.002 was not enacted until 1999, well after Draper's property was annexed by the city in 1985. Statutes are presumed to be prospective in their operation unless expressly made retrospective. TEX. GOV'T CODE § 311.022. As a result, the argument fails and the court did not need to address whether the term "use" in Section 43.002 applies to an undeveloped use. Further, the court held Draper may not assert ultra-vires claims against Guernsey, the planning director, under the circumstances alleged because an official's exercise of discretion does not constitute an ultra vires act. The city retains immunity from any remaining claims. The remaining non-claim issues raised by Draper, including breaching a Rule 11 agreement and perjury, are not properly before the court. The case was dismissed.*

Subject-Matter Jurisdiction: *City of New Braunfels v. Stop the Ordinances Please*, No. 03-14-00198-CV, 2017 WL 2224526 (Tex. App—Austin May 18, 2017). The Austin Court of Appeals dismissed a challenge to a city ordinance which prohibited the use of coolers and containers while utilizing the Guadalupe and Comal Rivers.

This is the third appellate opinion generated around the underlying dispute. In essence, the city, whose municipal limits encompass long stretches of both rivers, passed a series of ordinances limiting the use of drink coolers and containers while citizens floated down either river on tubes or other flotation devices. The plaintiffs, Stop the Ordinances Please (STOP), are an unincorporated association primarily made up of business owners who sell coolers and containers or cater to river tourists. The court went through, briefly, the holdings in the first two opinions, which principally focused on the pleadings. After remand, the parties conducted discovery and filed opposing motions for summary judgment. The trial court granted STOP's motion and denied the city's motion. The district court also permanently enjoined the city from enforcing, spending public funds, or collecting fines or any other penalties. The city appealed.

Historically, Texas courts are only to consider constitutional challenges to penal enactments within the context of a criminal proceeding. There is no dispute the ordinances under challenge are considered to be "penal" in nature. An exception to this principal is a civil challenge that the ordinance is: (1) unconstitutional; and (2) said to threaten "irreparable injury to vested property rights." "A right is 'vested' when it 'has some definitive, rather than merely potential existence.'" And while citizens may have a property right in the physical coolers, this right does not automatically translate to a "vested property right" to use said property a particular way or in a particular location. A vendor who owns such property as inventory retains the property right, but not the vested right to sell such property in any particular manner he sees fit. Texas courts have found, in the past, that an adverse economic impact on a business constitutes harm to a vested property right, at least in circumstances where the business lacks an adequate remedy through criminal proceedings due to the deterrent effect on customers. However, interpreting subsequent Texas Supreme Court precedent, the court held "irreparable injury to vested property rights" must flow from the actual or imminent enforcement of the penal statute against the claimant. It is questionable whether the owners' businesses could ever meet the requirement, considering that the ordinances do not directly criminalize their trade in coolers or disposable containers. The summary-judgment evidence conclusively established that the district court did not have subject-matter jurisdiction over the claims. There is a lot more to the opinion and many

nuances, but cramming all of that into a case summary defeats the purpose of it being a summary.*

Tort Claims Act: *City of Austin v. Vykoukal*, No. 03-16-00261-CV, 2017 WL 2062259 (Tex. App—Austin May 10, 2017) (mem. op.). Nicole Vykoukal and Eliezer Perez brought suit against the City of Austin and Austin Energy for personal injury damages from a motor vehicle accident. In this interlocutory appeal, the city challenged the trial court's denial of its plea to the jurisdiction and motion for summary judgment based on governmental immunity.

Vykoukal and Perez were riding their bicycles and came to a portion of the bike lane that was partially encroached by overgrown vegetation. The two stopped in the bike lane in the shade provided by the vegetation to have a drink of water. While they were stopped, a driver approached, crossed over into the bike lane, and struck Vykoukal and Perez. Both were seriously injured. Vykoukal and Perez sued the city alleging that the overgrown vegetation constituted a special defect and the city breached its duty to maintain the right of way and keep it free from obstruction. The city argued that it retained its immunity because overgrown vegetation was not a special defect and that Vykoukal and Perez could not amend their pleadings to establish a premises defect.

The court recognized that the Texas Tort Claims Act provides a limited waiver of immunity for premises and special defects. Under Texas law, whether the defect is a premises or special defect depends on the duty of care owed to the entrant by the governmental unit. For a special defect, the governmental unit owes the claimant the same duty of care that a private landowner owes an invitee. Under this standard, the governmental unit must use ordinary care to reduce or eliminate an unreasonable risk of harm, which the governmental unit knew about or should have known. The court considers the following factors when determining whether a condition is a special defect: (1) the size of the condition; (2) whether the condition unexpectedly and physically impairs a vehicle's ability to travel on the road; (3) whether the condition presents some unusual quality apart from the ordinary course of events; and (4) whether the condition presents an unexpected and unusual danger. The court concluded that the driver did not take the ordinary course of travel, and thus, was not an ordinary user. Because the driver was not an ordinary user, the overgrown vegetation was not a special defect. Additionally, the court concluded that the vegetation posed neither an unexpected or unusual danger to nor impeded the travel of Vykoukal and Perez.

The court reversed the trial court's order denying the city's plea to the jurisdiction and dismissed Vykoukal's and Perez's claims against the city for lack of subject matter jurisdiction.

Employment Law: *Carter v. City of Garland*, No. 05-16-00903-CV, 2017 WL 2118785 (Tex. App.—Dallas May 16, 2017) (mem. op.). This is a race discrimination and retaliation case where the Dallas Court of Appeals affirmed the dismissal of the plaintiff's claims on summary judgment.

Carter was a police officer with the city who applied for three different positions and was not selected. Carter filed a complaint with the Equal Employment Opportunity Commission, and

then filed a suit alleging race discrimination and retaliation. The city filed traditional and no-evidence summary judgment motions which the trial court granted. Carter appealed.

Section 21.254 of the Texas Labor Code provides: "Within 60 days after the date a notice of the right to file a civil action is received, the complainant may bring a civil action against the respondent." The court has interpreted this sixty-day provision to require not just the filing of a lawsuit but service of process as well. Summary judgment evidence established that sixty-three days elapsed between the time Carter received notice of his right to sue and when he filed suit. The city was served still later. While Carter attempts to argue on appeal he did file the petition timely, he did not attach evidence or make that argument at the trial court. On appeal, Carter points to evidence already contained within the court's record, specifically an affidavit attached to another filing, as grounds for his appellate arguments. However, again, he did not incorporate such evidence into his summary judgment arguments and the trial court is not required to consider evidence which is not identified. As a result, the city established its limitations defense and the trial court order is affirmed.*

Recreational Use Statute: *City of Canadian v. Klein*, No. 07-15-00452-CV, 2017 WL 2334233 (Tex. App.—Amarillo May 22, 2017) (mem. op.). This is an interlocutory appeal by the city from an order denying its plea to the jurisdiction where the Amarillo Court of Appeals reverses and renders judgment dismissing the suit.

In this case, a minor (E.K.) was injured at the city swimming pool. The pool manager (Burns) witnessed a lifeguard (C.D.) "double bouncing" other lifeguards and swimmers on the diving board. The pool rules allowed only one person on the diving board. E.K. was injured during his turn on the diving board with C.D.. Klein asserts that the negligence of two employees (Burns and C.D.) caused E.K.'s injury.

When premises are open to the public for recreational activities, the recreational use statute elevates the burden of proof required to invoke the Tort Claims Act's immunity waiver by requiring proof of gross negligence, malicious intent, or bad faith. The court concludes that the evidence shows only a failure to supervise by Burns but no negligent conduct. Likewise, the court finds that the evidence raises no issue that C.D. was aware of the extreme risk to E.K. but did not care (i.e., C.D. was not grossly negligent).

Because the city's tort liability under the recreational use statute depends on proof of gross negligence committed in a use of tangible personal property, the court finds that the Tort Claims Act does not waive the city's immunity from Klein's suit. The trial court's order denying the city's plea to the jurisdiction is reversed and Klein's suit is dismissed.

Recreational Use Statute: *City of Texas City v. Woodkins*, No. 14-15-01053-CV, 2017 WL 2367515 (Tex. App.—Houston [14th Dist.] May 31, 2017) (mem. op.). Joyce Woodkins sued the City of Texas City after she was injured when she crashed her bike into an uncovered and unmarked trench on a sidewalk in the city-owned sports complex. Woodkins alleged negligence and gross negligence, and claimed that the city waived its immunity under the Texas Tort Claims Act and the recreational use statute because the case involved premise and special defects, among other things. The city filed a plea to the jurisdiction, arguing that it did not owe Woodkins

a greater degree of care than that owed to a trespasser, and therefore the city could be liable only if it was grossly negligent or acted with malicious intent or bad faith. The trial court denied the city's plea to the jurisdiction, and the city appealed.

On appeal, the court held that the city failed to meet its burden to show there was no genuine issue of material fact as to its actual knowledge of the alleged defect. Woodkins claimed that the city was grossly negligent in removing the metal plate from the trench or allowing the dangerous condition to exist, and that the city had actual awareness of the condition. Having met her pleading burden, the burden shifted to the city to prove its entitlement to traditional summary judgment by disproving one of the essential jurisdictional facts alleged by Woodkins. The city offered affidavits from two city employees—the parks superintendent and recreation and tourism director. Both individuals concluded that they were unaware of any defective condition prior to Woodkins' injury. Looking at the language in both affidavits, the court found that the facts offered in the affidavits fell short of negating the actual-knowledge component of gross-negligence as a matter of law.

The city also argued that because it had an ordinance prohibiting a person older than twelve years of age from riding a bicycle on any sidewalk in the city, that it was not foreseeable that a person would ride a bicycle on the sidewalk across the uncovered drain. However, the court found that the city's ordinance did not relieve it of the duty to refrain from gross negligence. According to the court, even assuming that Woodkins rode her bicycle in violation of the ordinance, she would be owed no less than the duty owed a trespasser under the common law.

The court affirmed the trial court's order denying the city's plea to the jurisdiction.

May 2017

Note: Included cases are from April 11, 2017 through May 10, 2017.

Tort Claims Act: *City of Austin v. Frame*, No. 03-15-00292-CV, 2017 WL 1832485 (Tex. App.—Austin May 5, 2017) (mem. op.). The Austin Court of Appeals withdrew the opinion and judgment in this case that was originally decided May 27, 2016, and substituted this opinion.

This recreational use/personal injury case involved Joseph Rosales jumping the curb and driving onto a hike-and-bike trail. In so doing, his vehicle and debris struck and killed Colonel Griffith and injured Diana Pulido. The appellees (Griffith's estate and Pulido) sued the city for, among other things, failure to construct a guardrail or barrier for a known danger, which was allegedly a failure to carry out a ministerial act. The city filed a plea to the jurisdiction, which was denied. The city appealed.

The sole issue on appeal is whether the appellees' allegations concern discretionary roadway design, as the city contends, or a negligent failure to implement a previously formulated policy, as the appellees contend. Texas courts have generally found that actions and decisions implicating social, economic, or political considerations are discretionary while those that do not involve these concerns are operational- or maintenance-level. The court analyzed the facts and policies alleged. It held that even if the city had a policy to fix identified hazards, ". . . it does not

necessarily follow that the City's failure to address this particular hazard was negligent policy implementation for which immunity is waived. The policy that the appellees describe does not mandate the construction of a guardrail or barrier with sufficient precision to make that action nondiscretionary. . . . Rather, it requires the City to balance social and economic concerns and devise a plan to address each specific identified hazard. This demands a level of judgment . . ." which equates to discretionary actions. Further, even if the city had made a specific decision to modify the area, "immunity does not vanish where a governmental entity has decided to change the design of a public work but has not yet implemented that change." The court reversed the district court's order denying the plea and rendered judgment dismissing the case.*****

Contracts: *Hughes v. Tom Green Cty.,* No. 03-16-00132-CV, 2017 WL 1534203 (Tex. App.—Austin Apr. 20, 2017) (mem. op.). This is a breach of contract case where the Austin Court of Appeals affirmed the granting of the county's plea to the jurisdiction.

Hughes's uncle, Duwain E. Hughes, Jr., by his will, gave the county his home and remainder estate in order to establish a branch of the Tom Green County Library, and required it be named after him. He also gave Southern Methodist University (SMU) certain mineral interests in order to establish an endowment chair in the SMU English Department. The mineral interests exceeded the amounts needed to maintain the chair. The county intervened in a probate application asserting it was entitled to the excess funds since it was bequest the residuary estate. Charles Hughes, as heir, intervened alleging the "residuary estate" bequest had lapsed. The parties entered into a mediated settlement agreement (MPA) where Hughes and the county agreed to split equally the excess proceeds. The county used its funds to remodel the current library, but did not name it after Duwain Hughes. Charles Hughes sued alleging a breach of the MPA. The county filed a plea to the jurisdiction, which the trial court granted. Hughes appealed.

The court first held the city did not waive immunity by intervening in the SMU litigation. The voluntary litigation exception to immunity is limited to claims related to and defensive to claims asserted by the governmental entity. In other words, a governmental entity waives its immunity only as to claims asserted by the party it has sued. Here, the county did not make a decision to seek affirmative relief from Hughes and asserted no claims to which Hughes filed related defensive claims. The county filed its plea in intervention against SMU before Hughes was a party. When Hughes did become a party, it was only against SMU, not the county. Therefore the MPA is not related to an underlying claim for which immunity is waived. The county also did not waive immunity by conduct. The trial court properly granted the plea.*****

Contracts: *Romulus Group, Inc. v. City of Dallas,* No. 05-16-00088-CV, 2017 WL 1684631 (Tex. App.—Dallas May 2, 2017) (mem. op.). This is a breach of contract case where the Dallas Court of Appeals reversed an order granting the city's plea to the jurisdiction.

Romulus won a bid for a 36 month contract to provide temporary clerical and professional labor. Romulus provided employees within 25 categories of job types. Romulus asserts the city began redesignating employees into a catch-all category of "clerical not listed" and paying a lower rate below the contracted rate for the true category. The city eventually terminated the contract under the termination clause. Romulus made a demand for $1.6 million in underpayment due to the unauthorized redesignations. When the city refused to pay, Romulus

sued for breach of contract under Chapter 271 of the Texas Local Government Code. The city filed a plea to the jurisdiction which the trial court granted. Romulus appealed.

The city argued Romulus provided employees who did not fit into any of the 25 categories willingly, so they could not complain they were not paid under the contract. Romulus asserts the employees did fall under the contract and the city's redesignation gives an appearance of extra-contractual services. The court found the city's argument does nothing more than create a fact issue on the merits of the underlying claim. Further, Romulus pled that when it came time to pay for services provided, the city paid at a lower rate than allowed by contract. By way of example, a coordinator II position was bid at $23/hour, but the evidence submitted shows the city modified the pay to $21.92/hour, which was calculated by paying $18 an hour times 21.8% as a mark-up. Such indicates the city underpaid as to what was due and owed in order to establish jurisdiction. The city also asserted Romulus failed to provide timely notice of a claim. However, the court of appeals has previously concluded the notice provision in Section 271.154 is an affirmative defense to the merits of the suit, not a matter that deprives the trial court of subject matter jurisdiction. The order granting the plea was reversed and the case remanded.*

Employment: *Smith v. City of Garland*, No. 05-16-00474-CV, 2017 WL 1439699 (Tex. App.—Dallas Apr. 20, 2017). This dispute involves promotions in the City of Garland fire department. Originally, the city sued Randy Smith and many other city fire fighters after allegations of cheating on civil service examinations that qualified employees for a promotion. The city voluntarily dismissed Smith from the suit because he did not take the exam in question. However, he intervened and sued the city. The city moved to strike Smith's intervention and for entry of final judgment. The trial court granted the motion, and Smith appealed.

Smith asserts three issues in his appeal: (1) he had standing to file a motion for new trial, so his notice of appeal was timely; (2) the trial court abused its discretion in striking his intervention; and (3) the trial court's judgment is void for lack of subject matter jurisdiction.

The Dallas Court of Appeals concluded that Smith's motion for new trial did extend the appellate timetable, his notice of appeal was timely, and the court had jurisdiction over the appeal. As for Smith's second issue, the court noted that there was no administrative remedy for the city to exhaust before seeking declaratory judgment because no party sought to challenge grades and the method of grading of the civil service exam or any commission decision. Instead, the dispute was over how to fill resulting vacancies in accordance with civil service law. Thus, the court concluded that the trial court properly exercised its jurisdiction over the suit.

In deciding Smith's last issue, the court concluded that Smith failed to demonstrate a justiciable interest in the controversy since he did not take the test in question. Nor did he show that he would have or should have been promoted. The court also concluded that Smith's intervention would complicate the case, and he failed to establish that the intervention was essential to protect his interest. Thus, the court overruled each of Smith's issues and affirmed the trial court's decision.

Employment: *Jackson v. Port Arthur Indep. Sch. Dist.*, No. 09-15-00227-CV, 2017 WL 1425589 (Tex. App.—Beaumont Apr. 20, 2017) (mem. op.). In this employment dispute

asserting constitutional claims, the Beaumont Court of Appeals affirmed the granting of the school district's plea to the jurisdiction.

Jackson had an employment contract with the Port Arthur Independent School District. She was a principal at a local elementary school and was reassigned as an assistant principal at a high school. Jackson asserts the move violated her rights to free speech and interfered with her property rights. Jackson alleges that Superintendent Brown demoted her based on criticisms that she made about the matters at the elementary school involving issues of staffing, scheduling, learning plans, and services. Brown and the district filed pleas to the jurisdiction, which the trial court granted. Jackson appealed.

Jackson's contract shows she was subject both to being reassigned to other schools and to being reclassified into other positions. As a result, she did not have a property interest in her principal position via contract. Jackson's pleadings contain very few facts to support her claim that she was otherwise deprived of any constitutionally protected rights. To survive a plea to the jurisdiction, a plaintiff is required to plead a facially valid constitutional claim. Jackson did not provide the trial court with any evidence to rebut the fact that her contract allowed her to be reassigned and to be reclassified. Further, before any substantive or procedural due process rights attach, a plaintiff must show that they have either a liberty interest or a property interest that is entitled to constitutional protection. Here there are none. Jackson failed to plead sufficient facts to show that her speech was protected under either the state or federal constitutions. Her complaints were employee based, not citizen based and not on matters of public concern. As a result, the trial court properly granted the pleas.*****

Substandard Structures: *House of Praise Ministries, Inc. v. City of Red Oak*, No. 10-15-00148-CV, 2017 WL 1750066 (Tex. App.—Waco May 3, 2017) (mem. op). In this case, House of Praise Ministries, Inc. (HOP) appeals a district court order granting the city's plea to the jurisdiction.

HOP bought property in the city to build a new church. A brick structure and mobile home park were on the property when HOP bought it. Instead of building a church, HOP paid on the property loan with rentals from the mobile home park. In 2013, the city's municipal court held a hearing, found the property substandard, and ordered HOP to make specified repairs or demolish and remove the brick structure and mobile home park. HOP filed a motion for new trial which was overruled by operation of law and then filed a petition for review in district court. The city filed a plea to the jurisdiction. The district court granted the city's plea. HOP appealed, raising complaints about the trial court's evidentiary rulings and attacking the order on the merit of the plea to the jurisdiction.

HOP's complaints about the trial court's evidentiary rulings were overruled. As for the plea to the jurisdiction, the city alleged that HOP failed to timely perfect its appeal of the municipal court's order as required by Local Government Code 214.0012(a) (requiring a petition be filed within 30 calendar days). The time for filing a verified petition is triggered when a copy of the final order is delivered in one of three methods: personal delivery, delivery by mail, or mailing by first class mail. And personal delivery means hand-delivered, in person, to the owner, lienholder, or mortgagee of record aggrieved by the order. Even though HOP had a copy of the

order, the city did not provide proof of delivery of the signed final order by any of the three alternative methods provided in statute. Thus, HOP's amended verified petition was filed within 30 days and the trial court's jurisdiction was invoked. (In addition to being timely filed, Section 214.0012(a) requires a verified petition set forth why the final order is illegal and specify the grounds of the illegality. The Waco Court of Appeals held that this language is not a jurisdictional prerequisite.)

HOP also attacked the trial court's order on the plea to the jurisdiction claiming it had sufficiently pled regulatory taking and due process violations. HOP asserted the city's *enforcement* of code violations (not the code provisions themselves) constitutes a regulatory taking. As a result, the court held HOP did not assert a claim for a regulatory taking over which the trial court would have jurisdiction. HOP's procedural due process claim was essentially that more detailed descriptions of the violations should have been given by the city. This is not a valid procedural due process claim and the trial court didn't err in granting the plea to the jurisdiction on this claim.

While neither the regulatory taking nor due process claims can be cured through amended pleadings, the court of appeals held that HOP must be given the chance to amend its substantive due process pleadings to allege a sufficient claim. If HOP is unable to assert facts that make a prima facie case for a violation of substantive due process, the trial court may then properly dismiss HOP's claim on a plea to the jurisdiction. The trial court's judgment is affirmed in part and reversed and remanded in part.

Recreational Use: *Jackson v. City of Texas City*, No. 13-16-00179-CV, 2017 WL 1455091 (Tex. App.—Corpus Christi Apr. 20, 2017) (mem. op.). This is a wrongful death action where the Corpus Christi Court of Appeals affirmed the granting of the city's plea to the jurisdiction under the recreational use statute.

Plaintiffs and their daughter Kaloni attended a family reunion at a city park. During the event, Kaloni wandered into the pond and drowned. It was undisputed that the city had posted at least one warning sign near the ponds which read "No Swimming, Beware of Snakes." The parties also agreed there were no barriers or fences along the edge of the pond nearest to the playground. The parents sued the city alleging negligence and gross negligence. The city filed a plea to the jurisdiction and later supplemented. The trial court granted the plea and the plaintiffs appealed.

To defeat immunity in a premises case, it must also be established that the government-defendant had a duty to warn or protect the injured party. A landowner has no duty to warn or protect recreational users from open and obvious defects or conditions. Under the gross negligence theory, there must be legally sufficient evidence that the city had actual, subjective awareness that conditions at the pond involved an extreme degree of risk but nevertheless was consciously indifferent to the rights, safety, or welfare of others. After analyzing the facts, the court held the city carried its initial burden by presenting evidence which negated the subjective-awareness component. A pond is open and obvious as a possible danger. The city was unaware of any risk which went beyond that a reasonable recreational user would be aware. Further, the posting of

warning signs is usually sufficient to avoid a finding of conscious indifference. As a result, the trial court properly granted the plea.*

Texas Tort Claims Act: *Reaves v. City of Corpus Christi,* No. 13-15-00057-CV (Tex. App—Corpus Christi Apr. 13, 2017). This is a Texas Tort Claims Act police chase case where the Corpus Christi Court of Appeals reversed the granting of a Rule 91a motion to dismiss based on immunity. This is a 35 page opinion which goes through a detailed analysis of Rule 91a.

A city police officer initiated a high-speed chase against a suspect, Balboa, who eventually ran a stop sign and collided with plaintiff's vehicle. Instead of filing a plea to the jurisdiction, the city filed a Rule 91a motion to dismiss based on immunity, which the trial court granted. Reaves appealed.

The city's motion is based on the assertion it was Balboa who collided with the plaintiff's vehicle, so there is no nexus with any city employee's operation of a motor vehicle. The court may not consider evidence in ruling on a 91a motion and must decide the motion based solely on the pleading. Rule 91a declares that the trial court "must" grant or deny the motion within 45 days after it is filed. The court first considered the plaintiff's argument the order was signed by the court 159 days after the filing of the motion, well beyond the 45 days. However, even though the words "must" and "shall" are mandatory, failure to comply does not equate to jurisdiction.

Other circuits have held Rule 91a issues are not jurisdictional; this court agreed, but based on different reasoning. The legislature prescribed no consequence for non-compliance. Unlike other rules which overrule a motion as a matter of law, Rule 91a remains silent. The court felt this was a clear indication non-compliance is non-jurisdictional to the movant. Additionally, correction by mandamus was an effective way to serve the purpose of Rule 91a. Next, the court held that since the trial court could not consider evidence in considering the motion, the fact the trial court engaged in evidentiary inquiries relating to the motion was error. After a detailed analysis and review of other court holdings, the court ruled a Rule 91a motion is not a plea to the jurisdiction. While some similarities in the standards exist, they are separate procedures. After analyzing the plaintiff's petition under the standard the court adopted (retaining a fair notice standard and rejecting a factual standard), it held the pleadings, taken as true and liberally construed, were sufficient to allege an appropriate causal connection to trigger jurisdiction.*

Public Improvement Districts: *MHI P'ship, Ltd. v. City of League City*, No. 14-15-00457-CV, 2017 WL 1450563 (Tex. App.—Houston [14th Dist.] Apr. 18, 2017). In 1997, the City of League City established the League City Public Improvement District Number One (PID). The city adopted a service and assessment plan by ordinance, which included a specific assessment rate to fund both phase one and phase two of the public improvement projects. Later, the city commissioned an audit to reconcile the actual cost of phase one and phase two, which ultimately showed that the city collected more than $1.7 million in excess funds after the developer had been fully reimbursed.

After the city filed a petition in interpleader in the trial court, the trial court ultimately rendered a final judgment ordering that the funds available for each property be distributed to the legal title owners of each property appearing of record as of the date of the trial court's judgment. MHI

Partnership, Ltd., who had purchased various residential lots located within the PID, appealed the trial court's judgment.

On appeal, the court initially found that there was no trial evidence to support several findings of fact by the trial court. Additionally, the court held that the trial court erred in concluding that the refund amount for each property should be distributed to the holder of record title to each property as of the date of the trial court's judgment. The language in the city's ordinance provided that the excess assessments should be refunded to "parties having an interest in such funds." Using this language, the court reasoned that the interpleaded funds should be distributed for each property to the property owners who paid the assessments at the initial rates based on a pro rata formula instead of going to the property owner as of the date of the trial court's judgment, as those owners may not have actually paid any of the assessments. The appellate court reversed the trial court's judgment and remanded for further proceedings.

April 2017

Note: Included cases are from March 11, 2017 through April 10, 2017.

Sovereign Immunity: *Engelman Irrigation Dist. v. Shields Bros., Inc*., No. 15-0188, 2017 WL 1042933 (Tex. Mar. 17, 2017). The Texas Supreme Court issued this opinion holding a governmental entity's sovereign immunity does not protect it from a monetary judgment which has become final, even if the judgment allowed claims for which the entity is immune.

In 1992, Shields Brothers, Inc. (Shields) sued the Engelman Irrigation District (Engelman), a governmental entity, alleging Engelman had breached a contract to deliver water to Shields. Engelman contended the trial court lacked subject-matter jurisdiction because Engelman had sovereign immunity and the "sue and be sued" language in its incorporation authorization did not waive immunity. The "sue and be sued" language dispute was not ultimately decided in the courts at that time. After going up and down the court of appeals, Engelman lost at trial and the jury awarded damages. This became the *Engelman I* judgment. Engelman did not pay the judgment but sought permission to declare bankruptcy under the Texas Water Code. The Texas Commission on Environmental Quality denied the request and the district court judgment resulting from that denial is the *Engelman II* judgment. While *Engelman II* was on appeal, the Texas Supreme Court issued its opinion in *Tooke v. City of Mexia* holding the "sue and be sued" language in many statutes and incorporation documents is insufficient to waive sovereign immunity. In 2010, Engelman brought the pending suit (*Engelman III*) seeking relief that since it was always immune and the trial court always lacked subject matter jurisdiction, Engelman should not have to pay the *Engelman I* judgment arguing it was void. The trial court and court of appeals disagreed, holding the final judgment could not be collaterally attacked, and Engelman appealed to the Texas Supreme Court.

The Texas Supreme Court starts out by analyzing long held judicial principals including that a judicial decision, like *Tooke*, generally applies retroactively. But retroactive application of a judicial decision does not generally extend to allow reopening a final judgment where all direct appeals have been exhausted. The principles of *res judicata* precluded collateral attacks on final judgments. "The reason for not allowing collateral attack on a final judgment is that such an

attack would run squarely against principles of *res judicata* that are essential to a rational and functioning judicial system." "For any rational and workable judicial system, at some point litigation must come to an end, so that parties can go on with their lives and the system can move on to other disputes." However, the court also analyzed the fact that *res judicata* does not normally apply when the original tribunal lacked subject-matter jurisdiction. In order to resolve these competing issues, the court held sovereign immunity only "implicates" subject-matter jurisdiction, not that it involved subject-matter jurisdiction for all purposes. Immunity may implicate, yet does not necessarily equate, to an absence of subject-matter jurisdiction, because "sovereign immunity includes concerns about both subject-matter and personal jurisdiction but is identical to neither." Adopting provisions of the Second Restatement of Judgments the court held "[w]hen a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation." It is one thing to recognize immunity as equating to jurisdiction when dealing with a defense of an existing claim and preventing the waiver of that defense, and quite another to jettison the principles behind the finality of a judgment as a whole. Next, the court addressed Engelman's separation of powers argument and held its decision does not preclude the legislature from waiving immunity, but merely cements the judicial process of ending litigation through a final judgment not subject to attack. In fact, the court held the reverse of Engelman's argument is true in that if the legislature had passed a statute adopting *Tooke* and making it retroactive in a way which allowed collateral attack on final judgments, such a statute would cross the separation of powers line into the judicial process. Finally, the court addressed Engelman's equity arguments and held "recognizing the continuing validity of the *Engelman I* judgment is hardly so inequitable or contrary to the public interest as to compel abandoning principles of *res judicata* and allowing Engelman to avoid that judgment." As a result, Engelman cannot collaterally attack a final judgment on the basis of immunity.*

Whistleblower Act: *Barnett v. City of Southside Place*, No. 01-16-00026-CV, 2017 WL 976067 (Tex. App.—Houston [1st Dist.] Mar. 14, 2017). This is a Texas Whistleblower Act case where the Fourteenth Court of Appeals affirmed the granting of the city's plea to the jurisdiction.

Barnett worked as a detective for the City of Southside Place. Barnett informed the chief of police (McCarty) that he had learned the city implemented an illegal ticket quota system. McCarty included that information in a written memorandum to the Texas Rangers summarizing a list of his grievances against City Manager David Moss. He also forwarded the Texas Ranger memo to the mayor. After Barnett and McCarty met with Texas Ranger Jeff Owls, Barnett resigned but with an effective date of two weeks later. One day later, the city suspended McCarty pending an investigation for McCarty's conduct on a variety of matters. Several days later, the city manager informed Barnet of allegations of misconduct against him and provided him the opportunity to respond. The city manager advised that, if true, the allegations would constitute grounds for termination. Barnett refused to respond. One day before Barnett's resignation became effective the city manager terminated Barnett for insubordination. Barnett's F-5 separation notice to the state reflected a "dishonorable discharge." Barnett sued under the Texas Whistleblower Act (Act). The city filed a plea to the jurisdiction which the trial court granted. Barnett appealed.

To allege a violation of the Act, a plaintiff must allege that an adverse employment action was taken because he, in good faith, reported a violation of law by the employer to an appropriate law enforcement authority. The city argues Barnett failed to raise a fact question as to whether: (1) he suffered an adverse employment action; and (2) the action taken was because he reported a violation of law. However, "Barnett's assertion that his employment was terminated is belied by his own sworn testimony that he voluntarily resigned before he received the termination letter." Barnett testified when Moss instructed him to answer written questions and cooperate in the internal investigation, Barnett told him that he had already resigned and that he no longer considered himself an employee of the city. "Although the termination letter might otherwise qualify as an adverse employment action under a different set of facts, it does not here because there is undisputed evidence that Barnett had already resigned his employment . . . ." Further, under the definitions in the Act, a "public employee" means someone paid to perform services for the entity. The Act thus prohibits adverse personnel actions that affect the benefits flowing from an ongoing employment relationship. Since he was no longer employed when the F-5 was issued, it is not an adverse personnel action under the Act.

Finally, Barnett asserted he did not have adequate time for discovery. To preserve an issue for appeal, the record must show the complaint was made to the trial court by a timely request, objection, or motion, and that the trial court: (1) ruled on the request, objection, or motion, either expressly or implicitly; or (2) refused to rule, and the complaining party objected to that refusal. The trial court reset schedules and discovery to accommodate various case management aspects and witness availability for depositions. Since Barnett did not object to any of the resets, Barnett did not properly raise the issue before the trial court. The plea was properly granted.*

Sovereign Immunity: *City of Denton v. Rushing*, No. 02-16-00330-CV, 2017 WL 1103530 (Tex. App.—Fort Worth Mar. 23, 2017) (mem. op.). In this breach of contract case, the Fort Worth Court of Appeals affirmed the denial of the city's plea to the jurisdiction and held the city's policy manual waived immunity for the plaintiffs' claims for unpaid on-call time. The implication being when a city manager creates a policy, regardless of whether city council sees it, that creation can waive immunity from suit and bind the city in contract.

The city, by ordinance, delegated to the city Manager the ability to create policies. The city manager's office created a policy manual including Policy No. 106.06 which defined and established the city's pay practices and administrative procedures for response time and on-call duty. It sets forth the pay the city will provide employees for on-call services and includes charts setting forth specific examples of how on-call pay is calculated. All three plaintiffs worked week-long on-call shifts in addition to their normal work hours at least one week per month for several years. Plaintiffs allege a unilateral employment contract was created when the city, as the employer, created the policy and agreed to pay them a specific rate in exchange for working on-call shifts. The city filed a plea to the jurisdiction and alternative summary judgment arguing it retained immunity because the policy cannot create an authorized contract and its disclaimers preclude a determination of a contract. The trial court denied the plea and the city appealed.

The court analyzed the language of Texas Local Government Code Section 271.152, which waives immunity for written authorized contracts for goods or services in certain situations. It went point-by-point and element-by-element. It held a unilateral contract is created when a

promisor promises a benefit if a promisee performs. The policy, according to the court, created such a contract notwithstanding the disclaimer. The reason being the unilateral contract was not a contract altering the employment-at-will or employment relationship, but was a contract only to pay a certain amount for on-call time if such on-call time was worked. So, it's a limited contract only to on-call payment for performance. The court also determined the contract was "executed" because the city manager had authority to create it, after approval by an executive committee, and put the policy in the policy manual. It was therefore properly approved and adopted by the city. The court then held the constitutional prohibition against paying additional compensation for services already performed does not apply because it promised to pay prior to performance. As a result, it is not immune from a breach of contract claim and the plea was properly denied.*

Public Information: ***University of Tex. Sys. v. Paxton*****, No. 03-14-00801-CV, 2017 WL 1315374 (Tex. App.—Austin Apr. 7, 2017).** This is a Texas Public Information Act (PIA) case where the Austin Court of Appeals reversed a summary judgment granted to the Texas Attorney General (AG) and remanded the case back to the trial court.

The university received a PIA request seeking several categories of information related to three separate social-science research studies being conducted by a tenured faculty member regarding terrorism. The university released some information but requested an AG opinion for the remainder of the responsive information. Specific to this lawsuit, the university asserted the identities of the human research subjects who participated in the study are protected from disclosure by Government Code Section 552.101 (matters confidential as a matter of law – constitutional and common-law privacy). The AG disagreed and determined the identities must be released, noting no highly embarrassing facts exist within the information to keep private. The university filed suit against the AG under the PIA. The parties filed cross-motions for summary judgment. The trial court granted the AG's motion. The university appealed the granting of the AG's motion but did not appeal the denial of its motion. Instead, it sought a remand for trial.

The court noted the AG's arguments were not that of a traditional summary judgment, but that once the AG determined no embarrassing facts exist, the university must completely negate the lack of embarrassing facts, not simply raise a fact question on the subject. The court rejected this argument outright. The Texas Supreme Court has not limited the type of information that is highly intimate or embarrassing and such a status may be fact driven. The studies were designed to explain and predict individual actions related to terrorism and counterterrorism by using laboratory experiments with human subjects. The experiments captured feelings and behaviors of individuals that they may not otherwise share with the public and their participation could lead to negative inferences about why they were selected, chose to participate, or what their responses may have been. In a footnote, the court also noted in the context of common-law privacy, a party's expectation of privacy (encapsulated in a confidentiality agreement) before choosing to participate in a study is relevant to whether a reasonable person of ordinary sensibilities would find disclosure to be an embarrassing fact. Fact-specific questions related to the research study exist, including whether details in the results could be tied to the subjects' identities, whether a reasonable person would view participation in the study as embarrassing, and the potential consequences. While the university bears the burden at trial to establish the exception, its burden

of proof to counter a summary judgment is merely to raise a fact question. The order granting the AG's motion is reversed and the case is remanded.*

Purchasing: *City of Austin v. Utility Assoc., Inc.,* No. 03-16-00586, 2017 WL 1130397 (Tex. App—Austin Mar. 24, 2017). In this consolidated case, the court reversed the denial of a plea to the jurisdiction and dissolved an injunction order that prevented the City of Austin from utilizing its contract for body-worn cameras.

The city bid and executed a $12.2 million contract with Taser International, Inc., (Taser) for body-worn cameras. One of the vendors that had submitted a competing proposal, Utility Associates, Inc., (Utility) accused city staff of manipulating or corrupting the selection process to favor Taser. Utility sought an injunction to prohibit the purchase and to invalidate the award. The city defendants filed various pleas to the jurisdiction. The trial court granted the pleas as to the declaratory judgment claims and attorney's fees but denied them as to other claims. The trial court granted the temporary injunction in order to preserve the status quo. The city appealed.

The parties' arguments centered largely on the extent to which plaintiffs' claims were authorized under a provision of Chapter 252 of the Local Government Code regarding competitive bidding requirements. Section 252.061 states, in part, "[i]f the contract is made without compliance with this chapter, it is void and the performance of the contract, including the payment of any money under the contract, may be enjoined…." The court considered the plaintiffs' public policy arguments and dispelled them, including the argument that attorney's fees are proper and essential weapons against public corruption. The legislature is best suited to waive immunity, not the judiciary. Next, the court held the plaintiffs are unable to establish an *ultra vires* claim against city officials under Chapter 252 as the definition of "responsible offeror" has too much discretion built in to be ministerial. While Chapter 252 may require the city defendants weigh specified considerations and factors, it does not limit their discretion in the outcome of these judgment calls. Additionally, *ultra vires* claims are only prospective, not retrospective. The basis of the plaintiffs' claims is to retrospectively undo an award, not to prevent awards in the future. As a result, the plaintiffs failed to allege a proper *ultra vires* claim. The injunction issued by the trial court exceeded the power for enjoining under Chapter 252. Additionally, Utility did not establish it was qualified to act as a plaintiff under Chapter 252, which was the only applicable waiver of immunity mentioned in the pleadings. The pleas should have been granted in their entirety.*

Takings: *Guadalupe Cty. v. Woodlake Partners, Inc.,* No. 04-16-00253-CV, 2017 WL 1337650 (Tex. App.—San Antonio Apr. 12, 2017) (mem. op.). This is a takings case where the San Antonio Court of Appeals reversed the denial of the county's plea to the jurisdiction holding the county is not liable for property values affected by Federal Emergency Management Agency (FEMA) flood plain adjustments.

In 2007, FEMA revised its 100-year Flood Insurance Rate Maps for Guadalupe County. After the revisions, several lots owned by defendants (Woodlake Partners) became encompassed in a floodway and floodplain. The Woodlake Partners later submitted a development permit application. However, the county asserted the applicant was now required to submit no-rise

documentation from an engineer and that federal regulations required the construction to have the lowest floor elevated to or above the base flood level. Woodlake Partners filed suit asserting a taking and that the new regulations would require new homes to be built 8-12 feet above ground, which was against their restrictive covenants. They also asserted it would negatively affect home values. The county filed summary judgment motions, asserting immunity. Both were denied by the trial court and the county appealed.

The court first held the county's no-evidence motion for summary judgment is improper as such motions should not be utilized to establish a lack of jurisdiction given the change in burden shifting. However, in the traditional summary judgment motion, the county challenges the existence of jurisdictional facts, including causation. Woodlake Partners based their takings claim on the portions of the county's order requiring them to obtain a no-rise certificate and construct the houses 8-12 feet above ground level. However, these same requirements appear in the federal regulations setting forth flood plain management criteria for flood-prone areas, specifically 44 C.F.R. § 60.3. Additionally, uncontested evidence established that if the county had not adopted the FEMA maps, neither flood insurance nor financing would be available for homes built on the lots. Woodlake Partners was required to follow the same federal standards regardless, so the county's adoption of the FEMA maps did not cause any damage. And since the inverse condemnation claim was the only pled waiver of sovereign immunity, the trial court should have dismissed the claims.*

TML Intergovernmental Risk Pool: *Housing Auth. of the City of Alice v. Texas Mun. League Joint Self-Insurance Fund*, No. 04-15-00813-CV, 2017 WL 1161195 (Tex. App.—San Antonio Mar. 29, 2017) (mem. op.). In this dispute over the amount owed for storm damage to property, the Housing Authority of the City of Alice (authority) sued its insurer, the Texas Municipal League Intergovernmental Risk Pool (IRP). The authority purchased an insurance policy from IRP to protect against damage to the authority's property. The policy required that the authority provide signed and sworn proof of loss to IRP within 60 days.

In May 2014, a storm damaged 120 of the authority's properties. The authority reported the damage to IRP the next day by telephone. The authority sent a signed, written report of the loss two days later. IRP determined that the authority's reimbursable loss minus their deductible was $429,143.72 and tendered payment to the authority. The authority disputed the proposed amount of loss and asserted that its actual losses exceeded $3 million. To support this claim, the authority attempted to invoke the appraisal process described in their insurance policy. IRP resisted this, and the authority sued for breach of contract.

The trial court denied the authority's motion for summary judgment and granted IRP's partial summary judgment motion. The authority filed a notice of appeal. The court of appeals looked at whether the summary judgment order was final, and thus, whether the court had appellate jurisdiction. The authority claimed that the case involved only two parties and one cause of action, so the trial court's order inescapably disposed of its breach of contract claim and the entire case.

The court of appeals concluded that the trial court's order granted only a partial summary judgment and does not dispose of the entire case. Because there was no other circumstance making the order final, the order was interlocutory. Thus, the appellate court did not have jurisdiction and dismissed the appeal for want of jurisdiction.

Immunity/Contracts: ***City of Leon Valley Econ. Dev. Corp. v. Little,*** **No. 04-15-00488-CV, 2017 WL 1066829 (Tex. App—San Antonio Mar. 22, 2017) (mem. op.).** This is a breach of contract case where the Fourth Court of Appeals reversed a jury award against an economic development corporation, holding it was immune from liability.

This is the second appellate case involving this dispute. The Leon Valley Economic Development Corporation (EDC), which is a Type B EDC, agreed to purchase certain land from Little as part of a project if the EDC could obtain specific financing terms from a state loan program. When the EDC was unable to obtain the financing under the conditions and time frame it desired it did not purchase and Little sued claiming a breach of contract. The EDC originally filed a plea to the jurisdiction, but the court of appeals eventually determined that because it is a non-profit creature of statute, it was only entitled to immunity from liability, not immunity from suit. The interlocutory opinion remanded the case for trial. The jury found that Little and the EDC "intend[ed] to be bound by agreements relating to the Larry Little-Leon Valley Town Center project without the execution of a written agreement" and that the EDC "fail[ed] to comply with the agreement." The jury awarded over $100,000 for expenditures Little made in performance of the agreements, and over $1,400,000.00 in lost past and future profits. The EDC appealed.

The court reiterated a Type B EDC is not immune from suit for breach of contract. However, Texas Local Government Code Section 505.106(a) states that an EDC is not liable for damages arising from pursuing a project. Actions taken pursuant to the Development Corporation Act of 1979 (Act) to develop projects authorized by the Act are governmental functions. While the EDC approved the state's loan commitment component as part of the project, the Act requires such projects also be approved by the city council by resolution. The city council did not approve the project in time for the loan amount to be authorized by the state program. After analyzing the project and undisputed actions of the EDC, the court held it was performing the governmental functions of a Type B corporation in its dealings with Little and the project and proposed expenditures were authorized by the Act. As a result, it is immune from liability for all damages. While Little argued the acts of the EDC were not for public benefit, but his own private benefit, the court did not find the argument persuasive. The project was intended and expected to revitalize the specific town center area, create jobs, and expand the tax base. Moreover, the Act expressly provides that a corporation may provide direct financial incentives to a private business enterprise, provided there is a performance agreement. As a result, the jury award is reversed and judgment was rendered in favor of the EDC.*****

Immunity/Contracts: ***JAMRO Ltd. v. City of San Antonio,*** **No. 04-16-00307-CV, 2017 WL 993473 (Tex. App—San Antonio Mar. 15, 2017) (mem. op.).** This is, in essence, a breach of

contract claim against the City of San Antonio where the Fourth Court of Appeals affirmed the granting of the city's plea to the jurisdiction.

The city created a tax increment reinvestment zone (TIRZ) to finance public improvements in the Palo Alto Trails Development (project). The city clerk received an application from JAMRO seeking the use of tax increment financing for the project, and the application proposed public improvements for the project. The ordinance included findings that the improvements in the TIRZ will significantly enhance the value of all the taxable real property in the TIRZ and was in compliance with Texas Tax Code Chapter 311. However, before the city signed any agreements with developers or the TIRZ board, the city terminated the zone. JAMRO sued for breach of contract and a host of other claims asserting the city was performing a proprietary function, that city officials were the ones who originally approached JAMRO about the zone and it relied upon the city's initial actions in creating the zone to its detriment. JAMRO made changes to its plans and specifications at the city's request and completed the construction but was never notified the TIRZ had been terminated. The city filed a plea to the jurisdiction which the trial court granted. JAMRO appealed.

Governmental functions are "functions enjoined on a municipality by law . . . to be exercised by the municipality in the interest of the general public." JAMRO argues the city's actions were proprietary because it sought out a specific private developer "to spur development in a specific area of town for the benefit of only those inhabitants and the City itself." Chapter 311 of the Texas Tax Code also known as the Tax Increment Financing Act gives the city the authority to create reinvestment zones to promote development or redevelopment of an area that would not occur solely through private investment. The city's ordinance allowed the use of tax increment financing for proposed public improvements for the project including streets, drainage, water, sewer, etc., which are statutorily defined as governmental acts. The city's ordinance contained express findings that the TIRZ met the criteria for a reinvestment zone contained within the Tax Code. After analyzing the Tax Code provisions and the definitions of governmental and proprietary functions contained within the Texas Tort Claims Act, the court held the city's actions were directed at financing public improvements and were governmental functions. The city was entitled to immunity, and the plea was properly granted.*****

Substandard Buildings: *Topletz v. City of Dallas*, No. 05-16-00741-CV, 2017 WL 1281393 (Tex. App.—Dallas Apr. 6, 2017) (mem. op.). This is an interlocutory appeal of the trial court's order granting a temporary injunction requested by the City of Dallas.

Dennis Topletz owns and/or manages approximately 225 rent houses in the city. The City of Dallas filed suit against Topletz for a variety of code violations and for maintaining nuisance properties. After the city filed its lawsuit, Topletz sent a letter to its tenants directing them to refuse to allow any city inspectors to enter their houses and to tell city inspectors there were no issues with their houses that needed to be addressed.

Two tenants, James Choice and Reneka Towers (tenants) intervened in the city's lawsuit alleging violations of the Texas Property Code and Deceptive Trade Practices Act. Shortly after the tenants intervened in the suit, Topletz sent someone to the tenants' homes asking them to sign

documents stating their rent house complied with city codes and the tenants were satisfied with the condition of the house. After this encounter, the tenants amended their petition to include an application for a temporary restraining order, temporary injunction, and permanent injunction. The city joined in the tenants' application for a temporary restraining order and a temporary injunction. The trial court granted the relief requested by the tenants. Topletz filed this interlocutory appeal.

Topletz raised six issues contending that the temporary injunction should be vacated or modified. The only issue the court found compelling was that the injunction improperly enjoins Topletz from engaging in lawful activities and exceeds the scope of the pleadings. Because the injunction would prohibit Topletz from raising rent, properly initiating eviction proceedings, or carrying out evictions, the court concluded that the injunction enjoins activities Topletz otherwise has a legal right to perform. Thus, the injunction is too broad. The court modified the temporary injunction order to delete the paragraph and affirmed all other portions of the trial court's temporary injunction order.

Takings: *City of Beaumont v. Ermis,* No. 09-15-00451-CV, 2017 WL 1178348 (Tex. App—Beaumont Mar. 30, 2017) (mem. op.). This is a demolition/takings case where the Beaumont Court of Appeals reversed the denial of the city's plea to the jurisdiction and dismissed the case.

Ermis acquired her property interest in 2002 Park Street in 2008. However, in 2007 the city found the structure to be a dangerous structure and scheduled it for demolition. The notice that the structure was dangerous came at multiple levels, including an initial order by a field supervisor, an ordinance signed by the acting mayor declaring the property dangerous and a public nuisance, formal mailed notice to the owners of the property in 2007 (the Seymours) that the building must be demolished within 10 days, and a signed certified mail return receipt from the Seymours noting it was received within one week of being mailed. In 2008, the Seymours conveyed the property to Brian Muldrow by special warranty deed. The city submitted evidence that Muldrow and Ermis were married at the time of the conveyance. In 2010, Ermis filed suit challenging the ordinance and declaration for demolition. The city filed a plea to the jurisdiction, which the trial court denied. Afterward, Ermis sued several city officials including the assistant city attorney who had done work on the matter. They appeared, joined the city's plea which was already denied, and requested the court rehear the plea. The court denied their requests and the city defendants appealed.

The court first declared the city's actions were governmental not proprietary, although they assert Ermis did not argue they were proprietary, so it's unclear why they brought it up. Ermis did not own the structure at 2002 Park Street when the city declared it dangerous and ordered that it be repaired or demolished. Her pleadings must establish she had standing to pursue her claims against the city for issuing Ordinance Number 07-105 and for the decisions she alleged the city made afterwards. Ermis' pleadings state she knew the city had declared the property a dangerous structure and ordered it demolished before she and her husband acquired the property. Under Texas law, the injury occurred when the city declared the structure on the property dangerous and ordered it demolished. At that time, Ermis did not own it and nothing indicates she acquired such a claim from the Seymours as part of the purchase. Her standing cannot rest on

rights owned by the Seymours in the absence of an express assignment. Subsequent purchasers of a property cannot recover for injuries to the property that were committed prior to their purchase. Further, given the facts alleged by Ermis, the standing deficiencies cannot be cured by repleading. But even if they could, she was already given ample opportunities to replead and did not. As a result, the plea should have been granted. The remainder of the opinion deals with whether the court had jurisdiction over the individual city defendants' appeals. The court holds it did not so dismissed the appeals to await an appealable order.

Justice Johnson concurred but wrote separately as she felt the proper analysis was to examine the language of Chapter 214 of the Texas Local Government Code, the mechanism used by Ermis to sue originally. Section 214.0012(a) states that "[a]ny owner, lien holder, or mortgagee of record of property . . . " may sue to declare an order illegal. Ermis does not qualify under the statute since she did not own the property at the time of the injury and therefore has no standing. Additionally, the owner has 30 days to seek judicial review, which did not happen. Further, Section 214.001(e) expressly provides notice of a demolition order is binding on subsequent grantees and lienholders if filed in the public records office, which occurred.*

Tort Claims: *Port of Beaumont Navigation Dist. v. McCarty,* No. 09-16-00356-CV, 2017 WL 1089604 (Tex. App.—Beaumont Mar. 23, 2017) (mem. op.). This is a Texas Tort Claims Act case where the Beaumont Court of Appeals reversed and rendered in part, and reversed and remanded in part a trial court's order on a plea to the jurisdiction.

Plaintiff McCarty alleges he was injured when the car he was driving was struck by a train at a crossing leased to the Port of Beaumont Navigation District (port). He asserts an unreasonably dangerous condition existed at the crossing, the port knew or should have known of the condition, and failed to properly warn him. Essentially he asserts the crossing is at a curve in the tracks and the crossing tracks and inadequate lighting did not let him see the oncoming train. The port filed a plea to the jurisdiction asserting it did not possess the premises, and that it merely held a roadway easement to the crossing. The port also asserted McCarty ran the stop signal and collided with the train. The trial court denied the plea and the port appealed.

In analyzing whether or not the pleadings indicate a special defect or an ordinary premise defect, the court held the question turned on the objective expectations of an ordinary user of the roadway. The court held: "In our opinion, an ordinary user on a road that crosses railroad tracks at a crossing equipped with a crossbuck—the familiar black-and-white, X-shaped signs that read 'RAILROAD CROSSING'—is expected to cross railroad tracks only after looking for trains to determine if any trains are in hazardous proximity to the crossing." The mere presence of railroad tracks and the transitory nature of a train passing through a crossing is unlike an obstruction or excavation and nothing indicates the tracks caused the accident. As a result, no special defect exists. Under a theory of a premise defect regarding the tracks or land, McCarty was unable to establish the port breached any duty. The evidence established signs were present near the crossing that provided warnings about the presence of trains at the crossing. As a result, the plea should have been granted as to all claims regarding the tracks. However, under an inadequate lighting premise defect theory, the court was not convinced the record established or negated such a claim. The court went over each way McCarty could establish a waiver and each way the port could negate it and held it could not establish either determination based on the

record. As a result, it remanded the inadequate lighting claim to allow McCarty the ability to replead.*

Immunity: *Hidalgo Cty. v. Herrera*, No. 13-15-00167-CV (Tex. App—Corpus Christi Mar. 30, 2017) (mem. op.). This is a wrongful death claim brought under the Texas Tort Claims Act where the Thirteenth Court of Appeals reversed the denial of the county's plea to the jurisdiction and dismissed the case.

This is a companion case, of sorts, to a case the Thirteenth Court of Appeals issued on March 14. The family of Reynaldo Herrera sued various entities resulting from a vehicle accident. A City of Pharr police officer attempted to make a traffic stop for violations of the Transportation Code, only to have the suspect vehicle flee. Various entities joined the pursuit as the fleeing vehicle went through different jurisdictions. The city's officer eventually disengaged his pursuit but the other agencies continued. While being pursued by law enforcement, including sheriff's deputies of Hidalgo County, the suspect vehicle struck Herrera's vehicle, killing him. The companion case was against the City of Pharr and resulted in the city defendants' plea being granted since the city's officer disengaged the pursuit prior to the collision with Herrera. This case encompasses the sheriff's deputy who followed the suspect vehicle until it struck Herrera's vehicle. The county filed a plea to the jurisdiction which the trial court denied. The county appealed.

The court first held that for purposes of analysis, it assumed (without deciding) that Herrera's death "arises from" the deputy's operation of a motor vehicle and that the need to apprehend the suspect presented an "emergency situation" under Texas Local Government Code Section 101.055(2). The county's immunity remains intact unless Deputy Ortega acted with reckless disregard for the safety of others. The court noted that any pursuit by police invariably creates some degree of risk to the public of a collision. Therefore, the mere fact a pursuit exists is not *ipso facto* evidence of reckless disregard. Next, Deputy Ortega's affidavit established undisputed evidence of key facts including the grounds on which the pursuing officers believed it was a possible narcotics transport, the high speed at which the suspect vehicle was being driven, the fact Ortega did not know the city police officer had disengaged pursuit, the distance the suspect was from Ortega and the road configurations preventing Ortega from quickly overtaking the suspect vehicle, the traffic conditions Ortega observed, and Ortega's actions while he searched for the suspect on dirt roads. While searching for the suspect vehicle Ortega came upon the accident scene after the collision had occurred. Witness affidavits established the collision occurred at least two minutes before Deputy Ortega arrived at the scene. To counter this evidence, the plaintiffs only submitted the report of a police expert stating Deputy Ortega should not have joined the pursuit if he knew it was only based on a minor traffic offense. However, the court determined the expert report offered only conclusory opinions regarding Ortega's deliberate indifference. Based on this uncontroverted evidence, the court held Ortega was not deliberately indifferent, but operated his vehicle with due regard for the safety of the public. As a result, the county retains its immunity and the plea should have been granted.*

Age Discrimination: *Kaplan v. City of Sugar Land*, No. 14-15-00381-CV, 2017 WL 1287994 (Tex. App.—Houston [14th Dist.] Apr. 6, 2017). In this case, Leon Kaplan sued the City of Sugar Land for age discrimination under the Texas Commission on Human Rights Act, Texas

Labor Code Section 21.051, after Kaplan's employment with the city was terminated in 2011. The city filed a motion for summary judgment on Kaplan's age-discrimination claim, and the trial court granted the city's motion and dismissed Kaplan's suit with prejudice. Kaplan appealed.

On appeal, the court found that the trial court properly granted summary judgment in favor of the city. According to the court, Kaplan established a prima facie case of age discrimination by showing that he was a member of the class protected by the Texas Commission on Human Rights Act, that he was qualified for his position, and that he was terminated from his position and replaced by someone younger than him. However, the court found that the city conclusively proved legitimate, nondiscriminatory reasons for firing Kaplan, as the city provided several instances of Kaplan's poor work performance. Further, Kaplan offered no evidence that the city's reasons for firing him were a pretext for unlawful discrimination. The court overruled Kaplan's sole issue on appeal and affirmed the trial court's final judgment.

March 2017

Note: Included cases are from February 11, 2017 through March 10, 2017.

Tort Claims: *City of San Antonio v. Cervantes*, No. 04-16-00569-CV, 2017 WL 685718 (Tex. App.—San Antonio Feb. 22, 2017). This is a Texas Tort Claims Act (Act) case in which the San Antonio Court of Appeals reversed the trial court's order denying the city's plea to the jurisdiction because the city lacked proper notice of the claim.

In 2015, Charles Cervantes filed suit against the city seeking damages for personal injuries alleged to be caused by a 2013 automobile accident with a City of San Antonio police officer. Cervantes' petition asserted the city had both formal and actual notice of the claim as required by Section 101.101 of the Texas Tort Claims Act. The city filed a plea to the jurisdiction, arguing that governmental immunity was not waived because Cervantes failed to give notice within the required six months from the date of the incident. The trial court denied the plea and the city filed an interlocutory appeal. As a preliminary matter, the court determined that without further evidence of actual consent between the parties, the city did not waive its right to appeal by signing the trial court's order.

As a condition of the waiver of immunity from suit, the Texas Tort Claims Act requires that a governmental unit obtain notice of a claim within six months of the incident giving rise to it. That requirement is satisfied if the governmental unit receives formal notice that reasonably describes the damage or injury, the time and place of the incident, and the incident itself. Citing an affidavit from a risk management officer in the city's finance department, the court concluded that the city did not receive formal notice of the claim. The Texas Tort Claims Act can also be satisfied if the governmental unit has *actual* notice of the injury, but it is not enough that the governmental unit should have known about the injury or should have investigated further. Here, the police reports after the accident showed that there were no injuries reported at the time. In conversations both at the scene and afterwards, Cervantes indicated that he was "shaken up" and "kind of numb," but that he believed he was "all right." The court held that there was no evidence to support a finding that the city had actual notice of an injury. Because Cervantes was

claiming personal injury and not property damage, the court also rejected his argument that the city's notice of the property damage from the accident met the Act's notice requirement. Finally, Cervantes argued that the statute gives rise to an absurd result for claimants whose injuries manifest long after the incident. The court declined to address the argument because there was no evidence that Cervantes was such a claimant. The court reversed the trial court's order denying the plea.

Takings: *Meuth v. City of Seguin*, No. 04-16-00183-CV, 2017 WL 603646 (Tex. App.—San Antonio Feb. 15, 2017) (mem. op.). This is a takings case in which the San Antonio Court of Appeals affirmed the trial court's order granting a plea to the jurisdiction by the City of Seguin.

Prior to the City of Seguin annexing the property in question, a storm water drainage culvert pipe was constructed underneath it. After the city annexed the property in 1965, the owner constructed a house on the land over the drainage pipe. The current property owner, Tracy Meuth, brought several claims focusing on the city's annexation of the property and use of the pipe without a drainage easement, the city's permitting of a home to be built over the property, and the city's failure to take action to repair the corroding pipe and associated soil instability underneath the house.

Meuth first alleged that the city's actions and inactions amounted to a taking of her property. A takings claim requires (1) an intentional governmental act; (2) that results in property being taken; (3) for public use. First, the court determined that neither annexation nor permitting of the house's construction resulted in her property being taken for public use, leaving the issue of the drainage pipe. The court noted similarities with *AN Collision Ctr. of Addison, Inc. v. Town of Addison*, 310 S.W.3d 191 (Tex. App.—Dallas 2010, no pet.), where the City of Addison purchased a previously constructed airport that drained rainwater onto AN Collision's property. The Dallas court, noting that the drainage was caused by the prior construction of the airport, and not by any act of the city, concluded that a failure to take corrective measures does not rise to the level of a taking. The court also compared Meuth's case to *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 799 (Tex. 2016*)*, where the Texas Supreme Court held that governments "cannot be expected to insure against every misfortune occurring within their geographical boundaries, on the theory that they could have done more. No government could afford such obligations." *Id.* at 804. Here, Meuth's taking claim focused on city's failure to take corrective measures to the water elsewhere and repair the corroding pipe. Because Meuth's claim was based on the city's failure to take action, the court held that the city's actions were not intentional and that the trial court properly granted the city's plea to the jurisdiction.

Meuth next alleged that the trial court erred in granting the city's plea to the jurisdiction on her declaratory judgment claim. The Texas Supreme Court has explained that "private parties cannot circumvent the State's sovereign immunity from suit by characterizing a suit for money damages, such as a contract dispute, as a declaratory-judgment claim." *City of Houston v. Williams*, 216 S.W.3d 827, 828-29 (Tex. 2007) (*quoting Texas Nat. Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 856 (Tex. 2002)). Here, the San Antonio court concluded that because Meuth's declaratory judgment sought to hold the city "liable" for costs of repair, it was also barred by the city's sovereign immunity.

For Meuth's remaining claims, including intentional and negligent misrepresentation, gross negligence, and fraud, Meuth contended the trial court erred in granting the city's plea to the jurisdiction because the city was engaged in a propriety function for which immunity was waived. The court, quoting the Dallas Court of Appeals, concluded that refusal to repair the pipe is a governmental function and that Meuth "cannot avoid the effect of governmental immunity by creative pleading." *Bell v. City of Dallas*, 146 S.W.3d 819, 821 (Tex. App.—Dallas 2004 no pet.).

Finally, Meuth argued in the alternative that the city should be stopped from asserting immunity based on promises it allegedly made to Meuth before she purchased the property. "The general rule has been in this state that when a unit of government is exercising its governmental powers, it is not subject to estoppel*." City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835 (Tex. 1970). There is a narrow and rarely-applied exception, however, for cases where justice requires the doctrine's application and where there is no interference with governmental functions. *Id.* at 836. The court held that the facts of the case did not present an exceptional case for estopping the city because: (1) the property owners, not the city, chose to build the house; (2) The Texas Supreme Court has held that a city is not estopped from asserting immunity even if a plaintiff acts in reliance of the city's representations; (3) the city received no benefit for its promises; and (4) unlike the only two occasions when the Texas Supreme Court has applied estoppel, the City of Seguin's misrepresentations did not extinguish Meuth's right to pursue her claim. The San Antonio court affirmed the trial court's order.

Referendum: *City of Plano v. Carruth,* No. 05-16-00573-CV, 2017 WL 711656 (Tex. App.—Dallas Feb. 23, 2017) (mem. op.). This is a referendum case where the Dallas Court of Appeals dismissed all but one of the plaintiffs' claims under a plea to the jurisdiction. It held the trial court had jurisdiction to consider the merits of the remaining mandamus/ultra-vires claim against the city secretary.

The city adopted a comprehensive plan and zoning ordinance. The city charter permits qualified voters to submit a referendum petition seeking reconsideration of and a public vote on any ordinance. Citizens submitted a referendum petition to change the ordinance adopting a change in the comprehensive plan to the city secretary. The city secretary did not act on the referendum petition. The city took the position that zoning and comprehensive plans have been removed from the referendum scope by state law. So no action is required. The citizens filed a writ of mandamus seeking a court order directing the city secretary to present the petition to the city council, and directing the city council to reconsider the comprehensive plan and submit it to popular vote if the council did not entirely repeal it. In addition, they sought a declaratory judgment that pending approval by the voters in a referendum the comprehensive plan is suspended. The city filed a plea to the jurisdiction which the trial court denied. The city appealed.

The court of appeals first held the plaintiffs properly plead jurisdiction against the city secretary. The court held there is a difference between the merits of whether mandamus should be issued with whether the trial court has jurisdiction to hear those merits. "Whether the trial court should ultimately grant or deny the petition for mandamus is not the issue before [the court]." Based on the language in the pleadings, the trial court has jurisdiction to hear the merits of the mandamus

claim. However, no mandamus can be issued against the remaining officials since the city secretary has not submitted the petition to the council. Their duty is not triggered unless and until the petition is submitted; therefore, the claims are not ripe. Finally, the court dismissed the declaratory judgment claims noting the charter does not provide that an ordinance is suspended immediately upon the filing of a referendum petition. The charter is clear that a suspension applies only upon the subject being submitted to popular vote. Until the council is presented with the petition and acts on it, any declaration about the effect of that action would be advisory. The trial court's order was affirmed in part and reversed in part.*

Workers' Compensation: *City of Dallas v. Ellis*, No. 05-16-00348-CV, 2017 WL 655927 (Tex. App.—Dallas Feb. 17, 2017) (mem. op.). This is a workers' compensation/statute of limitations/subrogation case in which the Dallas Court of Appeals reversed the trial court's order and rendered judgment granting the city's motion, thus reviving the dormant judgment.

In 1987, a City of Dallas employee was injured in an automobile accident during the course and scope of his employment. The city paid the workers' compensation benefits while Ellis, an attorney, represented the employee in his suit against the third-party tort feasors. The suit settled, and the settlement agreement provided for Ellis to resolve the city's workers' compensation lien. The city, however, was not paid and sued Ellis for conversion of the lien and obtained a judgment awarding the city about $87,000. A modified final judgment later reduced the total award to about $75,000.

In 2012, the city filed a motion to revive the judgment by scire facias. However, the motion mistakenly sought to revive the earlier judgment rather than the modified judgment. After a writ of execution issued two and a half years later, the city realized it had revived the wrong judgment. In 2015, the city filed its first amended motion to revive the modified judgment, acknowledging that a judgment becomes dormant after ten years of rendition and ordinarily can be revived by scire facias within two years from the date it became dormant. The city asserted that Section 16.061(a) of the Civil Practices and Remedy Code exempted it from the two-year statute of limitations. Ellis filed a response arguing that laches barred the city's motion, but did not challenge the city's statute of limitations assertion. The trial court revived the modified judgment.

Ellis filed a motion for reconsideration and motion for a new trial, reasserting his laches defense and arguing that Section 16.061 did not exempt the city from the statute of limitations because the underlying claim was based on a subrogation interest belonging to the city employee, not the city. After a hearing, the trial court granted Ellis' motion, vacated its order reviving the modified judgment, and ordered that the judgment is not revived and is considered dormant and unenforceable for all purposes. The city appealed, asserting that the ruling was in error because: (1) it established the necessary statutory requirements to revive the judgment; and (2) Ellis' defenses of limitations and laches do not apply.

The city argued that it met all statutory requirements to revive the judgment and therefore that the trial court lacked discretion to deny its motion. In determining whether to issue a writ of scire fascias reviving a judgment, the trial court shall consider the date of the underlying judgment, evidence of any writs of execution, and the date of the motion to revive the judgment scire

fascias. *Chen v. Nguyen*, No. 05–15–00077–CV, 2016 WL 258786, at *1 (Tex. App.—Dallas Jan. 21, 2016, no pet.). Though the city waited longer than two years to revive the judgment, it argued that it was exempt under Section 16.061, which provides "A right of action of this state or a political subdivision of the state, including ... an incorporated city ... is not barred by any of the following sections [of the Texas Civil Practice and Remedies Code]: ... 31.006 ...."

Here, Ellis argued that the city was asserting a subrogation interest in its employee's claim, not its own "right of action." The court disagreed, reasoning that the city was seeking to invoke Section 16.061 and avoid the statute of limitations for a judgment for conversion, resulting from the city's suit against the employee's attorney who refused to pay the city what it was owed. The city, therefore, was asserting its own "right of action" and an employee's, and was thus entitled to exemption.

The court also rejected Ellis' laches defense. Laches is an equitable defense that prevents a plaintiff from asserting a claim due to delay—"not mere delay but delay that works a disadvantage to another." *Culver v. Pickens*, 176 S.W.2d 167, 170-71 (Tex. 1943). Two essential elements must exist for laches to bar a claim: (1) a party's unreasonable delay in asserting a legal or equitable right; and (2) a good-faith change of position by another to his detriment because of the delay. *Rogers v. Ricane Enters*., Inc., 772 S.W.2d 76, 80 (Tex. 1989).

Ellis claimed he was harmed by the city's delay in reviving the judgment because: (1) post-judgment interest had more than tripled the original judgment; and (2) he is no longer eligible to serve on city boards or commissions. In support, Ellis asserted in his affidavit that he intended to pay the city but held the impression that the city was willing to negotiate and settle for less than the judgment. He also asserted that, as a result of his conflict with the city, he is no longer eligible to serve on board and commissions and has suffered damage to his personal and professional reputations. The court reviewed the affidavit and concluded that there was no evidence that Ellis had a good faith, detrimental change in his position because of the city's delay, nor evidence that the city offered to settle for less than it was owed. The damage to Ellis' reputation and increase in the amount owed in interest, the court said, was due solely to Ellis' failure to pay a judgment he owed. The court reversed the trial court order granting Ellis' motion for reconsideration and a new trial and granted the city's motion for scire facias.

Tax Suit: *City of El Paso v. Mountain Vista Builders, Inc.*, No. 08-15-00186-CV, 2017 WL 912154 (Tex. App.—El Paso March 8, 2017). The City of El Paso filed suit on May 18, 2009, over property taxes allegedly owed on multiple tracts of land that were or had been owned by Mountain Vista Builders, Incorporated (Mountain Vista). Mountain Vista answered with a general denial. Mountain Vista did not contest that it owned the properties at the relevant date for assessing taxes but, instead, presented testimony that it was developing the properties by building homes and then selling the tracts, arguing that any outstanding taxes due on the land should have been addressed before title passed to the buyers. Mountain Vista argued the title company should have been alerted to any notice of a tax deficiency prior to closing. Mountain Vista also argued its procedure of paying the taxes was hampered by the El Paso Central Appraisal District (CAD) which sent tax notices to the wrong business address; it learned of the claimed delinquent tax bills from its bank in 2011 after all the tracts had been sold and the title company had gone out of business.

The city argued that any claim of lack of notice had to first be presented to the CAD. The court agreed, holding that a taxpayer who claims lack of notice from the taxing entity as a defense must pursue an available administrative remedy upon learning of the claimed tax liability. The city also complained of the admission of evidence and findings supporting affirmative defenses (such as waiver or estoppel) that were never pled. The court again agreed with the city, concluding that a taxpayer can't avoid tax liabilities at trial based on affirmative defenses that were never raised in a defensive pleading.

Tort Claims Act: *Brown v. Corpus Christi Reg'l Transp. Auth.,* No. 13-15-00188-CV, 2017 WL 929484 (Tex. App.—Corpus Christi March 9, 2017) (mem. op.). This is an appeal from the granting of a plea to the jurisdiction in a Texas Tort Claims Act case. The Thirteenth Court of Appeals affirmed the granting of the plea.

A Corpus Christi Regional Transportation Authority (RTA) bus stopped at a bus stop to load and unload passengers. Brown did not initially board as he had fallen asleep while waiting. As the RTA bus began to move again, one passenger asked the driver to stop so he could get off. The bus driver stopped and the passenger departed. As the bus began to move again, Brown woke up and attempted to board the bus. He lost his balance, fell to the ground, and the bus's rear tire ran over Brown's left arm. The investigating police report attributed fault solely to Brown. RTA's own investigation did not find any fault on the part of the bus driver. Two years later, Brown sued for negligence. RTA filed a plea to the jurisdiction asserting a lack of statutory and actual notice under the Texas Tort Claims Act (TTCA). The trial court granted the plea and Brown appealed.

It is undisputed that Brown failed to provide a written notice within six months under Section 101.101 of the TTCA. To succeed, Brown must establish RTA had actual notice of the claim. Texas law has rejected the theory a governmental entity must have actual knowledge *only* of an injury. To qualify as actual knowledge under the notice provision of the TTCA, an entity must have a subjective awareness of its fault in producing or contributing to the injury or damage. RTA provided an affidavit establishing how RTA conducted the internal investigation, what it was told, what it discovered, and that nothing indicated RTA was at fault. A certified copy of the police report indicated Brown was solely at fault. The Texas Supreme Court has held that "when a police report does not indicate that the governmental unit was at fault, the governmental unit has little, if any, incentive to investigate its potential liability because it is unaware that liability is even at issue." As a result, no subjective awareness of fault existed and the plea was properly granted.*****

Tort Claims Act: *City of Pharr v. Herrera,* No. 13-15-00133-CV, 2017 WL 929483 (Tex. App.—Corpus Christi March 9, 2017) (mem. op.). This is an interlocutory appeal from the denial of a plea to the jurisdiction for a wrongful death claim under the Texas Tort Claims Act. The Thirteenth Court of Appeals reversed and rendered judgment for the city.

The city's police officer, Emilio Gonzalez, attempted to conduct a traffic stop. When the vehicle driven by Rafael Quintero failed to stop on command, Officer Gonzalez pursued the vehicle into the City of Alamo. Other law enforcement agencies joined the pursuit. Sometime afterwards,

Gonzalez disengaged his pursuit but others did not. While two Hidalgo County sheriff's deputies were continuing pursuit, Quintero struck Reynaldo Herrera's vehicle. Herrera later died due to the injuries. His family sued the city for initiating the chase. The city filed a plea to the jurisdiction asserting governmental immunity which the trial court denied. The city appealed.

For waiver of immunity, the vehicle's use "must have actually caused the injury." In addition, "a government employee must have been actively operating the vehicle at the time of the incident." Herrera's expert provided testimony that Officer Gonzalez "got the momentum going" by initiating the chase when such a chase was not appropriate based on weak, legally-faulty, or non-existent justification for the pursuit. He believed Gonzalez was at fault. However, the court disagreed: "The actual cause of the collision was Quintero's decision to flee from police officers." Officer Gonzales had ended his pursuit and was not present when the accident occurred. The evidence in this case does not support a casual nexus between Officer Gonzalez's use of his vehicle and the plaintiff's injuries. As a result the plea should have been granted.

February 2017

Note: Included cases are from January 11, 2017 through February 10, 2017.

Public Information: *Paxton v. City of Dallas*, No. 15-0073, 2017 WL 469597 (Tex. Feb. 3, 2017). This is a Texas Public Information Act (PIA) case where the Texas Supreme Court holds the attorney/client privilege, in and of itself, is a compelling reason to prevent disclosure under the PIA, even if an entity untimely requests a Texas attorney general (AG) opinion. This is a case of first impression.

The City of Dallas received two PIA requests for information, but failed to timely notify the AG within the ten-business day deadline of its intent to seek an AG opinion. The city did seek an opinion and asserted the documents are protected by the attorney/client privilege. The AG determined that since the city failed to timely request an opinion, it waived the privilege and all documents must be released. When an entity fails to timely request an opinion, the documents are presumed public *unless there is a compelling reason to withhold the information.* The AG did not consider the attorney/client privilege a compelling reason. The city filed suit under the PIA to obtain judicial rulings but received conflicting results at the trial courts. The city and AG appealed respectively. At the different court of appeals levels, both courts held the privilege was a compelling reason to withhold the information. The AG filed a petition for review for both cases.

The Texas Supreme Court went into great detail and history (39 pages worth) discussing the balance between the attorney/client privilege (which is for the public's benefit for governmental advice) and the public's right to information (which is also for the public's benefit). It noted the AG has determined through agency precedent that the mere ability to waive the attorney/client privilege automatically and categorically precludes the privilege from constituting a compelling reason even when the privilege has not actually been waived. The court rejected this argument and held "[b]ecause failing to meet the PIA's deadline to assert a statutory exception to disclosure does not, in and of itself, constitute waiver of the attorney-client privilege, requested

information does not automatically lose its confidential status." It further rejected the AG's interpretation for all exceptions under the PIA, "that something more is always required to rebut the presumption that arises from a governmental body's failure to timely request an attorney general decision." The court held that certain exceptions (not all but some) can be compelling reasons *in their own right*. The AG's interpretation alters the plain language of the PIA. "To require public disclosure of confidential attorney-client communications as an automatic—and irremediable—sanction for missing a statutory deadline is not necessary to achieve the PIA's objective of an open government and would be a jurisprudential course fraught with peril." Finally, Justice Guzman puts an accurate but humorous summary on the entire thing by writing "[r]obotic perfection by a governmental body's public information officer is a statutory ideal, not an absolute requirement. To err is human, but to conduct a City's legal affairs without the occasional error would require divinity."

The dissent writes for 37 pages but essentially states the attorney/client privilege, by itself, is not enough to overcome the presumption of openness which attaches when the PIA deadlines are not met. The dissent would require an additional showing of a compelling reason for the non-release.*****

Employment: *Colorado Cty. v. Staff,* No. 15-0912, 2017 WL 461363 (Tex. Feb. 3, 2017). This is a Chapter 614 law enforcement termination case where the Texas Supreme Court changed some of the standards for investigating, disciplining, and terminating police officers. The court reversed the judgment of the court of appeals and rendered judgment in favor of the employer county. This is a significant case.

Colorado County Deputy Sheriff Marc Staff was terminated from the Colorado County Sheriff's Department. While an at-will employee, his termination notice listed incidents where Staff's behavior with members of the public was improper. The focus of the notice detailed a complaint where the county attorney advised the sheriff of Staff's behavior during a traffic stop. The video of the behavior was investigated and the investigating lieutenant recommended termination. Staff was listed as argumentative and abusive. Further, he unnecessarily arrested an otherwise cooperative motorist. Staff was provided the recommendation by the lieutenant and told he had 30 days to appeal the termination recommendation to the sheriff for a final order. Sheriff Wied advised Staff to "articulate all of his responses to his termination and the reasons for his appeal." Each incident had been identified in the recommendation with factual details. Staff appealed but rather than contesting the substantive grounds for termination or attempting to contextualize his behavior, Staff's appeal complained of procedural irregularities in the process leading to his discharge. Sheriff Wied upheld the termination and Staff sued the county and sheriff for declaratory relief, injunctive relief, and monetary damages. He asserted the county and sheriff violated Chapter 614 of the Texas Government Code with the procedure used for termination. The central theme of Staff's argument was that an internal report based on an external complaint alleging misconduct is insufficient to satisfy the statutory requirements. Sheriff Wied asserted Staff was terminated as an employee-at-will, but in the alternative, the process utilized satisfied Chapter 614. The trial court granted the county and sheriff's motions for summary judgment. The court of appeals reversed and asserted the sheriff violated Chapter 614. The Texas Supreme Court granted Sheriff Wied's petition for review.

Texas Government Code Section 614.023 states "(a) A copy of a signed complaint against a law enforcement officer . . . shall be given to the officer or employee within a reasonable time after the complaint is filed. (b) Disciplinary action may not be taken against the officer or employee unless a copy of the signed complaint is given to the officer or employee . . . ." The court first held that "[a]lthough Sheriff Wied could have discharged Staff for any reason or no reason, Chapter 614, Subchapter B nevertheless applies when an at-will employer terminates for cause that derives from allegations in a complaint of misconduct instead of terminating at will for no cause." In other words, if no complaint was filed against Staff, the sheriff could simply fire him for no reason. However, since a complaint was filed, Chapter 614 applies and the procedures must be followed. This process "helps ensure that cause-based removals of a specified nature bear a modicum of proof and that the affected employee has notice of the basis for removal." The court then considered, "as a matter of first impression, the kind of 'complaint' and 'person making the complaint' that is necessary to both activate and satisfy the statute's procedural safeguards." After applying various statutory construction principles, the court held the person making the complaint does not need to be the "victim" of the alleged conduct; it may be an investigator or supervisor. The court noted in a separate section that some intermediate appellate courts improperly connected the definition of "complaint" in Chapter 614 with a "complaint" under the civil service laws in Texas Local Government Code Chapter 143. However, they are not the same. Under the court's definition of "complaint" for Chapter 614 it determined Sheriff Wied followed the requirements. [Comment: For attorneys practicing in this area, the court's definition and explanation of what qualifies as a proper and sufficient complaint can be extremely helpful.]. In this case, Staff received the signed deficiency notice within two days of the initiation of an internal investigation. He suffered no disciplinary action until the complaint was in hand. However, the Court noted "[n]othing in the statute requires the complaint to be served before discipline is imposed or precludes disciplinary action while an investigation is ongoing. Nor does the statute require an opportunity to be heard before disciplinary action may be taken." Staff had ample opportunity to marshal any evidence and provide his explanation to the sheriff. As a result, the sheriff complied with Chapter 614. The court reversed and rendered in favor of the sheriff.*

Elections*: City of Houston v. Bryant,* No. 01-16-00273-CV, 2017 WL 17328 (Tex. App.—Houston [1st Dist.] Jan. 12, 2017.) This is an election contest case where the First Court of Appeals out of Houston held Texas Election Code Section 233.008 (requiring process be served within 20 days) is not jurisdictional.

Petitioners challenged a ballot measure concerning term limits for City of Houston elective offices. The city filed a plea to the jurisdiction asserting that while the petition was timely filed and the city received service to the correct person, it did not receive service within the 20 days mandated by Section 233.008. Therefore, the trial court was without jurisdiction. The trial court denied the plea and the city appealed.

The court of appeals held the 30 day deadline by which the *petition must be filed* under Section 233.006(b) is jurisdictional and non-waivable. It is undisputed the election contest was filed within that deadline. Thus, according to the court, the trial court obtained subject matter jurisdiction at that time. Section 233.008 is clearly mandatory in that it provides that a citation issued in an election contest "must direct" the officer to return the citation unserved if it is not

served within 20 days after it was issued. However, "just because a statutory requirement is mandatory does not mean that compliance with it is jurisdictional." Section 233.008 does not require a time to effectuate service and is not expressly jurisdictional. It does not prohibit the reissuance of a citation or preclude a party from making a second attempt. It also does not list a specific consequence for non-compliance. As a result, it is not jurisdictional. And while "other consequences" may be the result of failing to follow a non-jurisdictional deadline, such is not for evaluation under a plea to the jurisdiction.*

Public Information: *McLane Co., Inc. v. Texas Alcoholic Beverage Comm'n*, No. 03-16-00415-CV, 2017 WL 474067 (Tex. App.—Austin Feb. 1, 2017). In this Public Information Act (PIA) request lawsuit, the Austin Court of Appeals affirmed the granting of several pleas to the jurisdiction by a state official and the Texas Alcoholic Beverage Commission (TABC).

In 2015, McLane Company, Inc. (McLane) submitted a PIA request to the TABC. The TABC sought an opinion from the Texas Attorney General (AG) under the PIA procedures. The AG determined most of the information must be released, but allowed two exceptions. The TABC filed suit against the AG and McLane intervened. McLane sought a writ of mandamus ordering TABC to produce the requested information. McLane also sought declarations under the Texas Uniform Declaratory Judgments Act (UDJA). It further sued Sherry Cook, TABC's Chief Administrative Officer and Officer for Public Information, asserting her failure to release the information as an *ultra vires* activity. TABC filed a plea to the jurisdiction contending sovereign immunity deprived the trial court of jurisdiction over McLane's UDJA and *ultra vires* claims. Cook also filed a plea to the jurisdiction asserting that sovereign immunity barred McLane's suit against her. The trial court granted the pleas, and McLane appealed.

The Texas Supreme Court has explained that "the UDJA does not enlarge the trial court's jurisdiction but is 'merely a procedural device for deciding cases already within a court's jurisdiction.'" *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 (Tex. 2011) (per curiam). To the extent McLane's petition seeks the trial court to order "the PIA requires the TABC and Cook to promptly search for and produce" responsive documents, and the method in which they are to search, such a suit falls outside of the confines of the declaratory judgment action authorized by the PIA. Instead, such relief seeks a declaration of McLane's rights under the statute. As articulated in the *Sefzik* case, immunity is not waived under the UDJA except where the invalidity of an ordinance or statute is at play. The UDJA does not waive sovereign immunity for "bare statutory construction" claims. As a result, the UDJA claims raised in the plea were properly dismissed. Further, while sovereign immunity does not bar a true *ultra vires* claim against a public official, McLane's claims stem from the belief Cook was not performing a reasonably comprehensive search. The PIA does not authorize a declaration as to the search performed. Further, even if a proper *ultra vires* claim was factually pled, the redundant remedies doctrine precludes McLane pursuing it. The legislature created an explicit waiver of sovereign immunity in the PIA and neither TABC nor Cook has challenged McLane's right to intervene in the underlying PIA suit. McLane has a right of potential recovery under the PIA and therefore cannot sue for the same thing under an *ultra vires* theory. As a result, the trial court property granted the plea.*

Inverse Condemnation: *City of Dallas v. Trinity E. Energy, L.L.C.*, No. 05-16-00349-CV, 2017 WL 491259 (Tex. App.—Dallas Feb. 7, 2017) (mem. op.). In this accelerated, interlocutory appeal, the Dallas Court of Appeals reversed the trial court's order granting the City of Dallas' plea to the jurisdiction.

The city sought additional revenue by leasing minerals on city-owned property to a private party. The city sought bids from private parties and specifically asked Trinity East Energy (Trinity) to submit a bid. Trinity advised the city of specific pieces of property where surface drilling sites would need to be placed and asked for the city's pre-approval of these sites before closing on the leases. The city refused to do so stating the process would take too long. The parties negotiated the drill sites to be included in the leases. The city accepted Trinity's bids. In the lease, the city agreed that it "would not unreasonably oppose Trinity's request for a variance of waiver if necessary for its operations."

The planning commission voted to deny Trinity's applications for drill sites, which Trinity appealed to the city council. The motion to override did not receive three-fourths votes. Thus, the applications were denied. Following this denial, the city adopted a new gas well ordinance with more restrictive setback requirements. The new ordinance negated the possibility of locating a drill site on the leased property. In the mean time, the leases expired, and the minerals reverted to the city.

Trinity sued the city alleging breach of contract. The city filed a plea to the jurisdiction. Trinity argued that the city acted in its proprietary capacity when it leased the mineral rights to Trinity and governmental immunity does not apply to proprietary acts. The city responded that the "governmental-proprietary dichotomy" should not be extended to breach of contract claims. The trial court granted the city's plea to the jurisdiction based on governmental immunity.

Shortly after the trial court granted the city's plea, the Supreme Court of Texas concluded that the governmental-proprietary dichotomy does apply to claims for breach of contract in *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427 (Tex. 2016). The Dallas Court of Appeals cited *City of Corpus Christi v. Gregg*, 289 S.W.2d 756 (Tex. 1956), in concluding that the city was engaging in a proprietary function in leasing mineral rights. Thus, governmental immunity did not apply. The court also concluded that Trinity raised fact issues about whether the city's actions resulted in the deprivation of all economically viable use of Trinity's mineral interests. The court reversed the trial court's decision and remanded the case back to the trial court.

Takings: *Wells v. Texas Dep't of Transp.,* No. 13-15-00175-CV (Tex. App—Corpus Christi Feb. 2, 2017) (mem. op). This is a takings case involving allegations that the Town of South Padre Island took sand from the plaintiff's property without due process or just compensation. However, this opinion focuses on a subsequent settlement and its enforceability.

Wells purportedly owns various properties along Park Road 100 on South Padre Island. The Texas Department of Transportation (TxDOT) maintains Park Road 100, including keeping the roadway clear of sand. Wells filed suit against the Town of South Padre Island (town) and TxDOT alleging TxDOT removed sand from his property adjacent to the road and transported it to town beaches. The town filed a summary judgment asserting, among other things, that it only

provided trucks via a subcontractor and did not actually remove or take anything. After granting the town's motion (which was interlocutory), the trial court ordered the parties to mediation. At mediation the parties settled and sign the mediated settlement agreement (MSA). However, one month later Wells withdrew his consent asserting it was not a knowing and willful consent. The town counterclaimed to enforce the MSA and filed an additional summary judgment motion. The trial court denied the town's enforcement motion, but severed the case so the original MSJ could become final. The parties appealed and cross-appealed.

The central issue in this appeal is the town's right to enforcement of the MSA. The town produced conclusive evidence to establish a valid contract. The terms of the MSA state that in consideration of $10,000 paid by the town to Wells within twenty-one days Wells agreed to execute a full and final release and would dismiss the town with prejudice. The MSA states it is enforceable as a Rule 11 agreement. Wells did not establish the lack of an essential term (i.e. the ownership disposition of the sand) as his own affidavit states the ownership interest was transferred to TxDOT, not the town. So the town could not agree on the ownership of property it does not own. Second, despite Wells' complaints about his own counsel, he signed the MSA and the town conclusively established it complied with the terms by tendering payment by the deadline. As a result, the trial court should have granted the summary judgment motion on the town's counterclaim.*

Elections: *City of Houston v. Dacus*, No. 14-16-00123-CV, 2017 WL 536647 (Tex. App—Houston [14th Dist.] Feb. 9, 2017) (mem. op.). This is an election case involving posting of an alleged misleading charter amendment where the law of the case doctrine required the trial court to rule against the city.

The Texas Supreme Court already issued one opinion in this matter, and held the drainage charges to be imposed on benefitting real property was among the ballot measure's chief features, and that Proposition 1 was misleading because it failed to mention the charges. *Dacus v. City of Houston*, 466 S.W.3d 820 (Tex. 2015). The court remanded the case for trial because only the city moved for summary judgment, not the contestants. On remand, the contestants sought summary judgment on the grounds that: (a) the Texas Supreme Court had decided the issue in *Dacus II*, which became the law of the case; or (b) even if *Dacus II* did not constitute the law of the case, the trial court should reach the same result for the same reasons. The trial court granted the motion and the city appealed.

The First District Court of Appeals rejected the city's argument that the case is a challenge to "the post-election implementation of the charter amendment" instead of an election case. The trial court is not deprived of jurisdiction over this election contest merely because additional steps were taken after the election to implement the measure, and the city cited ". . . no authority that voters can bring an election contest challenging the sufficiency of a ballot description only in the rare case in which the measure itself is self-executing." Second, the case is governed by the questions of law decided in *Dacus II*, but only if the questions of law were answered by the Texas Supreme Court. The Texas Supreme Court explained that even voters already familiar with the measure to be voted on can be misled by ballot language that fails to sufficiently describe the measure. The court then compared the ballot's language (which is undisputed) to

the proposed charter amendment's language (which also is undisputed). From that comparison, the court determined that "[t]he ballot did not identify a central aspect of the amendment . . . ." Such holdings are not dictum but are explicit findings by the court. "The question of whether the ballot language misled voters by omitting one of the measure's chief features calls for a yes-or-no answer, and the state's highest civil court has answered that question in the affirmative." As a result, the law of the case required the trial court to rule against the city.*

Texas Tort Claims Act: *City of Houston v. Collins*, No. 14-16-00449-CV, 2017 WL 421988 (Tex. App—Houston [14th Dist.] Jan. 31, 2017). This is a Texas Tort Claims Act vehicle accident case involving official immunity where the Fourteenth Court of Appeals reversed and rendered the denial of the city's plea to the jurisdiction.

Houston Police Department Officer James Brown responded to a dispatch for assistance where another officer was pursuing a motorcycle whose driver was standing up, driving recklessly, and traveling at a high rate of speed. Collins's vehicle exited a parking lot and turned right onto the road in front of Officer Brown. She then changed lanes into the left lane, then back to the right lane in front of Brown. Brown struck Collins's vehicle while attempting to go around. Collins sued claiming Brown recklessly operated his vehicle. The city filed its first plea to the jurisdiction, which the trial court granted but the Fourteenth Court of Appeals reversed, noting the record did not contain sufficient evidence to establish Brown's good faith immunity. On remand, the city filed a second plea with new evidence which the trial court denied.

In the first appeal, the Fourteenth Court of Appeals held that the city established Brown was acting in the course and scope of his employment and was performing discretionary actions. It remanded based on a lack of record evidence that no reasonable officer would have acted the way Brown did under similar circumstances. For this appeal, the court held the officer must assess "both the need to which an officer responds and the risks of the officer's course of action, based on the officer's perception of the facts at the time of the event." The city's second plea produced various affidavits from officers and dispatchers. The supervising sergeant on duty who overheard the radio exchange regarding the pursuit noted the pursuing officer had stress and urgency in his voice, made it clear the suspect was not stopping and was endangering lives, and that a reasonable officer would conclude an emergency existed. Various officers provided affidavits that such situations require immediate responses from law enforcement for the safety of motorists and the public. The circumstances reasonably qualify as evading arrest which is a state jail felony under Section 38.04 of the Texas Penal Code. The court of appeals went into specific detail regarding the testimony supporting each of these statements. The court felt it was important to note the affidavits proffered by the city in support of the first plea stated that the suspect evaded arrest; they did not explain how a reasonable officer could have determined from the radio broadcast that the suspect was fleeing. The evidence for the second plea provided a great deal more detail and specific evaluations which go through an officer's mind. The court analyzed the "need" and "risk" assessment under the detailed statements and what alternative actions Brown could have used. In response to Collin's assertions that the new affidavits are conclusory because they analyze things differently than the first set of affidavits, the court held "[t]he new affidavits do not change the underlying factual assertions, but instead provide additional context to explain Officer Brown's response considering what he reasonably understood to be the situation. The new affidavits were substantiated with facts showing that

Officer Brown assessed the need for his response against the risks to the public" and "provide[d] the missing link explaining that reasonable officers'" mindset. After going through the analysis, the court held that the city established Officer Brown was entitled to official immunity. Therefore, the city's plea should have been granted. Reversed and rendered.

January 2017

Note: Included cases are from December 11, 2016 through January 10, 2017.

Utility Rates: *Oncor Elec. Delivery Co., L.L.C., v. Public Util. Comm'n of Texas*, No. 15-0005, 2017 WL 68858 (Tex. Jan. 6, 2017). This is a Texas Supreme Court case which held several things, but the main issue of interest to local governments is factors used in determining rates as well as the validity of certain franchise fee agreements.

Oncor Electric Delivery Company, LLC (Oncor) is the largest transmission and distribution utility in Texas and the sixth largest in the United States. Oncor is regulated by the Public Utility Commission (PUC), even after deregulation of certain parts of electric utility operations. In June 2008, Oncor initiated a ratemaking proceeding at the PUC, its first request for a comprehensive rate increase since deregulation. Several parties intervened during the administrative matter. After extensive hearings, the administrative law judges recommended only an increase of 1/7th of the requested rate. Oncor and other parties to the administrative proceeding sued for judicial review and then appealed to the court of appeals. Various parties appealed to the Texas Supreme Court, which granted all petitions and consolidated the cases.

The court first held that while the Public Utilities Regulatory Act (PURA) requires an end-user electrical utility to discount rates to a state-funded university, Oncor cannot sell to end-users. It can only charge for transmission and distribution. As a result, it does not have to provide any such discount. Next, the court held that when Oncor's parent corporation sold 19% of the ownership to other investors, it could not file an "affiliated group" consolidated tax return with the parent corporation. Filing under a consolidated tax return can affect the tax liability in a calculation for long-term expenses. Long-term expenses is one element the PUC reviews in determining rate changes. Oncor filed its return individually, not consolidated and the court held it was proper. Next, the court held cities are entitled to franchise fees for a utilities use of streets, alleys, and other public areas. The court then held that the PUC's determination Oncor could not pay a negotiated franchise fee to the cities was improper. Section 33.008(f) of PURA does not restrict renegotiated franchise charges to only those agreed to on the expiration of franchise agreements existing on September 1, 1999. The provision simply precludes the inference that Section 33.008(b) is exclusive.*

Contracting: *Byrdson Svs., L.L.C. v. South E. Tex. Reg'l Planning Comm'n*, No. 15-0158, 2016 WL 7421392 (Tex. Dec. 23, 2016). After South East Texas Regional Planning Commission (commission) received federal hurricane relief funding it contracted with Byrdson Services, LLC (Byrdson) to rebuild certain areas within its jurisdiction. Under a contract between the State of Texas and the commission, the state provided $95 million to the commission for various disaster-relief and housing-restoration services. Under this contract, the commission committed to provide homeowner-repair services to area households. The contract

authorized the commission to subcontract the repair work, which it did to Byrdson. A dispute arose between the commission and Byrdson regarding the quality of Byrdson's work and payment due under the contracts. Byrdson sued the commission for payments allegedly due. The commission filed a plea to the jurisdiction, which the trial court denied but the court of appeals reversed and granted. Byrdson appealed.

The commission asserts Local Government Code Chapter 271 does not apply because its contracts do not state essential terms "for providing goods or services to the local governmental entity." Citizens benefitted, not the commission. Byrdson counters the warranty and indemnity provisions provide the requisite services to the commission. These provisions require Byrdson to warrant its work to the homeowner and to hold the commission harmless. The court held it was not going to analyze the case in that fashion since contractual provisions intended to shield the commission from liability would have the effect of waiving immunity. Instead, the court noted the contract with the state obligated the commission to provide services to the property owners. By subcontracting the work, Byrdson was helping the commission fulfill its obligation to the state. "For this reason the Byrdson agreements provided real and direct services to the Planning Commission that brings the agreements within chapter 271." Finally, the court held "[w]e have never suggested that the agreements covered by chapter 271 are limited to those where the governmental entity obtains a property interest, nor can such a limitation be gleaned from a plain reading of the statute."*****

Tort Claims Act: *Tarrant Reg'l Water Dist. v. Johnson*, No. 02-16-00043-CV, 2016 WL 7601840 (Tex. App—Fort Worth Dec. 30, 2016). This is an interlocutory appeal in a Texas Tort Claims Act (TTCA) case where the Fort Worth Court of Appeals affirmed-in-part and reversed-in-part the denial of the Tarrant Regional Water District's (TRWD) plea to the jurisdiction. This is a 32-page opinion, plus the dissent.

Brandy Johnson drowned in the Trinity River after attempting to walk across Trinity Park Dam No. 2 (dam), which had been redesigned and reconstructed in 2002. Plaintiffs alleged the kayak chutes cut into the middle of the dam allowed water to flow unregulated and up to 2,700 cubic feet per second, which constitutes a Class II+ whitewater rapid. The chute was designed to be slippery to allow for kayak travel. Additionally, the materials partially filling a scour hole had been washed away, making the hole dangerous to anyone who fell in. According to the Johnsons, Brandy drowned when she fell from the kayak chute into the scour hole, which was not visible to Brandy and had become deeper than designed. The Johnsons further detailed three previous drownings and two near-drownings at the same site, all involving people falling off the dam. The chute was not designed as a walkway but these events made TRWD aware people were using it as such. The only warning sign present stated "Safety First Please Watch Your Children." No additional warning signs were added to the dam after the prior incidents. The plaintiffs alleged the dangerous condition was created by "altering the natural flow of the Clear Fork of the Trinity River by diverting the river through a series of artificial man-made dams and kayak chutes" creating "a smooth looking yet powerful and deceptively dangerous current through the kayak chute." The plaintiffs further allege the TRWD negligently implemented policy by not filling in the scour hole. The family sued TRWD under the TTCA asserting a special and/or premise defect on the dam. It also asserted a tangible personal property claim. TRWD filed a plea to the jurisdiction which the trial court denied. TRWD appealed.

After a detailed factual analysis, the court first held the death is a result of the chute's intentional design and not a malfunction of the chute or TRWD's failure to maintain it. The entire design of the dam indicates an intentional design to bring people down to the river to fish and not to parade them across the dam. No waiver of immunity exists for discretionary acts such as design elements. Further, the complaint about the warning signs is a complaint about the decision of whether or not to install safety features, which is likewise barred. The court held the plaintiffs did not allege a special defect, only a premise defect. Further, they did not allege the negligent use of personal property; this was a premise defect claim only. However, with regards to the scour hole, the evidence showed the hole was deeper than it was ever designed to be and TRWD was aware of the depth. The primary maintenance for the dam is "debris removal after storms [and] flow events." Thus, the complaints about the deepening scour hole and possible related boil effect are not complaints about the original design, but rather the failure to maintain the original design. The complaint alleged it was a dangerous condition of which TRWD had actual knowledge, so the plea was properly denied as to that claim.

The dissent disagreed with the majority's holding on the premise defect claim regarding the kayak cut, specifically that there still exists a duty to warn and the "Safety First Please Watch Your Children" sign comes nowhere close. As a result, the dissent would not have reversed any portion of the trial court's order denying the plea.*****

Whistleblower Act: *Connally v. Dallas Indep. Sch. Dist.*, No. 08-15-00310-CV, 2016 WL 7384188 (Tex. App—El Paso Dec. 21, 2016). This is a Texas Whistleblower Act case where the El Paso Court of Appeals affirmed in part and reversed in part the granting of the school district's plea to the jurisdiction.

The Dallas Independent School District (DISD) hired Connally in 2009 as its director of compliance, with part of her duties being to make recommendations for University Interscholastic League (UIL) rules. In order to prevent illegal recruiting of student athletes, the UIL requires the filing of a prior athletic participation form (PAPF) to ensure that a student athlete transferring into a new high school actually lives within the new school's attendance zone. This triggers a host of other forms to be signed and submitted. Connally pointed to several instances of what she categorized as inaccurate or fraudulent forms. She was not in charge of reviewing the forms so had no power to enforce compliance. Connally reported her suspicions of wrongdoing at various times to three departments within DISD: (1) the Office of Professional Responsibility (OPR); (2) the Internal Audit Department (IA); and (3) the Professional Standards Office (PSO); (4) the chief and assistant chief of the DISD police department; and (5) the PSO's manager, Jeremy Liebbe, who was a commissioned police officer and a former detective with the DISD police department. Connally participated as an expert on UIL rules during the investigations. PSO issued a detailed report in which it confirmed virtually all of Connally's reports of wrongdoing, including falsification of government forms. Sometime later, Connally was terminated for reported performance issues. She sued under the Texas Whistleblower's Act. DISD filed a plea to the jurisdiction which was granted.

The court first held none of the departments (OPR, IA, and PSO) were appropriate law enforcement authorities as they only had the power for internal review against employees. None

of these departments had any external authority to investigate criminal law violations against third parties. Likewise, the PSO manager, Liebbe, was not acting in the role of a police officer while he acted as a manager and had no external authority regarding PSO roles. No law authorizes an individual police officer who is commissioned through a police agency the unfettered authority to conduct an investigation of any nature he chooses without the permission or authority from the agency. Even though Liebbe briefly held his commission with the DISD police department after his transfer, there is nothing in the record to suggest that the DISD police department had authorized him to continue to investigate criminal law violations. The Texas Supreme Court made it clear that it is the governmental arm or entity to which the report is made that is the key focus, and that any report must be made to an individual within that governmental arm or entity. However, DISD police department has the authority to investigate virtually all violations of criminal laws occurring within its jurisdictional boundaries. While the UIL rules are not criminal in nature, the falsification of a governmental record is a violation of Section 37.10 of the Texas Penal Code. This falls under the DISD police department's authority, which is outward reaching. Therefore, the granting of the plea is sustained as to all reports except the falsification reports to the police chief and assistant Chief. The claims associated with those reports are reversed and remanded for trial.*

Tort Claims Act: ***Montgomery Cty. v. Lanoue,*** **No. 09-16-00195-CV, 2016 WL 7473896 (Tex. App—Beaumont Dec. 29, 2016) (mem. op.)**. This is a Texas Tort Claims Act slip-and-fall case where the Beaumont Court of Appeals reversed the denial of the county's plea to the jurisdiction and dismissed the case.

When Lanoue entered the Montgomery County Courthouse, the floor had recently been mopped and waxed. The county placed a sign in the area noting the floor was wet. Lanoue asserted the sign was confusing since the floor looked dry and the sign did not say he should watch out for wax, only that the floor was wet. The undisputed evidence included a still photograph of Lanoue in mid-fall, right next to the warning sign. When he entered onto the floor he slipped, fell, and was injured. The county filed a plea to the jurisdiction asserting it met is duty to warn of the dangerous condition. The plea was denied and the county appealed.

Premises owners have a duty to either "warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not." Lanoue asserted the "wet floor" warning sign was inadequate because the floor was actually dry, but was covered with a slippery wax. However, "[a] warning of the specific material causing a condition is not required, so long as the existence of the condition itself is conveyed." The warning need not identify the specific substance that made the floor wet. Therefore, the court held that the "'wet floor' sign inches from the location where Lanoue fell was adequate as a matter of law to warn Lanoue that the floor was slippery." The plea should have been granted.*

Temporary Injunction: ***Vera v. City of Hidalgo*****, No. 13-16-00088-CV, 2017 WL 56380 (Tex. App.—Corpus Christi Jan. 5, 2017) (mem. op.).** This is a dispute between the City of Hidalgo and the BorderFest Association as to who owns the rights and ability to control the BorderFest annual cultural festival.

The BorderFest festival has been held in the City of Hidalgo (Hidalgo) for the past thirty-nine years. The BorderFest Association (association) determined that in 2016 the festival would be held in neighboring City of McAllen (McAllen). Hidalgo sued the association and Joe Vera, the assistant city manager of McAllen for a declaratory judgment and injunctive relief regarding ownership of the festival. Vera was the former city manager of Hidalgo. Hidalgo was counter-sued for federal trademark infringement and unfair competition. The association claimed sole ownership and rights to the BorderFest brand and sought its own injunctive relief against Hidalgo from using the BorderFest mark, name, and goodwill. After a two-day temporary injunction hearing, the trial court granted Hidalgo's temporary injunction and prohibited the association from using the BorderFest name or utilizing the event in McAllen. The association filed this interlocutory appeal.

The preliminary record shows BorderFest has been held exclusively in Hidalgo for the previous thirty-nine years and has brought the city "fame" over these years. The city had paid the cost of the festival each year, although the association provided some funds to "defray" the full cost to the city. The city also contributed a large number of personnel and man hours to the festival. The record further shows that the 40th anniversary of the festival being held in Hidalgo was threatened by the actions of the association agreeing to hold the BorderFest festival in McAllen. Based on these facts, the court of appeals held the trial court was within its discretion to grant Hidalgo's temporary injunction application because Hidalgo pled and proved it had: (1) a cause of action against Vera and the association; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. The trial court's rulings show that it sought to preserve the status quo because these orders were issued approximately one month prior to BorderFest's 40th anniversary, while the underlying ownership issues would be resolved later at trial. The court of appeals expressly disclaimed any aspects of the opinion were meant to address the ultimate resolution of the case and is limited only to a temporary injunction standard of review.

Water Rights: *R.E. Janes Gravel Co. v. Texas Comm'n on Env. Quality*, No. 14-15-00031-CV, 2016 WL 7323307 (Tex. App.—Houston [14th] Dec. 15, 2016). The City of Lubbock applied to the Texas Commission on Environmental Quality (TCEQ) for an amendment to an existing permit, which would authorize the city to use a portion of the Brazos River to convey treated wastewater effluent from a discharge point to a point downstream, where the effluent would be diverted for beneficial purposes. The R.E. Janes Gravel Company (company) owned property downstream from the proposed diversion point and contested the application under the belief that the city's diversion of water upstream would threaten the company's viability. TCEQ granted the amended permit and the company filed suit in district court against TCEQ. The city intervened in the suit. The trial court ultimately signed a final judgment in favor of the city and TCEQ and the company appealed.

The company's two issues on appeal were: (1) that TECEQ failed to comply with Texas law when authorizing the amended permit; and (2) even if TCEQ were authorized to grant the permit, TCEQ failed to properly measure carriage losses (the amount of flow lost during conveyance between the discharge and diversion points). On the first issue, the company argued that because the city had been discharging the effluent derived from surface water into the Brazos River before obtaining a permit, existing discharges had become surplus water and the city's requested diversion would constitute a new appropriation of water that subordinated diversion to senior

water right holders downstream. The city contended that its requested amendment complies with Water Code Section 11.042(c) in that it sought to divert no more than the amount discharged so that the effluent is actually not a new appropriation of state water subject to appropriation by senior water rights holders. Thus, the company was seeking to improperly lay claim to the city's own effluent which it has a right to transport for reuse. The court of appeals agreed with the city, reasoning that the TCEQ's authority to grant a party the right to use a stream to convey surface water from a discharge point to a point downstream where it will be diverted for reuse under Water Code Section 11.042(c) would be meaningless if, under Water Code Section 11.046(c), the water became surplus water available for appropriation by senior rights holders upon being discharged into the stream. The court overruled the company's first issue.

In its second issue on appeal, the company argues that its substantial rights have been prejudiced because there is no evidence to support TCEQ's finding, conclusions, and decision with regard to the calculation of carriage losses. TCEQ requires that an application for a permit under Section 11.042(c) includes an estimate of carriage losses. The city submitted with its application a memo prepared by its water-planning manager calculating carriage losses. The company did not believe that TCEQ's determination of carriage losses based on the city estimate was reasonably supported by substantial evidence. The court of appeals disagreed, concluding that substantial evidence supported the reasonableness and reliability of the city's calculation of carriage losses, as the city's calculation was supported by more than a scintilla of evidence. The court overruled the company's second issue and affirmed the trial court's judgment.